

2010

# Iota a Utah limited liability company, and California Benefit Inc., a California corporation v. Davco Management Company L.C., a Utah Limited liability company: Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Paul D. Veasy; David R. Hall; Parsons, Behle, and Latimer; Counsel for Plaintiffs/Appellees.

Darwin C. Fisher; Counsel for Defendant/Appellant.

---

## Recommended Citation

Brief of Appellant, *Iota v. Davco*, No. 20100855.00 (Utah Supreme Court, 2010).

[https://digitalcommons.law.byu.edu/byu\\_sc2/3063](https://digitalcommons.law.byu.edu/byu_sc2/3063)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH**

---

IOTA LLC, a Utah limited liability  
company, and CALIFORNIA  
BENEFIT, INC., a California  
corporation

Plaintiff/Appellee

vs.

DAVCO MANAGEMENT COMPANY  
L.C., a Utah limited liability company,

Defendant/Appellant

Case No. 20100855-CA

---

**BRIEF OF APPELLANT**

---

Appeal from the Fifth District Court of Washington County, State of Utah  
The Honorable James L. Shumate

**COUNSEL FOR PLAINTIFFS /  
APPELLEES**

Paul D. Veasy (3964)  
David R. Hall (9225)  
PARSONS, BEHLE & LATIMER  
201 South Main St, Ste 1800  
Salt Lake City, UT 84111  
Telephone: 801.532.1234

**COUNSEL FOR DEFENDANT/  
APPELLANT**

Darwin C. Fisher (1080)  
DARWIN C. FISHER P.C.  
40 N. 300 East, Suite 101  
St. George, UT 84770  
Telephone: 435.688.1170

**FILED  
UTAH APPELLATE COURTS  
JUL 20 2011**

---

**IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH**

---

IOTA LLC, a Utah limited liability  
company, and CALIFORNIA  
BENEFIT, INC., a California  
corporation

Plaintiff/Appellee

vs.

DAVCO MANAGEMENT  
COMPANY L.C., a Utah limited  
liability company,

Defendant/Appellant

Case No. 20100855-CA

---

**BRIEF OF APPELLANT**

---

Appeal from the Fifth District Court of Washington County, State of Utah  
The Honorable James L. Shumate

**COUNSEL FOR PLAINTIFFS /  
APPELLEES**

Paul D. Veasy (3964)  
David R. Hall (9225)  
PARSONS, BEHLE & LATIMER  
201 South Main St, Ste 1800  
Salt Lake City, UT 84111  
Telephone: 801.532.1234

**COUNSEL FOR DEFENDANT/  
APPELLANT**

Darwin C. Fisher (1080)  
DARWIN C. FISHER P.C.  
40 N. 300 East, Suite 101  
St. George, UT 84770  
Telephone: 435.688.1170

## **LIST OF PARTIES**

The following are parties to this appeal:

1. Defendant/Appellant Davco Management Company, LC., a Utah limited liability company.
2. Plaintiff/Appellee Iota LLC, a Utah limited liability company.
3. California Benefit, Inc, a California corporation.

## TABLE OF CONTENTS

STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW .....	1
CONSTITUTIONAL OR STATUTORY PROVISIONS .....	3
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	7
<i>PARTIES</i> .....	7
<i>PLAYERS</i> .....	8
<i>BACKGROUND</i> .....	8
<i>PURCHASE OF CASA SONOMA</i> .....	9
<i>PURCHASE OF CASA GRANDE</i> .....	9
<i>ORAL AGREEMENT TO PROVIDE FINANCIAL STATEMENTS</i> .....	10
<i>EXTRA YEAR</i> .....	12
<i>PERFORMANCE BY BOTH PARTIES OF THE AGREEMENT</i> .....	13
<i>RENTS</i> .....	15
SUMMARY OF ARGUMENT .....	16
ARGUMENT .....	19
I. <u>The Trial Court Incorrectly Applied the Statute of Frauds to Bar Davco's Affirmative Defenses of Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing</u> .....	19
A. <u>PART PERFORMANCE</u> .....	21
1.    Real Estate Purchase Contracts .....	22
2.    The One-year Extension to the Promissory Notes .....	25
B. <u>THE TRIAL COURT'S FINDINGS THAT MR. MURSET PROVIDED THE FINANCIAL INFORMATION FOR 2005 AND 2006 TO MR. FISHER AND THE MORTGAGE BROKER ARE CLEARLY ERRONEOUS</u> .....	27

C.	<u>THE TRIAL COURT'S FINDING THAT THE PARTIES DID NOT ORALLY MODIFY THE PROMISSORY NOTES IS CLEARLY ERRONEOUS</u>	32
II.	<u>The Trial Court Erred in Not Finding and Ruling that Iota's and California Benefit's Claims are Barred by the Doctrine of Equitable Estoppel</u>	33
III.	<u>The Trial Court Incorrectly Applied the Waiver Clauses in the Iota Promissory Note and Trust Deed and in the California Benefit Promissory Note and Trust Deed to Bar Davco's Affirmative Defense of Waiver</u>	35
IV.	<u>The Trial Court's Finding that Iota's and California Benefit's Breach of the Contract Did Not Cause the Failure of Davco to Refinance the Promissory Notes is Clearly Erroneous.</u>	36
V.	<u>The Trial Court's Finding that Iota and California Benefit Did Not Breach the Covenant of Good Faith and Fair Dealing is Clearly Erroneous</u>	38
VI.	<u>The Trial Court Incorrectly Determined that It Had Jurisdiction to Hold a Contempt Proceeding and Davco and Mr. Fisher Were Given Due Process</u>	40
VII.	<u>The Trial Court Improperly Denied Davco's Rule 67 Motion</u>	43
VIII.	<u>The Trial Court Incorrectly Concluded that Davco Breached the Iota Deed of Trust</u>	45
A.	<u>TRUST DEED</u>	45
B.	<u>QUIT CLAIM DEEDS TO DARWIN FISHER</u>	47
CONCLUSION		48

## TABLE OF AUTHORITIES

### Statutes

<i>Utah Code Ann. §25-5-1</i> .....	3, 20
<i>Utah Code Ann. §25-5-4</i> .....	20
<i>Utah Code Ann. §78A-4-1032)(j)</i> .....	1
<i>Utah Code Ann. §78B-5-804</i> .....	44
<i>Utah Code Ann. §78B-6-303</i> .....	40

### Rules

<i>Utah Rules of Civil Procedure, Rule 67</i> .....	2, 18, 43, 44, 49-44
---	----------------------

### Utah Cases

<i>ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.</i> , 245 P.3d 184 (Utah, 2010) .....	36
<i>Ashby v. Ashby</i> , 191 P.3d 35 (Ut. Ct. App., 2008) .....	46, 48
<i>Bahr v. Imus</i> , 211 P.3d 987 (Utah App., 2009) .....	34
<i>Bastian v. Cedar Hills Investment &amp; Land Co.</i> , 632 P.2d 818 (Utah 1981) .....	38
<i>Beck v. Farmers Ins. Exch.</i> , 701 P.2d 795 (Utah 1985) .....	38, 39
<i>Bee v. Anheuser-Busch, Inc.</i> , 204 P.3d 204 (Utah App., 2009) .....	2

<i>Burgers v. Maiben</i> , 652 P.2d 1322 .....	42
<i>Calhoun v. Universal Credit Co.</i> , 146 P.2d 284 (Utah, 1944) .....	36
<i>Christiansen v. Farmers Ins. Exchange</i> , 116 P.3d 259 (Utah,2005) .....	38
<i>Colosimo v. Roman Catholic Bishop of Salt Lake City</i> , 104 P.3d 646 (Ut. Ct. App., 2004) .....	1
<i>Crank v. Utah Judicial Council</i> , 20 P.3d 307 (Utah, 2001) .....	41
<i>Dunlap v. Stichting Mayflower Mountain Fonds</i> , 76 P.3d 711 (Ut. Ct. App., 2003) .....	47, 48
<i>Ferris v. Jennings</i> , 595 P.2d 857 (Utah 1979) .....	39
<i>Fisher v. Fisher</i> , 907 P.2d 1172, 1176 (Ut. App. 1995) .....	20, 21
<i>Globe Leasing Corp. v. Bank of Salt Lake</i> , 547 P.2d 197, 199 (Utah, 1976) .....	44
<i>Kimball v. Kimball</i> , 217 P.3d 733 (Ut. Ct. App., 2009) .....	37
<i>Living Scriptures, Inc. v. Kudlik</i> , 890 P.2d 7 (Ut. Ct. App., 1995) .....	35
<i>Nielsen v. Spencer</i> , 1 96 P.3d 616 (Ut. Ct. App., 2008) .....	45
<i>Oakwood Village LLC v. Albertsons, Inc.</i> , 104 P.3d 1226, 1239-40 (Utah,2004) .....	39



<i>Olympus Hills Shopping Center, Ltd. v. Smith's Food &amp; Drug Centers, Inc.</i> , 889 P.2d 445, 460 (Ut. Ct. App., 1994) .....	46, 47
<i>Orlob v. Wasatch Medical Management</i> , 124 P.3d 269 (Ut. Ct. App., 2005) .....	20
<i>Orton v. Carter</i> , 970 P.2d 1254 (Utah,1998) .....	2
<i>Pack v. Case</i> , 30 P.3d 436 Ut. Ct. App., 2001) .....	47
<i>Parduhn v. Bennett</i> , 112 P.3d 495 (Utah, 2005) .....	16, 28
<i>RHN Corp. v. Veibell</i> , 96 P.3d 935 (Utah, 2004) .....	21
<i>Richards v. Brown</i> , 222 P.3d 69 (Ut. Ct. App., 2009) .....	1, 2, 3
<i>Robinson v. City Court for City of Ogden, Weber County</i> , 185 P.2d 256 (Utah 1947) .....	41, 42, 44
<i>Shar's Cars, L.L.C. v. Elder</i> , 97 P.3d 724 (Ut. Ct. App., 2004) .....	3
<i>Spears v. Warr</i> , 44 P.3d 742 (Utah, 2002) .....	21, 22
<i>St. Benedict's Development Co. v. St. Benedict's Hosp.</i> , 811 P.2d 194, 199-200 (Utah,1991) .....	39
<i>Von Hake v. Thomas</i> , 759 P.2d 1162, 1170 ( Utah, 1988) .....	42
<i>Whitaker v. Utah State Retirement Bd.</i> , 191 P.3d 814 (Utah App.,2008) .....	34

## **Federal Cases**

*U.S. v. Rainwater*,  
283 F.2d 386, 389 (C.A.8, 1960) ..... 30, 33, 38

## STATEMENT OF JURISDICTION

On November 11, 2010, the Utah Court of Appeals received this case via pour-over from the Utah Supreme Court. Jurisdiction is proper in this Case under Utah Code §78A-4-103(2)(j).

## STATEMENT OF ISSUES AND STANDARDS OF REVIEW

**ISSUE I:** The trial court incorrectly applied the statute of frauds.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 758-761), Iota's and California Benefit's Trial Brief (R. 550) and Iota's and California Benefit's Post-Trial Brief (R. 714).

STANDARD OF REVIEW: The applicability of the statute of frauds is a question of law to be reviewed for correctness. The facts offered regarding part performance of the agreement are reviewed under a clearly erroneous standard. (*Colosimo v. Roman Catholic Bishop of Salt Lake City*, 104 P.3d 646 (Ut. Ct. App., 2004) at ¶ 8).

**ISSUE II:** The trial court erred in not finding and ruling that Iota's and California Benefit's claims are barred by the doctrine of equitable estoppel.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 761-764).

STANDARD OF REVIEW: This presents a question of mixed law and facts. (*Richards v. Brown*, 222 P.3d 69 (Ut. Ct. App., 2009) at ¶10).

**ISSUE III:** The trial incorrectly applied the waiver clauses in the Iota promissory note and trust deed and in the California Benefit promissory note and trust deed to bar Davco's affirmative defense of waiver.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 764).

- STANDARD OF REVIEW: This presents a question of mixed law and facts.  
(*Richards*, at 69).

**ISSUE IV:** The trial court's finding that Iota's and California Benefit's breach of the contract did not cause the failure of Davco to refinance the promissory notes is clearly erroneous.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 757-761, 764-766).

STANDARD OF REVIEW: This issue presents a question of law that is reviewed for correctness. (*Orton v. Carter*, 970 P.2d 1254 (Utah, 1998)).

**ISSUE V:** The trial court's finding that Iota and California Benefit did not breach the covenant of good faith and fair dealing is clearly erroneous.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 764-766).

STANDARD OF REVIEW: This presents a question of fact that is reviewed under a clearly erroneous standard. (*Bee v. Anheuser-Busch, Inc.*, 204 P.3d 204 (Utah App., 2009)).

**ISSUE VI:** The trial incorrectly determined that it had jurisdiction to hold a contempt proceeding and Davco and Mr. Fisher were given due process.

PRESERVATION OF ISSUE: This issue was preserved below in Davco's Written Closing Argument (R. 771-774).

STANDARD OF REVIEW: This presents a question of mixed law and facts.  
(*Richards*, at 69.)

**ISSUE VII:** The trial court erred in denying Davco's Rule 67 motion.

PRESERVATION OF ISSUE: This issue was preserved below in R. 1127, at 560:22

to 562:2.

STANDARD OF REVIEW: This presents a question of mixed law and facts.

(*Richards*, at 69.)

**ISSUE VIII**: The trial court incorrectly concluded that Davco breached the Iota Deed of Trust.

PRESERVATION OF ISSUE: This issue was not preserved below but constitutes plain error.

STANDARD OF REVIEW: This presents a question of mixed law and facts.

(*Shar's Cars, L.L.C. v. Elder*, 97 P.3d 724 (Ut. Ct. App., 2004) at ¶14).

### CONSTITUTIONAL OR STATUTORY PROVISIONS

*UCA § 25-5-1*: No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

*UCA § 25-5-1*: (1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

- (a) every agreement that by its terms is not to be performed within one year from the making of the agreement;
- (b) every promise to answer for the debt, default, or miscarriage of another;
- (c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;
- (d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;
- (e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and
- (f) every credit agreement.

### STATEMENT OF THE CASE

On August 6, 2005, Defendant/Appellant Davco Management Company L.C.

("Davco"), signed a Real Estate Purchase Contract ("REPC") to purchase the Casa

Grande apartments from Plaintiff/Appellee California Benefit, Inc. ("California Benefit") and to purchase Casa Sonoma apartments from Plaintiff/Appellee Iota LLC ("Iota"). The terms and conditions of the REPC were negotiated by David Fisher ("Mr. Fisher"), the sole member of Davco, and Richard Murset ("Mr. Murset"), the managing member of Iota and the President of California Benefit.

The REPC required California Benefit and Iota to provide: 1) rent rolls for all of the units; 2) two years of rental history; 3) profit and loss statements; and 4) a copy of all lease agreements. However, Mr. Murset only provided: 1) a list of the rents for August 2005; 2) profit and loss statements for 1/1/05 through 7/31/05 which contained income and expenses belonging to other entities as well as the apartment complexes; and 3) a sample lease agreement.

The sale of the apartment complexes did not close in 2005 because Mr. Murset told Mr. Fisher that his son, a real estate agent, wanted to improve the apartment complexes, raise the rents and sell them for more than the amount that Mr. Murset agreed to sell them to Davco.

In 2006, Mr. Fisher and Mr. Murset again entered into discussions for the purchase of the apartment complexes by Davco. On September 29, 2006 Davco signed a Real Estate Purchase Contract ("REPC") to purchase the Casa Grande apartments from California Benefit. On November 30, 2006, Davco signed a REPC to purchase Casa Sonoma apartments from Iota. Davco also executed promissory notes and trust deeds in favor of California Benefit and Iota for each purchase. The maturity date for the Casa Sonoma promissory note was December 1, 2007 and the maturity date for Casa Grande promissory note was December 10, 2007.

Davco required two years of financial statements and one year of ownership of the

apartment complexes to qualify for refinancing to pay the promissory notes on the maturity dates. Mr. Murset agreed to Davco owning the apartment complexes for one year before refinancing.

Mr. Murset knew that Davco could not pay the balance of the promissory notes on the maturity dates unless it was able to refinance the apartment complexes and that Davco could not refinance without two years of financial statements for the apartment complexes. Mr. Murset orally agreed to provide the 2005 and 2006 financial statements to enable Davco to obtain financing to the pay the promissory notes.

Relying on Mr. Murset's oral promise to provide two years of financial statements, Davco executed the REPCs, the Promissory Notes, and trust deeds, and purchased the apartment complexes.

After closing, Davco, relying on Mr. Murset's promise to provide the financial statements, made the payments due under the Promissory Notes, paid the expenses incurred by the apartment complexes, made repairs, performed maintenance, spent \$128,376.00 refurbishing apartments, and otherwise managed the apartment complexes.

In pursuance of the oral agreement, Mr. Murset provided financial statements to Davco. However, the profit and loss statements for 2006 did not include the months of June through September for Casa Grande and the months of June through November for Casa Sonoma, the 2005 and 2006 Profit and Loss Statement for Iota was not accurate as it included the income and expenses for other properties owned by Iota in addition to the Casa Sonoma Apartments, and the 2005 Profit and Loss Statement for California Benefit was inaccurate as it contained expenses that were not incurred.

Mr. Murset never provided the financial statements for 2006 that included the months past May or corrected financial statements for 2005.

After the maturity dates had passed, Mr. Murset continued to tell Mr. Fisher that he would provide accurate financial statements and the 2006 financial statements but he did not. The end of March or beginning of April 2008, having failed to provide the financial statements, Mr. Murset told Mr. Fisher that Davco could have an extra year to create two full years of financial statements under its ownership of the apartment complexes. Mr. Murset also told Mr. Darcy Thompson, his real estate agent, that he had given Davco an extra year to refinance the apartment complexes.

Based on Mr. Murset's promise, Davco continued to make payments on the promissory notes and to pay for refurbishing the apartments.

In June 2008, before Davco had sufficient time to create two years of financial statements and obtain a loan to pay the balances of the promissory notes, Mr. Murset demanded that Davco give him deeds in lieu of foreclosure or he threatened to commence foreclosure proceedings. Mr. Fisher reminded Mr. Murset that he had promised that Davco could have an extra year to create two years of financial statements under its ownership of the apartment complexes nevertheless offered to give Mr. Murset deeds in lieu of foreclosure if he would reimburse Davco for renovations it had made to the apartment complexes. Mr. Murset would not commit to reimburse Davco for the improvements but offered to extend the maturity dates of the promissory notes if Davco paid Mr. Murset an additional \$1,000.00 for Casa Sonoma and \$1,500.00 for Casa Grande each month. Davco refused and believing that Mr. Murset was going to foreclose based on his threat to foreclose, placed a stop payment on its September 2008 payment.

Iota and California Benefit began non-judicial foreclosure proceedings by recording Notices of Default on October 15, 2008. They commenced this suit on October 23, 2008 requesting the Court to award them judgment against Davco for the rents collected



by Davco after August 2008 and requesting judgment against Mr. Fisher based on a non-extent guarantee allegedly signed by Mr. Fisher in favor of Iota. Mr. Fisher had never signed a guarantee.

On October 29, 2008, Iota and California Benefit filed an ex parte motion requesting the Court for an order requiring Davco and Mr. Fisher to pay the rents collected from the apartment complexes to be deposited with the Court. On November 3, 2008, Iota and California Benefit filed a Request for Expedited Ruling on Ex Parte Motion for Order Requiring Rents to be Deposited with the Court, and on November 5, 2008, prior to Davco and Mr. Fisher having filed any pleadings, the Court entered an order requiring Davco and Mr. Fisher to pay rents collected from the apartments to the court. Mr. Fisher received a copy of the order by mail on November 10, 2008.

Iota and California Benefit filed an amended complaint on November 14, 2008, and removed Mr. Fisher as a defendant.

On August 7, 2009, Davco deposited \$33,805.33 with the Court representing rent payments made to it by tenants of the apartment complexes. The Court on December 18, 2009, ordered that the monies be released to Iota and California Benefit.

In May 2009, Iota and California Benefit filed an amended complaint requesting the Court to award them deficiency judgments against Davco.

### **STATEMENT OF FACTS**

#### *PARTIES*

1. California Benefit Inc. is a California corporation and owned the Casa Grand apartments in St. George, Utah. (R. 777, at ¶¶2, 7).
2. Iota LLC is a Utah Limited Liability Company and owned the Casa Sonoma apartments in St. George, Utah. (R. 777, at ¶1).

3. Davco Management Company LC is a Utah Limited Liability Company authorized to do business in the state of Utah. (R. 777, at ¶3).

#### *PLAYERS*

4. Richard T. Murset is a managing member of Iota and California Benefit. (R. 777, at ¶4).

5. Mr. Murset is a trustee of the Murset Family Trust dated June 26, 1998 which owns California Benefit. (R. 777, at ¶ 5).

6. Murset, as agent for Iota and California Benefit negotiated the sale of the Casa Sonoma Apartments and Casa Grande Apartments ("Apartment Complexes") to Davco. (R. 777, at ¶ 9).

7. David Fisher is a member and manager of Davco and on behalf of Davco negotiated the purchase of the Apartment Complexes with Mr. Murset. (R. 777, at ¶ 9).

#### *BACKGROUND*

8. On August 6, 2005, Davco entered into a REPC to purchase the Casa Grande apartments from California Benefit and to purchase Casa Sonoma apartments from Iota. (R. 1127, at 464:16-11).

9. The REPC required California Benefit and Iota to provide: 1) rent rolls for all of the units; 2) two years of rental history; 3) profit and loss statements; and 4) a copy of all lease agreements. (Exhibit 63, at DT0200).

10. Mr. Murset did provide: 1) a list of the rents for August 2005; 2) profit and loss statements for 1/1/05 through 7/31/05 which contained income and expenses belonging to other entities as well as the apartment complexes; and 3) a sample lease agreement. (R. 1127, at 465:23 to 468:15).

11. Mr. Murset did not provide: 1) rent rolls for all of the units; 2) two years of

rental history for the apartment complexes; 3) copies of all lease agreements. (R.1127, 455:23 to 457:17).

12. The 2005 year-to-date financial statement for Iota included income and expenses not associated with Casa Sonoma. (R.1127, 467:3-17).

13. In 2006, Darcy Thompson, the real estate agent for Mr. Murset, contacted Lori Muscolino, the real estate agent representing Mr. Fisher, and inquired whether Davco was still interested in purchasing the Apartment Complexes. (R.1127, at 468:16-25).

#### *PURCHASE OF CASA SONOMA*

14. In September of 2006, Davco entered into a REPC with Iota, LLC to purchase the Casa Sonoma apartments. (R. 778, ¶13).

15. On September 29, 2006, Davco executed a Term Loan Promissory Note in the principal amount of \$1,341,395.00 in favor of Iota, LLC ("Iota Note"). (Plaintiffs' Ex. 1; R. 778, ¶ 14).

16. The Iota Note provided that the entire balance due and owing on the note be paid on or before December 1, 2007. (R. 779, ¶ 15).

17. Davco executed a Deed of Trust ("Iota Deed of Trust") wherein Davco was the trustor and Iota was the beneficiary. (R. 779, ¶ 16).

18. Davco did not pay the Iota Note at maturity on December 1, 2007. (R. 780, ¶ 22).

19. Davco made monthly interest payments to Iota from December 2007 until August 2008. (R. 780, ¶22).

20. There are no written amendments executed by Iota for the Iota Note or the Iota Trust Deed. (R. 780, ¶21).

#### *PURCHASE OF CASA GRANDE*

21. In November of 2006, Davco entered into a REPC with California Benefit to purchase the Casa Grande apartments. (R. 780, ¶ 23).

22. On November 30, 2006, Davco executed an All-Inclusive Promissory Note in the principal amount of \$2,411,596.00 in favor of California Benefit ("California Benefit Note"). (R. 780, ¶ 24).

23. The California Benefit Note provides that the entire balance due and owing on the note be paid on or before December 10, 2007. (R. 780, ¶25).

24. Davco executed a Deed of Trust ("California Benefit Deed of Trust") wherein Davco was the trustor and California Benefit was the beneficiary. (R. 781, ¶26).

25. Davco did not pay the California Benefit Note at maturity on December 10, 2007. (R. 781, ¶29).

26. Davco thereafter made monthly interest payments to California Benefit from December 2007 to August 2008. (R. 781, ¶29).

27. There are no written amendments executed by California Benefit for the California Benefit Note or the California Benefit Trust Deed. (R. 781, ¶ 28).

#### *ORAL AGREEMENT TO PROVIDE FINANCIAL STATEMENTS*

28. Mr. Murset knew that Davco would need financials statements to refinance the apartment complexes. (R. 1125, 176:6-10).

29. Not providing the financial statements was contrary to what Mr. Murset wanted and that was for Davco to refinance and pay him. (R. 1125, 224:4-10).

30. Mr. Murset knew that he was to provide and testified that he did provide the 2005 and 2006 financial statements for the apartment complexes. (R. 1125, 82:12-21; 176:11-12; 217:15-19).

31. Mr. Murset prepared Exhibit 3(a) and presented it at his deposition as the

financials statements given to Davco for the apartment complexes. (R. 1125, 189:22-25; 177:9-13; 179:1-4; 194:23 to 195:12).

32. Mr. Murset testified in deposition that Exhibit 3(a) contains the financial statements he gave to Davco. (R. 1125, 177:9-13; 179:1-4; 194:23 to 195:12).

33. Mr. Murset's testimony that Exhibit 3(a) contains the financial statements he gave to Davco is contradicted by his own testimony and the document in Exhibit 3(a) because: 1) he admits that he didn't give all of the documents in Exhibit 3(a) to Mr. Fisher even though he had testified in deposition that he had (R. 1125, 178:6-26; 187:12-20); 2) he admits that Iota's Profit and Loss Statement ("P&L") for 1/1/06 through 12/31/06 contained in Exhibit 3(a) could not have been provided in 2006 or 2007 or 2008 by Mr. Murset because it was not printed until 2/27/09 after the lawsuit was filed and was not available until the beginning of 2007 (Exhibit 3(a), at PL000272; R. 1125, 180:16 to 183:24); 3) he testified at trial that he gave Mr. Fisher a year-to-date P&L instead of PL000272 when he had testified in deposition that he knew he had given Mr. Fisher PL000272 because he does not keep a year to date financial statement (R. 1125, 184:13 to 185:17); 4) he admits that California Benefit's P&L for 1/1/06 through 12/31/06 in Exhibit 3(a) could not have been provided in 2006 or 2007 or 2008 by Mr. Murset because it was not printed until 2/27/09 after the lawsuit was filed and was not available until the beginning of 2007 (Exhibit 3(a), at PL-000273; R. 1125, 188:13 to 189:12); 5) Iota's P&L for 1/1/05 through 12/31/05 was inaccurate because it contained income and expenses for other entities owned by Iota other than the Casa Sonoma Apartments (R. 1127, 476:26 to 477:7; 472:6-22); 6) he admits that California Benefit's P&L for the period 1/1/05 through 12/31/05 is inaccurate because it contains expenses that are not expenses for Casa Grande (Exhibit 3(a), at PL000275; R. 1127, 479:5-23);

and 7) he admits that he had not prepared and had not provided to Mr. Fisher PL000276-279 in Exhibit 3(a) because they were prepared by Mr. Fisher (R. 1125, 188:13 to 189:12; 193:3 to 195:12).

34. After execution of the REPCs, Mr. Murset again promised Mr. Fisher that he would provide two years of financial statements for the apartment complexes. (R. 1127, 481:1423).

35. On March 26, 2008, Mr. Fisher asked Mr. Murset how the 2005 and the 2006 financial statements are coming and Mr. Murset understood that he was being asked to send the financials to the mortgage company so that the mortgage company knew the financial statements came from him. (Exhibit 18(a); R. 1125, 82:12-21).

36. Mr. Murset never provided corrected 2005 profit and loss statements for the apartment complexes. (R. 1127, 476:21-25; 479:24 to 480:1).

37. Mr. Murset never provided the 2006 profit and loss statements for the apartment complexes that included the months of June through December. (R. 1127, 480:7-10; 476:21-25).

38. Davco could not use the 2005 and 2006 profit and loss statements to refinance the apartment complexes because they were not accurate. (R. 1127, 476:26 to 477:12).

#### *EXTRA YEAR*

39. Mr. Fisher told Mr. Murset that Davco might need more time to pay the balloon payment and reminded him that he had promised to provide the 2005 and 2006 financial statements for the apartment complexes. (R. 1127, 492:3 to 493:15).

40. Mr. Murset testified that he never entered into a written or verbal extension. (R. 1125, 65:3-5).

41. Mr. Murset's testimony that he never agreed to a one year extension is

contradicted by Darcy Thompson's testimony that Mr. Murset told him that he had given Davco an additional year to finance the apartment complexes. (R. 1126, 272:6-10; 274:2-9; 276:8-11).

42. Mr. Murset told Mr. Fisher that he would give Davco another year so that it would have two full years of financials, rental history and everything under its ownership of the apartment complexes. (R. 1127, 496:23 to 497:19).

43. Davco had relied on Mr. Murset's promise to provide financials in executing the REPCs, in making payments on the promissory notes, and in refurbishing the apartment complexes. (R. 1127, 497:20 to 498:6).

44. Mr. Murset testified that Davco was performing renovations and agreed Davco could make renovations to the apartment complexes. (R. 1125, 206:3-5; 205:10-12)

45. Mr. Murset states it was Davco's choice to spend \$128,376 for improvements. (R. 1125, 154:6-14).

46. Mr. Murset never sent notices of default to Davco until Davco discontinued making payments in September 2008. (R. 1125, 152:23-26; R. 1127, 494:25 to 495:1; 496:9-13)

#### *PERFORMANCE BY BOTH PARTIES OF THE AGREEMENT*

47. Mr. Murset knew Davco would need to refinance the apartment complexes to pay the balloon payments due under the Iota Note and the California Note in December 2007. (R. 1125, 176:6-10).

48. Mr. Murset testified that he provided Mr. Fisher: 1) P&Ls for the apartment complexes for the periods of 1/1/02 to 12/31/02, 1/1/03 to 12/31/03; 2) P&Ls for Casa Sonoma for the periods of 1/1/04 to 12/31/04, 1/1/06 to 12/31/06; and 3) P&Ls for Casa Grande for the periods of 1/1/05 to 12/31/05, 1/1/06 -to12/31/06. (R. 1125, 177:9-13;

179:1-4; 184:13 to 185:3).

49. Mr. Murset has admitted that the 2006 Iota P&L (PL000272) is inaccurate, and Mr. Murset testified that the P&L he gave Mr. Fisher in February 2007 contained the same information as PL000272. (R. 1125, 183:15-25).

50. Iota and California Benefit failed to produce or have admitted into evidence any documents supporting Mr. Murset's testimony that he provided accurate 2006 financial statements to Mr. Fisher. (R. 1125, 218:10 to 223:21).

51. Mr. Murset's testimony that he provided the 2006 financial statements to Mr. Fisher in February 2007 is contradicted by his testimony that the financial documents he gave to Mr. Fisher are contained in Exhibit 3(a). (R. 1125, 177:9-13; 179:1-4; 184:13 to 185:17; 194:23 to 195:12).

52. On June 3, 2008, seven months after maturity of the Iota and California Benefit Notes, Mr. Murset requested that Davco refinance the Casa Sonoma and Casa Grande apartments by the end of July 2008. (R. 783, ¶ 37).

53. On August 25, 2008, Iota and California Benefit requested a deed in lieu of foreclosure from Davco as a result of Davco's failure to refinance the apartments. (R.784, ¶40).

54. On August 26, 2008, in response to the request for a deed in lieu of foreclosure, Fisher emailed Murset stating that the lending institutions were changing their guidelines on the capitalization rate and he would have to bring in money to close since the loan amount would not be enough to cover the debt, that he was expecting a settlement on October 2 which would be enough to pay the difference between what Davco owed and the loan amounts, and that he had two parties interested in purchasing the properties. Mr. Fisher requested that Davco have enough time for either one of these



things to happen. (R. 784, ¶ 41).

55. Davco could have obtained financing if it had been given the financial statements or had sufficient time to create the financial statements under its ownership. (R. 1127, 500:20 to 501:3).

56. Davco agreed to give deeds in lieu of foreclosure if Mr. Murset agreed to reimburse it for costs it expended in refurbishing apartments in the sum of \$128,376.00. (R. 1127; 518:14 to 519:25).

57. On September 3, 2008, in response to Mr. Fisher's request, Mr. Murset requested that payments be raised by \$1,000 for Casa Sonoma and \$1,500 for Casa Grande to pay for foreclosure costs. (Exhibit 29).

58. Davco made its last payments on the apartment complexes on September 8, 2008, but stopped payment on the check after realizing that Mr. Murset was going to foreclose. (R. 784, ¶ 43; 1127, 518:14 to 519:25).

59. The trustee's sale of the apartment complexes occurred on February 20, 2009. (R. 788, ¶ 60).

#### *RENTS*

60. On October 23, 2008, Iota and California Benefit filed a complaint against Davco and David Fisher alleging causes of action for Assignment of Rents and breach of an Iota Guaranty by David Fisher. (R. 1).

61. On October 29, 2008, Iota and California Benefit filed an Ex Parte Motion for Order Requiring Rents to be Deposited with the Court. (R. 20).

62. On November 3, 2008, Iota and California Benefit filed a Request for Expedited Ruling on Ex Parte Motion for Order Requiring Rents to be Deposited with the Court. (R. 67)

63. On November 5, 2008, the Court issued an Order requiring Davco and Mr. Fisher to deposit rents with the Court. (R. 73, at ¶2)

64. On November 10, 2008, Davco received the Notice of Entry of Order. (R. 1127, 531:10-23).

65. On November 14, 2008, Iota and California Benefit filed an amended complaint and removed Mr. Fisher as a Defendant. (R. 94).

66. On May 12, 2009, Iota and California Benefit filed a second amended complaint which did not include Mr. Fisher as a Defendant. (R. 185).

67. Davco deposited \$33,805.33 in rents into the Court. (Exhibit 80)

### **SUMMARY OF ARGUMENT**

First. The trial court incorrectly applied the statute of frauds to bar Davco's affirmative defenses of breach of contract and breach of the covenant of good faith and fair dealing because there was part performance of the oral agreement requiring Mr. Murset to provide the 2005 and 2006 financial statements and partial performance of the oral agreement to extend the maturity dates for one year to allow Davco to create two full years of financial statements under its ownership of the apartment complexes.

The trial court's findings that Mr. Murset provided the financial information for 2005 and 2006 to Mr. Fisher and the mortgage broker are clearly erroneous because the evidence supporting the trial court's findings is legally insufficient because: 1) it does not disprove but supports the evidence presented by Davco that accurate financial statements were not provided; and 2) it is contradicted by other evidence presented by Iota and California Benefit and thus, has no legal tendency to establish that accurate financial statements were given to Davco. (*Parduhn v. Bennett*, 112 P.3d 495 (Utah, 2005) at ¶25).

The trial court's finding that the parties did not orally modify the promissory notes

is clearly erroneous because the evidence in support of the trial court's finding is not legally sufficient to support the finding because: 1) Mr. Murset's trial testimony is contradicted by his statement to Mr. Thompson that he had given Davco an additional year to refinance the apartment complexes; and 2) Mr. Murset's trial testimony is contradicted by his deposition testimony and therefore, has no legal tendency to establish the truth that there was no agreement to extend the maturity dates for one year. (Id.).

Second. The trial court erred in not finding and ruling that Iota's and California Benefit's claims are barred by the doctrine of equitable estoppel because Mr. Murset failed to provide accurate financial statements and failed to allow Davco an extra year to create two full years of financial statements as he agreed to do, Davco relied on Mr. Murset's promises and it was damaged by expending more than \$128,000 in refurbishing the apartments and losing the opportunity to purchase the apartment complexes.

Third. The trial court incorrectly applied the waiver clauses in the Iota promissory note and trust deed and in the California Benefit promissory note and trust deed to bar Davco's affirmative defense of waiver because the presence of a non-waiver provision is relevant but not dispositive in a determination of whether Iota and California Benefit waived its right to default, and parties to a written contract may modify, waive or make new terms regardless of provisions in the contracts to the contrary. Iota and California Benefit waived their right to foreclose by agreeing to provide the financial statements and extending the maturity dates for one year.

Fourth. The trial court's finding that Iota's and California Benefit's breach of the contract did not cause the failure of Davco to refinance the promissory notes is clearly erroneous because the evidence in support of the finding consist of admissions and contradictions and therefore, is legally insufficient to prove that the breaches of the

contracts did not cause the failure of Davco to refinance the apartment complexes.

Fifth. The trial court's finding that Iota and California Benefit did not breach the covenant of good faith and fair dealing is clearly erroneous because the purpose, intentions, and expectations of the parties that Davco refinance the apartment complexes and pay the promissory notes on the maturity dates was prevented by Iota's and California Benefit's failure to provide accurate financial statements and to allow Davco the extra year to create the financial statements.

Sixth. The trial court incorrectly determined that it had jurisdiction to hold a contempt proceeding because neither an affidavit nor other initiating pleading was filed giving the trial court jurisdiction over a contempt proceeding. Davco and Mr. Fisher were not given due process because the trial court did not give notice prior to trial that a contempt proceeding would be combined with the trial, thus denying Davco and Mr. Fisher the opportunity to conduct discovery and prepare evidence to present at trial, and denying Mr. Fisher the opportunity to retain counsel to represent him.

Seventh. The trial court improperly denied Davco's Rule 67 motion because: 1) neither Davco nor Mr. Fisher had filed any pleadings prior to the Ex Parte Order being signed by the trial court and therefore, had not admitted in any pleadings that they had in their possession or under their control rents due to Iota or California Benefit; and 2) there was no examination of Davco or Mr. Fisher showing that they had funds belonging to Iota and/or California Benefit at the time the Ex Parte Order was issued as required by Rule 67.

Eighth. The trial court incorrectly concluded that Davco breached the Iota trust deed by the recording of a trust deed to Fab 5 Management LLC because Davco was not the trustor on the Fab 5 Management LLC trust deed, Iota failed to give notice of the

alleged default that provided Davco time to cure the alleged breach, and the recording of the trust deed was not a material breach of the Iota trust deed.

The trial court incorrectly concluded that Davco breached the Iota trust deed by the recording of quit claim deeds to Darwin Fisher because Iota failed to give notice of the alleged default that provided Davco time to cure the alleged breach and the recording of the deeds was not a material breach of the Iota trust deed.

### **ARGUMENT**

#### **I. The Trial Court Incorrectly Applied the Statute of Frauds to Bar Davco's Affirmative Defenses of Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**

Davco claims that: 1) the parties modified the REPCs and the promissory notes to require Iota and California Benefit to provide the 2005 and the 2006 year-to-date financial statements for the apartment complexes to Davco so that Davco could refinance the apartment complexes and pay the remaining balances on the promissory notes by their maturity dates; and 2) after Mr. Murset failed to provide the financial statements, the parties orally modified the REPCs and promissory notes extending the maturity dates an extra year to allow Davco to create two years of financial statements under its ownership of the apartment complexes.

Davco further claims that Iota and California Benefit breached the REPCs and promissory notes by failing to provide the 2005 and the 2006 year-to-date financial statements and by failing to give Davco an extra year to create two full years of financial statements under its ownership of the apartment complexes, and breached the covenant of good faith and fair dealing by failing to provide accurate financial statements and by failing to allow Davco an extra year to create two full years of financial statements thus, preventing it from refinancing the apartment complexes.

Davco contends that Iota's and California Benefit's breaches of the REPCs and the promissory notes, excused Davco's obligation to perform under the contract. (See *Orlob v. Wasatch Medical Management*, 124 P.3d 269 (Ut. Ct. App., 2005) at ¶ 26) ("It is well-settled law that one party's breach excuses further performance by the non-breaching party if the breach is material."). Thus, Davco contends that it is not liable to Iota and California Benefit for breach of the purchase contracts, the promissory notes, or the trust deeds.

The trial court did not make any conclusion of law regarding Davco's affirmative defense that Iota and California Benefit breached the REPCs by failing to provide accurate financial statements and failing to allow Davco the extra year to create its own financial statements. However, the trial court did conclude that the modifications to the promissory notes had to be in writing to be enforceable.

*Utah Code Ann. §25-5-1 and §25-5-4 bars Davco's defense that after maturity of the Iota and California Benefit Notes in December 2007, there was a one-year extension to the Iota Note, Iota Trust Deed, California Benefit Note and California Benefit Trust Deed. There are no writings executed by either Iota or California Benefit creating any modification of the original Notes and Deeds of Trust. (R. 790, at ¶ 4).*

In support of its conclusion of law that Iota and California Benefit did not breach the covenant of good faith and fair dealing (R. 790, ¶5), the trial court found that Mr. Murset delivered financial statements as requested by Davco (R. 783, ¶35), that based on the testimony of Jeff Feltwell, the prior owner's financial records were not required for refinancing and lenders required the owner of the apartment complex to have two years stream of income which Davco did not have. (R. 78, ¶32).

"The general rule is that 'any modification of a contract that is within the statute of frauds must also comply with the statute of frauds.'" (*Fisher v. Fisher*, 907 P.2d 1172,

1176 (Ut. App. 1995)). When a contract is required to be in writing the alteration or modification thereof must also be in writing. (*Id.*)

The applicability of the statute of frauds is a question of law to be reviewed for correctness; however, because a trial court must consider facts offered by the parties regarding part performance of the agreement, the standard of review for these subsidiary factual determinations is the clearly erroneous standard. (*Spears v. Warr*, 44 P.3d 742 (Utah, 2002) at ¶23; *RHN Corp. v. Veibell*, 96 P.3d 935 (Utah, 2004) at ¶35).

A. PART PERFORMANCE

A recognized and accepted exception to the statute of frauds is part performance of the oral modification. (*Id.*)

[W]here there is evidence of part performance under a modified agreement and where it would be inequitable to permit a party to repudiate the oral modification and seek enforcement of the written contract, the oral agreement may be removed from the statute of frauds and enforced. (*Fisher*, at pg 1177).

