

2009

# Michael C. Posner v. Equity Title Insurance Agency, Inc. : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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MICHAEL C. POSNER,

Appellant,

vs.

EQUITY TITLE INSURANCE  
AGENCY, INC., a Utah Corporation  
NRT, INC., a New Jersey corporation dba  
COLDWELL BANKER RESIDENTIAL  
BROKERAGE,  
Appellees.

Appellate Case No. 20090058-CA

Trial Court Case No. 040901853

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BRIEF OF APPELLANT  
ORAL ARGUMENT IS REQUESTED

---

Appeal from the Ruling of the Third Judicial District Court,  
The Honorable Tyrone E. Medley,  
Granting two Motions for Summary Judgment

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FILED  
UTAH APPELLATE COURTS

APR 30 2009

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<p>MICHAEL C. POSNER,</p> <p>Appellant,</p> <p>vs.</p> <p>EQUITY TITLE INSURANCE AGENCY, INC., a Utah Corporation NRT, INC., a New Jersey corporation dba COLDWELL BANKER RESIDENTIAL BROKERAGE, Appellees.</p>	<p>Appellate Case No. 20090058-CA</p> <p>Trial Court Case No. 040901853</p>
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## **LIST OF PARTIES**

Plaintiff/Appellant: Michael C. Posner

Defendant/Appellee: Equity Title Insurance Agency, Inc.

Defendant: NRT, Inc., doing business as Coldwell Banker Residential Brokerage (not a party to this appeal).

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has original jurisdiction under U.C.A. §78A-3-102(3)(j); the Supreme Court transferred this case to the Utah Court of Appeals pursuant to U.C.A. §78A-3-102(4).

## **ISSUES PRESENTED FOR REVIEW<sup>1</sup>**

### **I. Dismissal of Equity Title**

**Issue # 1: Did the trial court err in finding that the plaintiff's real estate agent, Kandis Christoffersen, acted within her authority?**

**Preservation of Issue:** Plaintiff Posner disputed several facts regarding exactly what happened at Posner's closing [R. 463-465]<sup>2</sup>. These disputed facts were material to Equity's argument that its title agent Helen Smith relied on Christoffersen's authority in closing his sale and to Posner's negligence and fiduciary breach claims, therefore dismissal was inappropriate. [R. 478]. Posner also argued that as a matter of law, the facts did not support a finding that his real estate agent Kandis Christoffersen acted within her authority. [R.465-474, 478].

**Issue # 2: Did the trial court err in concluding that defendant Equity Title Insurance Agency, Inc. met its fiduciary duties to plaintiff?**

**Preservation of Issue:** Counsel for Posner argued that Equity Title breached its fiduciary obligations to Posner when its agent failed to close his sale according to his escrow instructions. [ R. 474, 478] [5/16/05: Tr. pg.26-27].

### **II. Dismissal of Coldwell Banker Residential Brokerage**

**Issue # 3: Did the trial court err in striking Plaintiff's expert report?**

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<sup>1</sup> To avoid repetition, the applicable standards of review are discussed separately.

<sup>2</sup> References to the trial court record appear as [R. \_\_\_\_]. References to transcripts of oral arguments before Judge Medley identify the oral argument date and transcript page number, appearing as [Date: Tr. \_\_\_\_].

Preservation of Issue: Counsel for Posner argued that the sanction for striking Plaintiff's expert witness under the circumstances surrounding the late designation was an abuse of discretion. [R. 1610-1617] [05/12/08: Tr. pg. 24-35, 51].

Issue # 4: Did the trial court err in dismissing plaintiff's case for lack of expert testimony?

Preservation of Issue: Counsel for Posner argued that both statute and case law provided sufficient legal guidance to explain the standard of care and that an expert was not legally necessary in this case [R. 1786-1791], and that Posner's closing was not so intrinsically complex that it needed expert testimony. [11/10/08: Tr. 43-46].

Issue #5: Did the trial court err in awarding attorney fees to Defendant Coldwell Banker

Preservation of Issue: Plaintiff Posner argued that the determinative law in the case was tort law, and that defendant Coldwell was not entitled to attorney fees under the Listing Agreement because Posner did not sue for breach of that contract. [R.1783-1825] [11/10/08: Tr. pg. 41-54].

### **STANDARD OF REVIEW**

The standard of review for the trial court's findings of law on the following issues 1) whether Equity Title breached its fiduciary duty to Posner, 2) whether Kandis Christoffersen acted within her authority, 3) the dismissal of Coldwell Banker and 4) the award to Coldwell of attorney's fees, is correctness. When reviewing a summary judgment ruling, the Appellate Court should give no deference to the lower court's legal conclusions and should review the legal issues presented under a correctness standard. Schaerrer v. Stewart's Plaza Pharm., Inc., 79 P.3d 922, 927 (Utah 2003). Affirmation only proper when there is no genuine dispute as to material issues of fact and

the moving party is entitled to judgment as a matter of law. Wycalis v. Guardian Title of Utah, 780 P. 2d 821, 824 (Utah Ct. App. 1989).

The standard of review for the trial court's imposition of sanctions (striking Posner's expert testimony) is abuse of discretion. See Featherstone v. Schaerrer, 34 P.3d 194 (UT 2001); Tuck v. Godfrey, 981 P.2d 407 (Utah Ct. App. 1999).

### **DETERMINATIVE LAW**

Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 967 (Utah 2008).

"Our review of a district court's imposition of sanctions follows a two-step process. First, we ensure that the district court has made a factual finding that the party's behavior merits sanctions. Second, once the factual finding has been made, we will only disturb the sanction if "abuse of discretion [is] *clearly* shown." An abuse of discretion may be demonstrated by showing the district court relied on "an erroneous conclusion of law" or that there was "no evidentiary basis for the trial court's ruling."

#### **U.A.C.A. R162-6-1. Licensee Conduct.**

6.1.11.1. A principal broker and licensees acting on his behalf who represent a seller shall have a written agency agreement with the seller defining the scope of the agency.

#### **U.A.C.A. R162-6-2. Standards of Practice.**

6.2.15.1. Duties of a seller's or lessor's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the seller or the lessor owe the seller or the lessor the following fiduciary duties:

(a) Loyalty, which obligates the agent to act in the best interest of the seller or the lessor instead of all other interests, including the agent's own;

(b) Obedience, which obligates the agent to obey all lawful instructions from the seller or lessor;

(c) Full disclosure, which obligates the agent to tell the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction;

(d) [Omitted]

(e) Reasonable care and diligence;

(f) Holding safe and accounting for all money or property entrusted to the agent;  
and

(g) Any additional duties

## **STATEMENT OF THE CASE**

This matter arose out of the sale of a piece of real property in Park City, Utah, belonging to the Plaintiff Dr. Michael Posner (hereinafter “Posner”), a retire veterinarian residing in Florida. Mr. Posner commenced his action on January 31, 2004, in Third District Court in Salt Lake City, when he filed a suit against Equity Title Insurance Agency, Inc. (hereinafter “Equity”) and Independence Title Insurance Agency (hereinafter “Independence”) [R. 1-23]. Mr. Posner claimed breached of fiduciary duty, negligence and breach of contract against the defendants, alleging that the defendants violated the terms of Posner’s Real Estate Purchase Contract (hereinafter “REPC”) when they closed his sale without the surety bond his REPC expressly required as a necessary condition of the sale [R. 7-10].

On February 9, 2004, Independence filed a Motion and Memorandum to dismiss [R. 24-26, R. 27-32, which the trial court denied May 10, 2004 [R. 75]. On March 3, 2004, Equity filed its Answer to plaintiff’s Complaint [R.56-66]. On December 22, 2005, based on the discovery that his real estate agent, Kandis Christoffersen (hereinafter “Christoffersen”), had told Posner’s Equity title agent, Helen Smith (hereinafter “Smith”), to close his sale, Posner moved to amend his complaint to add NRT, Inc., a New Jersey corporation doing business in Utah as Coldwell Banker Residential Brokerage (hereinafter “Coldwell”) [R. 119-120]. The trial court granted permission to amend on February 7, 2005 [R.165], and on March 28, Posner filed a First Amended Complaint, adding Coldwell as a third defendant and dropping the breach of contract claims against Equity and Independence [R. 323-336].

On March 28 and 29 respectively, Equity and Independence filed Summary Judgment Motions and Memoranda [R.258-322; R. 337-418]. Posner filed his Memorandum Opposing Summary Judgment on April 14 [R. 455-545], and the defendants filed Reply Memoranda in the latter half of April [R. 546-566; R. 594-601]. On May 24, 2005 the Court granted summary judgment to Equity and Independence [R. 623]. Mistakenly believing that this judgment against Equity and Independence was final for the purposes of appeal, counsel for Mr. Posner filed a notice of appeal against Equity's dismissal on June 2, 2005 [R. 628-630]. At this time, Posner and Coldwell Banker jointly requested, and were granted, a stay of proceedings pending the outcome of the appeal [R. 635-637, R. 641].

Mr. Posner, Equity and Coldwell participated unsuccessfully in a mediation conducted by the Court of Appeals in the fall of 2005. In spring of '06, the Court of Appeals dismissed Mr. Posner's appeal without prejudice on the grounds that there had not been a final ruling in the case.

Discovery between Mr. Posner and Coldwell commenced in the summer of 2006, pursuant to a May '06 scheduling order. [R. 648-652]. Recognizing they needed additional time to complete discovery, Posner and Coldwell amended their scheduling order in early September. [R.872-874]. In October '06, Judge Medley ordered the parties to mediate by January 7, 2007 [R. 875, 878]. Mediation occurred on December 11 and was unsuccessful. At the end of the mediation session, Coldwell filed a motion for summary judgment [R.883-885, 886-902], which was denied in April '07. [R. 1486-1488]. In the fall of '07, counsel for Posner, Michael Goldsmith, withdrew from representation for health reasons, and Posner hired Mr. David Ross to replace him. [R.

1520-21]. In November '07, the Court filed an Order to Show Cause. [R.1515-1518]. At the January hearing on that Order, Mr. Ross indicated that Posner was ready to file his certificate of readiness for trial, and on February 8, 08, filed the certificate of readiness and request for scheduling conference. [R. 1525-1526].

The parties began preparations for trial. In March of '08, Coldwell filed a Motion in Limine to Strike Plaintiff's Expert Witness Report [R.1530-1558], and a Motion to Strike Documents and Testimony Produced by the Plaintiff After the Expiration of Fact Discovery [R.1559-1561]. Judge Medley granted both of Coldwell's motions.[R.1695-1699]. Thereafter, Coldwell submitted a second Motion for Summary Judgment [R.1744-1754, 1755-1757], while Mr. Posner filed a cross motion requesting that both parties be given time to designate experts [R. 1758-1760]. In November '08, Judge Medley granted Coldwell's Second Motion for Summary Judgment, denied Posner's Motion to Designate Experts, dismissed Mr. Posner's case with prejudice, and awarded attorney's fees to Coldwell Banker. [R.1842-1847]. Mr. Posner filed an appeal from the District Court's final Order on January 6, 2009. [R.1910-1912].

#### **STATEMENT OF THE FACTS RELEVANT TO THE ISSUES ON APPEAL**

- 1) In the summer of 2002, Michael Posner retained Coldwell Banker Residential Brokerage to list two lots he owned in Deer Valley. [R. 274]. Posner's Coldwell real estate agent was Kandis Christoffersen. [R. 273].
- 2) In July, Posner negotiated a sale of his land for a purchase price of \$450,000 (R.287), agreeing to provide \$260,000 in seller financing. (See Addendum Index, Exhibit A: Real Estate Purchase Contract) To ensure he would receive payment in full, Posner inserted a condition in his Real Estate Purchase Contract (REPC) that

- 3) required Chris Strachan (hereinafter “the buyer”) to supply a surety bond in the same amount as his seller financing. (Exhibit A: REPC, Addendum No. 4)
- 4) Posner retained Equity Title Insurance Agency, Inc. as his title company [R.16].  
The buyer hired Independence Title Insurance Agency of Salt Lake City as his title company [R.79].
- 5) On or about August 23, Posner signed his closing papers and returned to his residence in Florida [R. 274].
- 6) On or about August 28, the buyer closed with Independence [R. 21]. At closing, the buyer supplied a document entitled “Financial Guarantee” (See Addendum Index, Exhibit B: Financial Guarantee) (hereinafter “the Guarantee”) for \$260,000 and requested that Posner add \$3,900 to the seller financing amount.
- 7) Posner approved the \$3,900 increase to his seller financing from his residence in Florida (Exhibit A: REPC, Addendum No. 9), but was never informed that the buyer had supplied a so-called “Financial Guarantee” for \$260,000 rather than a surety bond for the full amount of the seller financing:\$263,900 [R. 328].
- 8) Equity closed Posner’s sale when Posner’s real estate agent, Christoffersen, instructed Equity escrow agent Helen Smith that Posner had seen and approved the Guarantee and said to close [R. 57-58].
- 9) Strachan never made a payment on the land and defaulted on his loan from a private mortgage company, Mustang Mortgage (hereinafter “Mustang”).
- 10) When Posner learned of Strachan’s default in November of 2002, he attempted to collect on the Financial Guarantee but it proved worthless [R. 329]
- 11) To mitigate his damages, Posner bought back his land in June of 2003 for

- 12) approximately \$120,000 more than he had received at the time of closing [R. 334].
- 13) In October 2, 2006 Judge Medley entered a Scheduling Order that set the deadline for discovery cutoff at October 13, 2006, for filing dispositive motions at November 13, 2006 and the deadline for Plaintiff to designate expert witness at 60 days after discovery cutoff date. [R.872-874].
- 14) October 3, 2006 Court ordered mediation on October 19, 2006. [R. 875-877].
- 15) October 19, 2006 Judge Medley extended deadline for mediation to January 12, 2007. [R.878-879].
- 16) After the October 13, 2006 cutoff date for factual discovery, Coldwell issued a Notice of Deposition of Michael Posner on November 2, 2006. [R.880-882].
- 17) Coldwell deposes Michael Posner on November 20, 2006. [R.1290].
- 18) The parties conducted an unsuccessful mediation on December 8, 2006 [R.1619].
- 19) Coldwell filed its motion and memorandum for summary judgment on December 11, 2006. [R.893-1042].
- 20) Posner's expert witness designation and report was entered by the court on December 26, 2006. [R.1066-1071].
- 21) Posner submitted Notice of Readiness for Trial and Request Pretrial Conference on 02/08/08. [R.1525-1526].
- 22) On 03/13/08 Coldwell filed its motion and memorandum to exclude Posner's expert witness report. [R. 1527-1558].
- 23) On 03/26/08 Posner filed an opposition memorandum to Coldwell's motion to exclude his expert witness. [R.1610-1617].



