

2010

Leslie D. Mower v. David R. Simpson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LESLIE D. MOWER, an individual, et. al,

Plaintiffs and Appellants;

vs.

DAVID R. SIMPSON, an individual, et. al,

Defendants and Appellees.

Utah Court of Appeals No. 20100532

District Court Civil No. 090403844

APPELLANTS' REPLY BRIEF ON APPEAL

Appeal from the Order of the Fourth District Court,
Utah County, Provo Division, The Honorable Samuel D. McVey

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LIST OF PARTIES TO PROCEEDINGS IN DISTRICT COURT

Plaintiffs/Appellants:

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Defendants/Appellees:

David R. Simpson; Nathan R. Simpson; Michael K. Thompson; Todd Dorny; Brandon Dente; David N. Nemelka; Dallas M. Hakes; Chad D. Carlson; Michael Marx; Allen R. Hakes; Michael W. Aviano; ALS Properties, LLC; Mai Ke Kula, LLC; Hanalei Kai Holdings, LLC; Ka Mahina, LLC; He Kiakolu, LLC; Koamalu Plantation, LLC; Landmark Real Estate, Inc.; Wood Springs, LLC; Oak Leaf, LLC; Dente, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC, Carnessecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; Maple Mountain Water Tank, LLC; Lonestar Gutters, LLC; 2 Brothers Communications and Lonestar Builders, Inc.

Rule 19 Defendants:

Koamalu Plantation Investment, LLC; and, Kathy A. Templeman.

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ARGUMENT

This matter concerns the trial court's dismissal of Plaintiffs' fraud-based causes of action. Plaintiffs' *Second Amended Complaint* describes five major theaters of activity where fraudulent acts occurred, and includes thirty-five defendants who were involved in various inter-related frauds described in twenty-one causes of action. Plaintiffs allege what misrepresentations were made, who made them, when they were made and to whom they were made. Yet the trial court dismissed all of Plaintiffs' fraud-based causes of action, holding that because all of the specific facts from the general allegations section of the *Second Amended Complaint* were not repeated in each specific cause of action for fraud, Plaintiffs failed to plead fraud with particularity.

The trial court also dismissed Plaintiffs' fraud-based causes of action, on the basis that Ken Dolezsar ("Dolezsar") is a necessary and indispensable party under Rule 19(b) of the Utah Rules of Civil Procedure ("URCP"). Despite Plaintiffs' allegations that Dolezsar was always acting as Leslie D. Mower's ("Leslie") agent and that Defendants made misrepresentations to Dolezsar, who they knew was acting as Leslie's agent, the trial court concluded Dolezsar was a necessary and indispensable party.

The trial court dismissed Plaintiffs' fraud-based causes of action without leave to amend, failing to give any reason for doing so, and without applying the required factors. The trial court further held that Utah does not recognize a cause of action for aiding and abetting breach of fiduciary duty, nor a cause of action for aiding and abetting intentional torts generally.

I. Plaintiffs Pled Fraud with Particularity

A. The Trial Court Must Draw All Reasonable Inferences in Plaintiffs' Favor

The Simpson Defendants argue that when considering a motion to dismiss based on Rule 9(b) URCP, a court does not need to draw all reasonable inferences in the light most favorable

to the plaintiff. Brief of Simpson Appellees ("Simpson Brief") 19. However. In contrast, in *Kuhre v. Goodfellow*, 2003 UT App 86, 69 P.3d 286, a case which addresses a motion to dismiss under Rule 9(b), the Utah Court of Appeals stated, "[a]fter viewing the factual allegations as true and considering them, and all reasonable inferences to be drawn from them, in the light most favorable to [plaintiffs], we conclude that [plaintiffs] have presented a cognizable claim for relief." *Id.* at ¶ 25, *see also Cosmas v. Hassett*, 886 F.2d 8, 11 (2nd Cir. 1989) (stating that on a motion to dismiss for failure to plead fraud with particularity a court must read the complaint generously and draw all inferences in favor of the pleader); *Armani v. Maxim Healthcare Services, Inc.*, 53 F.Supp.2d 1120, 1129-30 (D. Colo. 1999) (stating a dismissal of a claim for failing to satisfy Rule 9(b) is treated as a dismissal under Rule 12(b)(6) and all factual allegations must be accepted as true and all reasonable inferences must be drawn in favor of the pleader). Contrary to the Simpson Defendants' argument, when considering a motion to dismiss based on Rule 9(b), a court must draw all reasonable inferences in the light most favorable to the plaintiffs. When the correct standard is applied, Plaintiffs' *Second Amended Complaint* clearly alleges fraud in accordance with the requirements of Rule 9(b) URCP.

B. Plaintiffs Plead Their Fraud Based Claims in Conformance with Rule 9(b)

Rule 9(b) URCP requires that all averments of fraud set forth the circumstances of the fraud with particularity.¹ Particularity means a plaintiff must provide "sufficient particularity to show what facts are claimed to constitute the charges." *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35. A plaintiff must assert "the substance of the acts constituting the

¹The Simpson Defendants quote *Debry v. Noble*, 889 P.2d 428, 443 (Utah 1995) as stating that a plaintiff must "allege with particularity facts necessary to make all elements of fraud." However, the *Debry* case does not make that statement. It simply states "Rule 9(b) of the Utah Rules of Civil Procedure requires that fraud claims be pled with particularity." *Id.*

alleged wrong." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982). Importantly, a plaintiff who alleges the time of the alleged fraud, the persons involved and the facts and transactions underlying the fraud satisfies the requirements of Rule 9(b) URCP. *See Dahl v. Gardner*, 583 F.Supp. 1262, 1267 (D. Utah 1984). "[M]ore complex transactions require less specificity in pleading and, in these matters, the paragraphs of the complaint cannot be isolated but must be read as a whole." *Lochhead v. Alacano*, 697 F.Supp. 406, 416 (D. Utah 1988) (citations omitted). Here, the transactions at issue are just as complex, if not more so, than the transactions at issue in *Lochhead*. There are multiple, inter-related frauds occurring over several years.

The Simpson Defendants argue both that Plaintiffs did not provide enough detail and that they provided too much detail. They spend several pages of their brief describing how Plaintiffs failed to satisfy the "basic and fundamental requirement of clarity and conciseness." Simpson Brief 19. The Simpson Defendants complain that Plaintiffs' *Second Amended Complaint* spans 361 pages and contains 1362 numbered paragraphs and therefore violates a requirement of clarity and conciseness. The Simpson Defendants further complain that Plaintiffs included unnecessary detail from credit card statements and other unhelpful "minutia" and that it "rambles on." Simpson Brief 22.

However, in dismissing Plaintiffs fraud-based causes of action, the trial court never found Plaintiffs' *Second Amended Complaint* violates a standard of clarity and conciseness.² Rec. 5606-

²In the trial court, the Simpson Defendants provided argument, reason and authority only as to why Plaintiffs fraud claims in relation to the MagnetBank loan, the non-disclosure action in relation to the Double T Ranch Water Purchase and the fraud allegations in relation to the Presidio Land and Water Deal failed to meet the particularity requirement. Rec. 5288-5263, 5430-5407. Yet the trial court dismissed *all* of Plaintiffs' fraud based claims after a "careful review of the memoranda and authorities submitted." Rec. 5605. Plaintiffs were never put on

5602. Further, the trial court never held that the *Second Amended Complaint* was filled with "minutia." Rec. 5605-5602. Furthermore, when the Simpson Defendants refer to "minutia," they refer to allegations about Plaintiffs' claim for breach of fiduciary duties in relation to the Hawaii Condominium Development, claims neither dismissed by the trial court nor the subject of this appeal. Simpson Brief 22.

Plaintiffs clearly and specifically allege the misrepresentations made by David Simpson, Nathan Simpson and others. Rec. 3177-3173, ¶¶ 82-87; 3113-3110, ¶¶ 256-260; 3094-3085, ¶¶ 309-319; 3075-3065, ¶¶ 350-372; 3055-3052, ¶¶ 404-417; 3048-3046, ¶¶ 433-436; and 3033-3032, ¶¶ 486-488. These allegations are incorporated into the specific causes of action for fraud. Rec. 3016, ¶¶ 542-550; 3011, ¶¶ 553 and 557; 3005, ¶ 581; 2992, ¶¶ 640-644; 2986, ¶¶ 678-679; 2977-2976, ¶¶ 721-725; 2975-2970, ¶¶ 739-755; 2951, ¶ 833; 2926-2925, ¶¶ 975-977; 2922-2911, ¶¶ 991-1001. Therefore, Plaintiffs' fraud allegations comport with the requirements of Rule 9(b) URCP. The *Second Amended Complaint* tells a very complicated legal story, and it does so with particularity and clarity.

When a case involves complicated and inter-related facts and issues, trial courts are instructed not to apply Rule 9(b)'s requirements stringently. *See Lochhead*, 697 F.Supp. at 416. Here, the trial court and the Simpson Defendants focus solely on specific paragraphs of the *Second Amended Complaint* in isolation, instead of reading the *Second Amended Complaint* as a whole. When read as a whole, the *Second Amended Complaint* clearly contains the "substance of the acts constituting the alleged wrong." *Williams*, 656 P.2d at 972. The *Second Amended Complaint* gives

notice of a challenge to the sufficiency of the allegations of fraud in relation to the other areas of The Preserve Development and Hawaii Development. Defendants therefore could not have carried their burden of convincing the trial court that Plaintiffs' allegations were deficient. The trial court's decision should be reversed on that basis alone.

Defendants fair notice of Plaintiffs' claims and the factual ground upon which they are based. See *Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1252 (10th Cir. 1997).

The Simpson Defendants argue, "similar to the complaint in *Coroles*, the Second Amended Complaint incorporates by reference all of the 536 paragraphs from the general factual statement into each of the fraud-based claims." Simpson Brief 22. In *Coroles v. Sabey*, 2003 UT App 339, 79 P.2d 974, the Utah Supreme Court stated:

[t]he section of the complaint that is devoted to common law fraud consists of eleven paragraphs. The first of these paragraphs, paragraph 661 of the complaint, simply reads: 'The forgoing paragraphs numbered 1-660 are incorporated into this Count.' The remaining ten paragraphs of this section merely recite the elements of fraud and allege the Defendants committed each element.

Id. at ¶ 25. Here, unlike *Coroles*, Plaintiffs, in addition to incorporating all previous paragraphs of the *Second Amended Complaint* into each cause of action, Plaintiffs additionally make specific factual allegations within each fraud-based cause of action and incorporate specific and distinct paragraphs from the general allegations section of the *Second Amended Complaint* into each of the specific fraud-based causes of action. Defendants clearly were given notice of Plaintiffs' claims against them.³

The Simpson Defendants do not present any argument, reason or authority that contradicts Plaintiffs' contentions that the trial court erred when it required all relevant facts to each fraud cause of action be contained within the fraud-based causes of action. The trial court was required to consider Plaintiffs' *Second Amended Complaint* as a whole, which it failed to do. The trial court focused on individual paragraphs of the *Second Amended Complaint* instead of considering the *Second Amended Complaint* as a whole.

³The Simpson Defendants also disregard the fact that it is common practice in Utah's legal community to incorporate all the previous paragraphs into each cause of action.

C. Plaintiffs' Correctly Plead Causes of Action for Fraudulent Non-Disclosure

The trial court dismissed Plaintiffs' fraudulent non-disclosure causes of action for failure to meet the pleading standard of Rule 9(b) URCP. Rec. 5603. It did so for the reasons set forth by the Simpson Defendants. Rec. 5605. In the trial court, the Simpson Defendants argued Plaintiffs were required to plead reliance as part of their causes of action for fraudulent non-disclosure. They rely on the unpublished opinion in *Barber Bros. Ford, Inc. v Foiaini*, 2008 UT App 463 (unpublished opinion). Accepting the Simpson Defendant's argument would mean that the Utah Court of Appeals, in an unpublished opinion, changed the long held pleading standard for fraudulent non-disclosure outlined by the Utah Supreme Court in *Yazd v. Woodside Homes Corp.*, 2006 UT 47, 143 P.3d 283.

