

2015

Remax Elite Dba, Hilary "Skip" Wing, Aspenwood Real Estate Corporation, Elite Legacy Corporation, Plaintiffs v. Still St Anding St Ables, LLC, Charles "Chuck" Schv Aneveldt, and Cathy Code, Defendants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REMAX ELITE DBA, HILARY "SKIP"
WING, ASPENWOOD REAL ESTATE
CORPORATION, ELITE LEGACY
CORPORATION,

Plaintiffs

v.

STILL STANDING STABLES, LLC,
CHARLES "CHUCK" SCHVANEVELDT,
AND CATHY CODE,

Defendants

No. 20130746-CA

Second District Case No.
060906802

**BRIEF OF APPELLANT
CHUCK SCHVANEVELDT**

Appeal from a judgment entered in the Second Judicial District Court
Weber County, State of Utah, Honorable Noel S. Hyde

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PARTIES TO THE PROCEEDING

In addition to the parties on appeal identified in the caption, Tim Shea, Shane Thorpe, Scott Quinney, and ReMax Realty were parties in the case below.

A third party named Dale Quinlan owned the dba ReMax Elite.

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code § 78A-3-102(3).

ISSUES PRESENTED FOR REVIEW

ISSUE 1: WHETHER PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

Standard of review: Determinations of the legal requirements for standing are reviewed for correctness. *Jones v. Barlow*, 2007 UT 20, ¶ 10, 154 P.3d 808.

Preservation: Standing is a jurisdictional requirement, *Brown v. Division of Water Rights*, 2008 UT App 353, ¶ 6, 195 P.3d 933, and therefore can be raised at any time. *Chen v. Stewart*, 2005 UT 68, ¶ 50, 123 P.3d 416. The issue of whether Plaintiffs had statutory standing was also raised in the lower court. (*E.g.*, R. 1407; R. 1414-24; R. 1498-1503; R. 1885; R. 6819; R. 6864; R. 7009.)

ISSUE 2: WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE ISSUES OF FACT EXISTED AS TO WHETHER COMPLETION OF THE SALE WAS “PREVENTED BY DEFAULT OF THE SELLER,” OR WHETHER THE BUYER WAS READY, WILLING, ABLE, AND ACCEPTED BY THE SELLER.

Standard of Review: A court’s grant of summary judgment is reviewed for correctness. *Jones v. ERA Brokers Consol*, 2000 UT 61, ¶ 8, 6 P.3d 1129.

Preservation: This issue was raised below. (*E.g.*, R. 3655-70; R. 4054-74; R. 4434; R. 4517; R. 4634-35; R. 4958; R. 8382, pp. 10-35, 40-43, 53-59, 68-70, 77-81; R. 8386, pp. 8-41; R. 8389, pp. 17-29, 46-49, 61.)

ISSUE 3: WHETHER THE TRIAL COURT ERRED IN NOT DISMISSING THE CLAIMS AGAINST DEFENDANT SCHVANEVELDT INDIVIDUALLY, AND IN RULING AS A MATTER OF LAW THAT HE SIGNED THE REPC IN HIS INDIVIDUAL CAPACITY RATHER THAN AS A MEMBER OF THE LLC.

Standard of Review: A trial court's ruling on summary judgment presents a question of law and the legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness. *Massey v. Griffiths*, 2007 UT 10 ¶ 8, 152 P.3d 312 (cited in *Fire Ins. Exch. v. Oltmanns*, 2012 UT App. 230, 285 P.3d 802).

Preservation: Schvaneveldt's lack of personal liability was raised below. (E.g., R. 927-929; R. 1890; R. 3664; R. 4426, p. 11; R. 5153-5154; R. 5512; R. 8382, pp. 39-40; R. 8383, pp. 5-6, 11-13; R. 8388, p. 11.)

DETERMINATIVE STATUTES, RULES, AND ORDINANCES

Assumed name statute

Utah Code § 42-2-10:

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state;....

Revised Limited Liability Company Act (2006)

Utah Code § 48-2c-116:

A member or manager of a [limited liability] company is not a proper party to proceedings by or against a company, except when the object is to enforce a member's or manager's right against, or liability to, the company.

Utah Code § 48-2c-601:

[N]o organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.

Utah Code § 48-2c-802(3):

[U]nless the articles of organization expressly limit their authority, any member in a member-managed company, or any manager in a manager-managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

STATEMENT OF THE CASE

Nature of the case, course of proceedings and disposition below

This case arises out of a real estate transaction that went awry. The case has, to put it mildly, a long and complicated history. For purposes of this appeal, however, the relevant history is relatively simple:

ReMax Elite (an assumed name whose owner was not identified) brought an interpleader action against two parties to a real estate contract, Emmett Warren and or Assigns (Buyers) and Still Standing Stables, LLC (Seller). The interpleader

action was to resolve the parties' dispute over an earnest money deposit being held by ReMax Elite.

Nearly two years later, Buyers and Seller settled their dispute. Afterward, ReMax Elite asserted claims for a commission against Still Standing Stables, Charles Schvaneveldt (a member of the LLC), and Cathy Code (Schvaneveldt's girlfriend and later wife).

Numerous amendments, motions, and cross motions were filed throughout the litigation. *See* pp. 5-16, *infra*. Through the course of litigation, the issues for trial were narrowed significantly. As a matter of law, the trial court ruled that 1) a valid commission agreement existed; 2) the plaintiffs had done everything they were required to do in order to earn a commission and therefore a commission was owing; 3) the sale had fallen through because the seller could not guarantee "insurable" access to the property; and 4) there was no basis upon which one of the defendants, the LLC, could be liable for the commission.