The standard for sufficient partial performance in Utah is: (1) the oral contract and its terms must be clear and definite; (2) the acts done in performance of the contract must be equally clear and definite; and (3) the acts must be in reliance on the contract. The acts in reliance must be such that (a) it would not have been performed had the contract not existed; and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied since damages would be inadequate. Reliance may be made in numerable ways all of which could refer exclusively to the contract. (*Spears*, at para. 24).

“[A]cts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made by him or her must be reasonably explicable only on the postulate that a contract exists. The reason for such requirement is that the equitable doctrine of part performance is based on estoppel and unless



the acts of part performance are exclusively referable to the contract, there is nothing to show that the Plaintiff relied on it or changed his [or her] position to his prejudice..." (*Spears*, at para. 24)

However, under certain circumstances the exclusively referable requirement may be relaxed. "The more conclusive the direct proof of the contract, the less stringent the requirement of exclusively referable acts." (*Spears*, at para. 24).

### **1. Real Estate Purchase Contracts**

First. The terms of the oral contract are clear and definite.

The terms of the oral contract are established by: 1) Mr. Murset's testimony that he knew that Davco would need financials to refinance (R. 1125, 176:6-10); 2) that he was being asked to provide the financial statements to the mortgage company so that it would be known that the financial statements came from him (R. 1125, 82:12-21); 3) that he provided financial statements for 2005 and for 2006 which are contained in Exhibit 3(a) and later gave 2006 financials statements to Mr. Fisher in February 2007 (R. 1125, 176:11-12; 217:15-21; 218:10-18); and 4) that his failure to provide the financial statements was contrary to what he wanted which was Davco refinancing the apartment complexes and paying him. (R. 1125, 224:4-10).

The terms of the oral contract are also established by Mr. Fisher's testimony that the parties agreed that Mr. Murset would provide the 2005 and the 2006 year-to-date financial statements. (R. 1127, 468: 26 to 469:14; 493:3-15).

Lastly, the terms of the oral agreement are set forth in the email dated 3/26/2008, where Mr. Fisher is asking Mr. Murset if he had provided the 2005 and the 2006 year-to-date financial statements to Davco's broker. (Exhibit 18(a)).

Thus, the terms of the oral contract are clear and definite that Mr. Murset is to provide the 2005 and the 2006 year-to-date financial statements for the apartment



complexes.

Second. The acts done in performance of the oral contract are equally clear and definite

Davco expended \$128,376 to refurbish the apartment complexes after executing the purchase contracts. (R. 1127, 497:20 to 498:6). Mr. Murset knew that Davco was performing renovations, agreed that Davco could perform the renovations, and never objected or told Mr. Fisher that Davco could not perform the renovations. (R. 1125, 206:3-5; 205:10-12).

In addition, after the maturity dates of the promissory notes, Davco continued to refurbish the apartments (R. 1125, 95:11-14), make payments on the notes (R. 1125, 65:23-26; 1127, 497:25 to 498:2), to manage the apartment complexes, to make repairs, and to pay the expenses of the apartments. (R. 1127, 533:4 to 534:2).

Third. Davco's acts were done in reliance on the contract.

The REPCs did not require Davco to refurbish the apartment complexes or to pay for the refurbishing (Exhibits 7(a); 71, at p. 44; (R. 1125, 154:6-14) which is acknowledged by Mr. Murset. (R. 1125, 154:6-14). Yet Davco, prior to the maturity dates of the promissory notes, paid tens of thousands of dollars for the refurbishing of the apartment complexes.

And, after the maturity dates of the promissory notes, when Davco could not enforce the purchase contracts unless there was an oral agreement, Davco in reliance on the oral agreement, continued to perform and pay for refurbishing the apartment complexes (R. 1125, 95:11-14), to pay payments on the notes (R. 1125, 65:23-26; 1127, 497:25 to 498:2), to manage the apartment complexes, to make repairs, and to pay the expenses of the apartments. (R. 1127, 533:4 to 534:2).

Davco would not have performed these acts if there was not an oral agreement because: 1) the purchase contracts did not require Davco to pay \$128,376 for refurbishing the apartment complexes; and 2) after the maturity dates of the promissory notes had passed, Davco could not enforce the purchase contracts without the oral modifications.

The exclusivity requirement should be relaxed because of the following direct proof of the oral agreement: 1) Mr. Murset's testimony that he provided to Mr. Fisher financial statements for the apartment complexes from 2002 through May 2006 (R. 778, at ¶ 11); 2) Mr. Fisher and Mr. Murset discussed that the financial statements provided by Mr. Murset contained inaccurate financial information and that the information would have to be corrected (R. 778, at ¶ 11); 3) Mr. Murset acknowledging that Davco would need financial statements to refinance the apartment complexes (R. 1125, 176:6-10); 3) Mr. Murset acknowledging that he was being asked to provide the financial statements to the mortgage company so that it would be known that the financial statements came from him (R. 1125, 82:12-21; 4) Mr. Murset acknowledging that he provided financial statements (R. 1125, 176:11-12; 217:15-21); 5) Mr. Murset acknowledging the failure to provide financial statements was contrary to what he wanted (R. 1125, 224:4-10); 6) Mr. Murset acknowledging he never sent Davco a notice of default (R. 1125, 152:23-26); and 7) Mr. Murset acknowledging he was continually trying to help Davco to refinance (R. 1125, 153:1-4).

The failure to perform on the part of Mr. Murset constitutes fraud because: (1) he promised to provide financial statements (R. 1125, 176::6-10); 2) which was material to Davco executing the purchase contracts and expending \$128,376 in making improvements to the apartment complexes (R. 1127, 497:20 to 498:5); 3) Mr. Murset knew to be false or made recklessly because he provided 2005 financial statements that were not accurate and

did not provide the Iota 2006 which he also admitted was inaccurate and never submitted a 2006 financial statement for California Benefit. (R. 1125, 195:16 to 196:20; R. 1127, 476:21 to 477:12; 479:1 to 480:10); (4) for the purpose of inducing Davco to rely upon his misrepresentation and execute the purchase contracts and expend \$128,376 for improvements; and (5) Davco having received the financial statements acted reasonably and not knowing that Mr. Murset would not provide corrected financial statements or the 2006 financial statments (R. 1127, 497:20 to 498:5); (6) did rely upon the misrepresentation and executed the purchase contracts and expended \$128,376 (R. 1127, 497:20 to 498:5); and (8) has lost the \$128,376 and has lost the opportunity to purchase the apartment complexes.

Awarding damages to Davco is inadequate because it has lost the opportunity to purchase the apartment complexes and has lost income that it could have had by using the \$128,376 for other projects.

Since the terms and the acts done in performance of the oral agreement are clear and definite, and the acts performed are clear and definite and were in reliance on the contract, the trial court's failure to find that there was part performance of the oral agreement is clearly erroneous.

## **2. The One-year Extension to the Promissory Notes**

First. The terms of the oral contract are clear and definite.

After Mr. Murset failed to provide accurate 2005 financial statement and failed to provide the 2006 financial statments, in March/April 2008, the parties agreed that Davco would have another year to create two full years of financial statements under its ownership of the apartment complexes. (R. 1127, 496:23 to 497:19). The existence and the terms of the oral agreement are verified by Mr. Muset communicating to Mr. Thompson that he had given Davco an extra year to refinance the apartment complexes.

(R. 1126, 272:6-10; 274:2-9; 276:8-11).

Second. The acts done in performance of the contract are equally clear and definite.

The following acts were done in performance of the oral agreement: 1) refurbishing the apartment complexes and making payment for refurbishing the apartment complexes (R. 1125, 95:11-14); 2) making payments on the promissory notes (R. 1125, 65:23-26), 1127, 497:25 to 498:2); 3) managing the apartment complexes, making repairs, and paying the expenses of the apartments (R. 1127, 533:4 to 534:2).

Third. Davco's acts were done in reliance on the contract.

The purchase contracts did not require Davco to refurbish the apartment complexes or to pay for refurbishing the apartment complexes. (Exhibit 71, at p. 44; Exhibit 7(a); (R.1125,154:6-14)). Yet, Davco after the maturity dates of the promissory notes, refurbished the apartment complexes and paid for the refurbishing. (R. 1125, 95:11-14). Davco also continued to make payments on the notes (R. 1125, 65:23-26; 1127, 497:25 to 498:2), to manage the apartment complexes, to make repairs, and to pay the expenses of the apartments (R. 1127, 533:4 to 534:2).

Davco would not have performed these acts if there was not an oral agreement because: 1) the purchase contracts did not require Davco to pay \$128,376 for refurbishing the apartment complexes; and 2) after the maturity dates of the promissory notes had passed, Davco could not enforce the purchase contracts without the oral modification.

The exclusivity requirement should be relaxed because: 1) Mr. Murset told Mr. Thompson about the extension, establishing that Mr. Murset knew about the extension and had agreed to the extension.

The failure to perform on the part of Mr. Murset constitutes fraud because: (1) he

promised Davco an extension to create two full years of financial statements; 2) which was material to Davco continuing to make and pay for refurbishing the apartment complexes and continuing to manage the apartments, make repairs, etc.; 3) which Mr. Murset knew to be false or made recklessly, knowing he had insufficient knowledge upon which to base such representation, (4) for the purpose of inducing Davco to continue to make and pay for refurbishing the apartment complexes, etc.; and (5) Davco having been told that it would have an extra year to create the financial statements acted reasonably and not knowing that Mr. Murset would not honor the oral agreement; (6) did rely upon the misrepresentation and refurbished the apartment complexes, etc.; and (8) as a result has lost the money it expended in refurbishing the apartment complexes and has lost the opportunity to purchase the apartment complexes.

Awarding damages to Davco is inadequate because it has lost the opportunity to purchase the apartment complexes and has lost other business opportunities that it could have had from the funds it expended to refurbish the apartment complexes.

**B. THE TRIAL COURT'S FINDINGS THAT MR. MURSET PROVIDED THE FINANCIAL INFORMATION FOR 2005 AND 2006 TO MR. FISHER AND THE MORTGAGE BROKER ARE CLEARLY ERRONEOUS**

The trial court found that Mr. Murset provided financial information for 2005 and 2006 to the mortgage broker and to Mr. Fisher. (R. 783, at ¶35; 778, at ¶11; 790, at ¶5).

The evidence that supports the trial court's findings of fact is: 1) Mr. Murset's testimony that he knew that Davco would need financials to refinance the apartment complexes (R. 1125, 176:6-10); 2) the financial statements that Mr. Murset testified he provided in 2006 when Davco did purchase the apartment complexes (Exhibit 3(a); (R. 1125, 176:11-12; 177:9-13; 179:1-4; 194:23 to 195:9-12; 217:15-19; ); 3) the financial statements that Mr. Fisher testified he was provided by Mr. Murset in 2006 (Exhibit 4(a);

R. 469:12-25); 4) Mr. Murset's trial testimony that he had given Mr. Fisher a copy of California Benefit's P&L for the period of 1/1/06 through 12/31/06 in February 2007 (R.1125, 190: 25 to 191:7); 5) Mr. Murset's trial testimony that he had given Mr. Fisher a copy of Iota's P&L for the period of 1/1/06 through 12/31/06 in February 2007 (R. 1125, 180:16 to 181:24); 6) trial Exhibit 18(a) which states "I received an e-mail from my broker asking me the status of the 2005/2006 YTD operating statements. How are those coming?"; 5) Mr. Murset's testimony regarding Exhibit 18(a) that he "...was being asked to, again, provide the 2005/2006 financials to the mortgage company so that they know it came from me." (R. 1125, 82:6-21); and 6) Mr. Murset's testimony that he provided financial statements in 2005 to his real estate agent, Mr. Thompson, when Davco first attempted to purchase the apartment complexes (Exhibit 1(a); (R. 1125, 199:11-13). The evidence supporting the trial court's findings is legally insufficient because: 1) it does not disprove but supports the evidence presented by Davco; and 2) it is contradicted by other evidence presented by Iota and California Benefit and thus, has no legal tendency to establish that accurate financial statements were given to Davco. (*Parduhn*, at ¶25).

First. Mr. Murset's testimony establishes that the financial statements he provided Davco are inaccurate.

Davco presented evidence at trial that the 2005 financial statements for Iota and California Benefit are inaccurate and could not be used to refinance the apartments. (R. 1127, 476:21 to 477:12; 479:1 to 480:10). Mr. Murset also testified at trial that the 2005 and 2006 Iota P&Ls for Casa Sonoma contained in Trial Exhibits 3(a) and 4(a) are inaccurate because they contain income and expenses for properties other than Casa Sonoma and he would have to correct them. (R. 1125, 195:16 to 196:-11; 200:20-26). Iota and California

Benefit failed to present any evidence that corrected 2005 financial statements were provided to Davco.

This evidence is not legally sufficient to support the trial court's finding because it does not disprove, but supports the evidence presented by Davco that the financial statements provided by Mr. Murset were inaccurate and could not be used to refinance the apartment complexes.

Second. Financial statements for 2005 and 2006 supporting the trial court's finding were not introduced into evidence.

Mr. Murset testified that he provided 2005 and 2006 financial statements. (R. 1125, 82:12-21; 176:11-12; 217:15-19). He testified in deposition that he prepared the financial statements for the years 2002 through 2006 and other financial documents in Trial Exhibit 3(a) and had given them to Mr. Fisher. (R. 1125, 178:20-22; 189:22-25; R. 1125, 177:9-13; 179:1-4; 194:23 to 195:12). He further testified in deposition that he knew that Exhibit 3(a) contained the financial documents he gave to Mr. Fisher because Mr. Fisher had written on some of them. (R. 1125, 178:1-5).

However, at trial Mr. Murset contradicted his deposition testimony by: 1) admitting that he didn't give all of the documents in Exhibit 3(a) to Mr. Fisher even though he had testified in deposition that he had (R. 1125, 178:6-26; 187:1220); 2) admitting that he did not provide the Iota P&L for the period of 1/1/06 through 12/31/06 (PL000272) to Mr. Fisher in Exhibit 3(a) because it was not available until the beginning of 2007 and it has the print date of 2/27/09 (R. 1125, 180:16 to 183:24); 3) testifying at trial that he gave Mr. Fisher a year-to-date P&L instead of PL000272 when he had testified in deposition that he knew he had given Mr. Fisher PL000272 because he does not keep a year to date financial statement (R. 1125, 184:13 to 185:17); 4) admitting that he could



not have given Mr. Fisher the California Benefit P&L for the period 1/1/06 through 12/31/06 (PL000273) prior to the end of 2006 because it would not have been prepared until after 2006 had ended and because it had the print date of 2/27/09 (R. 1125, 188:13 to 189:12); and 6) that he had not prepared and had not provided to Mr. Fisher PL000276-279 in Exhibit 3(a) because they were prepared by Mr. Fisher (R. 1125, 188:13 to 189:12; 193:3 to 195:12).

Such contradicting testimony by Mr. Murset is not legally sufficient to support the trial court's finding. (See *U.S. v. Rainwater*, 283 F.2d 386, 389 (C.A.8, 1960) ("Contradictory statements can have no legal tendency to establish the truth of their subject matter.")). Therefore, this evidence does not disprove Davco's evidence and therefore, is legally insufficient to support the trial court's finding.

Third. Exhibit 18(a) does not support the trial court's finding because it does not state that Mr. Murset actually sent accurate financial statements to the broker. Nor does Mr. Murset's testimony support the trial court's findings because he never testified that he sent the financial statements to the mortgage broker but only testified that he was asked to provide them. (R. 1125, 82:6-21). The loan officer, Mr. Feltwell never testified that he received financial statements from Mr. Murset, but did testify that he received financial statements from Mr. Fisher for a part of 2006 and for 2007. (R. 1126, 292:16-25). And, it is clear from the e-mail that accurate 2005 and 2006 financial statements had not been provided prior to March 26, 2008.

Exhibit 18(a) does not disprove Davco's evidence but supports it and therefore, is legally insufficient to support the trial court's finding.

Fourth. Three months after sending Exhibit 18(a) to Mr. Murset requesting accurate 2005 and 2006 financial statements, Mr. Fisher sent Exhibit 27 to Mr. Murset



informing him that he has delivered to the loan officer the apartment complexes' financial statements for the portion of 2006 and all of 2007 created under Davco's ownership of the apartment complexes.

Exhibit 27 does not support the trial court's finding because it clearly states that the loan officer had received updated financials from Mr. Fisher, "[t]he loan officer said that he received my e-mail with the updated financials except for the 07 returns. My cpa is making a couple of changes and then sending them back to me for review then I will forward them to the loan officer." (Exhibit 27).

It is clear that it is the financial statements created by Davco under its ownership of the apartment complexes that Mr. Fisher is sending to the loan officer. This is verified by the loan officer, Mr. Feltwell, who testified that Mr. Fisher provided him with financial statements for a part of 2006 and for 2007. (R. 1126, 292:16-25). Mr. Murset could not have prepared the 2007 financial statements because Davco was managing the apartment complexes and Mr. Murset did not have any of that financial information.

Exhibit 27 is legally insufficient to support the trial court's finding because it proves, not disproves, that Mr. Murset failed to provide accurate or any financial statements to the loan officer.

Fifth. Exhibit 4(a) does not support the trial court's finding because it contains the same 2005 and 2006 Iota P&Ls as Exhibit 3(a) which Mr. Murset admitted are inaccurate and the 2006 P&Ls are only through May 2006.

Exhibit 4(a) does not disprove but supports Davco's evidence that Mr. Murset failed to provide accurate financial statements and financial statements for 2006.

Sixth. Mr. Murset's testimony that he provided Mr. Fisher the 2006 P&Ls for the apartment complexes in February 2007 does not support the trial court's finding because:

1) Mr. Murset has admitted that the 2006 Profit and Loss Statement (PL000272) for Iota is inaccurate and Mr. Murset testified that the P&L he gave Mr. Fisher in February 2007 contained the same information as PL000272 (R. 1125, 183:15-25); 2) there were no documents admitted into evidence supporting Mr. Murset's testimony that he provided the 2006 financial statements to Mr. Fisher (R. 1125, 218:10 to 223:21); 3) there is no evidence that the 2006 financial statement for California Benefit is accurate; 4) Mr. Murset's testimony that he provided the 2006 financial statements to Mr. Fisher in February 2007 is contradicted by his testimony that the financial documents he gave to Mr. Fisher are contained in Exhibit 3(a) (R. 1125, 177:9-13; 179:1-4; 184:13 to 185:17; 194:23 to 195:12); and 5) the trial court's finding is specifically that he gave the 2006 financial statements to the loan officer and not to Mr. Fisher (R. 783, ¶35).

The evidence supporting the court's finding that Mr. Murset provided the 2006 financial statements is legally insufficient because it does not disprove Davco's evidence that accurate financial statements were not provided and is based on Mr. Murset's contradictory testimony which is legally insufficient to prove the truth that he provided the 2006 financial statements to Davco.

Seventh. The financial statements given to Mr. Fisher (Exhibit 1(a)) does not support the trial court's finding because it does not contain financial statements for 2006, the financial statements are only from 1/1/05 through 7/31/05, and Mr. Murset wrote on the financial statement for Iota that "[t]his statement reflects more than the 13 units at 669 So. 700 E. and also includes many expenses not related to these units." (Exhibit 1(a) at DT019).

Exhibit 1(a) is legally insufficient to support the trial court's finding because it does not disprove that Mr. Murset failed to provide accurate financial statements.

C. THE TRIAL COURT'S FINDING THAT THE PARTIES DID NOT ORALLY MODIFY THE PROMISSORY NOTES IS CLEARLY ERRONEOUS.

The trial court found that “[o]n September 30, 2008, Mr. Murset sent a letter responding to David Fisher's September 24, 2008 letter denying any one-year extension was made and stating that if an agreement for a one-year extension had been made then that agreement would have been honored.” (R. 785, at ¶46).

The evidence that supports the trial court's finding is: 1) Mr. Murset's letter stating “I have never, verbally or in writing extended the deadline by one year. I worked with you as each possibility came and went, but I never agreed to a one year extension. If I had, I would not have been pressing you for something to happen until that second year had expired.” (Exhibit 32) ; 2) Mr. Murset's testimony that he never agreed to a one-year extension (R. 1125, 65:3-5; 72:22-16); 3) Mr. Murset's testimony that he first heard of the extension in September 2008 (R. 1125, 65:7-14); 4) Mr. Murset stated in an e-mail that the maturity date had passed (Exhibit 25); 5) Mr. Murset's testimony that he requested that the loan be paid (R. 1125, 68: 21-26); and 6) Mr. Murset's testimony that he requested a deed in lieu of foreclosure (Exhibit 28).

This evidence is not legally sufficient to support the finding because: 1) Mr. Murset's trial testimony is contradicted by his statement to Mr. Thompson that he had given Davco an additional year to refinance the apartment complexes (R. 1126, 272:6 to 274:9). Based on Mr. Murset's contradictions between his trial testimony and his deposition testimony as demonstrated above and his admission to Mr. Thompson, Mr. Murset's denial of an extension has no legal tendency to establish the truth of whether there was an extension. (*U.S. v. Rainwater*, at 386, 389).

II. The Trial Court Erred in Not Finding and Ruling that Iota's and California Benefit's Claims are Barred by the Doctrine of Equitable Estoppel

The trial court did not make any conclusions of law regarding Davco's affirmative defense of equitable estoppel. The factual findings made by the trial court that relate to Davco's affirmative defense concern Mr. Murset's promises to provide accurate financial statements and to extend the maturity date of the promissory notes.

Equitable estoppel "is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." (*Bahr v. Imus*, 211 P.3d 987 (Utah App., 2009) at ¶6).

To establish equitable estoppel Davco must prove: 1) Iota and California Benefit made a statement, and/or an admission, and/or acted, and/or failed to act, that is inconsistent with their claims for deficiency judgment and rents; 2) Davco took action and/or inaction on the basis of Iota and California Benefit's statement, admission, act, or failure to act; and 3) Davco will be injured if Iota and California Benefit are allowed to contradict or repudiate such statement, admission, act, or failure to act. (*Whitaker v. Utah State Retirement Bd.*, 191 P.3d 814 (Utah App., 2008) at ¶22).

The evidence that support the findings that Iota and California Benefit provided the financial statements and that Mr. Murset did not agree to an extension of one-year are set forth on pages 28-33, in section I subsections B and C above. However, as shown in sub-sections B and C, the evidence is legally insufficient to support a finding that Mr. Murset provided accurate financial statements, that he provided accurate 2006 financial statements, and did not agree to an extension of one-year.

As shown in Section I above, pgs 22-33, Davco presented sufficient evidence from which the trial court should have found that Davco relied on Mr. Murset's promises and that Davco was injured by having expended \$128,376 for refurbishing the

apartments and continuing to manage the apartment complexes.

Davco established the elements of equitable estoppel by demonstrating that Iota and California Benefit promised to provide accurate financials but did not (see above Sub-section B, pgs 27-31), that Davco relying on their promises purchased the apartment complexes (R. 1127, 497:20 to 498:6), expended \$128,376 in refurbishing them (Id.), and was prevented from purchasing them by Iota and California Benefit declaring default. As such, the trial court erred by failing to find and rule that Iota's and California Benefit's claims are barred by equitable estoppel.

**III. The Trial Court Incorrectly Applied the Waiver Clauses in the Iota Promissory Note and Trust Deed and in the California Benefit Promissory Note and Trust Deed to Bar Davco's Affirmative Defense of Waiver**

The trial court concluded that Iota's and California Benefit's acceptance of Davco's payments after the maturity date had passed did not waive their right to declare default.

"The acceptance of Davco's monthly interest payments from December 2007 to August 2008 after the maturity of the Iota and California Benefit Notes in December 2007 did not waive the rights of Iota or California Benefit to strictly enforce the terms of the Iota Note, Iota Trust Deed, California Benefit Note and California Benefit Trust Deed. See Plaintiffs' Ex. 2, Iota Note, ~ 12 ("... No delay or failure of Lender in the exercise of any right or remedy provided for under this Note shall be deemed a waiver of such right by Lender, and no exercise of any right or remedy shall be deemed a waiver of any other right or remedy which Lender may have."); Plaintiffs' Ex. 3, Iota Trust Deed, ~ 12.7 ("Beneficiary's failure at any time or times hereafter to require strict performance by Trustor of any of the undertakings, agreements or covenants contained in this Deed of Trust shall not waive, affect or diminish any right of Beneficiary hereunder to demand strict compliance and performance therewith."); Plaintiffs' Ex. 13, California Benefit Note, ~ 11 ("The Maker and endorser hereof waive presentment for payment, protest, demand, notice of protest, notice of dishonor, notice of nonpayment and expressly agree that this Note or any payment hereunder may be extended from time to time by the Holder thereof without in any way affecting the liability of such parties. No course of dealing between the Maker and Holder in exercising any rights hereunder, shall operate as a waiver of rights of Holder.") (R. 789, at ¶ 3).

The presence of a non-waiver provision is relevant but not dispositive in a determination of whether Iota and California Benefit waived its right to default. (*Living*

*Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10 at N5 (Ut. Ct. App., 1995). Parties to a written contract may modify, waive or make new terms regardless of provisions in the contracts to the contrary. (*ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 245 P.3d 184 (Utah, 2010) at ¶ 38).

“A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. [The relinquishment] must be distinctly made, although it may be express or implied.” (Citations Omitted).

At trial, it was established that Iota and California Benefit had a right to declare a default when the maturity dates passed without payment (Exhibit 1, at ¶12; Exhibit 3, at ¶12.7; Exhibit 13, at ¶11). It was also established that Iota and California Benefit knew of their right to declare default after the maturity dates but did not (R. 1125, 83:9-12).

However, as shown above, Mr. Murset promised to provide accurate financial statements after the maturity dates and when he failed to do so, promised Davco an extra year to create financial statements under its ownership of the apartment complexes. By agreeing to an extension of time for the payment of the amount due, Iota and California Benefit waived their right to a default for failure to pay the amount due on the maturity dates for a one-year period. (See *Calhoun v. Universal Credit Co.*, 146 P.2d 284, 287 (Utah, 1944)). (“In *Commercial Credit Co. v. Macht*, it was held that by giving an extension of time for payment of an amount then due, the seller waived his right to a forfeiture. In other words, the extension is in effect a waiver.”).

**IV. The Trial Court’s Finding that Iota’s and California Benefit’s Breach of the Contract Did Not Cause the Failure of Davco to Refinance the Promissory Notes is Clearly Erroneous**

The trial court concluded that “[t]here was no breach of any obligation of Plain-

tiffs to cause the failure of Davco to refinance the Iota and California Notes. Rather, the reasons for the failure to refinance include the pending foreclosures against David Fisher and the reduced appraisal value of the properties during this time. ” (R. 791, at ¶6).

The trial court found that: 1) for refinance to occur, the lenders required that David Fisher have a two-year income stream as the owner of the properties (R. 782, at ¶33); 2) the prior owner's financial statements for 2005 and 2006 were not required by the lenders and under the guidelines were not needed to obtain a loan for the apartment complexes (R. 782, at ¶33); and 3) the loan application for refinancing for Casa Grande was denied on February 21, 2008 by the lenders because Mr. Fisher did not have two years of income stream as the owner and the appraised value of the Casa Grande apartments did not come in as high as anticipated based on the December 2007 appraisal of Craig Morley; and 4) David Fisher had credit problems specifically the December 21, 2007 credit report listed eleven (11) foreclosures, each of these reasons led to denial of the loan application for the Casa Grande apartments; and 5) the foreclosures demonstrated financial mismanagement by David Fisher (R. 782, at ¶ 34).

The evidence does not support the trial court's findings because: 1) the trial court ruled that Mr. Feltwell's testimony was excluded because it is hearsay and therefore, there is no evidence that Mr. Fisher had to have two years of income stream as the owner to qualify for financing (*Kimball v. Kimball*, 217 P.3d 733 (Ut. Ct. App., 2009 ) at ¶20 n.5); 2) the appraisal was not as high as Davco wanted but that only meant that Davco would have to bring in more money (Exhibit 28); 3) this was Mr. Feltwell's first attempt at brokering commercial loans and relied on what others said were the requirements and the court did not admit the hearsay evidence (R. 1126, 297:22 to 298:14; 307:6-26); 4) in deposition Mr. Feltwell testified that he did not know if the loans would have been



approved if the seasoning requirements had been met, but he changed his testimony at trial (R. 1126, 311:11-21); 5) Mr. Feltwell did not know whether the prior owner's financial statements could be used to obtain a commercial loan (R. 1126, 312:24-4).

The contradictions and the admissions that Mr. Feltwell did not know the requirements necessary to obtain a commercial loan undermines his testimony and therefore is legally insufficient to establish that Iota's and California Benefit's breach of the oral agreements did not prevent the refinancing of the apartment complexes. (*U.S. v. Rainwater*, at 386, 389).

Lastly, Davco still had time to refinance the apartments during the one-year extension and therefore, the trial court erred in finding that Iota's and California Benefits' breaches were not the cause of its inability to obtain financing. There is no evidence that if Davco had created two full years of financial statements under its ownership of the apartment complexes, that it would not had been successful in refinancing the apartment complexes.

**V. The Trial Court's Finding that Iota and California Benefit Did Not Breach the Covenant of Good Faith and Fair Dealing is Clearly Erroneous**

A claim for breach of the implied covenant of good faith and fair dealing is based on judicially recognized duties not found within the four corners of the contract. (See *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)). These duties, unlike the duties expressly stated in the contract, are not subject to alteration by the parties. They exist whenever a contract is entered into and are imposed on the parties "consistent with the agreed common purpose" of the contract. (*Christiansen v. Farmers Ins. Exchange*, 116 P.3d 259, 261-2 (Utah, 2005) ¶10).

"Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the



other party's right to receive the fruits of the contract. (*Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981); *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979). A violation of the covenant gives rise to a claim for breach of contract. *Beck*, 701 P.2d at 798." (*St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199-200 (Utah,1991).

"The obligation of good faith requires each party to refrain from actions that will intentionally 'destroy or injure the other party's right to receive the fruits of the contract.' To determine the legal duty a contractual party has under this covenant, a court will assess whether a 'party's actions [are] consistent with the agreed common purpose and the justified expectations of the other party.' This court determines the 'purpose, intentions, and expectations' by considering 'the contract language and the course of dealings between and conduct of the parties.'" (*Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1239-40 (Utah,2004) ¶43).

The purpose, intentions, and expectations of the parties was that Davco refinance the apartment complexes and pay the promissory notes on the maturity dates. (Exhibit 7(a); Exhibit 71, at p. 44). To accomplish the refinancing, it was necessary that Mr. Murset provide accurate financial statements for 2005 and 2006. (R. 1125, 176:6-10). The trial court found that Mr. Murset delivered the financial statements to Mr. Feltwell as requested by Davco and that Mr. Murset's financial statements were not required for refinancing. (R. 782, at ¶¶32- 35; 783, at ¶39).

However as demonstrated in sub-sections B and C above, pgs 27-33, the evidence does not support the trial court's findings. Mr. Murset did not provide accurate financial statements for 2005 or 2006 for either Iota or California Benefit, and did not fulfill the promise to allow Davco an extra year to create two full years of financial ownership

under its ownership of the apartment complexes.

The trial court concluded based on the erroneous findings of fact that Iota and California Benefit did not breach the covenant of good faith and fair dealing. (R. 790, at ¶ 5). Thus, the trial court incorrectly concluded that Iota and California Benefit did not breach the covenant of good faith and fair dealing.

**VI. The Trial Court Incorrectly Determined that It Had Jurisdiction to Hold a Contempt Proceeding and Davco and Mr. Fisher Were Given Due Process**

On November 5, 2008, the trial court issued an Ex Parte Order requiring Davco and Mr. Fisher to deposit all rents collected from the tenants at the apartment complexes with the court. (R. 73, at ¶2).

The trial court determined that it had jurisdiction to hold a contempt proceeding with the trial because: 1) On April 19, 2010, Iota and California Benefit in their trial brief requested the trial court to hold Davco and Mr. Fisher in contempt for failure to deposit rents with the trial court without having previously filed an affidavit or other initiation pleading setting forth the alleged contempt. (R. 551); 2) Davco responded in its trial brief that a contempt proceeding is a separate action from the lawsuit and since Iota and California Benefit had not filed an affidavit or an initial pleading setting forth the alleged acts of contempt as required by UCA §78B-6-303, the trial court lacked jurisdiction to determine whether Davco and Mr. Fisher should be held in contempt of court in this trial. (R. 600-1); and 3) Mr. Fisher was not a party to the lawsuit having been dropped from the lawsuit with the filing of the amended complaint on November 14, 2008. (R. 551).

The evidence relied on by the trial court is legally insufficient to give it jurisdiction to hold a contempt proceeding because an affidavit or other initial pleading was never filed and Davco and Mr. Fisher were denied due process because they were never informed until

after trial was commenced that a contempt proceeding would be combined with the trial.

The trial court did not notify Davco and Mr. Fisher that it would hold a contempt proceeding with the trial of this lawsuit and would be accepting evidence on the contempt charges until Mr. Fisher was called to testify and objection was made to the introduction of evidence regarding the contempt charges. (R. 1125, 127:7-16).

UCA § 78B-6-303 controls the procedure that must be followed before a hearing on contempt of court charges can be held when the contempt is not committed in the immediate view and presence of the trial court.

When the contempt is not committed in the immediate view and presence of the court or judge, an affidavit setting forth a statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt.

Here, the alleged contempt that Davco and Mr. Fisher failed to deposit with the trial court rents collected from tenants was not committed in the immediate view and presence of the trial court. Therefore, an affidavit or initiating pleading had to be filed with the trial court to give it jurisdiction over the alleged contempt and the trial court had to give notice to Davco and Mr. Fisher to advise them of the nature of action against them, to give them time to prepare their evidence, and to give Mr. Fisher an opportunity to hire counsel to represent him because he was not a party to the lawsuit. (See *Crank v. Utah Judicial Council*, 20 P.3d 307 (Utah, 2001) at ¶ 28) (“Thus, in Utah, the statutory requirement of an affidavit is a procedural prerequisite to the imposition of any sanctions for indirect contempt.”) (See also *Robinson v. City Court for City of Ogden, Weber County*, 185 P.2d 256, 258 (Utah 1947)) (“A contempt proceeding is separate from the principal action, and in order for the court to acquire jurisdiction of the offense when committed, an affidavit or initiating pleading must be filed, and unless that is done,

subsequent proceedings are void.”). Mr. Fisher was not a party to the lawsuit after November 14, 2008.

Indirect contempt, in contrast to direct contempt, can properly be adjudged only in a proceeding more tightly hedged about with procedural protections. The due process provision of the federal constitution requires that in a prosecution for a contempt not committed in the presence of the court, “the person charged be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf.” *Burgers v. Maiben*, 652 P.2d at 1322; see U.S. Const. amend. XIV; cf. *Robinson v. City Court ex rel. City of Ogden*, 112 Utah at 42, 185 P.2d at 259 (applying Utah Const. art. I, § 12 to criminal contempt proceedings). These protections are amplified upon in the Code, which requires, inter alia, that in a case of indirect contempt, an affidavit must be presented to the court reciting the facts constituting the contempt in order to ensure that the court and the person charged are informed of the conduct alleged to be contemptuous. Utah Code Ann. § 78-32-3 (1987); *Robinson*, 112 Utah at 41, 185 P.2d at 258. (*Von Hake v. Thomas*, 759 P.2d 1162, 1170 (Utah, 1988)).

Davco also argued in its written closing argument that the trial court lacked jurisdiction to conduct a hearing on the contempt charges and that Davco and Mr. Fisher believed that Iota and California Benefit committed fraud on the trial court by including Mr. Fisher as a party to the lawsuit in the original complaint, knowing they did not have a cause of action against him, for the sole purpose of obtaining personal jurisdiction over him to obtain the Ex Parte Order and then dropped him as a party prior to Mr. Fisher having filed any pleadings in the case. (R. 772-4).

At trial, Davco and David Fisher were unable to present evidence of Iota’s and California Benefit’s fraud on the court because they believed that the trial court lacked jurisdiction to hear the contempt charges, they were never given notice prior to trial that the contempt proceedings would be combined with the trial and therefore, did not conduct discovery or otherwise prepare to present evidence of fraud on the court at trial, and Mr. Fisher did not have the opportunity to retain counsel and was not represented at trial because he was not a party to the lawsuit.

In this case, neither an affidavit nor an initiating pleading was filed; hence, the trial court never acquired jurisdiction over the contempt charges. The trial court also failed to give notice to Davco and Mr. Fisher that it would combine a contempt proceedings with the trial and therefore, they did not have the opportunity to prepare for the contempt proceeding by conducting discovery on their belief that Iota and California Benefit committed fraud on the trial court to obtain the Ex Parte Order, to prepare testimony on their behalf, and Mr. Fisher did not have the opportunity to obtain counsel to represent him.

The trial court never had jurisdiction over the contempt charges and denied Davco and Mr. Fisher due process and therefore, erred in conducting a contempt proceeding during the trial, allowing evidence of the alleged contempt at trial, making findings and facts and conclusions of law concerning the contempt charges, and awarding judgment against Davco and Mr. Fisher for contempt of court.

## **VII. The Trial Court Improperly Denied Davco's Rule 67 Motion**

The trial court signed an order granting Iota's and California Benefit's Ex Parte Motion for Order Requiring Rents to be Deposited with the Court. The trial court signed the order just 7 business days after the complaint was filed, 4 business days after Davco and Mr. Fisher were served with the complaint, and one day after Iota and California Benefit filed a request for an expedited ruling.

The order required Davco and David Fisher to deposit all rents collected from the apartment complexes with the clerk of the court. It further provided: "[t]his order shall remain in effect during the pendency of this action, or until further order of the Court."

Rule 67 of the Utah Rule of Civil Procedure governs the issuance of orders requiring a party to deposit rents with the trial court.

When it is admitted by the pleadings, or shown upon the examination of a

party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party upon such conditions as may be just, subject to the further direction of the court; provided that if money is paid into court under this rule it shall be deposited and withdrawn in accordance with Utah Code Section 78B-5-804 or any like statute. (U.R.P.C. 67).

Under Rule 67, Iota and California Benefit had to show that Davco and Mr. Fisher had admitted in their pleadings or through an examination that they had in their possession or under their control rents due to Iota and/or California Benefit. (*Id.*; *Globe Leasing Corp. v. Bank of Salt Lake*, 547 P.2d 197, 199 (Utah, 1976).

The trial court relied on the affidavit of Mr. Murset which contained the following facts: 1) that Davco entered into REPCs, executed promissory notes and trust deeds for the purchase of the apartment complexes (R. 33, ¶¶3-5; 35, ¶¶10-13); 2) that the Iota Trust Deed and the California Benefit Trust Deed contain an assignment of rents (R. 33, ¶¶ 6-8, 14); 3) that Davco had defaulted under the promissory notes by failing to pay the interest payments and failing to pay the principal amount by the maturity dates (R. 35, ¶9; 36, at ¶15); and 4) that Davco continues to collect rents from the apartment complexes (*Id.*).

The evidence relied on by the trial court to issue the Ex Parte Order is legally insufficient because: 1) it consists of the testimony of Mr. Murset; 2) neither Davco nor Mr. Fisher had filed any pleadings prior to the Ex Parte Order being signed by the trial court and therefore, had not admitted in any pleadings that they had in their possession or under their control rents due to Iota or California Benefit; and 3) there was no examination of Davco or Mr. Fisher showing that they had funds belonging to Iota and/or California Benefit at the time the Ex Parte Order was issued. (*Globe Leasing Corp.*, at 199).

The trial court erred in issuing the Ex Parte Order because the requirements of

Rule 67 were not met, and thus, erred in denying Davco's motion to set aside the Ex Parte Order.

**VIII. The Trial Court Incorrectly Concluded That Davco Breached the Iota Deed of Trust**

The trial court concluded that Davco had breached the Iota Deed of Trust by the recording of a Trust Deed encumbrance against the Casa Sonoma apartments by Mr. Fisher on April 1, 2008 and by recording deeds to Darwin Fisher on October 31, 2007, without notice to or the consent of Iota. (R. 791, at ¶¶ 7,8).

There was no evidence presented, and the trial court did not find that: 1) notice of default providing for a reasonable period of time to cure the alleged defaults was given by Iota to Davco; and 2) the alleged breaches were material breaches justifying a conclusion of breach of contract.

In order to obtain relief based on plain error, an appellant must establish that: 1) error exists; 2) that the error should have been obvious to the trial court; and 3) that the error harmed the appellant by depriving him or her of the reasonable probability of a more favorable outcome. (*Nielsen v. Spencer*, 196 P.3d 616 (Ut. Ct. App., 2008) at ¶14).

**A. TRUST DEED**

First. Error exists because Davco did not encumber the Casa Sonoma apartments with a trust deed. (Exhibit 7; R. 516:11-13). Mr. Fisher, individually, signed as trustor and not as managing partner of Davco, thus, Davco did not breach the deed of trust as it did not encumber the Casa Sonoma apartments. (Exhibit 7).

The error was obvious to the trial court because Exhibit 7 clearly shows Mr. Fisher as the trustor and not Davco, and Mr. Fisher testified that the trust deed is in his name and not Davco's name. (Exhibit 7; R. 516:11-13).



Second. Error also exists because Iota did not give notice of default to Davco and even if there is a breach, it is not a material breach.

Iota was required to give notice of default to Davco and the notice had to give Davco a reasonable time in which to cure the default. (*Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 460 (Ut. Ct. App., 1994)). ("A notice of default must 'plainly indicate the nature of the default or breach and give reasonable notice that failure to cure the default within the time allowed may lead to termination.'" (Citations Omitted)).

Iota did not give Davco a notice of the default giving reasonable notice that failure to cure the default within the time allowed may lead to termination of the contract. Mr. Murset did send an e-mail to Mr. Fisher stating that he had discovered the deed but there was no mention of a time to cure, and Mr. Murset testified that the purpose of the e-mail was to inform Mr. Fisher that the property was in Darwin Fisher's name. (Exhibit 35; R. 99:25 to 100:8).