The *Yazd* court stated "[i]n order to prevail on a claim of fraudulent concealment, a plaintiff must prove '(1) that the nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate.'" *Id.* at ¶ 10 (quoting *Mitchell v. Christensen*, 2001 UT 80, ¶ 10, 31 P.3d 572.⁴ The Utah Court of Appeals cited the same three elements in *Gilbert Development Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 20, 246 P.3d 131. The Utah Court of Appeals reference and approval of the three elements of fraudulent non-disclosure as set forth in *Gilbert* was after the *Barber Bros.* case. Further, as recently as April 26, 2011, the Utah Supreme Court, citing *Yazd*, stated the elements for a claim for fraudulent non-disclosure are "(1) the defendant had a legal *duty* to communicate information, (2) the defendant *knew* of the information he failed to disclose, and

⁴*Yazd* was first heard by the Utah Court of Appeals which listed the same elements for a claim of fraudulent non-disclosure as the Utah Supreme Court listed when it heard the matter. See *Yazd v. Woodside Homes Corp.*, 2005 UT App 82, ¶ 8, 109 P.3d 393.

(3) the nondisclosed information was *material*." *Hess v. Canberra Development Company, LC*, 2011 UT 22, ¶ 29 (emphasis in original).

In their *Reply Memorandum in Support of Motion to Dismiss Second Amended Complaint* filed in the trial court, the Simpson Defendants admitted the *Yazd* court did not list reliance as a required element of a cause of action for fraudulent non-disclosure. Instead they argued reliance is "embodied" in the requirement that a plaintiff show the non-disclosed information is material. Rec. 5411-5410. The Simpson Defendants make no argument that Plaintiffs failed to allege the elements for fraudulent non-disclosure as set forth in *Yazd*. Defendants only argue that Plaintiffs failed to allege reliance, which is not required.⁵ In the *Second Amended Complaint* Plaintiffs allege all the required elements for fraudulent non-disclosure. Rec. 3005-3004, ¶¶ 580-587; 2952-2948, ¶¶ 832-854; 2899, ¶¶ 1075-1080; 2889-2888, ¶¶ 1134-1138; 2882-2881, ¶¶ 1175-1184. Plaintiffs meet the pleading standard for fraudulent non-disclosure as set forth in *Yazd* and therefore the trial court erred by dismissing all of Plaintiffs' causes of action for fraudulent non-disclosure.

D. The Second Amended Complaint Gives Each Defendant Notice of the Fraud for Which They are Responsible

The Simpson Defendants argue Plaintiffs impermissibly "lumped" together David Simpson and Nathan Simpson in alleging fraud. Plaintiffs allege both David Simpson and Nathan Simpson made misrepresentations. Importantly, Plaintiffs allege all the Defendants

⁵Importantly, in the trial court the Simpson Defendants only argued that Plaintiffs fraudulent non-disclosure claim in relation to the Double T Ranch Water Purchase failed to meet the pleading standard. They never offered any argument, reason or authority that Plaintiffs must allege reliance and they never addressed any of Plaintiffs' pleadings in that regard except the pleadings in relation to the Double T Ranch Water Purchase, yet the trial court dismissed all of Plaintiffs' claims for fraudulent non-disclosure.

acted as part of a conspiracy. The Utah Court of Appeals stated that a person can be liable for fraud if "he made false representations himself, authorized someone to make them for him or participated in the misrepresentations in some way, such as through conspiracy." *Israel Pagan Estate v. Cannon*. 746 P.2d 785, 792 (Ut. Ct. App. 1987). Here, Plaintiffs clearly allege that both David Simpson and Nathan Simpson made misrepresentations and that they did so as part of a conspiracy.

When a plaintiff alleges that a group of defendants agreed to accomplish a fraudulent objective, "it is irrelevant whether all ... defendants participated in every alleged act. ... A complaint which alleges the manner in which a conspiracy to defraud is to be carried out and the role of the defendants in the conspiracy is sufficient to withstand a motion to dismiss." *Lochhead*, 697 F.Supp at 418. Here, Plaintiffs clearly alleged a group of defendants acted as part of a conspiracy, they clearly alleged the manner in which the conspiracy to defraud was carried out and the role of each Defendant. Therefore, Plaintiffs meet the requirements of Rule 9(b).

The Simpson Defendants argue that because Plaintiffs included both David Simpson and Nathan Simpson in one paragraph, they are impermissibly "lumping" them together. However, Plaintiffs' allegations that David Simpson and Nathan Simpson made the misrepresentations certainly state the *persons* involved in the misrepresentations. *See Dahl*, 656 P.2d at 972. Plaintiffs give each Defendant notice of what they claim each Defendant did wrong by identifying the misrepresentations, the party or parties responsible for them, and when they were made. Plaintiffs' factual allegations meet the requirements of Rule 9(b) URCP because they clearly set forth the substance of the acts constituting the alleged wrongs.

E. Plaintiffs Adequately Set Forth the Factual Bases Behind Allegations Made on Information and Belief

The Simpson Defendants argue Plaintiffs did not include factual bases for allegations made on "information and belief." They point the Court to only one such alleged instance, paragraph 316 of the *Second Amended Complaint*. Simpson Brief 27. Although Plaintiffs make allegations of misrepresentations based on information and belief, they set forth the facts upon which their information and belief was based. Paragraph 315 of the *Second Amended Complaint* clearly claims Dolezsar made representations to Leslie. Paragraph 316 then alleges, on information and belief, that David Simpson and Nathan Simpson first made those same representations to Dolezsar. Therefore, paragraph 315 sets forth the basis for the information and belief allegations in paragraph 316. The Simpson Defendants read each paragraph of the *Second Amended Complaint* in isolation, ignore all of the general allegations when reading the individual causes of action, and ignore all of the exhibits to the *Second Amended Complaint*, rather than reading the *Second Amended Complaint* as a whole. They then claim Plaintiffs' allegations of fraud lack particularity and that Plaintiffs failed to include the basis for allegations made on information and belief.

F. Plaintiffs Plead Specific Facts Regarding Defendant Aviano

Defendant Michael Aviano ("Aviano") argues that "Plaintiffs also allege an unsubstantiated conclusion that the difference of \$325,000.00 (\$900,000.00 - \$575,000.00 = \$325,000.00) was paid to Plaintiffs by Mr. Simpson. Plaintiffs, however, provide no factual allegations in support of these speculative conclusions" Michael Aviano's Appellee Brief on Appeal ("Aviano Brief") 16. Moreover, Aviano ignores his own *Answer, Counterclaim and Cross-Claim (Michael W. Aviano)* in which he alleges:

[a]s part of a prior loan made by Mr. Aviano to Mr. Simpson, which is unrelated to the present law suit, Mr. Aviano and Mr. Simpson agreed that Mr. Aviano would pay \$575,000.00 of the \$900,000.00 sales price, and that Mr. Simpson would pay the remaining \$325,000.00 of the \$900,000.00 sales price.

Rec. 5522, ¶ 15. Further, Aviano alleges Leslie offered to repay Aviano the purchase price of the lot, \$575,000.00. Rec. 5522, ¶ 15; 5521-5520; ¶¶ 21-22. Therefore, Aviano admits that he paid \$575,000.00 for the lot, that the sales price was reported to MagnetBank as \$900,000.00 and that the closing documents showed the sales price as \$900,000.00. Aviano cannot now argue Plaintiffs' claims are unsubstantiated when in the trial court he admitted they are true. Plaintiffs claims are anything but "unsubstantiated," Aviano has admitted they are true.

Aviano further argues that Plaintiffs fail to allege any damages because the sales price was reported to be \$900,000.00 and that MagnetBank received \$900,000.00. However, Plaintiffs allege that if MagnetBank had known the true price Aviano had paid for the lot, it would have had reason to suspect the loan to The Preserve as well as the collateral for the loan were both in peril, and would have taken steps to protect the collateral and to collect the loan. Plaintiffs allege such steps would have included not allowing the sale to occur and calling the loan due. Rec. 2963, ¶¶ 806-808. Because MagnetBank did not take steps to protect the loan and the collateral, the loan is unpaid and in default. Further, Aviano filed causes of action against Plaintiff Navona, LLC ("Navona"), MagnetBank's successor in interest, for Failure to Release Security Interest, Slander of Title, Unjust Enrichment, Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing and Unjust Enrichment. Rec. 5517-5505. If MagnetBank had known the true facts regarding the price truly paid by Aviano for the lot, it would not have approved the sale and none of these causes of action, which Plaintiff Navona is now forced to defend, would have occurred.

II. Dolezsar is Not a Necessary and Indispensable Party

A. Plaintiffs Allege That Dolezsar Was Acting as Leslie's Agent at All Times

The Simpson Defendants argue the trial court was correct in determining that Dolezsar was both a necessary and indispensable party, finding that Dolezsar "occupied a pivotal representative role." Simpson Brief 34. The Simpson Defendants emphasize Plaintiffs never allege that any of the Defendants made any representations directly to Leslie. However, Plaintiffs' core allegation is that at all times Dolezsar was acting as Leslie's agent. Under Utah's law of agency, when Defendants made misrepresentations to Dolezsar, they were making them to Leslie. *See Swan Creek Village Homeowners v. Warne*, 2006 UT 22, ¶ 27, 134 P.3d 1122; *see also* 3 Am Jur 2d Agency § 287.

Defendants and the trial court focused on Plaintiffs' allegations that Dolezsar repeated Defendants' misrepresentations to Leslie, rather than focusing on Plaintiffs' allegations that Defendants first made the misrepresentations to Dolezsar. Plaintiffs allege: (1) Defendants knew Dolezsar was acting as Leslie's agent when they made misrepresentations to him, and (2) Defendants authorized and encouraged Dolezsar to repeat their misrepresentations to Leslie. Rec. 3016, ¶¶ 542-543; 2978, ¶ 719-720; 2975, ¶ 731; 2974, ¶ 734; 2973, ¶ 739.

The Simpson Defendants admit the general rule is that agents are not typically necessary parties to lawsuits against their principals, yet they fail to distinguish why this matter is different. Defendants reason the trial court did not conclude Dolezsar was indispensable because he was Leslie's agent, but because it was he who communicated the misrepresentations to Leslie. However, Dolezsar's communication of the misrepresentations to Leslie as her agent does not make him a necessary and indispensable party. Utah law holds that when the misrepresentations were made to Dolezsar, Leslie's agent, they were made to Leslie. *See Swan Creek Village*

Homeowners, 2006 UT 22 at ¶ 27.

The Simpson Defendants also argue Dolezsar is a necessary and indispensable party because Defendants risk incurring double, multiple, or otherwise inconsistent obligations. However, the Simpson Defendants completely fail to describe how they are at risk.

The Simpson Defendants further argue that Dolezsar is necessary and indispensable because the parties cannot question him regarding the misrepresentations and that "presumably Plaintiffs would rely on hearsay statements from Dolezsar and such statements are inadmissible." Simpson Brief 40. Whether Plaintiffs may later encounter evidentiary issues is not a proper consideration for finding that Dolezsar is a necessary and indispensable party, and is not one of the factors listed in Rule 19 URCP. Although the Simpson Defendants assert they will be prejudiced by not having the opportunity to question Dolezsar, they fail to explain how or why they will suffer prejudice. The trial court found Defendants would suffer prejudice only because of their inability to cross-claim against Dolezsar. It never addressed the inability to question him. Rec. 5593.