At trial, the court instructed the jury as to each of these findings, and barred Schvaneveldt from offering any evidence challenging them. After the Plaintiffs' case in chief, the court granted a motion for directed verdict by Cathy Code, one of the two remaining defendants. Thus, while the trial was supposed to resolve who owed the commission, by the time it went to the jury, Schvaneveldt (in his individual capacity) was the jury's only remaining choice. Given that the judge

had already instructed the jury that a commission was owed and the only question left was who owed it, the jury, not surprisingly, chose the sole defendant on the special verdict form.¹

In this appeal, Schvaneveldt challenges the trial court's pretrial rulings, arguing that the jury should have been permitted to determine whether a commission was owed at all and, if so, whether any such liability was by the LLC for whom Schvaneveldt was acting, rather than Schvaneveldt personally. There is an additional threshold issue, however, involving the Plaintiffs' standing to maintain this action. Because the latter issue requires additional background, and as required by U.R.A.P. 24(a)(7), Schvaneveldt hereby provides (as briefly as possible) the procedural history of the case with record cites:

As noted, this appeal arises from what began as an interpleader case brought by the dba ReMax Elite against the parties to a Real Estate Purchase Contract ("REPC"), Emmett Warren/Assign WBL Development LLC (identified by ReMax Elite as "Purchaser") and Still Standing Stables (identified as "Seller"). (R. 1.) From this simple beginning, the case grew in complexity.

Still Standing Stables answered and counterclaimed against ReMax Elite and Buyers' real estate agent, Tim Shea. (R. 30.) Buyers answered, adding a cross-

¹ As the trial court summarized, "[T]his Court ruled prior to going into trial, that the only two people who would have any potential liability in this case would be the two principal people here in this courtroom...." (R. 8385, pp. 27-28:23-1.)

claim against Still Standing Stables and a third-party complaint against Charles "Chuck" Schvaneveldt. (R. 52.) Schvaneveldt and Still Standing Stables answered Buyers' third party complaint and cross-claim (R. 95), and filed a motion for judgment on the pleadings (R. 110), which was denied. (R. 190.)

The pleadings were amended at various stages throughout 2007, some of these amendments occurring while discovery proceeded. Early in 2008, Buyers and their assign reached a settlement with Still Standing Stables and Schvaneveldt, and the claims between them were dismissed by the court. (R. 538.)

ReMax Elite and Buyers' agent Shea then amended their pleadings to demand a sales commission from Still Standing Stables under the For Sale By Owner commission agreement ("FSBO"). (R. 554.) The trial court ultimately barred Shea from pursuing this claim, as a claim for commission can only be brought by a licensed broker, not an agent. (R. 1081.)

After a large portion of discovery was complete, Still Standing Stables added as additional third-party defendants Hilary "Skip" O. Wing, Shane Thorpe, Scott Quinney, Aspenwood Real Estate Corporation dba ReMax Elite, Aspenwood Realty, LLC, Aspenwood Elite, and ReMax Realty. (R. 828.) It was alleged that ReMax Elite was simply a dba of Aspenwood Real Estate Corporation. The other third-party defendants participated, it was alleged, in the management of Aspenwood Real Estate Corporation, either as principals, subsidiaries, or dbas. *Id.*

ReMax and Shea then amended their complaint and third-party counterclaim again, adding as a defendant Schvaneveldt and as a Third Party Defendant his wife, Cathy Code. (R. 1232.) When answering this amended pleading, Schvaneveldt included as a third-party complaint the same causes of action against the Aspenwood parties previously alleged by Still Standing Stables. (R. 1303.)

Plaintiffs filed a motion for partial summary judgment, seeking a ruling as a matter of law that they were entitled to a commission. (R. 1561.) This was successfully stayed pending discovery, and defendants responded when the stay was lifted nearly two years later. (R. 3655.)

Meanwhile, Still Standing Stables and Schvaneveldt filed a motion for summary judgment contending that ReMax Elite, a dba, could not collect a commission because it was not a broker nor owned by a broker. (R. 1407.) The trial court denied the motion. (R. 1885.)

The court also denied motions by both Schvaneveldt and Code seeking dismissal as individual defendants on the grounds that they were acting on behalf of the limited liability company Still Standing Stables, not as individuals. (R. 1885; R. 1890.)

Based upon arguments made by Plaintiffs in opposing the dismissal of Schvaneveldt and Code (*i.e.*, that those defendants were liable and not the LLC),

Still Standing Stables then filed a motion for summary judgment on the issue of its own liability (R. 2394).

While this motion was pending, and despite already being named as third-party defendants in the litigation, Skip Wing, Elite Legacy Corporation, and Aspenwood Real Estate Corporation moved to add themselves as plaintiffs, asserting that ReMax Elite was their dba. (R. 2318.) Shortly thereafter, these plaintiffs moved for summary judgment on all of Still Standing Stables' claims against them (R. 2887). Still Standing Stables filed a cross motion on the issue of breach of fiduciary duty. (R. 3094.)

While these motions were pending, Still Standing Stables and Schvaneveldt filed their response to Plaintiffs' third amended answer and counterclaim. (R. 3604.) (This was the answer and counterclaim in which the Elite and Aspenwood entities had been joined as plaintiffs, along with Skip Wing.)