- 24) On 04/01/08 Coldwell filed its reply memorandum in support of motion to exclude expert witness. [R.1618-1624].
- 25) Minutes of oral argument 05/12/08. [R. 1683].
- 26) Affidavit of Posner's expert witness. [R. 1685-1687].
- 27) On 05/28/08 the court entered to exclude Posner's expert witness. [R.1695-1699].
- 28) On 06/06/08 Coldwell filed its motion and memorandum for summary judgment, based upon theory that Posner could not prove his case without expert testimony as to the standard of care. Coldwell also filed an affidavit for attorney fees. [R.1700-1757].
- 29) On 06/19/08 Posner moved the Court with a motion and memorandum requesting an extension of time to designate an expert witness. [R.1758-1765].
- 30) After all filings for summary judgment and the motion to extend time were submitted, the Court conducted a hearing for oral argument on 11/10/08. [R. 1833-1834].
- 31) Court on 12/08/08 denied Posner's motion for an extension of time to designate expert witness and granted Coldwell's motion for summary judgment and for attorney fees. [R. 1842-1851].

### **SUMMARY OF THE ARGUMENTS**

This appeal asks the Court to review several matters of law and one issue involving judicial discretion, all arising from the Summary Judgment dismissals of Equity and Coldwell, and the award of attorney fees to Coldwell Banker. Although Posner's case against each defendant arises out of the same basic transaction, the relevant facts and legal issues pertaining to each defendant are presented in two separate sections.

## I. Dismissal of Equity Title

Posner's appeal of Equity's dismissal rests on three arguments, each of which, if correct, provides a sufficient legal basis for reversing the trial court's ruling. First, factual disputes existed between Posner and Equity about exactly what happened at Posner's closing [R. 463-465]; these disputes were material to Posner's negligence and fiduciary breach claims as well as Equity's argument regarding Christoffersen's authority, and therefore dismissal was inappropriate Wycalis v. Guardian Title of Utah, 780 P. 2d 821, 824 (Utah Ct. App. 1989)( Affirmation is only proper when there is no genuine dispute as to material issues of fact and the moving party is entitled to judgment as a matter of law).

Second, the finding that Kandis Christoffersen acted within her actual and/or apparent authority was incorrect as a matter of law, as Equity did not supply documentary evidence that Christoffersen had authority to change the terms of Posner's contract, Utah Admin. Code Rule 162-6-1(6.1.11.1) (1993). Finally, Posner contends that Equity breached its fiduciary obligations to Posner when Smith failed to close his sale according to his escrow instructions, Schoepe v. Zion's First National Bank, 750 F. Supp. 1084, 1088, (D. Utah 1990), ("the scope of the escrow agent's duty is governed by the escrow agreement, and includes, at minimum, an obligation to exercise reasonable skill and ordinary diligence in following the escrow instructions.")

## II. Dismissal of Coldwell Banker

Posner's appeal of the dismissal of Coldwell Banker (with prejudice and an award of attorney fees) rests primarily upon his argument that the trial court abused its discretion in striking Posner's expert testimony. As set forth below, under the determinative standards set forth in the Utah Supreme Court case of Kilpatrick v.

Bullough Abatement, Inc., 199 P.3d 957 (Utah 2008), the district court did not make *any* of the threshold evidentiary findings necessary to sustain the sanction of striking Posner's expert report. If Posner's expert report is reinstated on this basis, then the dismissal of Coldwell Banker must be reversed, as the sole basis of Coldwell's second summary judgment motion to dismiss was Posner's lack of expert testimony.

If this court determines that Judge Medley's decision to strike the expert report was proper, Posner submits that the ruling that expert testimony was required in this case was incorrect as a matter of law. Posner argues that, based upon the ordinary nature of Posner's transaction, the straightforward guidance provided by statute (Utah Admin. Code Ann. Rule 162-6-2) identifying the fiduciary duties of a real estate agent to her principal, and Utah case law (e.g. Reese v. Harper, 329 P. 2d 410, 412 (Utah 1958); Phillips v. JCM Development Corp., 666 P.2d 876, 886 (Utah 1983), the trial court erred when it found that a juror would not be capable of understanding Posner's transactions and correctly applying the relevant law.

In addition to reviewing Coldwell's dismissal, this appeal also seeks a ruling on whether, if Coldwell ultimately prevails in this case, it is entitled to attorney fees under the terms of the Listing Agreement (See Addendum Index, Exhibit C: Listing Agreement). Posner argues that 1) his right as a plaintiff to frame his suit as he sees fit, Smoot v. Lund, 369 P 2d. 933, 935 (Utah 1962); 2) the established principle that a tortious claim may arise out of a contractual relationship (DCR. Incorp. v. Peak Alarm Co. 663 P.2d 433, 435 (Utah 1983); and 3) a reasonable reading of the plain language and purpose of the Listing Agreement (Holladay Duplex Mgmt. Co. v. Howells, 47 P.3d 104 (UT App 2002), are decisive authorities substantiating Posner's argument that the trial

court's decision to award attorney fees was incorrect as a matter of law.

## **ARGUMENTS**

### **I. DISMISSAL OF EQUITY TITLE**

#### **A. EVIDENCE SUPPORTING THE DISTRICT COURT'S DISMISSAL**

In its Motion for Summary Judgment, Equity argued that Helen Smith was *not* liable for “relying on the representations of Posner’s agent, and following her instructions, which were clearly within the scope of her actual and/or apparent authority, and which [were] binding upon Posner.” [R. 263]. This argument rested upon three facts. First, Equity alleged that Posner’s agent “with respect to the transaction” [R. 263] was Kandis Kristofferson. Equity’s evidence [at R. 266] for this agency relationship came from Posner’s Amended Complaint [R. 273], Posner’s Real Estate Purchase Contract [R. R. 287-298], Posner’s deposition [R. 286] and Christoffersen’s deposition [R. 300-301].

Second, Equity alleged that on August 28, 2002, Helen Smith “telecopied” the Guarantee to Kandis, who received and read it [R. 264]. As evidence that the telecopying occurred, Equity cited deposition testimony from Smith’s deposition in which Smith stated that she did not recall whether she had faxed Posner a copy of the Financial Guarantee [R. 313] but said that she had faxed a copy to Christoffersen on August 28 [R. 312], and Christoffersen’s deposition, in which Christoffersen stated that Smith had faxed her a copy of the Guarantee on August 28 [R. 302].

Finally, citing Posner’s Amended Complaint [R. 275-276], Smith’s deposition [R. 314], and Christoffersen’s deposition [R. 306], Equity stated that on August 30, 2002, Christoffersen informed Smith that Posner had approved the Financial Guarantee and to

go ahead and close. At the summary judgment hearing on May 16, 2005, Equity clarified its interpretation of why Christoffersen's instructions to Smith to close Posner's sale fell within her authority as Posner's real estate agent. Counsel for Equity explained that Christoffersen had not stepped into Posner's shoes, assuming to speak for him, when she told Smith to close. Instead, Equity argued that Christoffersen was merely a conduit who conveyed an approval by Posner, and that Christoffersen was within her authority as his real estate agent because she was simply conveying information on behalf of Posner regarding his sale:

“What she said was ‘Mr. Posner has reviewed it and approved it, and he said to close it.’ Now, that—authority to convey that bit of information was clearly within her authority. She had been conveying bits of information like that all the way from the beginning when the REPCE (sic) was first signed” (May 16 '05: Tr. at 30)

In his Order dismissing Equity and Independence, Judge Medley accepted Equity's three statements of fact when he stated: “[b]ased up on all of the undisputed facts, legal authorities and legal analysis...set forth....Posner's agent, Kandis Christoffersen, was acting within the scope of her actual implied and/or apparent authority when she communicated plaintiff's approval of the Financial Guarantee.” [R. 623].

**B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED**

In his Opposition to Summary Judgment, Posner identified several disputes about exactly what happened at his closing [R.463-465]. These disputes materially affect the credibility of Equity's defense that Christoffersen was acting within her authority.

Specifically, the success of Equity's authority argument depends on the truth of several assertions: 1) that Smith did indeed receive a copy of the Financial Guarantee and fax it to Christoffersen on August 28, 2) that Christoffersen did receive the fax of the Guarantee, 3) that Christoffersen did fax a copy of the \$260,000 Financial Guarantee to Posner, 4) that Christoffersen's transmission of Posner's approval to Smith was based upon full disclosure to Posner that the buyer had submitted a \$260,000 Financial Guarantee and 5) that Posner's verbal approval was sufficient. Posner disputed each of these allegation, and offered evidence [R. 473-473, 478] demonstrating that neither agent informed him about the Financial Guarantee the buyer submitted, and that he never saw nor approved it.

To dispute Equity's claim that Helen Smith telecopied the Financial Guarantee to Kandis Christoffersen, Posner offered the following evidence:

- i) Subpoenaed phone records of Independence show no faxes to Equity on August 28 or 29 [R. 497-515], calling into question Equity's assertion that Smith even possessed a copy of the Financial Guarantee when the buyer closed [R. 463-464]. Independence suggested that, although it faxed all the other closing documents to Equity, it hand-delivered the Financial Guarantee [R. 463]. Posner challenged this explanation as unlikely, given that Independence faxed all the other paperwork for the closing, and given that phone records from Independence's office for the dates in question do not show a fax to Equity's number.
- ii) Ms. Smith did not include a copy of the Financial Guarantee in the

closing documents she assembled and sent to Mr. Posner in Florida. There was no copy of the Financial Guarantee in Posner's file when he subsequently returned to Equity's office at the end of September '02, (at that time, Smith had to call Independence to request that they fax her a copy of the Financial Guarantee) [R. 464-465].

iii) Deposition testimony from both agents indicates that each agent thought the other had faxed Posner a copy of the Guarantee but never obtained positive proof i.e. a signature, of Posner's informed consent. Christoffersen stated that Smith faxed Posner 'the surety bond' [R. 304] and Smith stated that she faxed the Financial Guarantee to Christoffersen, but did not recall whether she had faxed it to Posner [R. 313-314].

Posner submitted an affidavit in which he stated that he never saw, discussed or approved the Financial Guarantee with Christoffersen [R.483]. Posner explained instead that Christoffersen told him in a telephone conversation on August 29 that the buyer had supplied a "surety bond." Throughout her deposition, Christoffersen identified the Financial Guarantee as "the surety bond", which is consistent with Posner's claim that he was informed that the buyer had supplied "a surety bond." [R. 303-304]. Although Posner alleged in his Amended Complaint that he initialed an addendum (hereinafter "the Addendum") which changed the amount of seller financing to reflect the added cost of "the surety bond", he also testified that he never gave verbal approval of the Financial Guarantee [R. 483], nor did he ever indicate in writing, *anywhere*, that he approved it [R. 128-129]. Copies of the Addendum Posner initialed, approving the increase in his seller

financing to \$263,900, clearly indicate that he received this fax from Kandis, and all other closing documents carry the fax numbers of either Independence or Equity, but no copies of the Financial Guarantee have ever been produced that show the office fax numbers of any of the parties on the closing dates.

Finally, Posner offered evidence suggesting that Smith did not, as a factual matter, rely on Christoffersen's instructions conveying Posner's approval, since Smith expressly stated that she did not believe Christoffersen spoke with authority for, or in place of, Posner himself [R. 469-471]. Smith recalled that she sent Christoffersen copies of the closing documents to make her aware of all the information [R. 526]. Although Smith stated that she thought she needed Posner's permission to close, she could not recall whether she had faxed the Financial Guarantee to Posner [R. 527]. If Smith failed to observe her duties to Posner and recognized, or should have known, that Christoffersen had failed in hers, then Christoffersen's appearance of authority is irrelevant to determining whether Smith was negligent or breached a fiduciary duty to Posner.