B. Dolezsar Is Not Necessary and Indispensable Because Defendants Cannot Bring a Cross Claim Against Him

The Simpson Defendants argue the trial court found Dolezsar was indispensable not because he was a joint tortfeasor against whom Defendants cannot bring a cross-claim, but rather because he occupied a pivotal representative role in the alleged fraud. When applying the factors to determine if Dolezsar is an indispensable party, the trial court found Defendants would be "unfairly prejudiced by any judgment issued in the absence of Dolezsar because of ... their inability to cross claim against him." Rec. 5593. The trial court further concluded, "any judgment rendered without Mr. Dolezsar would be inadequate because ... no cross claims can

now be brought against his estate." Rec. 5593. The trial court found Dolezsar was an indispensable party not because he occupied a "pivotal representative role" but rather because Defendants could not bring a cross-claim against him.

The trial court's conclusion that Dolezsar is indispensable because he was the one who repeated the misrepresentations to Leslie ignores Plaintiffs' allegations that Dolezsar was acting as Leslie's agent. It also ignores Plaintiffs' key allegation that the Defendants' misrepresentations did not originate with Dolezsar.

The Simpson Defendants argue Dolezsar is just like Mr. Clark in the case of *Turville v. J&J Properties, L.C.*, 2006 UT App 305, ¶¶ 2-4, 145 P.3d 1146. In *Turville*, the Utah Court of Appeals found Mr. Clark occupied a pivotal representative role. Mr. Clark did so because he initiated the misrepresentations and he alone benefitted from his misrepresentations. This matter is entirely different. In *Turville*, the only person who made misrepresentations was Mr. Clark. Mr. Clark told others he owned the real property and could sell it. Mr. Clark titled the real property in his own name. *See Id.* Here, Defendants made the misrepresentations to Dolezsar, knowing he was acting as Leslie's agent. Defendants made the misrepresentations and benefitted from them, not Dolezsar.

The Simpson Defendants argue the *Turville* court found that Mr. Clark's Estate was an indispensable party because Mr. Clark was the major actor responsible for the plaintiffs' damages. They also argue that because "plaintiffs were responsible for Clark's absence because they failed to join the estate within the limitations period after Clark's death." The Simpson Defendants refer the Court to paragraph 42 of the *Turville* opinion to support their argument. Simpson Brief 38. However, while the *Turville* court held Mr. Clark was the sole actor responsible for the plaintiffs' damages, it never held Mr. Clark was an indispensable party

because plaintiffs failed to join the estate within the limitations period. *See Id.* at ¶ 42. The *Turville* court found Mr. Clark's Estate was an indispensable party because Mr. Clark was "the major, if not the sole, actor responsible for Plaintiff's damages." *Id.* Here, David Simpson and Nathan Simpson were the major actors responsible for Plaintiffs' damages, as was Mr. Clark in *Turville*, because the misrepresentations originated with them, not with Dolezsar.

The Simpson Defendants also ignore the provisions of Utah Code Annotated §78B-5-821(2) which states, "[a] person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and all defendants." Utah Code Annotated § 78B-5-821(2). Defendants have the option to ask the trial court to allocate fault pursuant to Utah Code Annotated §78B-5-821(2). *See* Utah Code Annotated §78B-5-821(4). The inability to join Dolezsar's estate has no effect on such a claim.

The Simpson Defendants admit the general rule is that the inability to join joint tortfeasors or co-conspirators does not make them indispensable parties. *See Pasco Int'l Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.10 (7th Cir. 1980); *Nottingham v. General American Communications Corp.*, 811 F.2d 873, 880 (5th Cir. 1987); *Johnson v. Higley*, 1999 UT App 278, ¶¶ 33-34, 989 P.2d 61). The Simpson Defendants state, without any supporting authority, that the general rule does not apply in this case. Further, the trial court failed to state any reason for not applying the general rule. The trial court cannot conclude Dolezsar is necessary and indispensable for the sole reason that Defendants are unable to bring a cross-claim against him. The trial court cited no authority or facts allowing it to ignore the general rule.

The Simpson Defendants argue they would be prejudiced if the action were to proceed without Dolezsar because the parties in this case cannot question him. They argue Plaintiffs will

rely on hearsay statements from Dolezsar and any such statements could not be considered by the trial court. Simpson Brief 40. Whether Defendants can question Dolezsar is unrelated to whether he is necessary and indispensable. The trial court never found Dolezsar was necessary and indispensable because Defendants cannot question him. Any proof issues Plaintiffs may encounter are speculative and are inappropriate considerations in deciding a Rule 19 motion.

III. The Trial Court Improperly Dismissed Plaintiffs' Claims Fraud-Based Causes of Action Without Leave to Amend

The Simpson Defendants argue the trial court correctly dismissed Plaintiffs' claims without leave to amend, claiming that Plaintiffs had repeated failures to cure the deficiencies by amendments previously allowed.⁶ The Simpson Defendants assert that Plaintiffs have failed to properly plead fraud despite at least three attempts at doing so. Simpson Brief 44. Such argument ignores the actual procedural history of this matter.

After Plaintiffs filed their original complaint, they realized they did not include several causes of action. Before they could amend the original complaint, two defendants filed motions to dismiss.⁷ Plaintiffs amended the complaint, adding two causes of action. Plaintiffs made no other changes and did not make any changes to address any alleged pleading deficiencies.

⁶The trial court committed error when it dismissed the *Second Amended Complaint* without leave to amend and when it failed to indicate that the dismissal was without prejudice. A complaint dismissed upon the inadequacy of the pleadings must be dismissed without prejudice. See *Coroles v. Sabey*, 2003 UT App 339, ¶ 47, 79 P.3d 974. The trial court did not specify dismissal was without prejudice. Rule 41 URCP states a dismissal operates as an adjudication on the merits unless the court states otherwise, the dismissal is for lack of jurisdiction, improper venue or lack of an indispensable party. By failing to indicate dismissal was without prejudice, the trial court's dismissal operates as an adjudication on the merits making it impossible for Plaintiffs to refile a complaint.

⁷Plaintiffs filed their *First Amended Complaint* as a matter of right because a motion to dismiss is not a responsive pleading that preempts a plaintiff's right to file an amended complaint.

Plaintiffs filed a *Second Amended Complaint* in response to the trial court's finding that they failed to plead fraud with particularity in their *First Amended Complaint*. Therefore, Plaintiffs have not had many opportunities to amend as argued by Defendants. In response to arguments that Plaintiffs' failed to allege fraud with particularity, Plaintiffs have amended only once.

Further, the Simpson Defendants incorrectly argue that because Plaintiffs' did not make a motion to amend to the trial court, the Court should affirm the trial court's dismissal without leave to amend. Such an argument ignores that the trial court specifically dismissed the *Second Amended Complaint* without leave to amend. By specifically dismissing Plaintiffs' fraud-based causes of action without leave to amend, the trial court made it clear that a motion to amend would be futile.

The Simpson Defendants fail to address Plaintiffs' argument that the trial court abused its discretion by failing to give any reasons for dismissing the *Second Amended Complaint* without leave to amend and by failing to apply any of the required factors in considering a motion to amend. In *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273 (Utah 1998), the trial court denied a motion to amend a complaint in a minute entry by simply stating "the motion to Amend the Complaint is denied." *Id.* at 1281. The trial court in *Aurora Credit Services* did not offer any explanation for the denial. *See Id.* The Utah Supreme Court, quoting the United States Supreme Court, stated, "outright refusal to grant the leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The trial court in this matter did the same. The *Aurora* court quoted the Idaho Supreme Court with approval when it stated, "a district court's refusal to grant leave to amend without any justifying reason is, per se, an abuse of discretion." *Id.* at 1281

(quoting *Idaho Schools for Equal Educational Opportunity v. Idaho State Board of Education*, 912 P.2d 644, 652 (1996). Similarly the trial court's dismissal of Plaintiffs' fraud-based causes of action without leave to amend is, per se, an abuse of discretion.

The trial court abused its discretion by dismissing Plaintiffs' fraud-based causes of action specifically without leave to amend because it did not give Plaintiffs the opportunity to make a motion to amend and it failed to consider any of the required factors. The Simpson Defendants fail to show the trial court considered any of the required factors when it dismissed Plaintiffs' fraud based claims without leave to amend. The trial court's order clearly demonstrates that the trial court never considered the required factors. Rec. 5606-5602. The trial court's failure to apply the required factors, or to give any basis at all for its dismissal without leave to amend, is an abuse of discretion.

Defendant Aviano argues any amendment would be untimely and that Plaintiffs have had four chances to amend the complaint.⁸ As shown above, Plaintiffs have amended their complaint only one time in response to arguments that fraud was not pled with particularity. A trial court is to use its discretion in "the furtherance of justice and [it] must not be exercised so as to defeat justice. The rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial." *Gillman v. Hansen*, 486 P.2d 1045, 1046 (Utah 1971). Here, only three of thirty-five (35) Defendants have filed an answer and there has been no discovery. Therefore, any amendment would be timely.

⁸Aviano argues the *Errata to Second Amended Complaint* constitutes an amendment to the complaint. Such is not the case. *The Errata to Second Amended Complaint* simply attempted to clarify the captions to the various causes of action to specify the correct defendants named in the causes of action. No substantive changes were made to the allegations in the *Second Amended Complaint*.

In deciding a motion to amend, a trial court "should primarily consider whether granting the motion would subject the opposing party to unavoidable prejudice by having an issue adjudicated for which it had not had time to prepare." *Aurora Credit Services, Inc.*, 970 P.2d at 1282. Although there are several factors a trial court may consider, prejudice is the primary consideration. Aviano argues he would suffer prejudice because he would "necessarily expend a substantial amount of time, resources, and attorneys fees in responding to Plaintiffs inadequate pleadings." Aviano Brief 20. He also argues he would be "forced to conduct his life and his business under the constant stigma of being named as a defendant in a seemingly never-ending lawsuit." Aviano Brief 20. However, such factors, even if true, are not the proper factors in considering prejudice.

A showing of simple prejudice is not enough to support a denial of a motion to amend.⁹ "[T]he Utah Supreme Court indicated that amendment should be denied only where the opposing side would be put to *unavoidable prejudice* by having an issue adjudicated *for which he had not time to prepare*. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44 ¶ 31, 87 P.3d 734 (quoting *Kasco Services Corp. v. Benson*, 831 P.2d 86, 92 (Utah 1992) (emphasis in original). The *Kelly* court went on to state, "[t]hus, in order to justify the denial of a motion to amend on prejudice grounds, the prejudice must be undue or substantial prejudice, since almost every amendment of a pleading will result in some practical prejudice to the opposing party. Mere inconvenience to the opposing party is *not* grounds to deny a motion to amend." *Id.* (emphasis in original).

Here, the trial court did not give any reasons for dismissing Plaintiffs' fraud-based causes of action without leave to amend, it failed to explain how any Defendant would not be able to

⁹No matter the outcome of this appeal, Aviano will still be a defendant because the trial court did not dismiss all claims against him.

respond to any amendments and it did not explain how any Defendant would suffer the type of prejudice required to deny amendment. Therefore, the trial court abused its discretion in dismissing Plaintiffs' claims without leave to amend.

IV. Utah Recognizes Claims for Aiding and Abetting

Defendants fail to offer any argument as to why this Court should not join the majority of jurisdictions and recognize a cause of action for aiding and abetting. The Simpson Defendants simply argue that recognizing a new cause of action is not necessary.

Utah courts recognize the tort of breach of fiduciary duty found in the Restatement (Second) of Torts § 874. In *d'Elia v. Rice Development, Inc.*, 2006 UT App 416, ¶ 36, 147 P.3d 515, the Utah Court of Appeals stated that Utah recognized the Restatement (Second) Torts § 874, which deals with breach of fiduciary duty. Comment c of Section 874 of the Restatement (Second) Torts recognizes the tort of aiding and abetting breach of fiduciary duty. It states that a "person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused." Restatement (Second) Torts § 874, comment c. By recognizing the validity of the Restatement (Second) Torts, § 874, the Utah Court of Appeals recognized a cause of action for aiding and abetting breach of fiduciary duty.