It took several years, but the characters on the stage of the litigation were beginning to gel. On the plaintiff's side, Wing was a principal broker, and associated with him, he alleged, were a mixture of persons and entities that together constituted his brokerage: entities, associate brokers and agents. These included (by their narratives) Tim Shea, Elite Legacy Corporation, Aspenwood Real Estate Corporation, Aspenwood Elite Legacy Corporation, Shane Thorpe, Scott Quinney, Aspenwood Realty, LLC, Aspenwood Elite, and ReMax Realty.

Wing alleged that Aspenwood Real Estate Corporation owned the ReMax Elite dba. (Later, ReMax Elite Legacy Corporation would also claim to own the ReMax Elite dba (R. 2364).) On the defendants' side figured Still Standing Stables, its member Schvaneveldt, and his wife, Code.

After a two-year hiatus (caused in part by stays for mandatory mediation, discovery, and Tim Shea's bankruptcy), the plaintiffs filed an opposition (R. 3644) to Still Standing Stables' motion for summary judgment on its liability (R. 2394), and Still Standing Stables, Schvaneveldt, and Code filed an opposition (R. 3655) to the plaintiffs' motion to secure partial summary judgment on their claim to collect the commission (R. 1561). While these motions were pending, the plaintiffs responded to the counterclaims and third-party complaint brought by Still Standing Stables, Schvaneveldt, and Code. (R. 3989.)

In March 2012, the trial court held oral argument on Shea's and Still Standing Stables' cross motions for summary judgment. The court ruled orally that, as a matter of law, the sole reason the transaction had failed was that "insurable" access to the property could not be obtained. (R. 8389.) In light of this ruling, the court dismissed all of Still Standing Stables' tort claims because Still Standing Stables could not show that any alleged tortious conduct by the Plaintiffs caused it any harm. *Id.*

Plaintiffs thereafter filed a motion (R. 4401) to dismiss the defendants' second third-party complaint, arguing that it amounted to the same pleading that had been dismissed by the court in its recent summary judgment ruling. All three defendants opposed this motion, as the grant of summary judgment was not final and did not affect the rights of Schvaneveldt or Code. (R. 4509.) The defendants also filed a cross motion to amend their counterclaims. (R. 4507.)

Yet another motion was filed in this timeframe, the Plaintiffs' second motion for partial summary judgment (R. 4504), in which they asked the court to rule that Schvaneveldt and Code were responsible for paying the commission. The court did not ultimately rule on that motion.

At a hearing in July 2012, the court granted Plaintiffs' motion for partial summary judgment (R. 1561), ruling that Plaintiffs were entitled to a commission as a matter of law. (R. 8382.) The court ruled that changes that had been made by Shea to the REPC after the parties signed it were "a red herring" and legally irrelevant. The court further foreclosed any possibility of alleging fraud at the trial. Finally, the court denied defendants' motion for summary judgment. (R. 4972.) The district court also granted Plaintiffs' motion to dismiss the third-party complaint, and denied defendants' motion to amend. (R. 5047.)

The day before trial, the court dismissed Still Standing Stables as a defendant. (R. 8383, pp. 17-20; R. 5613.) The case then proceeded to trial against

Schvaneveldt and Code. At the conclusion of Plaintiffs' case in chief, Schvaneveldt moved for a directed verdict, which was denied. (R. 5317.)

Code moved for a directed verdict, which was granted. (R. 5424.) The court told the jury that it had concluded there was no basis for liability against Code, and had dismissed her from the case. "Therefore, as a result of my ruling, you will consider only the liability of Chuck Schvaneveldt in this case." (R. 8386 pp. 42-43.)

The jury entered a verdict against the sole remaining defendant, Schvaneveldt, assessing damages in the amount of \$30,000. (R. 5388.) Schvaneveldt filed a motion for judgment notwithstanding the verdict (R. 5393), which was denied. (R. 5615.) The plaintiffs filed a motion for a new trial, alleging that the damages the jury assessed were not consistent with the evidence. (R. 5450.) Rather than grant the motion, the trial court instead opted to increase the judgment to \$130,875. (R. 5950.) The court later added an award of attorney fees, for a total judgment against Schvaneveldt of \$362,485.96. *Id.*

Schvaneveldt filed his own motion for new trial (R. 6200), which was denied. (R. 6510). Other post-trial motions went forward, and ultimately Still Standing Stables was awarded \$2,659.73 in costs. (R. 6732.) When an attempt was made to collect these costs, Skip Wing denied that he was liable for them because, Wing said, he was not a party to the contract on which ReMax Elite was

suing. This prompted Still Standing Stables to bring a motion to identify real parties in interest, the nub of which was a contention that none of the plaintiffs had standing to pursue a commission. (R. 6819.) Schvaneveldt filed a companion motion, seeking dismissal of all of the named commission claim plaintiffs with prejudice and to have the judgment struck or otherwise made void. (R. 6864.)