The error was obvious to the trial court because no notice of breach was testified to or introduced into evidence as an exhibit.

Third. Iota had the burden to prove that the trust deed to Fab 5 Management LLC ("Fab 5") was a material breach. (*Ashby v. Ashby*, 191 P.3d 35 (Ut. Ct. App., 2008) at ¶9). To determine whether a breach is material the courts look at the following factors: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure,



taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. (*Pack v. Case*, 30 P.3d 436 Ut. Ct. App., 2001) at ¶18).

The trust deed to Fab 5 is not a material breach of the Iota trust deed because: 1) the trust deed is subordinate to Iota rights to the Casa Sonoma apartments and therefore, Iota would not be deprived of any benefit which it reasonably expected because either Davco would pay the amount owing to Iota or Iota would foreclose, which it did, and eliminate any rights that Fab 5 had in Casa Sonoma (*Dunlap v. Stichting Mayflower Mountain Fonds*, 76 P.3d 711 (Ut. Ct. App., 2003) at ¶15).

The errors deprived Davco from defeating Iota's affirmative defense of breach of contract and harms Davco because Iota is claiming that Davco breached the Iota Deed of Trust before Iota breached the REPCs and promissory note by providing inaccurate P&Ls for 2005, inaccurate 2006 P&L for Iota, and failing to provide accurate 2006 P&Ls. If the trial court had not committed the plain error, it would have denied Iota's affirmative defense and Iota could not claim that Davco was the first to breach.

It should be noted that Davco claims that Iota first breached the REPC and promissory note because it failed to provide accurate financial statements in 2006 and thereafter.

#### B. QUIT CLAIM DEEDS TO DARWIN FISHER

Error exists because Iota did not give notice of default to Davco, and even if there is a breach, it was not a material breach.

First. Iota was required to give notice of default to Davco and the notice had to give Davco a reasonable time in which to cure the default. (*Olympus Hills*, at 446, 460.)

Iota did not give Davco a notice of the default giving reasonable notice that failure to cure the default within the time allowed may lead to termination of the contract. Mr. Murset did send an e-mail to Mr. Fisher stating that he had discovered the deeds but there was no mention of a time to cure and Mr. Murset testified that the purpose of the e-mail was to inform Mr. Fisher that the property was in Darwin Fisher's name. (Exhibit 35; R. 99:25 to 100:8).

The error was obvious to the trial court because no notice of breach was testified to or introduced into evidence as an exhibit.

Second. Iota had the burden to prove that the deeds to Darwin Fisher were a material breach. (*Ashby*, at 35).

The deeds to Darwin Fisher are not material breaches of the trust deed because: 1) the deeds are subordinate to Iota rights to the Casa Sonoma apartments and therefore, Iota would not be deprived of any benefit which it reasonably expected because either Davco would pay the amount owing or Iota would foreclose, which it did, and eliminate any rights that Darwin Fisher had in Casa Sonoma (*Dunlap*, at 711); 2) Davco immediately cured any default by recording deeds transferring Casa Sonoma back to itself after receiving the e-mail. (Exhibit 8; R. 60:25 to 61:11).

The errors deprived Davco from defeating Iota's affirmative defense of breach of contract and harms Davco because Iota is claiming that Davco breached the Iota Deed of Trust before Iota breached the REPC and promissory note. If the trial court had not committed the plain error, it would have denied Iota's affirmative defense and Iota could not claim that Davco was the first to breach.

### CONCLUSION

For the foregoing reasons, Davco respectfully requests the Appellate Court to:

1) reverse the trial court's ruling that the statute of frauds bars Davco's affirmative defense of breach of contract, and rule that Iota and California Benefit breached the REPCs and promissory notes, and/or remand to the trial court Davco's affirmative defense of breach of the covenant of good faith and fair dealing for findings of fact and conclusions of law;

2) reverse the trial court and rule that Iota's and California Benefit's claims are barred by the doctrine of equitable estoppel;

3) reverse the trial court and rule that Iota and California Benefit waived their claims against Davco;

4) reverse the trial court's ruling that Iota's and California Benefit's breach of contract did not cause the failure of Davco to refinance the promissory notes;

5) reverse the trial court's ruling that Iota and California Benefit did not breach the covenant of good faith and fair dealing;

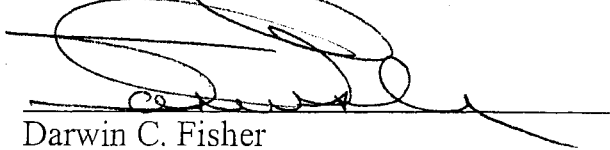
6) rule that the trial court did not have jurisdiction to combine a contempt proceeding with the trial, and that Davco and Mr. Fisher were denied due process;

7) reverse the trial court's ruling denying Davco's Rule 67 motion and rule that the Ex Parte Order be set aside; and

8) reverse the trial court's ruling that Davco breached the Iota deed of trust.

DATED this 20th day of July, 2011.

DARWIN C. FISHER P.C.



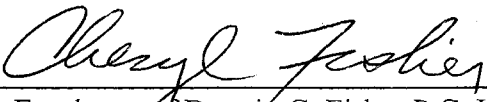
Darwin C. Fisher  
*Attorney for Defendant/Appellant Davco  
Management Company LC*

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 20<sup>th</sup> day of July, 2011, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **BRIEF OF APPELLANT** to the following:

\_\_\_\_ VIA FACSIMILE  
\_\_\_\_ VIA HAND DELIVERY  
  X   VIA U.S. MAIL

Paul D. Veasy, Esq.  
David R. Hall, Esq.  
Parsons, Behle & Latimer  
201 South Main Street, Ste 1800  
Salt Lake City, UT 84111

  
\_\_\_\_\_  
An Employee of Darwin C. Fisher P.C. Law Office

## **ADDENDUM**

1. Findings of Fact and Conclusions of Law
2. Trial Exhibit 1
3. Trial Exhibit 2(a)
4. Trial Exhibit 3(a)
5. Trial Exhibit 4(a)
6. Trial Exhibit 7
7. Trial Exhibit 13
8. Trial Exhibit 18(a)
9. Trial Exhibit 27
10. Trial Exhibit 28
11. Trial Exhibit 29
12. Trial Exhibit 32
13. Trial Exhibit 35
14. Trial Exhibit 63
15. Trial Exhibit 80
16. Record pages: 1, 20, 32-33, 35, 67, 72-73, 78, 94, 185, 546, 550-551, 575, 600,  
703, 714, 730, 757-66, 771-774
17. Trial Transcript, Volume One, Record 1125, pages 65, 68, 72, 82-83, 95, 127,  
152-154, 176-189, 193-196, 199-200, 205-206, 217-224
18. Trial Transcript, Volume Two, Record 1126, pages 272-274, 276, 292, 294-298,  
307, 311-312
19. Trial Transcript, Volume Three, Record 1127, pages 464-469, 472, 476-477, 479-  
481, 492-493, 496-498, 500-501, 518-519, 531, 533-534, 560-562

## Tab 1

FILED  
IN THE DISTRICT COURT  
2010 JUL -9 PM 4:26  
WASHINGTON COUNTY

---

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY  
L.C., a Utah limited liability company

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Case No. 080502981

Judge James L. Shumate

Plaintiffs' Second Amended Complaint and Davco's Counterclaim came on regularly for a bench trial on April 26, 27 and 29, 2010. The Honorable James L. Shumate presided. Plaintiffs were represented by Paul D. Veasy of Parsons Behle & Latimer. Davco was represented by Darwin C. Fisher.

Having reviewed and considered the pleadings on file herein, the briefs of the parties, the exhibits presented at trial, the testimony of the witnesses, the post-trial briefs, and having issued its preliminary ruling on the statute of frauds, and good cause appearing, the Court now enters the following:

**FINDINGS OF FACT**

(Parties)

1. Plaintiff Iota, LLC ("Iota") is a Utah limited liability company.
2. Plaintiff California Benefit, Inc. ("California Benefit") is a California corporation registered to do business in Utah.
3. Defendant Davco Management Company L.C. ("Davco") is a Utah limited liability company authorized to do business in Utah.

(Players)

4. Richard T. Murset ("Murset") is a managing member of Iota and the President of California Benefit.
5. Murset is a trustee of the Murset Family Trust dated June 26, 1998 which owns California Benefit.
6. Iota's principal asset is the Casa Sonoma apartments located at 669 South 700 East, St. George, Utah.
7. California Benefit's principal asset is the Casa Grande apartments located at 735 East 700 South, St. George, Utah.
8. David Fisher is a member and manager of Davco.
9. Murset as agent for Iota and California Benefit and David Fisher as agent for Davco negotiated the sale of the Casa Sonoma apartments and Casa Grande apartments.

(Background)

10. In 2005, Darcy Thompson, a real estate agent for Murset, and Lori Muscolino, a real estate agent for David Fisher, attempted to sell the Casa Sonoma and Casa Grande apartments to Davco. As part of an August 2005 Real Estate Purchase Agreement, Murset was to provide to David Fisher profit and loss statements for the apartment complexes. (Plaintiffs'



Exs. 63 and 64). Murset provided David Fisher with the requested financial information.

(Plaintiffs' Ex. 61). The 2005 Real Estate Purchase Agreement did not close because David Fisher was unable to obtain conventional financing.

11. In 2006 Murset and David Fisher, through their same real estate agents, again began negotiations for Davco to purchase the Casa Sonoma apartments and Casa Grande apartments with owner financing. Murset provided to David Fisher financial statements for the apartment complexes from 2002 through May 2006. (Defendant's Exs. 1 through 4). David Fisher had discussions with Murset over the provided financial statements, including that some of the financial information was incorrect. (Defendant's Exs. 3 through 6). Murset cooperated with David Fisher and provided additional information to David Fisher. David Fisher made purchase offers for the Casa Sonoma and Casa Grande apartments based upon the seventeen months (January 2005 through May 2006) of financial information provided by Murset to David Fisher.

12. The remaining financial information for 2006 could not be provided because the year 2006 had not been completed. Murset provided his remaining 2006 financial information to David Fisher in February 2007.

(Casa Sonoma Apartments)

13. In September of 2006, Davco entered into an agreement with Iota, LLC to purchase the Casa Sonoma apartments. Even though David Fisher did not have all the 2006 financial information for Casa Sonoma apartments in September 2006, Davco chose to close the purchase of the Casa Sonoma apartments.

14. On September 29, 2006, Davco executed a Term Loan Promissory Note in the

principal amount of \$1,341,395.00 in favor of Iota, LLC (hereinafter referred to as the "Iota Note"). (Plaintiffs' Ex. 1).

15. The Iota Note provided that the entire balance due and owing on the note be paid on or before December 1, 2007.

16. Davco executed a Deed of Trust, Security Agreement Assignment of Rents and Leases, and Fixture Filing (hereinafter referred to as the "Iota Deed of Trust") wherein Davco was the trustor and Iota was the beneficiary. (Plaintiffs' Ex. 3).

17. The Iota Deed of Trust granted to Iota a security interest in the Casa Sonoma apartments, together with the rents and security deposits.

18. Paragraph 8.7 of the Iota Trust Deed provides that Davco shall not sell, convey or alienate the Casa Sonoma apartments or any portion thereof.

19. Paragraph 10.1 of the Iota Trust Deed states, in part:

Upon the occurrence and continuance of an Event of Default hereunder, Trustor's right to collect and use any of such proceeds shall cease, and Beneficiary, shall have the right, with or without taking possession of the Trust Estate, and either in person, by agent or through a court appointed receiver (Trustor hereby consents to the appointment of Beneficiary or Beneficiary's designee as such receiver), to sue for or otherwise collect all such sales proceeds, rents, subrents, issues, royalties, income and profits, including those past due and unpaid.... All purchasers, tenants, lessees, sublessees and other persons who have any obligation to make any payment to Trustor in connection with the Trust Estate or any portion thereof are hereby authorized and directed to pay the rents, subrents, issues, royalties, income, profits and other payments payable by them with respect to the Trust Estate, or any portion thereof, directly to Beneficiary on the demand of Beneficiary.

20. Paragraph 11.1 of the Iota Trust Deed defines an "Event of Default" as follows:

Events of Default. The occurrence and continuance of any one of the following shall constitute an Event of Default under this Deed of Trust:

- (a) Failure by Trustor to observe and perform any term, covenant or condition to be observed or performed by Trustor contained in this Deed of Trust, the Note or any of the other Loan Documents.
- (b) Any representation or warranty of Trustor contained in this Deed of Trust, the Note or any of the other Loan Documents was untrue when made.
- (c) A default by Trustor under the terms of any other promissory note, deed of trust, security agreement, undertaking or arrangement between Trustor and Beneficiary now in existence or hereafter arising.

21. There are no written amendments executed by Iota for the Iota Note or the Iota Trust Deed.

22. Davco did not pay the Iota Note at maturity on December 1, 2007. Iota thereafter made monthly interest payments to Iota from December 2007 until August 2008.

(Casa Grande Apartments)

23. In November of 2006, Davco entered into an agreement with California Benefit to purchase the Casa Grande apartments. Even though David Fisher did not have all the 2006 financial information for the Casa Grande apartments in November 2006, Davco chose to close the purchase of the Casa Grande apartments.

24. On November 30, 2006, Davco executed an All-Inclusive Promissory Note in the principal amount of \$2,411,596.00 in favor of California Benefit (hereinafter referred to as the "California Benefit Note"). (Plaintiffs' Ex. 13).

25. The California Benefit Note provides that the entire balance due and owing on the note be paid on or before December 10, 2007.

26. Davco executed an All-Inclusive Deed of Trust and Assignment of Rents (hereinafter referred to as the "California Benefit Deed of Trust") wherein Davco was the trustor and California Benefit was the beneficiary. (Plaintiffs' Ex. 14).

27. The California Benefit Deed of Trust granted to California Benefit a security interest in the Casa Grande apartments, together with the rents, issues and profits.

28. There are no written amendments executed by California Benefit for the California Benefit Note or the California Benefit Trust Deed.

29. Davco did not pay the California Benefit Note at maturity on December 10, 2007. Davco thereafter made monthly interest payments to California Benefit from December 2007 to August 2008.

(August 2007 to October 2008)

30. On August 28, 2007, Davco Management Company LLC executed five Warranty Deeds conveying the Casa Sonoma apartments to Davco Management Company, LLC. (Plaintiffs' Ex. 5). The purpose of the five Warranty Deeds was to subdivide the property into smaller residential property descriptions to allow for refinancing. Davco notified Iota of these conveyances and Iota gave its consent to Davco for the five Warranty Deeds.

31. On October 31, 2007, Davco conveyed the Casa Sonoma apartments to Darwin Fisher (Plaintiffs' Ex. 6) without notice to or the consent of Iota. Iota would not have given its consent to these conveyances. Darwin Fisher owned the Casa Sonoma apartments for one year or until October 7, 2008, when Darwin Fisher conveyed the Casa Sonoma apartments to Davco. (Plaintiffs' Ex. 8). During the time Darwin Fisher owned the Casa Sonoma apartments, Davco provided no evidence to Iota of refinancing efforts by Darwin Fisher.

32. Starting in November 2007 and through March 2008, David Fisher contacted Jeff Feltwell, a mortgage broker, to obtain refinancing for the Casa Sonoma and Casa Grande apartments. David Fisher provided to Feltwell financing operating statements for 2007 for the Casa Grande apartments (Plaintiffs' Ex. 68) and a December 21, 2007 credit report for David Fisher.

33. Feltwell prepared an application to refinance the Casa Grande apartments in the name of David Fisher as the owner. Feltwell was not told by David Fisher that Davco was the owner. Feltwell prepared an application to refinance the Casa Sonoma apartments in the name of David Fisher. Feltwell was not told by David Fisher that Darwin Fisher was the owner. Feltwell forwarded the applications and information to two lenders for review. For refinance to occur, the lenders required that David Fisher have a two-year income stream as the owner of the properties. Feltwell testified that the prior owner's financial statements for 2005 and 2006 were not required by the lenders and under the guidelines were not needed to obtain a loan for the apartment complexes.

34. The loan application for refinancing for Casa Grande was denied on February 21, 2008 by the lenders for the following reasons: (1) David Fisher did not have two years of income stream as the owner; (2) the appraised value of the Casa Grande apartments did not come in as high as anticipated based on the December 2007 appraisal of Craig Morley; and (3) David Fisher had credit problems specifically the December 21, 2007 credit report listed eleven (11) foreclosures. Each of each of these reasons led to denial of the loan application for the Casa Grande apartments. (Plaintiffs' Ex. 65). Feltwell testified the foreclosures demonstrated financial mismanagement by David Fisher. Based on the denial of the Casa Grande loan

application, David Fisher withdrew his loan application to obtain refinancing for the Casa Sonoma apartments on March 12, 2008. (Plaintiffs' Exs. 69). David Fisher never told Murset about being denied refinancing with Feltwell.

35. On March 26, 2008, David Fisher emailed Murset and requested the status of the 2005 and 2006 year-to-date operating statements for the Casa Sonoma and Casa Grande apartments for David Fisher's broker. (Plaintiffs' Ex. 24). Murset provided the financial information for 2005 and 2006 to the mortgage broker.

36. On April 1, 2008, David Fisher, without notice to or the consent of Iota, recorded a \$500,000 Trust Deed encumbrance against the Casa Sonoma apartments with David Fisher as the trustor and in favor of the beneficiary Fab 5 Management LLC. (Plaintiffs' Ex. 7). At that time David Fisher did not own the Casa Sonoma apartments nor was it owned by Davco. Iota would not have given its consent to this \$500,000 Trust Deed encumbrance.

37. Seven months after maturity of the Iota and California Benefit Notes, or on June 3, 2008, Plaintiffs requested that Davco refinance the Casa Sonoma and Casa Grande apartments by the end of July 2008. (Plaintiffs' Ex. 25). This request for refinancing by the end of July 2008 was not done by Davco.

38. On June 20, 2008, David Fisher emailed Murset stating that he would have a letter of commitment in seven to ten days for refinancing. The refinancing never occurred. (Plaintiffs' Ex. 26).

39. On July 21, 2008, David Fisher emailed Murset stating the loan officer said that he received the updated financials except for the 2007 returns which David Fisher's CPA was making a couple of changes and then would be sending them back to David Fisher for review and

forwarding to the loan officer. (Plaintiffs' Ex. 27). Again, Davco had the financial information but was unable to refinance the apartment complexes.

40. On August 25, 2008, Plaintiffs requested a deed in lieu of foreclosure from Davco as a result of Davco's failure to refinance the apartments. (Plaintiffs' Ex. 28). The deed in lieu of foreclosure was requested by Murset without knowledge of the actual ownership of the Casa Sonoma apartments by Darwin Fisher and without notice of the recorded \$500,000 Fab 5 Trust Deed. Davco rejected the request for a deed in lieu of foreclosure.

41. On August 26, 2008, David Fisher emailed Murset stating that the lending institutions were changing their guidelines on the capitalization rate. David Fisher told Murset that David Fisher would have to bring in money to close since the loan amount would not be enough to cover the debt. David Fisher was expecting a settlement on October 2 which would be enough to pay the difference between what he owed and the loan amount. David Fisher also stated that he had two parties interested in purchasing the properties. David Fisher requested that he have enough time for either one of these things to happen. (Plaintiffs' Ex. 28). Murset accommodated David Fisher's request.

42. On September 3, 2008, Plaintiffs then requested payment of additional consideration from Davco as a result of the failure to refinance the apartments. (Plaintiffs' Ex. 29). This request was rejected by Davco.

43. On September 8, 2008, Davco executed September monthly interest payment checks to Iota and California Benefit and then issued a stop payment order on those checks. (Plaintiffs' Ex. 9). Davco made no further monthly interest payments to Iota and California Benefit after stopping the September monthly interest payment checks.

44. On September 9, 2008, David Fisher for the first time requested from Murset that Davco be paid for its alleged 2007 improvements to the two apartment complexes. (Plaintiffs' Ex. 31). At this time, Davco had not paid Plaintiffs the September monthly interest payments under the Iota and California Benefit Notes. Plaintiffs refused to pay Davco for its alleged improvements, but rather wanted Davco to refinance the apartments.

45. Non-payment of the September 2008 monthly interest payments by Davco to Plaintiffs placed Murset in a predicament with having to pay the monthly senior note obligations against the Casa Sonoma and Casa Grande apartments.

46. On September 24, 2008, Davco sent a letter to Murset stating, among other things, that it wanted to be paid for the improvements and stating for the first time to Murset that Plaintiffs had previously agreed to a one-year extension agreement on the Iota and California Benefit Notes. (Plaintiffs' Ex. 31). The letter fails to notify Murset that the Casa Sonoma apartments were owned by Darwin Fisher and of the \$500,000 Feb 5 Trust Deed, all of which information should have been disclosed to Murset, and fails to address Davco's non-payment of the September monthly interest payments to Iota and California Benefit.

47. On September 30, 2008, Murset sent a letter responding to David Fisher's September 24, 2008 letter denying any one-year extension was made and stating that if an agreement for a one-year extension had been made then that agreement would have been honored. Murset also proposed a solution to the dispute which was rejected by Fisher. (Plaintiffs' Ex. 32).

48. Between October 3 and October 8, the parties exchanged emails hoping to resolve their dispute. (Plaintiffs' Exs. 33 and 34). On October 8, 2008, Murset emailed Fisher stating



that Davco's failure to address withholding the September and on October monthly interest payments was unacceptable. (Plaintiffs' Ex. 35). In that email, Murset disclosed to Fisher that Murset had ordered a foreclosure report and for the first time discovered that the Casa Sonoma apartments had been owned by Darwin Fisher since October 2007 and for the first time discovered the \$500,000 Fab 5 Trust Deed against the Casa Sonoma apartments. David Fisher responded to Murset's October 8, 2008 email with an email on October 9, 2008 stating that the he had put the apartments in Darwin Fisher's name as another route to try and obtain financing. As of October 9, 2008 they were now back in the name of Davco. (Plaintiffs' Ex. 35). In his email, David Fisher failed to address the \$500,000 Fab 5 Trust Deed encumbrance against the Casa Sonoma apartments.

49. At the time of Murset's October 8, 2008 email, Davco had not presented to Plaintiffs any letter from a lender stating that it was going to refinance the apartments.

50. As of October 2008, Davco had two years of income stream for the Casa Sonoma apartments. By December 2008, Davco had two years of income stream for the Casa Grande apartments.

(Rents and Security Deposits)

51. After Davco stopped the September monthly interest payments and made no further monthly payments from September 1, 2008 until the trustee's sales on February 20, 2009, Davco and David Fisher exercised self-help and collected the rents and security deposits from the tenants for the Casa Sonoma and Casa Grande apartments and failed to remit any payment of the rents and security deposits to either Iota or California Benefit. During this time, Davco and David Fisher collected \$163,243 in rents and \$30,050 in security deposits for a total income to

David Fisher and Davco of \$193,293. After application of credits, the net amount of rents and security deposits owed by Davco to Iota and California Benefit is \$132,844.96. (Plaintiffs' Ex. 80). David Fisher collected these amounts to reimburse Davco for the alleged 2007 improvements made by Davco to the apartments rather than apply the rents and security deposits towards the debt obligations.

52. On November 5, 2008, this Court issued its Order on Plaintiffs' Ex Parte Motion for Order Requiring Rents to be Deposited with the Court ("Ex Parte Order") that all rents were to be deposited with the Court. At that time David Fisher was a defendant in the lawsuit. David Fisher was served with the Ex Parte Order on November 10, 2008.

53. After service of the Ex Parte Order on November 10, 2008, David Fisher willfully and knowingly collected \$71,119.17 in rents and security deposits to pay himself back for 2007 improvements. (Plaintiffs' Ex. 81).

54. David Fisher testified he still had in his possession security deposits which he failed to provide to Plaintiffs for payments towards the debt obligations of the Iota and California Benefit Notes.

55. Davco's and David Fisher's retention of the rents and security deposits left Murset with no basis to pay the senior note holders under the Iota and California Benefit Notes. As a result of the actions of Davco and David Fisher, Murset was left with no choice but to foreclose the apartment complexes and to commence litigation to recover the retained rents and security deposits.

(Foreclosures and Lawsuit -- October 15, 2008 to February 20, 2009)

56. On October 15, 2008 Iota and California Benefit commenced non-judicial

foreclosures of the Iota and California Benefit Deeds of Trust by having the successor trustee file Notices of Default with the Washington County Recorder's Office pursuant to the provisions of the Deeds of Trust and Utah Code Ann. § 57-1-23, et seq. (Plaintiffs' Exs. 10 and 16).

57. Davco received copies of the Notices of Default.

58. Iota and California Benefit commenced this lawsuit on October 23, 2008.

59. Davco did not make payment on the Iota and California Benefit Notes after receiving the Notices of Default. Iota and California Benefit then noticed the Casa Sonoma and Casa Grande apartments for trustee's sales. (Plaintiffs' Exs. 11 and 17).

60. The trustee's sales occurred on February 20, 2009. Iota was the successful bidder for the Casa Sonoma apartments with the credit bid amount of \$934,000 against the Iota Note. California Benefit was the successful bidder for the Casa Grande apartments with the credit bid amount of \$1,800,000 against the California Benefit Note. Iota and California Benefit became the owners of the Casa Sonoma and Casa Grande apartments with recording Trustee's Deeds with the Washington County Recorder. (Plaintiffs' Exs. 12 and 18).

61. Davco did not object to or attempt to stop the trustee's sales.

62. At the time of the trustee's sale for the Casa Sonoma apartments, the delinquent debt on the Iota Note was \$1,649,438.30. (Plaintiffs' Ex. 74).

63. At the time of the trustee's sale for the Casa Sonoma apartments, the fair market of the apartments was \$1,260,000. (Plaintiffs' Ex. 70).

64. At the time of the trustee's sale for the Casa Sonoma apartments, the deficiency amount owing after applying the fair market value of the Casa Sonoma apartments was \$389,438.30. (Plaintiffs' Ex. 74).

65. At the time of the trustee's sale for the Casa Grande apartments, the delinquent debt on the California Benefit Note was \$2,522,266.20. (Plaintiffs' Ex. 74).

66. At the time of the trustee's sale for the Casa Grande apartments, the fair market value of the apartments was \$2,250,000. (Plaintiffs' Ex. 70).

67. At the time of the trustee's sale for the Casa Grande apartments, the deficiency amount owing after applying the fair market value of the Casa Grande apartments was \$272,266.20. (Plaintiffs' Ex. 74).

### CONCLUSIONS OF LAW

1. This Court has jurisdiction over the above-captioned action pursuant to Utah Code Ann. § 78A-5-102(1) (2008).

2. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-301 (2008).

3. The acceptance of Davco's monthly interest payments from December 2007 to August 2008 after maturity of the Iota and California Benefit Notes in December 2007 did not waive the rights of Iota or California Benefit to strictly enforce the terms of the Iota Note, Iota Trust Deed, California Benefit Note and California Benefit Trust Deed. See Plaintiffs' Ex. 2, Iota Note, ¶ 12 ("... No delay or failure of Lender in the exercise of any right or remedy provided for under this Note shall be deemed a waiver of such right by Lender, and no exercise of any right or remedy shall be deemed a waiver of any other right or remedy which Lender may have."); Plaintiffs' Ex. 3, Iota Trust Deed, ¶ 12.7 ("Beneficiary's failure at any time or times hereafter to require strict performance by Trustor of any of the undertakings, agreements or covenants contained in this Deed of Trust shall not waive, affect or diminish any right of Beneficiary hereunder to demand strict compliance and performance therewith."); Plaintiffs' Ex.

13, California Benefit Note, ¶ 11 (“The Maker and endorser hereof waive presentment for payment, protest, demand, notice of protest, notice of dishonor, notice of nonpayment and expressly agree that this Note or any payment hereunder may be extended from time to time by the Holder thereof without in any way affecting the liability of such parties. No course of dealing between the Maker and Holder in exercising any rights hereunder, shall operate as a waiver of rights of Holder.”)

4. Utah Code Ann. § 25-5-1 and 25-5-4 bars Davco’s defense that after maturity of the Iota and California Benefit Notes in December 2007, there was a one-year extension to the Iota Note, Iota Trust Deed, California Benefit Note and California Benefit Trust Deed. There are no writings executed by either Iota or California Benefit creating any modification of the original Notes and Deeds of Trust.

5. Davco claimed that Plaintiffs violated the implied covenant of good faith and fair dealing and, having breached that covenant, they cannot recover on the Notes and Deeds of Trust. Davco’s allegation of breach rests upon the claim that Plaintiffs failed to provide updated financial statements for 2005 and 2006 to enable Davco to refinance the apartments. The Court has found that those financial statements were delivered as requested by Davco. ( See Finding #35 above) In addition, based on the testimony of Jeff Feltwell, the prior owner’s financial records were not required for refinancing. Lenders required the owner of the apartment complex to have two years stream of income which Davco did not have.

6. There was no breach of any obligation of Plaintiffs to cause the failure of Davco to refinance the Iota and California Benefit Notes. Rather, the reasons for the failure to refinance include the pending foreclosures against David Fisher and the reduced appraisal value of the

properties during this time.

7. Davco's October 31, 2007 conveyance of the Casa Sonoma apartments to Darwin Fisher without notice to or the consent of Iota was a violation of the Iota Deed of Trust, specifically paragraph 8.7.

8. David Fisher's April 1, 2008 recording of a \$500,000 Trust Deed encumbrance against the Casa Sonoma apartments with David Fisher as the trustor in favor of the beneficiary Fab 5 Management, LLC without notice to or the consent of Iota was a violation of the Iota Deed of Trust, specifically paragraph 8.7.

9. Davco's defense claiming an off-set for 2007 improvements to the apartment complexes is dismissed as a matter of law. Under paragraph 6.2 of the Iota Deed of Trust, Davco may not claim a set-off or make a demand for payment in the form of a counterclaim or otherwise for these improvements. Moreover, under the Iota Deed of Trust and the California Benefit Deed of Trust, improvements are part of the trust estate. At the trustee's sales, the alleged improvements were presumed to be taken into account in increasing the fair market value of the apartments and thereby reducing any potential deficiency judgment.

10. Davco and David Fisher's collection of rents and security deposits from the tenants from September 1, 2008 until February 20, 2009 was a violation of the Iota Note, Iota Deed of Trust, California Benefit Note and California Benefit Deed of Trust.

11. On the Sixth Cause of Action for a deficiency judgment for the Casa Sonoma Note, the Court awards Judgment against Davco and in favor of Iota in the principal amount of \$389,438.30 as of February 20, 2009. Iota has satisfied the three elements of Utah Code Ann. § 57-1-32, specifically the amount of the indebtedness at the time of the trustee's sale on

February 20, 2009 was \$1,649,438.30, the amount for which the Casa Sonoma apartments was sold at the trustee's sale was \$934,000 and the Court determines the fair market value as of the date of the trustee's sale for the Casa Sonoma apartments to be \$1,260,000. In addition, Iota is awarded since February 20, 2009, the date of the trustee's sale, to May 28, 2010 its reasonable attorney's fees in the amount of \$76,577.75, interest at 18% per annum from the date of the trustee's sale to the date of Judgment with interest to accrue thereafter at the default interest rate of 18% per annum. Credit shall be given to Davco for rents remitted by the Court to Iota of \$20,602.67 on December 18, 2009. Allowable costs should be submitted pursuant to Rule 54(d) of the Utah Rules of Civil Procedure. Attorneys' fees and costs will continue to accrue.

12. On the Seventh Cause of Action for a deficiency judgment for the Casa Grande Note, the Court awards Judgment against Davco and in favor of California Benefit in the principal amount of \$272,266.20 as of February 20, 2009. California Benefit has satisfied the three elements of Utah Code Ann. § 57-1-32, specifically the amount of the indebtedness at the time of the trustee's sale on February 20, 2009 was \$2,522,266.20, the amount for which the Casa Grande apartments was sold at the trustee's sale was \$1,800,000 and the Court determines the fair market value as of the date of the trustee's sale for the Casa Grande apartments to be \$2,250,000. In addition, California Benefit is awarded since February 20, 2009, the date of the trustee's sale to May 28, 2010, its reasonable attorney's fees in the amount of \$76,451.75, interest at 7% per annum from the date of the trustee's sale to the date of Judgment with interest to accrue thereafter at the default interest rate of 7% per annum. Credit shall be given to Davco for rents remitted by the Court to California Benefit of \$20,602.66 on December 18, 2009.

Allowable costs should be submitted pursuant to Rule 54(d) of the Utah Rules of Civil Procedure. Attorneys' fees and costs will continue to accrue.

13. On its First through Fifth Causes of Action for rents, declaratory relief and accounting, the Court awards Judgment against Davco and in favor of Iota and California Benefit in the amount of \$132,844.96 for Davco's failure to pay the rents and security deposits to Iota and California Benefit from September 1, 2008 through February 20, 2009. Retention of the rents and security deposits was a violation of the Iota and California Benefit Deeds of Trust. Davco through its agent David Fisher is ordered to provide an accounting to Plaintiff of the security deposits and to immediately remit all security deposits in Davco's or David Fisher's possession to Iota and California Benefit. If paid, this amount will reduce the Judgments awarded in the Sixth and Seventh Causes of Action.

14. In addition, the Court awards Judgment against Davco and David Fisher and in favor of Iota and California Benefit for contempt of this Court's November 5, 2008 Ex Parte Order in the amount of \$71,119.17. Davco and David Fisher violated Utah Code Ann. § 78B-6-301 by knowingly disobeying this Court's November 5, 2008 Ex Parte Order in failing to turn over the rents to the court clerk for further disposition by Order of this Court. David Fisher has knowingly and wrongfully retained the security deposits and has failed to deliver those amounts to Iota and California Benefit to apply towards the debt obligations. Iota and California Benefit are awarded their reasonable attorney's fees and costs for having to prove contempt for violation of the Court's November 5, 2008 Ex Parte Order. Davco and David Fisher are ordered to provide an accounting to Plaintiff of the security deposits and to immediately remit all security deposits in Davco's or David Fisher's possession to Iota and California Benefit. If paid, this



amount will reduce the judgments awarded in the Sixth and Seventh Causes of Action. The defense in this matter argues that only Davco should be liable under this finding of contempt. It is true that the causes of action in the Plaintiffs' Second Amended Complaint allege liability only against Davco, but the Defendant David Fisher was a party to the case at the time of the entry of the November 5, 2008, order, the order was served upon him personally, and he personally collected and retained the funds from the tenants in violation of this Court's Order.


15. Davco's Counterclaim and First Cause of Action for alleged breach of the covenant of good faith and fair dealing is dismissed. There are no violations of the covenant of good faith and fair dealing by either Iota or California Benefit.

16. Iota and California Benefit are awarded their reasonable attorneys' fees and costs as the prevailing party in this litigation under Utah Code Ann. § 57-1-32 (2001) and under paragraph 11.7 of the Casa Sonoma Deed of Trust and paragraph 10 of the Casa Grande Note. However, as the defense has pointed out, the Court has the responsibility to determine reasonable attorney's fees in this case. The Court has reviewed the Plaintiff's Affidavit of Attorney's Fees and agrees that there is the appearance of "double billing" of hours for the drafting of pleadings for each of the Plaintiff's. Therefore, the calculation of attorney's fees shall be reduced by one-half for the hours claimed for drafting pleadings. Other hours of attorney's fees will not be reduced. The defense claim of excessive and unjustified attorney's fees for the collection of rents and security deposits are unpersuasive in the judgment of the Court. While the statute on trust deed foreclosure and deficiency actions may not permit the recovery of attorney's fees in the collections of unpaid rents and security deposits, the Notes and Deeds of Trust in this action do. The Court is not totally convinced that the statute on Trust Deed Foreclosure does not allow for

the recovery of the rents and security deposits when the purpose of the statute seems to be broadly drawn in favor of full recovery for all costs and attorney's fees. The breadth of the statute and the contracts between the parties to this action support the Court's award of attorney's fees as set forth herein.

17. Counsel for the Plaintiffs will prepare and submit a Judgment in accordance with these Findings of Fact and Conclusions of Law.

DATED this 8th day of July, 2010.

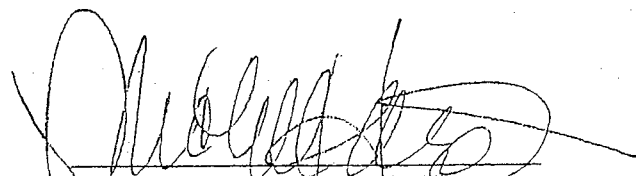
  
JUDGE JAMES L. SHUMATE  
FIFTH DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on 9 July, 2010, I caused to be mailed a copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW**, to the following:

Paul D. Veasy  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111

Darwin C. Fisher  
40 North 300 East, #101  
St. George, UT 84770

  
DISTRICT COURT CLERK

## Tab 2

TERM LOAN  
PROMISSORY NOTE

\$1,341,395.00

September 29, 2006

FOR VALUE RECEIVED, the undersigned, DAVCO MANAGEMENT COMPANY, L.C., an Utah limited liability company ("Borrower"), promises to pay to the order of IOTA, LLC, an Utah limited liability company ("Lender"), at 164 N. 160 E., Hurricane, Utah 84737, or at such other place as Lender may from time to time designate, the principal sum of **ONE MILLION THREE HUNDRED FORTY-ONE THOUSAND THREE HUNDRED NINETY-FIVE DOLLARS (\$1,341,395.00)**, together with all subsequent advances made, expenditures authorized and additional payments provided for in this Term Loan Promissory Note, and in any of the Loan Documents (defined below).

1. Definitions. As used in this Note, the following terms shall have the meanings set forth below:

"Deed of Trust" means the Deed of Trust, Security Agreement, Assignment of Rents and Leases, and Fixture Filing, dated the same date as this Note, executed by Borrower, as grantor, in favor of Lender, as beneficiary, and encumbering the Property.

"Event of Default" shall have the meaning given in the Deed of Trust.

"Loan" means the term loan advanced by Lender to Borrower in the principal amount of **ONE MILLION THREE HUNDRED FORTY-ONE THOUSAND THREE HUNDRED NINETY-FIVE DOLLARS (\$1,341,395.00)**.

"Loan Documents" means the following documents executed in conjunction with this Note: the Deed of Trust; a Certificate and Indemnity Regarding Hazardous Substances, a Uniform Commercial Code Financing Statement; one or more Guaranties in favor of Lender; and such other documents as may now be given or as may be entered into after the date of this Note by Borrower, any guarantor of Borrower's obligations under this Note or any other party for the benefit of Lender as security for this Note.

"Maturity Date" shall mean **December 1, 2007**.

"Month" means a calendar month.

"Note" means this Term Loan Promissory Note and any extensions, renewals or modifications thereof.

"Payment Date" means the **1<sup>st</sup> day of each Month** on which Borrower shall pay to Lender accrued interest, on the outstanding principal of this Note, as required by the terms of this Note.

"Principal Indebtedness" means at any time and from time to time during the term of this Note all advances, disbursements, expenditures and payments made by Lender after the date of this Note pursuant to the terms of this Note or any of the Loan Documents, and includes the unpaid principal balance of the Senior Note then

"Property" means certain real property located in Washington County, Utah, as more particularly described on Exhibit "A" attached to and incorporated in this Note by reference.

"Senior Note" means that certain note in the amount of \$500,000 made by Lender in favor of LaSalle Bank National Association

2. Security. This Note is to be secured by the Deed of Trust, and other Loan Documents. Reference is made to such documents for a description of the property and interests encumbered or pledged as security for this Note, and the rights, remedies and obligations of Lender with respect thereto.

3. Interest Accruals. Interest shall accrue on the unpaid Principal Indebtedness at an annual rate of 7.0%.

4. Interest Calculation Basis. All interest accruing under this Note shall be calculated on the basis of a 365-day year for the actual number of days elapsed.

5. Payments of Accrued Interest.

(a) Beginning on <sup>November 22, 2006</sup> ~~October 1, 2006~~, Borrower shall make monthly interest only payments to Lender of accrued interest on the unpaid Principal Indebtedness in the amount of \$7,824.81.

(b) The entire unpaid Principal Indebtedness, together with all accrued and unpaid interest thereon, if not sooner paid, shall be due and payable in full on the Maturity Date, with Borrower receiving a credit at the Maturity Date in the amount of security deposits held by Lender with respect to the Property.

6. Default Rate of Interest. During any period of time in which an Event of Default has occurred and is continuing, interest shall accrue against the outstanding Principal Indebtedness evidenced hereby at an annual rate equal to eighteen percent (18.0%), calculated on the basis of a 365-day year for the actual number of days elapsed.

7. Late Fee Charges. If any payment required by this Note or any of the Loan Documents is not received by Lender within ten (10) days after such payment is due, a late fee charge equal to five percent (5.0%) of such late payment shall be due and payable.

8. Usury Savings Clause. It is the express intent hereof that Borrower not pay and Lender not receive, directly or indirectly in any manner whatsoever, interest in excess of that which may be legally paid by Borrower under applicable law, and this Note is subject to the express condition that at no time shall Borrower be obligated or required to pay, nor shall Lender be permitted to collect, interest on the Principal Indebtedness at a rate which could subject Lender to either civil or criminal liability as a result of being in excess of the maximum rate which Borrower is permitted by law to agree to pay. If any such excess amount of interest is contracted for, charged, paid, received or applied under the Loan Documents or this Note, or in the event the maturity of this Note is accelerated in whole or in part or the principal of or interest on this Note shall be prepaid, so that under any of such circumstances the amount of interest contracted for, charged, paid, received or applied under the Loan Documents or this Note shall exceed the maximum amount of interest permitted by applicable law, then in any such event: (a) neither Borrower nor any other person liable for payment of the indebtedness evidenced hereby shall be obligated to pay the amount of such interest to the extent that it is in excess of the maximum amount of interest

permitted by applicable law; (b) any such excess which may have been collected shall, at Lender's option, either be applied as a credit against the then unpaid principal amount of this Note (without payment of a prepayment premium) or refunded to Borrower; and (c) the effective rate of interest shall be automatically reduced to the maximum lawful rate of interest allowed under applicable law, as now or hereafter construed by the courts having jurisdiction thereof. Without limiting the generality of the foregoing, all calculations of the rate of interest contracted for, charged or received under the Loan Documents or this Note which are made for the purposes of determining whether such rate exceeds the maximum amount of interest permitted by applicable law shall be made, to the extent permitted by applicable law, by amortizing, prorating, allocating and spreading in equal parts during the period of the full stated term of this Note, all interest at any time contracted for, charged or received in connection with the indebtedness evidenced by this Note.