Recognizing the liability of a person who acts in concert with others is a logical extension of recognizing the Restatement (Second) Torts, § 874. The Colorado Court of Appeals held that because Colorado had adopted Restatement (Second) Torts § 874 which recognizes a person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct, it would recognize Restatement (Second) Torts, § 876 and recognize aiding and abetting causes of action generally. *See Holmes v. Young*, 885 P.2d 305, 308 (Colo. Ct. App. 1994).

The Simpson Defendants argue Utah plaintiffs should be limited to causes of action for conspiracy, unlike the majority of other jurisdictions in the United States. However, a cause of action for aiding and abetting and a cause of action for conspiracy have different elements. The United States Court of Appeals for the District of Columbia explained:

civil conspiracy includes: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.

Halberstam v. Bernard, 705 F.2d 472, 477 (D.C. Cir. 1983). The *Halberstam* court went on to explain, "the element of agreement is a key distinguishing factor for a civil conspiracy action. Proof of tacit, as opposed to explicit, understanding is sufficient to show agreement. *Id.* The elements for civil conspiracy are similar in Utah. See *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Ut. Ct. App 1087).

The *Halberstam* court listed the elements for aiding and abetting as:

(1) the party whom the defendant aids must perform a wrongful act that causes injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.

Halberstam, 705 F.2d at 477 (citations omitted). The *Halberstam* court went on to note the "prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity. Aiding-abetting focuses on whether a defendant knowingly gave substantial assistance to someone who performed wrongful conduct, not whether the defendant agreed to join the wrongful conduct." *Id.* at 478.

In speaking of the reason for recognizing aiding and abetting causes of action generally, the Restatement (Second) Torts, states:

[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon liability of the adviser as participation or physical assistance. If encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. ... The rule applies whether or not the other knows his act is tortious.

Restatement (Second) Torts, § 876, comment on clause b. Recognizing a cause of action for aiding and abetting allows courts to hold parties liable for their acts when a defendant has given a tortfeasor substantial assistance but has not explicitly agreed to join the wrongful conduct. *See Halberstam*, 705 F.2d at 478.

Defendants argue Utah need not recognize a "new" cause of action. However, this cause of action is not new. It is recognized in the majority of jurisdictions in the United States. Commentators have "perceived a trend toward increased recognition" of aiding and abetting torts." Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 The Business Lawyer 1135, 1140 (2006). Therefore, this Court should confirm Utah has already recognized a cause of action for aiding and abetting breach of fiduciary duty and should recognize torts for aiding and abetting generally, as set forth in Restatement (Second) Torts, § 876.

Defendants also argue that even if Utah recognizes a cause of action for aiding and abetting fraudulent non-disclosure, Plaintiffs' did not plead fraudulent non-disclosure with particularity. Such an argument necessarily relies on the faulty conclusion that "reliance" must be pled as part of a cause of action for fraudulent non-disclosure. There is no requirement for Plaintiffs' to plead reliance as part of a cause of action for fraudulent non-disclosure.

CONCLUSION

Plaintiffs plead their fraud allegations with particularity. When the *Second Amended Complaint* is read as a whole, instead of focusing on isolated paragraphs, it tells the story of

several inter-related and complicated fraudulent transactions. The trial court failed to read the *Second Amended Complaint* as a whole and instead required that all fraud related allegations be contained in the specific causes of action. It committed error when it did so.

Plaintiffs *Second Amended Complaint* clearly gives each of the Defendants notice of what they are charged with so that they can prepare a response. Plaintiffs sufficiently describe the misrepresentations made, who made them, when they were made and the circumstances surrounding them. Therefore, dismissing all of Plaintiffs' fraud-based causes of action in the *Second Amended Complaint* was error.

The trial court abused its discretion when it found Dolezsar is a necessary and indispensable party. The misrepresentations originated with the Defendants, not Dolezsar. Because Dolezsar was acting as Leslie's agent, when Defendants made misrepresentations to him, they made them to Leslie. Further, the trial court found Dolezsar is an indispensable party solely because Defendants cannot bring a cross-claim against his estate. The inability to bring a cross-claim against Dolezsar does not make him an indispensable party.

Further, the trial court abused its discretion when it dismissed Plaintiffs' fraud based causes of action without leave to amend. The trial court failed to explain the reasons it dismissed the fraud-based causes of action without leave to amend and it never applied any of the required factors in considering a motion to dismiss. Given the trial court's order, it would have been futile for Plaintiffs to have filed a motion to amend.

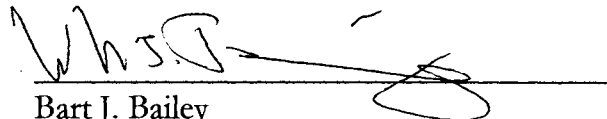
Lastly, the trial court erred when it dismissed all of Plaintiffs' claims for aiding and abetting. Contrary to the trial court's ruling, Utah has recognized a cause of action for aiding and abetting breach of fiduciary duties. The majority of jurisdictions in the United States have recognized causes of action for aiding and abetting tortious acts generally, as described in the

Restatement (Second) Torts, § 876. Finally, it is a logical extension to recognize general causes of action for aiding and abetting after recognizing causes of action for aiding and abetting breaches of fiduciary duties.

Therefore, this Court should find that: (1) the trial court erred in dismissing Plaintiffs' fraud based claims for lack of pleading with particularity; (2) the trial court abused its discretion in finding that Dolezsar was a necessary and indispensable party; (3) the trial court abused its discretion in dismissing Plaintiffs' fraud based claims without leave to amend; and (4) Utah recognizes causes of action for aiding and abetting.

DATED this 2nd day of May, 2011.

BAILEY & JENNINGS, LC



Bart J. Bailey
William T. Jennings

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2011, I served two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF ON APPEAL** and a **COURTESY BRIEF ON CD OF APPELLANTS' REPLY BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:-

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1840 North State St., Suite 200
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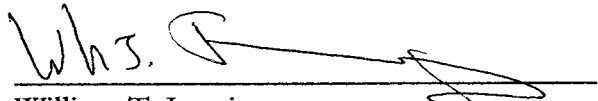
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William T. Jennings

ADDENDUM TABLE OF CONTENTS

- A. Answer, Counterclaim and Cross-Claim (Michael W. Aviano).

Tab A

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

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Attorney for Defendant, Michael W. Aviano

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, et al.,

Plaintiffs,

vs.

DAVID R. SIMPSON, et al.

MICHAEL W. AVIANO,

Counterclaimant,

vs.

**LESLIE D. MOWER, NAVONA, LC, and
JOHN DOES 1-10,**

Counterclaim Defendants,

and

**DAVID SIMPSON, AND THE PRESERVE
AT MAPLETON DEVELOPMENT
COMPANY, LLC,**

Cross-Claim Defendants.

**ANSWER, COUNTERCLAIM, AND
CROSS-CLAIM
(MICHAEL W. AVIANO)**

Case No.: 090403844

Judge Samuel D. McVey

The Defendant, Michael W. Aviano ("Mr. Aviano") by and through his counsel of record, HANSEN WRIGHT EDDY & HAWS, P.C., answers Plaintiffs' Second Amended Complaint as follows:

FIRST DEFENSE

The Plaintiffs' Second Amended Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

In answer to the specific paragraphs of Plaintiffs' Second Amended Complaint, Mr. Aviano answers as follows:

1. Mr. Aviano denies the allegations contained in Paragraphs 1 – 2 of Plaintiffs' Second Amended Complaint.
2. Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 3 – 22 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.
3. Mr. Aviano admits the allegations contained in Paragraph 23 of Plaintiffs' Second Amended Complaint.
4. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 24 – 403 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 24 – 403 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 24 – 403 of Plaintiffs' Second Amended Complaint and,

therefore, denies the same.

5. With respect to the allegations contained in Paragraph 404 of Plaintiffs' Second Amended Complaint, Mr. Aviano admits that David Simpson solicited a \$2,000,000.00 loan from Mr. Aviano. Mr. Aviano denies all other allegations contained in Paragraph 404 of Plaintiffs' Second Amended Complaint.

6. With respect to the allegations contained in Paragraph 405 of Plaintiffs' Second Amended Complaint, as well as each Subparagraph thereto, Mr. Aviano admits that he agreed to lend David Simpson \$2,000,000.00 for a period of one year, and that said loan was secured by a \$2,000,000.00 Deed of Trust on David Simpson's personal residence. Mr. Aviano denies all other allegations contained in Paragraph 405 of Plaintiff's Second Amended Complaint.

7. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 406 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 406 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 406 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

8. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 407 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 407 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 407 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

Moreover, any document or documents referenced in Paragraph 407 of Plaintiffs' Second Amended Complaint speak for themselves.

9. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 408 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 408 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 408 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

10. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. Mr. Aviano denies all other allegations contained in Paragraph 409 of Plaintiffs' Second Amended Complaint.

11. Mr. Aviano admits the allegations contained in Paragraph 410 of Plaintiffs' Second Amended Complaint. Mr. Aviano also affirmatively states MagnetBank should have released its security interest in Lot 67 as MagnetBank had previously agreed to do.

12. Mr. Aviano admits the allegations contained in Paragraph 411 of Plaintiffs' Second Amended Complaint. Furthermore, any document or documents referenced in Paragraph 411 of Plaintiffs' Second Amended Complaint speak for themselves.

13. Mr. Aviano admits the allegations contained in Paragraph 412 of Plaintiffs' Second Amended Complaint. Furthermore, any document or documents referenced in Paragraph 412 of Plaintiffs' Second Amended Complaint speak for themselves.

14. Mr. Aviano denies the allegations contained in Paragraph 413 of Plaintiffs' Second Amended Complaint as such allegations constitute legal conclusions.

15. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 414 – 793 of Plaintiffs’ Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 414 – 793 of Plaintiffs’ Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 414 – 793 of Plaintiffs’ Second Amended Complaint and, therefore, denies the same.

16. With respect to the allegations contained in Paragraphs 794 – 812 of Plaintiffs’ Second Amended Complaint, comprising Plaintiffs’ Eleventh Cause of Action for Fraud and Intentional Misrepresentation against Mr. Aviano, Mr. Aviano affirmatively states that said cause of action was dismissed as against Mr. Aviano without leave to amend. Consequently, no answer is required of Mr. Aviano with respect to said allegations. To the extent that Mr. Aviano is required to provide an answer to the allegations contained in Paragraphs 794 – 812 of Plaintiffs’ Second Amended Complaint, Mr. Aviano denies the same.

17. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 813 – 826 of Plaintiffs’ Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 813 – 826 of Plaintiffs’ Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 813 – 826 of Plaintiffs’ Second Amended Complaint and, therefore, denies the same.

18. With respect to the allegations contained in Paragraphs 827 – 830 of Plaintiffs’

Second Amended Complaint, comprising Plaintiffs' Thirteenth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty against Mr. Aviano, Mr. Aviano affirmatively states that said cause of action was dismissed as against Mr. Aviano without leave to amend. Consequently, no answer is required of Mr. Aviano with respect to said allegations. To the extent that Mr. Aviano is required to provide an answer to the allegations contained in Paragraphs 827 – 830 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

19. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 831 – 855 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 831 – 855 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 831 – 855 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

20. With respect to the allegations contained in Paragraphs 856 – 859 of Plaintiffs' Second Amended Complaint, comprising Plaintiffs' Fifteenth Cause of Action for Aiding and Abetting Fraudulent Non-Disclosure against Mr. Aviano, Mr. Aviano affirmatively states that said cause of action was dismissed as against Mr. Aviano without leave to amend. Consequently, no answer is required of Mr. Aviano with respect to said allegations. To the extent that Mr. Aviano is required to provide an answer to the allegations contained in Paragraphs 856 – 859 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

21. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 860 – 937 of Plaintiffs' Second Amended Complaint and, therefore, no answer is

required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 860 – 937 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 860 – 937 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

22. Mr. Aviano admits that The Preserve sold Lot 67 to Mr. Aviano in December 2007. Mr. Aviano denies all other allegations contained in Paragraph 938 of Plaintiff's Second Amended Complaint.

23. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 939 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 939 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 939 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

24. Mr. Aviano admits that he made a \$2,000,000.00 loan to David Simpson. Mr. Aviano denies all other allegations contained in Paragraph 940 of Plaintiffs' Second Amended Complaint.

25. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 941 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 941 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in

Paragraph 941 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

26. Mr. Aviano affirmatively states that any document or documents referenced in Paragraph 942 of Plaintiffs' Second Amended Complaint speak for themselves. Mr. Aviano denies all other allegations contained in Paragraph 942 of Plaintiffs' Second Amended Complaint.

27. Mr. Aviano denies the allegations contained in Paragraph 943 of Plaintiffs' Second Amended Complaint.

28. Mr. Aviano denies the allegations contained in Paragraph 944 of Plaintiffs' Second Amended Complaint.

29. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 945 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 945 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 945 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

30. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 946 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 946 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 946 of Plaintiffs' Second Amended Complaint and, therefore, denies the same. Mr. Aviano affirmatively states that the purchase price was \$900,000.00.

31. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. With respect to the remaining allegations contained in Paragraph 947 of Plaintiffs' Second Amended Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 947 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 947 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 947 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

32. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 948 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 948 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the allegations contained in Paragraph 948 of Plaintiffs' Second Amended Complaint as such allegations constitute legal conclusions.

33. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 949 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 949 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the allegations contained in Paragraph 949 of Plaintiffs' Second Amended Complaint as such allegations constitute legal conclusions.

34. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. With respect to the remaining allegations contained in Paragraph 950 of Plaintiffs' Second Amended

Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 950 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 950 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 950 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

35. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. With respect to the remaining allegations contained in Paragraph 951 of Plaintiffs' Second Amended Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 951 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 951 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

36. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. With respect to the remaining allegations contained in Paragraph 952 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

37. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. With respect to the remaining allegations contained in Paragraph 953 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

38. With respect to the remaining allegations contained in Paragraph 954 of Plaintiffs' Second Amended Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 954 of Plaintiffs' Second Amended Complaint and, therefore, no

answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 954 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 954 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

39. Mr. Aviano denies the allegations contained in Paragraph 955 of Plaintiffs' Second Amended Complaint.

40. Mr. Aviano denies the allegations contained in Paragraph 956 of Plaintiffs' Second Amended Complaint.

41. With respect to the remaining allegations contained in Paragraph 957 of Plaintiffs' Second Amended Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 957 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 957 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 957 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

42. Mr. Aviano denies the allegations contained in Paragraph 958 of Plaintiffs' Second Amended Complaint.

43. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 959 – 976 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is

levied against Mr. Aviano in Paragraphs 959 – 976 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 959 – 976 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

44. Mr. Aviano denies the allegations contained in Paragraph 977 of Plaintiffs' Second Amended Complaint.

45. Mr. Aviano denies the allegations contained in Paragraph 978 of Plaintiffs' Second Amended Complaint.

46. Mr. Aviano denies the allegations contained in Paragraph 979 of Plaintiffs' Second Amended Complaint.

47. Mr. Aviano denies the allegations contained in Paragraph 980 of Plaintiffs' Second Amended Complaint.

48. Mr. Aviano denies the allegations contained in Paragraph 981 of Plaintiffs' Second Amended Complaint.

49. With respect to the remaining allegations contained in Paragraph 982 of Plaintiffs' Second Amended Complaint, Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 982 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 982 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 982 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

50. Mr. Aviano denies the allegations contained in Paragraph 983 of Plaintiffs' Second Amended Complaint.

51. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 984 – 997 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 984 – 997 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 984 – 997 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

52. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 998 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 998 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

53. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 999 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 999 of Plaintiffs' Second Amended Complaint, Mr. Aviano denies the same.

54. Mr. Aviano affirmatively states that the purchase price was \$900,000.00. Mr. Aviano denies all other allegations contained in Paragraph 1000 of Plaintiffs' Second Amended Complaint.

55. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 1001 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 1001 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 1001 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

56. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 1002 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 1002 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 1002 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

57. Mr. Aviano denies the allegations contained in Paragraph 1003 of Plaintiffs' Second Amended Complaint.

58. Mr. Aviano denies the allegations contained in Paragraph 1004 of Plaintiffs' Second Amended Complaint.

59. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraph 1005 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraph 1005 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph 1005 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

60. Mr. Aviano denies the allegations contained in Paragraph 1006 of Plaintiffs' Second Amended Complaint.

61. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 1007 – 1215 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 1007 – 1215 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1007 – 1215 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

62. Mr. Aviano denies the allegations contained in Paragraph 1216 of Plaintiffs' Second Amended Complaint.

63. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 1217 – 1230 of Plaintiffs' Second Amended Complaint and, therefore, no answer is required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 1217 – 1230 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1217 – 1230 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

64. Mr. Aviano denies the allegations contained in Paragraph 1231 of Plaintiffs' Second Amended Complaint.

65. Mr. Aviano affirmatively states that no allegations are levied against him in Paragraphs 1232 – 1310 of Plaintiffs' Second Amended Complaint and, therefore, no answer is

required of Mr. Aviano with respect to said allegations. To the extent that any allegation is levied against Mr. Aviano in Paragraphs 1232 – 1310 of Plaintiffs' Second Amended Complaint, Mr. Aviano is without sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1232 – 1310 of Plaintiffs' Second Amended Complaint and, therefore, denies the same.

THIRD DEFENSE

Mr. Aviano hereby affirmatively denies all allegations not expressly admitted herein.

FOURTH DEFENSE

Mr. Aviano hereby asserts the affirmative defenses sets forth in Rule 8 of the Utah Rules of Civil procedure inasmuch as any such defense is applicable, namely, accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver, as well as any other matter constituting an avoidance or affirmative defense.

FIFTH DEFENSE

Mr. Aviano hereby asserts the defenses set forth in Rule 12 of the Utah Rules of Civil procedure inasmuch as any such defense is applicable, namely, lack of jurisdiction over the subject matter, lack of jurisdiction over the Plaintiff herein, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, failure to join an indispensable party, and any other defense set forth in the Utah Rules of Civil Procedure which would be applicable to this matter.

SIXTH DEFENSE

Mr. Aviano hereby assert the defenses set forth in Rule 9 of the Utah Rules of Civil procedure inasmuch as any such defense is applicable, including, but not limited to, failure to plead fraud, mistake, and conditions of the mind with particularity.

SEVENTH DEFENSE

Plaintiffs' claims are barred by Plaintiffs' own unclean hands, as well as Plaintiffs' own material breaches of contract, if any, Plaintiffs' failure to mitigate damages, if any, and by the economic loss doctrine. Furthermore, Plaintiffs have no standing to assert any of the claims contained in its Complaint, nor is Plaintiff a real party in interest with respect to any claims contained within its Complaint.

EIGHTH DEFENSE

Mr. Aviano may have claims against other parties or persons and hereby reserves the right to bring said claims against the same. Moreover, there may be further and additional affirmative defenses which are not yet known to Mr. Aviano, but which may become known through discovery. Mr. Aviano, therefore, reserves each and every affirmative defense as it may be ascertained through discovery herein. Furthermore, Mr. Aviano hereby incorporate all other affirmative defenses that may be alleged by any other parties to this lawsuit, or any individual or entity which may become a party hereto, to the extent that said affirmative defenses do not create liability for or waive rights enjoyed by Mr. Aviano.

WHEREFORE, having fully answered Plaintiffs' Second Amended Complaint, Mr. Aviano demands that said Second Amended Complaint be dismissed as against him, and that Mr. Aviano be awarded his costs and attorneys' fees incurred in answering Plaintiffs' Second Amended Complaint, and for such other and further relief as the Court deems appropriate.

COUNTERCLAIM AND CROSS-CLAIM

The Defendant, Michael W. Aviano ("Mr. Aviano"), for cause of action against the Plaintiffs, Navona, LC ("Navona") and Leslie D. Mower ("Ms. Mower"), and against the Defendants, The Preserve at Mapleton Development Company, LLC ("The Preserve") and David Simpson ("Mr. Simpson"), pursuant to *Utah R. Civ. P. 13*, asserts, alleges, and complains as follows:

PARTIES, JURISDICTION, AND VENUE

1. The Counterclaimant, Mr. Aviano, is an individual and resident of Utah County, Utah.
2. The Counterclaim Defendant, Ms. Mower, is also an individual and resident of Utah County, Utah. *See, Second Amended Complaint, ¶ 3.*
3. The Counterclaim Defendant, Navona, is a Utah limited liability company with its principal place of business in Utah County, Utah, and was and is, at all relevant times, a successor-in-interest of MagnetBank, collectively "MagnetBank/Navona." *See, Second Amended Complaint, ¶ 7.*
4. The Cross-Claim Defendant, Mr. Simpson, is an individual and resident of Utah County, Utah.
5. The Cross-Claim Defendant, The Preserve, is a Utah limited liability company with its principal place of business in Utah County, Utah.
6. John Does 1-10 are other individuals or entities which may also be liable to Mr. Aviano and who are subject to the jurisdiction of this Court.
7. The amount claimed is more than \$20,000.00, exclusive of costs.

8. The obligations giving rise to Mr. Aviano's allegations and causes of action were executed and performable in writing in Utah County, Utah.

9. In addition, the basis for Mr. Aviano's allegations and causes of action involve real property which is situated in Utah County, Utah.

10. This Court has jurisdiction over the subject matter of this lawsuit pursuant to *Utah Code Ann.* § 78A-5-102.

11. Venue is proper in this Court pursuant to *Utah Code Ann.* §§ 78B-3-301, 78B-3-304, and 78B-3-307, in addition to *Utah R. Civ. P.* 13.

FACTUAL ALLEGATIONS

12. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

13. On or about December 6, 2007, Mr. Aviano, as Trustee of the Michael W. Aviano Trust, purchased a certain parcel of real property, commonly referred to as Lot 67 of Plat A of The Preserve at Mapleton subdivision ("Lot 67"), from The Preserve, with the intent to build his home thereon. *See, Warranty Deed, attached to Plaintiff's Second Amended Complaint as Exhibit 145.*

14. David Simpson, acting as an authorized agent for The Preserve, agreed to sell Mr. Aviano Lot 67 for the amount of \$900,000.00.

15. As part of a prior loan made by Mr. Aviano to Mr. Simpson, which is unrelated to the present law suit, Mr. Aviano and Mr. Simpson agreed that Mr. Aviano would pay \$575,000.00 of the \$900,000.00 sales price, and that Mr. Simpson would pay the remaining \$325,000.00 of the \$900,000.00 sales price.

16. Pursuant to the agreement for the sale and purchase of Lot 67, the entity holding the first mortgage on the property, MagnetBank (of which Navona is the applicable successor-in-interest), agreed to release its security interest in Lot 67 upon the receipt of \$897,773.00. *See, Settlement Statement, attached as Exhibit 143 to Plaintiffs' Second Amended Complaint. See also, Approval Letter from MagnetBank, attached hereto as Exhibit "A" and incorporated herein by this reference.*

17. Subsequently, MagnetBank/Navona received \$897,773.00, as represented pursuant to the above-referenced Settlement Statement. *See, Id. See also, Second Amended Complaint, ¶ 410; and Standard Wire Transfer Request Form, attached hereto as Exhibit "B" and incorporated herein by this reference.*

18. Notwithstanding the fact that MagnetBank/Navona received \$897,773.00 from the proceeds of the sale of Lot 67, MagnetBank/Navona refuses to release its security interest in Lot 67. *See, Second Amended Complaint, ¶ 410.*

19. On or about April 14, 2009, Mr. Aviano, through his legal counsel, sent a letter to the Counterclaim Defendants, demanding the release of MagnetBank/Navona's security interest in Lot 67. *See, Letter dated April 14, 2009, attached hereto as Exhibit "C" and incorporated herein by this reference.*

20. MagnetBank/Navona still refuses to release its security interest in Lot 67.

21. In addition to the foregoing, Ms. Mower met with Mr. Aviano on at least five (5) separate occasions and personally offered to repay Mr. Aviano for any money which he paid towards the purchase price of Lot 67, as well as any other costs or fees subsequently incurred by Mr. Aviano with respect to Lot 67 in exchange for Mr. Aviano's agreement not to require

MagnetBank/Navona to release its security interest in Lot 67 and Mr. Aviano's agreement to postpone any further improvements of Lot 67.