In summary, Equity's Motion for Summary Judgment rests entirely on the argument that its agent Smith was entitled to rely on the authority of Christoffersen when she closed Posner's sale. The fundamental premise of this argument is that both Smith and Christoffersen adequately disclosed to Posner exactly what the buyer had supplied. Posner has offered documentary and testimonial evidence that his agents never informed him about the Financial Guarantee and that he never approved it. Posner's evidence suggests Smith may never have received the Guarantee from Independence at all, thus knew that Posner hadn't seen the Guarantee, and closed anyway. Even if Smith faxed the



Guarantee to Christoffersen, she still closed without Posner's signature approving the Financial Guarantee, a document written for \$3,900 less than the REPC required. Either of these scenarios supports a finding that Smith did not, in fact, rely on Christoffersen's authority, and that she breached her fiduciary duty and/or was negligent. If there is any doubt...concerning questions of fact, the doubt should be resolved in favor of the [non-moving] party." Wilkinson v. Union Pac. Railroad Co., 975 P. 2d 464 (Utah 1998); Young v. Felornia, 244 P.2d 862, cert. denied, 344 U.S. 886, 73 S. Ct. 186, 97 L. Ed. 685 (1952). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In order for nonmoving party to oppose successfully a motion for summary judgment and send the issue to the fact-finder, it is not necessary for the party to prove its legal theory; it is only necessary for nonmoving party to show facts controverting the facts stated in moving party's affidavit. Salt Lake City Corp. v. James Constructors, Inc. 761 P2d 42 (Utah Ct App 1988). In light of the trial court's obligation to view the facts in a light most favorable to the non-moving party, Posner contends that his evidence was sufficient to demonstrate a genuine factual dispute. For this reason, the Trial Court erred in dismissing Equity.

### **C. THE TRIAL COURT ERRED IN FINDING THAT POSNER'S AGENT ACTED WITHIN HER AUTHORITY**

The trial court erred in concluding that Posner's real estate agent acted within her authority, as none of Equity's evidence satisfied the threshold requirements necessary to make such a finding.

### A. Actual Authority

The law in Utah requires that a real estate agent's express authority *be in writing*.<sup>3</sup> Utah Admin. Code, Rule 162-6-1(6.1.11.1) (1993) requires that the scope of a real estate agent's authority be defined in a written agency agreement.<sup>4</sup> At the summary judgment hearing on May 16 '05 [Tr. at 21-27], counsel for Posner argued that the overriding reason why Christoffersen lacked authority to close was that her instructions were verbal, and that by law, as well as Posner's REPC, any and all changes to the REPC had to be made in writing. The trial court offered the defendants an opportunity to respond to this argument (Tr. at 28-29], which they declined.

Although Equity maintained that it was not arguing that Christoffersen had stepped into Posner's shoes, and that instead she merely "conveyed Mr. Posner's approval," this explanation overlooks the fact that by giving verbal instructions to go ahead, Christoffersen effectively *changed the terms of Posner's contract* without supplying written authorization of any kind. Thus, whether or not she intended to, the concrete effect of Christoffersen's verbal instructions was that she did step into Posner's shoes and materially change his contract; in doing so, she breached fiduciary duties she had to fully inform Posner about the Financial Guarantee, and to properly obtain (via written authorization), Posner's approval of the change.

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<sup>3</sup> Pursuant to U.C.A. § 61-2-5.5, creating a Real Estate Commission authorized to make administrative rules, Utah Admin. Code Rule 162-6-1(6.1.11.1) (1993) of the Division of Real Estate, Utah Department of Commerce requires a principal broker and licensees acting on his behalf who represent a seller to "have a written agency agreement with the seller defining the scope of the agency."

<sup>4</sup> Cf. *Baumgartner v. Burt*, 365 P. 2d 681, 682(Colo. 1961): The relationship between an agent and his principal is a contractual one and the extent of the rights and duties of each is to be found in the express or implied terms of the agency contract.

Equity fails to demonstrate that Christoffersen had actual (express or implied) authority, because it relies [R. 266] on Posner's deposition testimony [R. 267],<sup>5</sup> not written authorization, as evidence of her authority. The only document relevant to determining the scope of Christoffersen's authority was Posner's listing agreement [R. 301; R. 468]. A listing agreement does not grant broad or general powers to a real estate agent, but commonly confers to a brokerage the right to find a buyer for the vendor and to receive a commission, § 13.02(b)(1), § 13.02(b)(1)(i), Agreements for Realtor's Services; Commissions. Utah Real Property Law. See also Pilling v. Eastern and Pacific Enterprises Trust, 702 P. d 1232, 1237 (Wash. App. 1985): (The scope of the agency between the seller and the broker is defined by the agent's purpose, which is to find a purchaser.); Painter v. Huke, 862 P. 2d 566, 568 (Ore. Ct. App. 1993): ( listing agreement authorizing broker to sell vendor's property "at the selling price and on the terms noted" did not provide express or implied authority to agent to accept a buyer's offer on terms different than those specified in the contract).

Citing Posner's testimony, Equity argued that Christoffersen had "actual and/or apparent authority over all aspects of the closing..." [R. 266], yet Utah cases expressly hold that listing agreements generate a narrow scope of authority that does not authorize real estate agents to transact transfers of real property on behalf of their principals. See Frandsden v. Gerstner, 487 P. 2d 697, 700 (Utah 1971): (A listing agreement empowering the realtor to find a buyer does not authorize the broker in writing to execute a contract on sale on behalf of his principal: "Thus the authority of a real estate broker with whom lands are listed for sale does not extend to the signing of a contract for sale.

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<sup>5</sup> Citing the general rule that "Express authority exists where the principal directly *states* that an agent has the authority to perform a particular act on the principal's behalf." (emphasis added) Id.

The power to execute a contract of sale is an additional authority that must be expressly granted in writing.” citing Queen City Lumber Co. v. Fisher, 111 N.W. 2d 714, 716 (N.D. 1961).

Posner submitted evidence that he expressly authorized Christoffersen to help find a buyer for his land and nothing more. [R.481, R. 301]. Equity did not refute Posner’s evidence with proof that Christoffersen’s written contract of agency included the power to negotiate his sales terms [R. 267] or that she was Posner’s “agent with specific authority over the closing and terms of the surety bond” [R. 266]. On the contrary, the only proof of Christoffersen’s agency that Equity offered was deposition testimony [R.267]; by law, evidence of express authority must be written. The trial court’s finding that express authority existed was therefore incorrect.

Equity also urges that Christoffersen had actual authority under the doctrine of implied authority. When an agent is given express authority, he acquires, by implication, the *implied authority* to do all that is necessary to exercise the authority expressly granted. An agent has implied authority if his conduct fell within the scope of, or was incidental, necessary, usual or proper to, the main authority delegated. Diston v. Enviropak Med. Products, Inc., 893 P. 2d 1071, 1076 (Utah Ct. App. 1995). An analysis of actual authority, whether express or implied, focuses on the acts of the principal from the agent's perspective. *Id.*

In support, Equity states that Ms. Christoffersen was Posner’s “listing agent.” [R. 266, R. 288]. As set forth above, however, the only express authority a listing agreement gives is authority to help the seller find a buyer. In fact, the record demonstrates that

Christoffersen *herself* did not believe she had such implied authority at closing, as she took steps to obtain Posner's written authorization of the new amount of seller financing [R. 304].

In giving verbal instructions to close with a document that materially breached the terms of Posner's REPC without Posner's written authorization, Christoffersen made a significant mistake. Her error in failing to obtain Posner's signature cannot plausibly be characterized as "incidental, necessary or proper" Diston v. Enviropak Med. Products, Inc., 893 P. 2d 1071, 1076 (Utah App. 1995), to the authority Posner delegated to her to help him find a buyer for his land: her instructions to close effectively altered the express terms of Posner's REPC and ultimately resulted in the sale of his lots to an unqualified buyer, thwarting the very purpose for which she was hired. In addition to violating the terms of his REPC, Christoffersen violated the very fiduciary duties of disclosure and reasonable care that she owed to Posner as a real estate agent<sup>6</sup>. Therefore, Equity's argument that Christoffersen had implied authority is unfounded in law.

#### B. Apparent Authority

"Apparent authority exists: 'where a person has created such an appearance of things that it causes a third party *reasonably and prudently* to believe that a second party has the power to act on behalf of the first person . . . ." (emphasis added) Walker Bank & Trust Company v. Jones, 672 P. 2d 73,75 (Utah 1983). An analysis of apparent authority must focus on the acts of the principal from a third party's perspective. Diston v.

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<sup>6</sup> Pursuant to U.C.A. § 61-2-5.5 and 61-2-11, Kristofferson's conduct must conform to professional standards articulated in the Administrative Rules of the Division of Real Estate, Utah Department of Commerce. These standards include the prescription that that principal broker and licensees acting on his behalf owe to their principal fiduciary duties of care including full disclosure Utah Admin. Code R162-6-2(1998) (6.2.15.1.(c)) and reasonable care and diligence 6.2.15.1.(e).

Enviropak Med. Products, Inc., 893 P. 2d 1071,1076 (Utah App. 1995). As applied to this case, Christoffersen had apparent authority if the evidence shows that Posner's conduct led Equity reasonably and prudently to believe that Christoffersen could give verbal instructions that changed her principal's REPC without his written authorization. Equity's evidence of Posner's conduct fails to meet this threshold requirement.

Equity urges that Christoffersen had apparent authority because "listing Kristofferson as his agent on the REPC, using her to negotiate the contract, delegating to her the responsibility of 'making sure that we had a surety bond and how much it was and everything else'" created the appearance of apparent authority [R. 267-268]. Merely hiring a real estate agent to sell land is not sufficient conduct on Posner's part to create the appearance that Christoffersen had authority to change Posner's REPC without his written approval. Under general principles of agency law, a real estate agent is a special agent acting under a *limited* power, rather than a general agent, and has the power to do *only those acts specifically named in the contract of agency*. (emphasis added) 3 Am. Jur. 2d §122 AGENCY; 12 Am Jur. 2d §88 BROKERS (See also Martin v. Vincent, 593 P. 2d 45, (Mont. 1979) (A real estate broker does not have general authority and is only authorized to do what is specifically assigned in his contract)).

The record establishes that Smith understood that Christoffersen's agency was limited rather than general. None of Smith's actions indicate that she believed Christoffersen possessed authority beyond helping Posner find a buyer and sell his land. On the contrary, Smith stated in her deposition that she did not believe Christoffersen had the authority to replace Posner and stated that she believed she needed Posner's approval to proceed to close [R. 526-527]. Smith testified that Posner told her his attorney had

approved the Guarantee, again showing lack of reliance on any authority possessed by Christoffersen.<sup>7</sup> [R. 531]. Christoffersen openly told Posner, in Helen Smith's presence, that she had no idea what a surety bond was [R. 544-545]. Smith's decision to accept Christoffersen's verbal representations regarding Posner's wishes, when the documents before her plainly deviated from the express terms of Posner's REPC, is simply evidence of her own misjudgment rather than evidence of her belief in Kristofferson's apparent authority.

Smith's reliance on Christoffersen's authority was also inappropriate given that apparent authority cannot be invoked by one who knows or has good reason to know the limits and extent of an agent's authority. 3 Am. Jur. 2d § 78. See Ellis v. Nelson, 233 P.2d 1072,1075 (Nev.1951):

...there can be reliance only upon what the principal himself has said or done, or at least said or done through some other and authorized agent. The acts of the agent in question can not be relied upon as alone enough to support an estoppel. If his acts are relied upon there must also be evidence of the principal's knowledge and acquiescence in them. Moreover, in any case, *the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances.* (emphasis added).

Utah cases uphold this limitation: See Bodell Construction Company v. Stewart Title Guaranty Company, 945 P. 2d 119, 124 (Utah App. 1997); City Elec. V. Dean Chrysler-Plymouth, 672 P. 2d 89,90 (Utah 1983); Bradshaw v. McBride, 649 P. 2d 74, 78 (Utah1982), citing Dohrmann Hotel Supply Co. v. Beau Brummel, Inc., 103 P. 2d 650, 651 (Utah 1940): one who deals with an agent has the responsibility to ascertain the agent's authority despite the agent's representations. Reliance on apparent authority is

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<sup>7</sup> Posner's attorney supplied an affidavit stating he never saw the Financial Guarantee prior to closing [R. 586-587].

also not justified where it is inconsistent with the circumstances of the transaction. 3 Am. Jur. 2d § 78 AGENCY. See also Simpson v. Compagnie Nationale Air France, 248 N.E. 2d 117, 120 (Ill. 1969). The mere fact that Smith chose to rely on Christoffersen is not itself evidence of Christoffersen's authority;<sup>8</sup> indeed, as previously mentioned, Smith stated she did not think that Christoffersen was acting in place of Posner.

On the facts of the case, Helen Smith knew or had good reason to know Kandis Christoffersen did not have the authority to change Posner's REPC without his written approval. Helen Smith was not an uninformed third party in this transaction but Posner's escrow agent [R. 519] with a fiduciary duty to him.<sup>9</sup> It was neither prudent nor reasonable for Smith to rely on verbal instructions from Christoffersen without a written signature from Posner. Equity's assertion of apparent authority is an attempt to escape liability for its agent's failure to act to protect Posner's interests. None of the evidence supplied in Equity's motion for summary judgment can correctly be construed as sufficient to support a finding of apparent authority. "[A] genuine issue of fact exists where, on the basis of the facts on the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." Sanns v. Butterfield Ford, 94 P. 3d 301, 304 (Ut. Ct. App. 2004), citing Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982).

#### **D. THE TRIAL COURT ERRED IN FINDING THAT EQUITY DID NOT BREACH A FIDUCIARY DUTY TO POSNER**

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<sup>8</sup> "Authority is not 'apparent' simply because the party claiming has acted upon his conclusions." Tsouras v. Southwest Plumbing and Heating, 587 P. 2d 1321, 1323 (Nev. 1978).

