

2009

Marlene Stone v. Richard Flint, Judy Flint : Brief of Appellant

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

MARLENE STONE,

Plaintiff/Appellee,

vs.

RICHARD FLINT and JUDY FLINT,

Defendants/Appellants.

Case No. 080907234

Trial Court No. 20090564

BRIEF OF APPELLANTS

On Appeal from the Second District Court in and for the County of Weber, State of Utah,
Honorable Michael D. Lyon.

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RE: MARLENE STONE, Plaintiff/Appellee, vs. RICHARD FLINT and JUDY FLINT,
Defendants/Appellants, Case No. 080907234, Trial Court No.: 20090564 - **CA**

Dear Ms. Collins,

Rule 24(j) of the Utah Rules of Appellate Procedure Appellant provides that “after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter” when pertinent and significant authorities come to the attention of the party. Utah Rules of Appellate Procedure, Rule 24(j) (2010). This matter was heard on May 27, 2010 and no decision has been issued.

During oral argument the Honorable Judge Gregory K. Orme inquired whether Appellants’ third argument (concerning whether the trial court misstated or omitted salient facts in its judgment) was waived for failure to object to the trial court’s findings of fact prior to appeal. The parties did not address the issue in their briefs. After the hearing Appellant reviewed Rule 52 of the Utah Rules of Civil Procedure and the applicable case law on the question and provides this supplemental authority to the question raised.

Rule 52 provides that “the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings . . .” Utah Rules of Civil Procedure Utah, Rule 52 (2010). In 2009 the Utah Supreme Court addressed the difference between a challenge to the adequacy of the court’s findings (i.e. the level of detail) versus a challenge to the sufficiency of the evidence when it stated:

A challenge to the adequacy of the court's findings is notably different from a challenge to the sufficiency of evidence. “It is one thing for a party to say that the judge's findings are erroneous because they are contrary to or unsupported by the evidence, and quite another to say that the findings are

that a party challenge the evidentiary support for a court's findings shortly after the court articulates them. But it is quite a different matter and wholly necessary for a party to challenge and thus afford the trial court "an opportunity to correct the alleged error" of inadequately detailed findings in order to provide for meaningful appellate review of the court's decision . . .

State ex rel. K.F., 201 P.3d 985, ¶ 61 (Utah 2009)(quoting from 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 54, 99 P.3d 801).

In the current case Appellants' third issue concerns whether the trial court's Findings of Fact supported its conclusion and omitted or misstated salient facts which were critical to its ruling. The Appellants' challenge was not to the adequacy or detail of the trial court's findings, but the sufficiency of the evidence. The Court found that only three lounging/loafing sheds, and some mobile gates and panels were on Stone's property and in dispute in the suit. However, the testimony at trial showed a different picture. In addition to the three sheds, mobile gates and mobile panels in dispute, at the time of the closing on the real estate two feeders, a number of waterers, and the horse walker were physically located on Stone's property. The Flints subsequently took possession of the two acres, as well as the all the feeders, waterers and horse walker, all located on Stone's property. Stone raised no objection to this, but objected only to the Flints taking the gates, panels, and three lounging/loafing sheds on Stone's property. The trial court made detailed findings and chose to omit the presence of feeders and waters on Stone's property at the time of closing, that the Flints took possession of this personalty, and that Stone did not to dispute Flint's ownership of the same. In addition, the trial court also misstated the timing of when the horse walker was first discussed between the parties, which was months after Flints purchased the property, and instead found that the parties had discussed the horse walker at the time of closing—which timing is critical in determining whether the REPC and Bill of Sale are ambiguous.

Appellants urge the panel to consider the above named authority when determining whether Appellants third issue concerns the sufficiency of the evidence, and find that the Appellants have not challenged the adequacy or level of detail of the trial court's findings.

Respectfully Submitted,



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Mailing Certificate

I hereby certify that I mailed a copy of the foregoing document by U.S. mail,
postage prepaid, this 3rd day of June, 2010, to the following:

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A handwritten signature in dark ink, appearing to read 'David B. Stevenson', written over a horizontal line.

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BEFORE THE UTAH COURT OF APPEALS

MARLENE STONE,

Plaintiff/Appellee,

vs.

RICHARD FLINT and JUDY FLINT,

Defendants/Appellants.

Case No. 080907234

Trial Court No.: 20090564

Jurisdictional Statement

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. § 78A-3-102(3)(j) (2008).

Statement Of The Issues

1. Did the trial court err in determining that the Real Estate Purchase Contract between Appellants and Appellee was facially unambiguous and thereby excluding parol evidence from the case notwithstanding the fact that the Contract and Bill of Sale expressly included personal property outside the surveyed boundary of the real property?

Determinative law for issue No.1: *Flores v. Earnshaw*, 2009 UT App 90; *Café Rio v. Larkin-Gifford-Overton*, 2009 UT 27, 207 P.3d 1235; *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269.

Standard of Review for Issue No. 1: A reviewing court “review[s] a district court’s interpretation of a written contract for correctness, granting no deference to the court below.” *Café Rio* ¶ 21.

Issue preserved in the record: The issue was preserved in the record at Transcript Volume 1, pp. 195-197; 205-229.

2. Did the trial court err in excluding witnesses under Utah R. of Evid. 401 when their testimony was that Appellee attempted to sell them the same personal property and real property that Appellee sold to the Appellants?

Determinative law for issue No.2: *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269.

Standard of Review for Issue No. 2: A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Daines* ¶ 21. A trial court's ruling on evidence will be reversed if it was beyond the limits of reasonability. *Id.*

Issue preserved in the record: The issue was preserved in the record in Transcript Volume I, pp. 131-141.

3. Did the trial court err in its finding that certain farm equipment was not located on Appellee's property at the time of the sale?

Determinative law for issue No.3: *Western Capital and Securities, Inc. v.*

Knudsvig, 768 P.2d 989 (Utah App. 1989); *Maughan v. Maughan*, 770 P.2d 156 (Utah App. 1989); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989).

Standard of Review for Issue No. 3: A trial court's findings of fact will be reversed if clearly erroneous. *Gilmour v. Cummings*, 904 P.2d 703, 706 (Utah App. 1995).

Issue preserved in the record: The issue was preserved in the record at R. Trans. Vol. 1, pp. 38-39, 60-63, 66-71, 88, 90, 145-149.

Statement Of The Case

Nature of the Case:

The case heard by the trial court is a breach of contract and/or conversion claim between the vendor and vendee of real property and farm-related personalty located in Hooper, Utah. At issue is whether the Appellants/Defendants/Counterclaimants (hereinafter “Flints”) purchased all personal property of the Appellee/Plaintiff/Counterdefendant (hereinafter “Stone”) that constituted farm equipment on her entire seventeen acre parcel, or merely the personal property located on the two-acre parcel. Ultimately, the trial court found that it had to construe the language of the parties’ Real Estate Purchase Contract, with its associated Addenda, and a Bill of Sale.

Course of Proceedings:

This case was filed on 13 November 2008 in the Second Judicial District for Weber County. Plaintiff Stone initially filed an eviction action against the Defendant Flints alleging that Defendants committed waste on fifteen acres that Defendant Flints leased from Plaintiff Stone. Defendants filed an answer and counterclaim on 20 November 2008 alleging causes of action for trespass, breach of contract, and conversion, and breach of the covenant of quiet enjoyment. On 2 February 2009 the parties reached a Settlement Agreement in which Stone agreed to drop her claims against the Flints, and the Flints agreed to drop all claims except for their claim for breach of contract and conversion against Stone. In addition, the parties agreed to the terms and conditions of a Joint Motion for Stipulated Temporary Injunction (R. at Exh. 7, ¶8 of Confidential

General Release and Settlement Agreement; Add. C). On 3 March 2009 the parties filed a joint Motion for Stipulated Temporary Injunction enjoining Plaintiff Stone from trespassing on Flints' property, enjoining Stone from direct contact with the Flints or from parking or driving on their property, and enjoining Stone from any stalking behavior. On 15 April 2009 at trial the parties stipulated to dismiss all actions except the issues of the ownership of numerous fence panels and gates, and three lounging/loafing sheds on Stone's real property.

Disposition by Trial Court:

All of the claims were resolved in the above-entitled action as a result of the final judgment of the trial court dismissing the Flints' Counterclaim on 1 June 2009. This appeal is taken from the court's Memorandum of Decision dated 24 April 2009, and it's Orders Dismissing the Flints' Counterclaim and making Findings of Fact and Conclusions of Law, both dated 1 June 2009. (R. at 0069-79; 0087-88; 0089-96.)

Statement of Facts

1. Stone owned real property known as 6006 S. 7100 W. in Hooper, Utah, consisting of approximately seventeen acres. (R. at 0089.)
2. Stone listed the property for sale on the multiple listing services, giving prospective buyers three options: 1) purchase all seventeen acres, 2) purchase two acres, or 3) purchase one acre. (R. at 0089-90.)
3. The Flints were interested in the property. They and their realtor Joe Adair met with Plaintiff on 1 February 2008. (R. at 0090.)

4. During this initial meeting, Stone explained that her husband had recently passed away, that she wanted to be relieved of the burden of managing the property by herself, and that she was interested in selling, preferably, all of her seventeen acres, including the structures on the property, but was willing to sell it in smaller parcels. Because the Flints could not afford all seventeen acres, the Flints indicated their interest in two acres. Mr. Flint inquired, “Does all of this stuff stay with the property?” Stone replied affirmatively. When Flint asked his question, he was looking out of Stone’s bedroom window, facing to the east of Stone’s property, overlooking the hay barn, horse, barn, and various items of personal property. The structures included mobile fencing, called panels; mobile gates; movable open sheds for animals, called loafing sheds; waterers and feeders for livestock, and a horse walker. (R. at 0090; Vol. 1, pp. 145-149; 185-186.)
5. The Flints expressed to Stone that they wished to purchase two acres, including the home and the two barns. (R. at 0090.)
6. Stone explained that if the Flints bought only the two acres, she would retain a sixty-six-foot-wide strip lying on the northern part of the property and extending eastward, because she needed access to her remaining fifteen (15) acres in the back. Without this access, Stone would have been unable to access her property. (R. at 0090.)
7. Stone also explained that a survey of the two acres would be necessary in order to create separate legal descriptions for the two acres and the remaining fifteen

acres. At that time, the boundaries of the proposed two acres were undetermined. (R. at 0090-91.)

8. After the parties discussed the Flints' interest in only two acres and Stone said that the two-acre lot being sold them included "all the loafing sheds, all the gates, all the panels, all the waters, all the feeders, the horse barn and the hay shed", no further discussion took place regarding any structures, including the horse walker until after the sale. (R. at 0091; Vol. 1, pp. 145-149; 185-186.)
9. Based on earlier discussions, the Flints believed that they were buying all the personal property on the entire seventeen acres as part of the purchase. (R. at 0091.)
10. On 1 February 2008, the Flints' real estate agent, Joe Adair, prepared and presented a real estate purchase contract ("REPC") to Stone. The first addendum to the REPC provided that Stone would have the property surveyed and the four corners staked to the satisfaction of the Flints. The addendum also listed the structures included in the sale as "all lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist." (R. at 0031; 0091; Exhibit or Exh. 1; Addendum or Add. A.)
11. As agreed, Stone had the property surveyed and the four corners staked just prior to closing, which occurred on 16 April 2008. (R. at 0092.)
12. At the time of closing, two feeders, waterers, the horse walker, four sixteen-foot and eleven ten-foot panels, four mobile gates, and three lounging/loafing sheds were physically located on Stone's remaining fifteen acre parcel. Two

feeders, three lounging/loafing sheds and a much smaller number of panels and gates were physically located on the Flints' property, plus 12 square panels (R. at Vol. 1, pp. 38-39, 60-63, 66-71, 88, 90, 145-149.)

13. The Flints subsequently took possession of the two acres, as well as feeders, waterers, and the horse walker, all located on Stone's property. (R. at Vol. 1, pp. 148-49, 66-68; Add. C.)
14. The horse walker was a large structure with a cement slab and was located on Appellee Stone's property after the Flints' two-acre lot was surveyed. Stone and the Flints expressly agreed to such, stating that the horse walker "is located on the STONE'S real property but which is the property of Flint pursuant to a 16 April 2008 Real Estate Purchase Contract and accompanying Bill of Sale of the same date." (R. Add. 3; Exh. 7, ¶9 of Confidential General Release and Settlement Agreement; R. at 0032; Vol. 1, p. 125)
15. Contemporaneous with the closing, Stone leased the remaining fifteen acres to the Flints. The lease has since been terminated by mutual agreement. (R. at 0093.)
16. Flints assumed the original address 6006 S. 7100 W. in Hooper, Utah upon the purchase (i.e at closing) of Stone's home and two acres. At an unknown date following the sale of Stone's home and lot, Stone received a new address for her remaining 15 acres, known as 5990 S. 7100 W., in Hooper, Utah. (R. at 0092-93.)

17. Contemporaneously with the closing of the real property, the title company prepared a bill of sale that Plaintiff signed and Defendants accepted in the closing. The bill of sale transferred title to “that certain personal real property now at 6006 S. 7100 W., Hooper, Utah.” (R. at 0032; see Exh. 2 and Add. 2.) The bill of sale then enumerated the personal property specified in the first addendum to the REPC “as presently exist.” Exh. 2; Add. 2; (R. at 0031-32.)
18. The Flints proffered the testimony of Jeffrey Dean Harris and his wife Vickie Harris, who were potential buyers of the same two-acre parcel that Ms. Stone sold the Flints. (R. at Vol. 1, pp. 132-141.) The Harris couple found Stone’s two-acre lot on the multiple listing service and viewed the property with their realtor. At trial, when Jeffrey Harris was asked by Flints’ counsel what personal property (i.e. farm equipment) Ms. Stone stated was included with the purchase of the two-acre parcel, Stone’s counsel objected on numerous grounds. *Id.* The trial Court excluded the testimony of Jeffrey Dean Harris and his wife Vickie Harris for lack of relevancy. The court stated, “I just don’t think it’s relevant.” (R. at Vol. 1, p. 141.) The court stated, speaking of Ms. Stone, “If she said something that she’s now denying in this trial, and Mr. Flint is contending that it occurred, and she told him, then it would be very relevant, because it would be an admission against interest the fact that she makes a different offer to a different person on a different day can’t be controlling in this case.” *Id.*

19. After the sale a dispute arose concerning the lease. At that time Ms. Stone for the first time told Mr. Flint that he had to remove the horse walker to his property and informed him that she disputed the Flints' ownership of three of the loafing sheds and the mobile panels and gates located on her property. She did not raise a dispute over feeders, waterers and the horse walker that were on her property. Further, this was the first discussion between the parties concerning the horse walker. (R. at Vol. 1, pp. 66-69, 186-187; see also Vol. 1, pp. 38-39, 60-63, 66-71, 88, 90, 145-149.)

Summary of Argument

The trial court conducted a full trial on Flints' (Defendants'/Appellants') counterclaims for breach of contract and conversion concerning whether the three loafing sheds and numerous mobile panels and gates were their property pursuant to the parties' agreement. The court reviewed the Real Estate Purchase Contract (REPC) between the parties and determined that, according to the four corners rule, the document was unambiguous. The Flints appealed. Three issues arise from the trial court's decision below. The first issue concerns whether the Real Estate Purchase Contract is unambiguous; the second issue concerns whether the court wrongfully excluded witnesses; the third issue concerns misstatements of fact in the trial court's Findings of Fact.

The trial court erred in finding that the REPC was unambiguous because the REPC is capable of more than one reasonable interpretation. At issue is whether the term "all",

used in the REPC and Bill of Sale in conjunction with a list of farm-related personalty, referred to ‘all’ Stone’s farm-related personal property on her adjoining acreage, the personalty located on the two-acre lot sold to the Flints, or some combination of the two. The court found the language unambiguous even though the REPC and Bill of Sale specifically called out items which were not on the two-acre lot sold to the Flints and were not separately discussed or negotiated for by the parties. Notably, the Bill of Sale language selling “that certain personal property now at 6006 S. 7100 W., Hooper, UT” expressly included a horse walker that was not physically located at the new address. In addition, waters and feeders that were on Stone’s property at the time of closing were possessed by the Flints. This extrinsic evidence also informs the court of the ambiguity existing in the REPC and Bill of Sale, and opening the door to use parol evidence to determine the parties’ intent in the sale.

The trial court also erred when it excluded the testimony of two witnesses for the Flints that were going to testify that they met with Ms. Stone and were interested in buying the same two-acre property as the Flints. Their testimony of what personal property (i.e., farm-related equipment) Ms. Stone stated was included in the sale was excluded because the court found it irrelevant. The trial court reasoned that the discussion was not the same transaction and therefore irrelevant.

Finally, the court’s Findings of Fact omitted certain salient facts critical to the court’s decision. Specifically, the court omitted the fact that at the time the parties closed on the real estate purchase, two feeders, several waterers, a horse walker, four sixteen-foot and eleven ten-foot panels, four mobile gates, and three lounging/loafing sheds were

physically located on Stone's adjoining parcel. The Flints gave testimony that they took possession of the feeders, waterers and the horse walker following the sale. While the court acknowledged in the Findings of Fact that the three lounging/loafing sheds, horse walker and the mobile gates and panels were on Appellee Stone's property at the time of sale, the court failed to acknowledge that feeders and waterers were located on Stone's property as well, and that the Flints took possession of these items after the sale. Further, the court misstated the evidence concerning whether the parties negotiated over the horse walker and looked to (and misstated) parol evidence taken at trial to reach its decision, notwithstanding its alleged reliance on the four-corners rule.

Argument

A. THE TRIAL COURT ERRED IN FINDING THAT THE REAL ESTATE PURCHASE CONTRACT WAS UNAMBIGUOUS.

The trial court erred in its finding that the Real Estate Purchase Contract ("REPC") and its accompanying addenda were not facially ambiguous, because the language contained therein was subject to more than one reasonable interpretation.

A contractual term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Daines v. Vincent*, 2008 UT 51, ¶ 25 (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 20) (internal quotations omitted). Although the language of the contract itself is to be the primary source in making a determination of ambiguity, other evidence—if available—should be considered to determine whether

ambiguity exists. *Daines* at ¶ 26. After examining the four corners of the document and any relevant evidence, if the court finds that the provisions in question are capable of more than one reasonable interpretation, parol evidence should be admitted to determine the parties' intentions. *Flores v. Earnshaw*, 2009 UT App 90, ¶ 9 (Utah 1995).

In this case, the trial court held that an Agreement consisting of a Real Estate Purchase Contract and various addenda was facially unambiguous. However, the provisions at issue in the trial court are capable of more than one reasonable interpretation, and thus are ambiguous.

The trial court rested its determination that the contract was facially unambiguous on two grounds. First, that Clause 1.1 of the REPC unambiguously asserted that the property at issue was not included in the transaction, and second, that the bill of sale later signed by the parties did the same.

1. The REPC is Facially Ambiguous With Respect to Clause 1.1 and Addendum No. One.

The REPC's Clause 1.1 and Addendum No. One create a facially ambiguous contract provision when viewed together, because the provision is subject to more than one reasonable interpretation. The trial court's determination that the contract at issue was facially unambiguous rested in large part on its analysis of Clause 1.1 of the REPC, which it found was "identical" to a contractual provision interpreted in a case recently decided by this court, *Flores v. Earnshaw*. Findings of Fact and Conclusions of Law, ¶ 4.

Flores dealt with the sale of a not-yet-built condominium by use of a standard form Real Estate Purchase Contract similar to the one used in this case. 2009 UT App 90,

¶¶ 1–4. At issue was whether the parties had bargained for a fully built condominium unit, or merely a “shell,” i.e., a unit not containing all necessary fixtures and infrastructure to make the building inhabitable and complete. *Id.* at ¶¶ 5–6. Plaintiff’s argument was essentially that because the condominium unit did not yet exist, Clause 1.1—which specified that certain items were included “if presently owned and attached to the property”—was an ambiguous provision. *Id.* However, both parties were in agreement that the word “presently” referred to the date of the REPC’s execution, and furthermore that “none of the items listed in Clause 1.1 were ‘owned and attached to the property’ at the time the REPC was executed because the building was not yet constructed.” *Flores* ¶ 14. On this basis, the *Flores* court found no ambiguity. *Id.*

The trial court’s error here is the faulty analogy to *Flores*. The contractual language at issue in the two cases is not the same. *Flores* interpreted only the standard boilerplate of the REPC contract, and did not address the addition of additional terms by an addendum. In other words, the ambiguity of the boilerplate provision of Clause 1.1 is not the issue here; it is whether that provision even properly controls or modifies the language in Addendum One. Also, the transaction in *Flores* did not involve the transfer of personal property not located on the real property, as in this case. Furthermore, all the property at issue in this case actually existed at the time of sale, thus Clause 1.1 has significantly different implications here.