Schvaneveldt's central argument was that a man named Dale Quinlan was the principal broker who had established, registered, and owned the dba ReMax Elite, the status of which had vexed the entire litigation. At least two of the Plaintiffs had claimed that they owned the dba. Now Quinlan appeared with documentation from the State of Utah that it was his. Quinlan also submitted an affidavit indicating that he had never transferred any commission agreement or contract rights to any other individual nor entity. Quinlan owned the ReMax Elite dba at the time of the execution of the FSBO and REPC in 2006. As such, the defendants argued that he was required to be the party seeking the commission. Thickening the plot, Quinlan was no longer a principal broker at the time of the FSBO and REPC. Because Quinlan was neither a principal broker nor named as a party, the defendants argued, the commission claims asserted by his dba were void. *Id.*

While these motions were pending, Still Standing Stables and Schvaneveldt entered into a settlement agreement with Quinlan and his dba ReMax Elite to

dismiss ReMax Elite's claims related to the commission. (R. 6990-91.) Settlement was limited to those parties identified as parties to the commission agreement, reserving any claims that Still Standing Stables or Schvaneveldt might have against others (Wing and the amalgam of others constituting his brokerage who remained as litigants). *Id.*

The trial court denied Still Standing's and Schvaneveldt's motions. (R. 7009.) The court first concluded that Wing could not avoid liability for attorney fees under the FSBO by characterizing himself as a nonparty to the agreement. The court also said that it was "dismay[ed]" at the reassertion of standing arguments by the defendants at this point in the proceedings. While standing may be raised at any time during litigation, the court reasoned that it had lost jurisdiction once a final judgment was entered. After expressing its hesitancy to even engage in any analysis at all, the court concluded that the evidence suggesting that Wing was not the principal broker could have been found earlier, and therefore defendants' standing arguments were untimely. *Id.*

Schvaneveldt then filed a Rule 52(b) motion to amend findings in the final judgment. (R. 7088.) He requested that all three named plaintiffs be removed from the commission judgment because none of them was the actual party to the FSBO agreement. He also requested that the court recognize as an undisputed fact that Dale Quinlan was the certified and record owner of the dba ReMax Elite. He

finally requested that a letter of transfer dated 9 March 2006, purporting to transfer the dba to Wing, and the Aspenwood articles of incorporation (which might also be used to substantiate a transfer of the dba) be authenticated. Schvaneveldt contended that neither document was executed by Quinlan, and submitted an expert report to that effect. (R. 7115.)

Just over a month after filing his rule 52(b) motion, Schvaneveldt filed a rule 60(b) motion, the substance of which was that overwhelming documentation now showed that Skip Wing was not the principal broker of the dba ReMax Elite, and therefore there was no proper party plaintiff in the action. (R. 7287.)

No ruling was issued on the motions for approximately nine months. At that point, Schvaneveldt submitted to the court supplemental exhibits and an additional memorandum in support of his rule 52(b) motion. (R. 7854.) This evidence also showed that Skip Wing was never a broker for the dba ReMax Elite. *Id.*

The court denied the rule 52(b) motion. (R. 8234.) The court found that information contained within the Department of Commerce (including a determination by the State that the purported 2006 transfer documents were forgeries, and that the dba had never been transferred by Quinlan), could have been discovered before trial. The court ruled that a dba is an asset, and could be held in a "somewhat segregated capacity, where legal title is held in one particular name, but equitable interests are actually owned by someone else." (R. 8240-41.) The

court speculated that Quinlan “may have been simply functioning in his capacity as a participant in the business entity that owned the dba of ReMax Elite, when his name was placed on that document [registration of the dba].” With respect to Wing, the court stated that “to the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims.” (R. 8243.)

The trial court also denied the rule 60(b) motion. (R. 8254.) The court concluded that relief under Rule 60(b)(6) was not available. With respect to Rule 60(b)(5), the court ascribed no legal significance to Quinlan’s settlement with the defendants because Quinlan’s ownership status had not been conclusively established. With respect to Rule 60(b)(4), the court noted that arguments regarding standing had already been rejected in previous rulings. The court said that there were two separate questions at issue: Is there a properly registered dba for the business entity that asserted the claim, and who owns that dba? There may be argument about who owns a dba, the court said, but this did not necessarily go to whether the lawsuit could be maintained by the dba in question. (R. 8263.)

Related to other post-trial motions concerning the ownership of the dba, Still Standing Stables not only had settled all outstanding claims with Quinlan and

ReMax Elite, but it had also had secured ownership of and registered the ReMax Elite dba. Based on these facts, Still Standing filed a motion to be substituted as plaintiff under Rule 25 as the rightful owner of the dba. (R. 8110.) The motion was denied. (R. 8444, pp. 30-36.) All parties appealed some aspect of the court's rulings and final judgments.

Statement of facts relevant to issues on appeal

The For Sale By Owner ("FSBO") agreement

In January 2006, former defendant Cathy Code, then a girlfriend of Chuck Schvaneveldt, ran an advertisement for a piece of property in Weber County, Utah. (R. 3266, pp. 14-16.) The Property was owned by a limited liability company called Still Standing Stables. (R. 660 ¶ 1.) Schvaneveldt was a member of the LLC. (R. 3126 ¶ 1.)

A real estate agent named Tim Shea saw the advertisement and contacted Code, purporting to have some potentially interested buyers. (R. 3266-67, pp. 16-17.) On January 20, 2006, Shea sent a proposed Real Estate Purchase Contract ("REPC") to Code along with a For Sale By Owner Commission Agreement & Agency Disclosure ("FSBO"). (R. 3271, p. 45.) A copy of the FSBO is attached hereto as Add.Exh. 5.²

² There was a dispute below as to whether this FSBO was one that Schvaneveldt authorized Code to sign, and that she did sign. That is immaterial to resolution of

The FSBO contained the following provision regarding a commission (“brokerage fee”):

2. BROKERAGE FEE. The Seller agrees to pay the Company, irrespective of agency relationship(s), as compensation for services, a Brokerage Fee in the amount of \$_____ or 3% of the acquisition price of the Property, if the Seller accepts an offer from Emmett Warren and or Assigns (the “Buyer”), or anyone acting on the Buyer’s behalf, to purchase or exchange the Property. The Seller agrees that the Brokerage Fee shall be due and payable, from the proceeds of the Seller, on the date of recording of closing documents for the purchase or exchange of the Property by the Buyer or anyone acting on the Buyer’s behalf. If the sale or exchange is prevented by default of the Seller, the Brokerage Fee shall immediately be due and payable to the Company.