<sup>9</sup> Freegard v. First Western National Bank, 738 P. 2d 614, 616 (Utah 1987)



Utah escrow agents owe a fiduciary duty of care to the parties to an escrow. In Freegard v. First Western National Bank, 738 P. 2d 614, 616 (Utah 1987), the Utah Supreme Court noted “it is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and as such, a fiduciary is held to a high standard of care in dealing with its principals.” See also New West Federal Savings and Loan Assoc. v. Guardian Title Company of Utah, 818 P. 2d 585, 589 (1991 Utah App.); Hertz v. Nordic Limited, Inc., 761 P. 2d 959, 962 (Utah App. 1988).<sup>10</sup>

Although an escrow agent’s fiduciary duty may vary somewhat according to jurisdiction, courts agree that the core of the escrow agent’s fiduciary duty is to follow the escrow instructions. See, e.g., Schoepe v. Zion’s First National Bank, 750 F. Supp. 1084, 1088, (D. Utah 1990), (noting Utah courts have endorsed the principle that “the scope of the escrow agent’s duty is governed by the escrow agreement, and includes, at minimum, an obligation to exercise reasonable skill and ordinary diligence in following the escrow instructions.” (Additional cites omitted))

In the instant case, Posner’s escrow agent, Helen Smith, closed his sale with a document that, in both name and amount, did not match the specific requirements of the REPC terms. Despite the discrepancies between the REPC terms and the Guarantee, and despite the fact that Smith was an agent who owed a fiduciary duty of care to Posner, Equity’s phone records show no fax to Posner’s residence in Florida prior to his closing [R. 461; R. 504-515]. As alleged in the Equity’s summary judgment motion, the sole

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<sup>10</sup> This principle is recognized in other jurisdictions as well: The escrow agent must strictly comply with the instructions of the principals. See, e.g., Manley v. Tigor, 798 P. 2d 1327, 1331 (Az. Ct. App 1989): “[H]e must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence.” National Bank of Washington v. Equity Investors, 506 P. 2d 20, 35 (Wash. 1973).

foundation upon which Ms. Smith based her decision to close was that Posner's real estate agent told her that Posner had approved the Guarantee and said that closing could occur. Ms. Smith closed without requesting or receiving written authorization of the Guarantee from Mr. Posner.

The evidence plainly establishes that Smith knew Posner's closing documents needed to meet the terms of his REPC [R. 519-520]. To ensure that she reasonably and diligently followed Posner's escrow instructions, Smith needed, at minimum, to notify Posner of the discrepancy between the amount of seller financing he required at closing (\$263,900) and the amount for which the Financial Guarantee was written (\$260,000) and take steps to make sure that the closing numbers matched the REPC requirements. To verify that Christoffersen's instructions were proper and accurate, Smith should have insisted that Christoffersen supply Posner's written approval of the Financial Guarantee, or else contacted him herself. When she failed to follow Posner's escrow instructions, Smith breached her fiduciary duty to Posner, therefore, the trial court's ruling that Equity did not breach its fiduciary duties to Posner is incorrect as a matter of law.

## **II. DISMISSAL OF COLDWELL BANKER**

### **A. EVIDENCE SUPPORTING DISTRICT COURT'S DISMISSAL**

1. Striking Expert Witness: The Court, upon its own analysis, determined that the deadline for Posner to designate an expert witness under the October 2, 2006 Scheduling Order (hereinafter the "Scheduling Order") was December 12, 2006, and not the December 14 deadline Posner's counsel had calculated. The Court further found that an unsigned copy of the 12/14/06 cover letter Posner's counsel sent to Robert Ponte that

identified Gage Froerer as an expert [R. 1617; R. 1835] was insufficient proof of a December 14, 2006 mailing . Coldwell Banker claimed that it did not receive Plaintiff's designation until December 26, 2006 [R1066-1071], the day counsel for Posner filed the expert designation and report with the Court and the day Coldwell claims it received Posner's Memorandum Opposing Summary Judgment [05/12/08: Tr. p.8], lines 18-19; P. 35, lines 10-15]. The Court found that Coldwell Banker would suffer prejudice for the reasons set forth in their Memoranda in support of the Motion to Strike, and with trial date set for June 2008,<sup>11</sup> the Court was satisfied that the two week late December 2006 expert designation would prejudice Coldwell Banker. [05/13/08: Tr. p. 5].

## 2. Grant of Summary Judgment to Coldwell Banker

The trial court concluded [11/12/08: Tr. p. 3] that the standard set forth in Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997) applied. The Court held that an expert witness was only unnecessary where the propriety of the defendant's conduct is within the common knowledge and experience of the layman, and the alleged misconduct is so obvious that no reasonable juror could fail to comprehend the breach of the duty. In finding that expert testimony was necessary in Posner's case, the trial referenced the complexity of the closing of Posner's real estate transaction.

For example, the court noted that closing was a split closing involving a title company for the buyer and a separate title company for the seller. The closing involved separate pre-signed closing papers, signed at different times by the buyer and the seller. [11/12/08: Tr. p. 4] One issue facing the jurors involved the fact that the buyer substituted an instrument entitled "Financial Guarantee" for the surety bond Posner's

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<sup>11</sup> Motion in Limine to Exclude the Testimony of Plaintiff's expert filed 03/13/08 and Court on 03/20/08 set trial dates for 6/17 thru 6/19/06 [R. 1603].

REPC required. [11/12/08: Tr. p. 4] Some confusion existed as to whether the fiduciary duty imposed on the realtor arose from statute, case law or the Listing Agreement between Posner and Coldwell. The Court found that Posner's split closing that involved a title company for the buyer and a separate title company for the seller, separate pre-signed closing papers that were signed at different times by the buyer and the seller, the seller's carry back interest and the fact that the buyer substituted an instrument entitled "Financial Guarantee" for the surety bond required by the Real Estate Purchase Contract [11/12/08: Tr. p. 4], were all factors that constituted specific circumstances beyond the ken of the average juror. [11/12/08: Tr. p. 4] [R.1749].

### 3. Evidence supporting the Trial Court's Award of Attorney Fees

The Court awarded Coldwell Banker its attorney fees in this matter based on Coldwell's successful Summary Judgment Motion to Dismiss. The trial court found that the Listing Agreement between Posner and Coldwell Banker was determinative in this matter. The court noted that the Listing Agreement provided, in part, at paragraph 8:

"...in case of the employment of an attorney in any matter arising out of the Listing Agreement (including the sale of the Property) the prevailing party shall be entitled to receive from the other party all costs and reasonable attorney fees whether the matter is resolved through court action or otherwise."

In awarding fees to Coldwell, the Court found that but for the Listing Agreement, there would not have been any relationship between Coldwell banker and Posner, and that under these circumstances, Coldwell Banker was entitled to fees under paragraph 8 of the Listing Agreement. [11/12/08: Tr. p. 6].

## **B. THE DISTRICT COURT ABUSED ITS DISCRETION IN STRIKING THE PLAINTIFF'S EXPERT REPORT**

The district court abused its discretion in striking Posner's expert witness report because 1) it failed to make the evidentiary findings required to impose such a sanction under rule Rule 37(b)(2) of the Utah Rules of Civil Procedure (See Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 967 (Utah 2008), and moreover, the evidence of Posner's conduct in submitting the expert report does not reflect misconduct, and 2) contrary to Rule 37(b)(2)(C) of the Utah Rules of Civil Procedure, striking the expert report was unjust.

### 1. The Trial Court's Order failed to make the Required Evidentiary Findings

The standard for reviewing a trial court's imposition of discovery sanctions is abuse of discretion. See Pete v. Youngblood, 141 P.3d 629, 632 (Utah Ct. App. 2006): "We review the trial court's imposition of sanctions for failure to comply with [rule 26], including the exclusion of testimony, for an abuse of discretion." The trial court derives its power for imposing discovery sanctions from Utah Rules of Civil Procedure Rule 16(d) and Rule 37(b)(2). Rule 16(d) states:

"Sanctions. If a party or a party's attorney fails to obey a scheduling order....., the court, upon motion ...., *may make such orders with regard thereto as are just*, and among others, any of the orders provided in Rule 37(b)(2)(B),(C),(D)." (Emphasis added)

Rule 37(b)(2) states:

"Sanctions .... If a party fails to obey an order entered under Rule 16(b)...., unless the court finds that the failure was substantially justified, the court in which the action is pending *may take such action in regard to the failure as are just*, including the following: (b)(2)(C) strike pleadings or parts thereof, ....dismiss the action....." (Emphasis added).

Recently the Utah Supreme Court delineated the elements that must exist for a

trial court to impose sanctions. A trial court must provide factual findings that the party's behavior merits sanctions. Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 967 (Utah 2008). Once the factual finding has been made, "we will only disturb the sanction if "abuse of discretion [is] *clearly* shown." Id.:

An abuse of discretion may be demonstrated by showing that the district court relied on "an erroneous conclusion of law" or that there was "no evidentiary basis for the trial court's ruling." Utah Dep't of Transp. v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995) (internal quotation marks omitted).

The Court then explained that sanctions are warranted only when the party's conduct meets certain criteria: Sanctions are warranted when "(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process." Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 967 (Utah 2008) referencing Morton v. Continental Baking Co., 938 P.2d 271, 276 (Utah 1997).

In this case, the trial court made factual findings that there was no proof of service of the expert designation on December 14, 2006, that Posner's counsel's word that she had sent the designation on December 14 was insufficient, and that the first receipt of the expert designation was December 26, 2006, after the December 12 deadline. The court concluded that the untimely filing would prejudice Coldwell Banker if Posner were allowed to use its expert witness. [05/13/08: Tr. p. 5]. There were no factual findings that Posner's conduct deserved sanctions, nor were there specific findings of a willful failure to obey, bad faith, fault or persistent dilatory disobedience. The Record itself does not reflect any persistent dilatory disobedience.

On the contrary, Posner's Memorandum in Opposition set forth Posner's good

faith effort to supply the expert report in a timely fashion. Posner's counsel thought she was timely filing the expert witness designation when she served Coldwell on December 14, 2006. [R.1612]. Coldwell also believed this date to be the deadline. [R.5132].

Posner's counsel also explained her assumption that, as a result of Mediation Order, the Scheduling Order no longer applied to either party but that both parties were proceeding on a good faith basis, noting: "... in my view, once the Court ordered ...mediation, my own view was it doesn't make sense to spend money on any steps towards litigation until we see the outcome of this mediation." [05/12/08: Tr. p. 32, lines 22-25].

Coldwell Banker likewise believed that the Order to Mediate amended the Scheduling Order: "At the conclusion of fact discovery, and because the scheduling order had been *informally amended by the Court's order to attend mediation*, Coldwell Banker filed a dispositive motion .. it's motion for summary judgment immediately following the mediation .. the unsuccessful mediation." [05/12/08: Tr. p. 4, lines 3-7] (emphasis added). Coldwell noted that because of the mediation "we sat on [the summary judgment motion]" as its explanation for not filing by the November 13 '06 deadline. [05/12/08: Tr. p.38, lines 16-22] [R.1620] Coldwell issued a notice of deposition of Plaintiff on 11/02/06 and took his deposition on 11/20/06, after the fact discovery cutoff date of October 13, 2006 set forth in the Scheduling Order [R. 880-882 Notice of Deposition; 1290 Deposition; and, 872-874 Scheduling Order]

In effect, both parties stated that the order to mediate affected the dates of their filings under the Scheduling Order. This was not an unreasonable result, and suggests that the parties had a tacit agreement of the kind mentioned in Berkshires, L.L.C. v. Sykes, 127 P.3d 1243, 1246 (Utah Ct. App. 2005), where the Court of Appeals

determined that since both sides filed motions late, “...the parties had ‘tacitly agreed’ to ignore the cutoff dates.”

Despite Posner’s evidence that his submission of the expert report reflected no misconduct, the trial court concluded that the untimely submission merited a sanction and struck the report. However, contrary to determinative criteria for imposing sanctions set forth in Kilpatrick, the trial court made no factual finding that the Posner’s behavior warranted sanctions, nor did it supply any evidentiary findings establishing that one or more of the four types of conduct meriting sanctions had occurred. Instead, as justification for striking Posner’s expert, the court cited prejudicial effect. Under Kilpatrick, prejudice is not a sufficient evidentiary basis for imposing a sanction. See Id. at 965: “The willfulness requirement cannot be satisfied by showing mere prejudice. Rather, there must be evidence that the noncompliance was the product of willful failure.” The trial court in this case abused its discretion in striking Posner’s expert report because it did not make the evidentiary finding required to imposition of such a sanction, nor do the facts support such a finding.

## 2. The Trial Court’s Decision to Strike the Plaintiff’s Expert Report was Unjust

Under Rule 37(b)(2)(C) of the Utah Rules of Civil Procedure, a court may take any action that is “just,” including onerous sanctions such as dismissing the action or rendering judgment by default against the disobedient party. Striking Posner’s expert report under the circumstances of this case was not such a “just” action. When the district court denied Posner’s Motion to Designate Experts, and simultaneously granted Coldwell’s Motion to Dismiss based on lack of expert testimony, it effectively transformed a sanction which kept Posner from presenting certain testimony at trial into a



sanction which denied Posner the right to a trial by jury. Given this consequence, the Utah Supreme Court cautionary words in Morton v. Continental Baking Co., 938 P.2d 271, 280 (Utah 1997) are apposite: “Indeed, constitutional due process rights may be violated if a court refuses to hear the merits of the case where there has been a relatively trivial infraction of procedural rules. See Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542-43 (11<sup>th</sup> Cir. 1993). Thus, ‘[d]ismissal is generally imposed only for *egregious misconduct*, such as repeated failure to appear for deposition.’ Regional Refuse Sys., Inc. v. Inland Reclamation Co. 842 F.2d 150, 155 (6<sup>th</sup> Cir. 1988) (emphasis added).”