The standard boilerplate language of Clause 1.1 of the REPC reads as follows:

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and 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.

This was the portion of Clause 1.1 at issue in *Flores*, which was found to be unambiguous in terms of what is included in the sale. However, this language is not Clause 1.1 in its entirety. Clause 1.1 also contains the following sentence immediately after the language quoted above: “*The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title:*” (emphasis added). This “also” provision of Clause 1.1 is followed by blank lines, on which, in the instant case—other items included in the sale are listed in handwriting. Here, the oven/range, refrigerator, and “window coverings as presently exist” are the items listed on those blank lines.

The items named in the boilerplate portion of Clause 1.1 all are linked by a common thread; they are all items physically attached and are thus considered “part of” that building, i.e., “fixtures.” As such, these fixtures are included in the sale, if present. However, it is the prerogative of the parties involved as to whether other, nonpermanent items, such as large household appliances should be included in the transaction. These items, while perhaps difficult to move, are not part of the building in the way that fixtures are.

Therefore, the “also included” portion of Clause 1.1 is significant in that it contemplates items not “presently owned and attached to the Property” in the way that fixtures necessarily must be. In other words, such items “also included” are not subject to

being presently owned and attached to the property, but are included in the transaction by virtue of a provision separate from the first part of Clause 1.1. Clearly then, personal property located away from the real property can be included, such as the seller's personal property located on adjoining real property, or in a storage facility offsite.

This "also included" clause is especially significant with respect to Addendum One of the REPC, as it highlights the inconsistencies in the trial court's ruling. Addendum One is incorporated into the agreement by Clause 9 of the REPC, and contains the following language, in pertinent part:

This is an addendum to [the REPC], including all prior addenda and counteroffers between Richard & Judy Flint as Buyer, and Marlene Stone as Seller, regarding the Property located at 6006 So. 7100 West Hooper. The following terms are hereby incorporated as part of the REPC: *Included items: All lounging/loafing sheds – panels, gates, feeders/waterers & horse walker as presently exist* (emphasis added).

Exh. 2; Add. 2; (R. at 0031-32.)(emphasis added).

The trial court determined that this portion of Addendum One is properly integrated into Clause 1.1 of the REPC, and thus subject to the requirement that all the items listed therein be "presently owned and attached to the Property." *Id.* However, this determination is wrong. Because the items listed in Addendum One are all readily moveable, not attached to the property, and thus not properly considered "fixtures," it would be a reasonable interpretation of the contractual terms to determine that these items are governed by the second portion of Clause 1.1, and thus part of the transaction notwithstanding the language of the first portion. This interpretation is a reasonable one

based on the plain language of Clause 1.1 of the REPC and Addendum One, and is therefore a valid basis for a finding of facial ambiguity.

A third interpretation is also possible. The REPC explicitly specifies in Clause 9 that the terms of all addenda are incorporated into the REPC. However, the integration clause does not specify any specific part of the REPC to which those addenda must be integrated. Therefore, it is reasonable to assume that the terms contained in Addendum One stand on their own as a separate provision of the agreement, and are not necessarily modified or controlled by the language in any part of Clause 1.1 at all. In such a scenario, there would also be no requirement that any of the property listed in Addendum One be “presently attached” to the property at the time of sale.

Clearly, the language contained in the REPC and Addendum One is subject to more than one reasonable interpretation, even when viewed in light of Clause 1.1. The ambiguity there lies mainly in how much, if any, of Clause 1.1 is actually applicable to the analysis of Addendum One. No evidence other than the plain language of the documents is required to support this analysis.

Accordingly, the trial court erred when it disallowed parol evidence to determine the intent of the parties regarding the items listed in Addendum One.

2. The Bill of Sale is Facially Ambiguous.

The trial court also substantially based its decision on a determination that the bill of sale executed by the parties at closing was facially unambiguous. The bill of sale, among other things, contains a recitation of certain personal property intended to be conveyed in the transaction, and reads, in pertinent part:

SELLER . . . have/has bargained, sold, assigned and transferred, and by these presents do/does bargain, sell, assign and transfer unto said BUYER that certain personal property now at 6006 S. 7100 W., Hooper, UT, 84315 WEBER County, State of UT, particularly described as follows: Oven/Range, Refrigerator, Window Covering, 2 Water Irrigation Shares, All Lounging and Loafing Sheds, Panels, Gates, Feeders, Waterers, and Horse Walker as presently exist.

The trial court relied on the language “now at 6006 S. 7100 W., Hooper, UT” to support its finding that the bill of sale was unambiguous. However, although at the outset this language appears to clearly limit the personal property transfer to include items then located on the two acres that would, upon recordation with Weber County, become the Flint’s new address, this was not its function at all. Significantly, the included horse walker was located entirely on Stone’s property. Thus, if the unambiguous meaning of the bill of sale is that the items included were *only* those then located on the two acres comprising the new address, correct application of such an instrument necessarily excludes the horse walker, a multi-ton structure permanently affixed to large, subterranean concrete blocks that eventually required the use of heavy equipment to move onto the Flint’s property. Because of these permanent characteristics, the horse walker was affixed to Stone’s property. Although, as the trial court noted, the walker was connected to the horse barn located on the new address via electrical wiring, that connection was much less significant than the walker’s physical presence on Stone’s property, and could have been severed much more easily. And although the arms of the horse walker would pass partially over the Flint’s property at their ends were the walker rotates, a structure that merely casts a shadow onto a neighbor’s property does not become part of, or somehow move onto that property.

If the construction adopted by the trial court is taken to its logical extreme, the bill of sale must be construed not to refer to *this* horse walker at all (which was, incidentally, the only such apparatus in the vicinity), but to some hypothetical machine no longer located at the specified address. However, the fact remains that this selfsame horse walker—located just outside the Flint’s new property line at the time the bill of sale was executed—was in fact the one contemplated by the parties, as evinced by its subsequent removal to the other side of the Flint/Stone property line. In *Ward*, the Utah Supreme Court held regarding facial ambiguity that “[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the ‘extrinsic evidence of the judge’s own linguistic education and experience.’” 907 P.2d at 268. Under the *Ward* rule, the horse walker’s location and subsequent removal was certainly proper evidence for the trial court to consider in determining whether the bill of sale was ambiguous. The language of the provision, the walker’s location, and its eventual destination are ample evidence of ambiguity within the bill of sale. Specifically, they show the existence of a dichotomy that must be resolved: does “certain personal property now at 6006 S. 7100 W. Hooper, UT” mean *only* the enumerated items actually located at that address, or does it mean something else? (such as “certain other items in the vicinity of the address?”)

The trial court attempted to resolve this issue by implying in its decision that the horse walker was “otherwise specifically identified” in the bill of sale. Findings of Fact and Conclusions of Law ¶5. While the trial court construed the bill of sale to limit the transaction only to “personal property *presently* existing on the two acres conveyed,” it

reasoned that this “specific identification” was the basis for carving out an exception to that construction.

However, this distinction is illusory. Each category of the items at issue here—the loafing sheds, panels, gates, waterers, feeders, and horse walker—is “specifically identified” in the bill of sale. None of the items is identified in any different manner than any of the others. The only real significant distinction between the horse walker and the rest is that there existed multiple loafing sheds, panels, gates, waterers and feeders—some on the property described by the address, some off—and only one horse walker, located *outside* the two acres. The horse walker referred to in the bill of sale is not identified as being off the Flint’s property, but is simply another in the list of enumerated items. Thus, the bill of sale itself, if construed according to the meaning given it by the trial court, provides no basis for an inference that the transaction includes *anything* located off the Flint’s property, horse walker or otherwise. Yet, the actions of the parties clearly demonstrate that this was the horse walker contemplated in the transaction. It is undisputed that the transaction always included the horse walker, which was not bargained for separately, or identified in any different manner than any other category of item.

The unavoidable conclusion is that the bill of sale is a facially ambiguous document. If construed according to the plain-language requirement advanced by the trial court—that the transaction included only items presently existing on the two acres—the reader of the bill of sale must ask “to what horse walker does this document refer?” One could either infer then that no horse walker was to be included—as none was then present

on the property—or that the only horse walker in the vicinity was in fact the one described in the document. Either interpretation could reasonably be arrived at. On the one hand, the document names a nonexistent, merely hypothetical horse walker (the one that *should* be present on the property, but is not); on the other, it implies that its earlier condition—that all items be present on the property—is not really a hard-and-fast rule. Either way, a plain-text examination of the bill of sale, in light of the number of horse walkers actually in existence on and around the property, leads to unclear results. Because of this problem, the bill of sale is facially ambiguous, and the trial court erred by disallowing parol evidence to determine the intent of the parties regarding the panels, gates, and loafing sheds.

B. THE TRIAL COURT ERRED IN EXCLUDING WITNESSES ON RELEVANCE GROUNDS.

The trial court wrongfully excluded two of the Flints' witnesses at trial. The Flints intended to use the testimony of Jeffrey Dean Harris and his wife Vickie Harris, who were potential buyers of the same two-acre parcel and farm equipment that Ms. Stone sold the Flints. (R. at Vol. 1, pp. 132-141.) The Harris couple found Stone's two-acre lot on the multiple listing service and viewed the property with their realtor. At trial, when Jeffrey Harris was asked by Flints' counsel what personal property (i.e., farm equipment) Ms. Stone stated was included with the purchase of the two-acre parcel, Stone's counsel objected on numerous grounds. *Id.* The court found their testimony irrelevant. The court failed to find it relevant to determining what personal property Stone was selling with the

two-acre lot, her motive to get rid of the animal-related equipment, her state of mind, her intentions, plan or scheme for selling ALL of the farm equipment, or to disprove what she claimed in court, that she only intended to sell a portion of the personal property outside of the surveyed two-acre plot.

Ultimately the Court accepted Stone's objection to the testimony. That objection was as follows: "Your Honor, they are entirely two different dates, two different situations, two different parties. I don't see the connection between the two. But if she ever said anything to him, it would not be relevant to the case at hand where we have his testimony and his written contract." (R. at Vol. 1, p. 140.) The court responded, "I'm going to sustain that, the objection." The whole point of the Harris's testimony was to show the consistency of the Flint's testimony and the inconsistency or fallacy of Stone's. The Harrises did not receive a different offer than the Flints; they received the same offer. Nevertheless the court stated, "even assuming the best scenario for your client . . . she made an offer to him, and then days later made a different offer to your client, doesn't necessarily mean that the offer she made to him is the same one she made him. People change their mind. And I just don't think it's relevant." (R. at Vol. 1, p. 141.)

The court later stated, speaking of Ms. Stone, "If she said something that she's now denying in this trial, and Mr. Flint is contending that it occurred, and she told him, then it would be very relevant, because it would be an admission against interest . . . the fact that she makes a different offer to a different person on a different day can't be controlling in this case." *Id.*

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269. A trial court's ruling on evidence will be reversed if it was beyond the limits of reasonability. *Id.* This Court should find that the trial court's ruling was beyond the limits of reasonability. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Civ. P. Rule 401 (2009).

It is well understood that "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." Utah R. Civ. P. Rule 402 (2009). Further, relevant, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Civ. P. Rule 403 (2009).

The trial court did not rely on Rule 403 for its ruling that the Harris' testimony was irrelevant. Instead, the court simply found the testimony not relevant because the "the fact that she makes a different offer to a different person on a different day can't be controlling in this case." (R. at Vol. 1, p. 141.) The trial court misses the mark. The testimony was offered to show that Ms. Stone extended to the Harrises the same offer as the Flints. Such testimony is relevant to know what Ms. Stone's offer was to the Flints, which constitutes an independent act of significance which is not hearsay. Also, it is a statement of a party opponent under Rule 801(d)(2). It shows whether the Flints are telling the truth about the sale of personal property and Stones lack of propriety in

asserting she did not intend to sell ALL the farm equipment with the two acres. Under Rule 401, relevance is a low bar. All that need be show is that the evidence has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Utah R. Civ. P. rule 401 (2009).

If Ms. Stone said to a third party that the same two-acre lot the Flints purchased includes all farm equipment on Stone’s property, this makes the existence of her intent to include in the sale personal property not physically located on the two-acre plot more probable, and her statements to the contrary less probable. If Stone intended with more than one buyer to include in the sale items not physically located on her property, this is relevant. An examination of what Stone said to these potential buyers is highly relevant. At minimum, the statements go to the weight of the evidence and assist the trier of fact in determining the credibility of the parties’ testimonies. Stone’s potential sale to the Harris’s was for the same two acres of real property and their testimony as to what personal property was included is not “a different offer”. (R. at Vol. 1, p. 141.) Therefore, this Court should find that the trial court abused its discretion and hear the testimony.

C. THE TRIAL COURT ERRED IN EXCLUDING AND MISSTATING CERTAIN SALIENT FACTS FROM ITS FINDINGS OF FACT.

The trial court’s Findings of Fact used facts that supported its conclusion and omitted or misstated salient facts which were critical to its ruling. The Court found at ¶¶

12 and 13 of the Findings of Fact and Conclusions of Law that only three lounging/loafing sheds, and some mobile gates and panels were on Stone's property and in dispute in the suit.

However, the testimony at trial showed a different picture. At the time of the closing on the real estate, two feeders, a number of waterers, the horse walker, four sixteen foot and eleven ten foot panels, twelve square panels, four mobile gates, and three lounging/loafing sheds were physically located on Stone's property. (R. at Vol. 1, pp. 68-71, 88, 90.) Two feeders, three lounging/loafing sheds and a much smaller number of panels and gates were physically located on Flints' property. *Id.*

The Flints subsequently took possession of the two acres, as well as the all the feeders, waterers and horse walker, all located on Stone's property. Stone raised no objection to this, but objected to the Flints taking the gates, panels, and three lounging/loafing sheds on Stone's property. (R. at Vol. 1, pp. 145-149; 185-186.)

The trial court ignored the fact that there was testimony that the waterers and feeders were on her property, that the Flint's took possession of them, and that Stone never raised this in her suit. It focused on the horse walker and misstated the evidence about whether the parties negotiated the horse walker before the sale—in order to explain away why the horse walker's expressly being sold in the REPC did not make the contract ambiguous. In fact, the opposite was true.

Ms. Stone, when pinned down on the issue, ultimately agreed that there was no discussion about the horse walker before it was included in the REPC on February 1, 2008, and Mr. Flint testified that they never discussed the horse walker until after the sale

when a dispute arose concerning the fifteen acres they lease from Stone. (R. at Vol. 1, pp. 66-68, 145-149, 185-186.) The settlement reached by the parties in dismissing some the claims before the trial shows that Stone required that the horse walker be moved in February 2009 as part of the settlement negotiations. (R. at Exh. 7; Add. C) This is not the same as the trial court's assertion that that negotiations between the parties to purchase the horse walker occurred before the contract was made. The court misunderstood or misstated the facts and instead inferred that the reason Stone sold the horse walker on her real property was because Flints specifically requested it. They did not.

The trial court also found that because the shadow of the horse walker's arms passed over the Flint's property—and because the electrical connection for the equipment attached to the Flint's barn—the multi-ton structure/fixture located on Stone's property somehow became a part of the Flints' property. Such reasoning is nonsensical. It is important that in the settlement agreement, Stone expressly agreed that the horse walker was on her property—she also stated such in her trial testimony. (R. at Exh. 7, ¶9 of Confidential General Release and Settlement Agreement; R. at 0032; Vol. 1, p. 125; Add. 3.)

The Court of Appeals should find that the trial court erred by omitting from its Findings the fact that feeders and waters were located on Stone's property at the time of the sale, but Stone never disputed the Flints' right to these items. Also salient is the fact that the parties never discussed the horse walker before it was included in the REPC and Bill of Sale. Only after the sale was complete for the two-acre plot and the Flints had

leased the fifteen acres did a dispute arise; the horse walker was then part of a discussion about which items of personalty Stone would choose to dispute.

These extrinsic facts are important for the court to determine whether the REPC and Bill of Sale are ambiguous. Without knowledge of what was negotiated (or, in the case of the horse walker, what was not negotiated), what was physically located on Stone's property versus Flints' two-acre plot, and what became in dispute, the Court cannot reasonably determine the ambiguity of the REPC and Bill of Sale. The court's omission of these facts will be reversed if clearly erroneous. *Gilmour v. Cummings*, 904 P.2d 703, 706 (Utah App. 1995). In this case, the Flints have marshaled the evidence to show that the trial court's Findings at paragraphs 12 and 13 were clearly erroneous. For these reasons the court should find that the trial court erred in excluding these facts from its Findings.

Conclusion

For the foregoing reasons, the Flints (Appellants/Defendants/Counterclaimants) respectfully request that the Court of Appeals take the following actions:

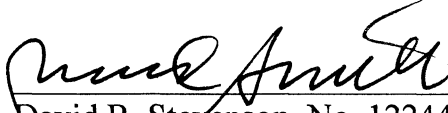
- Find that the REPC, its addenda and final Bill of Sale, are facially ambiguous;
- Remand the case to the trial court to make findings regarding the

Defendant/Appellants' intent to buy and Plaintiff/Appellee's intent to sell the disputed personal property physically located on Stone's real property following the survey and sale of real property (i.e. all farm equipment, including three lounging/loafing sheds, and numerous mobile panels and gates)

- Order the trial court to hear any necessary parol evidence to deduce the parties' intent;
- Order the trial court to determine whether a contract was formed with respect to the disputed personal property and to make findings stating whether there was a meeting of the minds concerning these disputed items of personal property;
- Order the trial court to compensate the Flints for their losses if there was no meeting of the minds concerning this disputed property and therefore no contract;
- Order the trial court to allow the testimony of Jeffrey Dean Harris and Vickie Harris, husband and wife, concerning their discussions with Stone relevant to whether personal property on her real property is/was included in the sale of the two acres of real property eventually sold to the Flints;
- Find that the trial court failed to recognize that in addition to the three lounging/loafing sheds and the horse walker, which were all on Stone's real property, two feeders, a certain number of waterers, the horse walker, four sixteen-foot and eleven ten-foot panels, four mobile gates, and three lounging/loafing sheds, as well as twelve square panels were located on Stone's property at the time of the sale; that Stone only disputed the ownership of the three lounging/loafing sheds and the mobile panels/gates;
- Award Flints their attorney's fees for this appeal. The settlement agreement between the parties expressly allows attorney's fees for resolving this issue concerning the ownership interest in the loafing/lounging sheds and panels/gates.

Addendum A, ¶17 of 3 February 2009 Settlement Confidential General Release
and Settlement Agreement.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David B. Stevenson", is written over a horizontal line.

David B. Stevenson, No. 12244

Brad C. Smith, 6656

STEVENSON & SMITH, P.C.

Attorney for Defendant/Appellant

Mailing Certificate

I hereby certify that I mailed a copy of the foregoing document by U.S. mail, postage prepaid, this 13 day of November 2009, to the following:

Robert L. Neeley
NEELEY & NEELEY
2485 Grant Ave., Suite 200
Ogden, UT 84401



ADDENDUM A

"THIS IS A LEGALLY BINDING CONTRACT IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

Bill of Sale

(WITH WARRANTIES)

Know all Men by These Presents:

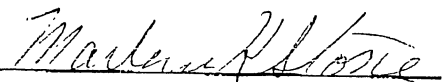
That Craig D. Stone and Marlene K. Stone as Trustees of The Stone Family Revocable Trust U/A dated February 1, 2007 the SELLER, for and in consideration of the sum of: Ten Dollars and Other Valuable Considerations to me/us in hand paid by Richard Flint and Judy Flint, the BUYER, the receipt whereof is hereby acknowledged, have/has bargained, sold, assigned and transferred, and by these presents do/does bargain, sell, assign and transfer unto said BUYER that certain personal property now at 6006 S. 7100 W., Hooper, UT. 84315 WEBER County, State of UT, particularly described as follows: Oven/Range, Refrigerator, Window Covering, 2 Water Irrigation Shares, All Lounging and Loafing Sheds, Panels, Gates Feeders, Waterers, and Horse Walker as presently exist

And the Seller upon the consideration recited above warrants ownership of and good title to said property, the right to sell the same and that there are no liens, encumbrances or charges thereon or against the same and to defend the title and possession transferred to the BUYER against all lawful claims.