(Add.Exh. 5, p. 1 § 2.)

The FSBO also contained a provision addressing certain seller warranties:

4. SELLER WARRANTIES / DISCLOSURES. The Seller warrants that the individuals or entity listed above as the “Seller” represents all of the record owners of the Property. The Seller warrants that it has marketable title and an established right to sell, lease, or exchange the Property. The Seller agrees to execute the necessary documents of conveyance. The Seller agrees to furnish buyer with good and marketable title, and to pay at Settlement, for a standard coverage owner’s policy of title insurance for the buyer in the amount of the purchase price. The Seller agrees to fully inform the Agent regarding the Seller’s knowledge of the condition of the Property. The Seller agrees to personally complete and sign a Seller’s Property Condition Disclosure form.

(Add.Exh. 5, p. 1 § 4.)

The FSBO incorporated the Seller’s Property Condition Disclosure Form referenced in Section 4. *See id.*, § 13 (“ENTIRE AGREEMENT. This

the issues on appeal, and therefore it is assumed for purposes of argument that Code signed the FSBO and that she was authorized to do so by Schvaneveldt.

Commission Agreement, including the Seller's Property Condition Disclosure Form contain the entire agreement between the parties relating to the subject matter of this Commission Agreement. This Commission Agreement may not be modified or amended except in writing signed by the parties hereto.") The Seller's disclosure form is discussed below.

The REPC

The agent, Shea, identified his buyers as "Emmett Warren and or Assigns." (R. 857.) Shea initially conveyed a \$6,000,000 offer from Buyers through a proposed REPC on January 20, 2006. Schvaneveldt submitted a counteroffer, which lapsed by its terms when Buyers did not respond. (R. 4710-11.)

On February 6, 2006, Shea submitted another offer from Buyers. Other than a reduced offer amount (\$4,362,500), the proposed REPC was identical to the earlier lapsed one. (*Compare* Add.Exh. 6 and R. 38.) Both REPCs were prepared by Shea. (R. 3270-71, pp. 44-48.) According to Shea, he was acting solely as an agent of Buyers in connection with the deal. (R. 3286, p. 245; *see also* Add.Exh. 6 (FSBO) p. 1 § 5 (stating that Broker and Agent "are representing the Buyer" and are "the Buyer's agent").)³

The REPC prepared by Shea identified the Property as "Land LLC, Still Standing Stables also described as Parcel # 23-006-0006 City of Huntsville,

³ *But see* R. 7 (modified copy of REPC on which Shea checked boxes stating that Listing Agent and Listing Broker represented "Seller" as well as "Buyer").

County of Morgan, State of Utah, ZIP 84310.” (Add.Exh. 6, § 1.) (Morgan was later crossed out and Weber written in.)

Shea admits that, when meeting with Schvaneveldt, he (Shea) represented that he had “cash buyers.” (R. 3268, p. 22.) According to Schvaneveldt, Shea represented that Buyers included an owner of the Arizona Diamondbacks professional baseball team. (R. 3128, ¶¶ 16, 23.) Schvaneveldt contended that a cash transaction was consistent with a space left blank next to the “loan” provision in the financing section of the proposed REPC. (R. 3113.)

On February 7, 2006, Schvaneveldt signed an Acceptance of Offer to Purchase. (R. 861.) The Plaintiffs claim that the agent, Shea, did not keep the original of this document; instead, the Plaintiffs produced and relied on a black and white copy. (R. 1096 ¶ 7; R. 1135.)

On its face, the signature of Schvaneveldt on the copy appears to be irregular. In particular, the words “Chuck Schvaneveldt” are on the far left side of the page, inside the margin, followed by an unexplained white space:

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. _____

Chuck Schvaneveldt 2.7.06
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Chuck Schvaneveldt 292012 Directors Road SLK 84004 801-381-4825
(Seller's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

(See Add.Exh. 6 (REPC), signature page.)

During cross-examination at trial, Schvaneveldt attempted to explain that the copy only contained part of his signature, because on the original he had written “Member” following his name, which appeared to have been “whited out” on the copy. (R. 8385, pp. 13-15:9-9; *see also* R. 3126 (averring that his signature on the REPC was “forged” [sic].) During a break, the trial court agreed with Plaintiffs that Schvaneveldt’s testimony was barred by the court’s earlier ruling that the LLC had no liability as a matter of law. (*Id.*, pp. 27-41.) (The court had also barred Schvaneveldt from mentioning that the Plaintiffs did not produce an original of the REPC (R. 8384, p. 177).)

The court directed the parties to “stipulate” that there was no evidence of whited out text on the REPC, despite Schvaneveldt’s testimony to the contrary and the face of the document itself. (R. 8385, pp. 40-41.) The court told the jury:

Notwithstanding the testimony of Schvaneveldt, the parties stipulate that there is no evidence that any document has been whited out nor are the defendants aware of any such documents. Pursuant to the Court’s earlier ruling, there is no liability on Still Standing liability [sic] a limited liability company; therefore, do not consider anything you have heard to suggest liability on Still Standing liability company as opposed to the defendants that are present in the courtroom.