9. Application of Payments. All payments on this Note shall, at the option of Lender, be applied first to the payment of accrued interest and after all such interest has been paid, any remainder shall be applied toward repayment of any additional advances Lender has made under the terms of any of the Loan Documents which have not already been added to the Principal Indebtedness then outstanding, and the balance, if any, toward the reduction of the Principal Indebtedness.

10. Incorporation of Loan Documents. The terms, conditions, covenants, provisions, stipulations and agreements of the Loan Documents are hereby made a part of this Note by reference to such documents in the same manner and with the same effect as if the Loan Documents were fully set forth herein. Borrower hereby covenants and promises to abide by and comply with each and every covenant and condition set forth in this Note and the Loan Documents.

11. Prepayment. Borrower may prepay all or any portion of the Principal Indebtedness before it is due, without notice to Lender and without payment of any prepayment fee or premium.

12. Waivers, Substitution of Security. Borrower waives presentment for payment, notice of dishonor and protest, and consents to any extension of time with respect to any payment due under this Note, to any substitution or release of collateral, and to the addition or release of any party. No waiver of any payment under this Note shall operate as a waiver of any other payment. No delay or failure of Lender in the exercise of any right or remedy provided for under this Note shall be deemed a waiver of such right by Lender, and no exercise of any right or remedy shall be deemed a waiver of any other right or remedy which Lender may have.

13. Governing Law. This Note is to be construed in accordance with the laws of the State of Utah, without giving effect to principles of conflicts of laws.

14. General. Time is of the essence hereof. Upon the occurrence and continuance of an Event of Default, Lender shall have, in addition to all rights and remedies available to Lender at law or in equity, all rights and remedies specified in any of the Loan Documents.

15 taxes and Insurance beginning  
Jan 1, 2007 payments will increase to \$ 8,399.59  
7824.81 (interest) + 339.12 (taxes) + 235.66 (insurance)

DATED effective as of the date first above written.

BORROWER:

DAVCO MANAGEMENT COMPANY, L.C., an Utah  
limited liability company

By: 

David Fisher its Managing Member

EXHIBIT "A"

PROPERTY DESCRIPTION

The following described real property is located in Washington County, Utah:

**PARCEL #1:**

THE SOUTH ONE-HALF OF LOT 4, BLOCK 4, PLAT "B", ST. GEORGE CITY SURVEY, ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDS OF WASHINGTON COUNTY, STATE OF UTAH.

**PARCEL #2:**

THE WEST ONE-HALF OF LOT 3, BLOCK 4, PLAT "B", ST. GEORGE CITY SURVEY, ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDS OF WASHINGTON COUNTY, STATE OF UTAH.

Property Address: 669 S 700 East, St. George, UT 84770  
P.I.# SG-763 & SG-762-B



## Tab 3

Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

Profit & Loss Statement

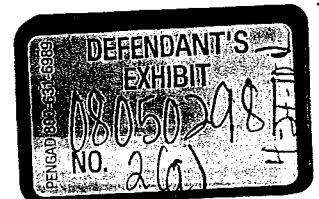
1/1/05 through 7/31/05

8/17/05  
1:12:28 PM

Income		
Rental Income	\$87,066.64	
Total Income		<u>\$87,066.64</u>
Cost of Sales		
Gross Profit		<u>\$87,066.64</u>
Expenses		
Office Supplies	\$1,610.95	
Business Promotion	\$632.83	
Interest Expense	\$23.60	
Dues & Subscriptions	\$219.93	
Fees Paid	\$112.00	
Insurance	\$3,368.01	
Taxes	\$4,142.76	
Professional Services	\$894.25	
Maintenance & Repairs	\$10,022.56	
HVAC Maint.	\$313.57	
Plumbing	\$667.12	
Carpet/Flooring	\$1,537.00	
Car Maint. and Repair	\$3,931.83	
Carpet cleaning	\$579.05	
Landscape/Yardwork	\$3,504.76	
Postage & Shipping	\$87.96	
Gasoline	\$2,533.55	
Telephone	\$1,288.33	
Travel & Entertainment	\$3,870.86	
Utilities		
Electricity	\$596.35	
Water	\$2,794.46	
Total Expenses		<u>\$42,729.53</u>
Net Profit / (Loss)		<u>\$44,337.11</u>

This Statement Reflects More Than The 13  
Units At 669 So. 700 E And Also Includes Many Expenses  
Not Related To These Units. I Will Make One That  
Is More Correct For Just Those 13 Units

Rian



Tab 4

California Rehabil, Inc.  
164 N. 160 E.  
Hurricane, UT 84737

Profit & Loss Statement

1/1/02 through 12/31/02

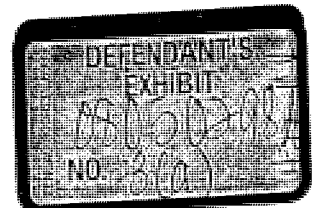
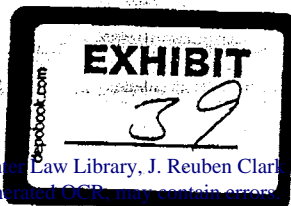
2002

3/22/04  
9:10:26 AM

This only shows 24 units

Income	
Rental Income	\$144,960.57
Total Income	<u>\$144,960.57</u>
Cost of Sales	
Gross Profit	<u>\$144,960.57</u>
Expenses	
Office Supplies	\$96.14
Business Promotion	\$1,851.45
Dues & Subscriptions	\$121.00
Fees Paid	\$42.75
Professional Fees	\$23,955.00
Management Fees	\$1,900.00
Maintenance & Repairs	\$4,347.88
HVAC maint. & repair	\$4,063.12
Carpet, Vinyl, maint. & repair	\$3,642.74
Payroll	
Employer Expenses	\$238.66
Postage & Shipping	\$71.00
Taxes	\$14.00
Telephone	\$56.76
Utilities	
Water	\$5,708.70
Garbage	\$2,237.94
Carpet Cleaning	\$1,562.00
Total Expenses	<u>\$49,707.14</u>
Operating Profit	<u>\$95,253.43</u>
Other Income	
Other Expenses	
Net Profit / (Loss)	<u>\$95,253.43</u>

for 735 E. 700 S



Iota, LLC  
164 N. 180 E.  
Hurricane, UT 84737

2002

Profit & Loss Statement

1/1/02 through 12/31/02

7/6/04  
5:26:45 PM

Corrected for 13 units only

Income		
Rental Income	\$113,007.88	
Income from Equity Sales	\$31,044.14	
Total Income	\$144,051.17	
Cost of Sales		
Gross Profit	\$144,051.17	
Expenses		
Office Supplies	\$700.00	160.17
Business Promotion	\$717.07	261.10
Dues & Subscriptions	\$537.71	0
Fees Paid	\$240.00	
Insurance	\$7,267.90	2,858.00
Late Fees Paid	\$50.00	
Professional Fees	\$1,032.35	525.00
Maintenance & Repairs	\$6,220.42	3,941.08
HVAC maint. & repair	\$2,772.14	2,772.14
Carpet, vinyl, maint. & repair	\$824.02	341.62
Vehicle maint. & repair	\$1,707.22	0
Gasoline	\$1,700.00	0
Postage & Shipping	\$156.76	0
Taxes	\$8,996.00	3,734.28
Telephone	\$2,132.01	0
Travel & Entertainment	\$1,223.07	0
Utilities		
Gas	\$30.12	
Electricity	\$303.96	
Water	\$2,660.54	2,669.34
Carpet Cleaning	\$1,070.00	1,070.00
Total Expenses	\$40,272.09	
Operating Profit	\$103,779.18	
Other Income		
Interest Income	\$2,400.74	
Total Other Income	\$2,400.74	
Other Expenses		
Interest Expense	\$2,070.04	
Total Other Expenses	\$2,070.04	
Net Profit / (Loss)	\$103,109.88	

\$5,800 INCOME

1788033 EXPENSES  
67919.67 Profit

67,919.67  
Net Profit

for 669 5. 700 E

California Benefit, Inc.  
164 N. 760 E.  
Hurricane, UT 84787

2003

Profit & Loss Statement

1/1/03 through 12/31/03

4/22/04  
10:47:11 AM

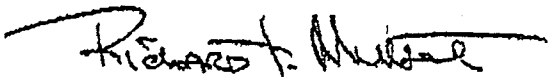
Corrected to show only 24 units

Income		
Rental Income	\$146,217.50	Note ①
Income from Equity Sales	\$54,234.07	Note ②
Total Income	<del>\$200,451.57</del>	
	146,217.50	
Cost of Sales		
Gross Profit	<del>\$200,451.57</del>	
	146,217.50	
Expenses		
Business Promotion	\$8,022.00	1,822.18 Note ③
Fees Paid	\$39.20	OK
Insurance	\$7,000.00	3,337.06 Note ④
Professional Fees	\$85,900.00	11,000.00 Note ⑤
Management Fees	\$700.00	OK Note ⑥
Maintenance & Repairs	\$16,690.44	14,042.48 Note ⑦
HVAC maint. & repair	\$2,675.18	OK
Carpet, Vinyl, maint. & repair	\$5,321.07	1,937.68 Note ⑧
Postage & Shipping	\$89.49	OK
Taxes	\$1,714.31	OK
Telephone	\$9.95	OK
Travel & Entertainment	\$24.03	OK
Utilities		
Gas	\$72.04	Other Property
Electricity	\$520.35	Other Property
Water	\$4,392.02	OK
Garbage	\$2,493.17	OK
Carpet Cleaning	\$1,415.00	OK
Total Expenses	<del>\$192,975.07</del>	34,368.08
Operating Profit	<del>\$87,476.50</del>	109,849.42
Other Income		
Other Expenses		\$ 109,849.42
Net Profit / (Loss)	<del>\$87,476.50</del>	

for 735 E. 700S.

Notes to California Benefit Profit and Loss Statement:

1. This income is correct. We do not show income for the managers apartment, which they receive rent free, nor do we show their work as an expense. If we did there would be \$7320 more income and the same amount shown for management expense. The properties we foreclosed on were never rented.
2. This is a property that we foreclosed on that was sold during 2003. A more detailed explanation is on another sheet.
3. This change was due to advertising the properties that we foreclosed on.
4. This insurance amount shows two years of payments, one made in January for the year 2003, and the other made in December for 2004.
5. With the exception of \$1100, all of this amount is concerned with the foreclosure and judgments on other property. A more detailed explanation is on another sheet.
6. See #1 concerning management fees. For 7 months we paid them \$100 per month to cut lawns and fix sprinklers.
7. Some of the maintenance was for the foreclosed on properties. The driveway was resurfaced at a cost of \$4959 which would need to be re - done every five years or so, but is not a yearly expense.
8. Most of this was on the repossessed properties.



Richard T. Murset  
prepared 4/22/04

lots, LLC  
164 N. 160 E.  
Hurricane, UT 84737

Profit & Loss Statement

2003

4/22/04  
10:53:09 AM

1/1/03 through 12/31/03

Corrected to show only 13 units

Income		
Rental Income	\$100,886.85	\$89,040
Income from Equity Sales	\$14,472.45	
Total Income		<u>\$124,359.30</u>
		\$89,040.00
Cost of Sales		
Gross Profit		<u>\$35,319.30</u>
Expenses		
Office Supplies	\$275.54	206.72
Business Promotion	\$1,242.81	304.75
Dues & Subscriptions	\$447.09	0
Fees Paid	\$121.44	92.30
Insurance	\$7,200.85	2540.00
Professional Fees	\$1,688.35	1010.42
Maintenance & Repairs	\$43,430.97	7011.00
HVAC maint. & repair	\$5,901.75	OK
Carpet, vinyl, maint. & repair	\$2,604.70	1400.76
Vehicle maint. & repair	\$4,298.48	0
Gasoline	\$3,786.75	0
Postage & Shipping	\$224.88	0
Taxes	\$7,040.95	3717.45
Telephone	\$2,517.40	0
Travel & Entertainment	\$2,159.34	0
Utilities		
Gas	\$71.24	0
Electricity	\$278.48	0
Water	\$3,730.71	OK
Carpet Cleaning	\$929.66	681.00
Total Expenses		<u>\$57,711.34</u>
		\$27,102.24
Operating Profit		<u>\$86,227.46</u>
		61,937.74
Other Income		
Interest Income	\$350.00	
Total Other Income		<u>\$350.00</u>
Other Expenses		
Interest Expense	\$2,207.60	
Total Other Expenses		<u>\$2,207.60</u>
Net Profit / (Loss)		<u>\$84,296.46</u>
		\$61,937.74

for 669 S. 700 E

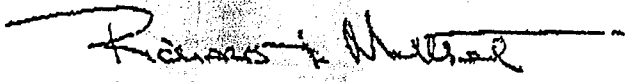


Notes to Iota LLC Profit and Loss Statement:

General note: If an exact amount was not able to be determined, it was calculated on this basis; Iota at the time owned 17 rental units and the percentage that the 13 units comprises makes up approximately 76%, so the available numbers were multiplied by that amount to arrive at a figure. Although there are other expenses involved in operating a business, such as transportation and telephone I have only included those directly connected to these 13 units.

Notes:

1. This was arrived at using the rent-roll.
2. This is from a home that was built and sold, this was it's profit. A more detailed account is on another sheet.
3. This number includes \$2437 that was for the parking lot resurfacing, and is usually done about every 5 years, and is not a yearly cost.
4. This includes two new AC units. Part of the proceeds of this loan is for the replacement of the other eleven units to reduce future repair costs.

  
Richard T. [unclear] set  
prepared 4/22/04

Iota, LLC  
164 N. 160 E.  
Hurricane, UT 84737

Estimation for 2004  
YEAR END

Profit & Loss Statement

1/1/04 through 12/31/04

7/6/04  
5:25:02 PM

BASED ON 13 UNITS ONLY

Income		
Rental Income	\$66,168.46	
Total Income	<u>\$66,168.46</u>	89,040
Cost of Sales		
Gross Profit	<u>\$66,168.46</u>	
Expenses		
Office Supplies	<del>\$337.48</del>	
Business Promotion	<del>\$398.02</del>	191.52
Dues & Subscriptions	<del>\$107.00</del>	
Fees Paid	<del>\$228.48</del>	325.42
Insurance	<del>\$2,091.46</del>	2807.00
Late Fees Paid	<del>\$45.00</del>	
Professional Fees	<del>\$2,560.00</del>	2700.00
Maintenance & Repairs	<del>\$7,935.27</del>	3942.00
HVAC maint. & repair	<del>\$5,257.64</del>	25772.00
Carpet, vinyl, maint. & repair	<del>\$1,153.14</del>	1,132.00
Vehicle maint. & repair	<del>\$1,520.10</del>	
Gasoline	<del>\$1,005.20</del>	
Postage & Shipping	<del>\$111.00</del>	
Rent	<del>\$80.00</del>	
Taxes	<del>\$900.97</del>	
Telephones	<del>\$1,021.77</del>	
Travel & Entertainment	<del>\$2,752.60</del>	
Utilities	<del>\$15.14</del>	
Gas	<del>\$343.23</del>	
Electricity	<del>\$1,022.01</del>	2733.00
Water	<del>\$991.56</del>	780.00
Carpet Cleaning		
Total Expenses	<u>\$30,699.12</u>	42,384.94
Operating Profit	<u>\$35,470.34</u>	45,656
Other Income		
Other Expenses		
Net Profit / (Loss)	<u>\$35,470.34</u>	45,656

for  
669 S. 700 E

Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

Profit & Loss Statement

1/1/08 through 12/31/08

2/27/09  
8:32:35 AM

Income	
Rental Income	\$156,586.21
Miscellaneous Income	\$133,948.90
Total Income	<u>\$290,535.11</u>
Cost of Sales	
Gross Profit	<u>\$290,535.11</u>
Expenses	
Office Supplies	\$433.00
Business Promotion	\$245.60
Dues & Subscriptions	\$181.85
Fees Paid	\$917.67
Insurance	\$4,382.64
Taxes	\$1,558.36
Professional Services	\$7,920.00
Maintenance & Repairs	\$11,808.13
HVAC Maint.	\$5,605.00
Plumbing	\$918.43
Carpet/Flooring	\$6,637.45
Car Maint. and Repair	\$4,981.15
Carpet cleaning	\$1,581.00
Landscape/Yardwork	\$4,080.76
Postage & Shipping	\$75.86
Rent	\$35.00
Gasoline	\$5,903.44
Telephone	\$4,604.33
Travel & Entertainment	\$12,313.98
Utilities	
Gas	\$8.57
Electricity	\$1,805.62
Water	\$3,789.71
Garbage	\$15.25
Total Expenses	<u>\$79,802.80</u>
Net Profit / (Loss)	<u>\$210,732.31</u>

California Benefit  
164 N. 160 E.  
Hurricane, UT 84737

## Profit & Loss Statement

1/1/06 through 12/31/06

2/27/09  
8:49:37 AM

Income	
Rental Income	\$145,936.03
Miscellaneous Income	\$100,000.00
Total Income	<u>\$245,936.03</u>
Cost of Sales	
Gross Profit	<u>\$245,936.03</u>
Expenses	
Office Supplies	\$28.00
Business Promotion	\$1,125.28
Commissions Paid	\$5,000.00
Fees Paid	\$37.40
Professional Services	\$3,888.53
Management	\$2,450.00
Maintenance & Repairs	\$4,085.76
HVAC Maint.	\$5,158.61
Plumbing	\$527.10
Carpet/Flooring	\$1,462.05
Carpet Cleaning	\$875.00
Landscape/Yardwork	\$788.71
Postage & Shipping	\$182.33
Gasoline	\$210.00
Utilities	
Gas	\$233.08
Water	\$4,763.00
Garbage	\$3,695.09
taxes	\$619.00
Total Expenses	<u>\$35,128.94</u>
Net Profit / (Loss)	<u>\$210,807.09</u>

California Benefit  
164 N. 160 E.  
Hurricane, UT 84737

Casa Grande  
24 units

## Profit & Loss Statement

1/1/05 through 12/31/05

8/1/06  
11:20:18 AM

Income	\$148,592.28
Rental Income	\$0.00
Commission Income	\$0.00
Management Fees	\$0.00
Income from Equity Sales	\$0.00
Delivery Fees Collected	\$47,805.53
Miscellaneous Income	<u>\$196,397.81</u>
Total Income	

Cost of Sales	\$0.00
Freight	<u>\$0.00</u>
Total Cost of Sales	<u>\$196,397.81</u>

Gross Profit

Expenses	\$0.00
Office Supplies	✓ \$1,806.22
Business Promotion	— \$0.00
Commissions Paid	— \$0.00
Depreciation Expense	— \$0.00
Dues & Subscriptions	— \$16.00
Fees Paid	— \$0.00
Insurance	<del>\$5,506.25</del>
Professional Services	<del>\$200.00</del> 650/mo for all 37 units per unit
Management	\$5,340.12
Maintenance & Repairs	<del>\$3,758.47</del> 800/yr
HVAC Maint.	<del>\$1,191.78</del>
Plumbing	<del>\$8,073.93</del> 3 or 4 units
Carpet/Flooring	\$0.00
Car Maint. and Repair	\$730.00
Carpet Cleaning	\$1,258.75 250/mo
Landscape/Yardwork	
Payroll	\$0.00
Wages	\$0.00
Vacation Pay Expense	\$0.00
Employer Expenses	\$94.01
Postage & Shipping	\$0.00
Rent	\$0.00
Gasoline	\$0.00
Telephone	\$0.00
Travel & Entertainment	
Utilities	\$0.00
Gas	\$0.00
Electricity	5% cap \$4,145.92
Water	\$2,982.02
Garbage	
taxes	635-7503 \$0.00

Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

Casa Sanoma  
13 units

Profit & Loss Statement

1/1/05 through 12/31/05

8/1/06  
11:59:46 AM

Income		\$160,287.49	
Rental Income			\$160,287.49
Total Income			
Cost of Sales			\$160,287.49
Gross Profit			
Expenses			
Office Supplies	\$1,768.94	206.81	
Business Promotion	\$687.83	557.41 ✓	17 mo. av.
Interest Expense	<del>\$22.60</del>		
Dues & Subscriptions	<del>\$211.91</del>		
Fees Paid	<del>\$1,248.27</del>		
Insurance	<del>\$6,081.30</del>	2826 ✓	
Taxes	\$5,396.51	3968.07 ✓	
Professional Services	<del>\$1,419.25</del>	0 ✓	
Maintenance & Repairs	\$12,216.03	4000	40/mo 5400 ✓
HVAC Maint.	\$340.59	340.59 ✓	
Plumbing	<del>\$1,404.24</del>	0 ✓	
Carpet/Flooring	<del>\$1,305.00</del>	0 ✓	
Car Maint. and Repair	<del>\$7,292.51</del>	0 ✓	
Carpet cleaning	<del>\$997.71</del>	1046.74 ✓	
Landscape/Yardwork	<del>\$4,395.56</del>	1500 ✓	
Postage & Shipping	<del>\$165.81</del>		
Gasoline	<del>\$4,728.40</del>		
Telephone	<del>\$2,290.56</del>		
Travel & Entertainment	<del>\$9,621.44</del>		
Utilities			
Electricity	2110.87	\$2,315.78	average
Water		\$5,627.23	
Total Expenses		7943.01	\$69,868.33
Net Profit / (Loss)			\$90,419.16

All have new heat pumps

# 12:00 - Tuesday

EXPENSES	GRANDE 24 units	SANOMA 13 units
OFFICE SUPPLIES		\$ 206.81
ADVERTISING	\$ 1,539.14	\$ 557.41
PROFFESIONAL SERVICES	\$ 955.04	
MANAGEMENT (650/MO)	\$ 5,059.45	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 11,520.00	\$ 7,800.00 \$50/month per unit
CARPET CLEANING	\$ 903.53	\$ 1,096.74
LANDSCAPING (250/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,547.40	\$ 7,485.33
GARBAGE	\$ 3,072.00	\$265/month
TAXES	\$ 9,053.23	\$ 3,968.07
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 42,275.23	\$ 28,182.90
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (3%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 42,275.23	\$ 28,182.90
NET OPERATING INCOME	\$ 125,340.77	\$ 70,175.10

# 12:00 Tuesday

EXPENSES	GRANDE 24 units	SANOMA 173 units
OFFICE SUPPLIES		\$ 208.81
ADVERTISING	\$ 1,638.14	\$ 557.41
PROFESSIONAL SERVICES	\$ 955.04	
MANAGEMENT (650/MO)	\$ 5,059.48	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 11,520.00	\$ 7,800.00 \$50/month per unit
CARPET CLEANING	\$ 903.53	\$ 1,098.74
LANDSCAPING (250/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,817.40	\$ 7,485.33
GARBAGE	\$ 3,072.00	\$258/month
TAXES	\$ 9,053.23	\$ 3,988.07
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 42,275.23	\$ 28,182.90
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (3%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 42,275.23	\$ 28,182.90
NET OPERATING INCOME	\$ 125,340.77	\$ 70,175.10
CAPITALIZATION 5%	\$ 2,506,815.40	\$ 1,403,502.00

\$20,000 Down

Carry 6 months

\$14,506.42 Profit

7% Interest only

Carry 14 months 7%

Interest only profit - They  
Cover all costs, utilities, taxes, maint,  
No other costs, cosmetic changes, 2  
units at a time  
\$20,000

~~\$14,506.42~~ profit

\$20,000 Down



EXPENSES	GRANDE	SANOMA
OFFICE SUPPLIES		\$ 206.81
ADVERTISING	\$ 1,539.14	\$ 557.41
PROFFESIONAL SERVICES	\$ 955.04	
MANAGEMENT (850/MO)	\$ 5,059.46	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 11,520.00	\$ 7,800.00 \$50/month per unit
CARPET CLEANING	\$ 903.59	\$ 1,096.74
LANDSCAPING (250/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,517.40	\$ 7,485.33
GARBAGE	\$ 3,072.00	\$256/month
TAXES	\$ 9,053.23	\$ 3,968.07
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 42,275.23	\$ 28,182.90
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (3%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 42,275.23	\$ 28,182.90
NET OPERATING INCOME	\$ 125,340.77	\$ 70,175.10
CAPITALIZATION 5.5%	\$ 2,278,923.08	\$ 1,275,910.91

PL000278

EXPENSES	GRANDE	SANOMA
OFFICE SUPPLIES		\$ 206.81
ADVERTISING	\$ 1,539.14	\$ 667.41
INTEREST EXPENSE		\$ 23.80
FEEES PAID	\$ 23.29	
PROFFESIONAL SERVICES	\$ 955.04	
MANAGEMENT (650/MO)	\$ 5,059.46	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 4,531.21	\$ 4,000.00
HVAC MAINTENANCE	\$ 3,768.47 - 2200	\$ 340.59
PLUMBING	\$ 1,273.33	
CARPET CLEANING	\$ 903.53	\$ 1,096.74
LANDSCAPING (250/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,517.40	\$ 6,719.05 - 560 per mo?
GARBAGE	\$ 3,072.00	
TAXES	\$ 6,642.28	\$ 3,787.94
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 39,870.58	\$ 23,800.68
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (3%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 39,870.58	\$ 23,800.68
NET OPERATING INCOME	\$ 127,745.42	\$ 74,557.32
CAPITALIZATION 5.8%	\$ 2,202,507.24	\$ 1,285,471.03

*File 29  
Commission  
Mayer  
1031*

*Drive  
fisher  
703-3686  
40 N.  
300 E.*

EXPENSES	GRANDE	SANOMA
OFFICE SUPPLIES	\$ 1,539.14	\$ 206.81
ADVERTISING		\$ 557.41
INTEREST EXPENSE		\$ 23.80
FEES PAID	\$ 23.29	
PROFFESIONAL SERVICES	\$ 955.04	
MANAGEMENT (650/MO)	\$ 5,059.46	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 4,531.21	\$ 4,000.00
HVAC MAINTENANCE	\$ 2,758.47	\$ 340.59
PLUMBING	\$ 1,213.33	
CARPET CLEANING	\$ 903.53	\$ 1,098.74
LANDSCAPING (250/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,517.40	\$ 6,719.05
GARBAGE	\$ 3,072.00	
TAXES	\$ 8,542.28	\$ 3,787.94
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 39,870.58	\$ 23,800.68
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (2%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 39,870.58	\$ 23,800.68
NET OPERATING INCOME	\$ 127,745.42	\$ 74,557.32
CAPITALIZATION 5.8%	\$ 2,202,507.24	\$ 1,285,471.03

*See name*

*PRM Thurston  
DNLT@Quixnet*

*Diff. 366,000*

*per unit 107,000*

*2,568,000  
35,000  
70,000  
128,000  
4,705,000*

*MA  
171,000*

*119,000*

*148,000  
145,600  
25,000  
50,000  
72,800  
1358,200  
500,000  
858,200*

EXPENSES	GRANDE	SANOMA
OFFICE SUPPLIES		\$ 206.81
ADVERTISING	\$ 1,539.14	\$ 557.41
INTEREST EXPENSE		\$ 23.60
FEES PAID	\$ 23.29	
PROFFESIONAL SERVICES	\$ 955.04	
MANAGEMENT (650/MO)	\$ 5,059.46	\$ 2,740.54
MAINTENANCE/REPAIRS	\$ 4,531.21	\$ 4,000.00
HVAC MAINTENANCE	\$ 3,758.47	\$ 340.59
PLUMBING	\$ 1,213.33	
CARPET CLEANING	\$ 903.53	\$ 1,096.74
LANDSCAPING (230/MO)	\$ 1,500.00	\$ 1,500.00
POSTAGE	\$ 132.43	
WATER/SEWER	\$ 4,517.40	\$ 6,719.05
GARBAGE	\$ 3,072.00	
TAXES	\$ 8,642.28	\$ 2,787.94
ELECTRICITY	\$ 318.00	
INSURANCE	\$ 3,705.00	\$ 2,828.00
TOTAL EXPENSES	\$ 39,870.58	\$ 23,800.68
POTENTIAL GROSS INCOME	\$ 172,800.00	\$ 101,400.00
LESS VACANCY (3%)	\$ 5,184.00	\$ 3,042.00
EFFECTIVE GROSS INCOME	\$ 167,616.00	\$ 98,358.00
EXPENSES	\$ 39,870.58	\$ 23,800.68
NET OPERATING INCOME	\$ 127,745.42	\$ 74,557.32
CAPITALIZATION 8%	\$ 2,129,090.33	\$ 1,242,822.00

## Tab 5

Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

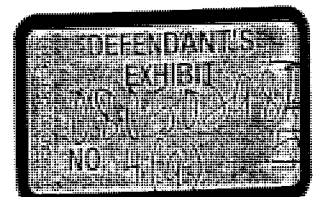
Casa Sanonra  
13 units

Profit & Loss Statement

1/1/06 through 5/31/06

8/1/06  
11:54:34 AM

Income	
Rental Income	\$77,241.27
Total Income	<u>\$77,241.27</u>
Cost of Sales	
Gross Profit	<u>\$77,241.27</u>
Expenses	
Office Supplies	✓ \$206.81 <i>close</i>
Business Promotion	✓ \$101.84 <i>17 mo average</i>
Dues & Subscriptions	— <del>\$77.92</del>
Fees Paid	— <del>\$374.09</del>
Insurance	— \$1,754.43 <i>figure per unit basis</i>
Taxes	— \$891.20 <i>figure</i>
Professional Services	— <del>\$2,675.00</del>
Maintenance & Repairs	<i>\$1600/mo</i> <del>\$3,182.90</del> <i>250/m unit</i>
Plumbing	0 <del>\$918.43</del>
Carpet/Flooring	0 <del>\$2,472.60</del>
Car Maint. and Repair	0 <del>\$1,003.67</del>
Carpet cleaning	<i>17 mo average / 1096.74</i> <del>\$556.00</del>
Landscape/Yardwork	<del>\$1,037.07</del> <i>figure 250/mo</i>
Postage & Shipping	<del>\$44.86</del>
Gasoline	<del>\$1,734.87</del>
Telephone	<del>\$1,368.74</del>
Travel & Entertainment	<del>\$2,613.27</del>
Utilities	
Gas	<del>\$8.57</del>
Electricity	\$673.51
Water	\$1,987.69 <i>figure</i>
Garbage	<del>\$4.50</del>
Total Expenses	<u>\$23,687.97</u>
Net Profit / (Loss)	<u>\$53,553.30</u>



Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

Profit & Loss Statement

January 2006 through May 2006

Page 1

8/1/06

11:55:54 AM

	January	February	March	April	May	Total
Income						
Rental Income	\$17,391.50	\$15,291.67	\$15,654.50	\$16,944.60	\$11,959.00	\$77,241.27
Total Income	<u>\$17,391.50</u>	<u>\$15,291.67</u>	<u>\$15,654.50</u>	<u>\$16,944.60</u>	<u>\$11,959.00</u>	<u>\$77,241.27</u>
Cost of Sales						
Gross Profit	<u>\$17,391.50</u>	<u>\$15,291.67</u>	<u>\$15,654.50</u>	<u>\$16,944.60</u>	<u>\$11,959.00</u>	<u>\$77,241.27</u>
Expenses						
Office Supplies	\$0.00	\$32.55	\$49.26	\$0.00	\$125.00	\$206.81
Business Promotion	\$0.00	\$0.00	\$0.00	\$85.00	\$16.84	\$101.84
Dues & Subscriptions	\$0.00	\$30.00	\$0.00	\$17.97	\$29.95	\$77.92
Fees Paid	\$31.00	\$10.00	\$18.99	\$2.10	\$312.00	\$374.09
Insurance	\$135.39	\$508.72	\$139.54	\$252.17	\$718.61	\$1,754.43
Taxes	\$370.00	\$0.00	\$0.00	\$270.25	\$250.95	\$891.20
Professional Services	\$0.00	\$2,050.00	\$475.00	\$0.00	\$150.00	\$2,675.00
Maintenance & Repairs	\$237.54	\$565.79	\$1,141.28	\$338.64	\$899.65	\$3,182.90
Plumbing	\$252.78	\$0.00	\$38.35	\$78.32	\$548.98	\$918.43
Carpet/Flooring	\$0.00	\$0.00	\$1,273.80	\$1,198.80	\$0.00	\$2,472.60
Car Maint. and Repair	\$236.82	\$54.53	\$71.77	\$239.09	\$401.46	\$1,003.67
Carpet cleaning	\$0.00	\$0.00	\$216.00	\$170.00	\$170.00	\$556.00
Landscape/Yardwork	\$250.00	\$0.00	\$36.69	\$501.67	\$248.71	\$1,037.07
Postage & Shipping	\$40.00	\$0.00	\$0.00	\$4.86	\$0.00	\$44.86
Gasoline	\$53.30	\$786.10	\$271.69	\$281.41	\$342.37	\$1,734.87
Telephone	\$14.95	\$507.96	\$175.37	\$322.69	\$347.77	\$1,368.74
Travel & Entertainment	\$955.50	\$625.14	\$203.04	\$546.06	\$283.53	\$2,613.27
Utilities						
Gas	\$0.00	\$0.00	\$0.00	\$0.00	\$8.57	\$8.57
Electricity	\$0.00	\$402.49	\$145.10	\$61.01	\$64.91	\$673.51
Water	\$0.00	\$829.75	\$246.36	\$497.61	\$413.97	\$1,987.69
Garbage	\$0.00	\$0.00	\$0.00	\$4.50	\$0.00	\$4.50
Total Expenses	<u>\$2,577.28</u>	<u>\$6,403.03</u>	<u>\$4,502.24</u>	<u>\$4,872.15</u>	<u>\$5,333.27</u>	<u>\$23,687.97</u>
Net Profit / (Loss)	<u>\$14,814.22</u>	<u>\$8,888.64</u>	<u>\$11,152.26</u>	<u>\$12,072.45</u>	<u>\$6,625.73</u>	<u>\$53,553.30</u>

Iota LLC  
164 N. 160 E.  
Hurricane, UT 84737

Casa Sanoma  
13 units

Profit & Loss Statement

1/1/05 through 12/31/05

8/1/06  
11:53:46 AM

Income		
Rental Income	\$160,287.49	
Total Income		<u>\$160,287.49</u>
Cost of Sales		
Gross Profit		<u>\$160,287.49</u>
Expenses		
Office Supplies	<del>\$1,768.94</del>	206.81
Business Promotion	<del>\$687.83</del>	587.41 ✓ 17 mo a
Interest Expense	<del>\$22.60</del>	24.00 ✓
Dues & Subscriptions	<del>\$311.91</del>	—
Fees Paid	<del>\$1,246.27</del>	—
Insurance	<del>\$6,081.38</del>	2826 ✓
Taxes	<del>\$5,396.51</del>	3968.07 ✓
Professional Services	<del>\$1,419.25</del>	0 ✓
Maintenance & Repairs	<del>\$12,216.03</del>	40/mo 5400 GWD
HVAC Maint.	<del>\$240.59</del>	340.59 ✓ Newer @ 100/yr
Plumbing	<del>\$1,404.24</del>	0 ✓
Carpet/Flooring	<del>\$1,537.80</del>	0 ✓
Car Maint. and Repair	<del>\$7,292.51</del>	0 ✓
Carpet cleaning	<del>\$997.71</del>	17 mo 1096.74 ✓
Landscape/Yardwork	<del>\$4,395.36</del>	1500 ✓
Postage & Shipping	<del>\$165.81</del>	
Gasoline	<del>\$4,728.40</del>	
Telephone	<del>\$2,290.56</del>	
Travel & Entertainment	<del>\$9,621.44</del>	
Utilities		
Electricity	2110.87 \$2,315.78	17 mo average
Water	\$5,627.23	includes summer
Total Expenses	7943.01	<u>\$69,868.33</u>
Net Profit / (Loss)		<u>\$90,419.16</u>

All have new heat pumps



Iota Inc.  
164 N. 100 E.  
Hurricane, UT 84737

Profit & Loss Statement  
January 2005 through December 2005

	January	February	March	April	May	June	July	August	September	October	November	December
8/1/06												
115500 AM												
Income												
Rental Income	\$11,185.00	\$8,970.00	\$14,478.14	\$13,262.00	\$14,001.00	\$11,432.50	\$13,740.00	\$16,791.56	\$13,150.00	\$13,320.20	\$15,707.09	\$14,250.00
Total Income	\$11,185.00	\$8,970.00	\$14,478.14	\$13,262.00	\$14,001.00	\$11,432.50	\$13,740.00	\$16,791.56	\$13,150.00	\$13,320.20	\$15,707.09	\$14,250.00
Cost of Sales												
Gross Profit	\$11,185.00	\$8,970.00	\$14,478.14	\$13,262.00	\$14,001.00	\$11,432.50	\$13,740.00	\$16,791.56	\$13,150.00	\$13,320.20	\$15,707.09	\$14,250.00
Expenses												
Office Supplies	\$1,193.13	\$209.37	\$211.45	\$0.00	\$0.00	\$0.00	\$0.00	\$34.95	\$26.56	\$61.80	\$0.00	\$31.68
Business Promotion	\$4.55	\$0.00	\$0.00	\$45.70	\$97.00	\$37.70	\$447.88	\$20.00	\$7.00	\$0.00	\$0.00	\$28.00
Interest Expense	\$18.04	\$5.56	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Dues & Subscriptions	\$44.58	\$100.00	\$29.95	\$0.00	\$20.00	\$25.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Fees Paid	\$50.00	\$32.00	\$2.00	\$10.00	\$2.00	\$14.00	\$2.00	\$2.00	\$571.00	\$502.00	\$80.09	\$39.18
Insurance	\$550.22	\$573.99	\$410.21	\$719.59	\$736.94	\$0.00	\$372.06	\$352.48	\$571.55	\$207.71	\$280.86	\$1,305.75
Taxes	\$105.50	\$75.50	\$835.71	\$42.09	\$32.00	\$2,976.46	\$75.50	\$116.00	\$233.25	\$0.00	\$76.49	\$1,305.75
Professional Services	\$180.00	\$0.00	\$546.25	\$24.00	\$94.00	\$50.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$25.00
Maintenance & Repairs	\$60.00	\$179.56	\$2,849.28	\$432.86	\$2,011.71	\$2,973.66	\$2,115.49	\$776.55	\$457.11	\$263.26	\$198.98	\$497.57
HVAC Maint.	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$178.98	\$134.59	\$27.02	\$0.00	\$0.00	\$0.00	\$0.00
Plumbing	\$0.00	\$214.85	\$0.00	\$0.00	\$0.00	\$252.27	\$300.00	\$600.00	\$0.00	\$0.00	\$0.00	\$0.00
Carpet/Flooring	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,237.00	\$200.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Car Maint. and Repair	\$566.45	\$810.26	\$284.92	\$89.20	\$9.00	\$2,020.00	\$300.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Carpet cleaning	\$0.00	\$96.48	\$0.00	\$21.85	\$0.00	\$152.00	\$260.72	\$463.21	\$1,247.03	\$0.00	\$1,127.98	\$572.46
Landscape/Yardwork	\$45.00	\$0.00	\$0.00	\$251.99	\$0.00	\$0.00	\$0.00	\$64.66	\$0.00	\$0.00	\$55.00	\$0.00
Postage & Shipping	\$41.06	\$0.00	\$2.50	\$0.00	\$12.59	\$1,631.83	\$1,190.85	\$190.66	\$0.00	\$0.00	\$88.76	\$551.18
Cashmere	\$312.78	\$443.04	\$400.53	\$89.11	\$46.91	\$0.00	\$0.00	\$37.00	\$0.00	\$0.00	\$90.00	\$0.00
Telephone	\$245.74	\$218.10	\$163.82	\$186.58	\$323.56	\$518.95	\$45.38	\$341.50	\$468.74	\$458.07	\$604.61	\$322.13
Travel & Entertainment	\$596.42	\$129.61	\$287.31	\$491.46	\$1,166.22	\$79.31	\$108.01	\$189.53	\$170.43	\$107.84	\$220.56	\$313.87
Utilities												
Electricity	\$72.29	\$71.47	\$71.54	\$74.17	\$88.54	\$48.61	\$169.53	\$90.87	\$79.23	\$47.68	\$331.08	\$746.57
Water	\$401.29	\$378.79	\$379.24	\$96.02	\$790.28	\$79.09	\$119.75	\$571.11	\$669.91	\$51.09	\$421.65	\$719.01
Total Expenses	\$4,507.44	\$3,538.58	\$6,524.71	\$3,474.62	\$5,617.52	\$13,041.12	\$6,025.54	\$4,791.67	\$4,749.00	\$4,510.68	\$7,090.69	\$6,056.76
Net Profit / (Loss)	\$6,677.56	\$5,431.42	\$7,953.43	\$9,787.38	\$8,383.48	\$1,608.62	\$7,714.46	\$11,999.89	\$8,401.00	\$8,809.52	\$8,616.40	\$8,193.24