In Witness Whereof, I/We have hereunto set My/Our hand(s) this 16th day of April, 2008

Witness: _____




Marlene K. Stone (Trustee)

ADDENDUM B



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 Richard & Judy Flint offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 1,000 in the form of Personal checks #1677 which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [Signature] on 1/19/08
(Signature of agent/broker acknowledges receipt of Earnest Money) (Date)

Brokerage: ADAIR REALTORS INC. Phone Number 801-390-1188

OFFER TO PURCHASE

1. PROPERTY: 6006 South 7100 West
also described as: 2 Two Acres with Horse Barn & Hay Barn
City of Hooper County of Weber State of Utah Zip 84315
(The "Property")

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and 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: Overrange Refrigerator - window coverings as presently exist.

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: Culinary Connections Two (2) Shares Hooper Irrigation All fees & transfer costs to be paid by seller

2. PURCHASE PRICE. The Purchase Price for the Property is \$ 410,000

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

\$ 1,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.
\$ As Req'd (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) _____
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:
1) SPECIFIC LOAN TERMS. Seller to pay 3% of sales price towards buyers closing cost for buy down
\$ 0 (c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)
\$ 0 (d) Seller Financing (see attached Seller Financing Addendum if applicable)
\$ 0 (e) Other (specify) 0
\$ 100,000 (f) Balance of Purchase Price in Cash at Settlement
\$ 410,000 PURCHASE PRICE. Total of lines (a) through (f)

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 Loan Application & Fee Deadline referenced in Section 24(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 "Notice of 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 Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit 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 Condition. Buyer's obligation to purchase the Property ~~IS~~ **IS NOT** conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), 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 (?) 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 24(f), 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: [] hours [] days after Closing;

[] Other (specify) (7) Seven days from Recording Seller to pay Buyers
Daily Rate of Interest until occupancy

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

[] Seller's Initials [] Buyer's Initials

The Listing Agent, Mark Parker, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Listing Broker, Mike Bowman, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Agent, Joe Adair, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Broker, Adair Realty Inc., represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent

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

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(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):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;

(e) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

Any inspection of Buyer's choice At buyer's Expense.

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. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted 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: 1 Addendum No. one

☒ Seller Financing Addendum ☒ FHA/VA Loan Addendum ☒ Assumption Addendum

☒ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law)

☒ Lead-Based Paint Addendum (in some transactions this addendum is required by law)

☒ Other (specify) Contingency on sale of Buyer's Home.

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. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. 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.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes): A one-year Home Warranty Plan ☒ ~~WILL~~ ☐ ~~WILL NOT~~ be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☒ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$ 380 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

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 supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

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

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

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

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

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, 16 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, Notice of Loan Denial, 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) Loan Application & Fee Deadline 2/10/08. (Date)
(b) Seller Disclosure Deadline 2/10/08. (Date)
(c) Evaluations & Inspections Deadline 2/28/08. (Date)
(d) Loan Denial Deadline MARCH 1 2008 (Date)
(e) Appraisal Deadline MARCH 1 2008 (Date)
(f) Settlement Deadline on or before April 1 2008 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 9:00 [] AM [] PM Mountain Time on 2/3/08 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

Richard Flint 2/1/08 Judy Flint 2/1/08
(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"

Richard + Judy Flint
(Buyer's Name) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

Maureen Stone 02-01-08
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

(Seller's Name) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller Rejects the foregoing offer.

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

Richard H Flint 2/5/08 Judy Flint 2/5/08
(Buyer's Signature) (Date) (Buyer's Signature) (Date)

(Seller's Signature) (Date) (Seller's 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.

Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 4, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Page 6 of 6 pages Seller's Initials WJ Date 02-01-08 Buyer's Initials R.F. Date 2/1/08



ADDENDUM NO. one

Page 1 of 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 2/1/08, including all prior addenda and counteroffers, between Richard & Emily Elmer as Buyer, and Martene Stone as Seller, regarding the Property located at 6006 So. 7100 West Hooper. The following terms are hereby incorporated as part of the REPC:

Included Items: all landscaping/irrigating sheds - Panels, Gates, Seeders/Waterers & Horse Walker as presently exist

Seller to have property surveyed & (4) four corners staked to buyers APPROVAL - Survey completed by Greg Harrison w/ Harrison Engineering - 1st lot split required. APPROVAL thru Hooper Cite to be completed & paid by seller

OFFER/CONTRACT SUBJECT TO SELLERS ACQUISITION OF A SUITABLE NEW RESIDENCE.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

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 _____ ☐ 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.

Richard Elmer 2/1/08
(Buyer) (Seller Signature) Date Time

Martene Stone 2/1/08
(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. _____

Martene Stone 02-01-08
(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 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.





ADDENDUM NO. two
TO

Page 1 of 1



REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 2/1/08 including all prior addenda and counteroffers, between Richard & Judy Flint as Buyer, and Marlene Stone as Seller, regarding the Property located at 6006 SA 710th Ave. The following terms are hereby incorporated as part of the REPC:

1. OPTION TO KEEP HOUSE ON MARKET ("TIME CLAUSE")

1.1 Right to Accept Other Offers. Buyer and Seller agree that Seller may continue to offer the Property for sale and to accept other offers subject to the rights of Buyer as provided below. If Seller accepts any such offers, Seller will notify Buyer in writing within one (1) calendar days after entering into such a contract.

1.2 Right to Remove Conditions. Buyer shall have 72 hours after receipt of Seller's written notice in which to either: (a) agree in writing to remove from the REPC the following condition(s) (check applicable boxes): ☒ Financing Condition; ☐ Appraisal Condition; ☒ Evaluations & Inspections; ☒ Subject to the Sale of Buyer's Residence; ☐ Other (explain): _____

or (b) by failing to respond in writing to Seller's notice, allow the REPC to automatically become canceled, in which instance, the Earnest Money Deposit shall be released to Buyer.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

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 ☐ AM ☒ PM Mountain Time on 2/2/08 (Date), 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.

Richard Flint 2/1/08 Judy Flint 2/1/08
☒ 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. _____

Marlene Stone 02-01-08
(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 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. ThreePage 1 of 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 2/1/08, including all prior addenda and counteroffers, between Richard & Sarah Flint as Buyer, and Mark Stone as Seller, regarding the Property located at 6006 So. 7100 W. Midvale. The following terms are hereby incorporated as part of the REPC:

1. SUBJECT TO SALE OF BUYER'S RESIDENCE

1.1 Subject to Sale of Buyer's Residence. Buyer's obligation to purchase the Property is conditioned upon the closing of the sale of Buyer's residence located at: 3289 West 1500 North (the "Residence") by 5:00 P.M. (MST) on the 1st day of April 2008 (the "Residence Closing Deadline").

1.2 Status. Buyer ☐ DOES ☒ DOES NOT have a signed contract for the sale of the Residence. The Residence ☐ IS ☒ IS NOT presently listed for sale through (provide name/address/phone of real estate brokerage): Adair Realtors / P.O. Box 271 / 801-390-1188. If the Residence is not now listed, it will be so listed on or before the 8th day of February 2008. Buyer will diligently pursue the closing of the sale of the Residence.

1.3 Right to Cancel. If the sale of the Residence is not closed by the Residence Closing Deadline, Buyer or Seller may, within three calendar days after the Residence Closing Deadline, cancel the REPC by providing written notice to the other party. In the event of such cancellation, the Earnest Money Deposit shall be released to Buyer. Buyer may however, remove this condition at any time prior to the Residence Closing Deadline by providing written notice to Seller.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

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 ☐ AM ☒ PM Mountain Time on 2/2/08 (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.

Richard Flint 2/1/08 Richard Flint 2/1/08
☒ 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

Mark Stone 02-01-08
 (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 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



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 February 1, 2008 including all prior addenda and counteroffers, between Elint as Buyer, and Stone as Seller, regarding the Property located at 6006 S. 7100 W. Hooper, Utah 84315. The following terms are hereby incorporated as part of the REPC:

1) The confirmation of agency disclosure referenced in section 5 of the R.E.P.C. shall be changed as follows: The Listing agent shall be Mike Bowman and the listing broker shall be Realty Link, LLC who both represent the seller. The Selling agent and selling broker who represents the buyer shall remain the same.

All other terms to remain the same.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ **REMAIN UNCHANGED** ☐ **ARE CHANGED AS FOLLOWS:** _____

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 February 8, 2008 (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.

Margaret Stone
☐ 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. _____
Richard H. Elint 2/5/08 Richard H. Elint 2/5/08
 (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 1, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM NO. Extension TO Addendum

Page _____ of _____



REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of _____, including all prior addenda and counteroffers, between First as Buyer, and STONE as Seller, regarding the Property located at _____. The following terms are hereby incorporated as part of the REPC:

Closing Extended to on or before April 15
2008 - All other terms remain the same.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

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 _____ ☐ AM ☐ PM Mountain Time on _____ (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 22 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Richard H. Hunt 3/29/08 Gary K. Hunt 3/29/08
(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. _____

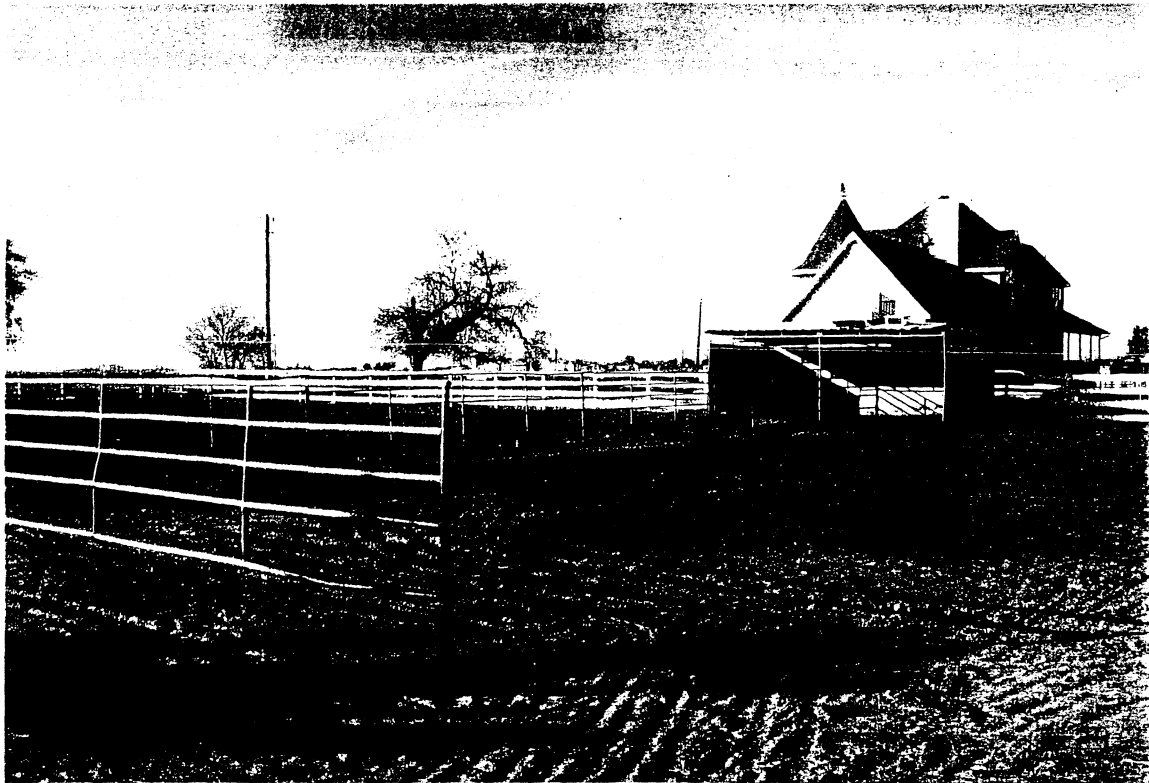
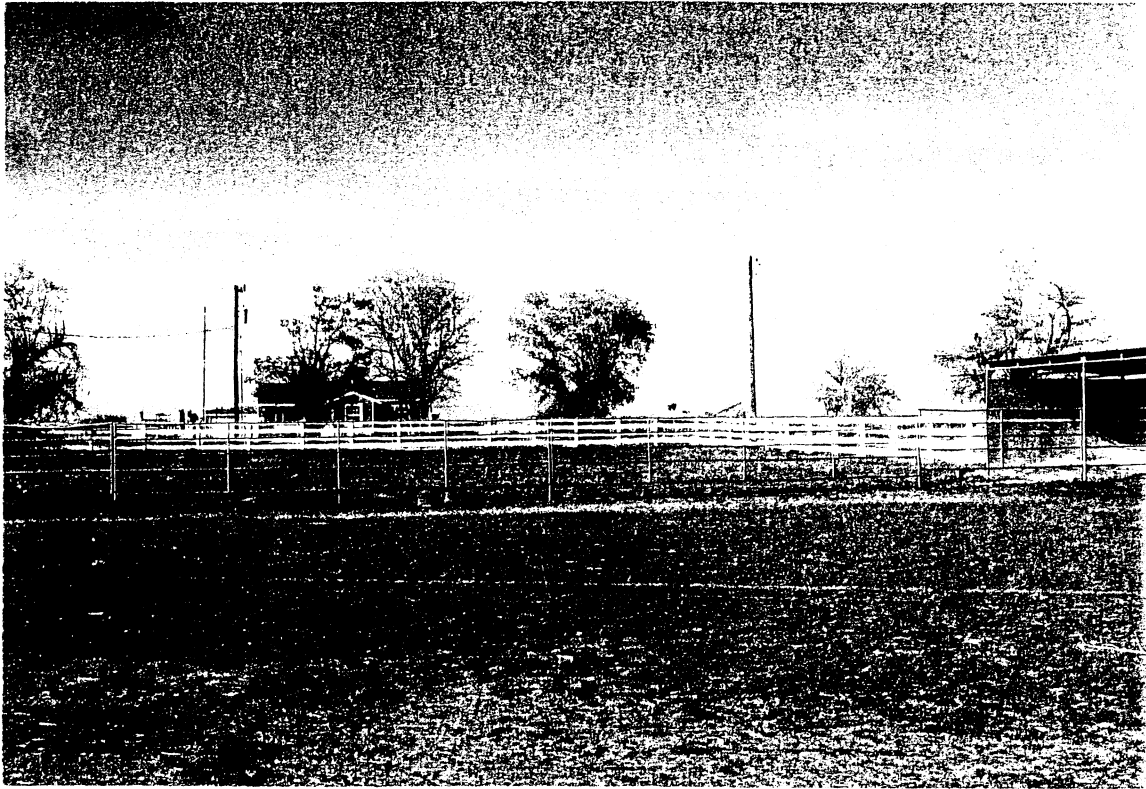
Monique Stone _____
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ 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 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.





ADDENDUM C

Confidential General Release and Settlement Agreement

RECITALS

This action was commenced in the Second Judicial District Court of Weber County, State of Utah, by Plaintiff, Marleen Stone, in which she sought eviction of Defendants and Counter Plaintiffs, Richard and Judy Flint, from leased property pursuant to claims of waste. The Defendants responded to this allegation and brought counter claims against the Plaintiff on three grounds:

1. Trespass
2. Breach of Contract and/or Conversion
3. Breach of the Covenant of Quiet Enjoyment (i.e., property warranty)

Pursuant to the following Settlement Agreement, **STONE** expressly agrees to drop her lawsuit against **FLINT** and **FLINT** agrees to drop the First Cause of Action, Trespass, from the suit. These items will be dismissed with prejudice within seven (7) days of signing this agreement. The parties herein stipulate that the only remaining issues for the court are whether three (3) sheds and several non-fixed mobile panels on **STONE'S** property are part of a Bill of Sale and Real Estate Purchase Contract, both dated 16 April 2008.

This Confidential General Release and Settlement Agreement shall hereinafter be referred to as the "Agreement."

1. **RICHARD AND JUDY FLINT (FLINT)**, their heirs, successors, administrators, agents and representatives, shall hereinafter be referred to, jointly and individually, separately and collectively, as **FLINT**.

2. **MARLENE STONE** her partners, parents, subsidiaries, divisions, branches, and affiliates (the foregoing shall be collectively referred to as **STONE**), and each of their incorporators, directors, officers, owners, shareholders, servants, agents, employees, former employees, attorneys and representatives, and the successors, heirs and assigns of each of the foregoing, and any person, partnership, corporation, association, organization or entity now or previously acting, directly, in the interest of or on behalf of **MARLENE STONE** shall hereinafter be referred to, jointly and individually, separately and collectively, as **STONE**.

AGREEMENT:

3. The parties hereby agree to stipulate that the legal ownership of the sheds and non-fixed mobile panels are the sole and remaining issues which are scheduled for a trial on 15 April 2009.

4. On 1 January 2009, the parties agree that **FLINT** removed all animals, belongings, materials, farm equipment, and any other personal property belonging to **FLINT** from off of the property of **STONE**, which is the subject of a lease dated 16 April 2008 (15 acres adjoining and on the North and East of the **FLINT** property).

5. It is expressly acknowledged that while the duration of said lease was from 17 April 2008 to 17 April 2009, the lease expired per agreement of the parties effective on 2 January 2009.

6. **STONE** herein agrees to pay **FLINT** the sum of \$559.00 for the prorated remainder of the lease (\$559 = \$1,889.25/yr + 365 days/yr x 108 days remaining for lease period) within seven (7) days of the signing of this Agreement by the parties. This number will be further reduced by an amount of \$40 per month for each month that the horse walker remains on **STONE'S** property. The parties agree that \$80 of the above sum will be withheld from the \$559 payment listed above to ensure such \$40 per month payment for a period of two months.

7. The parties hereby agree not to disparage one another, specifically including statements about the other to neighbors, friends, or church members of the FLINTS; further, the parties mutually agree to keep the terms and conditions of this agreement confidential, subject to the exceptions in numbered paragraph 23 below.

8. **STONE** hereby acknowledges and agrees to the terms and conditions of the Joint Motion for Stipulated Temporary Injunction (i.e. three years, or until STONE sells her property, which ever is longer) and the proposed Order submitted to the court that is attached hereto.

9. It is hereby acknowledged that there is a horse walker that is located on the **STONE'S** real property but which is the property of **FLINT** pursuant to a 16 April 2008 Real Estate Purchase Contract and accompanying Bill of Sale of the same date. This statement is in no way an admission concerning the rightful ownership of the loafing sheds or any remaining property on the **STONE'S** land and which the **FLINTS** claim an interest in by virtue of said contracts.

10. **FLINT** agrees to remove said horse walker by 30 January 2009. **FLINTS** also agrees to cap the electrical line to the pasture electrical fence also by said date and **STONE** agrees to cap and/or sever any connections from her electric fence that go onto the **FLINTS'** property by said date.

11. It is expressly agreed that **STONE** shall have no right to any utilities presently existing on her property but that are attached and/or coming from the **FLINT** property. This includes, but is not limited to, any electrical, water or sewer. It is expressly agreed that the electrical lines for the horse walker will remain underground. As part of the deconstruction and/or movement of the horse walker, **FLINT** herein agrees to cap the exposed electrical lines and bury them underground where they

currently exist. Furthermore, **FLINT** agrees to disconnect the electrical line to the horse walker, at the point it comes above ground on **FLINT'S** property.

12. To the extent there are other issues to work out between the parties regarding the ownership or right to use utilities, including but not limited to gas, electrical, irrigation or potable water lines on either party's property, this Agreement does not address such issues which are not currently before the court.

13. The parties hereby expressly agree to comply with the requirements of the court with respect to contact with one other.

14. This Agreement constitutes a partial settlement of the claims between the parties.

15. The parties acknowledge that their properties adjoin each other and that for significant sections of the property line there is no fence, or there are fences or other structures traversing through the mutual property line. As a result, the parties recognize that there will be continued need in the future to resolve disputes either between these parties or their successors in interest.

16. This Agreement in no way affects the property rights of the parties with respect to either real property or personal property not at issue in this current lawsuit. This includes, but is not limited to, **FLINTS'** interest in two or more shares of irrigation of the Wilson Hooper Water line purchased by the **FLINTS** from **STONE**. However, it is the intent of the parties to work together through their respective counsel to resolve any future disputes concerning the common property lines and the structures that may be in common as well.

17. Each party will bear their own attorney's fees and costs for all matters settled herein. The parties expressly reserve the right to request the fees and costs for litigation for the remaining issue concerning the ownership interest of the loafing sheds.

18. This release is purposefully broad, and it is intended to capture any conceivable claim which the parties have against each other or their agents excluding those specifically preserved herein.

19. The parties warrant and represent that they have not sold, assigned, granted, or transferred to any other person, corporate or natural, any claims encompassed by this Agreement that he has, had, or may have at any time in the future, or claims to have or have had against the other party.

20. All negotiations relating to this Agreement are merged herein. There are no promises, agreements, conditions, undertakings, warranties, or representations, oral or written, express or implied, among **FLINT** and/or **STONE** as to such matters other than as set forth herein. No waiver, change, or modification of this Agreement shall be valid unless the same is in writing and is signed by the party to be bound thereby.