(*Id.*, p. 42:18-1.)⁴

⁴ In his closing argument, the Plaintiffs’ counsel cited this statement by the court as proving that Schvaneveldt was a liar: “I looked at this and I say, is that your signature? Yeah, that’s my signature and then he says, and you know, I put

The trial court also prohibited Schvaneveldt from offering evidence at trial regarding other alterations the agent admitted making to the original REPC after it was signed by Schvaneveldt. For example, as discussed in Point II below, Shea added "TBD" in the blank space next to "loan". The original reads:

2. PURCHASE PRICE The purchase price for the Property is \$4362500
The purchase price will be paid as follows:
\$ 25,000 (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 one or more of the following loans:
[X] CONVENTIONAL [] OTHER (specify) _____
If the loan is to include any particular terms, then check below and give details:
[] SPECIFIC LOAN TERMS _____
\$ _____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)
\$ _____ (d) Other (specify) _____
\$ _____ (e) Balance of Purchase Price in Cash at Settlement.
\$4362500 PURCHASE PRICE. Total of lines (a) through (e)

The version as modified by Shea reads:

2. PURCHASE PRICE The purchase price for the Property is \$4362500
The purchase price will be paid as follows:
\$ 25,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.
\$ TBD (b) New Loan. Buyer agrees to apply for one or more of the following loans:
[X] CONVENTIONAL [] OTHER (specify) _____
If the loan is to include any particular terms, then check below and give details:
[] SPECIFIC LOAN TERMS _____
\$ _____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)
\$ _____ (d) Other (specify) _____
\$ _____ (e) Balance of Purchase Price in Cash at Settlement.
\$4362500 PURCHASE PRICE. Total of lines (a) through (e)

'member' there or – or something to the effect 'member' should be there, I don't know what happened. I think somebody whited out that document. Jury leaves the room..., and you come back in and the stipulation by the parties was is that there is no evidence that any of these documents have been whited out. So why go to the jury and tell the jury, I think that's been whited out, you even heard him say and over here, look here, there's been something there, and he went through all those documents and wanted to claim—why? Because he falsely testified about an important matter in this case because he doesn't want you to put his personal signature on those documents." (R. 8387, p. 45:7-23.)

With respect to agency disclosure, the original signed REPC reads:

Listing Agent _____ represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Listing Broker for _____ represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;
Buyer's Agent Tim Shea represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Buyer's Broker for Remax Elite (Scott Quinney) represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;

As later modified by Shea, the REPC read:

Listing Agent FSBO AGREEMENT represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Listing Broker for FSBO AGREEMENT represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;
Buyer's Agent Tim Shea represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Buyer's Broker for Remax Elite (Scott Quinney) represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;

In a pretrial ruling, the trial court ruled that Shea's modifications, and the plaintiffs' representation of the modified version as the original, were irrelevant because Schvaneveldt did not learn about either until after the lawsuit was filed, and because as a matter of law Shea's modifications were just made for "internal" purposes. (R. 8384, p. 72:914.)⁵

⁵ To rule as a matter of law that Shea's modifications were merely routine administrative annotations seems inconsistent with Shea's own evolving story as to how they occurred: At various times, he denied making the modifications after the REPC was signed, acknowledged that they were made after it was signed, acknowledged it appeared to be his handwriting, suggested that someone else in his office might have done it, or speculated that "Chuck [Schvaneveldt] could have wrote that TBD." (R. 3274, pp. 149-150; R. 3290-3291, pp. 308-311.)

Pertinent provisions of the REPC

The REPC submitted by the Buyer and signed by Schvaneveldt includes several relevant sections. Section 2 (typed in smaller font to more accurately depict its appearance on the REPC) provides:

2. PURCHASE PRICE. The purchase price for the Property is \$4362500

The purchase price will be paid as follows:

<u>\$25,000</u> \$ _____ \$ _____ \$ _____ \$ _____ <u>\$4362500</u>	<p>(a) Earnest Money Deposit. Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.</p> <p>(b) New Loan. Buyer agrees to apply for one or more of the following loans: <input checked="" type="checkbox"/> CONVENTIONAL <input type="checkbox"/> OTHER (Specify) _____ If the loan is to include any particular terms, then check below and give details: <input type="checkbox"/> SPECIFIC LOAN TERMS _____</p> <p>(c) Seller Financing. (see attached Seller Financing Addendum, if applicable)</p> <p>(d) Other (specify). _____</p> <p>(e) Balance of Purchase Price in Cash at Settlement.</p> <p>PURCHASE PRICE. Total of lines (a) through (e)</p>
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Section 3 of the REPC, addressing Settlement and Closing, states:

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), 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.... 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.

Section 8 of the REPC addressed Buyers' due diligence obligations and right

to cancel:

8. BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE. 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; ...

If any of items 8(a) through 8(g) 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 Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities or Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1. Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence 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 Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

Section 10 of the REPC addressed certain seller warranties:

10. SELLER WARRANTIES AND 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. 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....

Section 13 of the REPC addresses the authority of signers:

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.

Section 14 of the REPC is an integration clause:

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.

Section 24 of the REPC set forth the deadlines for Seller's Disclosures, Buyer's Due Diligence, and Settlement. (The deadlines were handwritten.)