California Benefit  
164 N. 160 E.  
Hurricane, UT 84737

## Profit & Loss Statement

TH

1/1/06 through 5/31/06

8/1/06  
11:58:58 AM

Income	
Rental Income	\$64,702.56
Total Income	<u>\$64,702.56</u>
Cost of Sales	
Gross Profit	<u>\$64,702.56</u>
Expenses	
Business Promotion	<del>\$374.23</del>
Fees Paid	<del>\$17.00</del>
Professional Services	\$955.04 <i>Any year</i>
Management	<del>\$450.00</del> <i>650/mo w/guante</i>
Maintenance & Repairs	<del>\$1,079.10</del>
HVAC Maint.	<del>\$3,416.63</del> <i>2800/yr</i>
Plumbing	<del>\$527.10</del> <i>1213.33 17 mo average</i>
Carpet Cleaning	<del>\$550.00</del> <i>403.53 17 mo average</i>
Landscape/Yardwork	<del>\$63.71</del> <i>250/mo</i>
Postage & Shipping	\$93.60 <i>4000</i>
Utilities	
Gas	\$233.08 <i>? - No gas, electric only - for cars and</i>
Water	\$2,259.73 <i>17 mo average to maintenance</i>
Garbage	<del>\$1,403.77</del> <i>" "</i>
taxes	\$619.00
Total Expenses	<u>\$12,035.99</u>
Net Profit / (Loss)	<u>\$52,666.57</u>

Profit & Loss Statement

January 2006 through May 2006

Page 1

	January	February	March	April	May	Total
8/1/06 11:58:12 AM						
Income						
Rental Income	\$12,693.41	\$11,711.00	\$13,235.17	\$12,974.00	\$14,088.98	\$64,702.56
Total Income	\$12,693.41	\$11,711.00	\$13,235.17	\$12,974.00	\$14,088.98	\$64,702.56
Cost of Sales						
Gross Profit	\$12,693.41	\$11,711.00	\$13,235.17	\$12,974.00	\$14,088.98	\$64,702.56
Expenses						
Business Promotion	\$0.00	\$337.21	\$0.00	\$37.02	\$0.00	\$374.23
Fees Paid	\$0.00	\$17.00	\$0.00	\$0.00	\$0.00	\$17.00
Professional Services	\$0.00	\$855.04	\$0.00	\$0.00	\$100.00	\$955.04
Management	\$0.00	\$225.00	\$75.00	\$0.00	\$150.00	\$450.00
Maintenance & Repairs	\$200.00	\$287.91	\$0.00	\$143.00	\$448.19	\$1,079.10
HVAC Maint	\$0.00	\$3,416.63	\$0.00	\$0.00	\$0.00	\$3,416.63
Plumbing	\$79.61	\$0.00	\$447.49	\$0.00	\$0.00	\$527.10
Carpet Cleaning	\$0.00	\$455.00	\$0.00	\$0.00	\$95.00	\$550.00
Landscape/Yardwork	\$0.00	\$0.00	\$83.71	\$0.00	\$0.00	\$83.71
Postage & Shipping	\$0.00	\$3.05	\$0.00	\$0.00	\$50.55	\$53.60
Utilities						
Gas	\$0.00	\$233.08	\$0.00	\$0.00	\$0.00	\$233.08
Water	\$0.00	\$1,051.55	\$403.12	\$415.25	\$383.81	\$2,253.73
Garbage	\$0.00	\$794.72	\$26.49	\$290.92	\$291.64	\$1,403.77
Taxes	\$0.00	\$0.00	\$0.00	\$0.00	\$619.00	\$619.00
Total Expenses	\$279.61	\$7,716.19	\$1,015.61	\$886.19	\$2,138.19	\$12,035.99
Net Profit / (Loss)	\$12,413.80	\$3,994.81	\$12,219.56	\$12,087.81	\$11,950.79	\$52,666.57

California Benefit  
164 N. 160 E.  
Hurricane, UT 84737

Casa Grande  
24 units

## Profit & Loss Statement

1/1/05 through 12/31/05

8/1/06  
11:20:18 AM

Income	
Rental Income	\$148,592.28
Commission Income	\$0.00
Management Fees	\$0.00
Income from Equity Sales	\$0.00
Delivery Fees Collected	\$0.00
Miscellaneous Income	\$47,805.53
Total Income	<u>\$196,397.81</u>

Cost of Sales	
Freight	\$0.00
Total Cost of Sales	<u>\$0.00</u>

Gross Profit	<u>\$196,397.81</u>
--------------	---------------------

Expenses	
Office Supplies	✓ \$0.00
Business Promotion	✓ \$1,806.22 closer
Commissions Paid	— \$0.00
Depreciation Expense	— \$0.00
Dues & Subscriptions	— \$0.00
Fees Paid	— \$16.00
Insurance	— \$0.00
Professional Services	— \$5,596.25
Management	— \$200.00 650/mo for all 37 units
Maintenance & Repairs	\$5,340.12 closer to 40 per unit + HUA
HVAC Maint.	<del>\$8,758.47</del> 2800/yr
Plumbing	<del>\$1,191.78</del> 1213.33 17 mo average
Carpet/Flooring	<del>\$8,073.93</del> ? 3 or 4 units done in
Car Maint. and Repair	\$0.00 grande rest for other
Carpet Cleaning	<del>\$730.00</del> 903.53 17 mo average
Landscape/Yardwork	\$1,258.75 250/mo
Payroll	
Wages	\$0.00
Vacation Pay Expense	\$0.00
Employer Expenses	\$0.00
Postage & Shipping	✓ \$94.01
Rent	\$0.00
Gasoline	\$0.00
Telephone	\$0.00
Travel & Entertainment	\$0.00
Utilities	
Gas	\$0.00
Electricity	\$0.00
Water	✓ \$4,145.92 17 mo average
Garbage	✓ \$2,982.02
taxes	\$0.00

5% cap

835-7503

California Benefit

Profit & Loss Statement

1/1/05 through 12/31/05

8/1/06  
11:20:18 AM

---

Total Expenses	<u>\$35,193.47</u>
Net Profit / (Loss)	<u>\$161,204.34</u>

23

California Benefit  
164 N. 160 E.  
Hortonsville, UT 84737

# Profit & Loss Statement

January 2005 through December 2005

8/1/06  
11:27:22 AM

	January	February	March	April	May	June	July	August	September	October	November	December
<b>Income</b>												
Rental Income	\$12,372.00	\$15,644.86	\$11,673.50	\$11,425.00	\$14,158.49	\$11,367.83	\$11,753.52	\$13,631.97	\$11,737.60	\$11,235.34	\$12,232.00	\$11,360.17
Commission Income	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Management Fees	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Income from Equity Sales	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Delivery Fees Collected	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Miscellaneous Income	\$0.00	\$0.00	\$47,805.53	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Total Income</b>	<b>\$12,372.00</b>	<b>\$15,644.86</b>	<b>\$59,479.03</b>	<b>\$11,425.00</b>	<b>\$14,158.49</b>	<b>\$11,367.83</b>	<b>\$11,753.52</b>	<b>\$13,631.97</b>	<b>\$11,737.60</b>	<b>\$11,235.34</b>	<b>\$12,232.00</b>	<b>\$11,360.17</b>
<b>Cost of Sales</b>												
Freight	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Total Cost of Sales</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>
<b>Gross Profit</b>	<b>\$12,372.00</b>	<b>\$15,644.86</b>	<b>\$59,479.03</b>	<b>\$11,425.00</b>	<b>\$14,158.49</b>	<b>\$11,367.83</b>	<b>\$11,753.52</b>	<b>\$13,631.97</b>	<b>\$11,737.60</b>	<b>\$11,235.34</b>	<b>\$12,232.00</b>	<b>\$11,360.17</b>
<b>Expenses</b>												
Office Supplies	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Business Promotion	\$170.44	\$54.81	\$119.09	\$0.00	\$544.82	\$143.34	\$0.00	\$0.00	\$41.79	\$204.45	\$119.46	\$408.02
Commissions Paid	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Depreciation Expense	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Dues & Subscriptions	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Fees Paid	\$0.00	\$0.00	\$0.00	\$4.00	\$0.00	\$1.00	\$0.00	\$0.00	\$4.00	\$0.00	\$4.00	\$0.00
Insurance	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Professional Services	\$0.00	\$17,633.56	\$0.00	\$0.00	\$288.84	\$48.00	\$0.00	\$0.00	\$1,608.23	\$0.00	\$528.04	\$0.00
Management	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Maintenance & Repairs	\$0.00	\$388.81	\$0.00	\$231.95	\$65.00	\$913.81	\$0.00	\$254.14	\$500.00	\$0.00	\$1,391.53	\$0.00
HVAC Maint.	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Plumbing	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$220.00	\$228.28	\$0.00	\$1,500.00	\$0.00	\$2,300.00
Carpet/Flooring	\$0.00	\$1,209.27	\$0.00	\$0.00	\$191.78	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Car Maint. and Repair	\$0.00	\$0.00	\$0.00	\$2,325.66	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,009.00	\$0.00
Carpet Cleaning	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Landscape/Yardwork	\$0.00	\$50.00	\$0.00	\$0.00	\$0.00	\$160.00	\$0.00	\$0.00	\$250.00	\$0.00	\$190.00	\$0.00
Payroll	\$71.25	\$31.25	\$31.25	\$125.00	\$250.00	\$0.00	\$125.00	\$125.00	\$250.00	\$0.00	\$0.00	\$250.00
Wages	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Vacation Pay Expense	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Employer Expenses	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Postage & Shipping	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Rent	\$0.00	\$38.06	\$15.10	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Cashless	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Telephone	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Travel & Entertainment	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Utilities	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Gas	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Electricity	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Water	\$252.67	\$248.91	\$726.34	\$0.00	\$578.43	\$188.82	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Garbage	\$236.86	\$236.86	\$236.86	\$244.83	\$245.82	\$215.50	\$248.40	\$319.68	\$446.50	\$428.36	\$400.46	\$1,055.26
Taxes	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$255.94	\$264.66	\$367.63
<b>Total Expenses</b>	<b>\$1,196.56</b>	<b>\$4,003.33</b>	<b>\$1,317.64</b>	<b>\$3,011.44</b>	<b>\$2,164.69</b>	<b>\$2,382.80</b>	<b>\$599.40</b>	<b>\$1,176.08</b>	<b>\$3,350.80</b>	<b>\$5,888.79</b>	<b>\$4,997.15</b>	<b>\$5,145.43</b>
<b>Net Profit / (Loss)</b>	<b>\$11,175.04</b>	<b>\$11,641.53</b>	<b>\$58,166.39</b>	<b>\$8,413.56</b>	<b>\$11,993.80</b>	<b>\$8,985.03</b>	<b>\$11,160.12</b>	<b>\$12,455.89</b>	<b>\$8,386.80</b>	<b>\$5,346.59</b>	<b>\$7,294.85</b>	<b>\$6,214.74</b>

735 E. 700 So.

Casa Grande 1985

A	B	C	D	E	F	G	H	I	J	K	L	M	N
Unit	Tenants Names	Bed/ba	Phone	Rent \$	Dep.\$	Lease	Lease date	Pet Add	Dep.\$	Filter sz	Keys	In/out	CrimeF
1	Redone	700	3/1.5	650	500					20X30			
2	Aaron Reep <i>Manager</i>	700	3/1.5	674-2920	650	500	yes	5/17/02	dog	250	20X30	Y	Y
3	John Cole	700	3/1.5		650	500	yes	9/1/05	na	na	20X30	Y	Y
4	Andrew & Amy Carpenter	625	2/1	652-8175	575	400	yes	3/28/02	na	na	16 X 20	Y	Y
5	Eric & Ashley Lundquist	625	2/1	229-7235/36	575	400	yes	7/17/03	na	na	20X25	Y	Y
6	Alexandra Reinken	625	2/1		575	400	yes		na	na	16 X 20		
7	Rowdy and Brooke Reeve	625	2/1	674-5514	575	400	yes	4/21/01	na	na	20X25	Y	N
8	Ken & Amity Hulse	625	2/1		575	500	yes	7/20/04	na	na	16 X 20	Y	Y
9	Aaron LaCorti	625	2/1		575	400					20X25		
10	Kevin & Lori Murset	625	2/1	862-3880	575	0	yes	7/1/05	na	na	16X20	Y	Y
11	Jerm Taylor	625	2/1		575	400					20X25		
12	Margaret Schoenfeld	700	3/1.5	688-2124	650	500	yes	3/30/03	na	na	20X30	Y	Y
13	Tim & Sandra Hansen	700	3/1.5	313-2929	650	500	yes	8/15/01	1 cat	250	20X30	Y	N
14	Victoria, Thomas & Christine	680-0890	3/1.5	680-4659	650	525	yes	10/1/99	na	na	20X30	No	N
15	Ben & Cami Randall	231-2367	625	2/1	669-1772	575	400	yes	10/1/05	na	na	16X20	Y
16	Brett & Jenna Tomazin	625	2/1	862-4990	575	400	yes	11/16/05	na	na	20X30	Y	Y
17	David Pederson	625	2/1	628-5709	575	400	yes	2/14/05	na	na	16X20	Y	Y
18	Jordan Hart	625	2/1		575	400	yes				20X25		
19	Mickie Cochrane	700	3/1.5	652-8159	650	500	yes	7/1/01	na	na	20X30	Y	Y
20	Bret & Lori Olsen	700	3/1.5		650	500	yes	5/15/06	na	na	20X30	Y	Y
21	Joseph & Ginger Harrison	625	2/1	656-4285	575	400	yes	4/1/05	na	na	16 X 20	Y	Y
22	Javier Gutierrez	625	2/1		575	400	yes	6/9/03			20X30	Y	Y
23	Tracy Rout	625	2/3		575	400	yes	12/1/05	na	na	16 X 20	Y	Y
24	Eduardo & Suyapa Orellana	625	2/1	656-5099	575	400	yes	10/1/02	na	na		Y	Y
2099E	Mark and Melissa Yoder	700	3/2	652-8535	600	0							
8	3 bedroom apts, each 1218 sq. ft.												
16	2 bedroom apts., each 887 sq.ft.												
	Filters; 8-16 X 20												
	Filters; 5-20 X 25	15600											
	Filters; 11-20 X 30												
	Date of this updated list- 7/27/06												



6604 do. 1006

Casa Sunoma 1986

A	B	C	D	E	F	G	H	I	J	K	L	M	N
Unit	Tenants Names	Bed/ba	Phone	Rent \$	Dep. \$	Lease	Lease date	Pet Add	Dep. \$	Filter sz	Keys	In/Out	Crin
A	Jorge Torres, Cecilia Casique 750	3/1.5	229-5810	650	500	yes	12/6/03	na	na	20X25	Y	Y	Y
B	Wade & Heidi Selman	3/1.5	628-7232	650	500	yes	9/23/04	dog	250	20X25	Y	Y	Y
C	Twitchell, Dale cell-467-8803	3/1.5	673-4108	650	300	No	6/13/99	na	na	20X25	Y	Y	N
D	Jose Ortega	3/1.5	652-9031	650	500	Yes	5/13/02	na	na	20X25	Y	Y	Y
E	Marsa Moore	3/1.5	675-9251	650	500	yes	9/7/04	na	na	20X25	Y	Y	Y
F	Ortiz, Carlos Jr. 229-8408	3/1.5	656-3032	650	300	Old	2/4/98	na	na	20X25	N	N	N
G	Tamara Hatch	3/1.5	674-3193	650	500	yes	2/4/02	cat	250	20X25	Y	Y	Y
H	Christopher & Cindy Collum	3/1.5		650	500	yes	6/19/06	na	na	20X25			
I	Costel & Violeta Ionita	3/1.5		650	500	yes	6/22/06	na	na	20X25	Y	Y	Y
J	Bruce & Andrea Bryant	3/1.5	634-0712	650	500	yes	1/6/06	na	na	20X25	Y	Y	Y
K	Jeramie & Tara Stephenson	3/1.5	313-0280	650	500	yes	6/15/06	na	na	20X25	Y	Y	Y
L	Rick & Mary McFadden	3/1.5	229-1061	650	500	yes	4/12/03	na	na	20X25	Y	Y	Y
M	Adame, Francisco	3/1.5	656-2824	650	500	yes	11/13/00	na	na	20X25	Y	N	Y
above	All apartments are 1218 sq. ft. each 910 <sup>sq</sup>												
171 N	Cesar & Sandy Asunsolo	1/1	862-5977	450	300	yes	2/1/06	na	na	na	Y		Y
55 E.	Graham Bird/Shandon Davis	2/1.5	635-9169	575	500	yes	2/23/05	na	na	na	Y		Y
51 E.	Pride & Kathy Aldredge	2/1	635-7637	575	400	yes	4/1/04	na	na		Y	Y	Y
49 E.	Lois Edler	2/1	635-7167	550	500	yes	7/1/05	2cats	na		Y	Y	Y
0													
118N.	Morgan & Colleen Harris	2/1	635-4951	300	0	no	6/1/05	na	na	na	N	N	N
167 A	B.J. & MaryAnne Yazzie 862-7775	3/1	862-7775	575	1095	yes	1/1/03	na	na	na		Y	
167 B	Brandon Jackson, Sami Wysocki	2/1	229-6649	575	500	yes	4/5/06	na	na	na			
167 C	Danny & Bree Dutton	3/1	680-1024	600	500	yes	3/15/06	na	na	na	Y		Y
167 D	Bruce & Sherri Pettus SW	2/1	635-5440	525	450	yes	4/1/03	na	na	na		Y	
403A	Jane Sykes	2/1	928-643-6313	400	400								
403B	Matt & Tori Jones	2/1	435-689-0544	425	350								
0	Filters are all 20 X 25												
0													
131V	Brent & Stacey Dalton	2/1	635-2900	650	500	yes	4/15/06			na	Y		Y
129V		2/1		650	500	yes				na			

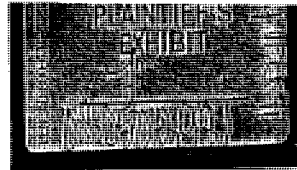


## Tab 6

P3  
L10

DOC # 20080013381

Trust Deed Page 1 of 3  
Russell Shirts Washington County Recorder  
04/02/2008 09:02:23 AM Fee \$ 24.00  
BY AMERICAN MORTGAGE



When Recorded Mail To:

FAB5 ~~BY~~ American Mortgage  
40 N 300 E # 102  
St. George, UT 84790

## TRUST DEED

Tax Serial # SG-762-C, SG-762-B,  
SG-763-C, SG-763-B, SG-763

THIS TRUST DEED, made this 1<sup>st</sup> day of April, 2008, between DAVID FISHER, as Trustor, whose address is St. George, Utah, PRESTIGE TITLE INSURANCE AGENCY, INC, as Trustee, and FAB5 MANAGEMENT LLC, as Beneficiary.

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST WITH POWER OF SALE, the following described property, situated in Washington County, State of Utah:

SEE EXHIBIT "A" ATTACHED

Together with all building, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto now or hereafter used or enjoyed with said property, or any part thereof,

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$500,000.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof.

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and assessments on water or water stock used on or with said property, not to commit waste, to maintain adequate fire insurance on improvements on said property, to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder, including a reconveyance hereof.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinabove set forth.

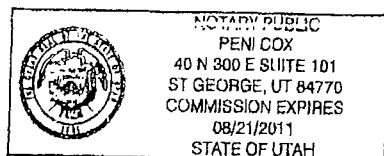
  
DAVID FISHER, Trustor

STATE OF UTAH )

)ss.

COUNTY OF WASHINGTON )

On this 1 day of April, 2008, before me, a notary public, personally appeared DAVID FISHER, proved on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged to me that he executed the same. Witness my hand and official seal.



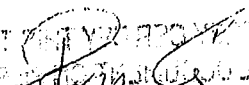
  
Notary Public



EXHIBIT "A"  
to Trust Deed dated April 1, 2008

**PARCEL 1: Tax ID No.: SG-762-C**

Beginning at the Southwest corner of Lot 3, Block No. 4, Plat B of St. George City Survey and running thence N 0°08'44" E along the East Right of Way of 700 East Street 49.97 Feet; thence S. 89°51'30" East 132.01 feet to a point on the East line of a parcel more particularly described in instrument #00641842 recorded and on file at Washington County Recorder's Office, State of Utah; thence S 0°08'44" W along said line 49.97 feet to the Southwest corner of said parcel, said point also being on the North line a parcel more particularly described in instrument #624716; thence N 89° 51'30" W along said parcel 132.01 feet to the point of beginning.

Subject to a Grant of Easement, Instrument #467954, more particularly described as: Beginning at the Southwest corner of Lot 3, Block 4, Plat "B", of the St. George City Survey, as platted on the official map of said survey in the Washington County Recorder's Office, State of Utah, and running thence North along the block line of said block, 55.00 feet; thence East, parallel to the south line of said Lot 3, Block 4, St. George City Survey, 30.00 feet; thence South parallel to the west line of said block, 55.00 feet to the south line of said Lot 3; thence West along the south line of said Lot 3, 30.00 feet, more or less, to the point of beginning.

**PARCEL 2: Tax ID No.: SG-762-B**

Beginning N 0°08'44" E along the East Right of Way line of 700 East Street 49.97 feet from the Southwest corner of Lot 3 Block No. 4, Plat B of St. George City Survey and running thence N 0°08'44" E along said Right of Way 82.02 feet to the Northwest corner of a parcel more particularly described in instrument #00641842; thence S 89°51'44" E along the north line of said parcel 132.01 feet to the Northeast corner of said parcel; thence S 0°08'44" W along the East line of said parcel 82.03 feet; Thence N 89°51'30" W 132.01 feet to the point of beginning.

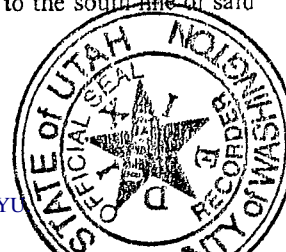
Together with a 26.00 foot public utility easement, and ingress and egress easement across, below and above the following described parcels:

Beginning at the Southwest Corner of Lot 4, Block No. 4, Plat B St. George City Survey and Running thence N 0°08'44" E along the East Right of way of 700 East Street 66.00 feet, said point also being the Northwest Corner of a parcel described in Book 1328, Page 2204, recorded and on file at Washington County Recorder's Office, State of Utah; thence S 89°51'51" E along the North line of said parcel 81.84 feet; thence S 0°08'44" W 66.00 feet to the South line of said parcel; thence S 89°51'44" W along said south line 81.84 feet to point of beginning. Contains 0.12 acres.

Beginning S 89°51'44" E along the South line of Lot 4, Book No. 4, Plat B, St. George City Survey 81.84 feet and running thence N 0°08'44" E 66.00 feet to a point on the South line of a parcel more particularly described in instrument #960637; thence S 89°51'51" E along said South line 81.82 feet; thence S 0°08'44" W 66.00 feet to the South line of Lot 4; thence N 89°51'44 W along said South line 81.82 feet to the point of beginning. Contains 0.12 acres

**PARCEL 3: TAX ID No.: SG-763-C**

Beginning at the Southwest corner of Lot 4 Block No. 4, Plat B of St. George City Survey and running thence N 0°08'44" E along the East Right of Way of 700 East Street 66.00 feet, said point also being the Northwest corner of a parcel described in Book 1328 Page 2204, recorded and on file at Washington County Recorder's Office, State of Utah; thence S 89°51'51" E along the north line of said parcel 81.84 feet; thence S 0°08'44" W 66.00 feet to the south line of said parcel; thence S 89°51'44" W along said south line 81.84 feet to the point of beginning.



**PARCEL 4: TAX ID No.: SG-763-B**

Beginning S 89°51'44" E along the South line of Lot 4 Block No. 4, Plat B of St. George City Survey 81.84 feet and running thence N 0°08'44" E 66.00 feet to a point on the South line of a parcel more particularly described in instrument #960637; thence S 89°51'51" E along said South line 81.82 feet; thence S 0°08'44" W 66.00 feet to the south line of lot 4; thence N 89°51'44" W along said South line 81.82 feet to the point of beginning. Contains 0.12 acres.

Together with a 26.00 foot public utility easement, and ingress and egress easement across, below and above the following described parcel:

Beginning at the Southwest Corner of Lot 4, Block No. 4, Plat B St. George City Survey and Running thence N 0°08'44" E along the East Right of way of 700 East Street 66.00 feet, said point also being the Northwest Corner of a parcel described in Book 1328, Page 2204, recorded and on file at Washington County Recorder's Office, State of Utah; thence S 89°51'51" E along the North line of said parcel 81.84 feet; thence S 0°08'44" W 66.00 feet to the South line of said parcel; thence S 89°51'44" W along said south line 81.84 feet to point of beginning.

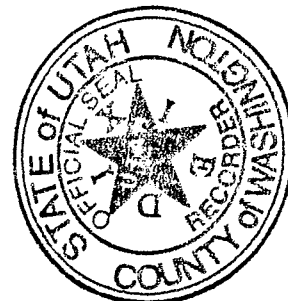
**PARCEL 5: TAX ID No.: SG-763**

Beginning S 89°51'44" E along the South line of Lot 4 Block No. 4, Plat B St. George City Survey 163.66 feet and running thence N 0°08'44" E 66.00 feet to the south line of a parcel more particularly described in instrument #960637; thence S 89°51'51" E along said south line 100.35 feet to a point on the east line of lot 4; thence S 0°08'44" W along said east line 66.01 feet to the Southeast corner of Lot 4; thence N 89°51'44" W 100.35 feet to the point of beginning. Contains 0.15 acres.

Together with a 26.00 foot public utility easement, and ingress and egress easement across, below and above the following described parcels:

Beginning at the Southwest Corner of Lot 4, Block No. 4, Plat B St. George City Survey and Running thence N 0°08'44" E along the East Right of way of 700 East Street 66.00 feet, said point also being the Northwest Corner of a parcel described in Book 1328, Page 2204, recorded and on file at Washington County Recorder's Office, State of Utah; thence S 89°51'51" E along the North line of said parcel 81.84 feet; thence S 0°08'44" W 66.00 feet to the South line of said parcel; thence S 89°51'44" W along said south line 81.84 feet to point of beginning. Contains 0.12 acres.

Beginning S 89°51'44" E along the South line of Lot 4, Book No. 4, Plat B, St. George City Survey 81.84 feet and running thence N 0°08'44" E 66.00 feet to a point on the South line of a parcel more particularly described in instrument #960637; thence S 89°51'51" E along said South line 81.82 feet; thence S 0°08'44" W 66.00 feet to the South line of Lot 4; thence N 89°51'44" W along said South line 81.82 feet to the point of beginning.



Tab 7

## ALL-INCLUSIVE PROMISSORY NOTE

(Secured by All-Inclusive Trust Deed)

\$2,411,596.00

November 30, 2006

St. George, Utah

IN INSTALLMENTS AS HEREIN STATED, for value received, DAVCO MANAGEMENT COMPANY LLC, hereinafter referred to collectively as "Maker", promises to pay to CALIFORNIA BENEFIT INC hereinafter referred to as "Holder", or order, at 164 North 160 East, Hurricane, Utah, the sum of Two Million Four Hundred Eleven Thousand Five Hundred Ninety-Six and No Dollars (\$2,411,596.00) with interest at the rate of seven percent (7%) per annum, said principal and interest being payable as follows:

Beginning January 1, 2007, and each month thereafter, a payment of interest at the rate of seven percent (7%) in the amount of \$14,067.64 plus pro-rated taxes and hazard insurance. A balloon payment of the principal balance of \$2,411,596.00 plus unpaid interest, taxes and insurance, due on or before December 10, 2007.

Any such prepayment shall be first applied to all accrued and unpaid interest, and the balance to the reduction of principal.

2. The total principal amount of this Note includes the unpaid principal balance of any existing Promissory Notes ("Senior Notes") secured by Trust Deeds. Such Trust Deeds are hereinafter collectively referred to as "Senior Encumbrances". The Senior Notes are more particularly described as follows:

(A) A Promissory Note dated January 11, 2005, in favor of LaSalle Bank as Holder, with California Benefit Inc. as Maker, in the original principal amount of \$700,000.00;

3. At the option of Maker, and at any time, Maker prepay the amounts required herein, provided, however:

(a) Maker shall designate at the time the prepayment is made whether the prepayment shall be credited to unpaid principal or in prepayment of future installments due under this Note; and

(b) In the event that Holder is required under the terms of this Note or the All-Inclusive Trust Deed securing this Note, to make prepayments on the Senior Notes as a direct result of any prepayment(s) on this Note by Maker, and Holder thereby incurs a prepayment penalty under



the Senior Notes, then in such event, Maker agrees to pay to Holder, on demand, the full amount of such prepayment penalty. Any prepayment penalties so paid by Maker shall not reduce the unpaid balance of this Note.

4. When all the sums payable pursuant to the terms of this Note and the Trust Deed securing this Note have been paid in full, Holder shall: (1) immediately pay all remaining sums to be paid under the terms of the Senior Notes and Senior Encumbrances; and (2) surrender this Note to Maker marked paid in full and execute and deliver to the Trustee of the Trust Deed a Request for Full Reconveyance of the Trust Deed securing this Note.

5. Provided Maker is not in default under any terms of the Note or the All-Inclusive Deed of Trust securing this Note, Holder shall pay when due all installments required under the terms of the Senior Note(s) and Senior Encumbrance(s). In the event of any default by Maker under any terms of this Note or the All-Inclusive Trust Deed securing this Note, Holder's obligation to make payments on the Senior Note(s) shall be deferred until any such default is cured. All penalties, charges and other expenses incurred under the Senior Notes and the Senior Encumbrances as a result of any such default by Maker shall be added to the principal amount of this Note and shall be immediately payable by Maker to Holder. Should Holder default in making any payments on the Senior Notes as required herein, Maker may make said payments directly to the Holder of such Senior Notes; any and all payments so made by Maker shall be credited to this Note.

6. When all sums due pursuant to the terms of this Note and the All-Inclusive Trust Deed securing this Note, at any time, are equal to or less than the unpaid balance of principal and interest then due under the terms of the Senior Notes, then:

(a) Upon (i) assumption by Maker of the Senior Note(s) and (ii) release of Holder from all liabilities and obligations on the Senior Notes and Senior Encumbrances, Maker, at Maker's option, may request and shall receive from Holder, cancellation and delivery of the Note, and Holder shall execute and deliver to the Trustee a Request for Full Reconveyance of the All-Inclusive Trust Deed securing this Note; or

(b) Even in the absence of assumption and release under subsection (a), above, Holder, at his option, may cancel this Note and deliver same to Maker and execute and deliver to Trustee a Request for Full Reconveyance of the All-Inclusive Trust Deed securing this Note; or

(c) In the event neither Holder nor Maker exercises the options provided in (a) and (b) of this section, and this Note and the All-Inclusive Trust Deed securing this Note therefore remain in effect, then the payments and interest rate shown in Section 1 of this Note, to the extent they differ from the Senior Notes shall immediately and automatically be adjusted to equal the payments and interest rate then required under the Senior Notes, and Maker, in addition to such adjusted payments, shall also pay a monthly servicing fee to Holder of an amount equal to 0- percent



(0%) of such adjusted monthly payments.

7. Holder shall have no further obligation under the terms of this Note or the All-Inclusive Trust Deed securing this Note, after: (1) foreclosure by Holder or his Trustee of the All-Inclusive Trust Deed securing this Note, or (2) delivery by Holder to Trustee of a Request for Reconveyance of the All-Inclusive Trust Deed securing this Note.

8. In the event the Holder of the Senior Notes is entitled to any remedy pursuant to any due on sale, non-alienation, or non-assumption provision as a result of the execution of this Note and/or any document(s) related hereto, the entire unpaid balance of this Note, without further notice, shall become immediately due and payable thirty (30) days following written notice to the Maker of this Note of the intent of the Holders of the Senior Notes to exercise any such remedy.

9. In the event that any payment under this Note is not made, or any obligation provided to be satisfied or performed under this Note or the All-Inclusive Trust Deed securing this Note is not satisfied or performed at the time and in the manner required, or in the event Maker is adjudged a bankrupt or executes an assignment for the benefit of creditors, Holder, at Holder's option and without notice or demand, may declare the entire principal balance, all amounts of accrued interest and all other amounts then due under the terms of this Note and the All-Inclusive Trust Deed securing this Note immediately due and payable. After acceleration, the unpaid principal balance and all other sums owed hereunder shall bear interest at the Default Rate. The acceptance of any payments of installments thereafter by Holder will not constitute a waiver by Holder of the right to accelerate.

10. In the event that any payment under this Note is not made, or any obligation provided to be satisfied or performed under this Note or the All-Inclusive Trust Deed securing this Note is not satisfied or performed at the time and in the manner required, the defaulting party shall pay any and all costs and expenses (regardless of the particular nature thereof and whether or not incurred in connection with the exercise of the power of sale provided for in the All-Inclusive Trust Deed securing this Note) which may be incurred by the Maker or Holder hereof in connection with the enforcement of any rights under this Note, including, without limitation, courts costs, reasonable attorney's fees, and other costs incurred by Holder in pursuing any such remedies, with such amounts to bear interest at the Default Rate.

11. The Maker and endorser hereof waive presentment for payment, protest, demand, notice of protest, notice of dishonor and notice of nonpayment and expressly agree that this Note or any payment hereunder may be extended from time to time by the Holder hereof without in any way affecting the liability of such parties. No course of dealing between the Maker and Holder in exercising any rights hereunder, shall operate as a waiver of rights of Holder.

12. This Note shall inure to the benefit of and shall be binding upon respective successors



and assigns of the Maker and Holder.

13. This Note shall be construed in accordance with the laws of the State of Utah.

14. In this Note, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

15. If Maker consists of more than one person, Maker's obligations hereunder shall be joint and several.

16. This Note is secured by an All-Inclusive Trust Deed of even date herewith.

IN WITNESS WHEREOF this Promissory Note is execute on the 30th day of November 2006.

MAKER:

DAVCO MANAGEMENT COMPANY LLC

By: 

David Fisher, Managing Member, Maker

### ACCEPTANCE BY HOLDER

The undersigned hereby accepts the foregoing All-Inclusive Promissory Note and agrees to perform each and all of the terms thereof on the part of the Holder to be performed.

HOLDER:

California Benefit Inc.

By: 

Richard T. Mursel, Vice President

## Tab 8

**David Fisher | American Mortgage**

---

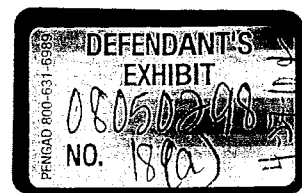
**From:** David Fisher | American Mortgage [dfisher@amfs-usa.com]  
**Sent:** Wednesday, March 26, 2008 9:02 AM  
**To:** 'Rich Murset'  
**Subject:** RE: mortgage stuff

Thanks. I received an e-mail from my broker asking me the status of the 2005 2006 YTD operating statements. How are those coming?

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

**From:** Rich Murset [mailto:lagunawelding@gmail.com]  
**Sent:** Tuesday, March 25, 2008 10:04 PM  
**To:** David Fisher; David Fisher | American Mortgage  
**Subject:** mortgage stuff

I asked my normal mortgage broker if he had some more leads for you and I will forward a couple of them to you.  
Rich



## Tab 9

**David Fisher | American Mortgage**

---

From: David Fisher | American Mortgage [dfisher@amfs-usa.com]  
Sent: Monday, July 21, 2008 2:20 PM  
To: 'Rich Murset'  
Subject: RE: progress

Good. The loan officer said that he received my e-mail with the updated financials except for the 07 returns. My cpa is making a couple of changes and then sending them back to me for review then I will forward them to the loan officer.

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

From: Rich Murset [mailto:lagunawelding@gmail.com]  
Sent: Saturday, July 19, 2008 7:33 PM  
To: David Fisher  
Subject: progress

I was just checking on if you are making any progress since I spoke with you last?  
Thanks, Rich

Information from ESET NOD32 Antivirus, version of virus signature database 3284  
(20080721)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>



## Tab 10

**David Fisher | American Mortgage**

---

**From:** David Fisher | American Mortgage [dfisher@amfs-usa.com]  
**nt:** Tuesday, August 26, 2008 10:10 AM  
**3:** 'Rich Murset'  
**Subject:** RE: progress?

Actually there is progress but the lending institutions are changing their guidelines. They will no longer accept the cap rate given by the market which now is between 6 and 6.5%. instead they will use a 8.5 to 9% cap rate to establish value then only lend up to 75 % of that. Therefore I have to bring in money to close since the loan amount will not be enough to cover the debt. I am expecting a settlement on October 2nd which will be enough to pay down the difference between what I owe and the loan amount. Also I have 2 parties interested in purchasing the properties. I would like enough time for either one of these things to happen.

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

**From:** Rich Murset [mailto:mac\_wad@sisna.com]  
**Sent:** Monday, August 25, 2008 6:39 PM  
**To:** David Fisher | American Mortgage  
**Subject:** progress?

Dear Dave,

I am assuming that no news is bad news. We have let this go plenty of time beyond our agreement. We would like a deed in lieu of foreclosure, so it will be cleaner and quicker. We would entertain the thought of you continuing to manage the properties, if you are interested. Let me know your thoughts.  
Rich

Information from ESET NOD32 Antivirus, version of virus signature database 3386  
(20080825)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>



Tab 11



From: Rich Murset [mac\_wad@sisna.com]  
Sent: Wednesday, September 03, 2008 10:59 AM  
To: David Fisher  
Subject: terms

David,

I have thought about what you have said and the possibilities for your refinance/sale or whatever. We have lost a lot of money and opportunities over the past year by not being able to do what we planned. Here is what I would like to do to help cover the cost of our missed opportunities and to help pay for foreclosure if it comes to that. I would like to add \$1000.00 per month to the Casa Sonoma payment and \$1500 to the Casa Grande payment both starting in Sept. I would like you to make those checks to Carolyn Murset. I know you are trying hard and it is a very strange market, especially with the mortgage industry, but something needs to happen soon.  
Thanks, Rich

Information from ESET NOD32 Antivirus, version of virus signature database 3409 (20080902)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

Tab 12

9/30/08

David,

I have looked over the info that you have sent to me. First let me clarify two things.

1.

I never, verbally or in writing extended the deadline by one year. I worked with you as each possibility came and went, but I never agreed to a one year extension. If I had, I would not have been pressing you for something to happen until that second year had expired.

2. I have never said that I have not benefited from the the sale of these properties to you. You have done precisely what I expected you to do and that was to improve them and to raise the rents and to make the payments as you agreed. When I speak of being injured, it is simply because I have not had the money to work with that you agreed to pay me. I make money by using money and my hands have been tied by not having the money. I also could have paid off mortgages that I have and continue to pay on. I have missed many many opportunities because of this, and that is how I have been injured and continue to be injured, not from monthly payments.

This is what I propose:

I would go with your option A (you continue to manage and maintain the apartments and you continue trying to get the financing to be able to pay me off) subject to compliance by you to the following conditions;

1. That I have a cashiers check for both of the payments (\$8451.85 for Casa Sonoma, \$15,205.83 for Casa Grande) with late fees, that you stopped payment on for your September payments by tomorrow, Wednesday Oct. 1st at 5PM.
2. That I have a cashiers check for both of your payments (\$8451.85 for Casa Sonoma, \$15,205.83 for Casa Grande) for October to me by October 6th.
3. You have all subsequent payments to me in the form of cashiers checks no later than the 6th of that month.
4. I will have my attorney draft and we will both sign a formal agreement extending our existing agreement until April 1, 2009. You would have until that time to refinance as you have been trying to do.
5. You must agree to this in writing and have it to me no later than October 1, 2008 at 12 Noon.
6. If you can't agree to this then we will go forward with the foreclosure and all of the provisions in the original documents.

Sincerely,  
Rich Murset



PS, if you decided to continue to look for financing, I have a lead for you. Call Ryan Bolton at Superior Lending. His number is 627-0494 or cell # 801-558-9632

## Tab 13

David Fisher | American Mortgage

m: David Fisher | American Mortgage [dfisher@amfs-usa.com]  
 Sent: Thursday, October 09, 2008 12:21 PM  
 To: 'Rich Murset'  
 Subject: RE: Response

I put the apartments in my Darwin's name as another route in trying to obtain financing. They are in my name now.

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

From: Rich Murset [mailto:mac\_wad@sisna.com]  
 Sent: Wednesday, October 08, 2008 3:11 PM  
 To: David Fisher | American Mortgage  
 Cc: Paul Veasy  
 Subject: Response

>>  
 >> October 8, 2008  
 >>  
 >> David Fisher,  
 >> My last response dated October 3, 2008 had nothing new in it that  
 >> my previous letter, dated September 30th, 2008 did not, other than  
 >> the timing of payments and the tenant meeting, which you were aware  
 >> of. Regardless, you have failed to address the default of the loans  
 >> by Davco Management.  
 >> Again, I did not grant you a one year extension; either orally or  
 >> in writing, but rather was patient with you in allowing you to  
 >> pursue the refinancing of the properties.  
 >> Now that you are withholding monthly payments and rents as well,  
 >> you have pushed us to take action. I have discovered that you  
 >> have also taken out a \$500,000 loan with Fab5 Management on Casa  
 >> Sonoma and that you have conveyed ownership of the property to  
 >> Darwin Fisher without my consent, which is a breach of the terms of  
 >> the Deed of Trust.  
 >> The failure to satisfy my two written offers is unacceptable. We  
 >> will commence foreclosure on the properties and will take separate  
 >> action on the monthly payments of rent and our liability as a  
 >> Guarantor.  
 >>  
 >> Sincerely, Richard T. Murset  
 >

CC: Paul Veasy

Information from ESET NOD32 Antivirus, version of virus signature database 3505  
 (20081008)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>



Tab 14



## REAL ESTATE PURCHASE CONTRACT



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

## EARNEST MONEY RECEIPT

Buyer Shirley Fisher / Duane Hingorani Co. offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 15,000 in the form of Cash which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [Signature] on \_\_\_\_\_ (Date)  
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Prestige Title Phone Number 888-1069

## OFFER TO PURCHASE

1. PROPERTY: 735 E. + 69 E. 700 S.  
also described as:  
City of St George, County of Washington, State of Utah, Zip 84750  
(the "Property")

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

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

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

2. PURCHASE PRICE. The Purchase Price for the Property is \$ 333,300

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

15,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ \_\_\_\_\_ (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: [ ] CONVENTIONAL [ ] FHA [ ] VA [ ] OTHER (specify) \_\_\_\_\_

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

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

[ ] SPECIFIC LOAN TERMS \_\_\_\_\_

\$ \_\_\_\_\_ (c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)

\$ \_\_\_\_\_ (d) Seller Financing (see attached Seller Financing Addendum if applicable)

\$ \_\_\_\_\_ (e) Other (specify) \_\_\_\_\_

\$ \_\_\_\_\_ (f) Balance of Purchase Price in Cash at Settlement

333,300 PURCHASE PRICE. Total of lines (a) through (f)

DT0194

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.