21. The singular number, when used herein, includes the plural, and vice-versa, as the context may require. The masculine, feminine, and neutral genders shall include such other genders as are appropriate.

22. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement nevertheless shall remain in full force and effect.

23. The confidentiality provisions of this Agreement shall not, however, apply to prevent **STONE** or **FLINT** from advising its attorneys, tax return preparers, financial advisors, and/or government tax agencies of the settlement of the claims and the consideration received therefore. To the extent that **FLINT** or **STONE** disclose such information to its attorneys, tax return preparers, financial advisors, and/or government tax agencies, they shall advise those persons of the confidentiality provisions of this Agreement. Nothing herein prevents the parties from disclosing this agreement, its terms and conditions, in litigation, in a court of law, or in an alternative dispute resolution proceeding.

24. The parties agree to maintain and/or not remove survey stakes or markers on their property. This is not a ratification of said survey, or a waiver of any claim or right, but merely a good faith agreement to maintain the alleged boundary for the benefit of both parties to this agreement. To the extent that such markers or stakes have been removed by **STONE'S** animals or otherwise, the parties agree to replace the same if the original location is known to them and it is located on their individual property. This does not give either party the right to trespass onto the other's property to move or replace a stake.

25. This Agreement shall in all respects be interpreted, enforced, and governed by and under the laws of the State of Utah. The parties agree to pay all reasonable attorney's fees incurred in enforcing this Agreement.

26. This Agreement contains the entire agreement, understanding and stipulation between the parties hereto. The terms of this Agreement are contractual, and not a mere recital, and may be enforced in court. Any waiver by **STONE** or **FLINT** of a breach or violation of any provision of this Agreement shall not be construed as a waiver of any other provision or of any subsequent breach or violation of the Agreement. This Agreement is deemed to have been drafted jointly by the parties. Any uncertainty or ambiguity shall not be construed for or against any party based on attribution of drafting to any party.

27. The parties are encouraged to consult with an attorney of their choice before signing this Agreement.

28. The parties agree that they are entering into the Agreement knowingly, willingly, and voluntarily, and that no promises, representations, or inducements not expressly set forth herein were made to them that caused them to sign the Agreement.

THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND FULLY
UNDERSTAND THE MEANING AND INTENT OF ALL OF THE PROVISIONS AND
TERMS OF THIS AGREEMENT, INCLUDING THE FINAL BINDING EFFECT.

WITNESS my signature on this 2nd day of Feb, 2009.

Richard Flint
Richard Flint

2/2/09
Date

Judy R. Flint
Judy Flint

02/02/09
Date

Marleen Stone
Marleen Stone

02/03/09
Date

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David B. Stevenson, No. 12244
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Attorneys for Defendants
3986 Washington Blvd.
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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

MARLENE STONE, Plaintiff, vs. RICHARD FLINT AND JUDY FLINT, Defendants.	JOINT MOTION FOR STIPULATED TEMPORARY INJUNCTION Civil No. 080907234 395 1171 Judge: Michael D. Lyon
RICHARD FLINT AND JUDY FLINT, Counterclaimants, vs. MARLENE STONE and Does 1-5, Counterdefendants.	

Come now Defendants/Counterclaimants (hereinafter "Defendants"), Richard Flint and Judy Flint, by and through counsel, David Stevenson, and Plaintiff/Counterdefendant (hereinafter "Plaintiff"), Marlene Stone, by and through counsel, Isaac Macfarlane, and moves the Court for a temporary injunction by stipulation of the parties and requests that an injunction issue enjoining Counterdefendant, Marlene Stone, and/or her agents from the following:

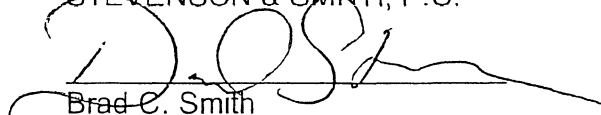
1. From trespassing on Defendants' property, located at 6006 S. 7100 West in Hooper, Utah, and having serial number Serial # 10-124-0001. Plaintiff is

enjoined from being on any part of Defendants' property, including, but not limited to, their driveway and unpaved surfaces, private sidewalk adjoining their porch, and/or their home.

2. Plaintiff is enjoined from contacting Defendants in any way, including, but not limited, direct in-person contact, over the telephone, through the internet, at their places of employment, or otherwise. This also includes any contact through an agent of the Plaintiff, except for Plaintiff's attorney, real estate agent, or police officer.
3. From parking or driving on Defendants' property.
4. From any stalking behavior, as defined in Utah Code Ann. § 77-3a-101 et seq.

By stipulation, the parties motion that the Court issue a temporary injunction through the attached order, and that said injunction exist for three years or until such time as Plaintiff sells her adjoining property lying immediately to the North and East of Defendants' property, whichever is longer, and with respect to each and every item listed above.

STEVENSON & SMITH, P.C.

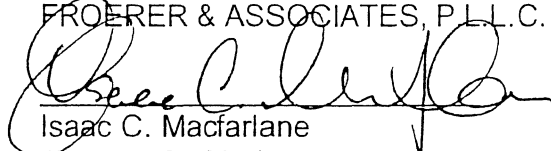


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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

MARLENE STONE, Plaintiff, vs. RICHARD FLINT AND JUDY FLINT, Defendants.	ORDER FOR TEMPORARY INJUNCTION Civil No. 080907234 Judge: Michael D. Lyon
RICHARD FLINT AND JUDY FLINT, Counterclaimant, vs. MARLENE STONE and Does 1-5, Counterdefendants.	

The parties, Defendants Richard Flint and Judy Flint and Plaintiff Marlene Stone, by and through their respective counsel, having moved the Court for a temporary injunction by stipulation, and having found good cause for issuing said temporary injunction, it is therefore ORDERED and DECREED that Plaintiff, Marlene Stone, and/or her agents are temporarily enjoined:

1. From trespassing on Defendants' property, located at 6006 S. 7100 West in Hooper, Utah, and having Serial # 10-124-0001. Plaintiff is enjoined from being on any part of Defendants' property, including, but not limited to, their driveway

and unpaved surfaces, private sidewalk adjoining their porch, and/or their home.

2. Plaintiff is enjoined from contacting Defendants in any way, including, but not limited, direct in-person contact, over the telephone, through the internet, at their places of employment, or otherwise. This also includes any contact through an agent of the Plaintiff, except for Plaintiff's attorney, real estate agent, or police officer.
3. From parking or driving on Defendants' property.
4. From any stalking behavior, as defined in Utah Code Ann. § 77-3a-101 et seq.

Said injunction shall exist for three years or until such time as Plaintiff sells her adjoining property lying immediately to the North and East of Defendants' property, whichever is longer, and with respect to each and every item listed above.

Judge Michael D. Lyon

ADDENDUM D

1 A No.

2 Q Okay.

3 A I probably would have if I knew for sure they were
4 going to be there or be somewhere else.

5 **MR. STEVENSON:** Your Honor, would you give me just a
6 second?

7 **THE COURT:** Sure.

8 **MR. STEVENSON:** No further questions for this
9 witness.

10 **THE COURT:** Okay. Do you have any other questions?

11 **MR. NEELEY:** Your Honor, I have no other questions.

12 **THE COURT:** Okay.

13 **MR. NEELEY:** The only thing I would proffer is in
14 regard to attorney fees. I would prefer to file an affidavit
15 with the court, if that becomes an issue.

16 **THE COURT:** Okay. Would you like to do the same,
17 counsel? You didn't offer any testimony regarding your fees.
18 I'll allow you the same opportunity if you want to do it that
19 way.

20 **MR. STEVENSON:** Yes, Your Honor. And I would like to
21 offer a motion as a matter of law, Your Honor.

22 **THE COURT:** Go ahead.

23 **MR. STEVENSON:** Okay. Your Honor, I don't want to
24 waste the court's time in going back over the items that have
25 already been discussed. But the defendant and

1 counter-plaintiff in this case would ask the court to
2 consider a motion as a matter of law on a couple of bases:
3 One, that first the contract itself, the plain language of
4 the contract includes all the loafing sheds and all of the
5 panels.

6 **THE COURT:** All the loafing sheds on the property at
7 6006 South. That's what the contract says.

8 **MR. STEVENSON:** Yes. That's what the contract says.
9 And, at the time prior to the sale, that constituted all of
10 the -- that was the property for both sides. And the
11 contract that was entered in --

12 **THE COURT:** The Bill of Sale was made contemporaneous
13 with the sale of the real property, doesn't it?

14 **MR. STEVENSON:** Yes. And that matched verbatim to
15 the original REPC that also had the same language. It's
16 intended from the beginning, Your Honor, we believe --

17 **THE COURT:** They weren't buying all 17 acres,
18 counsel? They were only buying 2 acres?

19 **MR. STEVENSON:** Yes, Your Honor. The evidence that's
20 been put on so far has, we believe, will show as a matter of
21 law that the language is plain on its face and that the four
22 corners, the intent from looking at the four corners of this
23 document so that Miss Stone intended to include the horse
24 walker and all panels and sheds. And even if this court does
25 not so find that the plain language is unambiguous, the

1 evidence that's been proffered today shows that as a matter
2 of law that the, that there is ample evidence that shows the
3 parties' intent through panels, gates, parole evidence and
4 the documents in this manner to satisfy the elements of a
5 breach of contract action and conversion.

6 In addition, our clients put on evidence of damages for
7 both of those causes of action, including mentioning that he
8 wished to be awarded his attorney's fees and costs and interest
9 in this action. For these reasons, we would ask the court to
10 rule in our favor on a motion as a matter of law.

11 **THE COURT:** I'm going to take your motion under
12 advisement. We are going to -- I would like to have a chance
13 to go through all of the evidence before I rule on either of
14 your motions. What I anticipate is that I'll give you a
15 chance to come back and to further oral argue everything, if
16 you would like. I didn't anticipate that just what you made
17 was now your closing argument. Do you want anything further
18 to say?

19 **MR. STEVENSON:** Your Honor, I don't believe it's
20 necessary to do any further closing argument at this point.

21 **THE COURT:** Okay. Mr. Neeley, what is your intent?

22 **MR. NEELEY:** Well, Your Honor, I assumed that we were
23 coming back based on what the court said. I think you wanted
24 us to take a look at the law and argue points and law to the
25 court and relate that to the facts of the case. So, I guess

1 April 20, 2009. Ogden, Utah.

2 PROCEEDINGS

3 **THE COURT:** Good afternoon, folks.

4 **MR. STEVENSON:** Good afternoon, Your Honor.

5 **THE COURT:** Record may show this is the time set for
6 oral arguments in the matter of Marlene Stone vs. Richard and
7 Judy Flint.

8 Since this is your counterclaim and you have the
9 burden, I'll allow you to go first. Thank you.

10 **MR. STEVENSON:** Thank you, Your Honor. Your Honor,
11 first, we just appreciate the chance to make one final legal
12 argument.

13 **THE COURT:** Sure.

14 **MR. STEVENSON:** And, Your Honor, because there is two
15 issues here, first is whether the contract itself was
16 ambiguous then, second, if it was, what the facts were in
17 this case. I'm planning on just reciting after we discuss,
18 first, some of the key facts in this case and why you should
19 rule in favor of the Flints, Your Honor.

20 Your Honor, this is simply a contract interpretation
21 issue that the court has to decide. And, first, the question
22 is, was the contract, the Bill of Sale and the REPC, did it
23 give, did it define the personal property that was to go with
24 the real property? Or did the initial contract, was it
25 undefined as to both? That's one of the questions that the

1 court has to determine.

2 Your Honor, this court should find, first, that the
3 Bill of Sale and the REPC which stated that all sheds and
4 panels, waterers, feeders, the horse walker, that we would
5 assert to the court, that this is -- this is something,
6 certainly, something the court could find as unambiguous.
7 The court could find that when it says "all" in the context
8 of the property being sold when it was unidentified, where
9 the property was, that it intended to include all the
10 personal property regardless of whether the entire real
11 property was included in the sale.

12 Secondly, there's been -- let me point out the three
13 cases I believe that identify this point and give, I guess,
14 some direction to the court on determining which way to go.
15 First is the Flores vs. Earnshaw case which we discussed last
16 week, which specifies simply that when you are doing a contract
17 interpretation, the meaning intent, when interpreting the
18 meaning intent, you consider the provisions in relation to all
19 others. Where the language of the four corners is unambiguous,
20 the intentions are determined from the plain meaning as a
21 matter of law.

22 If it is ambiguous, then the court considers
23 extrinsic evidence. The question really is under that case
24 law, is this section, this Bill of Sale and REPC. Is it
25 capable of more than one reasonable interpretation because of

1 uncertain meanings and terms, missing terms or other facial
2 deficiencies? And, Your Honor, we would assert that it seems
3 fairly clear in this case that all, referring to all panels
4 and all sheds, did refer to all those items that were
5 potentially in sale. The real property was not determined at
6 that point.

7 Second case that we believe comes into play is Spears
8 vs. Warr, which was partially abrogated with regard to its
9 standard of review. But, basically, Spears vs. Warr stood for
10 the proposition that you can't enter in parole evidence unless
11 there is an ambiguity in the final documents, or there exists,
12 the existence of rights which are collateral to the original
13 contract.

14 Now, it's unclear whether Flores vs. Earnshaw changes
15 that in any way, but to the extent that law still applies,
16 and it doesn't appear that the supreme court has overturned
17 it on that principle, we urge the court to find that, I guess
18 when it boils down to it, was there ambiguity in the final
19 documents? Was there ambiguity in either the REPC or the
20 Bill of Sale? And I guess, Your Honor, I think it's clear
21 that there is, there is more than one interpretation that can
22 be made here.

23 One interpretation is that Miss Stone actually gave
24 up every bit of personal property regardless of where her
25 real property lied. Another --

1 **THE COURT:** Let me ask a question about that. As I
2 look at the REPC, and clause 1.1 is entitled "Included
3 items," it says, "Unless excluded herein, this sale includes
4 the following items that are presently owned and attached to
5 the property."

6 The property, of course, is not all 17 acres, is it?
7 It's just the 2 acres that they were purchasing. Because up
8 above, on paragraph one, it says the property is 6006 South
9 7100 West. Also described as 2 acres with a barn -- horse
10 barn and a hay barn. So, as I read that, doesn't that narrow
11 the scope of what is the property that the parties are
12 contracting for? And, therefore, when you talk -- so, if
13 that's the property, it's the 2 acres, it's not the 17 acres
14 and, therefore, when you get down to 1.1 where it's the
15 included items that are attached to the property, and the
16 property being 2 acres, not 17 acres, how do you then, you
17 know, reach out and include personal property that's not part
18 of the sale of the real property?

19 **MR. STEVENSON:** Your Honor, the other 15 acres
20 besides the 2 acres, I don't think there's much dispute that
21 beyond the items that are in question here, those aren't
22 generally out on the horse pasture. Those aren't -- that's
23 just not in that area. If you look at the pictures that have
24 been provided as part of the record, the 15 acres, with the
25 exception of the 66 feet right-of-way, there is nearly

1 nothing out there. It's -- all of these items, if you and I
2 were to look at them out the window, they are going to look
3 very close, all of the gates and panels.

4 **THE COURT:** Sure.

5 **MR. STEVENSON:** And the sheds, they are going to look
6 very close. It's not like you have a couple sheds that are
7 together, then others that are several acres away. It's not
8 that, Your Honor. The other 15 acres, essentially, has no
9 other buildings on it. So, Your Honor, I guess the first
10 question on whether the original Bill of Sale and whether the
11 REPC is unambiguous, I guess, we are going to have to concede
12 that, at least, at least it is subject to the interpretation,
13 you know, other than one way to see it.

14 Of course, my client's testimony means all, means
15 all. They looked at all the items of personal property were
16 supposed to be included in the sale. Evidence of that as
17 shown in the trial was that the statement of Joe Adair that
18 all these items are included. It all goes. Her, the
19 statement, you know, that it all stays. Then there was an
20 additional -- there was testimony put on that Mrs. Flint
21 spoke directly about each item with Mrs. Stone. Well, the
22 question is, what would have been an absolutely unambiguous
23 statement if the REPC or the Bill of Sale were perfectly
24 unambiguous, what would it have included? It probably would
25 have said all six sheds. It would have said all 30 panels

1 instead of just three that the Flints ended up getting. It
2 would have said panels or, I guess, gates. It probably would
3 have said all personalty or farm equipment including, then it
4 listed the same items.

5 I think, Your Honor, if there was a way to make it
6 completely unambiguous, that would have made it completely
7 unambiguous. So, to the extent there is a possible other
8 interpretation, we do feel that the court, you know, both
9 Spears vs. Warr and Flores vs. Earnshaw point to the fact
10 that if there is some ambiguity, then you could look at
11 parole evidence.

12 In this case, because the client, I mean the
13 plaintiff and counter-defendant, is challenging the contract
14 to the degree saying the contract didn't state that you get
15 all the panels, it didn't state that you get all of the
16 sheds, now we have to put on parole evidence of it. And let
17 me ask first, Your Honor, to take note of the things that the
18 plaintiff and counter-claimant didn't, did not put on.

19 They didn't put on any evidence that there was a
20 condition precedent. They didn't say the items of personal
21 property listed are subject to a survey. It didn't say that.
22 Second, they didn't produce the agent or broker to refute the
23 evidence that we put on through a broker and two other parties.
24 Third, their agent nor Miss Stone corrected the Bill of Sale.
25 They didn't correct the former REPC. They didn't correct the

1 five addendums. In fact, the parties have five addendums here.
2 There is multiple opportunities to correct these issues if
3 that's not what she intended. If she didn't intend all the
4 panels and all the sheds, she had an opportunity to correct
5 them. She didn't sue to collect the two feeders.

6 And, Your Honor, this might seem like a small thing,
7 but this is fairly important. There was substantial evidence
8 that showed that two of the feeders were actually on her
9 property. She didn't dispute --

10 **THE COURT:** Did I miss -- as I am recalling, I
11 thought she said the feeders were on her property. I
12 understand they have a different view, but wasn't that her
13 testimony?

14 **MR. STEVENSON:** Yes, Your Honor. Why I say
15 substantial evidence, and the weight, at least, this goes to
16 the weight of the evidence, there was three parties that said
17 this was clearly on her property. And she hasn't sued to try
18 to get it back or claim that it's not theirs.

19 **THE COURT:** Can't she also -- apart from that, is
20 there anything inconsistent with putting it even in the same
21 category as the horse walker? I mean, the horse walker, it
22 was within the right-of-way, but it was the wiring was
23 connected to the barn. And, therefore, made sense to leave
24 that, especially, when she knew that he wanted it very badly.
25 And she testified that between the time of their first visit

1 and the return of Mr. Adair with the contract she had talked
2 to her children about that, and they had decided just to let
3 the horse walker go. So, what's inconsistent with saying I'm
4 going to give you these things even though they are not
5 within the property? Is there anything inconsistent with
6 that?

7 **MR. STEVENSON:** Well, first, Your Honor, my
8 recollection of the facts on that point are different. I had
9 to pin her down after that, because she first said, no, we
10 didn't talk about any of the individual items. And it was
11 only when Mr. Adair came later that same day that they viewed
12 it for the very first time she admitted that she saw that the
13 horse walker was even listed. So, she didn't have the
14 discussion with her children prior to seeing that. Maybe she
15 had a discussion with them after she saw that the horse
16 walker was listed.

17 The only testimony that was had concerning what was
18 discussed was two items. One, it appears that Miss Judy
19 Flint said they discussed each item. And then, both Richard
20 Flint and Joe Adair said, you know, both gave common
21 statements that she said it all goes. And to the extent that
22 there was a discussion about the horse walker individually,
23 like Miss Judy discussed, if there was a discussion, there
24 was a discussion about all of the items, not just -- not just
25 them in general. So, her -- she did --

1 **THE COURT:** Did she say that?

2 **MR. STEVENSON:** What's that?

3 **THE COURT:** Did she say that?

4 **MR. STEVENSON:** Did Miss Flint say that?

5 **THE COURT:** Yes.

6 **MR. STEVENSON:** Yes, Miss Flint said they discussed
7 each item. So, in essence, Your Honor, if you look at it
8 from our standpoint, the easiest thing for someone to say
9 that has decided they got a bad deal, that things didn't turn
10 out the way they wanted them to, is to say, well, I never
11 intended that. That wasn't part of the deal.