22. Mr. Aviano accepted Ms. Mower's offer to repay the \$575,000.00, as well as subsequently incurred costs as set forth in Paragraphs 33 and 37, below, instead of requiring MagnetBank/Navona to release its security interest in Lot 67.

23. Ms. Mower never repaid any portion of the purchase price paid by Mr. Aviano towards the purchase of Lot 67, nor did Ms. Mower repay any subsequently incurred costs as set forth in Paragraphs 33 and 37, below.

24. Additionally, Navona's counsel also met with Mr. Aviano and offered, on behalf of his client, to repay Mr. Aviano any amount which Mr. Aviano had personally paid towards the purchase of Lot 67 within a few weeks, instead of requiring MagnetBank/Navona to release its security interest in Lot 67 and Mr. Aviano's agreement to postpone any further improvements of Lot 67.

25. Mr. Aviano accepted Navona's offer to repay the \$575,000.00 which Mr. Aviano had personally paid towards the purchase of Lot 67, instead of requiring MagnetBank/Navona to release its security interest in Lot 67.

26. The Counterclaim Defendant never repaid any portion of the purchase price paid by Mr. Aviano towards the purchase of Lot 67.

27. In addition to the foregoing, and in connection with the sale and purchase of Lot 57, on or about December 5, 2007, Mr. Simpson and The Preserve specifically represented to Mr. Aviano that all of the necessary preliminary work had been completed with respect to Lot 67 and its subdivision, such that the City had approved the entire subdivision, including Lot 67, for

building and construction, and that Mr. Aviano would be able to immediately obtain the requisite building permit and commence construction immediately after purchasing the lot.

28. In fact, however, the subdivision, including Lot 67, had not been approved for building or construction by the City of Mapleton.

29. At the time Mr. Simpson and The Preserve made these representations with respect to the ability to build on Lot 67, Mr. Simpson and The Preserve knew that the City of Mapleton had not approved Lot 67 for building and construction.

30. Consequently, Mr. Simpson and The Preserve knew that their representations were false.

31. Alternatively, Mr. Simpson and The Preserve made such representations recklessly, knowing that they had insufficient knowledge upon which to base such representations.

32. Mr. Simpson and The Preserve made the aforementioned representations to Mr. Aviano, with respect to the ability to build on Lot 67, for the purpose of inducing Mr. Aviano to purchase Lot 67.

33. Mr. Aviano, acting reasonably upon and in ignorance of the false representations made by Mr. Simpson and The Preserve, with respect to the ability to build on Lot 67, purchased Lot 67 for the purpose of building his home thereon, and expended an additional \$67,744.52 to begin initial improvements on Lot 67, comprised of the following costs:

- a. \$37,818.45: PRW Architects;
- b. \$8,792.50: RB&G Engineering;
- c. \$5,970.13: Clyde Roundy Construction;

- d. \$14,338.44: Equine Facilities Architects; and
- e. \$825: Interior Design Consultant.

34. Subsequently, on April 13, 2009, the City of Mapleton's Planning Director, Cory Branch, informed Mr. Aviano that the City would not issue a building permit for Lot 67 as the only preliminary work that had been completed with respect to the entire subdivision, including Lot 67, consisted solely of a recorded subdivision plat. *See, Letter dated April 13, 2009 from Mapleton City Corporation, attached hereto as Exhibit "D" and incorporated herein by this reference.*

35. The Planning Director further informed Mr. Aviano that the entire subdivision, including Lot 67, had not yet been serviced by completed improvements for culinary water mains, water service lines, street improvements, sewer mains, and sewer service lines and, therefore, no building permit could be issued. *See, Id.*

36. Additionally, the Planning Director informed Mr. Aviano that the City of Mapleton required a completed debris basin for the entire subdivision, including Lot 67, and that said debris basin was not completed. *See, Id.*

37. In addition to the expenses set forth in Paragraph 33, above, Mr. Aviano has also been required to pay, and continues to accrue, applicable property taxes for property that is essentially useless, i.e., Lot 67, as follows:

- a. \$10,773.95 for 2008; and
- b. \$5,913.92 for 2009.

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[CONTINUED ON NEXT PAGE]

FIRST CAUSE OF ACTION
Failure to Release Security Interest (*Utah Code Ann.* § 57-1-38, et seq.)
Navona, LC

38. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

39. On or about December 6, 2007, Mr. Aviano, as Trustee of the Michael W. Aviano Trust, purchased Lot 67 from The Preserve. *See, Warranty Deed, attached to Plaintiff's Second Amended Complaint as Exhibit 145.*

40. Pursuant to the agreement for the sale and purchase of Lot 67, the entity holding the first mortgage on the property, MagnetBank/Navona, agreed to release its security interest in Lot 67 upon the receipt of \$897,773.00. *See, Settlement Statement, attached as Exhibit 143 to Plaintiffs' Second Amended Complaint. See also, Exhibits "A" and "B", hereto.*

41. MagnetBank/Navona received \$897,773.00 from the proceeds of the sale of Lot 67. *See, Id. See also, Second Amended Complaint, ¶ 410. See also, Exhibit "B", hereto.*

42. Notwithstanding the fact that MagnetBank/Navona received \$897,773.00 from the proceeds of the sale of Lot 67, MagnetBank/Navona refuses to release its security interest in Lot 67. *See, Second Amended Complaint, ¶ 410.*

43. Mr. Aviano has sent written demand to MagnetBank/Navona for the immediate release of MagnetBank/Navona's security interest in Lot 67, but MagnetBank/Navona still refuses to release its security interest in Lot 67. *See, Exhibit "C", hereto.*

44. Mr. Aviano has been damaged by MagnetBank/Navona's refusal to release its security interest in Lot 67.

45. Specifically, Mr. Aviano personally paid \$575,000.00 towards the purchase price

of Lot 67, and has expended an additional \$84,432.39 to improve Lot 67, as set forth in Paragraphs 33 and 37 above, but is unable to sell, convey, mortgage, or otherwise benefit from Lot 67 because of MagnetBank/Navona's recorded security interest thereon.

46. Moreover, Mr. Aviano has incurred, and continues to incur, legal expenses in bringing this action against the Counterclaim Defendants.

47. Consequently, Navona is liable to Mr. Aviano, pursuant to *Utah Code Ann.* § 57-1-38, et seq., for failing to release its security interest in Lot 67, in an amount to be proved at trial, but in no event less than the greater of \$1,000.00 or treble actual damages, totaling \$1,978,297.17, in addition to all expenses incurred in enforcing this action against Navona, in addition to reasonable attorneys' fees and court costs.

SECOND CAUSE OF ACTION

Slander of Title

Navona, LC

48. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

49. By failing to release its security interest in Lot 67, as recorded in the official records of the Utah County Recorder, Navona has published a slanderous statement disparaging Mr. Aviano's title thereto, indicating encumbrances on Lot 67 which do not actually or lawfully exist.

50. Because Mr. Aviano is the rightful owner of Lot 67, free and clear of Navona's security interest, any recording in the official records of the Utah County Recorder to the contrary, including Navona's recorded security interest, are false.

51. Navona has acted maliciously, wrongfully, knowingly, and intentionally in

refusing to release its security interest in Lot 67, which has now cast a false or misleading impression that such security interest actually exists, when, in fact, it does not.

52. Such false or misleading impressions are adverse to Mr. Aviano's ownership of Lot 67, and under the circumstances, Navona should have reasonably foreseen that such false or misleading impressions would result in damage to Mr. Aviano.

53. Mr. Aviano has been damaged by MagnetBank/Navona's refusal to release its security interest in Lot 67.

54. Specifically, Mr. Aviano personally paid \$575,000.00 towards the purchase price of Lot 67 and is unable to sell, convey, or mortgage Lot 67 because of MagnetBank/Navona's recorded security interest thereon.

55. Furthermore, Mr. Aviano has expended an additional \$84,432.39 in attempting to improve Lot 67, as set forth in Paragraphs 33 and 37, above, but has been unable to realize the fruits thereof because of MagnetBank/Navona's security interest thereon.

56. Moreover, Mr. Aviano has incurred, and continues to incur, legal expenses in bringing this action against the Counterclaim Defendants.

57. Consequently, Navona is liable to Mr. Aviano for Navona's slander of Mr. Aviano's title to Lot 67 in an amount to be determined at trial, in addition to punitive damages.

THIRD CAUSE OF ACTION

Unjust Enrichment

Navona, LC

58. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

59. Navona has been unjustly enriched by Mr. Aviano.

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60. Specifically, Mr. Aviano conferred a benefit upon Navona by ensuring that Navona, as successor-in-interest to MagnetBank, received \$897,773.00 from the proceeds of the sale of Lot 67, \$575,000.00 of which Mr. Aviano paid personally.

61. Moreover, Mr. Aviano has further conferred a benefit upon Navona by improving and maintaining Lot 67, upon which Navona claims a security interest, in the amount of \$84,432.39, as set forth in Paragraphs 33 and 37, above.

62. Navona appreciates and has a knowledge of said benefit conferred upon it by Mr. Aviano, as evidenced by Navona's own admissions. *See, inter alia, Second Amended Complaint, ¶ 410.*

63. Navona has accepted and retained said benefit, and under the circumstances of this case (i.e., failing to release its security interest in Lot 67 despite having received the \$897,773.00 it agreed to receive in exchange for releasing its security interest in Lot 67), it would be inequitable for Navona to continue to retain such benefit without the payment of its value to Mr. Aviano.

64. Mr. Aviano has been damaged in an amount to be proved at trial, but in no event less than \$659,432.39, as set forth in Paragraphs 60 and 61, above, as well as by incurring applicable costs and attorneys' fees in bringing this action against Navona.

65. Navona, therefore, has been unjustly enriched by Mr. Aviano, and Mr. Aviano has been damaged thereby in an amount to be proved at trial, but in no event less than \$659,432.39, plus applicable costs and attorneys' fees.

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FOURTH CAUSE OF ACTION
Breaches of Oral Contracts
Leslie D. Mower and Navona, LC

66. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

67. Mr. Aviano entered into valid oral agreements with both Ms. Mower personally, and Navona.

68. Specifically, Ms. Mower met with Mr. Aviano on at least five (5) separate occasions and personally offered to repay Mr. Aviano for any money which he paid towards the purchase price of Lot 67, as well as any other costs or fees subsequently incurred by Mr. Aviano with respect to Lot 67, in exchange for Mr. Aviano's agreement not to require MagnetBank/Navona to release its security interest in Lot 67 and Mr. Aviano's agreement to postpone any further improvements of Lot 67.

69. Mr. Aviano accepted Ms. Mower's offer to repay the \$575,000.00, as well as subsequently incurred costs as set forth in Paragraphs 33 and 37, above, instead of requiring MagnetBank/Navona to release its security interest in Lot 67.

70. Mr. Aviano has fully performed each of his obligations under the oral agreement with Ms. Mower, as set forth in Paragraphs 67 through 69, above, by postponing any additional improvements upon Lot 67, and by not attempting to further force Navona to release its security interest in Lot 67, until Ms. Mower materially breached the oral agreement.

71. Ms. Mower has materially breached her oral agreement with Mr. Aviano by failing to repay \$575,000.00 of the purchase price personally paid by Mr. Aviano towards Lot 67, as well as subsequently incurred costs.

72. Mr. Aviano has been damaged as a result of Ms. Mower's breach in the amount of \$659,432.39, and by incurring applicable costs and attorneys' fees in bringing this action against said Counterclaim Defendants.