**2.3 Application for Loan.**

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs **only** when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

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

**3. SETTLEMENT AND CLOSING.**

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (?) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

**4. POSSESSION.** Seller shall deliver physical possession to Buyer within: ☐ \_\_\_\_\_ hours ☐ \_\_\_\_\_ days after Closing; ☒ Other (specify) At Recording

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

☐ Seller's Initials ☒ Buyer's Initials

The Listing Agent, Barry Thompson, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Listing Broker, Prudential, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Selling Agent, Doni Pucelus, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Selling Broker, Century 21 At The Rockies, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent

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

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

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) \_\_\_\_\_

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

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

*Professional Home Inspection*

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

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

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

8.3 **Failure to Respond.** If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 **Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☐ Addendum No. \_\_\_\_\_  
☐ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum  
☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law)  
☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law)  
☐ Other (specify) \_\_\_\_\_

**10. SELLER WARRANTIES & REPRESENTATIONS.**

**10.1 Condition of Title.** Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

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

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

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

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

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

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

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

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

☒ SHALL

☐ MAY AT THE OPTION OF THE PARTIES

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

**16. DEFAULT.** If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

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

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

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

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

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

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

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

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

(a) Loan Application & Fee Deadline	<u>August 11, 2005</u>	(Date)
(b) Seller Disclosure Deadline	<u>August 11, 2005</u>	(Date)
(c) Evaluations & Inspections Deadline	<u>Sept 22, 2005</u>	(Date)
(d) Loan Denial Deadline	<u>Oct 6, 2005</u>	(Date)
(e) Appraisal Deadline	<u>Oct 3, 2005</u>	(Date)
(f) Settlement Deadline	<u>October 11, 2005</u>	(Date)



25. **OFFER AND TIME FOR ACCEPTANCE.** Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by 6:00 [ ] AM [X] PM Mountain Time on Aug 2, 05 (Date), this offer shall lapse; and the Brokerage shall retain the Earnest Money Deposit to Buyer.

[Signature] 8/1/05 (Buyer's Signature) (Offer Date) [Signature] (Buyer's Signature) (Offer Date)

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

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

### ACCEPTANCE/COUNTEROFFER/REJECTION

#### CHECK ONE:

- [ ] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.
- [ ] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. \_\_\_\_\_.

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

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

- [ ] **REJECTION:** Seller Rejects the foregoing offer.

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

### DOCUMENT RECEIPT

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

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

(Buyer's Signature) (Date) (Buyer's Signature) (Date)

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

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

Sent/Delivered by (specify) \_\_\_\_\_

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



**ADDENDUM NO. 1**  
**TO**  
**REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 7, 2003, including all prior addenda and counteroffers, between David Dale Floyd as Buyer, and Stacey as Seller, regarding the Property located at 735 + 6th St 700 E. St. George, UT 84202. The following terms are hereby incorporated as part of the REPC: IN ID # 7000, 7420 - 7025  
Stg. 703

\* Buyer to Receive and Approve

- 1) Rent Roll for all units
- 2) Issues Rental history
- 3) P & P Statement
- 4) Copy of All Lease Agreements

\* Purchase Price to include 6% Commission!

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☐ Buyer shall have until 6:00 ☐ AM ☒ PM Mountain Time on Aug 11, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

David Dale Floyd Aug 7, 2003  
☒ Buyer ☐ Seller Signature Date Time

Stacey \_\_\_\_\_  
☐ Buyer ☐ Seller Signature Date Time

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

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

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

(Signature) \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_ (Signature) \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_

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

(Signature) \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_ (Signature) \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_

## Tab 15

## Summary of Activities of David Fisher & Davco from 9/1/08 to 2/20/09

### Charges:

How much was collected from tenants from 9/1/08 to 2/20/09? \$163,243  
Before 11/4/08 court order? \$68,971  
After court order? \$94,272  
Total \$163,243

What is the source of this info? Detailed accounting records for each unit provided by David Fisher and Davco.

What is the amount of deposits (security & cleaning) collected for the 37 units? (includes \$2,711.00 recorded in detailed records) \$30,050

From Casa Sonoma? \$11,450  
From Casa Grande? \$18,600  
Total \$30,050

What is the source of this info? Tenant leases and detailed accounting records for each unit provided by David Fisher and Davco.

Total income to David Fisher and Davco from 9/1/08 to 2/20/09

Source: Same as above \$193,293

### Credits:

How much was deposited in compliance with the court order by tenants, And not collected by David Fisher or Davco? \$7,400.00  
Source: Court records

How much was deposited with the court by David Fisher and Davco after the hearing in August 2009? \$33,805.83  
Source: Court records

How much was refunded to tenants from deposits from 9/1/08-2/20/09? \$3,164.00  
Note: 24 move outs during this period  
Source: Detailed accounting records for each unit.

What is the total amount of debt service, i.e. repairs, utilities, garbage, cleaning, yard care, pest control for the period of 9/1/08 to 2/20/09? \$16,078.21  
Source: invoices submitted by David Fisher and Davco

What is the net amount of rents and security deposits owed by Davco to Iota and California Benefit?

\$132,844.96



## Tab 16

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

OCT 22 PM 1:47

BY tg

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

COMPLAINT

Case No. 080502981

Judge JS

Plaintiffs complain against defendants and alleges as follows:

PARTIES

1. Plaintiff, Iota, LLC, is a Utah limited liability company.
2. Plaintiff, California Benefit, Inc. ("California Benefit") is a California corporation registered to do business in Utah.

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Attorneys for Plaintiffs*

---

**IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH**

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

**EX PARTE MOTION FOR ORDER  
REQUIRING RENTS TO BE  
DEPOSITED WITH THE COURT**

Case No. 080502981

Judge Shumate

Pursuant to Rule 67 of the Utah Rules of Civil Procedure, plaintiffs Iota, LLC and California Benefit, Inc. move this Court, ex parte, for an order requiring all rents from the Casa Sonoma Apartments and the Casa Grande Apartments be deposited with the Court during the pendency of this lawsuit, or until further order of the Court.

Defendant Davco Management Company L.C. ("Davco") executed trust deeds which include assignment of rent provisions for two apartment complexes it purchased from plaintiffs. Davco is in default because of its failure to make payments to plaintiffs as required under the

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

FILED  
FIFTH JUDICIAL DISTRICT COURT  
2008 OCT 23 11:01 AM



---

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

**DECLARATION OF RICHARD T.  
MURSET**

Case No. 080502981

Judge Shumate

---

I, Richard T. Murset, declare as follows:

1. I am over the age of eighteen years and competent to testify to the matters stated herein.
2. I am a managing member of Iota, LLC and the Vice President of California Benefit, Inc. Iota, LLC and California Benefit, Inc. are the plaintiffs in this action. I have personal knowledge of the matters set forth in this Declaration.

3. In September of 2006, defendant Davco Management Company, L.C. ("Davco") entered into an agreement with Iota, LLC to purchase certain real property and improvements commonly known as the Casa Sonoma Apartments in St. George, Utah.

4. On or about September 29, 2006, Davco executed a Term Loan Promissory Note in the principal amount of \$1,341,395.00 in favor of Iota, LLC (hereinafter referred to as the "Iota Note"). The Iota Note required payment of interest on the principal balance and late fees if payments were not paid timely.

5. The Iota Note required the entire balance due and owing on the note be paid on or before December 1, 2007.

6. As part of the same transaction and as security for the payment of the Iota Note, Davco executed and delivered to Iota a Deed of Trust, Security Agreement Assignment of Rents and Leases, and Fixture Filing (hereinafter referred to as the "Iota Deed of Trust") wherein Davco was the trustor and Iota was the beneficiary. A true and correct copy of the Iota Deed of Trust is attached hereto as **Exhibit A**. The Iota Deed of Trust granted to Iota a security interest in the real property located in Washington County, State of Utah, commonly known as the Casa Sonoma apartments located 669 South 700 East, St. George, Utah, 84770, more particularly described as follows:

PARCEL #1:

THE SOUTH ONE-HALF OF LOT 4, BLOCK 4, PLAT "B", ST.  
GEORGE CITY SURVEY, WASHINGTON COUNTY, STATE  
OF UTAH.

PARCEL #2:

THE WEST ONE-HALF OF LOT 3, BLOCK 4, PLAT "B", ST.

9. Davco has defaulted under the Iota Trust Deed by failing to make interest payments when due and by failing to pay off the principal amount of \$1,341,395.00 due December 1, 2007. Iota, LLC has demanded that all rents for the Casa Sonoma Apartments be made to Iota, LLC but Davco has refused to voluntarily assign the rents to Iota, LLC. Davco continues to collect rents from the Casa Sonoma Apartments but Davco has not made any payments to Iota, LLC on the Iota Note since August of 2008.

10. In November of 2006, Davco entered into an agreement with California Benefit to purchase certain real property and improvements commonly known as the Casa Grande Apartments in St. George, Utah.

11. On or about November 30, 2006, Davco executed an All-Inclusive Promissory Note in the principal amount of \$2,411,596.00 in favor of California Benefit (hereinafter referred to as the "California Note"). The California Note required payment of interest at the rate of seven percent (7%) on the principal balance, plus pro-rated taxes and hazard insurance and late fees if payments were not paid timely.

12. The California Note required the entire balance due and owing on the note be paid on or before December 10, 2007.

13. As part of the same transaction and as security for the payment of the California Note, Davco executed and delivered to California Benefit a All-Inclusive Deed of Trust and Assignment of Rents (hereinafter referred to as the "California Deed of Trust") wherein Davco was the trustor and California Benefit was the beneficiary. The California Deed of Trust granted to California Benefit a security interest in the real property located in Washington County, State

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Attorneys for Plaintiffs*

FILED  
FIFTH JUDICIAL DISTRICT COURT  
2006 NOV -3 PM 2:47  
WASHINGTON COUNTY

---

**IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH**

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

**REQUEST FOR EXPEDITED RULING  
ON EX PARTE MOTION FOR ORDER  
REQUIRING RENTS TO BE  
DEPOSITED WITH THE COURT**

Case No. 080502981

Judge Shumate

---

Plaintiffs Iota LLC and California Benefit, Inc. (referred hereafter as "Plaintiffs"), respectfully request the court submit its *Ex Parte* Motion for Order Requiring Rents to be Deposited with the Court for an expedited decision and/or hearing. The motion requests that rents for two apartment complexes be deposited with the Court during the pendency of this lawsuit. Said rents will be collected for November over the next few days. Accordingly, an expedited ruling on the motion is necessary in order to determine where the November rents should be deposited.

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Attorneys for Plaintiffs*

**FILED**  
Date 11/5/08  
FIFTH DISTRICT COURT  
WASHINGTON COUNTY  
By X

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

**ORDER ON PLAINTIFFS' *EX PARTE*  
MOTION FOR ORDER REQUIRING  
RENTS TO BE DEPOSITED WITH  
THE COURT**

Case No. 080502981

Judge James L. Shumate

Before the court is Plaintiffs' *Ex Parte* Motion for Order Requiring Rents to be deposited with the Court.

The court has considered the motion, memoranda, declaration and accompanying exhibits and materials submitted by Plaintiffs, for good cause appearing, IT IS HEREBY ORDERED:

1. Plaintiffs' *Ex Parte* Motion for Order Requiring Rents to be deposited with the Court is GRANTED.



2. Defendants Davco Management Company L.C. and David Fisher shall deposit all rents collected from the real property commonly known as the Casa Sonoma Apartments located at 669 South 700 East, St. George, Utah, 84770 and the real property commonly known as the Casa Grande Apartments located 735 East 700 South, St. George, Utah, 84770 with the clerk of the court of the Fifth Judicial District Court of the State of Utah. This order shall remain in effect during the pendency of this action, or until further order of the Court.

3. All tenants at the Casa Sonoma Apartments located at 669 South 700 East, St. George, Utah, 84770 and all tenants of the Casa Grande Apartments located 735 East 700 South, St. George, Utah, 84770 shall deposit their rent checks with the clerk of the court of the Fifth Judicial District Court located at 220 North 200 East, St. George, Utah 84770 under Civil No. 080502981, until further order of the Court.

DATED this 4 day of Nov, 2008.

  
JAMES L. SHUMATE  
FIFTH DISTRICT COURT JUDGE

07 0900

2008 NOV 13 PM 4:58

FILED

DATE 11/5/08

FIFTH DISTRICT COURT  
WASHINGTON COUNTY

By [Signature]

Civil Process Services

435-673-8126

Date 11/10/08

Time 11:35 a.m. / p.m.

By [Signature]

ORIGINAL

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

Attorneys for Plaintiffs

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH.

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company, and DAVID  
FISHER, an individual;

Defendants.

ORDER ON PLAINTIFFS' *EX PARTE*  
MOTION FOR ORDER REQUIRING  
RENTS TO BE DEPOSITED WITH  
THE COURT

Case No. 080502981

Judge James L. Shumate

*Return*

Before the court is Plaintiffs' *Ex Parte* Motion for Order Requiring Rents to be deposited with the Court.

The court has considered the motion, memoranda, declaration and accompanying exhibits and materials submitted by Plaintiffs, for good cause appearing, IT IS HEREBY ORDERED:

1. Plaintiffs' *Ex Parte* Motion for Order Requiring Rents to be deposited with the Court is GRANTED.

FILED  
FIFTH JUDICIAL DISTRICT COURT  
SEP 17 14 PM 2:00  
WASHINGTON COUNTY

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Q*

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company,

Defendant.

AMENDED COMPLAINT

Case No. 080502981

Judge James L. Shumate

Plaintiffs complain against defendant and allege as follows:

PARTIES

1. Plaintiff, Iota, LLC, is a Utah limited liability company.
2. Plaintiff, California Benefit, Inc. ("California Benefit") is a California corporation registered to do business in Utah.
3. Defendant, Davco Management Company L.C. ("Davco") is a Utah limited liability company.
4. David Fisher is a member and manager of Davco.

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

---

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company,

Defendant.

**SECOND AMENDED COMPLAINT**

Case No. 080502981

Judge James L. Shumate

---

Plaintiffs complain against defendant and allege as follows:


**PARTIES**

1. Plaintiff, Iota, LLC, is a Utah limited liability company.
2. Plaintiff, California Benefit, Inc. ("California Benefit") is a California corporation registered to do business in Utah.
3. Defendant, Davco Management Company L.C. ("Davco") is a Utah limited liability company.
4. David Fisher is a member and manager of Davco.

PAUL D. VEASY (3964)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Attorneys for Plaintiffs*

FILED  
FIFTH JUDICIAL DISTRICT COURT  
2010 APR 19 PM 3:58  
WASHINGTON COUNTY



---

IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company,

Defendant.

**PLAINTIFFS' TRIAL BRIEF**

Case No. 080502981

Judge James L. Shumate

---

Plaintiffs IOTA LLC and California Benefit, Inc. (collectively "Plaintiffs") submit the following trial brief.

**INTRODUCTION**

This matter is scheduled for a four-day bench trial beginning on Monday, April 26, 2010. This lawsuit arises from defendant Davco Management Company L.C.'s ("Davco") purchase of two apartment complexes located in St. George, Utah from Plaintiffs. Davco purchased an apartment complex known as the Casa Sonoma Apartments from Iota, LLC in September of 2006 and another apartment complex known as the Casa Grande Apartments from California Benefit, Inc. in November of 2006. The apartment complexes were "seller-financed" under the

it became entitled to reimbursement from Plaintiffs for any all improvements made to the apartment complexes.

**III. DAVCO SHOULD NOT BE ALLOWED TO PRESENT PAROL EVIDENCE THAT CONTRADICTS THE TERMS OF THE WRITTEN CONTRACTS AND VIOLATES THE STATUTE OF FRAUDS.**

“The rule is well settled in Utah that if the original agreement is within the statute of frauds, a subsequent agreement that modifies any of the material parts of the original must also satisfy the statute.” Eldridge v. Farnsworth, 2007 UT App 243 ¶29, 166 P.3d 639, 648 (quoting Allen v. Kingdon, 723 P.2d 394, 396 (Utah 1986)). Utah’s Statute of Frauds requires that any “estate or interest in real property, other than leases for a term not exceeding one year, [or] any trust or power over or concerning real property or in any many relating thereto” must be in writing. Utah Code Ann. §25-5-1. The agreements at issue in this case are subject to the statute of frauds.

Even if the contracts at issue in this case were not subject to the statute of frauds, extrinsic evidence is not admissible because the contracts are integrated and unambiguous. “[A]n integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.” Daines v. Vincent, 2008 UT 51 ¶22 (internal quotations and cites omitted). In this case, “the language of the contract [is] not susceptible to contrary, tenable interpretations,” and therefore, Davoc cannot submit parol evidence that is inconsistent with the language of the contracts. Id. ¶30 (internal quotations and citation omitted). For example, the notes are perfectly clear as to when the principal amounts become due and owing. Despite this, Davco wants to submit parol evidence at trial regarding the date the amounts under the notes are due. Moreover, Davco seeks to add new oral terms and conditions to the written contracts

regarding providing financial statements that clearly were not contemplated nor required by the written contracts entered into between the parties. As is well established under Utah law, the court should “determine what the parties have agreed upon by looking first the plain language within the four corners of the document.” South Ridge Homeowners’ Assoc. v. Brown, 2010 UT App 23 ¶1 (quoting Peterson & Simpson v. IHC Health Services, Inc., 2009 UT 54, ¶13).

#### **IV. BOTH DAVCO AND DAVID FISHER SHOULD BE HELD IN CONTEMPT OF COURT.**

It is undisputed and will be established at trial that prior to the filing of this lawsuit, Davco did not pay the note obligations and stopped making payments under both the Iota Note and the California Note. As a result of the defaults, Plaintiffs became entitled to all the rents, security deposits, and cash proceeds from the apartments. Davco knowingly refused to voluntarily comply with its obligations under the assignment of rents provisions during the time period from when it defaulted under the notes until the apartment complexes could be sold at foreclosure, requiring Plaintiffs to obtain an order from the Court compelling Davco and David Fisher to deposit rents with the Court. The Court’s November 4, 2008 Order required Davco and David Fisher to “deposit all rents collected from the real property commonly known as the Casa Sonoma Apartments located at 669 South 700 East, St. George, Utah, 84770 and the real property commonly know as the Casa Grande Apartments located 735 East 700 South, St. George, Utah, 84770 with the clerk of the Fifth Judicial District Court of the State of Utah.” November 4, 2008 Order. At the time the Order was issued, David Fisher was a named defendant in the lawsuit and was personally served with the Order.

Davco and David Fisher refused to comply with the Court’s November 4, 2008 Order, instead David Fisher admitted in his deposition that he and his LLC (Davco) kept the rents from

FILED

2010 APR 21 PM 5:13

5<sup>TH</sup> DISTRICT COURT  
ST. GEORGE

ph

DARWIN C. FISHER, #1080  
A Professional Corporation  
40 N. 300 East, Suite 101  
St. George, UT 84770  
Telephone No. (435) 688-1170  
*Attorney for Defendant*

IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C.,  
a Utah limited liability company,

Defendant.

**DEFENDANT'S TRIAL BRIEF**

Civil No.: 080502981  
Judge: James L. Shumate

**I. STATEMENT OF THE CASE**

This case arises from the purchase by Defendant Davco Management Company L.C. ("Davco") of the Casa Grande apartments from Plaintiff California Benefit, Inc. ("California Benefit") on September 29, 2006, and of the Casa Sonoma apartments from Plaintiff Iota LLC ("Iota") on November 30, 2006 (collectively "apartment complexes").

Davco executed promissory notes and trust deeds in favor of Plaintiffs for each purchase. The maturity date for the Casa Sonoma apartments was December 1, 2007 and the maturity date for Casa Grande apartments was December 10, 2007. Davco was unable to pay the balance due on the



not mention improvements or renovations.

Davco should receive payment or an offset for the renovations that Davco made to the apartments.

## VI. CONTEMPT OF COURT.

Plaintiffs request in the Pretrial order that David Fisher be held in contempt of court for Davco's failure to timely pay the rents it collected from August 31, 2008 to February 20, 2009.

However, the Court lacks jurisdiction to hear the contempt charges. For the Court to have jurisdiction, an affidavit of the facts constituting the contempt must be given to the Court. (See UCA § 78B-6-303) ("When the contempt is not committed in the immediate view and presence of the court or judge, an affidavit setting forth a statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt."); (see also *Crank v. Utah Judicial Council*, 20 P.3d 307 (Utah, 2001) at ¶ 28) ("Thus, in Utah, the statutory requirement of an affidavit is a procedural prerequisite to the imposition of any sanctions for indirect contempt.") (See *Robinson v. City Court for City of Ogden, Weber County*, 185 P.2d 256, 258 (Utah 1947)) ("A contempt proceeding is separate from the principal action, and in order for the court to acquire jurisdiction of the offense when committed, affidavit or initiating pleading must be filed, and unless that is done, subsequent proceedings are void.").

Since a contempt proceeding is separate from this lawsuit and Plaintiffs have not filed an affidavit setting forth the alleged acts of contempt, this Court lacks jurisdiction to determine whether Mr. Fisher should be held in contempt of court in this trial.

At the contempt hearing, if the Court finds Mr. Fisher in contempt, "the court may impose

PAUL D. VEASY (3964)  
DAVID R. HALL (9225)  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

*Attorneys for Plaintiffs*

FILED  
JUL 11-1 PM 2:50  
CLERK OF DISTRICT COURT  
WASHINGTON COUNTY, UTAH  
[Signature]

---

**IN THE FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH**

---

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation,

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C., a  
Utah limited liability company,

Defendant.

**PLAINTIFFS' POST-TRIAL BRIEF**

Case No. 080502981

Judge James L. Shumate

Plaintiffs IOTA LLC and California Benefit, Inc. (collectively "Plaintiffs") submit the following Post-Trial Brief.

**INTRODUCTION**

The Iota and California Benefit Notes matured in December 2007. Thereafter, Iota and California Benefit cooperated with Davco in allowing Davco time to refinance the Notes. Because of that cooperation Iota and California Benefit have been the victims of the acts of Davco. Rather than pay the Notes, the evidence at trial shows that Davco offered one excuse after another for its failure to refinance the Notes and Davco and David Fisher knowingly took

Davco's first primary defense of an alleged one-year extension on the Iota and California Benefit Notes after their maturity in December 2007 was addressed by the Court at the third day of trial. The Court found there are no writings executed by either Iota or California Benefit to the original Notes and Deeds of Trust and then ruled as a matter of law that Utah Code Ann. § 25-5-1 and 25-5-4 bars Davco's defense that there was a one-year extension to the Iota Note, Iota Trust Deed, California Benefit Note and California Benefit Trust Deed.

As to Davco's second primary defense that Murset failed to provide updated financial documents for 2005 and 2006, this defense also lacks merit. At trial, Murset testified that he provided seventeen months (January 2005 to May 2006) of financial documents for 2005 and 2006 to David Fisher. Murset testified that Davco's basis for its purchase offer for each apartment complex was from the seventeen months of financial statements. (Defendant's Exs. 1 through 4). Murset testified he provided his remaining months in 2006 to David Fisher in February 2007. There is nothing in the Notes or Deeds of Trust discussing an obligation to provide two complete years of financial documents for 2005 and 2006. At each closing, Davco chose to close the purchases of the Casa Sonoma and Casa Grande apartments.

In contrast, David Fisher testified that Murset had failed to provide updated financial documents for 2005 and 2006. David Fisher testified that he continued to ask for updated financials and never received them from Murset up until July 2008. (Plaintiffs' Ex. 27). Initially, this defense begs the question of Murset's testimony of why he would not provide 2005 and 2006 updated financial operating statements for the apartments especially if Davco had produced a lender committed to refinance and pay the Notes. Murset wanted to be paid for the apartments. In addition, based on the testimony of Jeff Feltwell and existing guidelines, the prior

FILED

2010 JUN -9 PM 9:55

5<sup>TH</sup> DISTRICT COURT  
ST. GEORGE

*Ohm*

DARWIN C. FISHER, #1080  
A Professional Corporation  
40 N. 300 East, Suite 101  
St. George, UT 84770  
Telephone No. (435) 688-1170  
*Attorney for Defendant*

IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

IOTA LLC, a Utah limited liability company,  
and CALIFORNIA BENEFIT, INC., a  
California corporation

Plaintiffs,

vs.

DAVCO MANAGEMENT COMPANY L.C.,  
a Utah limited liability company,

Defendant.

DEFENDANT'S WRITTEN CLOSING  
ARGUMENT

Civil No.: 080502981  
Judge: James L. Shumate

Defendant Davco Management Company L.C. (hereinafter "Davco"), through counsel,  
Darwin C. Fisher, submits this Written Closing Argument.

ISSUES TO BE DECIDED BY THE COURT

There are four issues to be decided by the Court: 1) Whether Plaintiffs are entitled to deficiency judgments; 2) Whether Plaintiffs are entitled to any of the rents collected by Davco from September 1, 2008 through February 20, 2009; 3) Whether Plaintiffs breached the covenant of good faith and fair dealing; and 4) Whether Davco and/or David Fisher (hereinafter "Fisher") are in contempt of Court.

1. Plaintiffs are not entitled to deficiency judgments because: a) the amount of indebtedness

ORIGINAL

Less the rents paid to the court.	<u>\$20,602.92</u>
Total amount of indebtedness	\$2,493,744.41
Less: Mr. Smith's Fair Market Value	<u>-\$2,650,000.00</u>
Deficiency <i>None</i>	(\$156,255.59)
Less: Mr. Lawlis' Fair Market Value	<u>-\$2,250,000.00</u>
Deficiency	\$243,744.41

D. WHETHER DAVCO WAS JUSTIFIED IN DISCONTINUING PAYMENTS TO PLAINTIFFS.

Davco denies that Plaintiffs are entitled to: 1) deficiency judgments; or 2) the rents collected by Davco from September 1, 2008 to February 20, 2009 for the following reasons:

A. **Plaintiffs' claims are barred by their breach of the purchase contracts.**

First, Plaintiffs' breach of the Real Estate Purchase contracts by failing to provide Davco with corrected financials and by failing to honor their promise that Davco could have another year to create financials under its ownership of the apartment. Plaintiffs' breach of the Real Estate Purchase contracts relieved Davco of its obligation to perform under the contract, if the breach is material. (*Orlob v. Wasatch Medical Management*, 124 P.3d 269 (Utah App., 2005) at ¶26). Whether a breach of a contract constitutes a material breach is a question of fact which is reviewed under a clearly erroneous standard. (Id.)

The courts consider the following factors to determine if the breach was material: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his

failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. (*Pack v. Case*, 30 P.3d 436 (Utah App.,2001) at ¶18).

Trial testimony established that without the financial statements, Davco could not obtain a loan to refinance the apartment complexes and would lose the apartment complexes in foreclosure, which did happen. It is clear from the evidence presented at trial that Davco lost the apartment complexes through foreclosure, and that Davco lost \$128,633.35 in the improvements to the apartments. Mr. Murset testified that he knew that Davco could not obtain financing without Plaintiffs providing the financials to Davco. The evidence at trial established that Plaintiffs did not provide corrected financials to Davco that would have allowed Davco to obtain financing.

Thus, the breach by Plaintiffs is material and relieves Davco of its duty to perform under the purchase contracts.

Second, the oral modification of the purchase contracts is not barred by the statute of frauds. "The general rule is that 'any modification of a contract that is within the statute of frauds must also comply with the statute of frauds.'" *Fisher v. Fisher*, 907 P.2d 1172, 1176 (Ut. App. 1995). When a contract is required to be in writing the alteration or modification thereof must also be in writing. *Id.* However, a recognized and accepted exception to the statute of frauds provides that where a party has changed his position under the modified agreement and where it would be inequitable to permit a party to repudiate the oral modification and seek enforcement of the written contract, the oral agreement may be removed from the statute of frauds and enforced. *Id.*

[W]here there is evidence of part performance under a modified agreement and where it would be inequitable to permit a party to repudiate the oral modification and seek enforcement of the written contract, the oral agreement may be removed from the statute of frauds and enforced. (*Fisher, Id.*, at pg 1177).

The standard for sufficient partial performance in Utah is: (1) the oral contract and its terms must be clear and definite; (2) the acts done in performance of the contract must be equally clear and definite; and (3) the acts must be in reliance on the contract. The acts in reliance must be such that (a) it would not have been performed had the contract not existed; and (b) the failure to perform on the part of the promissor would result in fraud on the performer who relied since damages would be inadequate. Reliance may be made in numerable ways all of which could refer exclusively to the contract. (*Spears, Id.* at para. 24).

“[A]cts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made by him or her must be reasonably explicable only on the postulate that a contract exists. The reason for such requirement is that the equitable doctrine of part performance is based on estoppel and unless the acts of part performance are exclusively referable to the contract, there is nothing to show that the Plaintiff relied on it or changed his [or her] position to his prejudice...” (*Spears, Id.* at para. 24)

However, under certain circumstances the exclusively referable requirement may be relaxed.

“The more conclusive the direct proof of the contract, the less stringent the requirement of exclusively referable acts.” (*Spears, Id.* at para. 24).

First. The terms of the oral contract are clear and definite. Mr. Fisher testified that Mr. Murset promised to provide financials for the apartment complexes so that Davco could obtain refinancing for the apartment complexes and when that did not happen, Plaintiffs, in March 2008,

promised to allow Davco an additional year to create two years of financials for the apartment complexes under its ownership.

Mr. Murset testified that there was no reason for him not to and in fact he did provide financials to Davco because he wanted to be paid for the apartment complexes. Mr. Thompson and Mr. Fisher testified that Mr. Murset stated in March 2008 that Davco would have an additional year to refinance the apartment complexes. In addition, both Mr. Fisher and Mr. Murset testified that they knew that Davco could not obtain refinancing of the apartment complexes without at least two years of financial statements. Lastly, in the email dated 3/26/2008, Mr. Fisher is asking Mr. Murset if he had provided the financials to Davco's broker. (Plaintiffs' Exhibit 24/Defendant's Exhibit 18).

In reliance on Plaintiffs' representation, Davco did make payments on the notes, did pay the costs for the improvements, attempted to get the refinancing, continued to manage the apartments after the maturity dates of the notes in December 2007, and increased the rents. Thus, Davco changed its position and partially performed the oral contract.

Second. The acts done in performance of the contract are equally clear and definite. Davco performed and paid for the improvements on the property, it continued to seek refinancing of the apartment complexes after December 2007, and it continued to manage the apartment complexes and to increase the rents of the apartment complexes. Mr Fisher testified that, without Plaintiffs' representations, he would not have purchased the apartment complexes, he would not have performed and paid for the improvements, nor continued to seek financing, nor continued managing the apartment complexes and increasing the rents.



Third. Davco's acts were done in reliance on the contract. Mr. Fisher testified that Davco purchased the apartment complexes and performed and paid for the improvements based upon Plaintiffs' representations that they would provide the financial statements and give Davco an additional year to refinance the apartments. He also testified that he relied upon Plaintiffs' representations in continuing to manage the apartments and increasing the rents after December 1, 2007, and seeking financing.

Thus, the oral agreement is taken out of the statute of frauds by the doctrine of part performance. And, "In an equity review of facts, if the record shows a fair preponderance or even if the evidence is balanced unevenly, the trial court finding should be sustained. If the evidence is so vague and uncertain that the finding is obviously erroneous, there may be a new finding on review." (*Spears v. Ware*, 44 P.3d 742 (Ut. 2002) at ¶23).

It would be inequitable to permit Plaintiffs to enforce the unmodified agreement. By so doing, Plaintiffs would unfairly benefit from the \$128,633.35 in improvements plus the additional payments made by Davco on the purchase contract from December 1, 2007 through August 31, 2008.

**B. Plaintiffs' claims are barred by equitable estoppel.**

Equitable estoppel "is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." (*Bahr v. Imus*, 211 P.3d 987 (Utah App., 2009) at ¶6).

To establish equitable estoppel Davco must prove: 1) Plaintiffs made a statement, and/or an

admission, and/or acted, and/or failed to act, that is inconsistent with their claims for deficiency judgment and rents; 2) Davco took action and/or inaction on the basis of Plaintiffs' statement, admission, act, or failure to act; and 3) Davco will be injured if Plaintiffs are allowed to contradict or repudiate such statement, admission, act, or failure to act. (*Whitaker v. Utah State Retirement Bd.*, 191 P.3d 814 (Utah App.,2008) at ¶22).

Davco was required to pay the balance due on the Iota Note on December 1, 2007 and on the California Note on December 10, 2007. Mr. Murset, in deposition testimony, admitted that he knew and understood that Davco would have to obtain loans to pay the balances due on the promissory notes, and Mr. Murset testified that he did give Davco financial statements for the apartment complexes.

Mr. Fisher testified that in March 2008 after Plaintiffs failed to provide two years of financial statements, Mr. Murset promised Davco could have sufficient time to create two years of financial history under its ownership of Casa Grande and Casa Sonoma. Based on Plaintiffs's statement, Davco continued to pay monthly payments to Plaintiffs and continued to refurbish the apartments and to pay the refurbishing costs. Davco paid \$128,633.35 in refurbishing costs.

In June 2008, before Davco had owned the apartment complexes for sufficient time to create the financial history required to obtain a loan, Mr. Murset told Davco to execute deeds in lieu of foreclosure or he would commence foreclosure proceedings. Mr. Fisher testified that he told Mr. Murset that even though Plaintiffs had promised Davco another year to create the financials, Davco would execute deeds in lieu of foreclosure if Davco was reimbursed by Plaintiffs for Davco's costs

expended in refurbishing several of the apartments even though Plaintiffs had promised Davco could have an additional year to create two years of financials under its ownership of the apartment complexes.

Mr. Murset and Mr. Fisher testified that Plaintiffs did not agree to reimburse Davco for the improvements. Thereafter, Plaintiffs increased Davco's monthly payments without Davco's consent and Davco refused to pay the higher monthly payment. The increase in rent would not be applied to the monies Davco owed Plaintiffs.

Davco stopped making payments after August 2008 because Plaintiffs would not honor their promise to provide corrected financials to Davco, because Plaintiffs would not honor their promise to give Davco an additional year to create two years of financials under its ownership of the apartment complexes, and because Plaintiffs raised Davco's monthly payments without Davco's consent. Without the financials, Davco could not obtain loans to refinance the apartment complexes, would not be able to complete the purchase of the apartment complexes, and would continue to pay payments, etc., until Plaintiffs foreclosed.

If Plaintiffs are awarded deficiency judgments, Davco will be injured by having paid to Plaintiffs payments under the promissory notes and paying the costs of the improvements to the apartments. If Plaintiffs are awarded the rent paid by tenants from September 1, 2008 to February 20, 2009, Davco will be further injured by having to pay Plaintiffs the additional monies.

Plaintiffs should be estopped from taking unfair advantage of Davco by promising to provide financials and promising Davco that it could have sufficient time to create financial statements under

its ownership and failing to keep their promises.

**C. Plaintiffs' claims are barred by the doctrine of waiver**

"[A] waiver is the intentional relinquishment of a known right." *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 6, 196 P.3d 588. The elements of waiver consist of: "(1) an existing right, (2) knowledge of its existence, and (3) an intent to relinquish the right." *Id.*

Plaintiffs knew they had the right to declare the promissory notes due and payable in December 2007 when Davco failed to pay the balance due under the promissory notes. Plaintiffs demonstrated their intent to waive their right to declare the promissory notes due and payable by promising Davco that they would provide the financial statements, and/or give Davco sufficient time to create the financial statements through its ownership of the apartment complexes, and/or accepting the payments from Davco through August 2008.

Therefore, the evidence establishes that Plaintiffs in December 2007 had and knew they had the right to foreclose on the apartment complexes and demonstrated their intent to relinquish it by not declaring default, by continuing to accept payments from Davco, by promising in March 2008 that Davco could have sufficient time to create two years of financials, and by continuing to represent to Fisher after December 2007 that Davco could purchase the apartment complexes.

**D. Plaintiffs' claims are barred by their breach of the covenant of good faith and fair dealing.**

A claim for breach of the implied covenant of good faith and fair dealing is based on judicially recognized duties not found within the four corners of the contract. (*See Beck v. Farmers*

*Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)). These duties, unlike the duties expressly stated in the contract, are not subject to alteration by the parties. They exist whenever a contract is entered into and are imposed on the parties “consistent with the agreed common purpose” of the contract. (*Christiansen v. Farmers Ins. Exchange*, 116 P.3d 259, 261-2 (Utah,2005) ¶ 10).

“Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party’s right to receive the fruits of the contract. *Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981); *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979). A violation of the covenant gives rise to a claim for breach of contract. *Beck*, 701 P.2d at 798.” (*St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199-200 (Utah,1991).

“The obligation of good faith requires each party to refrain from actions that will intentionally ‘destroy or injure the other party’s right to receive the fruits of the contract.’ To determine the legal duty a contractual party has under this covenant, a court will assess whether a ‘party’s actions [are] consistent with the agreed common purpose and the justified expectations of the other party.’ This court determines the ‘purpose, intentions, and expectations’ by considering ‘the contract language and the course of dealings between and conduct of the parties.’” (*Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1239-40 (Utah,2004) ¶ 43).

Plaintiffs breached the covenant of good faith and fair dealing by failing to provide financials and failing to honor their promise that Davco could have an additional year to create two years of financial statements, and by raising the payments.

Therefore, Davco was relieved of its duty to perform under the Real Estate Purchase Contracts, and Plaintiffs claims are barred .

III. THE AMOUNT OF RENTS PLAINTIFFS ARE ENTITLED TO COLLECT FROM DAVCO.

1. Casa Grande.

Plaintiffs claim that they are entitled to \$106,575.00 for rents collected by Davco from 9/1/08 to 2/20/09. (Plaintiffs' Exhibit 81)

Plaintiffs have the burden to prove the amount of rents actually collected by Davco. Plaintiffs presented summaries of rents at trial which they claim were collected by Davco. (Plaintiffs' Exhibit 81 and Exhibit 80) However, the evidence presented at trial proves that Plaintiffs' accounting is not accurate.

Mr. Murset admitted at trial that he assumed that rents not paid to the Court were paid to Davco and included them in his summaries. He also testified that he had receipts from tenants showing that Davco received the rents. On cross examination, Mr. Fisher presented the receipts to the Court and demonstrated that the receipts were for rent for other apartments or otherwise were not proof that Davco was paid the rent. Mr. Fisher testified and Mr. Murset agreed that Plaintiffs also included monies paid by tenants for utilities and maintenance in the rents. Therefore, Plaintiffs' accounting is flawed and Plaintiffs have failed to meet their burden of proof.

Mr. Fisher admitted at trial that Davco had collected rents and presented summaries showing the amount of the rents collected by Davco. (Defendant's Exhibits 86, 87, and 89) The summaries

not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract. *Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981); *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979). A violation of the covenant gives rise to a claim for breach of contract. *Beck*, 701 P.2d at 798." (*St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199-200 (Utah,1991).

"The obligation of good faith requires each party to refrain from actions that will intentionally 'destroy or injure the other party's right to receive the fruits of the contract.' To determine the legal duty a contractual party has under this covenant, a court will assess whether a 'party's actions [are] consistent with the agreed common purpose and the justified expectations of the other party.' This court determines the 'purpose, intentions, and expectations' by considering 'the contract language and the course of dealings between and conduct of the parties.'" (*Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1239-40 (Utah,2004) ¶43).

Plaintiffs breached the covenant of good faith and fair dealing by failing to provide financials, by failing to honor its promise to give Davco sufficient time to create two years of financial statements under its ownership of the apartment complexes, and by raising Davco's monthly payment.

Therefore, Davco was relieved of its duty to perform under the purchase contracts, and Plaintiffs are barred from collecting deficiency judgments and a judgment for rents. Davco is also entitled to judgment against Plaintiffs for the improvements he made in the sum of \$128,633.35.

#### V. CONTEMPT OF COURT.

Plaintiffs request in the Pretrial Order that David Fisher be held in contempt of court for

Davco's failure to timely pay the rents it collected from November 10, 2008 to February 20, 2009.

However, the Court lacks jurisdiction to hear the contempt charges. For the Court to have jurisdiction, an affidavit of the facts constituting the contempt must be given to the Court. (See UCA §78B-6-303) ("When the contempt is not committed in the immediate view and presence of the court or judge, an affidavit setting forth a statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt."); (see also *Crank v. Utah Judicial Council*, 20 P.3d 307 (Utah, 2001) at ¶ 28) ("Thus, in Utah, the statutory requirement of an affidavit is a procedural prerequisite to the imposition of any sanctions for indirect contempt.") (See *Robinson v. City Court for City of Ogden, Weber County*, 185 P.2d 256, 258 (Utah 1947)) ("A contempt proceeding is separate from the principal action, and in order for the court to acquire jurisdiction of the offense when committed, affidavit or initiating pleading must be filed, and unless that is done, subsequent proceedings are void.").

Since a contempt proceeding is separate from this lawsuit and Plaintiffs have not filed an affidavit setting forth the alleged acts of contempt, this Court lacks jurisdiction to determine whether Mr. Fisher should be held in contempt of court in this trial.

At the contempt hearing, if the Court finds Mr. Fisher in contempt, "the court may impose a fine not exceeding \$1,000, order the person incarcerated in the county jail not exceeding 30 days, or both." (UCA § 78B-6-310). The Court may also award the Plaintiffs the actual loss they suffered and the actual attorney fees and costs they incurred caused by Mr. Fisher's contempt.