12 Well, apparently, you know, Miss Stone's testimony
13 was simply, we didn't discuss it beforehand. And I signed
14 the REPC. I never intended to include any other personal
15 property outside of my boundary. Well, she can't say that
16 because, certainly, the feeders and the horse walker were
17 within her newly defined boundary. Not only that, it was two
18 months later that she finally even learned where the boundary
19 was. So, it would be very difficult for her to say I didn't
20 include these items when she didn't know where the boundary
21 was.

22 Now, the other issue, she didn't, I wanted to point out
23 that Your Honor just mentioned, you mentioned that the
24 electrical for the horse walker comes over to my client's
25 property. Now, I'll admit, I'm not a farmer. And I don't know

1 what the price of a new horse walker is and what it takes to
2 put in all the cement work to even hold up one of these
3 behemoths, but a horse walker is not a small item. If she
4 wanted to be able to maintain use of it, she very easily could
5 have kept it.

6 **THE COURT:** Could I interrupt you for just a minute?

7 **MR. STEVENSON:** Sure. Yes, Your Honor.

8 **THE COURT:** Go ahead and finish your thought, then
9 I'll go back.

10 **MR. STEVENSON:** I was going to say, Your Honor, her
11 stated intent as part of the hearing was that she wanted
12 to -- she planned to go ahead and develop the back property
13 and even to sell it and to develop it into, perhaps, lots.
14 If she had to put a road through there, it's entirely
15 consistent with the statement of Joe Adair and the statement
16 of Judy Flint and the statement of Richard Flint that she
17 intended for all of the personal property to go. She didn't
18 want it. She got rid of her animals. She didn't intend to
19 do that animal work anymore. She didn't need the panels.
20 She didn't need the loafing sheds.

21 Now, the first time that the issue even came up about
22 the panels and whether the panels were theirs was well after
23 this litigation began. The first time that the sheds even
24 came up was well after the REPC and the Bill of Sale was
25 signed. Testimony was it came up months later when she

1 finally wanted to kick them off her land. Then, for the
2 first time, she had these other thoughts, I don't want to
3 have you -- you know. Those are mine and I am asserting a
4 right to them. So, at that point, she was asserting a right
5 under the contract saying, I never gave you that. That's the
6 first time that my clients ever heard it.

7 So, the real question for Your Honor is, was the
8 personal property defined under the contract? We would say,
9 yes, it was. But to the extent there is possibly more than one
10 meaning, Your Honor. You need to find that it was ambiguous
11 and allow the parole testimony that's already been added.

12 Now, as far as the parole testimony, I want to point
13 out the one thing that I think is clear. And this court -- I
14 don't know that the other side can refute this. The one thing
15 that is clear is that Miss Stone did not intend to just include
16 the property within the survey. She never included that. She
17 never intended that. It's clear from both the original REPC,
18 the Bill of Sale, and the testimony from the other day, she
19 didn't include just the -- she didn't intend just the items
20 that were in the REPC and the Bill of Sale. I'm sorry. She
21 didn't mean to -- she wasn't just including the items as
22 defined by the survey.

23 And there is two things that point to that. One,
24 Your Honor, first, is the property boundary under the map
25 that has a yellow line showed the original boundary and then

1 the modified boundary. The original boundary didn't even
2 include the hay barn. And if what she intended was to just
3 include certain items, she didn't know what she was going to
4 include. The hay barn would have been excluded if you looked
5 at the original 2 acres. If you look at -- if you looked at
6 it the other way, the 66 acres, then all of a sudden it
7 excludes three sheds and about 27 pieces of either fencing or
8 panels that my clients claim were part of the deal that were
9 mobile.

10 So, the one thing that we can, we do know is that Miss
11 Stone didn't intend to have just what's on their property per
12 the survey. The horse walker and, especially, both horse
13 walker and feeders are in the same category. They both prove
14 that.

15 **THE COURT:** I'm looking at my notes from Mrs. Stone's
16 testimony. And you can correct me, but my notes say that all
17 of the feeders were on the 2 acres at the time of the sale.
18 Did she not testify about that?

19 **MR. STEVENSON:** I know my clients testified that two
20 of them were not, that they were on her property. One of
21 them, Mr. Flint, specified that one was on the 66 foot
22 right-of-way and one was out in their pasture. So -- and I
23 guess what we could do, if that point needs to be clarified,
24 we can certainly open up testimony again. I do believe that
25 Miss Stone, I can't recall whether she refuted that or not.

1 My recollection is that if she addressed it, it was very,
2 very briefly.

3 **THE COURT:** Okay.

4 **MR. STEVENSON:** Your Honor, I guess one other thing I
5 wanted to point out is Your Honor pointed us to another case
6 called Tangren Family Trust vs. Tangren. And, in that case,
7 parole evidence was precluded because the one party was
8 seeking to have it admitted to show that the parties did not
9 intend to have a valid contract and, secondly, to show that
10 the contract itself was subject to a condition precedent. In
11 this case, there is -- we don't have that similar
12 circumstance. But what we do have is there is an absence of
13 a condition precedent. If Miss Stone intended to say I only
14 want to include in the Bill of Sale the items that are within
15 the surveyed lines, Your Honor, she could have put that in
16 there, been very easy for her to do it.

17 **THE COURT:** How do you get around in this case the
18 merger clause that's in the contract? In other words, even
19 assuming, looking at the evidence in a light most favorable
20 to your client, that contract was presented later in the day
21 after all these conversations had occurred in terms of what
22 goes with the property or what stays and all of those things?
23 And so, if you look at the purpose of the merger clause,
24 everything that is in terms of parole evidence is excluded
25 and you look at just the contract. Isn't that a proper way

1 of looking at it?

2 **MR. STEVENSON:** Yes, Your Honor, if there is no
3 ambiguity in the documents. Your Honor, you cited to us the
4 Danes vs. Vincent case the other day and also the Tangren
5 case. And the Earnshaw case actually cited to Danes and, I
6 think, clarified that it's the same exact standard, whether
7 the issue is the merger clause or, in our case, it's just a
8 facial ambiguity. In fact, on page 4 of the Earnshaw case it
9 said, said the sole issue on appeal -- well, I can get just
10 right to the issue. It refers to Danes. And it says, "Once
11 the court determines that the term or provision is facially
12 ambiguous, it may determine the parties' intent through
13 examination of parole evidence, the determination of which
14 presents a question of fact."

15 **THE COURT:** Let me stop you right there, though.
16 Looking just at the contract itself, without bringing in, you
17 know, the conversations that occurred upstairs in Mrs.
18 Stone's bedroom, and just looking at the contract, what about
19 the contract that is ambiguous? What is it that's ambiguous?

20 **MR. STEVENSON:** Your Honor, the statement "all."
21 It's either three or six panels.

22 **THE COURT:** But isn't it -- yeah, three or six. But
23 how many are on the property that's being sold?

24 **MR. STEVENSON:** Well, at the time --

25 **THE COURT:** Are there just three?

1 **MR. STEVENSON:** What's that?

2 **THE COURT:** Aren't there just three sheds on the
3 property that's being sold?

4 **MR. STEVENSON:** Yes, Your Honor. There is only three
5 that are on the physical property.

6 **THE COURT:** So, where is the ambiguity in the
7 contract then?

8 **MR. STEVENSON:** The ambiguity is found in several
9 items. One, when this contract was made, it says to
10 specify -- it says that there is going to be a survey that
11 occurs. It first says here's the items that are included.
12 It says "all." Then it says there is going to be a survey.
13 All right? Not only that, but then you have a final Bill of
14 Sale that includes every item in the formal REPC, but the
15 Bill of Sale does not mention the hay barn. It doesn't
16 mention the other animal barn. I think --

17 **THE COURT:** That's not in dispute though, is it?

18 **MR. STEVENSON:** It's not in dispute, but it certainly
19 shows there is ambiguity between the Bill of Sale. And there
20 is ambiguity between the REPC addendum, the REPC itself and
21 then the final Bill of Sale. The final Bill of Sale says
22 "all panels, all gates." And if "all" is supposed to be
23 interpreted from the four corners, you look at the -- you
24 look at the four corners to determine the intent of the
25 parties. In this case, the intent can be seen from the fact

1 that the feeders and the horse walker are included, which are
2 not part of that surveyed property in the final Bill of Sale.
3 So, Your Honor, you can look at that and determine that,
4 sure, they intended "all" to mean all six and not just three.
5 But, Your Honor, I think -- I think it's clear from the
6 evidence that's come up there is no doubt about it that there
7 is some ambiguity. If it had been clear, it would have said
8 six sheds, 30 panels instead of the three they got. Or it
9 would have been that clear.

10 **THE COURT:** Let me ask, point you to the Bill of
11 Sale. It says that, "The seller assigns and transfers unto
12 the buyer that certain personal property now at 6006 South
13 7100 West more particularly described." But wouldn't you say
14 that language there was the personal property now at this
15 address? I mean, this is the Bill of Sale's being executed
16 contemporaneously with the conveyance of the real property
17 which has now been surveyed. I mean, there is no ambiguity
18 about the 2 acres of where it is.

19 **MR. STEVENSON:** Your Honor --

20 **THE COURT:** So, we are talking about now, this is in
21 April, long after the parties have contracted, the survey has
22 occurred. Your clients have gone out and looked at the four
23 stakes. They know where that property is. They are
24 satisfied with the survey and the staking of the four corners
25 of the property. They know where that property is. And now

1 it's talking about the property they are buying. And it says
2 that certain property now at this address.

3 **MR. STEVENSON:** Your Honor --

4 **THE COURT:** Are your sheds A, B and C now at this
5 2 acres at 6006?

6 **MR. STEVENSON:** No, Your Honor. The same language
7 minus the word "now" exists in the REPC. And there's already
8 been testimony, Your Honor, that there was no change that was
9 done by Miss Stone or by her agent to that final Bill of
10 Sale. It's simply reflected what the real estate purchase
11 contract had. But, more importantly, Your Honor, the most
12 important issue, if it says -- and I agree with you, I
13 understand your point -- but, Your Honor, it includes the
14 horse walker and feeders that weren't on her -- weren't on
15 their property.

16 **THE COURT:** But she could give them anything she
17 wanted, couldn't she?

18 **MR. STEVENSON:** Including the three sheds, Your
19 Honor. They certainly could have given the sheds --

20 **THE COURT:** Does it say six sheds?

21 **MR. STEVENSON:** It just says "all." That's why there
22 is ambiguity, Your Honor. That's why we need the parole
23 evidence to show what the parties intended. And if
24 instead -- if, instead, the opposing party were arguing -- if
25 she says, well, it's just a mutual mistake, well, it would

1 have to be a reasonable mistake. And, in this case, I don't
2 think we have that. I mean, we have three individuals who
3 have testified. And the weight of the evidence shows that
4 she intended for all of it to go.

5 I guess, Your Honor, we would ask that you find that
6 there is ambiguity in this Bill of Sale and in this REPC to the
7 extent that "all" is not defined and opposing party is
8 challenging it. We do believe that Your Honor could find that
9 "all" means all six. And that she intended -- she intended to
10 give up all this personal property. And for these reasons, we
11 request that Your Honor grant the counter-plaintiffs in this
12 case their relief that they have requested, stating both
13 conversion and breach of contract. And put that to Your Honor.
14 Thank you.

15 **THE COURT:** Thank you, Mr. Stevenson, very much.

16 **MR. NEELEY:** Your Honor, on behalf of Marlene Stone,
17 I appreciate the court's patience in this matter. And the
18 trial took longer than we anticipated last week.

19 Your Honor, our position in the matter is the, and I
20 am relying to a large extent on the Danes/Vincent case, is
21 that the Bill of Sale in this case is an integrated agreement
22 as it is a final expression of the parties' agreement to
23 disposition of their personal property. So, we believe the
24 Bill of Sale dated April 16, 2008, the date of closing, is
25 the final expression of these parties' agreement and is, has

1 been referred to in cases as an integrated agreement.

2 The warranty deed, we believe, is an integrated
3 document and is the final expression of the parties'
4 conveyance of the real property, the 2 acres. The Uniform
5 Real Estate Contract talks about 2 acres, but it does not
6 specify the legal description. The deed and the Bill of
7 Sale, Your Honor, I think, merge this real estate purchase
8 contract into these two final documents commonly referred to
9 in cases now as integrated agreements or integrated
10 documents: The warranty deed as it relates to the real
11 property, the Bill of Sale as it relates to the personal
12 property.

13 The Bill of Sale relating to the loafing sheds, to the
14 horse walker and to the panels, Your Honor, is clear. It is
15 not ambiguous. There is no facial ambiguity. There is no
16 ambiguity as to the intent of the parties. The Bill of Sale
17 dated April 16 states that Marlene Stone, as seller, is
18 conveying and selling to Richard and Judy Flint, the buyers,
19 that certain personal property now at 6006 South 7100 West in
20 Hooper, Weber County, state of Utah, particularly described as
21 follows. Oven, range, refrigerator, window covering, two water
22 irrigation shares, all lounging, loafing sheds, panels, gates,
23 feeders, waterers and horse walker as presently exist."

24 The key language here, Your Honor, to my way of
25 thinking, is that certain personal property now at that

1 address. It is clear she intended to sell the horse walker.
2 It's in the Bill of Sale. It is clear that she intended to
3 sell the lounging and loafing sheds and panels now at that
4 property. That property is described in the Bill of Sale as
5 that property located at the 6006 South 7100 West.

6 Mrs. Stone testified last week that her address is
7 5996 South 7100 West. The personal property located on her
8 property was never intended to be sold. The Bill of Sale is
9 the final document. The horse walker is listed in here.
10 Factually, the horse walker, as I recall the testimony, was
11 it somewhat straddles the property line. When the horses
12 walk around there, they not only walk on Mrs. Stone's
13 property, they will also walk on the Flints' property. So,
14 something, obviously, had to be done with the horse walker.

15 So, in this case, Mrs. Stone indicated and had in the
16 Bill of Sale of the property that she's conveying to the
17 Stones that it's on their property. That that is straddling
18 her property, were theirs. And that is the horse walker.
19 All of the panels, all of the gates, all of the sheds, all of
20 the waterers, feeders, that type of thing, all of that
21 personal property on her 15 acres stay with her. All of the
22 personal property on the other 2 acres was conveyed by this
23 Bill of Sale and by the warranty deed that the parties have
24 signed.

25 I don't know that there is a great deal of difference

1 in referring to the documents as integrated documents or that
2 the real estate purchase contract merged into the Bill of Sale
3 and as to the warranty deed. The real estate purchase
4 contract, Your Honor, consisted of four or five addendums. It
5 is obvious that that needs to be consolidated into one
6 document. And that was the final Bill of Sale executed on
7 April the 16 of 2008.

8 The real estate purchase contract also references that
9 items of personal property are going to be sold and conveyed
10 under a separate Bill of Sale. So, this real estate purchase
11 contract continue --

12 **THE COURT:** Where are you reading from?

13 **MR. NEELEY:** 1.1 of the Real Estate Purchase
14 Contract.

15 **THE COURT:** Okay. Yeah.

16 **MR. NEELEY:** Right above the handwritten language of
17 that.

18 **THE COURT:** Yeah, I see it.

19 **MR. NEELEY:** "Ovens, ranges, refrigerator, window
20 coverings as presently exist. The following items shall be
21 included in this sale and conveyed under separate bill of
22 sales with warranties as to title. Then, after that, Your
23 Honor, we have the addendums that talk about the loafing
24 sheds and panels and gates and feeders and so forth. So,
25 it's clear, Your Honor, that the real estate purchase

1 contract contemplated a final Bill of Sale. We have a final
2 Bill of Sale. Document refers to sheds and gates on that
3 2 acres. And it clearly conveys the horse walker as well.

4 The only other point, Your Honor, that we would make
5 is that under paragraph 17 of the confidential general
6 release and settlement agreement, the parties could ask for
7 attorney fees in this case. I have prepared an affidavit.
8 We have expended 12 hours in this case. I got in late in
9 this case. I have expended 12 hours. I typically charge
10 \$200 per hour. And Mrs. Stone's attorney fees are \$2,400 in
11 this case plus costs. And I believe it's an appropriate case
12 to award attorney fees in this matter, Your Honor. Thank
13 you.

14 **THE COURT:** Thank you. Mr. Stevenson, you may
15 respond.

16 **MR. STEVENSON:** I'm sure Your Honor must be tired of
17 hearing the same issues.

18 **THE COURT:** That's okay. I want to make sure I
19 understand everything the way I should. That's why I'm
20 asking questions. That's why I'm giving you every
21 opportunity as well as Mr. Neeley that same opportunity.

22 **MR. STEVENSON:** Great. Thank you, Your Honor.

23 Mr. Neeley said this is integrated, it's an integrated
24 matter in which the REPC, the addendums, and the Bill of Sale
25 are all integrated to a final document, deed of trust, and said

1 that merger is applicable in this case.

2 Now, Your Honor, under the case I referred to
3 earlier, which is Spears vs. Warr, said that merger is not
4 applicable where there is ambiguity in the final documents or
5 where there is the existence of rights which are collateral.
6 In this case, Your Honor, I would assert that there are two
7 issues which are ambiguous in the final Bill of Sale. First,
8 is the word "all." There is no question it says all. What
9 does all mean? Is it all encompassing? In this case, it can
10 either mean three or six sheds. It can mean three or 30
11 panels, gates and other temporary gates -- and other
12 temporary gates. The question becomes -- or, I guess, the
13 second issue, Your Honor, that is ambiguous, first, is the
14 word "all."

15 The second thing is under the final Bill of Sale, it
16 says, "that certain personal property now at 6006 South 7100
17 West in Hooper, Utah." That certain property now. If we
18 look at that, that means the court can either interpret that
19 as meaning it's all the property that's as currently defined
20 at that residence and for you the final closing documents.
21 If that's the case, the horse walker and at least two feeders
22 are not going to be included. There is also some dispute
23 about there was at least one panel or gate that was between
24 the two properties. So, that certain personal property is
25 certainly ambiguous with regard to those items that are not

1 on that certain property. They certainly aren't now part of
2 that property.

3 So, the question is, if Marlene Stone intended I'm
4 going to sell just this item, just the horse walker and none
5 other, then her testimony would have been we had a bargain
6 for exchange on that item. That was not the case. What was
7 the case in the original REPC was the word "all." And it
8 intended to include all the matters. You know, her original
9 statement was, "it all goes." The way the evidence shows
10 that these items were discussed, and she said it all goes.
11 And so, Your Honor, we would ask you to find that there is
12 ambiguity in the final documents under the standards set
13 forth in Spears vs. Warr and as further defined by Flores vs.
14 Earnshaw.

15 And, finally, Your Honor, we also pointed out in our
16 direct that Section 17 of the REPC allows for attorney's
17 fees. If Your Honor would like, depending on the ruling, I
18 would, of course, put together an application for that at the
19 time of costs within five days of the ruling. My fees are
20 150 an hour, Your Honor. Still haven't figured out how many
21 hours we put in to date, but we'll do that with our costs
22 breakdown if Your Honor goes in case for the defendants and
23 counter-plaintiffs.

24 **THE COURT:** All right. Thank you very much.

25 **MR. STEVENSON:** Thank you, Your Honor.

1 **THE COURT:** Let me tell you folks what I have done.
2 I have -- I started outlining just some major points that I
3 wanted to give to you, because I anticipated that I would,
4 after hearing argument, render a decision from the bench.
5 The more I began working it through the intricate factual
6 aspects of this, and then later trying to relate it to the
7 case law that I believe is controlling in this case, it
8 became clear to me that I would do a disservice to you as
9 well as to the court if I tried to do this orally. And that,
10 I think -- so earlier today I began writing my decision. And
11 it's mostly written. I don't know that I'll finish it today.
12 But I will finish it tomorrow. And you'll have my decision
13 in the mail tomorrow on this case. Okay?

14 **MR. STEVENSON:** Okay.

15 **THE COURT:** But I think it will be better if it's
16 written out so that you can thoughtfully read it and
17 understand my analysis of the case. All right. Well, thank
18 you very much, folks.

19 **MR. STEVENSON:** Thank you, Your Honor.

20 **MR. NEELEY:** Thank you.
21
22
23
24
25

1 Q Or arms that go around in a circle. And you exercise
2 the horse that way?

3 A Yes.

4 Q Would it be fair to say that the horse being
5 exercised by this horse walker be partly on Marlene's
6 property and partly on yours?

7 A It would have been where it was, correct.

8 **MR. NEELEY:** That's all.

9 **MR. STEVENSON:** Your Honor, I believe while he's
10 still there, I neglected to add that to the record, would
11 like to offer the settlement agreement as part of the record
12 in this case.

13 **THE COURT:** That's received.

14 **MR. NEELEY:** I think it's already in the file, judge.
15 And I have no objection to it.

16 **THE COURT:** Okay. It's received as an exhibit in
17 this trial. Thank you.