73. Furthermore, Navona's counsel also met with Mr. Aviano and offered, on behalf of his client, to repay Mr. Aviano any amount which Mr. Aviano had personally paid towards the purchase of Lot 67 within a few weeks, instead of requiring MagnetBank/Navona to release its security interest in Lot 67 and Mr. Aviano's agreement to postpone any further improvements of Lot 67.

74. Mr. Aviano accepted Navona's offer to repay the \$575,000.00 which Mr. Aviano had personally paid towards the purchase of Lot 67, instead of requiring MagnetBank/Navona to release its security interest in Lot 67.

75. Mr. Aviano has fully performed each of his obligations under the oral agreement with Navona, as set forth in Paragraphs 73 through 74, above, by postponing any additional improvements upon Lot 67, and by not attempting to further force Navona to release its security interest in Lot 67, until Ms. Mower materially breached the oral agreement.

76. Navona has materially breached its oral agreement with Mr. Aviano by failing to repay \$575,000.00 of the purchase price personally paid by Mr. Aviano towards Lot 67.

77. Mr. Aviano has been damaged as a result of Navona's breach in the amount of \$575,000.00, and by incurring applicable costs and attorneys' fees in bringing this action against said Counterclaim Defendants.

78. Consequently, Ms. Mower is liable to Mr. Aviano for her breach of contract in an amount to be determined at trial, but in no event less than \$659,432.39, plus applicable costs and

attorneys' fees.

79. Navona is liable to Mr. Aviano for its breach of contract in an amount to be proved at trial, but in no event less than \$575,000.00, plus applicable costs and attorneys' fees.

FIFTH CAUSE OF ACTION
Breach of the Covenant of Good Faith and Fair Dealing
Leslie D. Mower and Navona, LC

80. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

81. Every contract in Utah, including the oral agreement between Ms. Mower and Mr. Aviano, and the oral agreement between Navona and Mr. Aviano, is subject to an implied covenant of good faith and fair dealing.

82. Under the covenant of good faith and fair dealing, each party, including the Counterclaim Defendants in their respective oral agreements, impliedly promises that he or she will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract.

83. By Ms. Mower's and Navona's respective failures to comply with the express contractual provisions of their respective oral agreements with Mr. Aviano, as set forth in Paragraphs 66 through 79, above, namely Ms. Mower's \$659,432.39 payment obligation, and Navona's \$575,000.00 payment obligation, the Counterclaim Defendants have intentionally or purposely destroyed and injured Mr. Aviano's right to receive the fruits of those oral agreements.

84. Mr. Aviano has been damaged as a result of the Counterclaim Defendants' various breaches of the covenant of good faith and fair dealing in the amount of \$659,432.39, plus applicable costs and attorneys' fees in bringing this action against said Counterclaim

Defendants.

85. Consequently, Ms. Mower and Navona are liable to Mr. Aviano for their respective breaches of the covenant of good faith and fair dealing with respect to their respective oral agreements with Mr. Aviano, in an amount to be proved at trial, but in no event less than \$659,432.39, plus applicable costs and attorneys' fees.

SIXTH CAUSE OF ACTION

Unjust Enrichment

Leslie D. Mower and Navona, LC

86. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

87. In the event the Court does not find damages pursuant to the respective oral agreement between Ms. Mower and Mr. Aviano, and between Navona and Mr. Aviano, Mr. Aviano alleges, in the alternative to its breaches of contracts claims, that the Counterclaim Defendants have each been unjustly enriched by Mr. Aviano.

88. Specifically, Mr. Aviano conferred various benefits upon Ms. Mower and Navona pursuant to the respective oral agreements between Ms. Mower and Mr. Aviano, and between Navona and Mr. Aviano, by, *inter alia*, postponing any further improvements on Lot 67 and by not forcing Navona to release its security interest in Lot 67.

89. Ms. Mower and Navona appreciate and have a knowledge of such benefits conferred by Mr. Aviano by, *inter alia*, not having to release Navona's security interest in Lot 67.

90. Ms. Mower and Navona have accepted and retained said benefits, and under the circumstances of this case, it would be inequitable for said Counterclaim Defendants to continue

to retain such benefits without the payment of their value to Mr. Aviano.

91. Therefore, Ms. Mower and Navona have been unjustly enriched, and Mr. Aviano has been damaged thereby in an amount to be proved at trial, but in no event less than \$659,432.39, plus applicable costs and attorneys' fees incurred in bringing this action against Ms. Mower and Navona.

SEVENTH CAUSE OF ACTION

Fraud

David Simpson and The Preserve at Mapleton Development Company, LLC

92. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

93. In connection with the sale and purchase of Lot 67, on or about December 5, 2007, Mr. Simpson, personally, and The Preserve specifically represented to Mr. Aviano that all of the preliminary work had been completed with respect to Lot 67 and its subdivision, such that the City had approved the entire subdivision, including Lot 67, for building and construction, and that Mr. Aviano would be able to immediately obtain the requisite building permit and commence construction immediately after purchasing the lot.

94. In fact, however, the subdivision, including Lot 67, had not been approved for building or construction by the City of Mapleton, the State of Utah, nor any other applicable governmental or regulatory entity. *See, Exhibit "D", hereto.*

95. At the time Mr. Simpson and The Preserve made these representations with respect to the ability to build on Lot 67, Mr. Simpson and The Preserve knew that neither the City of Mapleton or the State of Utah, nor any other applicable governmental or regulatory entity, had approved Lot 67 for building and construction, and Mr. Simpson and The Preserve

made such representations willfully, maliciously, intentionally, and fraudulently. *See, Id.*

96. Consequently, Mr. Simpson and The Preserve knew that their representations were false. *See, Id.*

97. Alternatively, Mr. Simpson and The Preserve made such representations recklessly, knowing that they had insufficient knowledge upon which to base such representations.

98. Mr. Simpson and The Preserve made the aforementioned representations to Mr. Aviano, with respect to the ability to build on Lot 67, for the purpose of inducing Mr. Aviano to purchase Lot 67.

99. Mr. Aviano, acting reasonably upon and in ignorance of the false representations made by Mr. Simpson and The Preserve with respect to the ability to build on Lot 67, purchased Lot 67 for \$900,000.00, \$575,000.00 of which Mr. Aviano paid personally, with the intent to construct a house thereon.

100. Mr. Aviano also spent an additional \$67,744.52 to begin initial improvements on Lot 67, comprised of the following costs:

- a. \$37,818.45: PRW Architects;
- b. \$8,792.50: RB&G Engineering;
- c. \$5,970.13: Clyve Roundy Construction;
- d. \$14,338.44: Equine Facilities Architects; and
- e. \$825: Carol, Interior Design Consultant.

101. Subsequently, on April 13, 2009, the City of Mapleton's Planning Director, Cory Branch, informed Mr. Aviano that the City would not issue a building permit for Lot 67 as the

only preliminary work that had been completed with respect to the entire subdivision, including Lot 67, consisted solely of a recorded subdivision plat. *See, Exhibit "D", hereto.*

102. The Planning Director further informed Mr. Aviano that the entire subdivision, including Lot 67, had not yet been serviced by completed improvements for culinary water mains, water service lines, street improvements, sewer mains, and sewer service lines and, therefore, no building permit could be issued. *See, Id.*

103. Additionally, the Planning Director informed Mr. Aviano that the City of Mapleton required a completed debris basin for the entire subdivision, including Lot 67, and that said debris basin was not completed. *See, Id.*

104. In addition to the expenses set forth in Paragraph 100, above, Mr. Aviano has also been required to pay, and continues to accrue, applicable property taxes for property that is essentially useless, i.e., Lot 67, as follows:

- a. \$10,773.95 for 2008; and
- b. \$5,913.92 for 2009.

105. Consequently, Mr. Aviano has been damaged as a result of Mr. Simpson's and The Preserve fraudulent acts, comprised of knowingly making false statements with respect to Mr. Aviano's ability to immediately begin building on Lot 67 and the necessary preliminary work that had allegedly been completed, for the purpose of inducing Mr. Aviano to purchase Lot 67.

106. Specifically, Mr. Aviano purchased Lot 67, based upon Mr. Simpson's and The Preserve's fraudulent misrepresentations, for the purpose of building his home thereon, which he is now unable to do.

107. Consequently, Mr. Aviano has paid \$575,000.00 towards the \$900,000.00 purchase price of a piece of real property which is essentially useless.

108. Additionally, Mr. Aviano has incurred an additional \$84,432.39 in expenses, as set forth in Paragraphs 100 and 104, above, based upon Mr. Simpson's and The Preserve's fraudulent misrepresentations.

109. Furthermore, Mr. Aviano has incurred, and continues to incur, legal expenses in bringing this action against said Cross-Claim Defendants.

110. Therefore, Mr. Simpson and The Preserve are jointly and severally liable to Mr. Aviano for the fraudulent misrepresentations made by Mr. Simpson and The Preserve, in an amount to be proven at trial, but in no event less than \$659,432.39, plus applicable costs and attorneys' fees, in addition to punitive damages.

EIGHTH CAUSE OF ACTION

Breach of Warranty Deed

The Preserve at Mapleton Development Company, LLC

111. Mr. Aviano incorporates herein by reference and realleges each of the preceding paragraphs.

112. On or about December 6, 2007, Mr. Aviano, as Trustee of the Michael W. Aviano Trust, purchased Lot 67 from The Preserve, for the purpose of building his home thereon.

113. The Preserve conveyed Lot 67 to Mr. Aviano via a general Warranty Deed. *See, Warranty Deed, attached to Plaintiff's Second Amended Complaint as Exhibit 145.*

114. Pursuant to the aforementioned Warranty Deed, The Preserve made, *inter alia*, the following covenants of title with Mr. Aviano:

- a. the covenant of seisin;

- b. the covenant of right to convey;
- c. the covenant against encumbrances;
- d. the covenant of quiet possession; and
- e. the covenant of general warranty.

115. The Preserve has breached the Warranty Deed's covenant against encumbrances and covenant of quiet possession by failing to obtain a release of MagnetBank/Navona's security interest in Lot 67, which injuriously affects the value of Lot 67 and constitutes a burden and limitation on Mr. Aviano.

116. The Preserve may have already breached, or may soon be in breach of, additional covenants made pursuant to the Warranty Deed.

117. Mr. Aviano has been damaged by The Preserve's breaches by having to incur, and continuing to incur, applicable costs and attorneys' fees in litigating the matter with MagnetBank/Navona.

118. Consequently, The Preserve is liable to Mr. Aviano for said costs and legal fees as a result of The Preserve's breaches of various covenants made pursuant to the Warranty Deed, in an amount to be determined at trial.

WHEREFORE, Mr. Aviano respectfully requests that the Court grant the following relief:

On Mr. Aviano's First Cause of Action:

1. For an Order of the Court declaring that Navona has wrongfully and unlawfully refused to release its security interest in Lot 67, pursuant to *Utah Code Ann.* § 57-1-38, et seq., and releasing Navona's security interest in Lot 67.

2. For a determination by the Court and a Judgment against Navona as to the amount of damages suffered by Mr. Aviano as a result of Navona's refusal to release its security interest in Lot 67, but in no event less than the greater of \$1,000.00 or treble actual damages, but not less than \$1,978,297.17, including all expenses incurred in enforcing this action against Navona, in addition to reasonable attorneys' fees and court costs, pursuant to *Utah Code Ann.* § 57-1-38, et seq.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Second Cause of Action:

1. For an Order of the Court declaring that Navona is liable to Mr. Aviano for the slander of Mr. Aviano's title to Lot 67.

2. For a determination by the Court and a Judgment against Navona as to the amount of damages suffered by Mr. Aviano as a result of Navona's slander of Mr. Aviano's title to Lot 67, as proved at trial, but in no event less than \$659,432.39, plus applicable costs and attorneys' fees incurred by Mr. Aviano in bringing this law suit.