If an actual loss or injury to a party in an action or special proceeding is caused by the



contempt, the court, in lieu of or in addition to the fine or imprisonment imposed for the contempt, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and expenses. The order and the acceptance of money under it is a bar to an action by the aggrieved party for the loss and injury. (UCA 78B-6-311)

Davco did not immediately pay the rents to the court because; 1) Plaintiffs had promised that Davco would have sufficient time to create financial statements for the apartment complexes to enable Davco to obtain a loan to refinance the apartments; 2) based on Plaintiffs' promise, Davco expended more than \$128,000 to refurbish the apartments; 3) before the two years had passed Plaintiffs asked for a deed in lieu or they would foreclose on the apartments; 4) Davco agreed to give Plaintiffs a deed in lieu if Plaintiffs would reimburse it the monies it had expended on refurbishing the apartments; 5) Plaintiffs refused to reimburse Davco for Davco's costs in refurbishing the apartments; 6) Davco believed it was entitled to the rents to reimburse it for the costs of refurbishing the apartments because Plaintiffs had breached their agreement to allow Davco sufficient time to create financial statements.

It is important to note that Plaintiffs' original complaint included Mr. Fisher as a defendant even though Plaintiffs knew that Mr. Fisher had not guaranteed payment of the promissory notes. Plaintiffs moved for an expedited ruling, received the order requiring Fisher to pay the rents into the Court, and then filed an amended complaint dropping Mr. Fisher as a defendant, all before Mr. Fisher had served an answer. (See Court file)

It is clear that Plaintiffs included Mr. Fisher as a defendant in the original complaint so that the Court could have personal jurisdiction over him to include him in the Court's order requiring the

rents be paid into the Court. It is equally clear that Plaintiffs filed the original complaint in violation of Rule 11 knowing that they did not have a valid cause of action against Mr. Fisher.

Therefore, Davco and Mr. Fisher request that the Court rule that Mr. Fisher is not bound by the Court's order requiring rents to paid into the Court.

It should be noted that Plaintiffs did not present any evidence of the actual loss they suffered and the actual attorney fees and costs they incurred caused by Davco's and/or Mr. Fisher's alleged contempt. Therefore, Plaintiffs should not be awarded a judgment against Davco or Mr. Fisher for contempt of Court.

DATED this 9<sup>th</sup> day of June, 2010.

A handwritten signature in black ink, appearing to read 'Darwin C. Fisher', is written over a horizontal line.

DARWIN C. FISHER  
Attorney for Defendant

## Tab 17

ORIGINAL

IN THE FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE  
WASHINGTON COUNTY, STATE OF UTAH

-o0o-

I-O-T-A LLC, and CALIFORNIA )  
BENEFIT, )

Plaintiffs, )

Case No. 080502981

vs. )

TRIAL

DAVCO MANAGEMENT COMPANY )  
and DAVID FISHER, )

(Volume One)

Defendants. )

-o0o-

BE IT REMEMBERED that on the 26th day of April,  
2010, commencing at the hour of 9:03 a.m., the above-entitled  
matter came on for hearing before the HONORABLE JAMES L.  
SHUMATE, sitting as Judge in the above-named Court for the  
purpose of this cause, and that the following proceedings were  
had.

-o0o-



DEPOMAXMERIT  
LITIGATION SERVICES

1125

1 agreement executed by

2 I-O-T-A?

3 A No.

4 Q On behalf of I-O-T-A, did you ever enter  
5 into a one-year extension of this note?

6 A No. Neither written nor verbal.

7 Q When was the first time that you had heard  
8 that there was a claim by Davco that the maturity date  
9 had been extended for one year?

10 A After he stopped payment on the checks in,  
11 I think that was September.

12 Q Okay.

13 A And he wrote a letter and he contained  
14 that in the letter.

15 Q Okay. Let's go from the time of maturity,  
16 up to that point in time of approximately September  
17 and go quickly through this.

18 THE COURT: Counsel, let's make sure.  
19 This is September, 2008, sir?

20 THE WITNESS: Yes.

21 THE COURT: Okay.

22 MR. VEASY: Okay.

23 Q (By Mr. Veasy) So, loan matures December  
24 of 2007. Were there monthly payments received by  
25 I-O-T-A after the loan had matured?

26 A Yes.

1 weren't getting paid off. And so partially in an  
2 effort to, I don't know, console my wife, whatever, I  
3 asked for an additional--an increase in the payment to  
4 be made to her.

5 Q Okay. Let me ask you this. In June of  
6 2000, (sic) do you recall sending an e-mail--

7 THE COURT: Counsel, the record is a  
8 little murky because your last question to Murset  
9 referred to June, 2007. Do you really mean June,  
10 2008?

11 MR. VEASY: Thank you.

12 THE WITNESS: Oh. Yes.

13

14 MR. VEASY: I do.

15 THE COURT: All right. I thought so.

16 MR. VEASY: Thank you. Okay.

17 Q (By Mr. Veasy) Let's--let's go back here.

18 June of 2008. Was there an event in 2008 where you  
19 requested from Davco that the loan be paid off?

20 A Every time I saw them.

21 Q Okay. In June of 2008, did you request  
22 that the loan be paid off by--in July of 2008?

23 A Yes.

24 Q Okay. What was the response of Davco?

25 A I don't recall there being, really, any  
26 response, other than "I'm trying."

1 MR. FISHER: No objection to that.

2 THE COURT: Okay. No. 16 is now the  
3 notice of default. That's where we'll stop, there.

4 MR. VEASY: But we're not quite there.  
5 Okay.

6 Q (By Mr. Veasy) Now, the Court has taken  
7 aware of the fact of the dates, the maturity dates,  
8 the provisions within the deeds--

9 THE COURT: All of those are now in the  
10 record, Counsel, and they speak for themselves.

11 MR. VEASY: Okay. We'll move along here.

12 Q (By Mr. Veasy) Now, are you aware of,  
13 with--with the Casa Sonoma deed of trust, are you  
14 aware of any amendments, written amendments executed  
15 by I-O-T-A of that deed of trust?

16 A No.

17 Q With respect to the promissory note and  
18 deed of trust for Casa Grande, are you aware of any  
19 written amendments executed by California Benefit for  
20 either the note or the deed of trust?

21 A No.

22 Q Your testimony with respect to Casa  
23 Sonoma, would it be fair to state to this point,  
24 including the monthly payments were also done on  
25 behalf of Casa Grande?

26 A Yes.

1           A       I just told him I was going to give him  
2       some names of some other mortgage brokers.

3           Q       Okay. And do you recall receiving Mr.  
4       Fisher's e-mail the next day on March 26th?

5           A       Yes.

6           Q       And he refers to a--an e-mail that he  
7       received from his broker asking him the status of  
8       2006/2007 year-to-date operating statements, how were  
9       those coming? Did I read  
10      that--

11          A       That's correct.

12          Q       What was your understanding as to the  
13      purpose of his e-mail to you?

14          A       Well, just like when we asked  
15      pros--prospective tenants, Are you a good renter?  
16      We--we don't really ask them that, we ask their former  
17      landlords. And so, mortgage companies typically will  
18      go to the source of the information to make sure that  
19      it's correct. So, I was being asked to, again,  
20      provide the 2005/2006 financials to the mortgage  
21      company so that they know it came from me.

22

23                   MR. VEASY: Offer Exhibit 24.

24                   THE COURT: Any objection to 24?

25                   MR. FISHER: No objection.

26                   THE COURT: 24 is in.



1 Q (By Mr. Veasy) 25.

2

3 MR. FISHER: Exhibit what?

4 MR. VEASY: 25.

5 Q (By Mr. Veasy) This is the June 3, 2008,  
6 e-mail from Richard Murset to David Fisher. Do you  
7 recognize this e-mail?

8 A Yes.

9 Q And what was the purpose behind you  
10 sending this e-mail to David Fisher?

11 A Just to remind him that we were in default  
12 and six months passed and I want to get cashed out.

13 Q Okay. Why had you continued to accept the  
14 monthly payments?

15 A Because I was giving--I guess I was trying  
16 to help him get what he needed and that was to  
17 refinance. I didn't--you know, I don't want to be  
18 here, I wanted it to be refinanced.

19 Q Why didn't you simply foreclose?

20 A Could have, but then we'd be here.

21 Q Were there representations being made to  
22 you that refinancing was coming?

23 A Yes.

24 Q Okay.

25 A Every month.

26 Q Okay. In this e-mail, Exhibit 25, you're

1 checks.

2 Q Okay. Was that a fair statement made by  
3 David Fisher in that first sentence of Paragraph 3?

4 A Yes.

5 Q Was that the first time other than--and  
6 the first time in writing--well, strike that. With  
7 respect to the issue on improvements, was the first  
8 time you had heard about payment for improvements at  
9 that September 9, 2008, meeting?

10 A I believe so.

11 Q Okay. During--do you know when these  
12 improvements were made to the apartments?

13 A They were made in the--right after he  
14 bought them until maybe March or so, 2006--2007.

15

16 Q Okay. Do you recall ever being consulted  
17 during the time the improvements were being made?

18 A No. I don't think I even was on the  
19 property after that.

20 Q Okay. Were you ever invoiced at any time  
21 for the improvements prior to September 9, 2008?

22 A No.

23 MR. VEASY: Offer Exhibit 31.

24 THE COURT: Any objection to 31, Counsel?

25 MR. FISHER: No.

26 THE COURT: 31 is in.

1           A       That's the records that we received from  
2     the Court showing payments by tenants and the total of  
3     \$7,400.

4           Q       Okay. So, what is the amount you're  
5     claiming owed by David Fisher after the entry of the  
6     Court order dated November 4th, 2008?

7           MR. FISHER: Your Honor, we're going to  
8     object to any amounts owed by David Fisher.

9           THE COURT: I understand the nature of  
10    your objection, Counsel, and that'll be a legal  
11    conclusion that the Court will have to reach. I'll  
12    receive the testimony, though the actual liability and  
13    the assignment of liability, if there is any, will be  
14    determined by the Court as a conclusion of law, at the  
15    afterward portion; but this is the claim made by the  
16    plaintiff and you do in fact, claim this \$71,119.17?

17          THE WITNESS: That's correct.

18          THE COURT: All right. Exhibit No. 81 is  
19    received; however, the Court's got some questions and  
20    you've got it there in front of you, sir.

21                I'm interested with your left-hand column  
22    breaks it out between the two apartment buildings and  
23    if you will look with me, Unit No, 15 in Casa Grande.

24          THE WITNESS: Yes.

25          THE COURT: You show \$1,400 received after  
26    the Court order of November 4. And then--the total of

1 says from the maturity date--

2 THE WITNESS: Oh. Okay.

3 MR. FISHER: --which is 12-1-07 to  
4 February 20th, '09. Here, it's only the six months,  
5 which would be from September through 2009, February  
6 20th, 2009.

7 Q (By Mr. Fisher) Why the difference?

8 A They're written under different trust  
9 deeds, such as the Casa Grande note, which your  
10 Prestige Title provided, it says a default rate, but  
11 there is no default rate. And so, we've used seven  
12 percent, which is the normal rate.

13 Q I'm not referring to the discount rate.  
14 I'm referring to differences in the dates.

15 You're charging for interest starting in  
16 December, 2007, for Casa Sonoma, but you don't  
17 charge--or you're charging for interest starting  
18 September, 2008, for Casa Grande. Do you know why?

19 A I don't--I don't really recall this. It's  
20 been a little while since I looked at this, but--

21 Q Okay. No, that's fine, if you don't  
22 recall, you don't recall.

23 Did you, after December, when--in 2007,  
24 when the balloon payment was due, after that period of  
25 time, did you send David a notice of default?

26 A No.

1 Q In fact, you were continually trying to  
2 help, or hoping that you could--that he'd be able to  
3 refinance and purchase them; correct?

4 A That's correct.

5 Q You also testified that in June or July of  
6 2008, someone asked you for a pay-off amount; is that  
7 correct?

8 Okay. Who was that that asked?

9 A InWest Title.

10 Q And did you give it to them?

11 A Yes.

12 Q I'm just trying to clean up just a couple  
13 of little things before I actually start with what I  
14 have.

15 Would you turn to Plaintiffs' Exhibit 36,  
16 please?

17 MR. VEASY: Darwin, which exhibit?

18

19 MR. FISHER: Pardon?

20 MR. VEASY: Which exhibit?

21 MR. FISHER: 36.

22 Q (By Mr. Fisher) Do you have that?

23 A Yup.

24 Q Now, if you'll go down near the bottom  
25 where it says total?

26 A Yes.

1 Q Now, that's divided by 11 instead of 12  
2 months; correct?

3 A Yes.

4 Q Okay. Why was that?

5 A 'Cause this is dated January 31st.

6 Q Okay. Would you go to Exhibit No 28,  
7 please? We've--we've looked at that document a number  
8 of times. You--you mentioned that you feel it was not  
9 unreasonable to ask for a request for the deed in lieu  
10 because of the--he'd only put \$40,000 down; correct?

11 A That's correct.

12 Q Do you consider it reasonable, where he's  
13 already put down \$128,000 in improvements?

14 A That was his choice.

15 I must say, if I got a deed in lieu at  
16 that time and if he was able to provide a deed in  
17 lieu, and I'm not sure he could with the five--500,000  
18 on there, we wouldn't be here and there would be no  
19 damages, other than we would both have lost a little  
20 money and we could have been as we were at the  
21 beginning.

22 Q Who is Sandra Asunsolo?

23 A That woman right over there.

24 MR. FISHER: Are you going to have her  
25 testimony?

26 MR. VEASY: Not today.

1 establish--

2 THE COURT: He might be the best source of  
3 this information.

4 MR. FISHER: That would be fine. That  
5 will be fine.

6 Q (By Mr. Fisher) Now, you knew that David  
7 would need financials for the apartments in order to  
8 refinance and pay the promissory notes when they  
9 matured; correct?

10 A Yes.

11 Q Did you provide him with financials?

12 A Yes.

13 Q And if you look at Plaintiffs' Exhibit No.  
14 3, are those the financials that you provided to him?

15 THE COURT: Counsel, Plaintiffs' Exhibit  
16 No. 3 is a Deed of Trust.

17 MR. VEASY: Plaintiffs' or Defendants',  
18 Darwin?

19 MR. FISHER: Defense.

20 THE COURT: That's what I thought.

21 THE WITNESS: Defendants' 3?

22 MR. FISHER: I hate this--I hate this.

23 THE COURT: In the white book.

24 THE WITNESS: Okay.

25 MR. FISHER: Too confusing to have two  
26 separate--

1 THE COURT: I'm glad you didn't both us  
2 black binders, Counsel, we'd have been really lost.

3 MR. FISHER: Yeah. True.

4 THE COURT: All right.

5 Q (By Mr. Fisher) Are you--Exhibit 3?

6 A No. 3.

7 Q Okay.

8 A Yes.

9 Q Is that--are those the--well, these are  
10 the--Exhibit No. 3 are the documents that you said in  
11 your deposition that you had given to David, financial  
12 documents; correct?

13 A That's correct.

14 Q All right. The--now, you also testified  
15 that on PL-265, 266, 267, 269, the address that's  
16 written down below is David's writing; is that  
17 correct?

18 A Yes.

19 Q Are you still certain of that?

20 A I'm certain that he was the only one who  
21 wrote on them besides me.

22 Q Okay. And that's not your writing?

23 A No.

24 Q So you're certain that that's David's  
25 writing?

26 A Yes.



1 Q Okay. Now, you, in fact, in deposition,  
2 you testified that you know that this is--or these are  
3 the documents you gave to David because he did write  
4 the address on some of them; correct?

5 A That's one way, yes.

6 Q Now, Exhibit 3, did you prepare all these  
7 documents?

8 A Everything in No. 3?

9 Q Uh huh (affirmative).

10 A No.

11 Q Okay. There are some documents that you  
12 received from David; correct?

13 A Yes.

14 Q Okay. So, how could these be the--the  
15 documents that you gave to David for financials, if  
16 some of them were prepared by David?

17 A Those aren't financials.

18 Q Well, there's--some are financials in  
19 here; correct?

20 A I provided from 2002 to year-to-date 2006  
21 financials to David for Casa Grande--or actually,  
22 California Benefit and I-O-T-A.

23 Q If you didn't--

24 A If you're trying to say that all of these  
25 other things that David produced, that I gave him, no,  
26 I didn't give those to him.

1 Q But you initially testified in deposition  
2 that Exhibit No. 3 were the financials that you gave  
3 to David; correct? That was your initial testimony.

4 A The financials that I gave David, yes.

5 Q This packet? You gave this packet to us  
6 and said, this is the packet I gave David; isn't that  
7 correct?

8 A Oh, then--then I was mistaken, because  
9 David produced some of these documents.

10 Q And not only that, in your deposition, you  
11 realized there couldn't have been--

12 MR. VEASY: I'm going to object, your  
13 Honor, on an improper use of the deposition. If he  
14 has a question to pose to him and it's (inaudible) in  
15 the deposition, there's an--an inconsistency, that's  
16 fine; but for Counsel to just simply say, you said  
this in your deposition is improper.

18 THE COURT: Well, where, within the Utah  
19 Rules of Evidence do we look at that? Is it because  
20 we don't have a proper foundation for this  
21 cross-examination? He's on cross, he can ordinarily  
22 lead and suggest and do all sorts of things on cross.

23 MR. VEASY: But--but my understanding  
24 under Rule, I think it's 32, use of a deposition is,  
25 to ask him a question and if he--and if he's  
26 inconsistent with that, then he can use his deposition

1 testimony.

2 THE COURT: All right.

3 MR. FISHER: I--I think he's--

4 THE COURT: So, Mr. Fisher has now asked,  
5 Do you remember in your deposition testifying like  
6 this? The witness has responded. If he wants to  
7 really nail it down, he can pull out the deposition,  
8 but if he doesn't want to go that far, Counsel, I'll  
9 let it stand where it is. That's overruled.

10 Q (By Mr. Fisher) Let's turn to PL-272,  
11 please.

12 THE COURT: This is within Exhibit No.--

13 MR. FISHER: 3.

14 THE COURT: --3?

15 Let me get down to it.

16 PL-272 is a document with I-O-T-A LLC at  
17 the top, the address in Hurricane, January 1, 2006,  
18 December 31, 2006; is that right, Counsel?

19

20 MR. FISHER: That's correct.

21 THE COURT: Okay.

22 Q (By Mr. Fisher) And you prepared this  
23 document; is that correct?

24 A Yes.

25 Q And now, this document, this page, PL-272,  
26 you couldn't have possibly given to David prior to the

1 closings; correct?

2 A No. I--I didn't give him this document.  
3 I gave him a year-to-date.

4 Q That's--year-to-date. And that's what he  
5 had in order to purchase the--the apartments; correct?

6

7 A That's right.

8 Q All right.

9 A Through May of '06.

10 THE COURT: Mr. Murset, was this document  
11 generated through the software that you've earlier  
12 told me about?

13 THE WITNESS: Yes.

14 THE COURT: Okay. And when you gave it to  
15 David, it would have ended some time, I'm presuming,  
16 August or September, 2006?

17 THE WITNESS: No. I didn't have that one  
18 then. I--I don't--the one I produced that was a  
19 partial year was to the end--I believe the end of May  
20 of 2006.

21 THE COURT: May of 2006? Okay. Thank  
22 you.

23 THE WITNESS: This particular item was  
24 given in February of 2007.

25 Q (By Mr. Fisher) Why do you say that?

26 A Because when I was looking through to

1 find--see, this one was printed in 2009 and so I was  
2 looking for the one that I had printed earlier and  
3 that's when it was, after I had done my taxes.

4 Q And this is printed February 27th, 2009;  
5 correct?

6 A That's correct.

7 Q Okay. And you said you did give this to  
8 him at a later date? Not--

9 A At a later date.

10 Q Okay.

11 A In--

12 Q So, your--in your deposition testimony,  
13 when you testified that this packet, you had given it  
14 to him in your meeting prior to the closing of the--of  
15 the sale is incorrect?

16 A I just re-read my deposition and we had  
17 probably 50 copies of all of these and I can tell you  
18 it was pretty confusing. And you were asking me to  
19 decide if I gave him one copy or another and they all  
20 have the same information on them. So, I could have  
21 been confused in my deposition on what I gave  
22 him--well, no, I'm not confused on what I gave him.  
23 Which individual paper I gave him, I may be confused  
24 on.

25 Q Now, do you specifically recall giving  
26 PL-272 to David?

1           A       That's where you're asking me that kind of  
2 question, because that was printed in--in '09 and so  
3 that particular printing of that one, I don't recall  
4 giving to him. That information, yes, I did give him.

5           Q       When did--did you give him another  
6 statement?

7           A       Yes.

8           Q       And when did you do that?

9           A       In February of 2008--or 2007.

10          Q       And how--how do you know it was February,  
11 2007?

12          A       'Cause that's the print date and I had  
13 a--I had a note on it.

14          Q       Okay. Now,--

15               THE COURT: So the record's clear, sir,  
16 what you're telling me is that you had the ability to  
17 look at a different document than is PL-272 and by  
18 looking at that document and seeing the print date on  
19 it of February, 2007, assure yourself that that was  
20 roughly the time that you gave the data that is shown  
21 on PL-272 to Mr. David Fisher, as he requested a  
22 year-to-date--not a year-to-date, but a full year of  
23 2006, that's when you printed it out and gave it to  
24 him 'cause you had it in your tax records?

25               THE WITNESS: That's correct.

26               THE COURT: I think I've got it put

1 together.

2 THE WITNESS: And so, actually--

3 THE COURT: Oh, you don't have to go back  
4 there, just wait for Mr. Fisher's next question.

5 MR. FISHER: Your Honor, we have the  
6 originals and we'd ask that be published, although I  
7 think under the rules, we don't need to do that  
8 anymore, but--

9 THE COURT: I don't think we need to  
10 publish it anymore, but if you've got a copy of it,  
11 Counsel, let's make it part of the record.

12 Thank you, Counsel.

13 Q (By Mr. Fisher) Would you go to Page 50  
14 of your deposition, Mr. Murset?

15 On there, I'm going to read the, where it  
16 says Q-Question and then it you'll read Answer, which  
17 is your answer.

18 Says--I'm starting with Line 23, Page 50.

19 All right. Going to PL-272 which is  
20 I-O-T-A LLC profit and loss statement for January 6,  
21 through December '06, any writing on that page  
22 David's?

23 A No.

24 Q And how do you know he received that  
25 document?

26 A Because I gave it to him.

1 Q And you specifically recall that the  
2 document you gave him contained PL-272?

3 A Yes.

4 Q Okay. Referring to P--oh, excuse me.  
5 Skip down if you would, to Line 16.

6 Okay. Why would PL-272 be part of these  
7 documents that you gave David, then?

8 A The part you're--you're skipping--

9 THE COURT: It's not your problem to worry  
10 about what he skips, sir. Would you just read the  
11 answer beginning on Line 18?

12 THE WITNESS: Okay. Where--where am I?

13 MR. FISHER: Down to 18.

14 THE COURT: What was your answer at Line  
15 18?

16 THE WITNESS: Because I don't keep a  
17 year-to-date ones, he would have that one.

18 Q (By Mr. Fisher) No. No. What I'm  
19 referring to is, why is PL-272 included with the  
20 documents that you gave David?

21 A Oh. 23, you mean.

22 Okay. I did give these to David. You're  
23 asking me, did I give him at the same meeting? No.

24 Q Okay. And if you'd go to 52?

25 THE COURT: And pick up on Line 1, if you  
26 will, sir.



1 to him, how would he have it?

2 A I did give it to him. You asked me if I  
3 recalled giving it to him.

4 Q Okay. How do you know you gave it to him  
5 if you don't recall giving it to him?

6 A When you were in this deposition with me,  
7 you were asking me specifically, such as, was this  
8 particular paper, the paper that--that I gave him, or  
9 do you remember being there, you know, what was the  
10 day like, all of that; I know that I gave him the  
11 information.

12 Q But you also said in your deposition that  
13 Exhibit No. 3, all of those docu--all of those papers  
14 in Exhibit No. 3 you gave him prior to closing.

15 A Well, I didn't.

16 Q Obviously.

17 And okay, that's--

18 A All the financials--

19 Q --that's enough.

20 A --in that exhibit I gave him.

21 Q And looking at No.--Exhibit--or PL-273,  
22 again, that's a profit and loss statement for  
23 California Benefit from January 1st, '06 through  
24 December 31st, '06; correct?

25 A Yes. It's--

26 Q And that date on that is also February

1 27th, '09, the print date.

2 A That's correct.

3 Q So, you couldn't have given that to David  
4 prior to the closing; correct?

5 A I can show you what I did--the print-out  
6 that I did give him.

7 Q Well, I only have what I--what you've  
8 given me so far and what I have on deposition, so--

9 A It looks just like this.

10 Q Well--

11 A But it has the different print date.

12 Q Yeah.

13 THE COURT: Sir, the California Benefit's  
14 transaction for Casa Grande closed before the end of  
15 2006; is that correct?

16  
17 THE WITNESS: That's correct.

18 THE COURT: So, the data that you might  
19 have given David if you did give him any data prior to  
20 that closing would not have been this full, total  
21 calendar year, 2006?

22 THE WITNESS: That's correct.

23 THE COURT: It would have been  
24 year-to-date?

25 THE WITNESS: Yes.

26 THE COURT: So, it would have had the same

1 column numbers on the left-hand, designation of  
2 utilities, gasoline, et cetera, et cetera, but the  
3 actual dollar figures on the right-hand side would  
4 have been different because they were year-to-date and  
5 not total year?

6 THE WITNESS: That's right. It was only  
7 through May.

8 THE COURT: And it would have probably  
9 borne a different print date, because this one that  
10 you had here was actually printed almost two years  
11 after the fact?

12 THE WITNESS: That's right.

13 THE COURT: Okay.

14 Next question, Counsel?

15 MR. FISHER: Okay.

16 Q (By Mr. Fisher) And--and also with  
17 PL-273, you don't recall giving that to David? Or  
18 that was your testimony in deposition; correct?

19 A It's--no. I--not that one.

20 Q I'm confused by that. You're saying that  
21 you do not remember giving that one to him either;  
22 correct?

23 A I gave him this one.

24 Q Okay. But you just--

25 A That one is dated later, so, I didn't give  
26 him that one in February.

1 MR. FISHER: Okay. Thank you.

2 THE COURT: --next question.

3 Q (By Mr. Fisher) Now, going to PL-276,  
4 that couldn't--that document could not have--you could  
5 not have given that document to David prior to the  
6 closing; correct?

7 A That's David's document.

8 Q Pardon?

9 A That's David's document.

10 Q Okay. So, it was not one you gave to him?

11 A No.

12 Q Okay. 277. Is that--are you--is it still  
13 your testimony that you gave this to David prior to  
14 the closing?

15 A No. He gave that to me prior to the  
16 closing.

17 Q Okay. 278. Is it still your testimony  
18 that David gave--or that you gave this to David,  
19 this--this document packet to David prior to the  
20 closing?

21 A That's David's document. I did not give  
22 it to him.

23 Q Okay. And 279, same testimony?

24 A Same testimony. I obviously understood  
25 that what we were talking about in 39 was my  
26 production and not any of David's production.

1 Q Pardon? You're--you're--

2 A If you're saying in--what you're trying to  
3 do is say that I produced these documents and gave  
4 them to David prior to closing. When you asked me in  
5 deposition, Did you give these documents to David, I  
6 was referring to the financial statements, not David's  
7 statements.

8 If you look on Page 54, I answer all those  
9 that they are David's.

10 Q Oh. I was looking at the wrong one.

11 (Inaudible)

12 A And Page 59, also refer--I mean--

13 Q Please don't--

14 A --55.

15 Q Please don't talk until--

16 THE COURT: There's not a question  
17 pending, sir. Just hang on a second until Mr. Fisher  
18 finds what he wants.

19 Q (By Mr. Fisher) Okay. If you'd go to  
20 Page 46 of your deposition, please.

21 Let's see, this one (inaudible) you have,  
22 do you have the first or second (inaudible)

23 On Line 4, I'll read the question and if  
24 you'll read the answer: I'm showing you what we've  
25 marked as Exhibit 39. Are these the documents that  
26 you say you gave to David prior to him purchasing

1 these apartments?

2 What is your answer?

3 A Yes.

4 Q Going to Page 47, Line 2. Okay. And  
5 Exhibit No. 39 consists of pages that are Bate stamped  
6 PL-265 through PL-281.

7 THE COURT: And your answer, sir?

8 THE WITNESS: That's correct. Sorry.

9 Q (By Mr. Fisher) And now, again, these are  
10 the financial statements you referred to that you said  
11 that you provided to David in a meeting; correct?

12 A That's correct.

13 Q Now, would you go back to Exhibit--well, I  
14 don't want to have to go through all of these. No,  
15 we don't have that one.

16 Okay. Going back to, if you look at  
17 PL-269, Exhibit 3, now, you--that's your writing up  
18 there that says corrected to show only 13 years;  
19 correct?

20 A That's correct.

21 Q And why did you have to correct that to  
22 show just the Casa Sonoma Apartments?

23 A 'Cause I-O-T-A has more assets than Casa  
24 Sonoma.

25 Q Okay. Because for I-O-T-A, it contains  
26 more apartments or more property than Casa Sonoma--

1 A Yes.

2 Q --correct?

3 A Yes.

4 Q And so you had to go back and correct  
5 that; correct?

6 A Yes.

7 Q Now, is that true on--for example, if we  
8 go to PL-272, did you have to correct that?

9 A If I was trying to show just Casa Sonoma,  
10 I would have tried to--I would have had to correct  
11 that.

12 Q Okay. And then would that be the same for  
13 PL-273?

14 A No.

15 Q And why is that?

16 A Because California Benefit only has that  
17 one property.

18 Q Okay. So, it's only Casa Sonoma that you  
19 have to weed out the other properties when you--

20 A That's correct.

21 Q All right. Now, did you have to, for your  
22 accountant, did you have to also correct the I-O-T-A  
23 statement to show each property?

24

25 A Separating--

26 THE COURT: Counsel, when you say for your

1 THE COURT: No. 3's in.

2 Q (By Mr. Fisher) Would you turn to  
3 Defendants' Exhibit No. 1, please?

4 MR. VEASY: No. 1?

5 MR. FISHER: 1.

6 MR. VEASY: Thank you.

7 Q (By Mr. Fisher) Do you recognize that  
8 document?

9 A Yes.

10 Q What is it?

11 A It's things that I sent to Darcy Thompson.

12 Q Okay. 2005?

13 A Yes.

14 Q Okay. And do you recall why you sent them  
15 to Mr. Thompson?

16 A Just trying to find a buyer for my  
17 property.

18 Q And did you prepare the documents in  
19 Exhibit 1?

20 A Most of them.

21 Q Okay. Which ones didn't you re--prepare?

22 A DT-027, DT-026, DT-025, DT-023, DT-021.

23 Q And you sent those to him because, at that  
24 point, he thought he had a buyer for the property?

25 A He had someone interested in multi-family  
26 property.



1 Q Okay. Did you later find out that was  
2 Davco?

3 A I did, later.

4 Q Okay. The sale with--in 2005 to Davco did  
5 not go through; correct?

6 A I don't even recall ever seeing earnest  
7 money.

8 Q In fact, I think in your deposition, you  
9 testified you don't recall of anything happening in  
10 2005; correct?

11 Yeah. Your first recollection is in  
12 approximately August or September of 2006; correct?

13 A That's correct.

14 Q Going--

15 MR. FISHER: We'd ask that Exhibit 1 be  
16 admitted, your Honor.

17 MR. VEASY: No objection.

18 THE COURT: All right. There being no  
19 objection, it's in.

20 Q (By Mr. Fisher) Turning to Exhibit No. 2,  
21 do you recognize that document? It's--the first page  
22 is profit and loss statement for California Benefit,  
23 January 1, '05, through July 31, '05.

24 A Yes.

25 Q Did you prepare that?

26 A Yes.

1 A Pardon?

2 Q You state in there rents are good and  
3 vacancies are usually filled fast; is that correct?

4 A That's what I was told.

5 Q Okay. And that's what you believe?

6 A I had no reason not to believe it.

7 Q Okay. When did you draft this letter?

8 A Probably two weeks, three weeks prior to  
9 the sale.

10 Q Okay. You knew that David was doing  
11 renovations; correct?

12 A He said he was or he said he had.

13 Q Did you ever go and check on those  
14 renovations?

15 A No reason to.

16 Q After you acquired the apartments back in  
17 February, 2009, did you go in and look at the  
18 apartments that were refurbished?

19 A I went to whatever one--I went to the ten  
20 empty ones.

21 Q They were refurbished?

22 A No.

23 Q Okay. So, you haven't--you haven't gone  
24 into the refurbished apartments?

25 A I've seen some of them.

26 Q Okay. And do you believe that they

1 increased the value of the property?

2 A No.

3 Q Now, you agreed with--you agreed that  
4 David could refurbish the apartments; correct?

5 A He said he was going to, yes.

6 Q And I think you testified in deposition  
7 that you believed the only--that in refurbishing you  
8 saw some repairs, such as carpets replaced, stoves  
9 replaced, dishwashers replaced and walls painted;  
10 correct?

11 A Yes.

12 Q Did he also replace the cabinets?

13 A Some.

14 MR. FISHER: Your Honor, could I just have  
15 a minute? I think I'm basically done.

16 THE COURT: Counsel, maybe this is a good  
17 time to take our mid-afternoon recess and let everyone  
18 sort of get things in order.

19 Why don't we take 15 minutes, come back  
20 into session at 3:30 and give you a better idea to  
21 know where you are.

22 MR. FISHER: Okay. Thank you.

23 THE COURT: We'll be in recess 15.

24 (Recess)

25 THE COURT: Thank you, everyone. We're  
26 back on the record in I-O-T-A vs. Davco.

1 hearsay.

2 THE COURT: --that's Ms. Asunsolo's note  
3 and she's not--you're not offering 48, are you, Mr.  
4 Veasy?

5 MR. VEASY: I--I was, that's fine, I'll  
6 get that in through her.

7 THE COURT: Okay. She can testify as to  
8 that.

9 MR. FISHER: 49, no objection, your Honor.

10 THE COURT: No objection to 49. That's  
11 in.

12 MR. VEASY: 56 through 59, you'll have the  
13 same concern with the one.

14 THE COURT: All right, Counsel.

15 Q (By Mr. Veasy) Now, on cross-examination,  
16 you were posed the question, do you recall whether you  
17 provided the financial statements for 2005 and 2006 to  
18 Davco.

19 A Yes.

20 Q Okay. And your answer was yes; correct?

21 A Yes. I did.

22 Q How do you know you provided the 2005  
23 financial statements to Davco?

24

25 A They were the basis of the whole purchase.

26 Q What do you mean by that?

1           A       All of those numbers were used in David's  
2     analysis and offers.

3           Q       By offers, you mean offers, the purchase  
4     price--the offer to purchase the apartments?

5           A       Yes. He did it at various cap rates.

6           Q       Okay.

7           MR. FISHER: . Excuse me, was that 2005,  
8     Counsel?

9           MR. VEASY: 2005.

10          Q       (By Mr. Veasy) Now, 2006, there was a  
11     conversation with the Court where you stated that it  
12     was your recollection that you had provided a  
13     document, February, 2007. Do you recall that answer?

14          A       Yes.

15          Q       Okay. And it was correct that you  
16     provided that document to Davco in February, 2007,  
17     which reflected the 2006 financials?

18          A       Yes. Year-end.

19          Q       Do you have that document that you were  
20     holding up in your left hand?

21          A       Yes.

22          THE COURT: This is the document that had  
23     the sticky note on it, Counsel?

24          MR. VEASY: Yes.

25          THE COURT: We should note for the record  
26     that today is the 30th anniversary of the sticky note.

1 Its inventors have been inducted into the Inventors  
2 Hall of Fame.

3 MR. VEASY: I--I can't let that go by  
4 without asking the Court, how do you know that trivia?

5 THE COURT: Every now and then I listen to  
6 the radio, Counsel, and that floated through my brain  
7 this morning.

8 MR. VEASY: So noted.

9 Q (By Mr. Veasy) Okay. Is this the  
10 document you're referring to?

11 A Yes.

12 Q Was this document in the documents you had  
13 at the deposition?

14 A Yes.

15 Q And at the deposition, you were requested  
16 to bring all of the documents of I-O-T-A and  
17 California Benefit; correct?

18 A Yes.

19 Q And you have these milk cartons, I know,  
20 back here as your files; right?

21 A Yes.

22 Q Was this document within those documents?

23 A Yes.

24 Q And as I recall, you didn't have all the  
25 documents when the deposition started; correct?

26 A That's correct.

1           Q       You went home and you pulled everything  
2   and brought it there; correct?

3

4           A       That's right.

5           Q       Did you then take all these documents and  
6   give them to Mr. Darwin Fisher for him to look at?

7           A       Yes.

8           Q       And this is one of the documents in that  
9   stack of documents?

10          A       Yes.

11                 MR. VEASY: Let's mark this.

12                 MR. FISHER: Your Honor, we're going to  
13   object. That document was not presented to us, all  
14   the documents that had financials in that deposition  
15   that he presented to us on Casa Sonoma--Cas--or Casa  
16   Grande and Casa Sonoma, I took copies of and made  
17   exhibits to the deposition. And there is--that  
18   document is not found in any of those financials. I  
19   took copies of every one of them and I made them part  
20   of the deposition.

21                 THE COURT: Counsel, I have the original  
22   deposition in front of me. I do not have any exhibits  
23   appended to the deposition that I have here in front  
24   of me nor is the deposition that I have in front of me  
25   even signed by Mr. Murset. The--

26                 MR. FISHER: Your Honor, I do have the

1 deposition exhibits here.

2 MR. VEASY: Well--

3 THE COURT: --the basic concern that I  
4 have is this, Mr. Fisher, and I don't know exactly how  
5 you want to address is. There appears to be a  
6 question of fact between the sides as to whether or  
7 not the document that Mr. Veasy has just handed to the  
8 clerk to have marked was delivered at discovery.

9 The real bottom line question I have is,  
10 why is there a fight over this one when the real  
11 determination that the Court's going to have to make  
12 is whether or not prior to close on the Casa Grande as  
13 well as the Casa Sonoma properties, Mr. David Fisher  
14 had these financials?

15 MR. VEASY: Let me--

16 THE COURT: That's the real heart of it.  
17 The fact that this particular document here was used  
18 by Mr. Murset in order to refresh his memory of the  
19 transactions and when various things were delivered,  
20 specifically when this document was delivered, not at  
21 closing, but within 30 days of the end of 2006, when  
22 Mr. David Fisher would have begun the process of  
23 seeking refinancing on the property and seeking to  
24 support that refinancing with the financials.

25 How is that going to bear any relevance to  
26 whether or not it--this particular version of that



1 data was produced at the deposition?

2 MR. FISHER: Well, what they complain is  
3 that he had the 2005 and 2006, therefore, he had two  
4 years of financials to be able to refinance by  
5 December, 2007. That was not the case. We did not  
6 have 2006, we could not--

7 THE COURT: Well, I know that's your  
8 position in the matter, Counsel. The testimony that I  
9 have right now, it's unrebutted because I've only got  
10 one witness so far. The testimony that I have right  
11 now is that it was delivered. You will give me  
12 testimony and evidence that it was not delivered, it  
13 was not had in David's hands prior to closing, was not  
14 had during any of the pertinent time periods in 2007  
15 and in fact, it was even requested in one of the  
16 e-mails that's already been placed into evidence right  
17 now, i.e., the 2005-2006 financials, David even made  
18 that request in one of his reply e-mails to Mr.  
19 Murset. That's already in the evidence before me.

20 MR. FISHER: I understand.

21 THE COURT: How is this going to help me  
22 as to whether or not it was available at Mr. Murset's  
23 deposition in August of 2009? Why are we fighting  
24 over this?

25 MR. FISHER: Well, I guess the reason I'm  
26 fighting is one, that we had, as Counsel's already

1     done to us, that this is a late delivery of a document  
2     that was never produced, therefore, it should not be  
3     admitted into evidence and that's exactly what I'm  
4     saying. It was never produced to us and therefore, it  
5     should not be admitted now on the say-so that they did  
6     produce it when they cannot prove they did.

7                 THE COURT: Well, Counsel--

8                 MR. VEASY: That was not--

9                 THE COURT: --the other concern that I  
10    have is making a record as to what it was, sometimes  
11    this document was unreferenced in Mr. Murset's  
12    testimony. I am going to, at least at this time,  
13    sustain your objection, but have this document marked  
14    and filed with the clerk of the Court so that the  
15    record is secure. Frankly, I'm not convinced of its  
16    probative value yet, but at least it's there and if  
17    you want to move to re-enter it at some time, Mr.  
18    Veasy, during the litigation, if it becomes key, then  
19    we can re-visit this and I shall humbly go to the  
20    annotated version of the Rules of Evidence that I have  
21    on the computer screen here and go where we need to.

22                 MR. VEASY: Okay.

23                 THE COURT: So, let's take that--what mark  
24    have you got on it, Counsel?

25                 MR. VEASY: That is Exhibit 82.

26                 THE COURT: Defendants' 82 is filed with

1 the clerk of the Court, offered by not received.

2 MR. VEASY: Okay.

3 THE COURT: Plaintiffs' Exhibit 82.

4 Q (By Mr. Veasy) Mr. Murset, is there any  
5 reason why you would not provide the 2005 and 2006  
6 financial statements to Davco?

7 A None. That would be contrary to what I  
8 was trying to accomplish.

9 Q And that is to get refinanced and paid?

10 A That's right.

11 MR. VEASY: Thank you, your Honor.

12 THE COURT: All right.

13 Anything more, Mr. Darwin Fisher?

14 MR. FISHER: No. No.

15 THE COURT: All right. Mr. Murset, thank  
16 you, sir. You may step down. I'm not going to make  
17 you lug the milk boxes with you, we can wait until we  
18 recess.