18 (Defendant's Exhibit No. 7

19 was received into evidence.)

20 **MR. STEVENSON:** All right.

21 **THE COURT:** All right. Thank you. You may step
22 down.

23 Call your next witness, please.

24 **MR. STEVENSON:** Next witness will be Jeff Harris.
25

1 JEFFREY DEAN HARRIS,
2 called by DEFENDANT, having been duly
3 sworn, was examined and testifies as follows:

4 DIRECT EXAMINATION

5 **BY MR. STEVENSON:**

6 Q Have a seat up here. Mr. Harris, would you please
7 state your full name for the record.

8 A Jeffrey Dean Harris.

9 Q Great. Mr. Harris, we appreciate your patience in
10 waiting so long to come in and speak. I'll try to make these
11 questions fairly short and to the point. Do you -- are you
12 aware or ever been out to a home located at 6006 South 7100
13 West in Hooper?

14 A Yes.

15 Q Okay. On what occasion brought you to that home?

16 A We went out to look at it. We were looking at a
17 house to buy.

18 Q When you say we, who were you with?

19 A My wife Vickie.

20 Q Okay. Did you have a real estate agent that was
21 helping you look?

22 A Yes. We had Judy Webben from Coldwell Bankers.

23 Q And were you looking at the home in response to an
24 MLS listing for the home? Let me ask you, how did you hear
25 about the home?

1 A I think we saw it on the computer or something. We
2 drove by. And it had flyers in the front yard. We picked up
3 a flyer, then we set up an appointment to go look at it.

4 Q All right. At any point, did you meet with the
5 plaintiff in this action, Marlene Stone?

6 A Yes.

7 Q Okay. Did you -- did you meet with her on one of the
8 meetings in which you were going to look at the home?

9 A What's that?

10 Q Did you meet with Marlene Stone when you looked at
11 the home?

12 A Yes.

13 Q And what was the size of the property that you were
14 considering buying?

15 A We were looking at the 2 acres.

16 Q Okay. And, in your discussions with Miss Stone about
17 what personal property was included in the 2 acres that you
18 were potentially buying, what did she state was the personal
19 property that was included with that purchase?

20 **MR. NEELEY:** Your Honor, I'm going to object on the
21 grounds of hearsay unless he has some type of Real Estate
22 Purchase Contract or something in writing. And I think it's
23 being offered for the truth of the matter asserted. I think
24 it's clearly hearsay. And I would object to that.

25 **MR. STEVENSON:** Your Honor, this is a party

1 opponent -- I mean, admission. This is a party to this
2 litigation. Not only does it establish her own statements --

3 **THE COURT:** But they are statements, even assuming
4 they were true, they were statements made to him. They were
5 not statements made surrounding this transaction, correct?

6 **MR. STEVENSON:** They were -- he hasn't testified that
7 it has to do with this transaction.

8 **THE COURT:** Then what would be the relevance?

9 **MR. STEVENSON:** Well, it's material, goes to the
10 plaintiff's state of mind.

11 **THE COURT:** Not necessarily. The best you could
12 argue, counsel, would be her state of mind as he may be -- as
13 she may have been negotiating with Mr. Harrison. But it
14 doesn't necessarily state what her state of mind was when she
15 dealt with the defendants in this case. And that's what's at
16 issue before this court.

17 **MR. STEVENSON:** Well, then, Your Honor, I think it
18 would also show a plan, scheme that showed what her intent
19 and plan was concerning this property, and would probably
20 show what her, certainly what her intent and plan was
21 concerning the property, her motive.

22 **THE COURT:** Let me just ask. We know that there was
23 a multiple listing and that there were three options. One
24 was for the sale of the whole 17 acres. Another option was
25 to sell 2 acres, another option to sell 1 acre. And he's

1 testified. I assume he can testify about that because he saw
2 the multiple listing on the computer just as anybody else was
3 interested in the property. But, beyond that, what can he
4 say that would be, that would be a fact in this case?

5 **MR. STEVENSON:** Well, Your Honor, I believe he's
6 already testified that it was the 2 acres that he was looking
7 at.

8 **THE COURT:** Okay.

9 **MR. STEVENSON:** So, that's -- I think that's already
10 been established. The question is whether or not he has
11 information that would be relevant to what her plan was for
12 the sale and whether she had, you know, what her motive was
13 in selling the entire property, what she stated to him it
14 was. When I say selling the personal property, whether she
15 was selling all of that. It certainly goes to --

16 **THE COURT:** Well, it's clearly hearsay. So, point to
17 me an exception that would allow it to come in.

18 **MR. STEVENSON:** Well, I think as I mentioned before,
19 I think it would go --

20 **THE COURT:** Give me a rule, counsel.

21 **MR. STEVENSON:** Under Section 803, Your Honor, for
22 one thing, I think it would go towards --

23 **THE COURT:** 803.

24 **MR. STEVENSON:** 803-3 would go towards the existing
25 mental, emotional or physical condition. I think that would

1 go towards the, you know, the state of mind of him of
2 knowing, knowing what the property was that was being offered
3 as part of it. It would go towards her plan in terms of what
4 she intended on the MLS listing to sell.

5 **THE COURT:** Well, first of all, let's go to Rule 803.
6 Okay. Now, what subpart?

7 **MR. STEVENSON:** Well, I would say, first, under
8 number three and also under 801(d)(2), but we'll get to that
9 one. Under 803-3, a statement of the declarant's then
10 existing state of mind can certainly be an exception to the
11 rule. The question here is whether declarant's state of mind
12 was to include all of this personal property or not. And
13 that's certainly at issue in this case.

14 **MR. NEELEY:** And, Your Honor, my response is if there
15 was a conversation to that effect it was with this gentleman
16 on a different day, different time, and it's not material or
17 relevant to the Flints' case.

18 **THE COURT:** I'm going to sustain the objection on
19 that basis. I mean, people can make different offers to
20 different people. But it doesn't mean that on one day
21 because she makes an offer to him that it's the same offer
22 that she made to him. In fact, isn't it the best evidence as
23 to what Mr. Flint -- he's already testified of what her
24 agreement was with him. So, are you -- you are trying to
25 have this gentleman testify about what she may have said to

1 him and have it contradict what Mr. Flint said?

2 **MR. STEVENSON:** Well, what -- I'm not trying to make
3 contradict at all what Mr. Flint says.

4 **THE COURT:** But hasn't Mr. Flint testified, counsel?

5 **MR. STEVENSON:** He has, Your Honor.

6 **THE COURT:** And what did he say?

7 **MR. STEVENSON:** Well, he's already stated that all of
8 the personal property was included.

9 **THE COURT:** Well, counsel, that's not what his
10 testimony was. The testimony that I recall, and you can
11 correct me, the testimony that I heard was when he came out
12 there, and counsel, you asked the question -- or, no, Mr.
13 Neeley asked the question -- that she wanted to sell all of
14 the 17 acres and all the property because she didn't want to
15 have the responsibility of managing any of it further. Is
16 that a fair statement?

17 **MR. STEVENSON:** Yes.

18 **THE COURT:** Okay. Then Mr. Neeley asked the
19 question, did you have any conversation with her on or about
20 February 1st regarding any of the sheds on the 66 foot
21 right-of-way? He said, no, he didn't recall any conversation
22 about any of the sheds on the 66 foot right-of-way. His
23 testimony is he assumed that it went because she had made a
24 general statement in relation to the 17 acres that she wished
25 to get rid of all of the sheds. Is that a fair statement?

1 **MR. STEVENSON:** I think, Your Honor, I'm not real
2 sure about the timing in terms of when he found out about the
3 60 acres. I don't know if that was even at issue. I don't
4 think they even knew which 60 acres she might be considering
5 at that time. But I won't go back and --

6 **THE COURT:** Well, I marked it at 3:05 when he gave
7 that testimony. The testimony was, and Mr. Neeley asked her,
8 and this was the latter part of February, they had a
9 conversation out in the horse barn. And Mr. Neeley's
10 question was, did you recall, have any discussion about the
11 sheds on the 66 foot right-of-way? And he said he doesn't
12 recall any discussion about the sheds on the 66 foot
13 right-of-way. He just assumed that those sheds went with the
14 property because she had talked about selling all of the
15 17 acres and getting rid of the sheds because she couldn't
16 manage the property anymore. That was his testimony.

17 And I guess -- and I just think it's kind of a
18 stretch to bring in what somebody else, his conversations
19 with her on another day and have it somehow be binding in
20 another contract with another party. I'm straining to see
21 the relevance of that. I mean, I understand what you are
22 trying to accomplish, but you would be asking -- even if he
23 said something that you want him to say, would that
24 contradict what your own client has testified in this case
25 about?

1 **MR. STEVENSON:** No, Your Honor. I think my client
2 and Mr. Adair have both testified that the parties resolved
3 that the property would be purchased was 2 acres.

4 **THE COURT:** Okay.

5 **MR. STEVENSON:** Okay? And then the discussion that's
6 already been testified to about what was included, there was
7 the generalized statement that you have already referenced
8 to. And if that is indeed the case, trying to establish
9 whether that was her plan, her scheme, her intent, is that
10 what she intended to sell? This gentleman knows what she
11 told him about the same 2 acres and what personal property
12 was included to the extent he can provide value to the court
13 in saying what one of the parties has stated, I think that
14 would help the court.

15 **THE COURT:** Anything else you wanted to say, counsel,
16 or Mr. Neeley before --

17 **MR. STEVENSON:** Yes. I guess the other thing under
18 Rule 807, statements that are offered as evidence of a
19 material fact, I would say also that this is material fact at
20 question here, is whether or not the property, the personal
21 property that the plaintiff disputes, that is a material fact
22 in this case. That under Rule 807 and also under, I guess --
23 again, I would say this is a party opponent admission. I
24 know that under 801(d)(2), it should be an admission by a
25 party opponent the state has offered against the party. And

1 the parties' own statements, in either individual or
2 representative capacity, it seems I'm not sure why Your Honor
3 would exclude it as a party opponent admission either. I'm
4 certainly, I can call him on cross to -- or on rebuttal -- to
5 show that she had stated something different than what she
6 had said. And that is her impeachment.

7 **THE COURT:** Is this something different about her
8 transaction with Mr. Flint or is it just a statement that she
9 made to a third person relative to a prospective contract?

10 **MR. STEVENSON:** It would just show the consistency
11 for the 2 acres that was offered. She was also offering the
12 personal property that my client's claim was offered.

13 **THE COURT:** Anything else, Mr. Neeley?

14 **MR. NEELEY:** Your Honor, they are entirely two
15 different dates, two different situations, two different
16 parties. I don't see the connection between the two. But if
17 she ever said anything to him, it would not be relevant to
18 the case at hand where we have his testimony and his written
19 contract. That's what is important in the case. There is no
20 causal connection between these two parties.

21 **THE COURT:** I'm going to sustain that, the objection.
22 It's -- I understand, and I respect what you are trying to
23 accomplish, but we have two different dates, we have two
24 different prospective buyers. And the person could make an
25 offer to one person and days later even reconsider. See, I

1 don't know that I want to do that. And just because she
2 makes an offer, even assuming the best scenario for your
3 client, best evidence, that he made -- she made an offer to
4 him, and then days later made a different offer to your
5 client, doesn't necessarily mean that the offer she made to
6 him is the same one she made him. People change their minds.
7 And I just don't think it's relevant.

8 I think what this court has to do in fairness to both
9 parties say, what did these parties discuss, and then what
10 did they finally agree in writing, and not what conversations
11 may have occurred on another date with other people. I mean,
12 if in fact your approach was that the plaintiff in this case
13 told this gentleman, you know, I told Mr. Flint this, then
14 that would be an admission against interest. If she said
15 something that she's now denying in this trial, and Mr. Flint
16 is contending that it occurred, and she told him, then it
17 would be very relevant, because it would be an admission
18 against interest.

19 But the fact that she makes a different offer to a
20 different person on a different day can't be controlling in
21 this case. Just can't. So, I'm going to sustain that
22 objection.

23 **MR. STEVENSON:** All right. Thank you, Your Honor.

24 You can step down. And you and your wife are free to
25 go.

1 Q Okay. In your experience, what was the condition
2 of these loafing sheds?

3 A They were in fair condition.

4 Q Okay. Are they movable?

5 A Yes.

6 Q Now, how about the panels and gates? Are they -- in
7 your experience, have you sold these as part of some of your
8 real estate sales?

9 A I have.

10 Q Okay. What's the value of these new?

11 A New, depending on the brand, they range from a
12 hundred to \$150 apiece for like a 12 foot, 14 foot panel.

13 Q What have you sold used panels for?

14 A \$50 up to 65.

15 Q Okay. Would you turn back to the real estate --
16 well, let's turn back to the Bill of Sale. I'm sorry. It
17 says on here, "all lounging and loafing sheds, panels, gates,
18 feeders, waterers and horse walker as presently exist." Was
19 the horse walker on Miss Stone's property after the
20 boundaries were changed?

21 A Yes, it was.

22 Q So, it wasn't on the Flints' property at all?

23 A Never.

24 Q To your knowledge, were some of the feeders, one or
25 more of the feeders on Miss Stone's property?

1 A Yes.

2 Q Were there any other items that were actually on Miss
3 Stone's property at the time that the Flints purchased the
4 2 acres?

5 A I'm sure there was some panels and gates.

6 Q Okay. In your mind, from the language of the Bill of
7 Sale and the REPC, were the Flints entitled to immediate
8 possession of those, that property, of the -- let me specify
9 which property I'm talking about -- of the sheds which are
10 shown as A, B, and C on the map? Let me ask you first that
11 question. Were they entitled to immediate possession based
12 on the REPC and the Bill of Sale for the sheds at A, B and C?

13 A Yes.

14 Q Okay. What about the panels, any of the movable
15 panels that were on Miss Flints -- on Miss Stone's property?

16 A Yes. They were all present.

17 Q Okay. Do you have any, any experience, either in
18 selling real estate or personally, in which you had to
19 install any of these sheds, where you had to install them?

20 A I haven't had to install them, no.

21 **MR. STEVENSON:** Okay. No further questions for this
22 witness.

23 **THE COURT:** All right. Thank you.

24 CROSS-EXAMINATION

25

1 the winter, it was a good situation to work out, because now
2 we had loafing sheds for the horses, a hay barn with stalls,
3 and now a pasture to turn them out in and, also, two other
4 properties that we could make hay for them in the winter.

5 Q Okay. And let me ask you about the discussion that
6 you had when you talked about what items were on her property
7 were going to be included in the sale. Tell me about that
8 discussion. And, first, tell me approximately when did it
9 happen, to the best of your recollection.

10 A First part of February. And we had driven by and
11 seen it, me and Judy. And then we called -- we had an
12 appointment to meet with her, I think, around 1 o'clock or
13 two, or something like that in the afternoon. Me and Judy
14 had drove down by it and seen it. And so, we thought, well,
15 now that we are already here maybe we can just see if we
16 could look at it now. And so, we called Joe. And Joe called
17 Marlene. And she says, no, you'll have to come at the time
18 that you have already scheduled. So, then me and Judy just
19 drove around and went back up and talked to Joe for a while
20 until the time came. And then we came back to that
21 appointment time and met with Marlene.

22 And she took us through the house and showed us all
23 the house and upstairs, all the room. Then from her bedroom,
24 master bedroom you can look out the window and see the whole
25 property and the pastures and everything. And that's when we

1 started talking about the 2 acres or the whole acres, or 1
2 acre or the whole thing. And I says, if I had the money I
3 would like it all. But until I win the lottery I'll have to
4 settle for what I can afford. So, she mentioned the 1 acre
5 with some of the items or 2 acres with everything. And we
6 says, well, we would like to get the 2 acres. And then it
7 was after that that she mentioned about the road and that she
8 would have to put in a 60 foot right-of-way. At the time I
9 looked at it I was thinking that the whole 2 acres was
10 actually covering everything, you know. And so, when she
11 says about taking out the 60 feet, I wasn't sure at first
12 what side she was talking about. But then I thought, well,
13 if she took it off the other side that would do away with the
14 driveway and that. That wouldn't work. But I didn't really
15 picture where it was going to be until they come out and
16 surveyed and pounded the stakes in. Then that, of course,
17 presented a different illusion in my mind as to what
18 everything was.

19 But we did talk about like Joe mentioned. She -- she
20 had lost her husband. They had been quite tied up with the
21 horse business that they had had and hadn't really had time
22 to get away and do anything as far as vacations and things.
23 And she says that she just wanted to get rid of everything.
24 She was going to move. And she had sold her tractor, or
25 going to. And she had already sold her baler and swather and

1 a few things. And we ended up buying a harrow from her and a
2 spring tooth that we bought off of her.

3 Q Okay.

4 A And she told us that everything that was there was
5 there. There's a little trailer that goes with a, like a
6 lawnmower, riding lawnmower or four-wheeler that was left out
7 there on the side property out by the front of the road
8 that's still sitting there. She says that come with it.
9 There is the troughs. There were several troughs, several
10 feeders. And she just says everything went. She said, I
11 don't want anything. In fact, everything that was in the
12 barn. She says, I don't care about the feeders. There was
13 an electric water heater and a calf delivery for pulling a
14 calf out of a cow that was in there that later come up
15 missing. And I had mentioned that to her. But where they
16 went, we didn't know.

17 A time or two we had driven down the far road to the
18 north. And we could see the barn door was open. And when we
19 had been there to look at it, it was always closed. So, I
20 don't know if someone else was there or what. But everything
21 else was left there. There was even a garbage can full of
22 stuff that had old halters and different things in that's
23 still sitting there now. And nobody took anything other than
24 those two items that disappeared.

25 Q Let me ask you: Looking back at this Addendum 1, we

1 talked about the loafing sheds. It says, panels, gates. Can
2 you tell me how many? From your knowledge now of where the
3 survey shows the lines are on Plaintiff's Exhibit 1, have you
4 counted the number of panels, you know, mobile panels? Have
5 you counted how many are on your property and how many are on
6 Miss Stone's property?

7 A If you look at the top picture on this here, there is
8 the two panels in front of the shed.

9 **THE COURT:** Are we talking about Exhibit 3, for the
10 record?

11 **THE WITNESS:** Yeah.

12 **MR. STEVENSON:** Yes.

13 **THE WITNESS:** She has dismantled them and leaned them
14 up against that shed there so that she could drive through on
15 that 60 feet. And so, there's two there. And then, there's
16 two others that are the galvanized panels that are further up
17 along that 60 foot right-of-way. So, there is four of the 16
18 foot panels. And then, as you get up there by --

19 **THE COURT:** You just asked a question about this 60
20 foot right-of-way. Did she, at the time, indicating that she
21 was going to be keeping some of that property because you
22 were only going to be buying 2 acres, did she in any hand
23 gestures or discussions about the property in terms of
24 monuments or marks, approximate where this right-of-way would
25 occur?

1 A That's on her property. Then there is 11 more
2 galvanized panels that existed here on where item "C" is
3 right there. That loafing shed there, there was a corral
4 there with those gates. And then over here by the where the
5 horse walker was, there is some panel there. And I counted
6 to the best that I could see around 11 more panels. And then
7 there is two gates, walk-through gates that are included in
8 those panels.

9 Q Okay. Now, let me have you turn to what's been shown
10 as the, I guess, Defendant's Exhibit No. 3, which is the Bill
11 of Sale. Should be to your left on the top of the -- just
12 further to your left there.

13 A Oh, right here? Okay.

14 Q I think it's under the picture you just put there.

15 A Oh.

16 Q Here it is. Yeah.

17 A Okay.

18 Q Okay. Under the Bill of Sale, the bottom of the
19 first paragraph, these are the items that were included in
20 the Bill of Sale. And I want you to go through and tell me
21 if any of these, which ones are disputed. All right. Oven,
22 range. Is there any dispute as far as you know concerning
23 the oven and range?

24 A No.

25 Q All right. Refrigerator?

1 A No.

2 Q Window covering?

3 A Um, no.

4 Q All right. Two water irrigation shares?

5 A No.

6 Q We have talked about the loafing sheds -- lounge and
7 loafing sheds. There is, I think you said, that there is --
8 now let me ask you this: Which loafing sheds are in dispute
9 and when did they first become in dispute?

10 A A, B, and C is what is the issue on the loafing sheds
11 right now.

12 Q All right. Now, tell me to your best knowledge, when
13 did that first become in dispute? When did those loafing
14 sheds first come into dispute?

15 A After she revoked the lease on the 15 acres, then she
16 says I'm taking everything back. So, she took the pastures
17 back. We had to have our horses off the property by the 1st
18 of January. And then, at that point, she started talking
19 "this is my side and this is your side." And I said
20 something about the panels.