Sanctions that result in dismissal of a plaintiff’s case are a severe remedy that may violate due process.<sup>12</sup> Although a trial court maintains substantial discretion to decide appropriate sanctions, this discretion is not unbridled: “Dismissal is ‘the most extreme sanction provided for in the rule, and the Supreme Court has emphasized the necessity for cautious use of the rule...[It] should be exercised only in exceptional circumstances.” In re Liquid Carbonic Truck Drivers, 580 F.2d 819, 822 (5<sup>th</sup> Cir. 1978). Posner’s filing of the expert report within 14 days of the deadline, particularly under the circumstances of mediation order, did not rise to the level of egregious misconduct outlined in In re Liquid Carbonic Truck Drivers. Given the absence of an evidentiary basis for any egregious

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<sup>12</sup> “[T]here are constitutional limitations upon the power of the courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.”(fn29) The Supreme Court has held that rule 37 of the Federal Rules of Civil Procedure “should not be construed to authorize dismissal . . . when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.” Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 966-67 (Utah 2008) citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

conduct on the part of Posner in its Order, the district court's decision to strike Posner's expert testimony and then dismiss his case for lack of expert testimony was not a just action.

### **C. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CASE FOR LACK OF EXPERT TESTIMONY**

The trial court erred in concluding that expert testimony was necessary in Posner's case because, as a matter of law, Utah cases and statutes on the fiduciary duty of care a real estate agent owes her principal are straightforward and easily understood, and because there is nothing intrinsically difficult to understand about Posner's closing.

Relevant Utah statutes and case law supply sufficient guidance for jurors charged with determining whether a real estate agent breached her fiduciary duty to her principal.

On the matter of fiduciary breach by a real estate agent, the language of Administrative Rule 162-6-2 is simple and straightforward: a principal broker and licensees acting on his behalf owe the fiduciary duties of loyalty, obedience, full disclosure, confidentiality and reasonable care and diligence to their principal. This provision clearly articulates what duties a real estate agent owes.

Second, several Utah cases provide straightforward guidance on when the duties of care and disclosure are breached. For example, in Reese v. Harper, 329 P. 2d 410, 412 (Utah 1958), the Supreme Court considered whether the seller's agent had adequately disclosed the details of an offer to buy plaintiff's property. The defendant (seller) sought a purchase price of \$45,000. Seller's agent brought the defendant an offer for \$30,000, which seller signed under the mistaken understanding that the \$30,000 also included a

promise to pay approximately \$15,000 in encumbrances (which would have brought the total value of the offer to the original asking price of \$45,000). Significantly, the Court found that even though the agent had actually shown the seller the Receipt and Agreement to Purchase, which bound seller to the sale, the seller's agent had nonetheless *failed to inform and explain to the seller fully of all the facts material to the transaction*, specifically that the Receipt required seller, not buyer, to pay the encumbrances. The circumstances in Reese closely resemble the facts of Posner's case, where the real estate agent allegedly saw a document that the buyer submitted, but failed to inform Posner about what the buyer supplied and failed to obtain Posner's signature approving the document.

Utah courts have also considered the duty of reasonable care and diligence:

"In light of the duty of a real estate salesman and his broker to exercise reasonable skill and diligence on behalf of the principal they represent, we ... continue to hold, that the principal is justified in relying upon information received from the salesman and broker **without making an independent investigation**. Phillips v. JCM Development Corp., 666 P.2d 876, 886 (Utah 1983) (emphasis added).

In Phillips, the Court found a breach of fiduciary duty when his real estate agent failed to obtain important financial information about the buyer that that his principal, the seller, had requested. Id. Like the plaintiff in Phillips, Posner had a clear requirement. Ms. Christoffersen understood that the surety bond was a critical back up to Posner's seller financing and indeed, that the entire sale was conditioned Posner's receipt of a surety bond at closing. Christoffersen obtained Posner's signature approving the addition of an increase of \$3,900, to \$263,900 to his seller financing amount but did not inform him that the document was titled "Financial Guarantee" and was written for \$260,000, nor obtain his signature approving this change in his REPC,

even though she knew the REPC required a surety bond equal to seller financing amount.

Relative to juror's possible difficulty in distinguishing a "Financial Guarantee" from a "surety bond", Posner properly and timely designated an expert witness to explain this difference to jury [R.178-179]. As for the remaining issues that the trial court identified as too complex for an average person to understand, there is nothing that cannot be explained in a manner a jury could easily comprehend, nor are the features of Posner's closing particularly unusual. For example, split closings are permitted by law in Utah, and the law places no restrictions upon who may participate in a split closing. Moreover, signing papers and reviewing closing papers are activities that are the same whether a lay person is closing with one title company or two. The "subordinated carry-back interest" is nothing more than the seller financing part of the buyer's loan and allowing the conventional mortgage company to have a first security position, while the seller takes a second position. Pre-signing loan papers is not uncommon or difficult. Except for the financial guarantee v. surety bond, the remaining items are not complex and certainly within the competency of a jury. The jury in Posner's case will be called upon to make findings on whether certain events occurred (for example, whether Coldwell Banker agent Kristofferson informed Posner that the buyer had not supplied a surety bond but an instrument labeled "Financial Guarantee," or that it was not in the amount called for in the addendum that Kristofferson presented to Posner to sign). The jury will then have to determine whether, if such acts/omissions occurred, they amounted to a breach of Kristofferson's fiduciary duties to Posner. These are issues juries face and decide every day.

#### **D. THE TRIAL COURT ERRED IN AWARDING COLDWELL BANKER ITS ATTORNEY FEES**

In his Amended Complaint, Posner asserted a *tort* claim against Coldwell. The trial court's decision to award Coldwell attorney fees was incorrect because the court based this award on a term in the contract (Listing Agreement) between Posner and Coldwell, not upon the application of a tort law principle in Posner's tort law claim.

Posner chose to sue for fiduciary breach because 1) a real estate agent owes her principal the fiduciary duties of reasonable care, diligence and full disclosure (U.A.C.A. R162-6-2), and 2) because "fiduciary breach" most closely described the conduct of his agent when she instructed his title company to close without obtaining his signature authorizing acceptance of the Financial Guarantee. It was Posner's determination that, if he sued for breach of contract under the Listing Agreement, Coldwell could argue that no breach had occurred: the Listing Agreement promises to sell listed property for the listed sales price, and indeed, the price listed in the REPC, and the price at Posner's closing, was the price Posner agreed to: \$450,000. In choosing to sue under tort, Posner exercised his right to frame his claim on the facts as he knew them. Smoot v. Lund, 369 P 2d. 933, 935 (Utah 1962) (a plaintiff may frame his case under any theory the facts of the case will support).<sup>13</sup>

The fact that it was the Listing Agreement that brought Coldwell Banker and Posner together does not prohibit Posner from suing in tort, nor should it subject him to the burdens and remedies contained in that contract. Utah courts expressly recognize that

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<sup>13</sup> ([Utah Rules of Civil Procedure] Rule 18(a) provides that a party may "join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.")

tortious conduct may arise out of a contractual relationship. D'Elia v. Rice Development, Inc., 147 P.3d 515, 523-524 (Ut App. 2006) (We begin by noting that "[i]n Utah, a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty." Norman v. Arnold, 57 P.3d 997, 1006 (Utah 2002) (additional cites omitted). Likewise, in DCR. Incorp. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983), the Supreme Court noted:

A party who breaches his duty of due care toward another may be found liable to the other in tort, *even where the relationship giving rise to such a duty originates in a contract between the parties...*: [A] wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of *the contractual relationship will not bar the injured party from pursuing redress in tort.* (emphasis added) [Quoting Peterson v. Sherman, 68 Cal.App.2d 706, 157 P.2d 863 (1945).]

It is clear from the above quoted Supreme Court decision that, having sued in tort, Posner is entitled to have tort law determine the outcome of his case.

Additionally, a close reading of the Listing Agreement does not compel the conclusion that it applies to Posner's claim:

1) The mere recitation in the Listing Agreement of a fiduciary duty does not render Posner's fiduciary breach claim a breach of contract claim. Unlike other truly bargained-for terms, Coldwell was not at liberty to bargain about its fiduciary duty with Posner; the Utah legislature has determined that real estate agents, for public policy reasons, owe their clients a fiduciary duty of care. Thus, by virtue of U.A.C.A. R162-6-2, Coldwell's fiduciary duty existed regardless of whether Posner's Listing Agreement mentioned it.

2) The plain language of paragraph 8 of the Listing Agreement limits fees to

“...any matter *arising out of* the Listing Agreement...” The plain language of the contract suggests its purpose is to ensure that the listed property is sold at the listed price. It is far from clear that the Listing Agreement language was intended to cover circumstances like Christoffersen’s transmission of Posner’s alleged approval of a document pertaining to his seller financing. A reasonable interpretation of the term “arising out of” is that it refers to attorney fees associated with actions arising out of claims related to the sale of the property at the listed price, *not* fees associated with tort claims pertaining to actions *arising outside* of the intended scope of the Listing Agreement, though still falling within a real estate agent’s fiduciary duties of disclosure and care. (emphasis added). “[I]t is [the trial] court’s duty to enforce the intentions of the parties as expressed in the plain language of the [contract’s] covenants.” Holladay Duplex Mgmt. Co. v. Howells, 47 P.3d 104 (UT App 2002).

In summary, based on Posner’s right as a plaintiff to frame his suit as he sees fit, to have tort law apply when he has sued in tort, and upon a reasonable reading of the plain language and purpose of the Listing Agreement, the trial court’s decision to award attorney fees under a term in the Listing Agreement was incorrect as a matter of law.

### **CONCLUSION**

Plaintiff Michael Posner respectfully requests that this Court 1) reverse the trial court’s dismissal of Equity because existing factual disputes should have precluded the grant of summary judgment, and/or 2) reverse the trial court’s findings that Posner’s real estate agent acted within her authority and that Equity breached no duty to Posner, and 3) remand this case for trial.

Posner also requests that for the reasons set forth, this Court 1) find that the trial court abused its discretion in sanctioning Posner by striking his expert report, which led to the dismissal of his case, and/or 2) reverse the trial court's ruling that expert testimony on the standard of care was necessary, remanding this case for trial. For the reasons stated, Posner also requests that this Court reverse the trial court's award of attorney fees under the Listing Agreement.

Dated this 30<sup>th</sup> day of April, 2009.

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Catherine James  
David E. Ross II  
*Attorneys for Plaintiff/Appellant*  
*Michael C. Posner*



## **ADDENDUM INDEX**

**Exhibit A** Real Estate Purchase Contract

**Exhibit B** Financial Guarantee

**Exhibit C** Listing Agreement

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing BRIEF OF APPELLANT to the following by U.S. Mail, first class, postage prepaid, this 30<sup>th</sup> day of April 2009:

David W. Overholt, Esq.  
Robert A. Ponte, Esq.  
RICHER & OVERHOLT, P.C.  
901 West Baxter Drive  
South Jordan, UT 84095-8687

David Bennion, Esq.  
Parsons Behle & Latimer  
One Utah Center  
201 S. Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, UT 84145

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## **ADDENDUM 1**

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P. 02

**REAL ESTATE PURCHASE CONTRACT**

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

**EARNEST MONEY RECEIPT**

Buyer Shackles & Associates LLC offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 500.00 in the form of 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: Stephane Gully on 7-23-02 (Date)  
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Allpro Realty Group, Inc Phone Number 801-450-9999 913-9392

**OFFER TO PURCHASE**

1. PROPERTY: 350 Deer Valley Dr.

also described as: 3010-301E

City of Park City County of Summit State of Utah, Zip 84662 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds, awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title:

1.2 Excluded Items. The following items are excluded from this sale:

1.3 Water Rights. The following water rights are included in this sale: Outstanding

1.4 Survey. (Check applicable boxes): A survey ☒ WILL ☐ WILL NOT be prepared by a licensed surveyor. The Survey Work will be: ☐ Property corners staked ☐ Boundary Survey ☒ Boundary & Improvements survey ☐ Other (specify) \_\_\_\_\_. Responsibility for payment: ☐ Buyer ☒ Seller ☐ Buyer and Seller share equally. Buyer's obligation to purchase under this Contract ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the Survey Work. If yes, the terms of the attached Survey Addendum apply.