19 THE WITNESS: Okay. Thanks.

20 THE COURT: Okay. Your next witness, Mr.  
21 Veasy.

22 MR. VEASY: Thank you. I'd like to call  
23 David Fisher as an adverse witness under Rule 6-11(c).

24 THE COURT: All right. Mr. David Fisher,  
25 if you'll come forward, sir? And Mr. Fisher, if  
26 you'll face my clerk, raise your hand and be sworn.

## Tab 18

IN THE FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE  
WASHINGTON COUNTY, STATE OF UTAH

-oOo-

I-O-T-A LLC, and CALIFORNIA )  
BENEFIT, )

Plaintiffs, )

Case No. 080502981

vs. )

TRIAL

DAVCO MANAGEMENT COMPANY )  
and DAVID FISHER, )

(Volume Two)

Defendants. )

-oOo-

BE IT REMEMBERED that on the 27th day of April,  
2010, commencing at the hour of 9:01 a.m., the above-entitled  
matter came on for further hearing before the HONORABLE JAMES  
L. SHUMATE, sitting as Judge in the above-named Court for the  
purpose of this cause, and that the following proceedings were  
had.

-oOo-



DEPOMAXMERIT  
LITIGATION SERVICES

333 SOUTH RIO GRANDE  
SALT LAKE CITY, UT 84143  
WWW.DEPOMAXMERIT.COM

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.  
Machine-generated OCR, may contain errors.

TOLL FREE 800-337-6629  
PHONE 801-328-1188  
FAX 801-328-1189

1026

1           Q       Do you recall testifying in your  
2       deposition that Mr. Murset told you after he examined  
3       your file that he had given David the same financials  
4       that you had in your file?

5           A       Yes.

6           Q       In one of your conversations with Mr.  
7       Murset, do you recall him telling him that he had  
8       given David an additional year to finance the  
9       apartments?

10          A       Vaguely.

11          Q       Okay. Would you like to refresh your  
12       memory?

13          A       Sure.

14                 MR. FISHER: Your Honor, again, I only  
15       have the two.

16                 THE COURT: Come on up and you can--

17                 MR. FISHER: Oh, I could--I could share  
18       with him.

19                 THE COURT: If you want to share with Mr.  
20       Thompson, that's fine, Counsel.

21                 What page are we on?

22                 MR. FISHER: We are on Page--excuse me,  
23       I've got to go back, I can't remember from walking up  
24       here.

25                 Page 41.

26                 THE COURT: All right. Thank you,

1 Counsel.

2 THE WITNESS: Uh huh (affirmative).

3 MR. FISHER: Help to refresh--

4 THE WITNESS: Yeah. You bet.

5 Q (By Mr. Fisher) Page 41. When--if you'll  
6 read where it says "A" and I'll read where it says  
7 "Q".

8 A Okay.

9 Q Okay. Says, before we get to the second  
10 meeting--

11 A The only meeting. The--the wit--

12 Q Yeah.

13 A Yeah. The witness: It was only--the only  
14 time we ever met face-to-face, wasn't it?

15 Q And let's skip down here, Getting back to  
16 the telephone conversation, did you tell him what  
17 documents you had required?

18 A During the telephone conversation, no. He  
19 asked me if I had a file and I said yes, I have it, I  
20 haven't looked at it in a couple years, and if he  
21 could take a look at it and see if it was the same  
22 thing I--he had.

23 Q Did you ask--did he ask you in that  
24 telephone conversation specifically about any  
25 documents that might be in your file?

26 A No. He just wanted to see if I had the

1 same documents I had.

2 Q What else do you recall him saying in that  
3 telephone conversation?

4 A Other than he had taken it back on  
5 foreclosure, probably the only real thing briefly was  
6 said was the reason he had taken it is because Mr.  
7 Fisher wasn't able to get financing for them, he had  
8 given them, I think it was another year and then there  
9 was no payment received by Mr. Murset from Mr. Fisher.

10 Q Okay. Thank you. Does that refresh your  
11 memory?

12 A A little bit.

13 MR. FISHER: That's all.

14 THE COURT: Anything more, Mr. Veasy?

15 MR. VEASY: Just a few questions.

16 \*

17 \*

18 REDIRECT EXAMINATION

19 BY MR. VEASY:

20 Q Exhibit 63. This real estate purchase  
21 contract in August, 2005.

22 A Okay.

23 Q And it's August of 2005; correct?

24 A Correct.

25 Q Counsel asked you, when he referred to the  
26 financials in Exhibit 61, specifically Bate stamp No.



1 THE WITNESS: No.

2 THE COURT: Thank you.

3 Anything else, Counsel?

4 MR. VEASY: Two more questions.

5 Q (By Mr. Veasy) Counsel referred to your  
6 deposition--

7 A Yes, sir.

8 Q --and I'll just note on line, Page 42,  
9 Line 13. Quote: So, they had worked out something  
10 for seller financing for another year, I guess.

11 A Yes. Sounds correct.

12 Q Okay. And I asked you in direct if you  
13 were part of any meeting in 2008, with either Mr.  
14 Fisher or Mr. Murset and your answer was no--

15 A No.

16 Q --correct?

17 And you have no knowledge as to whether  
18 there was any written agreement signed by either party  
19 with respect to a one-year extension?

20 A Correct.

21 Q And sir, would it be correct to state that  
22 you're guessing as to whether there was a one-year  
23 extension?

24 MR. FISHER: I'm going to object. He  
25 testified that he was told--

26 THE COURT: Counsel, his testimony in the

1           A       Because that was--there's a different  
2       entity involved. I was working to refinance the  
3       properties owned by Davco Management and I had no  
4       knowledge of any other ownership, so--

5           Q       Let me ask you this. Do you recall  
6       putting together an application for a loan?

7           A       Yes.

8           Q       Do you recall who the applicant was?

9           A       It was David Fisher.

10          Q       Okay. If it was David Fisher, you  
11       mentioned Davco, would you not be submitting an  
12       application in the name of Davco if you thought Davco  
13       was the owner?

14          A       I was assuming that David Fisher and Davco  
15       were the same entities.

16          Q       Okay. Now, we talked about David Fisher  
17       supplying you with some financial statements for the  
18       apartment complexes.

19          A       Yes.

20          Q       Do you recall what year that was?

21          A       Partial year of 2006 and then 2007.

22          Q       Okay. Do you ever recall Mr. Fisher  
23       supplying you with any financial operating statements  
24       for 2005?

25          A       No.

26          Q       Okay. Do you ever recall asking him for

1 credit report, the--the appraisal and the rent rolls,  
2 he--he said that the file was--was too weak to be able  
3 to--to move forward.

4 Q Okay. Were applications submitted in the  
5 name of David Fisher?

6 A Yes.

7 Q Okay. Do you recall why the loan  
8 applications were denied?

9 A Again, it was--it was a combination of--of  
10 layered risk, of--of weak credit. The appraisal did  
11 not come--did not provide sufficient equity and--and  
12 the lack of the two-year history.

13 Q From the owner of the property?

14 A From the owner of the property, yes.

15

16 Q Okay. You mentioned the credit, what do  
17 you mean by that?

18 A There were numerous foreclosures on the  
19 credit report that dated back into 2004, 2005, as I  
20 recall. Those were a big problem.

21 Q How so?

22 A Because it indicated a history of  
23 financial mismanagement.

24 Q Okay. Let me have you look at Exhibit 65  
25 for--

26 THE COURT: Which color book, Counsel, so

1 we don't get confused?

2 MR. VEASY: I always like the plaintiffs'  
3 book. The black one, please.

4 THE COURT: The black one. Okay.

5 Q (By Mr. Veasy) Do you recognize Exhibit  
6 65?

7 A Yes. This is the--the standard credit  
8 denial form that we use when we are indicating  
9 that--that we are not going to be able to provide  
10 financing.

11 Q Do you recognize the signature on this  
12 document?

13 A Yes. That's Tracy O'Kelley.

14 Q Who is she?

15 A She was the operations manager for E  
16 Mortgage.

17 Q And what was your duty or title at that  
18 time?

19 A I was a senior mortgage consultant, I  
20 believe.

21 Q Okay. And as part of the duties of being  
22 a senior mortgage consultant, would you have  
23 involvement with Ms. O'Kelley?

24 A Yes,

25 Q And would you have discussed the  
26 application and the denial with her?

1 A Yes.

2 Q And would you have been a part of this  
3 Exhibit 65 Statement of Credit Denial, Termination or  
4 Change?

5 A Yes.

6 Q Okay. Would she have sent that out  
7 without having reviewed it with you?

8 A No.

9 Q Okay. Let's go through this briefly.  
10 Applicant is David Fisher; correct?

11 A Yes.

12 Q And it's not Darwin Fisher?

13 A No.

14 Q And it's not Davco?

15 A Correct.

16 Q And that was who was told to you to be the  
17 applicant?

18 A Yes.

19 Q Okay. And we have a series of boxes here.  
20 talking about Paragraph 1, renewal or credit has been  
21 denied; correct?

22 A Correct.

23 Q Explain those boxes to us.

24 A Okay. Delinquent credit obligations  
25 has--has been checked. And then information from a  
26 consumer reporting agency has been checked. Again,

1 those refer to the credit reports, the--the problems  
2 with credit as--as one of the reasons for credit  
3 denial.

4 Q Okay. Then you also have on the right  
5 side "other" under Box F; right? Insufficient funds  
6 to close loan.

7 A Yeah. And--and that would require to  
8 the--the lack of equity, because the appraisal did not  
9 support enough equity in the property.

10 Q And the box you have below that checked  
11 "seasoning requirements," what does that mean?

12 A That, again, has to do with--with the lack  
13 of the two-year history.

14 Q By the owner of the property?

15 A By the owner of the property, yes.

16 Q Okay. Now, I notice at the bottom of the  
17 page--

18 THE COURT: Counsel, let me explore that a  
19 little bit more--

20 MR. VEASY: Sure.

21 THE COURT: --carefully.

22 Sir, when you say seasoning requirements  
23 means a two-year history by the owner of the property,  
24 are you telling me that the lenders are requiring that  
25 the owner/applicant be able to show a two-year history  
26 in the property?

1 THE WITNESS: Yes.

2 THE COURT: A prior history from a prior  
3 owner within that same two-year window would not be  
4 acceptable?

5 THE WITNESS: Apparently, in this case,  
6 no. As I recall in talking with Mr. Martositz, he  
7 felt--it was his opinion, as the lender, that--

8 MR. FISHER: Your Honor, I'm going to  
9 object. That is hearsay.

10 THE COURT: Well, and it does look like  
11 we're getting into hearsay and I can't solicit hearsay  
12 and be free from error in my own proceedings, sir.  
13 Much as I would love to do that, I can't get away with  
14 it either, my hands would be stained.

15 My concern about it is after you inquired  
16 into this one lender represented by Mr. Martositz, did  
17 you look at any other lenders?

18 THE WITNESS: No. He was the--again, I  
19 was--I had--I started with three.

20 THE COURT: Right.

21 THE WITNESS: But quickly eliminated two  
22 and he was my re--only remaining source.

23 THE COURT: And his response was  
24 insufficient seasoning and we can't get into the  
25 reasons for that.

26 Thank you.

1     that--that the rep here locally was incompetent.

2           Q       Okay. And I believe you stopped the one  
3     with the bank because Mr. Martositz made some comments  
4     to you; correct?

5           A       Yes.

6           Q       How long had you been doing commercial  
7     loans up to that point with apartments?

8           A       This was the first one that I'd ever  
9     attempted to do.

10          Q       And that's why you relied so heavily on  
11     Mr. Martositz?

12          A       Well, as a broker, again, my job is only  
13     to line up, to connect the individuals. The lender is  
14     the one that ultimately has all the control and makes  
15     all the decisions.

16          Q       Okay. My question again, is--is that why  
17     you relied so much on Mr. Martositz, because you--this  
18     was really your first commercial--

19          A       Yes.

20          Q       --loan?

21          A       Yes.

22          Q       Just starting out?

23          A       I--

24          Q       I mean in the commercial loan--

25          A       Yes.

26          Q       --for apartments?



1           A       Yeah. And I--and I approved the form,  
2   yes.

3           Q       Is there anywhere on there that you marked  
4   that you approved it?

5           A       No.

6           Q       No? And do you recall actually looking at  
7   this form for--that we've been talking about, these  
8   forms? Do you have a memory right now, do you  
9   remember sitting down and looking at those forms?

10          A       I do.

11          Q       Now, do you recall testifying in your  
12   deposition that you do not know if the loan would have  
13   been approved if the seasoning requirements had been  
14   met?

15          A       At the time that I did the deposition, I  
16   said that, yes. As I have thought about it since, I  
17   would say that that was not entire issue.

18          Q       But that's what you said in your  
19   deposition; correct?

20          A       That's correct. It's hard to remember  
21   things that far back.

22          Q       Yeah. It is, isn't it?

23                 Do you recall ever talking with David,  
24   that because of his financial--personal financial  
25   situation, that he should--or whether or not there  
26   might be someone else that he could put the

1 apartments--use--in their name and use them as  
2 financing?

3 A I think that--I--in talking with Mr.  
4 Martositz, we talked about bringing in a co-signer, if  
5 you would, but he did not feel that that would even  
6 work.

7 Q Okay. But do you--my question was, do you  
8 recall suggesting that to David?

9 A I can't recall.

10 Q Okay. Could have?

11 A I could have, but I--I can't recall.

12 Q Now, is it your understanding in 2007,  
13 that for a person to obtain a loan on apartments, that  
14 that person had to have those apartments in his name  
15 for at least two years?

16 A It's my understanding, correct, yes.

17 Q You did not--but you got that from Mr.  
18 Martositz?

19 A Yes.

20 Q Okay. Had you done any loans on  
21 apartments other than this loan that you attempted  
22 to--

23 A No. No.

24 Q Okay. Would it be fair to say that as to  
25 the requirement of financials, that the owner had to  
26 have financials or whether he could use the financials

Tab 19

ORIGINAL

IN THE FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE  
WASHINGTON COUNTY, STATE OF UTAH

-o0o-

I-O-T-A LLC and CALIFORNIA	)	
BENEFIT,	)	
	)	
Plaintiffs,	)	Case No. 080502981
	)	
vs.	)	<u>TRIAL</u>
	)	
DAVCO MANAGEMENT COMPANY	)	( <u>Volume Three</u> )
and DAVID FISHER,	)	
	)	
Defendants.	)	

-o0o-

BE IT REMEMBERED that on the 29th day of April,  
2010, commencing at the hour of 9:45 a.m., the above-entitled  
matter came on for further hearing before the HONORABLE JAMES  
L. SHUMATE, sitting as Judge in the above-named Court for the  
purpose of this cause, and that the following proceedings were  
had.

-o0o-



DEPOMAX MERIT  
LITIGATION SERVICES

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.  
333 SOUTH RIO GRANDE  
SALT LAKE CITY, UTAH 84101

Machine-generated OCR, may contain errors.

1127  
TOLL FREE 800-337-6629  
PHONE 801-328-1188

1 Q Okay. You've already been--I'm sorry. We  
2 don't need to go through that.

3 Okay. David, would you please tell us how  
4 you first become involved with the Casa Sonoma and  
5 Casa Grande Apartments?

6 A It was in summer of 2005.

7 Q Okay. And at that time, did you meet Mr.  
8 Murset?

9 A No.

10 Q Okay. And tell me what your involvement  
11 was?

12 A I had an interest in purchasing it, Casa  
13 Sonoma and Casa Grande.

14 Q Okay. Both of them?

15 A Yes.

16 Q Okay. And was there a contract--

17 A Just--I'm sorry. Just one of them, but  
18 the--it was a combined deal.

19 Q Okay. What do you mean by a combined  
20 deal?

21 A I couldn't buy just one.

22 Q Okay.

23 A I was mostly interested in Casa Sonoma, it  
24 had better numbers, but he was only willing to sell  
25 both of them or neither one of them.

26 Q All right. And was there actually a real

1 estate contract drawn up?

2 A Yes.

3 Q And did you sign it?

4 A I had my realtor sign it. I wasn't  
5 available to sign it.

6 Q Okay. Did--do you know if Mr. Murset  
7 signed it? .

8 A Yes.

9 Q Okay. And--

10 A Well, I wasn't there when he signed it.  
11 I--I assume that's his signature on it.

12 Q And did that sale go through?

13 A No.

14 Q Why not?

15 A After we'd agreed upon price and--and  
16 signed it, Mr. Murset notified us--notified me that  
17 his son was a realtor and they were looking at  
18 improving the property, raising the rents and--or his  
19 son had indicated to him, apparently to Mr. Murset,  
20 that he felt that he could improve the property, raise  
21 the rents and--and sell it for more.

22

23 Q Okay. Did you receive any financials on  
24 the apartments in 2005?

25 A I did.

26 Q Would you turn to Exhibit 1 of the

1 plain--defendants' exhibit book.

2 A Okay.

3 Q Do you recognize that document?

4 A These documents in Exhibit 1?

5 Q Yes.

6 A Yes.

7 Q And what are they?

8 A They're--well, it says on these, rent  
9 roll, but all it does is just indicate what the rent  
10 is that's being charged at the time and it has the  
11 person's--the tenant's name, phone number, what size  
12 filter they use and what their monthly rent is.

13

14 Q Okay. And there was profit and loss  
15 statements as well?

16 A Yes.

17 Q And looking at that, there's on DT-019,  
18 there's a profit and loss from I-O-T-A from January to  
19 July--through July, 2005; correct?

20 A Correct.

21 Q Did you receive that?

22 A I did.

23 Q Then DT-020 is the profit and loss for  
24 California Benefit for the same time--period of time  
25 from January through July of 2005; correct?

26 A Correct.

1 Q Did you receive that?

2 A I did.

3 Q Okay. The I-O-T-A profit and loss  
4 statement, the DT-019, did Mr. Murset indicate to you  
5 that that included other properties?

6 A I'd asked him about it when I read what  
7 was down at the bottom.

8 Q Okay. And what did he say?

9 A Which indicated that this profit and loss  
10 for

11 I-O-T-A represented income and expenses for more than  
12 just Casa Grande--Casa Sonoma.

13 Q In 2005, did you actually get a profit and  
14 loss statement from Mr. Murset that showed you the  
15 profit and loss, solely for the Casa Sonoma  
16 Apartments?

17 A No.

18 Q Okay. So, as I understand it, the  
19 transaction did not close then in 2005?

20 A Correct.

21 Q You became involved again in the purchase  
22 of the apartments in 2006?

23 A Yes.

24 Q And how did that happen?

25 A Darcy Thompson, that I understood was  
26 representing Mr. Murset, contacted Lori Muscolino,



1     which is a realtor that I was using on a regular  
2     basis.

3           Q     Let me interrupt you there. I'm going to  
4     follow this in order if I can.

5           MR. FISHER: I'm sorry, your Honor.

6           Q     (By Mr. Fisher) Go to Exhibit No. 2.

7           A     Okay.

8           Q     And do you recognize that?

9           A     Yes.

10          Q     And what is it?

11          A     It looks like the same page as Exhibit No.  
12     1, but the page marked DT-019.

13          Q     Okay. And is Exhibit No. 2 the actual  
14     documents you received in 2005?

15          A     I believe so, yes.

16          Q     Okay. Now, would you go back then and say  
17     how were you involved, continue, in 2006?

18          A     Darcy Thompson representing Mr. Murset,  
19     contacted Lori Muscolino, who I was using on a--using  
20     on a regular basis to buy and sell properties and from  
21     her remarks, she said that he had called to see if I  
22     was still interested in purchasing Casa Sonoma and  
23     Casa Grande.

24                 And, so, I responded to her that I had  
25     some interest and she got that back to him.

26          Q     Okay. Did you request financials from Mr.

1 Murset in 2006?

2 A I did.

3 Q Okay. Would you turn to Exhibit No. 3,  
4 please?

5 Now, this has already been identified by  
6 Mr. Murset in his testimony as the documents that, in  
7 deposition, he stated that he had given to you in--in  
8 2006; do you recall that?

9 A Him stating that?

10 Q Uh huh (affirmative).

11 A Yes. I recall that.

12 Q Okay. Did you get that packet in 2006?  
13 Exhibit No. 3, which is Exhibit 39 to the deposition?

14 A I got some of it.

15 Q Let's go to Exhibit No. 4. Do you  
16 recognize that document?

17 A Yes.

18 Q What is that?

19 A That's the profit and loss statement year  
20 to date for I-O-T-A from January 1st to May 31st of  
21 '06.

22 Q Okay. And looking at the other documents,  
23 are these the documents you received from Mr. Murset  
24 in 2006?

25 A Yes.

26 Q Okay. Going back to Exhibit No. 3, if

1 Q Okay. Did you also receive that document?

2 A I did.

3 Q All right. Now, is that your writing on  
4 that document as well?

5 A Yes. All of it is.

6 Q Okay. Could you explain to us why you  
7 were writing on these documents?

8 A Well, when I received them, it had a lot  
9 of charges on it I--I'm not accustomed to, like dues  
10 and subscriptions, gasoline, things like that. So, I  
11 called Rick to ask him what they were for, if those  
12 were things that were normal with that piece of  
13 property because I--I hadn't run into it with  
14 properties I'd been involved with.

15 And so, he says, no, that's--that has to  
16 do with another property and I said, okay. And asked  
17 for another one. Then another--when I say "another  
18 one," another expense item. And--and so at that  
19 point, I--I said, well, how--how many of these are not  
20 accurate? And he said, well, there's a few of them in  
21 there. I said, well, let's go through them one by  
22 one. So--

23 Q Let's take number one, then, where you  
24 have the \$206.81. Is that for office supplies?

25 A Yes.

26 Q Okay. Why did you write "closer" there?

1 and made this sheet. And then I called the appraiser,  
2 Stan McConkie, and I knew him, he was my stake  
3 president, so, I knew he did commercial appraisals,  
4 and so, I gave him a call, I said, how do you  
5 determine value? And--and so, he--he told me how to  
6 calculate--

7 MR. VEASY: Objection, hearsay.

8 THE COURT: Well, Counsel, he's not  
9 (inaudible)

10 THE WITNESS: Correct. He didn't  
11 tell--I'm sorry. He didn't tell me the numbers, he  
12 just said, well, you add this up to get potential  
13 gross income, then you subtract the vacancy rate which  
14 gives you effective gross income. And then from that,  
15 you subtract your expenses to get a net operating  
16 income and then you use a capitalization rate and from  
17 that, you can determine the value.

18 Q (By Mr. Fisher) Okay. And that's what  
19 you did?

20 A That's what I did.

21 Q Going back to Exhibit No. 4. Did you ever  
22 get a corrected profit and loss statement, which  
23 showed just the Casa Sonoma Apartments from Mr. Murset  
24 for the year 2005?

25 A Not for 2005 nor 2006.

26 Q Okay. Now, if you, on--on this first page

1 of Exhibit No.--well, I guess the third page of  
2 Exhibit No. 4, did you try to use that in order to  
3 obtain a loan?

4 A I couldn't, it was--it wasn't accurate.

5 Q And that was because it included other  
6 properties?

7 A Yeah.

8 Q Okay.

9 A And no lender's going to--try and convince  
10 a lender saying, well, I know I've written these  
11 numbers in, but they're true, so, you can believe me.  
12 And so, I--

13 Q Okay. Would you go to the--over to the, I  
14 think--believe it's the third, fourth, fifth page, the  
15 profit and loss statement for California Benefit from  
16 January through July, 2006--I mean, through May, 2006.

17 A Okay.

18 Q Okay.

19 A For?

20 Q California Benefit?

21 A California Benefits.

22 MR. VEASY: Which number are you on,  
23 Darwin?

24 MR. FISHER: It's Exhibit 4.

25 MR. VEASY: Thank you.

26 THE WITNESS: January through May; right?

1           Q       (By Mr. Fisher) Is that your writing on  
2     the--the full year of profit and loss statement for  
3     California Benefit for 2005?

4           A       Yes. All of it is.

5           Q       Okay. Now, tell us why your writing is on  
6     those two documents?

7           A       Same reason; after I was done with I-O-T-A  
8     profit and loss statements, I asked him if there was  
9     any expenses with California Benefits that weren't  
10    accurate, and so we went through each one, one by one  
11    and did the same thing. If--if he says no,  
12    that's--that wasn't there, that was for something  
13    else, then I drew a line through it. If he said that  
14    it is, yeah, that's a lot closer to being correct, I  
15    wrote down closer. If it was an average, then I did a  
16    17-month average again.

17          Q       Okay.

18          A       In some cases, he--he--especially when you  
19    get into repairs and H.V.A.C. repairs, he was saying  
20    that a lot of that was just one-time only expenses and  
21    so, it's--that's not accurate and so, between the two  
22    of us came up with an amount of approximately, like in  
23    this case, \$40 per unit.

24          Q       Did he ever give you a revised profit and  
25    loss statement for California Benefit for January  
26    through December, 2005?

1           A       No.

2           Q       And you didn't use this--the profit and  
3   loss statement from January through December of 2005  
4   for financing purposes, for the same reason you didn't  
5   use the Casa Sonoma?

6           A       That's right. It wasn't accurate, so...

7           Q       Did you ever receive a January through  
8   December profit and loss statement for the year 2006,  
9   for California Benefits

10          A       No.

11          Q       Now, you heard Mr. Murset's testimony that  
12   he had a--that he had given you one of those, I don't  
13   recall which one, if it was I-O-T-A or California--or  
14   Casa Sonoma or Casa Grande's financial--profit and  
15   loss statement for 2006 in February of 2007. Do you  
16   recall that?

17          A       Him saying he did?

18          Q       Yes.

19          A       I remember him saying he did.

20          Q       Did you ever receive it?

21          A       I did not.

22          Q       Okay. In the discovery, you--you've  
23   reviewed all the discovery we received from Mr.  
24   Murset; correct?

25          A       Correct.

26          Q       Did you ever see a profit and loss

1 statement that was dated February, 2007, for one  
2 of--either Casa Sonoma or Casa Grande, the print  
3 date--

4 A For the year--

5 Q --the print date of 2--or February, 2007?

6 A For the year 2006?

7

8 Q Right.

9 A Printed in '07? No.

10 Q Okay. Now, you--you determined the price  
11 from the in--this information that was given to you;  
12 correct?

13 A Correct.

14 Q Okay. And had you--was there any further  
15 discussion with Mr. Murset about receiving any further  
16 financials?

17 A Yeah. I needed the financials to be able  
18 to get financing.

19 Q Okay.

20 A The lenders needed more than just one year  
21 of financials.

22 Q And what did Mr. Murset tell you?

23 A He said he'd get them for me.

24 Q Okay. And it's been pointed out in  
25 questioning that the contract that you signed does not  
26 provide for the providing of financials; is that



1 Q Uh huh (affirmative).

2 A We did.

3 Q When was the first time you had  
4 conversation with him regarding it?

5 A I think we started talking about it  
6 in--no, I--if I remember correct, I think it as July,  
7 August, he was checking up on how things were going.

8 Q Okay.

9 A And let him know that I had a lot of the  
10 improvements done, had talked to a couple of  
11 lenders--or brokers, I guess, and that--that they're  
12 indicating to me that they would like to see a whole  
13 year, a complete calendar  
14 year--

15 MR. VEASY: Hearsay.

16 Q (By Mr. Fisher) What did you tell Mr.  
17 Murset?

18 THE COURT: Counsel, (inaudible) not for  
19 the truth, but (inaudible) any further (inaudible)

20 MR. VEASY: No, thank you.

21 THE COURT: All right.

22 THE CLERK: Which--which--

23 THE WITNESS: That they would like that I  
24 had a calendar year of financials myself, rather than  
25 just twelve months, so from whenever, December to  
26 December, they'd like to see a full calendar year. I

1 was mentioning that to him--to--to Mr. Murset and--

2 Q (By Mr. Fisher) What did he respond?

3 A Well, I told him I--I might need a little  
4 bit more time and not be able to finish it right on  
5 December 1st. And he--he, of course, responded back,  
6 he needed to talk to his family and I heard back from  
7 him that if--if I could, would like to close one in  
8 '07 and then one in '08, which would be better for him  
9 tax-wise. And I said, I'll--I'll do what I can and  
10 then what's when I told him I need--reminded him of  
11 needing those financials, I needed those corrected  
12 financials from him, because obviously, the ones I  
13 have, I--I couldn't hand in.

14 Q Okay. And what did he say?

15 A He said he'd get them for me.

16 Q Okay. And then the next conversation that  
17 you had with him regarding the balloon payments, when  
18 did that happen?

19 A As we got closer to December, I'd say  
20 October or November some time, asked again, I think at  
21 that point, just about every time he gave to get a  
22 check, he'd ask about status and I said, still working  
23 on it, but I need those financials, I gotta--gotta  
24 have more than just my one year of financials in to  
25 the lender, they needed to have a longer history. And  
26 he says, okay, I'll get them for you and that happened

1 mortgage broker and--and see if he could get some  
2 leads for me. And so, I responded thanks and then  
3 reminded him again that--that I needed those '05, '06  
4 operating statements, profit and loss statements,  
5 'cause my broker was asking the status of them.

6 Q And this was, I think, the e-mail is dated  
7 March 26th, 2008?

8 A Yes.

9 Q Had he, before March 26th, 2008, ever told  
10 you that you were in default?

11 A No.

12 Q Or sent you a notice of default?

13 A No.

14 Q Okay.

15 MR. FISHER: We'd ask for the admission of  
16 Exhibit No. 18, your Honor.

17 MR. VEASY: It's already in.

18 THE CLERK: It's already in.

19 MR. FISHER: Oh. Is it in? Okay. Thank  
20 you. If it's already in then, that's fine.

21 THE COURT: (Inaudible)

22 MR. FISHER: Okay. Thank you, your Honor.

23 Q (By Mr. Fisher) Now, at some point after  
24 this, did you have--did you have any discussions with  
25 Mr. Murset involving whether or not he was going to be  
26 able to give you the financials?

1           A       It was soon after this that we'd talked on  
2     the phone and again, I reminded him, I--I need two to  
3     three years' worth of financials and I can only  
4     provide one, one complete year and then three months  
5     of one year for one property and one month of another.

6     And I needed to have three complete years. And it  
7     wasn't just the fact that the numbers needed to be  
8     corrected, but I also needed the difference between  
9     May 31st of '06 up to December, when I purchased that  
10    property, California Benefits.

11               And at that point, that's--and I--it was  
12    strange, I--I didn't understand why I hadn't gotten  
13    them, I just assumed they would be done by then, they  
14    have to be prepared for accounting purposes, for his  
15    taxes, and so, again talked about it and asked what  
16    was wrong, why he couldn't get it and at that point,  
17    he said, well, I'll just give you another year,  
18    and--because then that way, I'd have two full years of  
19    financials, rental history and everything.

20           Q       All right. Now, up to this point in time  
21    and in fact, even executing the contract, did you  
22    execute the contract relying on the fact that he was  
23    going to provide you financials?

24           A       Oh, yes.

25           Q       And did you make the payments under the  
26    notes relying on the fact that he was going to give

1     you financials?

2             A       Yes.

3             Q       And you made the improvements to the  
4     apartments relying on the fact he was going to give  
5     you financials?

6             A       Yeah, of course.

7             Q       Now, after March, does there come a time  
8     that Mr. Murset began asking you about--or--or  
9     actually asked you to give him a deed in lieu of  
10    foreclosure?

11            A       Yeah. It surprised me. All of a sudden,  
12    I get this e-mail saying, we've gone six months past  
13    the deadline, we would like a deed in lieu.

14            Q       Okay. Would you--

15            AA      And--

16            Q       --would you turn to Exhibit No. 19,  
17    please?

18                   MR. FISHER: I'm sorry, your Honor, but I  
19    want to check and make sure we get all these in,  
20    if--but if they're already in, I don't want to do it  
21    twice.

22            Q       (By Mr. Fisher) Do you recog--

23                   THE COURT: I'm sure that we've seen  
24    (inaudible)

25                   MR. FISHER: I--I'm sure we have, too, but  
26    we don't show it on ours as being admitted.

1 know I indicated to him at one time or another that  
2 they prefer three but they can get by with two. And I  
3 said, I--I've told you all along that I need at least  
4 two years financials, you haven't given me the  
5 financials. I need at least until the end of the year  
6 to--to have two years' worth of financials to give to  
7 the lender. And--

8 Q Okay. And what was his response?

9 A He says, well,--again, I--I'm assuming the  
10 wording, but the gist of the conversation was that he  
11 said, well, what do you think, how far are you  
12 from--from getting this done? I said, I'm working on  
13 it every day, but the problem I'm having is,  
14 I--they're asking for two years financials, at least  
15 two years financials and I haven't got it.

16 Q How many places or people had you  
17 contacted for refinancing at--up to this point in  
18 June, 2008?

19 A Actually contacted, probably about five.

20 Q Okay. But do I understand correctly, you  
21 couldn't go any further in the process until you got  
22 the--actually got the financials?

23 A Oh, yeah. I had two or three of them  
24 that--that were willing to--if I paid an up-front fee  
25 of anywhere from three to \$5,000, it's non-refundable,  
26 it would go towards my closing costs if I closed, if I

1 paid that, then they would look at the file and--and  
2 give me a letter of interest. And I knew the file was  
3 incomplete, I didn't have the financials.

4 Q Now, after--in this conversation, did  
5 you--did Mr. Murset tell you what he was going to do?

6 A Just, he'll talk to his family and--and  
7 see about getting more time and I reminded him that we  
8 discussed this awhile back, that he'd given me another  
9 year and he--I need that, that's the only way I can  
10 get this done if he doesn't provide me the financials.

11 Q And what was his response?

12 A Well, he'll say, well, I'll talk to the  
13 family, see what I can do.

14 Q Okay. Did he get back to you?

15 A Oh, he got back to me, we talked again,  
16 but he never said, yeah, I talked to them, yeah,  
17 you've definitely got another year. He--he didn't do  
18 that, he just followed up in saying, okay, well, see  
19 what you can get done as soon as you can.

20 Q Okay. He didn't reconfirm that you had  
21 another year?

22 A No. He didn't.

23 Q Going to Exhibit No. 23. Do you recognize  
24 that document?

25 A Yes.

26 Q And what is that?

1 Mr. Murset's attorney, stating that I transferred it  
2 into someone else's name, I completely forgot that was  
3 the case, so, I corrected that and transferred it back  
4 into Davco's name.

5 Q Okay. Now, at some point, you stopped  
6 making payments on the apartments; is that correct?

7 A I did.

8 Q And when was that?

9 A September of 2008.

10 Q Okay. Now, you actually made payment but  
11 you can--you cancelled the checks; is that correct?

12

13 A Correct.

14 Q Okay. Why did you make payment in  
15 September?

16 A Well, because I still planned on  
17 continuing making payments. He--he'd come in--

18 Q You say "he," are you--

19 A I'm sorry. Mr. Murset had come into my  
20 office to collect the checks like he normally did,  
21 most of the time, he came, sometimes his wife came or  
22 I think I met his wife in the parking lot of Dixie  
23 College one time to give them the checks; at any rate,  
24 he--it was after he'd sent that letter asking for a  
25 thousand dollars more in payment for Casa Sonoma and  
26 twenty-five hundred more for Casa Grande. And I told



1 him I didn't think it was fair that--to charge me  
2 more, I--I'm doing everything that I was supposed to.

3

4 And I said--at that point, I said, well,  
5 what if I just--if I was to go ahead and sign a deed  
6 in lieu back to you, would you reimburse me for the  
7 improvements? And he said, well, I'd have to talk to  
8 my family. And I said, well, I'd obviously need to  
9 know that and--and he said, well, if you go ahead and  
10 transfer it back to us, we'll--I'll consider it. And  
11 I--I said okay and I wrote out the checks and gave it  
12 to him and it just--it was just gnawing at me, I just  
13 didn't feel comfortable, the fact that if I just  
14 transfer it back to him, the only thing he promised me  
15 is that he'd consider it. And he could just consider  
16 no and--and then not reimburse me.

17 And--and then in reviewing that one  
18 e-mail, where he said that he's wanting more money so  
19 that he can get reimbursed--or get covered for losses  
20 and for lost opportunities or whatever and then also  
21 to cover any foreclosure costs, made me realize that  
22 he's got foreclosure on his mind, he's--he's--whether  
23 I make the payments or not, it sounds--I--I was--I got  
24 the feeling that he was going to foreclose anyway.  
25 And so, I put a stop payment on the checks.

26 Q Okay. Now, up until September, 2008, when

1 Q Now, about October 29th, 2008, you were  
2 served with the complaint and ex parte motions; is  
3 that correct?

4 A What date?

5 Q October 29th, 2008.

6 A Oh. I'll take your word for it, I  
7 received it and it was probably around that time.

8 Q Okay.

9 A If that's the date, then that's--

10 Q Had--and you're aware from the testimony  
11 and the exhibits that have already been entered in  
12 this lawsuit that the Court entered an order requiring  
13 Davco and David Fisher to pay rents to the--or deposit  
14 the rents from the apartments in the Court?

15 A Yes.

16 Q And that was November 5th, 2008; correct?

17 A That it's dated?

18 Q Right.

19 A Or when I received it?

20 Q No, that--when it was dated.

21 A Yes.

22 Q Okay. When did you receive that?

23 A On the 10th of November.

24 Q Okay. Now, before the 10th of November,  
25 had you made any--or filed any pleadings in this  
26 lawsuit?

1 THE COURT: Thank you, everyone. We're  
2 back on the record in (Inaudible)

3 MR. FISHER: Thank you, your Honor.

4 Q (By Mr. Fisher) David, from September,  
5 2008, through February 20th, 2009, who took care of  
6 the apartments?

7 A I did.

8 Q And what did you do?

9 A Well, if there was any repairs to be made,  
10 then I--or certain ones, I did myself; otherwise, I  
11 called the property repairman to do it or an  
12 individual to take care of it.

13 Q Okay. Did you, during September, 2008,  
14 through February 20th, 2009, do anything different  
15 than you did prior to that period of time in your  
16 management of the apartments?

17 A Through November, when?

18 Q September, 2008, through--the period of  
19 time the foreclosure was taking place.

20 A Did I do anything different? No.

21 Q You continued making payments on the  
22 utilities?

23 A Yes.

24 Q And you paid the utilities?

25 A Yes.

26 Q Okay. And did you make the repairs?

1 necessary? Maintenance?

2 A Yes.

3 Q Okay. Would you turn to

4 Exhibit--Defendants' Exhibit No. 48, please? Now, at

5 Davco--

6 A Oop.

7 Q Oop, excuse me.

8 MR. VEASY: Excuse me. Which one is this?

9 THE WITNESS: Oh. Okay.

10 THE COURT: 48 in the white book.

11 MR. FISHER: 48. Defendants.

12 (Inaudible discussion - unable to  
13 understand)

14 MR. FISHER: (Inaudible) rental rates.

15 THE COURT: (Inaudible)

16 MR. VEASY: May I see a copy of it from  
17 someone? Oh. Is it this one?

18 MR. FISHER: This one right here.

19 MR. VEASY: May I have just a moment?

20 THE COURT: Certainly.

21 MR. VEASY: Okay.

22 MR. FISHER: Probably, if I can help  
23 counsel out, I think you're referring to this one that  
24 you had objected to?

25 MR. VEASY: Yes.

26 MR. FISHER: It is. We're going to

1 paid to you?

2 A Correct. I--I don't know who actually  
3 paid the Court, I never checked; however, I do know  
4 when people told me they either paid the Court or were  
5 going to pay the Court, but I have no way of verifying  
6 if they did.

7 Q Okay.

8 A So, even ones where it looked like he had  
9 checked with the Court to see which ones paid and even  
10 though I didn't count it as being received, 'cause I  
11 didn't receive anything, if they hadn't been paid to  
12 the Court, then he just assumed that I received it  
13 and--and added it in there.

14 Q Now, you did a summary, which has already  
15 been (inaudible) correct?

16 A Correct. That would be 89.

17 Q Yes. And that is based upon these  
18 documents here which you have created and shows the  
19 differences and why the differences?

20 A Yes.

21 Q Okay.

22 MR. FISHER: That's all I have, your  
23 Honor. But before I sit down, I'd like to make a  
24 motion with the Court real quick. I would move the  
25 Court for an order to strike the November  
26 4th--November 5th order requiring the rents--requiring

1 Davco and David Fisher to pay the rents to the Court  
2 on the grounds that when it was obtained, it was  
3 obtained on the basis of Rule 67 of the Utah Rules of  
4 Civil Procedure, which requires that when it is--which  
5 states: When it is admitted by the pleadings or shown  
6 upon the examination of a party that he had in his  
7 possession or under his control any money or other  
8 thing capable of delivery.

9 Well, before the--the order was entered  
10 before any pleadings, as David testified, any  
11 pleadings had been entered and he had no examination.  
12 So, at that point in time, I believe that under Rule  
13 67, the order should not have been entered. It--I  
14 think there had to be some pleading or some type of  
15 examination. That's all.

16 THE COURT: Thank you, Counsel.

17 Mr. Veasy, I'll give you a chance to  
18 respond -- (inaudible)

19 MR. VEASY: Your Honor already ruled on  
20 that motion and the validity of the order. I think  
21 probably, not twice, but three times in this lawsuit,  
22 each time, the order has been confirmed and it has  
23 been abided by by Counsel and Mr. David Fisher. It's  
24 a little late in the game to be attacking that,  
25 especially on a Rule 67, when there was fully  
26 opportunity to do it.

THE COURT: Counsel, the motion's  
overruled. You may cross.

MR. VEASY: Thank you, your Honor.

\*

CROSS-EXAMINATION

BY MR. VEASY:

Q I'm going to be using the plaintiffs'  
binder.

A Okay.

Q So, have you got that in front of you?  
Please look at Exhibit 1.

Okay. You recognize this as the--

A Oh, just hang on, I'm not there yet.

Q Okay.

A Okay.

Q Okay. You acknowledge this is the Casa  
Sonoma promissory note?

A I believe so.

Q Okay. And your signature on it?  
And it was executed by you on or about  
September 29th; correct? Of 2--

A As managing member of Davco Management.

Q Yes.

A Yes.

Q Yes, I--that's correct.

And you're not aware of any written