21 And she says, No. Them are not your panels.

22 I says, They certainly are. I says, We agreed to all
23 of that.

24 And she says, Why would you think they would be yours
25 if they are on my ground?

1 And I said, Well, when we talked about it, it wasn't
2 necessarily on your ground because at that time it hadn't
3 been surveyed.

4 Q Okay. And did you have any other discussions about
5 anything else that was on her ground or your ground?

6 A No. She told me that she didn't care about the horse
7 walker. That if I wanted it I could have that. But I had to
8 have that off by the 1st of February.

9 Q All right. Let me keep having you take a look at the
10 Bill of Sale some more. It says -- we talked about the
11 panels and the gates. How many gates are in dispute, and are
12 they in dispute?

13 A Well, there would be four, going up the north side,
14 then two over by this shed, the wooden shed, item "E" on that
15 fence line. East fence line, there is two gates there.

16 Q Okay. And are those mobile gates?

17 A Yes.

18 Q Okay. So, you could use those to corral your
19 animals?

20 A I could, yeah.

21 Q Now, feeders. Were there any disputes about any
22 feeders?

23 A Not to my knowledge.

24 Q Okay. When you purchased the property, or let's say
25 at the time of the Bill of Sale, when you obtained possession

1 of the property, were some of the feeders on her side of the
2 property?

3 A There was a couple of metal ones.

4 Q Okay. And did she dispute whether those feeders were
5 her's?

6 A Um-hmm.

7 Q Okay. Has there been a lawsuit concerning the
8 possession of those feeders?

9 A No.

10 Q All right. Next, the waterers. Is there any dispute
11 on any of the waterers?

12 A Not that I know of.

13 Q Okay. The horse walker. Is there a dispute on the
14 horse walker?

15 A Not any longer. Like I say, she told me that I could
16 have that. And I says, Well, I thought it was mine anyway.
17 But she says, I want it off my property.

18 Q Okay. And so, the horse walker, she didn't bring any
19 sort of suit to claim that that was her's, correct?

20 A No.

21 Q All right. She didn't dispute the horse walker?

22 A Other than I had to have it moved by the 1st of
23 February.

24 Q Okay. So, under this Bill of Sale, it says all
25 loafing -- all lounging and loafing sheds. So, let me just

1 make sure I clarify for the court what the dispute in your
2 understanding is, is that for the loafing sheds there is
3 three sheds in dispute, which are A, B, and C, correct?

4 A (No audible answer.)

5 Q There are panels which I believe you said that there
6 is four 16 foot panels and eleven 10 foot panels in dispute?

7 A Right. That are galvanized.

8 Q Those are the mobile panels?

9 A Yes.

10 Q Then you said there was some -- two gates?

11 A Four.

12 Q Four mobile gates?

13 A Yeah.

14 Q Okay. And the feeders that were on her property and
15 the horse walker, those haven't been in dispute?

16 A No.

17 Q Okay. Let me ask you to look at the picture. There
18 is the two pictures that you identified which are labeled as
19 Defendant's Exhibit 3, which is --

20 A This one?

21 Q Yeah, that. Are the pictures of the panels -- I know
22 the court, I believe they asked you if those are the panels.
23 Are these the 4 foot -- I mean, the 16 foot panels or the 10
24 foot panels?

25 A Them are the 16.

1 Q Okay. Are the 10 foot panels similar in nature to
2 those?

3 A Yes. Only just smaller. Then there is clamps that
4 you can clamp them together. You put two clamps on each
5 section, so you got two up and two bottom that you put them
6 together. Then you put a bolt through the middle. And
7 that's what holds them together.

8 MR. STEVENSON: Okay. Your Honor, I would like to
9 move to have Exhibit 3, Defendant's Exhibit 3 moved into
10 evidence.

11 MR. NEELEY: I have no objection.

12 THE COURT: It's received.

13 (Defendant's Exhibit No. 3

14 was received into evidence.)

15 MR. STEVENSON: Thank you, Your Honor.

16 BY MR. STEVENSON:

17 Q Now, you testified that Miss Stone now claimed that
18 the sheds were her's. And, approximately the time period,
19 let me ask you, were these --

20 THE COURT: Let me ask you. That isn't clear in my
21 mind. You mentioned January. Is this January of '08? Or
22 did I misunderstand you? When did you find out that the --

23 THE WITNESS: Yeah. It was January of -- no, of '09
24 when we had to have the horses off the property.

25 THE COURT: Well, that makes sense to me. This

1 **THE COURT:** Are you talking about the gates now?

2 **MR. STEVENSON:** These are the gates, yeah. I'm
3 sorry. That's confusing.

4 **BY MR. STEVENSON:**

5 Q Let me clarify again. This has to do with the
6 panels, the mobile panels that can be used to fence in
7 animals and other things, right?

8 A Right.

9 Q I believe your testimony was earlier that there was
10 eleven 10 foot and four 16 foot panels that are still on Miss
11 Stone's property that you claim are your property, correct?

12 A Yes.

13 Q All right. Looking at that sheet that's in front of
14 you, can you tell us what the new value of those panels is?

15 A Well, the new value would be 114.95.

16 Q Okay. Is that for the 10 foot or the 16 foot?

17 A That's for the 16 foot.

18 Q Okay. How about the 10 foot?

19 **THE COURT:** Give me the 16 foot again, cost of it.

20 **BY MR. STEVENSON:**

21 Q Thank you. Hear him?

22 A Pardon?

23 **THE COURT:** Give me the price again of the 16 foot
24 panel.

25 **THE WITNESS:** Okay. The 16 foot panels would be at

1 Q And do you know what that number is?

2 A Not right off. It would be 700 -- well, let's see.
3 Be 800 something.

4 Q Okay. Well, we can go through this summary here in a
5 minute.

6 But, Your Honor, I think just --

7 A I had that on the back of one of my papers, that I
8 wrote it on the back.

9 **MR. STEVENSON:** Your Honor, just take judicial notice
10 of what the 10, or, I guess 11 times 74.95 would be the value
11 of the new panels. Then seven times 16 would be the value of
12 the -- I mean --

13 **THE WITNESS:** Four times.

14 **MR. STEVENSON:** Four times -- four times, I guess
15 104.95 would be the value of the other panels.

16 **BY MR. STEVENSON:**

17 Q Now, you have testified that there is also 12 square,
18 I guess, panels. What are you talking about with those?

19 A Okay. These were panels that was there. Joe Adair
20 says that he thinks they were there when Nolan Kirtland had
21 his horses there on the place prior to Marlene and them
22 coming there. And they are a different type of gate. I have
23 never seen them sold anywhere. I don't know whether they
24 have been handmade or what. But they were on the northeast
25 corner of the shed and where the pigeon pen is.

1 exact date.

2 Q Okay. And do you recall having any other discussions
3 with Miss Stone after February 1st in which you discussed the
4 property prior to the closing date?

5 A You mean what went with the property?

6 Q Yes. What went with the property.

7 A We didn't really discuss anything other than -- and
8 I'm not sure that when we were in the barn looking -- she
9 took us to the barn to show us the water hookups and the
10 electrical hookups in the barn. I'm not sure if that was
11 before or after we signed the contract. But nothing was ever
12 said other than what we discussed in her bedroom in the
13 hallway on February 1st when we signed the papers then.

14 Q Okay. Now, I want you to focus in on that discussion
15 on February 1st. You said you had a discussion with her in
16 her bedroom or in the hallway. And tell me to your
17 recollection what was said.

18 A About what went with the property?

19 Q Yes.

20 A That it would include all of the loafing sheds, all
21 of the panels, the barn, the hay barn, that she no longer --
22 she had sold or eliminated all of her livestock. She no
23 longer had a use for it.

24 Q Okay. Did she talk about any of the waters or
25 feeders?

1 A Every -- all the waters, the feeders, the horse
2 walker. All of the horse equipment that would go with the
3 upkeep of horses. The controlling of where -- the
4 whereabouts of the horses.

5 Q Okay. Did she indicate at that time that she was
6 interested in developing the 15 acres behind your property?

7 A Yes.

8 Q Did she indicate what she was intending to do with
9 the 60 -- well, with the, I guess you said it was later you
10 found out that there was going to be a right-of-way?

11 A Right.

12 Q At the time you said on that date, though, she
13 discussed wanting to have a right-of-way?

14 A She discussed wanting to have a right-of-way.

15 Q Did she say what she wanted to put in the
16 right-of-way?

17 A She was going to develop that into a subdivision.
18 And she needed a right-of-way to get back to that.

19 Q Okay. And, at that time, tell me about anything that
20 you recall about her, the statements she stated. Do you
21 recall anything else about what she stated would come with
22 the property?

23 A Best of my knowledge is -- to the best that I
24 remember, she said if you bought the 2 acres it would include
25 all the loafing sheds, all the gates, all the panels, all the

1 waterers, all the feeders, the horse barn and the hay shed.

2 Q Okay. Now, in front of you is what's marked as
3 Defendant's Exhibit 3. And it's the Bill of Sale.

4 A Three?

5 Q I think it should be to your left. To your left.

6 A Yes.

7 Q The bottom paragraph -- well, let me ask you first:
8 Have you seen this document before?

9 A Yes.

10 Q Okay. Do you recall seeing it at the closing, of
11 when you had the closing on the home?

12 A Yes.

13 Q Okay. This document has been stipulated to by the
14 parties. If you'll look at the bottom of paragraph, bottom
15 sentence of the first paragraph, it says, "Particularly
16 described as follows:" And then it lists a number of things.
17 "Oven, range, refrigerator, window covering, two irrigation
18 shares, all loafing -- lounging and loafing sheds, panels
19 gates, feeders, waterers and horse walker as presently
20 exist." Is that the same understanding that you had on
21 February 1st when you spoke with her that this was the
22 personal property?

23 A Yes.

24 Q That was being sold with the real estate?

25 A Yes. With the 2 acres.

1 Q At that time -- when I say at that time, at the t
2 of the closing, did you already know where the property
3 boundaries were?

4 A When we signed the final closing?

5 Q Yes.

6 A After her surveyor?

7 Q Yes.

8 A Yes.

9 Q Okay. Of the items that are listed there under this
10 Bill of Sale, were any of these items on Miss Stone's
11 property at the date of closing?

12 A Yes.

13 Q Well, let me state it this way so I can be clear.
14 The date after closing, the date after you closed and you now
15 owned the property, which of these items were physically
16 located on Miss Stone's property?

17 A There was a double loafing shed, a single loafing
18 shed, and then a loafing shed that was, had a roof and two
19 sides. There was the horse walker. There were two metal
20 feeders. And I don't know how many panels and gates.

21 Q Okay. And, to your knowledge, has there been any
22 dispute about the feeders? Are you using all the feeders
23 that were on either her property or yours?

24 A Yes.

25 Q Okay. And the horse walker, that's been moved onto

1 your property, correct?

2 A Yes, it has.

3 Q All right. And when did you first learn that there
4 was a dispute about, that there was a dispute about the
5 contract?

6 A About these specific items? The --

7 Q Yes.

8 A It was when she told us she didn't want us leasing
9 her property anymore. She said that --

10 Q Let me ask you: Do you remember roughly when that
11 was when she said she didn't want you leasing the property
12 anymore?

13 A Verbally or in writing?

14 Q Well, how about first verbally?

15 A Verbally, it was about the 1st of August.

16 Q Okay. And then in writing?

17 A As near as I can recall, maybe the end of October.

18 Q Okay. And then is it your -- what did she say that
19 made you believe that some of these items were in dispute?

20 A The statement she made to me the first part of August
21 was -- I was out at the barn with my grandchildren. And she
22 drove out there and told me that she had heard that my
23 husband had been saying that the sheds belonged to us.

24 And I told her, Yes, that was my understanding.

25 And she said that they did not.

1 loafing sheds, panels, gates, feeders, waterers, and horse
2 walker as presently exist." Okay. That's your signature
3 down at the bottom, February 1st, '08, correct?

4 A Yes.

5 Q All right. On February 1st of 2008, did you intend
6 to include the horse walker?

7 A I can't remember. Let's see. I think I had talked
8 to my kids about that. And they said -- no. No, wait. I'm
9 wrong. Because Mr. Flint hadn't -- I had just decided maybe
10 I would just keep the horse walker, I think, until my kids
11 told me, mom, it's hooked to the barn. But in between there
12 Mr. Flint had made it known to me that he would really want
13 that horse walker.

14 Q Okay. I heard your prior testimony about him. You
15 claim that Mr. Flint said he really wanted the horse walker.
16 You were also asked earlier about any conversations about any
17 individual equipment out on your property. Were there
18 discussions on February 1st of 2008 with the Flints in the
19 presence of Joe Adair about the individual equipment that was
20 out on your property?

21 A No.

22 Q Okay. So, there was no, there was no discussion
23 about the individual equipment out there?

24 A No. Mr. Flint just said, Does this stuff stay? And
25 we were looking straight east from my bedroom.

1 Q Okay. But you are now saying that he also said
2 really wanted the horse walker?

3 A But not at that time.

4 Q Okay. When did he say that he really wanted the
5 horse walker? Was that after this date?

6 A Had to be, because that was the first time I met
7 them.

8 Q Okay. So, it had to be after February 1st, then?

9 A Yeah.

10 Q So, can we establish, at least, that on this date, on
11 February 1st, 2008, Mr. Flint had not yet told you he really
12 wanted the horse walker?

13 A Well, I didn't know he wanted the horse walker until
14 I seen it in his offer. And Mr. Adair had put it in there.
15 And I thought I didn't agree to sell that. But I talked to
16 my kids. And I did tell Mr. Flint that I would make it part
17 of the deal. Because of the wiring to the barn and the fact
18 that if he had a horse on there it would be walking partly on
19 his land and 66 -- because I knew where 66 feet was. I
20 didn't know where his corners were at that time, but I did
21 know I had to keep 66 feet. So, I measured over so I would
22 have some idea. And I knew for a fact that that horse
23 walker, if there was a horse on it, would be walking
24 partially on his property.

25 Q So, is it your testimony that you had already gone

1 out and measured the 66 feet before February 1st, 2008?

2 A I had measured that in the summer before that.
3 Because when I put it up for sale, I knew that if I couldn't
4 sell it all, and I was pretty sure I couldn't because no one
5 could afford it, that I would have to have a road. And I
6 went to the city and asked them what the requirements was.
7 And they told me. And so, I thought, okay. I had my
8 neighbor help me measure over so that I could have some idea
9 of where my land would end.

10 Q Okay. So, you -- at some point prior to February,
11 you already knew where that 66 feet landed?

12 A I did, yes.

13 Q All right. My next question is, when you saw this
14 Real Estate Purchase Contract, and it says all loafing,
15 lounging sheds, panels, gates, feeders, waterers, horse
16 walker as presently exist, did you ask at all either to your
17 real estate agent or to the Flints or Joe Adair, did you ask
18 what that constituted, what all lounging and loafing sheds
19 meant? Did you inquire as to what that meant?

20 A No, I did not.

21 Q Now, as presently exist. Let me ask you about that
22 statement.

23 A Okay.

24 Q As presently exist. At the time you didn't know
25 exactly where the boundary was going to be, did you?

1 because it gave me more room to spread out. But, yes, fr
2 the time we talked in her home that day and from what Joe
3 told us, yes, I figured everything that was there. She says
4 she wanted to get out of it, she didn't want nothing to do
5 with it, she was upset because her husband spent so much time
6 out there with them, she just wanted to get away.

7 **BY MR. STEVENSON:**

8 Q Okay. And her intention -- okay. Then the question
9 was asked you whether the horse walker was attached to your
10 land. Was the horse walker physically located on your
11 2 acres after closing?

12 A No. No.

13 Q Okay. Was there electrical wire coming from your
14 property to the horse walker?

15 A There was.

16 Q Okay. Tell me about this horse walker. Was this a
17 large structure?

18 A Pretty good size. It damn near filled this room.

19 Q Okay. What was the structure sitting on top of the
20 horse walker?

21 A Big cement slab.

22 Q Okay. Is the cement slab on your property?

23 A No. It's on her's.

24 Q So, from the time of the closing, what was your
25 understanding about whose property the horse walker was?

ADDENDUM E

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

MARLENE STONE,

Plaintiff,

vs.

RICHARD FLINT and JUDY FLINT,

Defendants.

MEMORANDUM DECISION

Judge Michael D. Lyon

Case No. 080907234

In this case, Defendants seek a determination, under their counterclaim, that they purchased from Plaintiff certain personal property as part of a real estate purchase transaction. All claims under Plaintiff's complaint were resolved through mediation, leaving only Defendants' claim. The parties tried this case without a jury on April 15 and 20, 2009. Following closing arguments, the Court took the matter under advisement for a review of the trial evidence and supporting exhibits. Based on the evidence and controlling law, the Court grants judgment in favor of Plaintiff, no cause of action on Defendants' counterclaim. The Court also awards Plaintiff a reasonable attorney fee for her defense of Defendants' counterclaim.

BACKGROUND

Plaintiff Marlene Stone owned real property known as 6006 S. 7100 W. in Hooper, Utah, consisting of approximately 17 acres. She listed the property for sale on the multiple listing service, giving prospective buyers three options: 1) purchase all 17 acres, 2) purchase two acres, or 3) purchase one acre.

Defendants Richard Flint and Judy Flint became interested in the property. They and their realtor, Joe Adair, met with the Plaintiff on February 1, 2008. During this initial meeting, Plaintiff explained that her husband had recently passed away, that she wanted to be relieved of the burden of managing the property by herself, and that she was interested in selling, preferably, all of her 17 acres, including the structures on the property. Mr. Flint inquired, "Does all of this stuff stay with the property?" Plaintiff replied affirmatively. Both parties seem in agreement that when Defendant asked his question, he was looking out of Plaintiff's bedroom window, facing to the east of Plaintiff's property, overlooking the hay barn, horse barn, and various items of personal property. For ease of description in this decision, the Court will refer to this personal property collectively as *structures*. These structures included mobile fencing, called panels; mobile gates that interfaces with the panels; open sheds, called loafing sheds, for animals that can be moved; and a horse walker.

Defendants expressed interest to Plaintiff, however, in purchasing only two acres, encompassing the home and the two barns. Plaintiff explained that if the Defendants wanted only two acres, the two acres would not include a strip of her property of approximately 66 feet in width, lying on the northern part of her property and extending eastward, because she needed an access to the remaining 15 acres; otherwise, she would essentially be landlocked. Plaintiff further explained that in order to sell the two acres the Defendants were interested in, encompassing the home and two barns, she would need to obtain a survey to partition this amount of real estate from the aggregate 17 acres because, at that time, the exact boundaries of the proposed two acres were undetermined.

After the parties discussed Defendants' interest in only two acres, no further discussion occurred regarding the structures, except regarding the horse walker, as discussed below. In point, the parties never addressed the structures or where they might be situated after the survey and partition of two acres from the remaining 15 acres.

Based on the discussions that occurred in Plaintiff's bedroom, the Defendants assumed that all structures on the entire 17 acres went with the two acres they were would eventually purchase because Plaintiff did not want to manage the property any more. Plaintiff, on the other hand, assumed that since the Defendants wanted less than the 17 acres, only the structures existing on the two acres would pass in the conveyance to the Defendants; she would keep the structures situated on the remaining 15 acres.

Later that same day, February 1, 2008, Mr. Adair, Defendants' realtor, prepared and presented to Plaintiff a real estate purchase contract (hereafter "REPC"). The first addendum to the REPC provided that Plaintiff would have the property surveyed and the four corners staked to Defendants' satisfaction prior to closing of the sale. The first addendum also listed the structures included in the sale: "All lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist."

When the Defendants presented the REPC through Mr. Adair, she told him that, if they wanted the horse walker, the Defendants would need to move it completely on to the two acres. As of February 1, 2008, the base of the horse walker was situated on the eventual ground that was part of the 66-foot-wide access reserved by Plaintiff, although the arm of the horse walker rotated partially into the two acres the Defendants would purchase. Further, the electric motor

operating the horse walker was wired to the barn, also within the two acres that the Defendants were receiving as part of the two acres. Otherwise, Plaintiff accepted the Defendants' offer.

As the parties agreed, Plaintiff had the property surveyed and the four corners of the property staked just prior to the closing on the property on April 16, 2008. Defendants physically inspected the staked property they were to purchase and were satisfied with the boundaries. Even at this juncture of the parties' dealings, no further discussions occurred regarding the structures, as they may lie inside and outside the two acres.