2. PURCHASE PRICE. The Purchase Price for the Property is \$ 450,000.00

2.1 Method of Payment. The Purchase Price will be paid as follows:

\$ 500.00

\$ 245,000.00

(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 a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☐ CONVENTIONAL ☐ FHA ☐ VA

☒ OTHER (specify) Private Funding

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

☐ SPECIFIC LOAN TERMS

\$

\$ 204,500.00

\$

\$

\$ 450,000.00

(c) Loan Assumption (see attached Assumption Addendum if applicable)

(d) Seller Financing (see attached Seller Financing Addendum if applicable)

(e) Other (specify)

(f) Balance of Purchase Price in Cash at Settlement

PURCHASE PRICE. Total of lines (a) through (f)



MP



7/28/02



7/23/02

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 ... .. MILLENNIUM REALTY GROUP

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### 2.2 Financing Condition. (check applicable box)

- (a) ☐ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition"
- (b) ☒ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

### 2.3 Application for Loan.

(a) Buyer's duties. No later than the Application Deadline referenced in Section 2.4(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the Lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) Procedure if Loan Application is denied. If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Loan Denial was received by Buyer on or before the 10th day of July, the Earnest Money Deposit shall be returned to Buyer; (ii) if the Loan Denial was received by Buyer after that date, Buyer agrees to forfeit, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal of Property. Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. If the appraisal condition applies and the Property appraises for less than the Purchase Price, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after Buyer's receipt of notice of the appraised value. In the event of such cancellation, the Earnest Money Deposit shall be released to Buyer. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the appraisal condition by Buyer.

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 2.4(d), 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. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 2.4(d) 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: 45 hours ☐ days after Closing; ☐ Other (specify) \_\_\_\_\_

★ CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract:

Seller's Initials [Signature]

Buyer's Initials [Signature]

The Listing Agent, Kandis Christoffersen represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Selling Agent, Stephanie Gyllenas represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Listing Broker, Coldwell Banker - PC represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Selling Broker, Allpro Realty Group represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent.



Seller's Initials



to

Buyer's Initials

Date 7/23/02

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 JUL 29 '02 16:06 FR E-PC JTHH 435 649 3760 TO 1 9956895-9440 P 04/07  
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8. **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.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), 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 and building or zoning code violations; and
- (e) Other (specify) \_\_\_\_\_

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

- ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property. (specify) \_\_\_\_\_

*Acceptance of Appraisal*  
 If any of the above items 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 the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 **Evaluations & Inspections Deadline.** No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections 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 Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved 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. 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 in Section 10.

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: ☒ Addendum No. \_\_\_\_\_  
☐ Survey Addendum ☒ Seller Financing Addendum ☐ FHAVA Loan Addendum ☐ Assumption Addendum  
☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law)  
☐ Other (specify) \_\_\_\_\_

#### 10. SELLER WARRANTIES & 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, unless the sale is being made pursuant to a real estate contract which provides for title to pass at a later date. In that case, title will be conveyed in accordance with the provisions of that contract. 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

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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. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), 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.

**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 broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

**11. WALK-THROUGH INSPECTION.** Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items 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 to 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 supercedes 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 ~~(I) SHALL~~ ☐ MAY (upon mutual agreement 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 demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

**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.



Seller's Initials



Date



Buyer's Initials



Date 7/23/02

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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, receipt of the Seller Disclosures, 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) Application Deadline 7/2 (Date)  
 (b) Seller Disclosure Deadline 10 days of acceptance  
 (c) Evaluations & Inspections Deadline 10 days of acceptance  
 (d) Settlement Deadline 30 days of acceptance

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: 5:00 PM 7/28/02 11:00 PM Mountain Time on 7-28-02 (Date), this offer shall lapse, and the Brokerage shall return the Earnest Money Deposit to Buyer.

[Signature] for Shirley Ann 7/28/02  
 (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"

Chris Strachan for Shirley Ann P.O. Box 27672 SLC UT 84127  
 (Buyer's Name) (PLEASE PRINT) (Notice Address) (Phone)

255-2474

[Signature]  
 Seller's Initials

7/28/02  
 Date

[Signature]  
 Buyer's Initials

7/28/02  
 Date



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MICHAEL POSNER

PAGE 02

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## ACCEPTANCE/COUNTEROFFER/REJECTION

## CHECK ONE:

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

☒ COUNTEROFFER: Seller prepares for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. 3.

★ [Signature] (Date) 7/24/02 ★ [Signature] (Date) (Time)

(Seller's Name) (PLEASE PRINT) (Seller's Address) (Phone)

☐ REJECTION: Seller Rejects the foregoing offer.

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

## DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

★ [Signature] (Date) [Signature] (Date)  
 ★ [Signature] (Date) [Signature] (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on \_\_\_\_\_ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.

Signature delivered by (specify) \_\_\_\_\_

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE SEPTEMBER 24, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Page 6 of 8 pages

★ [Signature] Date 7/23/02 ★ [Signature] Date 7/23/02

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ADDENDUM NO. 1  
TO  
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 7-23-02 including all prior addenda and counteroffers, between Shelton & Ass. LLC as Buyer, and \_\_\_\_\_ as Seller, regarding the Property located at 350 Deer Valley Dr.. The following terms are hereby incorporated as part of the REPC:

- ① Purchase price to be \$450,000."
- ② Seller to provide an Engineering allowance of \$40,000."
- ③ Seller financing 93 per "Seller Finance Addendum" to be secured in the Second position.
- ④ Seller pays all closing fees & costs.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. (X) Seller ( ) Buyer shall have until 5:00 ( ) AM (X) PM Mountain Time on 2/28/20 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☒ Buyer     Seller Signature     (Date)     (Time)     [ ] Buyer     [ ] Seller Signature     (Date)     (Time)

## ACCEPTANCE/COUNTEROFFER/REJECTION

**CHECK ONE.**

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

~~1~~ COUNTEROFFER: ~~Seller~~ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 3

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

**[ ] REJECTION; [ ] Seller [ ] Buyer rejects the foregoing APPENDUM.**

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1996. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

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ADDENDUM NO. 3  
TO  
REAL ESTATE PURCHASE CONTRACT



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THIS IS AN ☐ ADDENDUM ☒ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 7-23-02 including all prior addenda and counteroffers, between Stragham & Associates LLC as Buyer, and Posner as Seller, regarding the Property located at 330 Deer Valley Drive Park City UT, 84060. The following terms are hereby incorporated as part of the REPC:

Seller accepts Buyer's offer with these changes:

1. REF: 1.4 Survey The previous owners had a survey done on the property.

Seller will provide a copy of that survey to Buyer. Any additional survey work shall be the Buyer's responsibility.

2. REF: Addendum 1.2 Seller will not provide Engineering allowance.

3. 4. Seller will pay Sellers closing fees and costs. Buyer pays their closing fees and costs.

4. REF: Seller Financing

Credit terms. Interest to be 9% per annum.

5. Any costs or fees associated with setting up owner financing shall be the responsibility of Buyer.

6. Seller may wish to have Buyer's credit checked.

All other terms to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 7:00 PM, 7/24/02, 7 AM Mtn Time to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer set forth in this ADDENDUM shall lapse.

☒ Buyer ☒ Seller Signature Date 7/24/02 Time  
☐ Buyer ☐ Seller Signature Date Time

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

(Signature) (Date) (Time) (Signature) (Date) (Time)  
7/25/02 7:00 PM

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 17, 1996. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

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ADDENDUM NO. 4

TO

## REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 7-23-02 including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Posner as Seller, regarding the Property located at 350 Deer Valley Drive. The following terms are hereby incorporated as part of the REPC:

Buyer to provide to Seller a Surety Bond for the Sellers Financing: as

per Real Estate Purchase Contract and all Seller financing addendums

and all other addendums to the contract on 350 Deer Valley Drive

to be provided before closing of the property. The closing shall be on or before August 7, 2002, 5:00 PM Mountain Time. All prorations shall stay the same

August 2 2002. Buyer to pay off Seller financing in full before starting any construction on property.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 8/2/02 ☐ AM ☐ PM Mountain Time to accept the terms of this ADDENDUM in accordance with the provisions of Section 2.3 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☐ Buyer ☒ Seller Signature Date Time ☐ Buyer ☐ Seller Signature Date Time

## ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 4.

8/2/02 3:20 PM  
(Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

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**ADDENDUM NO. 5**  
**TO**  
**REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Michael Posner as Seller, regarding the Property located at 350 Deer Valley Dr.. The following terms are hereby incorporated as part of the REPC:

Buyer shall have an extension to close on or before August 9, 2002 5:00 PM Mountain time.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on 8-7-02 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 8-7-02 4:30 pm  
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

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

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

[Signature] 8/8/02  
 (Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

15

Attn: Kandis Christopherson

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**ADDENDUM NO. 6**  
**TO**  
**REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Michael Posner as Seller, regarding the Property located at 350 Deer Valley Dr.. The following terms are hereby incorporated as part of the REPC:

Buyer shall have an extension to close on or before August 14, 2002 5:00 PM Mountain time.

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

[Signature] 8-13-02 1:00 PM  
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

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

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

[Signature] 8/13/02  
 (Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

MHS

Attn: Kandis Christopher

Page 1 of 1

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

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Michael Posner as Seller, regarding the Property located at 350 Deer Valley Dr.. The following terms are hereby incorporated as part of the REPC:

Buyer shall have an extension to close on or before August 13 2002 5:00 PM Mountain time.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ **Seller** ☐ **Buyer** shall have until 5:00 ☐ **AM** ☒ **PM** Mountain Time on 8/16/02 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 8-13-02 1:00 PM [Signature] 8/16/02  
☒ Buyer ☐ Seller Signature (Date) (Time) ☒ Buyer ☐ Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

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

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

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

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

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

Page 1 of 1

**ADDENDUM NO. 8**  
**TO**  
**REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Michael Posner as Seller, regarding the Property located at 350 Deer Valley Dr.. The following terms are hereby incorporated as part of the REPC:

1. Buyer will increase Surety Bond to cover new amount Seller will carry.

2. Rate is increased to 10%.

3. Buyer will give Seller a check in the amount of \$1,100.00. to cover costs of testing fees for land being purchased.

4. All other items on contract to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on 8-22-02 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 8-22-02 7:00 pm  
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

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

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

[Signature] 8/22/02  
 (Signature) (Date) (Time) (Signature) (Date) (Time)

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

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



08/30/2002 03:03 56199 99  
08/30/2002 07:13 435549549  
FROM Stephanie Gvillenskog 2789756

MICHAEL POSNER

PAGE 02

CWP

PAGE 02

01-01-94 12:25PM TO

1435549521

P.2

ADDENDUM NO. 9  
TO  
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT dated July 23, 2002 with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers between Strachan & Associates LLC as Buyer and Michael Posner as Seller regarding the Property located at 390 Deer Valley Dr. The following terms are hereby incorporated as part of the REPC:

1. Buyer shall have until Thursday, August 29th at 6:00pm to close.

2. Seller carry back to be in the amount of \$250,000.00 secured in second position.

3. Surety bond will be issued in the amount above before close.

4. All other items on contract and previous addendums to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, those terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 6:00 PM Mountain Time on August 29, 2002 to accept the terms of this ADDENDUM in accordance with the provisions of the REPC. Unless so accepted, this ADDENDUM shall be null and void.

☒ Buyer ☐ Seller Signature (Date) Time

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

☒ COUNTEROFFER: ☐ Seller ☐ Buyer presents a counteroffer to the terms of the above ADDENDUM.

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

Signature (Date) Time Signature (Date) Time

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE JANUARY 17, 1999. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

FROM Stephanie Gyllenskog 2789756

01-83-94 06:10PM TO

14356495498

P.1

**ADDENDUM NO. 10  
TO  
REAL ESTATE PURCHASE CONTRACT**

Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Stephanie Gyllenskog LLC as Buyer and Michael Posner as Seller, regarding the Property located at 360 Deer Valley Dr. The following terms are hereby incorporated as part of the REPC.

1. Buyer will be responsible for all costs and fees associated with bond including the 1 1/2% annual fee.

2. All other items on contract and previous addendums to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [ ] Buyer shall have until 5:00 [ ] AM [X] PM Mountain Time on (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 28 of the REPC. Unless so specified, the offer and both of this ADDENDUM shall expire.

[X] Buyer [ ] Seller Signature (Date) (Time) [ ] Buyer [ ] Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

☒ ACCEPTANCE: [ ] Seller [ ] Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: [ ] Seller [ ] Buyer presents a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_\_

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

☐ REJECTION: [ ] Seller [ ] Buyer rejects the foregoing ADDENDUM

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1999. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

## **ADDENDUM 2**

## FINANCIAL GUARANTEE

THIS GUARANTEE is made and entered into, by and between AMERICAN NATURAL RESOURCES CORPORATION, hereinafter called GUARANTOR; and STRACHAN & ASSOCITES, LLC, hereinafter called BORROWER, for the benefit of MICHAEL C. POSNER, hereinafter called LENDER.

### WITNESSETH

WHEREAS, LENDER expects to loan to BORROWER certain assets, namely \$260, 000 (two hundred and sixty thousand dollars), balance of purchase price of a certain property located at 350 Deer Valley Drive, Park City, Utah., in terms of an agreement entered into between Borrower and Lender, dated August 2<sup>nd</sup>, 2002, hereinafter referred to as the loan, and  
WHEREAS, BORROWER desires GUARANTOR to act as GUARANTOR, at BORROWER'S request, to LENDER, for the amount on the Loan described below; and  
WHEREAS, GUARANTOR is willing to act as GUARANTOR subject to the provisions hereof;  
NOW THEREFORE, FOR VALUE RECEIVED, including the promises and mutual covenants herein set forth, BORROWER, LENDER and GUARANTOR do hereby mutually agree as follows:

### TERMS AND CONDITIONS

#### 1. DEFINITIONS

For the purposes of this Guarantee, the terms and phrases listed below shall have only the meaning shown when used herein;

- (a) The "GUARANTOR" means the GUARANTOR whose name appears on the face of the Guarantee.
- (b) The "LENDER" means the LENDER to whom the GUARANTOR is obligated and whose name appears in this Guarantee, and who makes a loan of securities to the BORROWER and whose interest in the Loan Instrument is an equitable interest under a contract or promissory note.
- (c) The "BORROWER" means the one stated as BORROWER on the Loan instrument, whether single or multiple individuals, partnership, corporation or other legal entity.
- (d) The "Loan Instrument" means any written evidence of obligation, including a promissory note, loan agreement, Asset Holder Agreement, or other debt instrument, obtained from the BORROWER by the LENDER which bears a genuine signature of the BORROWER and all other parties to the instrument, is complete on its face, and is valid and enforceable against the BORROWER.
- (e) A "Loss" means the aggregate amount of an unpaid principal and lease fees not to exceed \$260,000 (two hundred and sixty thousand dollars) on the loan instrument plus interest payments, evidencing an Eligible Loan which is in default notwithstanding anything to the contrary herein, loss shall exclude penalties of any nature and expenses of collection, and shall be reduced by any payments made by the GUARANTOR. The aggregate of all losses under the Guarantee shall in no event exceed the Limit of Liability stated in the Guarantee.