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

(a) Seller Disclosure Deadline 15 DAYS FROM WRITTEN ACCEPTANCE (Date)

(b) Due Diligence Deadline 60 DAYS FROM WRITTEN ACCEPTANCE (Date)

(c) Settlement Deadline 90 DAYS FROM WRITTEN ACCEPTANCE (Date)⁶

Seller's Property Condition Disclosure form

As noted above, the FSBO incorporates the seller's disclosure form. See pp. 17-18, *supra*. That disclosure form was prepared by Shea on February 9, 2006, two days after Schvaneveldt signed the REPC. (R. 2950, 3127 ¶ 24.) It included this information:

SELLER NAME STILL STANDING STABLES, LLC

PROPERTY ADDRESS Parcel No 23-006-0006

6. BOUNDARIES & ACCESS

E. Are you aware of any unrecorded easements, or claims for easements, affecting the Property? Yes. If "Yes," please describe, to your knowledge, the nature and approximate location of any such easement(s): 66 foot wide easement to Garth Allen, Jenna & Jeff Holt, Lesley Ann Becky Jarl Allen – previously provided.

⁶ Under Section 21, "Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties....." No claim is made that the deadlines in the REPC were extended.

F. To your knowledge, is there direct access to the Property from a public street/road? No.

G. If direct access to the Property is not from a public street/road, to your knowledge, is there direct access to Property through (check applicable box): Yes. Private Easement.

(R. 2952 § 6.)

According to Shea and the Plaintiffs, Buyers became concerned during the due diligence period about whether insurable access to the property existed. (R. 3278-85; R. 3445-46; *also* R. 8384, p. 11.) Schvaneveldt contended there was access, due to his purchase of an additional five acres after a previous adverse court ruling. (R. 3128 ¶ 25.) Various title insurance companies, however, were only willing to offer policies that excluded a guarantee of access to the property. (R. 2903-07.)

Despite their claimed concerns about insurable access, Buyers did not submit a written notice of objections or cancel the REPC pursuant to Section 8.2. The trial court ultimately ruled that Buyers had waived their objections regarding access pursuant to Section 8 of the REPC. (R. 8386, pp. 83-84:17-1.)⁷

⁷ Section 8(a) of the REPC stated that Buyers' obligation to buy was conditioned on their acceptance of the Seller's disclosures after completing due diligence. Under the REPC, if the Buyer has not canceled the REPC or objected by the expiration of the Due Diligence Deadline, "[t]he Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g)... shall be deemed waived by Buyer." § 8.3. When the due diligence period passed without cancellation, Shea admits telling Schvaneveldt that the Buyers' earnest money check was now on the line. (R. 3289, pp. 303-304.) The court ruled: "In failing to object to the access issue during the due diligence

On May 3, 2006, Seller executed closing documents and a runner delivered the documents. (R. 180.) It is undisputed that Buyers did not show up at the closing.

On cross-motions filed by Shea and Still Standing Stables, the trial court ruled as a matter of law that the sole reason that the sale had fallen through was due to an inability to obtain insured access to the property. (R. 8389 pp. 52-54; *also* R. 5049-50.) The court applied this ruling to other parties, including Schvaneveldt, as law of the case. (R. 5050-51.) As noted above, the court ruled that Buyers had waived their objections to the access issue before the closing date.⁸

The lawsuit and Plaintiffs' identity/standing

Facts regarding the identity of the Plaintiffs and their (non)status as principal brokers are set forth in the procedural history above, pp. 11-16, *supra*, and additionally at pp. 35-36, *infra*.

period, the buyer essentially assented to continue with the sale despite the access issue. I mean, that's the natural consequence under the terms of the agreement... Where the due diligence period passed without objection, the contingency here was apparently waived and the buyer gave up his right to object." (R. 8386, pp. 83-84:17-1.) *See Load Zone Marketing and Management, LLC, v. Clark*, 2014 UT App 194, ¶ 13, 333 P.3d 1255 (due diligence conditions are waived if buyer fails to exercise his right to cancel before the deadline).

⁸ The plaintiffs also claimed that Seller had refused to provide a "general" warranty deed as referenced in the REPC. Seller's attorney Gretta Spendlove, however, had proposed a special warranty deed, and Buyers had stated a willingness to accept it. (R. 18.) A fact issue therefore existed, and the trial court did not rule on it.

The key pretrial rulings

As noted above, various motions were filed by the parties during the litigation. Those included a motion for partial summary judgment filed by the Plaintiffs arguing that they were entitled to a commission as a matter of law, and motions/cross-motions for summary judgment by Still Standing Stables, Chuck Schvaneveldt, Cathy Code, Tim Shea, and Skip Wing.

Of import to this appeal, the court ruled that the Plaintiffs had done everything they were required to do in order to earn the commission. The remaining issue was who, between Schvaneveldt and Code, was obligated to pay it. (R. 8383, pp. 27-28 (“I have previously ruled that the plaintiffs satisfied all of their obligations to the FSBO and have therefore earned a commission.... And therefore, the only remaining issue from the July 12th decision was, who’s going to have liability for this commission that has been earned? And I think at this point, I think it’s not the LLC, I think it’s either Cathy Code, Chuck Schvaneveldt or both of them and I think that’s what this trial is going to be about this coming week.”))