The boundaries of the two acres Defendants purchased are defined by the pencil line on exhibit P1. On exhibit P1, north is to the top of the exhibit and west is to the left of the exhibit. The northern boundary of the two acres abuts the 66-foot-wide strip Plaintiff retained ownership in for access to the remaining 15 acres of her property. Included in the boundaries of the two acres are the home in the lower left-hand corner of the exhibit, the two barns identified with the letters G and H, and the structures defined with the letters F, D, and I. Excluded from the boundaries of the two acres, and appearing in Plaintiff's access, are three loafing sheds defined with letters A, B, and C. Structure A abuts the property line between Plaintiff's property and a third party neighbor. Structure E also remains on Plaintiff's remaining property that extends to the east.

In purchasing the home and the two acres, Defendants assumed the original address of 6006 S. 7100 W. in Hooper, Utah. Hooper City gave Plaintiff a new address for her remaining 15 acres, known as 5990 S. 7100 W., Hooper, Utah.

Contemporaneous with the closing on the real property, the title company prepared a bill

of sale that Plaintiff signed and Defendants accepted in the closing. The bill of sale transferred title to “that certain personal real property *now* at 6006 S. 7100 W., Hooper, Utah” (emphasis added). The bill of sale then enumerated the personal property specified in the first addendum to the REPC “as presently exist.”

Also contemporaneous with the closing, Plaintiff leased to Defendants the remaining 15 acres of her property to Defendants for one year. That lease was later broken in 2008, and the parties resolved their rights and liabilities under that lease through mediation after Plaintiff filed suit. Thus, those matters are not before the Court. Nonetheless, it is relevant in this proceeding that, as a result of friction between the parties stemming from Defendants’ use of the remaining 15 acres under the lease agreement, the parties realized that each side had a different interpretation of the REPC and bill of sale regarding the meaning of “all” of the structures. Defendants believed they had purchased all of the structures existing on the 17 acres, whereas Plaintiff believed she had sold only all of the structures on the two acres that she had conveyed to the Defendants.

ISSUES PRESENTED

This dispute in the interpretation of the REPC and the bill of sale is the crux of the lawsuit between the parties. Defendants contend that the language of the REPC and bill of sale gave them “*all* lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist,” both on the two acres they had purchased and on the 15 acres retained by the Plaintiff. On the other hand, Plaintiff argues that Defendants received only the structures on the property they purchased. At issue is whether the word *all*, as used in the REPC and bill of sale, is

ambiguous. The Court holds that it is not ambiguous.

ANALYSIS

Contractual ambiguity may occur in two contexts: “(1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties.” *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269, 1276. The Utah Supreme Court went on to further clarify: “The first context presents a question of law to be determined by the judge. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, parol evidence of the parties’ intentions should be admitted.” *Id.* However, “before permitting recourse to parol evidence, a court must make a determination of facial ambiguity.” *Id.* In other words, extrinsic evidence offered to show that an ambiguity exists does not “trump ‘the language of the contract.’” *Flores v. Earnshaw*, 2009 UT App 90, ¶ 10, quoting *Daines*, 2008 UT APP 51 at ¶27, 190 P.3d at 1276. In short, unless the Court finds that the language of the REPC is ambiguous, it may not consider parol evidence, or the discussions of what occurred upstairs in Plaintiff’s bedroom concerning what personal property goes with the real estate conveyance. The contract controls the rights of the parties.

Thus, the first responsibility of this Court is to determine whether a facial ambiguity exists. The Utah Supreme Court clarified the procedure for determining whether a contract is facially ambiguous also in *Daines*, where the Court set forth a two-step analysis. First,

“when determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge’s own linguistic education and experience.” Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that “the

interpretations contended for are reasonably supported by the language of the contract.”

Id. at ¶ 26, 190 P.3d at 1276, quoting *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995). The Court later clarified that “we [do] not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit.” *Daines*, 2008 UT 51, at ¶ 27, 190 P.3d at 1276.

The Utah Court of Appeals applied these principles in *Flores*, 2009 UT App 90. In *Flores*, the parties entered into an agreement for the sale of a “yet-to-be-built condominium unit.” *Id.* at ¶ 1. Although the building itself did not yet exist, the parties used a standard real estate purchase contract (REPC) to accomplish the sale. Clause 1.1 of the REPC, entitled “Included Items” stated: “Unless excluded herein, this sale includes the following items *if presently owned and attached to the Property* . . .” *Id.* at ¶ 5 (emphasis added by *Flores* court). The trial court determined that the surrounding circumstances of the case, including the fact that the building had not yet been built, rendered clause 1.1 ambiguous. The court of appeals disagreed, holding that clause 1.1 was not facially ambiguous. *Id.* at ¶ 14. The court emphasized that “the enumerated items are included in the sale only if they were presently owned and attached to the Property.” *Id.* Since the building had not yet been constructed, “none of the items listed in clause 1.1 were owned and attached to the property at the time the REPC was executed[.]” *Id.* The court concluded that “based on the plain language of the REPC, the parties intended for the sale to convey only a ‘shell’ of [the unit].” *Id.*

The *Flores* case is factually similar to the present case. Plaintiff and Defendants have a

signed agreement identifying what is included in the sale. Clause 1.1 of their agreement is identical to clause 1.1 of the contract in *Flores*. It states that the listed items are included “if presently owned and attached to the Property.” The Court determines that, as in *Flores*, this provision is unambiguous and cannot be read to include any items that were not “presently owned and attached to the Property,” namely, the two acres Defendants purchased. The property included in the sale, identified as a pencil line on Plaintiff’s exhibit P1, includes the house, the two barns labeled G and H, and the structures labeled F, D, and I. It does not include the loafing sheds labeled A, B, and E, nor the panels or gates on most of the structure labeled C. Those structures are not “presently owned and attached to the Property” to be conveyed and, under the unambiguous terms of the contract, were not intended to be conveyed to Defendants.

Moreover, the bill of sale, which is the final, integrated expression of the parties’ intent concerning the transfer of personal property in this transaction, transferred only those items of personal property *presently* existing on the two acres conveyed or otherwise specifically identified, such as the horse walker. The bill of sale plainly states what Plaintiff sold to Defendants, namely, “that certain personal property *now* at 6006 S. 7100 W., Hooper, Utah, . . . , more particularly described as follows: oven/range, refrigerator, window coverings, 2 water irrigation shares, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.” (Emphasis added.) Consequently, the Defendants received only three loafing sheds on their newly acquired real property, not the other three remaining on Plaintiff’s property. Likewise, they received the panels and gates on their property, as well as the waterers and feeders on their property. While the base of the horse walker was on Plaintiff’s property, and

thus may technically be on her property, because it also rotated partially on Defendants' property and because the apparatus was wired to the barn, Plaintiff chose to allow them to have it, provided they moved it completely on to their property.

Plaintiff is entitled to a reasonable attorney fee for the successful defense of Defendants' counterclaim, as provided in paragraph 17 of the REPC. Accordingly, she may present her counsel's affidavit to the Court, sending also a copy to Defendants' counsel to give him an opportunity to object to the reasonableness of the fees. As counsel prepares the affidavit, the Court reminds the parties that reasonable attorney fees are not merely measured by what an attorney actually bills and the number of hours spent on the case. Rather, in determining fees, the Court should consider those factors addressed in case law, namely, what work was actually performed, the work reasonably necessary to adequately defend the matter, the attorney's billing rate and whether it is consistent with customary rates in the locality, and any other circumstances listed in the Code of Professional Responsibility. See *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988).

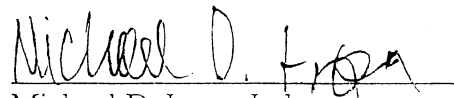
CONCLUSION

Notwithstanding the respective expectations or understandings of the parties arising from their discussions upon their initial meeting on February 1, 2008, the real estate purchase contract superceded all prior negotiations, representations, and understandings of the parties, as the clear language of paragraph 14 of the REPC provides. Moreover, the Court concludes, as a matter of law, that the REPC and the bill of sale governing the transfer of the personal property and structures are both unambiguous. Defendants are entitled to all structures that exist on the two

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acres at the time of the contract and at closing, unless otherwise expressly provided in the contract or bill of sale.

Dated this 21 day of April, 2009.

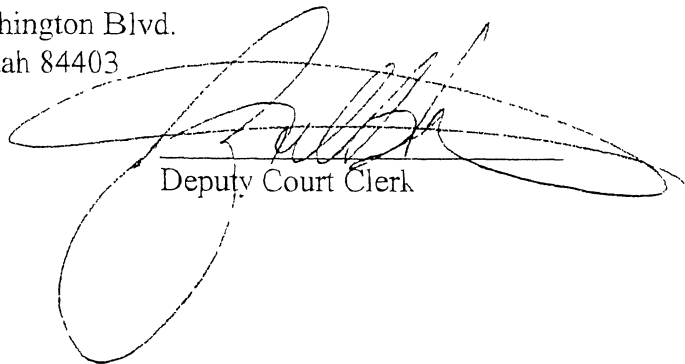

Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of April, 2009, I sent a true and correct copy of the foregoing ruling to counsel, as follows:

Robert L. Neeley
Attorney for Plaintiff
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

David B. Stevenson
Attorney for Defendants
3986 Washington Blvd.
Ogden, Utah 84403



Deputy Court Clerk

ADDENDUM F

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IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

MARLENE STONE,

Plaintiff,

vs.

RICHARD FLINT and JUDY FLINT,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 080907234

Judge: Michael D. Lyon

Non-jury trial in the above-entitled matter come on regularly for hearing before the above-entitled Court on April 15 and April 20, 2009. Plaintiff, Marlene Stone, was personally present and represented by her attorney, Robert L. Neeley, and Defendants, Richard Flint and Judy Flint, were personally present and represented by their attorney, David B. Stevenson. Plaintiff and Defendants were sworn and testified, together with witness Joe Adair and the court having received exhibits from Plaintiff and Defendants and having taken the matter under advisement and having issued its Memorandum Decision, therefore makes the following:

FINDINGS OF FACT

1. Plaintiff, Marlene Stone, owned real property known as 6006 S. 7100 W. in Hooper, Utah, consisting of approximately 17 acres.
2. Plaintiff listed the property for sale on the multiple listing service, giving prospective

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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buyers three options: 1) purchase all 17 acres, 2) purchase two acres, or 3) purchase one acre.

3. Defendants, Richard Flint and Judy Flint, became interested in the property. They and their realtor, Joe Adair, met with the Plaintiff on February, 1, 2008.

4. During this initial meeting, Plaintiff explained that her husband had recently passed away, that she wanted to be relieved of the burden of managing the property by herself, and that she was interested in selling, preferably, all of her 17 acres, including the structures on the property. Mr. Flint inquired, "Does all of this stuff stay with the property?" Plaintiff replied affirmatively. Both parties seem in agreement that when Defendant asked his question, he was looking out of Plaintiff's bedroom window, facing to the east of Plaintiff's property, overlooking the hay barn, horse barn, and various items of personal property. These structures included mobile fencing, called panels; mobile gates that interface with the panels; open sheds, called loafing sheds, for animals that can be moved; and a horse walker.

5. Defendants expressed interest to Plaintiff, however, in purchasing only two acres, encompassing the home and the two barns.

6. Plaintiff explained that if the Defendants wanted only two acres, the two acres would not include a strip of her property approximately 66 feet in width, lying on the northern part of her property and extending eastward, because she needed access to the remaining 15 acres; otherwise, she would essentially be landlocked.

7. Plaintiff further explained that in order to sell the two acres the Defendants were interested in, encompassing the home and barns, she would need to obtain a survey to partition this amount of real estate from the aggregate 17 acres because, at that time, the exact boundaries of the proposed

two acres were undetermined.

8. After the parties discussed Defendants' interest in only two acres, no further discussion occurred regarding the structures, except regarding the horse walker, as discussed below. In point, the parties never addressed the structures or where they might be situated after the survey and partition of two acres from the remaining 15 acres.

9. Based on the discussions that occurred in Plaintiff's bedroom, the Defendants assumed that all structures on the entire 17 acres went with the two acres they would eventually purchase because Plaintiff did not want to manage the property anymore.

10. Plaintiff, on the other hand, assumed that since Defendants wanted less than the 17 acres, only the structures existing on the two acres would pass in the conveyance to the Defendants; she would keep the structures situated on the remaining 15 acres.

11. Later that same day, February 1, 2008, Mr. Adair, Defendants' realtor, prepared and presented to Plaintiff a real estate purchase contract (hereafter "REPC"). The first addendum to the REPC provided that Plaintiff would have the property surveyed and the four corners staked to Defendants' satisfaction prior to closing of the sale. The first addendum also listed the structures included in the sale: "all lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist."

12. When the Defendants presented the REPC through Mr. Adair, she told him that, if they wanted the horse walker, the Defendants would need to move it completely on to the two acres. As of February 1, 2008, the base of the horse walker was situated on the eventual ground that was part of the 66-foot-wide access reserved by Plaintiff, although the arm of the horse walker rotated

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v. Flint

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partially into the two acres the Defendants would purchase. Further, the electric motor operating the horse walker was wired to the barn, also within the two acres that the Defendants were receiving as part of the two acres. Otherwise, Plaintiff accepted the Defendants' offer.

13. As the parties agreed, Plaintiff had the property surveyed and the four corners of the property staked just prior to the closing on the property on April 16, 2008. Defendants physically inspected the staked property they were to purchase and were satisfied with the boundaries. Even at this juncture of the parties' dealings, no further discussions occurred regarding the structures, as they may lie inside and outside the two acres.

14. The boundaries of the two acres Defendants purchased are defined by the pencil line on exhibit P1. On exhibit P1, north is the top of the exhibit and west is to the left of the exhibit. The northern boundary of the two acres abuts the 66-foot-wide strip Plaintiff retained ownership in for access to the remaining 15 acres of her property. Included in the boundaries of the two acres are the home in the lower left-hand corner of the exhibit, the two barns identified with the letters G and H, and the structures defined with the letters F, D, and I. Excluded from the boundaries of the two acres, and appearing in Plaintiff's access, are the three loafing sheds defined with the letters A, B, and C. Structure A abuts the property line between Plaintiff's property and a third party neighbor. Structure E also remains on Plaintiff's remaining property that extends to the east.

15. In purchasing the home and the two acres, Defendants assumed the original address of 6006 S. 7100 W. in Hooper, Utah. Hooper City gave Plaintiff a new address for her remaining 15 acres, known as 5990 S. 7100 W., Hooper, Utah.

16. Contemporaneous with the closing on the real property, the title company prepared a bill

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v. Flint

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of sale that Plaintiff signed and Defendants accepted in the closing. The bill of sale transferred title to “that certain personal real property *now* at 6006 S. 7100 W., Hooper, Utah.” The bill of sale then enumerated the personal property specified in the first addendum to the REPC “as presently exist.”

17. Also contemporaneous with the closing, Plaintiff leased to Defendants the remaining 15 acres of her property to Defendants for one year. That lease was later broken in 2008, and the parties resolved their rights and liabilities under that lease through mediation after Plaintiff filed suit. Thus, those matters are not before the Court. Nonetheless, it is relevant in this proceeding that, as a result of friction between the parties stemming from Defendants’ use of the remaining 15 acres under the lease agreement, the parties realized that each side had a different interpretation of the REPC and bill of sale regarding the meaning of “all” of the structures. Defendants believed they had purchased all of the structures existing on the 17 acres, whereas Plaintiff believed she had sold only all of the structures on the two acres that she had conveyed to the Defendants.

THE COURT having entered its Findings of Fact makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. At issue is whether the word *all*, as used in the REPC and bill of sale, is ambiguous. The Court holds that it is not ambiguous.

2. Contractual ambiguity may occur in two contexts: “(1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties.” *Daines v. Vincent*, 2008 UT 51 ¶ 25, 190 P.3d 1269, 1276. The Utah Supreme Court went on to further clarify: “The first context presents a question of law to be determined by the judge. The second context presents a question of fact where, if the judge determines that the contract is facially

ambiguous, parol evidence of the parties' intentions should be admitted." *Id.* However, "before permitting recourse to parol evidence, a court must make a determination of facial ambiguity." *Id.* In other words, extrinsic evidence offered to show that an ambiguity exists does not "trump 'the language of the contract.'" *Flores v. Earnshaw*, 2009 UT App 90 ¶ 10, quoting *Daines*, 2008 UT APP 51 at ¶ 27, 190 P.3d at 1276. In short, unless the Court finds that the language of the REPC is ambiguous, it may not consider parol evidence, or the discussions of what occurred upstairs in Plaintiff's bedroom concerning what personal property goes with the real estate conveyance. The contract controls the rights of the parties.

3. Thus, the first responsibility of this Court is to determine whether a facial ambiguity exists. The Utah Supreme Court clarified the procedure for determining whether a contract is facially ambiguous also in *Daines*, where the Court set forth a two-step analysis. First,

"When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge's own linguistic education and experience." Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract."

Id. at ¶ 26, 190 P.3d at 1276, quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995). The Court later clarified that "we [do] not intend that a judge allow surrounding circumstances to create ambiguity where the language of the contract would not otherwise permit." *Daines*, 2008 UT 51, at ¶ 27, 190 P.3d at 1276.

4. The *Flores* case is factually similar to the present case. Plaintiff and Defendants have a signed agreement identifying what is included in the sale. Clause 1.1 of their agreement is identical to clause 1.1 of the contract in *Flores*. It states that the listed items are included "if presently owned

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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and attached to the Property.” The Court determines that, as in *Flores*, this provision is unambiguous and cannot be read to include any items that were not “presently owned and attached to the Property,” namely, the two acres Defendants purchased. The property included in the sale, identified as a pencil line on Plaintiff’s exhibit P1, includes the house, the two barns labeled G and H, and the structures labeled F, D, and I. It does not include the loafing sheds labeled A, B, and E, nor the panels or gates on most of the structure labeled C. Those structures are not “presently owned and attached to the Property” to be conveyed and, under the unambiguous terms of the contract, were not intended to be conveyed to Defendants.

5. Moreover, the bill of sale, which is the final, integrated expression of the parties’ intent concerning the transfer of personal property in this transaction, transferred only those items of personal property *presently* existing on the two acres conveyed or otherwise specifically identified, such as the horse walker. The bill of sale plainly states what Plaintiff sold to Defendants, namely, “that certain personal property *now* at 6006 S. 7100 W., Hooper, Utah,..., more particularly described as follows: oven/range, refrigerator, window coverings, 2 water irrigation shares, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.” Consequently, the Defendants received only three loafing sheds on their newly acquired real property, not the other three remaining on Plaintiff’s property. Likewise, they received the panels and gates on their property, as well as the waterers and feeders on their property. While the base of the horse walker was on Plaintiff’s property, and thus may technically be on her property, because it also rotated partially on Defendants’ property and because the apparatus was wired to the barn, Plaintiff chose to allow them to have it, provided they moved it completely on to their property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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6. Plaintiff is entitled to a reasonable attorney fee for the successful defense of Defendants' counterclaim, as provided in paragraph 17 of the REPC.

7. Notwithstanding the respective expectations or understandings of the parties arising from their discussion upon their initial meeting on February 1, 2008, the real estate purchase contract superceded all prior negotiations, representations, and understandings of the parties, as the clear language of paragraph 14 of the REPC provides. Moreover, the Court concludes, as a matter of law, that the REPC and the bill of sale governing the transfer of the personal property and structures are both unambiguous. Defendants are entitled to all structures that exist on the two acres at the time of the contract and at closing, unless otherwise expressly provided in the contract or bill of sale.

DATED this ____ day of May 2009.

APPROVED AND ORDERED BY:

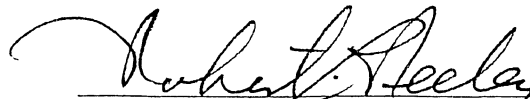
MICHAEL D. LYON
District Court Judge

RULE 7(f)(2) NOTICE

Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, the undersigned will submit the foregoing Findings of Fact and Conclusions of Law, Order Dismissing Respondent's Counterclaim, Affidavit of Robert L. Neeley, and Memorandum of Cost to:

Michael D. Lyon
District Court Judge
2525 Grant Ave.
Ogden, UT 84401

for signature at the expiration of eight (8) days from date of mailing, unless written objection is filed prior to that time.

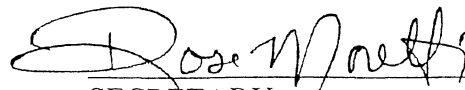


ROBERT L. NEELEY
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Findings of Fact and Conclusions of Law, Order Dismissing Respondent's Counterclaim, Affidavit of Robert L. Neeley, and Memorandum of Cost to Defendants' attorney, David B. Stevenson, this 14 day of May, 2009, postage prepaid, at the following address:

David B. Stevenson
STEVENSON & SMITH, P.C.
Attorneys at Law
3986 Washington Blvd.
Ogden, UT 84403



SECRETARY