(f) A "Loan" means an advance of funds or securities evidenced by a loan instrument, the proceeds of which have been or are to be used solely for the project as declared to the LENDER and the GUARANTOR as set forth above.

(g) The "Eligible Loan" means the total amount due inclusive of finance charges, if any. The loan shall be evidenced by a written instrument which bears a genuine signature of the BORROWER as well as all other parties. The Loan shall comply with all Federal, State, Province, and local rules, statutes and ordinances.

(h) An "Extension" means the permission granted to the LENDER to allow a payment to be deferred. These deferred payments must be paid before a loan is satisfied.

(i) The "Limit of Liability" means: the principal amount of two hundred and twenty five thousand dollars (\$250,000), plus interest payments, the aggregate amount as stated shall be the GUARANTOR's maximum liability under this Guarantee.

(j) The "Application" means any statement and/or presentation, either orally or in writing, made by the BORROWER, LENDER or their agents, servants or employees, in order to induce the GUARANTOR to issue this Guarantee.

(k) The "Payment" means a deposit by the BORROWER with the LENDER of funds or the return of securities which represents the full or partial payment on the Loan Instrument evidencing an eligible loan.

(l) The "Date of Default" means the earliest date upon which an installment payment was due which was not paid by the BORROWER according to the terms of the Loan Instrument.

(m) The "Guarantee Period" means from August 28, 2002 to August 28, 2003, and renewable annually thereafter for a period not to exceed ten years. In no event shall this Guarantee be called or loss claimed earlier than September 28, 2002.

## **2. CONDITIONS PRECEDENT TO RECOVERY**

Each of the following is a condition precedent to the obligation of the GUARANTOR to indemnify against a loss hereunder, and each condition must occur prior to any liability or obligation of the GUARANTOR to cover such loss.

(a) Prior to making a loan of the securities, the LENDER shall obtain financial information and representations from the BORROWER. The Lender will do such due diligence as it, in its sole discretion, deems necessary, which information will be made available to the Guarantor at the Guarantor's request. The Lender will consider such credit factors as a prudent person but one who does not routinely enter such transactions.

(b) If, after the loan is made the LENDER discovers any material misstatements in the information given by the BORROWER, or misuse of the proceeds of the loan by the BORROWER, the LENDER shall promptly report such discovery to the GUARANTOR.

(c) All payments received on account of the Loan Instrument, must be applied to the principal and interest payment due in their order, in the absence of specific written instructions from the GUARANTOR to do otherwise.

(d) The LENDER shall give written notice of default within thirty (30) days after the event and submit a claim, if the default is not rectified by the sixtieth (60th) day of default.

**3. EXCLUSIONS**

This Guarantee shall not indemnify the LENDER for any reasons other than for the default of the BORROWER, including but not limited to any loss:

(a) Resulting from the successful assertion of a defense against the LENDER releasing the BORROWER from the obligation to pay the Eligible Loan, or any judicial order, government statute, rule or regulation which otherwise extends, modifies or releases the BORROWER from obligation.

(b) Resulting directly or indirectly from any dishonest, fraudulent or criminal act of any officer or employee of the LENDER its successor, assigns or predecessors in interest, or any other person or business entity acting alone or in collusion with the BORROWER who is a party to the obligation covered by the GUARANTOR hereunder.

(c) Resulting from forgery.

(d) Resulting from any failure to comply with Federal, State, Province and local rules, statutes and regulations.

**4. CANCELLATION OF THE GUARANTEE**

Cancellation by the LENDER: This Guarantee may be canceled by the LENDER by returning it to the GUARANTOR or by mailing to the GUARANTOR a written notice of cancellation stating when, thereafter such cancellation shall be effective. Such cancellation shall not alter or affect the GUARANTOR's obligation with respect to any Claims Notice which was received by it prior to the cancellation effective date.

**5. NOTICE OF DEFAULT**

The LENDER shall as soon as possible, and in no event later than thirty (30) days after the event, notify the GUARANTOR in writing that payments or interest under the Loan Instrument are in default. The LENDER shall also send a Notice of Default to the BORROWER and provide a copy of such notice to the GUARANTOR. Monthly reports indicating the status of the Loan in default shall be given to the GUARANTOR thereafter until such Default is secured, an extension approved, or transfer of equity has been effected.

**6. SUBMISSION OF A CLAIM**

In the event that the Loan Instrument is in default for thirty (30) days and the BORROWER, after notice from the LENDER as required herein, has not made payment to rectify the default, by the sixtieth (60th) day of default, the LENDER shall, within ten (10) days thereafter, send a notice of claim to the GUARANTOR. Upon receipt of a Notice of Claim, the GUARANTOR shall take one of the following actions:

(a) Pay installments due thereon;

(b) Pay the aggregate amount, less all prior payments by the BORROWER.



**7. CONVEYANCE OF SECURITY OR COLLATERAL**

As an express condition to the settlement of any claim hereunder, the LENDER shall tender to the GUARANTOR an assignment of the lien, or collateral, within a reasonable period of time after settlement is made in accordance with the rights of subrogation herein (paragraph 10).

**8. AMOUNT OF LOSS**

(a) Within sixty (60) days of a submission of claim, and subject to the provisions of paragraphs 12 and 13, the GUARANTOR shall pay such claim by paying LENDER directly.

(b) In any event, the GUARANTOR may elect either to make installment payments in accordance with the Loan Instrument which is in default (in which case the GUARANTOR will, at the time of its first installment payment, make all payments in default) or unless other agreements are agreed to, or replacement instrument is provided for with the concurrence to the LENDER, or pay the LENDER the full amount of loss calculated in accordance with paragraph, 1 (e).

(c) In any event, there shall be no acceleration of the subject Loan Instrument or the Eligible Loan, if either is subject to acceleration by the terms hereof.

**9. WHERE NOTICE IS GIVEN**

All notices, pleadings, claims, tenders and reports and other data required to be given by the LENDER to the GUARANTOR shall be sent by courier service or registered mail (return receipt requested) and directed to the GUARANTOR in care of its Agent of Record as listed.

**10. SUBROGATION**

Upon payment of any claim under this Guarantee, the GUARANTOR shall be subrogated to the LENDER's rights under the terms of the Loan Instrument and against the BORROWER and any other party, business entity or organizations liable under the terms of the Defaulted LENDER's instrument and against any reserves or holdbacks in the LENDER's possession. The LENDER shall execute and deliver at the request of the GUARANTOR all instruments and papers and do whatever else is necessary to transfer, assign and secure such rights, the execution by the LENDER of a release or waiver of the right to collect the unpaid amount due on any Loan Instrument shall equally release the GUARANTOR from any further obligation under this Guarantee as to the Loan Instrument. In the event the Loan Instrument is paid in full, the GUARANTOR shall be subrogated to the rights of the LENDER under the security and/or collateral lien on said security and/or collateral to the extent of claim payments made directly by the GUARANTOR to the LENDER pursuant to this Guarantee.

**11. MISCELLANEOUS PROVISIONS**

(a) Transfer of Interest: Transfer of the BORROWER's obligations under the Loan Instrument and of the BORROWER's interest in any collateral securing such Loan Instrument shall not be permitted by the LENDER.

(b) Reports and Examinations of Records: The GUARANTOR may at any time call upon the LENDER for such reports as it may deem necessary and may inspect any accounts or records of the LENDER which are applicable to the Loan Instrument. Such examinations shall be made during the normal business hours of the LENDER.

(c) Conformity of Statutes: The terms and conditions of the Guarantee, if any, that are in conflict with the statutes or laws of the jurisdiction where the Guarantee is performed are hereby amended to conform with the minimum requirements of the State of Utah and Federal statutes of law.

(d) All instruments evidencing or securing or otherwise relating to the Loan must be satisfactory to the GUARANTOR.

(e) Failure by the BORROWER or the LENDER to satisfy any conditions as set forth above or elsewhere within this Guarantee, shall relieve the GUARANTOR of any obligations to perform under this instrument, but in such event, all premiums paid shall be regarded as earned and shall be retained by GUARANTOR.

(f) GUARANTOR shall be liable to LENDER in accordance with this Guarantee, and LENDER shall not be required to first exhaust its remedies against BORROWER.

(g) Applicability: The terms and conditions of this Guarantee are to the benefit of and be binding upon the GUARANTOR and the LENDER, their successors and assigns.

(h) Assignment of This Agreement: In order to assign the Guarantee the LENDER shall complete a Certificate of Assignment and the GUARANTOR shall consent to assignment in writing by a duly authorized officer of the GUARANTOR. Consent of assignment shall not be unreasonably withheld by the GUARANTOR; however, the LENDER may not assign the Guarantee without the prior written consent of the GUARANTOR and this Guarantee shall be deemed null and void if assigned or transferred without the written consent of the GUARANTOR, whether such transfer be voluntary or involuntary.

(i) Waiver Provision: No Waiver of any condition or covenant of this Guarantee shall be effective unless in writing and signed by the party against whom said waiver is asserted and no failure to exercise and any right or remedy by either the LENDER or the GUARANTOR shall be considered to imply or constitute a further waiver by such party by name or any other condition, covenant, right remedy, except as provided herein.

(j) Amendments: Notice to any agent or knowledge possessed by any agency or by any other person shall not effect a waiver or change any part of this Guarantee or stop the GUARANTOR or the LENDER from asserting any right under the terms of the Guarantee. The terms of this Guarantee may be waived, amended, or changed only after written approval of the GUARANTOR by its President, or authorized representative, agent and/or assigns.

(k) Conflict: It is understood and agreed that in the event of a conflict between provisions of this form and any expression of intent to cover or any other paper, the provisions of this form shall apply.

12.

#### EXPENSES, COMMISSIONS, ETC

BORROWER shall be solely and exclusively responsible for, and shall promptly pay, all fees, costs and expenses due any agent, broker, attorney, forwarders, finders, or any other party entitled to receive funds or which may be payable as a result of BORROWER entering into this Guarantee Agreement.



**13. CONSIDERATION TO GUARANTOR**

BORROWER shall pay to GUARANTOR the sum of three thousand nine hundred dollars (\$3,900) upon the execution of this FINANCIAL GUARANTEE BOND and shall be fully earned and shall be non refundable for any reason including cancellation. Further, as a condition to GUARANTOR's continuing obligation hereunder, BORROWER shall pay to GUARANTOR an additional one and one half percent (1½ %) each year for a period not to exceed a total of ten (10) years of the unpaid principal balance, or only so long as this Guarantee is required by the LENDER on or before the fifteenth day prior to the anniversary of the effective date of this Guarantee. This Guarantee is null and void ab initio in the event of non payment of any amount due, when due.

**14. BORROWER'S WARRANTY AS TO AUTHORIZATION TO ACT**

If BORROWER is a corporation, trust or partnership, association or other legal entity, the individual or individuals signing the Guarantee Agreement on BORROWER's behalf hereby expressly warrant: (a) that each such person has the full and complete authority, pursuant to appropriate resolution, or other direction in writing of BORROWER's Board of Directors, Trustees, General Manager or Managing Board of Directors who have been fully informed, concerning this transaction, understand and have approved the provisions of this Guarantee; and (b) that BORROWER is both in fact and in law, effectively bounded by the provisions of this Guarantee.

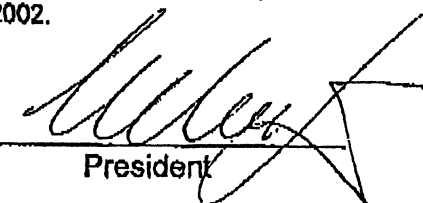
All notices required to be given herein and all correspondence must be sent certified mail, return receipt requested or by Federal Express to:

LENDER: Michael C. Posner, c/o The Manager, Caldwell Banker Residential Brokerage, 1750 Park Avenue, Park City, Utah, 84060

BORROWER: Christopher Strachan: c/o Stephanie Gyllenskog, Allpro, 144 West 100 South, Brigham City, Utah, 84302

GUARANTOR: Robert V. Murton, President, American Natural Resources Corporation, 10151 Thyme Circle, South Jordan, Utah. 84095.

IN WITNESS WHEREOF, THE GUARANTOR has duly executed this Guarantee and endorsement attached and has caused these presents to be signed by its duly authorized officer on this 3rd day of August 2002.

(Signed)   
President

## **ADDENDUM 3**



PREMIER REALTY

# **LISTING AGREEMENT & AGENCY DISCLOSURE** THIS IS A LEGALLY BINDING DOCUMENT. READ CAREFULLY BEFORE SIGNING.

THIS LISTING AGREEMENT is entered into by and between COLDWELL BANKER PREMIER REALTY (the "Company") and Michael Posner (the "Seller").