3. For punitive damages in the sum of \$1,000,000.00.

4. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Third Cause of Action:

1. For an Order of the Court declaring that Navona is liable to Mr. Aviano for unjust enrichment of the amount paid by Mr. Aviano towards the purchase price of Lot 67, as well as all amounts expended in the improvement or maintenance thereof.

2. For a determination and Judgment against Navona in an amount determined by the Court that is reasonable to cure the unjust enrichment of Navona, but in no event shall such amount be less than \$659,432.39, plus applicable costs and attorneys' fees incurred by Mr. Aviano in bringing this law suit.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Fourth Cause of Action:

1. For an Order of the Court declaring that Ms. Mower and Navona are both in breach of their respective oral agreements with Mr. Aviano.

2. For a Judgment against said Defendants, for such breaches in an amount to be determined at trial, but in no event shall such amount be less than \$659,432.39, plus applicable costs and attorneys' fees.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Fifth Cause of Action:

1. For an Order of the Court declaring that Ms. Mower and Navona are both in breach of their respective oral agreement with Mr. Aviano, for having breached the covenant of good faith and fair dealing therein.

2. For a Judgment against said Defendants for such breaches in an amount to be determined at trial, but in no event shall such amount be less than \$659,432.39, plus applicable costs and attorneys' fees.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

the circumstances.

On Mr. Aviano's Sixth Cause of Action:

1. For an Order of the Court declaring that Ms. Mower and Navona are each liable to Mr. Aviano for unjust enrichment pursuant to each of their respective nonperformances under their respective oral agreements with Mr. Aviano.

2. For a determination and Judgment against Ms. Mower and Navona, in an amount determined by the Court that is reasonable to cure the respective unjust enrichment of each Counterclaim Defendant, but in no event shall such amount be less than \$659,432.39, plus applicable costs and attorneys' fees incurred by Mr. Aviano in bringing this law suit.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Seventh Cause of Action:

1. For a Judgment against Mr. Simpson and The Preserve, jointly and severally, for their fraudulent misrepresentations in an amount to be proved at trial, but in no event shall such amount be less than \$659,432.39, plus applicable costs and attorneys' fees.

2. For punitive damages in the sum of \$1,000,000.00.

3. For such other and further relief as to the court appears just and equitable under the circumstances.

On Mr. Aviano's Eighth Cause of Action:

1. For an Order of the Court declaring that The Preserve is in breach of the Warranty Deed between The Preserve and Mr. Aviano.

2. For a Judgment against said The Preserve for its breaches in an amount to be

determined at trial, but in no event shall such amount be less than the costs and legal fees incurred by Mr. Aviano as a result of The Preserve's breaches of various covenants made pursuant to the Warranty Deed, in an amount to be determined at trial.

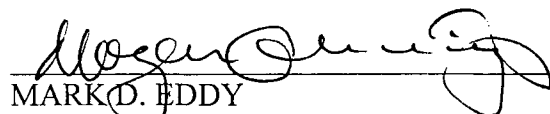
3. For such other and further relief as to the court appears just and equitable under the circumstances.

For All Causes of Action:

1. An award of reasonable attorneys' fees incurred in bringing this lawsuit, costs and expenses of suit, pre-judgment interest as allowed by law, and such other and further relief as the Court deems just and appropriate.

DATED this 27th day of May, 2010.

HANSEN WRIGHT EDDY & HAWS, P.C.



MARK D. EDDY

MORGAN L. CUMMINGS

Attorneys for Michael W. Aviano

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document, postage prepaid, to the following this 27 day of may, 2010:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
Troon Park, 584 South State Street
Orem, Utah 84058

Christopher D. Greenwood
GREENWOOD & BLACK, INC.
1840 North State Street, Suite 200
Provo, Utah 84604-0117

Craig Carlile
RAY QUINNEY & NEBEKER, P.C.
86 North University Avenue, Suite 430
Provo, Utah 84601

Jason D. Boren
BALLARD SPAHR LLP
201 South Main Street, Suite 800
Salt Lake City, Utah 84111

R. Spencer Macdonald
SUMSION MACDONALD, LLC
86 North University Avenue, Suite 400
Provo, Utah 84601

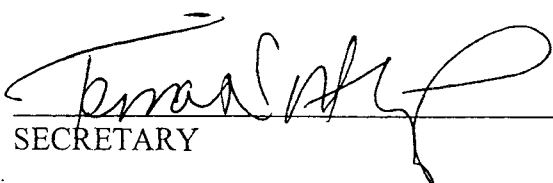
Matthew L. Moncur
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Jonathan L. Jaussi
FREEDOM LEGAL
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Salt Lake City, Utah 84145-0898

Julian D. Jensen
JULIAN D. JENSEN, P.C.
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Salt Lake City, Utah 84111

Nicholas U. Frandsen
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145-0898



SECRETARY



Magnet Bank

Jill Christensen
101 North University Ave
Provo, UT 84601

Subject: Lot Release Price for Lot 67

Dear Jill:

As you have requested, we are herein providing a pay-off quote for Lot 67 of The Preserve at Mapleton Subdivision.

The release price for this individual lot is equal to the net proceeds of that lot.

Net Proceeds is defined below:

"means, with respect to the sale of any Lot, the greater of (i) the amount of cash received by Borrower for such Lot plus the fair market value in cash of any non-cash consideration realized from such sale after deduction of any escrow, closing, recording and title insurance costs paid by Borrower in connection therewith, or (ii) the sum of cash received by Borrower plus the fair market value in cash of any non-cash consideration realized from such sale."

Please send fully executed HUD to Brian Webster at bwebster@magnetbank.net and wire funds directly to MagnetBank as noted below:

SunTrust Bank
ABA # - 061000104
For Credit to: The Preserve at Mapleton
Account Name: MagnetBank
Account Number: 1000025217091
Attn: (Loan Operations)
Note: Lot 67, Preserve at Mapleton Subdivision, Loan #101047

Wire funds will be credited as of the date actually received by MagnetBank.

If you have any questions, please don't hesitate to call, my phone number (801) 424-7185.

Cordially,

Brian Webster
Credit Analyst
MagnetBank

Mail to

2825 East Cottonwood Parkway ■ Suite 180 ■ Salt Lake City, UT 84121 ■ P 801.733.2626 ■ F 801.733.2627 ■ www.magnetbank.net

CENTRAL BANK
STANDARD WIRE TRANSFER REQUEST FORM

DATE: 12/7/07 WIRE#: _____

AMOUNT: 897,773.00

BANK NAME: SunTrust Bank

ADDRESS: _____

CITY: _____ STATE: _____

ROUTING AND TRANSIT # (ABA): 061000104

ORIGINATOR: Pro-Tide and Escrow, Inc.

ORIG. ADDRESS: 101 North University Ave., Provo, Utah 84601

ORIG. TAX ID #: 87-0495507

BENEFICIARY ACCOUNT #: 1000025217091

BENEFICIARY NAME: MagnetBank For Credit to: The Preserve at Mapleton

BENEFICIARY ADDRESS: _____

ADDITIONAL INFORMATION: Loan Operations; Lot 67, Preserve at Mapleton Sub, Loan #101047

ACCOUNT # TO BE CHARGED: 61110730 NON CUST/CK SYSTEMS INQ/OFAC: _____

TOTAL AMOUNT ACCOUNT WILL BE CHARGED: _____ DEBIT MEMO: _____

WIRE FEE: _____ CHARGE: _____ WAIVE: _____

HOW REQUEST RECEIVED: PERSON: _____ PHONE: _____ FAX/LETTER: _____

CALL BACK ON WIRE REQUESTED BY PHONE/FAX/LETTER: _____

PERSON CONTACTED: _____ DATE: _____ TIME: _____

OFFICE REQUESTING WIRE: _____ ORDERED BY: _____

VERIFIED WITH: Diane TIME: 11:00 INITIALS gc

OFFICER AUTHORIZATION: _____

CUSTOMER AUTHORIZATION: [Signature] DATE: 12/7/07

ATTORNEYS

233 SOUTH PLEASANT GROVE BLVD., SUITE 202
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 443-2380
FACSIMILE (801) 796-0984

; "TUCKER" HANSEN
' L. WRIGHT
: D. EDDY
: K. HAWS
SA K. MELLOR
D. JARVIS
PHY G. MERRILL
ME D. MERRITT

April 14, 2009

Mr. William T. Jennings
Bailey & Jennings, LC
584 S. State Street
Orem, Utah 84058

Re: Lot 67 - The Preserve at Mapleton Subdivision

Dear Mr. Jennings,

I represent Michael Aviano, the owner of Lot 67 of The Preserve at Mapleton. I am in possession of letters exchanged between you and Mr. Garrett Wilson at Pro-Title and Escrow, Inc. along with a payoff statement, closing documents and other materials evidencing the loan payoff to Magnet Bank in December of 2007. I also noticed from your letter that you represent the successor in interest to the Magnet Bank loan on The Preserve at Mapleton project. If I understand your letter correctly, your client purchased the underlying Note and Trust Deed on February 26, 2008, after the loan payoff was received by Magnet Bank on my client's lot.

Notwithstanding Pro-Title's efforts to convince your client to reconvey, or to allow it to do so under its statutory authority, your client has refused to do so. Again, my review of the ample documentation and the wire confirmation regarding Lot 67 show that payment has been received and that there would be no way of proving any differently. If you possess any evidence to the contrary, please make the same available to me at your earliest convenience. If not, your client has ten (10) days within which to file the reconveyance or I will instruct my client to bring action pursuant to Utah Code Annotated 57-1-38 et. seq. I will also be seeking the attorney's fees and other costs associated with this action.

Sincerely,

HANSEN WRIGHT EDDY & HAWS

MARK D. EDDY

Attorney at Law

Mayor: Laurel Brady
Administrator: Robert P. Bradshaw, M.P.A.
Community Development: Cory Branch
Finance Controller: Jeannie Bell
City Engineer: Gary Calder

Director of Public Works: M. Scott Bird
Treasurer: Marian Everett
Recorder: Camille Brown
Police Chief: Dean Petersson
Recreation Director: Stacey Child



MAPLETON CITY CORPORATION

April 13, 2009

Mike Aviano
1229 Town & Country Road
Springville, Utah 84663

Re: Building Permit #4586-NH – The Preserve at Mapleton Subdivision, Plat "A" (Lot 67) – 1331 East Little Canyon Court

Dear Mr. Aviano,

This letter will serve as a follow-up to our recent conversation regarding the status of your building permit. As per our conversation you have requested that the permit be issued, based on the fact that the subdivision (The Preserve at Mapleton Subdivision, Plat "A") plat has been recorded. Mapleton City Code Section 18.84.390, Minimum Level Of Improvements To Be Installed Before Building Permits May Be Issued, cites that no building permit may be issued unless and until the lot is serviced by completed improvements for culinary water main, water service line, street improvements, sewer main, and sewer service lines. Thus, simply recording a subdivision plat does not entitle an owner to issuance of a building permit.

Mapleton City Code Section 18.12.050, Building Permits, Paragraph E, Grounds for Denying Permit, states "The city shall have complete discretion to grant or deny a permit." As discussed in our earlier conversation Mapleton City is concerned with the current status of the subdivision improvements, especially as it relates to the proposed debris basin. As of today's date the basin has not been completed and in recent months conflicts have surfaced regarding ownership of the basin.

In short, the purpose of this letter is to emphasize that Mapleton City is prepared to review your proposed building permit once the ownership of the proposed basin has been resolved, a debris basin drainage easement has been found acceptable by Mapleton City and recorded at the Utah County Records Office, and the debris basin has been constructed and approved by Mapleton City. Once the above issues have been resolved Mapleton City will review the proposed plan and determine if it meets the requirements of the Mapleton City Code.

If you have any further questions, please contact me at (801) 806-9101, or cbranch@mapleton.org.

Sincerely,

MAPLETON CITY CORPORATION

Cory Branch
Planning Director

3492