1. **TERM OF LISTING.** The Seller hereby grants to the Company, including Randee Christoffersen (the "Listing Agent") as the authorized agent for the Company, for the period of 6 months starting on the date of execution of this Listing Agreement, and ending at 5:00 P.M. on the 5 day of Dec, 2002, (the "Listing Period"), (the Exclusive Right to Sell) Lease, or Exchange certain real property owned by the Seller, described as: 350 Deer Valley Dr "Skidoo" Subdivision AEB (the "Property"). At the price and terms stated on the attached board/association property data information form, or at such other price and terms in which the Seller may agree in writing. The Listing Agent agrees to use reasonable efforts to find a buyer or tenant for the Property.

2. **BROKERAGE FEE.** If, during the Listing Period, the Company, the Listing Agent, the Seller, another real estate agent, or anyone else locates a party who is ready, willing and able to buy, lease, or exchange (collectively referred to as "acquire") the Property, or any part thereof, at the listing price and terms stated on the attached board/association property data information form, or any other price or terms to which the Seller may agree in writing, the Seller agrees to pay to the Company a brokerage fee in the amount of 6% (10%, 11%, 12%, 13%, 14%, 15%, 16%, 17%, 18%, 19%, 20%, 21%, 22%, 23%, 24%, 25%, 26%, 27%, 28%, 29%, 30%, 31%, 32%, 33%, 34%, 35%, 36%, 37%, 38%, 39%, 40%, 41%, 42%, 43%, 44%, 45%, 46%, 47%, 48%, 49%, 50%, 51%, 52%, 53%, 54%, 55%, 56%, 57%, 58%, 59%, 60%, 61%, 62%, 63%, 64%, 65%, 66%, 67%, 68%, 69%, 70%, 71%, 72%, 73%, 74%, 75%, 76%, 77%, 78%, 79%, 80%, 81%, 82%, 83%, 84%, 85%, 86%, 87%, 88%, 89%, 90%, 91%, 92%, 93%, 94%, 95%, 96%, 97%, 98%, 99%, 100%) of each acquisition price, plus an Administrative Compliance Fee in the amount of \$195. The brokerage fee and administrative compliance fee, unless otherwise agreed in writing by the Seller and the Company, shall be due and payable on the date of closing of the acquisition of the Property. If a ready, willing, and able buyer is located as provided in this section above, and the Seller refuses to contract or to close, the Seller shall be obligated to immediately pay to the Company the brokerage fee listed above. 50% referral to others

3. **EXTENSION PERIOD.** If within one hundred twenty (120) days after the termination or expiration of this Listing Agreement, the Property is acquired by any party to whom the Property was offered or shown by the Company, the Listing Agent, the Seller, or another real estate agent during the Listing Period, the Seller agrees to pay to the Company the brokerage fee stated in Section 2 unless the Seller is obligated to pay a brokerage fee on such acquisition to another brokerage pursuant to another valid listing agreement entered into after the expiration or termination date of this Listing Agreement.

4. **SELLER WARRANTIES/DISCLOSURES.** The Seller warrants to the Company that the individual(s) or entity listed above as "Seller" represents all of the record owners of the Property. The Seller further warrants that it has marketable title and an established right to sell, lease, or exchange the Property. The Seller agrees to execute the necessary documents of conveyance and to furnish the buyer at closing good and marketable title with a policy of title insurance in the amount of the purchase price. The Seller agrees to fully inform the Listing Agent regarding the Seller's knowledge of the condition of the Property. Upon signing of this Listing Agreement, the Seller agrees to personally complete and sign a Seller's Property Condition Disclosure form. The Seller agrees to indemnify and hold harmless the Listing Agent and the Company against any claims which may arise from: (i) the Seller's providing incorrect or inaccurate information regarding the Property; (ii) the Seller's failure to provide material information regarding the Property, including, but not limited to, the condition of all appliances, heating, plumbing, and electrical fixtures and equipment, sewer, moisture problems in the roof or foundation, the size of the Property, and the location of property lines; or (iii) any injuries resulting from any unsafe conditions within the Property.

5. **AGENCY RELATIONSHIPS.** The following is a very important explanation about agency relationships between the buyer, the seller, the Company, and the real estate agents affiliated with the Company.

5.1 **Principal or Branch Broker.** All real estate agents must affiliate with a real estate broker. The broker is called a Principal Broker or Branch Broker (if the brokerage has a branch office). The broker is responsible for operation of the brokerage and for the professional conduct of all agents affiliated with the broker.

5.2 **Representing Buyers and/or Sellers.** Through the broker, an agent may represent a seller, a buyer, or, with prior written consent, both buyer and seller in the same transaction. When representing a seller, the agent is a "Seller's Agent"; when representing a buyer, the agent is a "Buyer's Agent"; and when representing both buyer and seller in the same transaction, the agent is a "Limited Agent".

5.3 **Requirement of Written Agreement.** To represent a buyer, a seller, or both, a written agreement is required by state law. Except as provided below, the Principal or Branch Broker also represents whomever the agent represents, and regardless of whom the agent represents, the agent owes a duty of honesty and fair dealing to all parties.

5.4 **Seller's Agent.** A Seller's Agent assists the seller in locating a buyer and in negotiating a transaction suitable to that seller's specific needs. A Seller's Agent has fiduciary duties to the seller which include loyalty, full disclosure, confidentiality, diligence, obedience, reasonable care, and holding safe monies entrusted to the agent.

5.5 **Buyer's Agent.** A Buyer's Agent assists the buyer in locating and negotiating the acquisition of a property suitable to that buyer's specific needs. A Buyer's Agent has the same fiduciary duties to the buyer that the Seller's Agent has to the Seller.

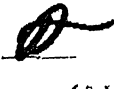
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5.6 Limited Agent. A Limited Agent represents both the buyer and seller in the same transaction and assists both parties in negotiating a mutually acceptable transaction. A Limited Agent has fiduciary duties to both parties, but those duties are "limited" because the agent cannot give both buyer and seller undivided loyalty, full confidentiality and full disclosure. For that reason, a Limited Agent must remain neutral when negotiating a transaction between buyer and seller.

5.7 Right to Designate an Agent. When choosing a brokerage, the seller or buyer may designate which agent or agents in that brokerage will represent them as their respective Seller's Agent or Buyer's Agent. By signing this Agreement, the Seller designates the following agent(s) to represent the Seller (check applicable box):

Seller's Initials 

☒ SELLER'S AGENT AND THE PRINCIPAL BRANCH BROKER; or  
☐ ALL AGENTS IN THE COMPANY AND THE PRINCIPAL BRANCH BROKER

5.8 In-House Sale. If the Company is representing both the buyer and seller in the same transaction (through one or more agents) it is referred to as an "In-House Sale". Most In-House Sales involve limited agency and there is the potential for conflict. For example, agents affiliated with the Company often discuss with each other the needs of their respective buyer or seller clients. Such discussions may inadvertently compromise confidential information provided to those agents by their respective clients. For that reason, the Company has policies designed to protect the confidentiality of discussions between agents and access to confidential client and transaction files.

5.9 Disclosure Obligation. The buyer and seller must be informed in writing if the proposed transaction is an In-House Sale. Although it is the business practice of the Company to participate in In-House Sales, neither the buyer nor the seller is required to do so. Due to the potential for conflict, if the buyer and seller agree to an In-House Sale they will each be asked to sign a Limited Agency Consent Agreement before starting negotiations.

5.10 Out of town or Unavailable. The Seller authorizes the Seller's Agent or the Principal/Branch Broker to appoint another agent in the Company to temporarily represent the Seller, if necessary, in the event the Seller's Agent or the Principal/Branch Broker will be unavailable to assist the Seller.

6. PROFESSIONAL ADVICE. The Company and the Listing Agent are trained in the marketing of real estate. Neither the Company nor any agents affiliated with the Company are trained to provide the Seller or any prospective buyer with legal or tax advice, or with technical advice regarding the physical condition of the Property. If the Seller desires advice regarding: (i) legal or tax matters; (ii) the physical condition of the Property; (iii) this Listing Agreement; or (iv) any transaction arising out of this Listing Agreement, the Listing Agent and the Company STRONGLY RECOMMEND THAT THE SELLER OBTAIN SUCH INDEPENDENT PROFESSIONAL ADVICE.

7. DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Listing Agreement shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Any agreement signed by the parties pursuant to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this Listing Agreement shall apply.

B. ATTORNEY FEES. Except as provided in section 7, in case of the employment of an attorney in any matter arising out of this Listing Agreement (including a sale of the Property) the prevailing party shall be entitled to receive from the other party all costs and reasonable attorney fees, whether the matter is resolved through court action or otherwise. If, through no fault of the Company, any litigation arises out of the Seller's employment of the Company under this Listing Agreement, the Seller agrees to indemnify the Company from all costs and attorney fees incurred by the Company in pursuing and/or defending such action.

9. INFORMATION RELEASE. The Company is authorized to obtain financial information from any mortgagee or other party holding a lien or interest on the Property.

10. MULTIPLE LISTING SERVICE & INTERNET. The Company is authorized and instructed to offer this Property through the Multiple Listing Service of the \_\_\_\_\_ Board/Association of REALTORS. The Seller also authorizes the Property to be advertised via the Internet by the Company, and by other brokerages and web sites authorized by the Company. The Company is further authorized to disclose after closing the final sales price of the Property.

11. KEYBOX. The Company ☐ IS ☐ IS NOT authorized and instructed to have a keybox installed on the Property. The Company ☐ IS ☐ IS NOT authorized to have a key to the Property. The Company ☐ IS ☐ IS NOT authorized to hold "Open Houses" at the Property. The Seller acknowledges that the Company has discussed with the Seller the safeguarding of personal property and valuables located within the Property. The Seller further acknowledges that the Company is not an insurer against the loss of or damage to personal property; and the Seller accepts full responsibility for any loss or damage that might result from the use of the key or the keybox from any source whatsoever and agrees to hold the Company and the Listing Agent harmless from any and all liability as a result of having the key to the Property, and having the keybox installed on the Property. If a tenant occupies the Property on other than a "nightly rental basis", the tenant agrees to the installation of a keybox and joins in the waiver and release of the Listing Agent and the Company as provided above.

(Tenant Signature)

(Date)

 Sellers Initials

Date \_\_\_\_\_

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12. **SIGNAGE.** The Company is authorized to place an appropriate sign on the Property.

13. **ATTACHMENT.** The provisions of the attached board/association property data information form are incorporated by reference. In order to complete the property data information form the Listing Agent will provide the Seller with a copy of the estimate of the square footage of the Property. As an estimate the square footage figure shall not be relied upon by the Seller in their decision to purchase/sell the Property.

14. **EARNEST MONEY DEPOSITS.** As part of an offer to purchase the Property, a potential buyer will typically deliver an Earnest Money Deposit to the brokerage that assists the buyer in preparing that offer. The Company is hereby authorized and directed to accept on behalf of the Seller, and to hold in its trust account, any Earnest Money Deposit delivered to The Company by a potential buyer. Regardless of whether the Company or another brokerage holds the Earnest Money Deposit, if the buyer defaults a buyer's all or any portion of the Earnest Money Deposit, the Company shall, upon such default or forfeiture, be entitled to receive (1) 21 of the defaulted or forfeited sum up to the total brokerage fee referenced in Section 2 above. The balance, if any, shall be returned to the Seller.

15. **PRELIMINARY TITLE REPORT.** In order to, (i) identify potential title concerns, and (ii) avoid possible delinquency in marketing the Property, the Company recommends that the Seller, upon signing this Listing Agreement, authorize the Company to order a Preliminary Title Report ("PR") on the Property. The Seller, [ ] AUTHORIZES the Company to immediately order a PR through a title insurance provider. [ ] DOES NOT AUTHORIZE the Company to immediately order a PR and [ ] ENCLOSURE CHECK for the cost of the same [ ] AUTHORIZES THE PR FEE to be credited toward the title insurance costs charge closing (a bill for the PR will be issued if the order is cancelled).

16. **EQUAL HOUSING OPPORTUNITY.** The Property will be presented in compliance with Federal, State and local anti-discrimination laws.

17. **ASSIGNMENT.** The Company and Seller agree that this Listing Agreement is not a personal service contract, and shall be freely assigned and transferred by the Company to its successors and assigns.

18. **FACSIMILE (FAX) DOCUMENT.** Facsimile transmission of a signed copy of this Listing Agreement and transmission of any signed facsimile transmission, shall be the same as delivery of an original. If this transaction involves multiple Sellers facsimile transmissions may be executed in counterparts.

19. **ENTIRE AGREEMENT.** This Listing Agreement may not be changed, modified or altered, except by prior written consent of the parties hereto.

THE UNDERSIGNED SELLER does hereby agree to the terms of this Listing Agreement.

Seller(s)

★ Michael Posner

Seller's Signature

Address/Phone

★ 4/5/02

Date

Seller's Signature

Address/Phone

Date

Seller's Signature

Address/Phone

Date

THIS LISTING AGREEMENT shall become effective only upon acceptance by Coldwell Banker Premier Realty as evidenced by signatures below.

ACCEPTED by Coldwell Banker Premier Realty

By Linda C. [Signature] Date

By [Signature] Managing Broker

4/11/02 Date

★ [Signature]

Seller's Initials

Date