Consistent with the narrow issues allowed to be presented to the jury, the court instructed the jury at the beginning of trial that one or more of the remaining two defendants, Schvaneveldt and Code, had entered into a commission agreement with the plaintiffs, that plaintiffs had done everything required to earn the

commission, that a commission was owed, and that the jury's sole task was to determine who owed it:

The plaintiffs and defendants were involved in an attempt to sell a piece of property. Defendants, Chuck Schvaneveldt and Cathy Code, are the sellers of the property, which is owned by Still Standing Stable, LC, that's a limited liability company. Chuck Schvaneveldt is one of the owners of Still Standing Stable, LC. Plaintiffs are the real estate brokers who attempted to find someone to buy the land. Plaintiffs entered into a contract with one or more of the defendants to find a buyer for the land. That contract is called the for sale by owner and you'll hear throughout the trial, it referred to as the FSBO or the FSBO commission agreement.

In performance of the FSBO agreement, plaintiffs produced a ready, willing and able buyer that defendants accepted. The buyer and Chuck Schvaneveldt, one of the defendants, signed a real estate purchase contract.... The REPC between Schvaneveldt and the buyer is a binding contract and satisfies the terms of the FSBO. Ultimately, the transaction failed and the buyer did not purchase the land because the defendants could not provide title insurance that guaranteed access to the property. Importantly, however, the FSBO agreement does not require that the land actually be sold in order for plaintiffs to earn a commission, only that the buyer be ready, willing and able to purchase; thus, the Court previously ruled that plaintiffs satisfied their obligations under the FSBO and therefore, have earned a commission. In this trial, your duty as jurors is to determine whether the defendants are responsible to pay the commission to plaintiffs.

(R. 8384, pp. 123-125.) As noted above, the court directed a verdict in favor of Code at the end of the plaintiffs' case in chief; consequently, Schvaneveldt was the only remaining option for the jury. *See* p. 11, *supra*.

SUMMARY OF ARGUMENT

The trial court committed legal error in this case in a number of respects. As a threshold issue, the trial court erred in not dismissing this action and striking the

judgment because the Plaintiffs do not have standing to sue the Defendants for recovery of a real estate commission under the FSBO agreement. Utah statutory law is clear that only a principal broker can seek recovery in the courts for a real estate commission. The dba ReMax Elite is identified as the brokerage company party to the FSBO. The undisputed evidence shows that none of the Plaintiffs were the principal broker of dba ReMax Elite when the FSBO was executed and none of the Plaintiffs ever became the principal broker of dba ReMax Elite. Rather, dba ReMax Elite was established, registered and owned by Dale Quinlan, a former principal broker. Mr. Quinlan has not sued the Defendants and, subsequent to the verdict, Mr. Quinlan assigned all of his interest and the interest of dba ReMax Elite in the FSBO agreement to Still Standing Stables, L.C. Accordingly, the Plaintiffs, never being the principal broker for dba ReMax Elite, lack standing under Utah law to sue the Defendants under the FSBO and cannot cure that standing defect.

Additionally, the trial court erred in granting summary judgment and taking from the jury the determination of whether a real estate commission was due and owing to the Plaintiffs under the FSBO. The court ruled that the Plaintiffs had done everything they were required to do and were entitled to a commission under the FSBO regardless of whether the sale fell through due to default of the Buyer or the Seller.

The court's ruling is wrong because, first and foremost, it overlooks the plain language of the FSBO. The plain language of the FSBO provides for payment of the commission from the proceeds of the sale and if the sale falls through, ReMax Elite is only entitled to a commission if the sale is "prevented due to default of seller." That language is in direct contravention with Plaintiffs' claim and the trial court's finding that it was irrelevant whether the sale was prevented by default of the Buyer or the Seller.

Furthermore, the court's ruling that the Plaintiffs were entitled to a commission as a matter of law is wrong because: 1) the Plaintiffs did not prove that the Sellers defaulted in any way and the court later ruled that the Buyers had waived any objections to the property access issue; and 2) the court incorrectly conflated the legal principals of "insurable access" and "good and marketable title" to find that the Seller breached the obligation to convey good and marketable title.

The court's grant of summary judgment as to the Plaintiffs' right to a real estate commission is also wrong based an alternative standard that the Plaintiffs had produced a "ready, willing, able and accepted" buyer. The record shows that issues of fact exist regarding whether the Plaintiffs produced a "ready, willing, able and accepted" buyer.

Lastly, the trial court erred in denying the Defendants' Motion for Summary Judgment to dismiss claims against Schvaneveldt in his individual capacity, and

conversely ruling as a matter of law that any liability of Schvaneveldt for the real estate commission was in his individual capacity rather than as a member of Standing Still, LLC. The law and facts clearly demonstrate that any liability of Schvaneveldt for the real estate commission is, as a matter of law, as a member of and in his representative capacity of Standing Still, LLC, the owner of the property being offered for purchase.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION.

Whether a party has standing to bring or maintain an action is a matter of the court's jurisdiction. The party pursuing the claim bears the burden of establishing standing. *Society of Professional Journalists v. Bullock*, 743 P.2d 1167, 1171 (Utah 1986).

In this case, the plaintiffs cannot establish standing for two independent reasons: First, by statute the Plaintiffs lacked standing in the court below. Second, the claimholder and associated rights have now been acquired by one of the defendants, Still Standing Stables, who does not wish to continue the action.

A. The Plaintiffs lacked standing in the court below.

Utah statutes impose specific restrictions on who may bring an action seeking a real estate commission. Under Utah law, only a "principal broker" can contract for, and later seek in the courts, a real estate commission:

No sales agent or associate broker may sue in his own name for the recovery of a fee commission or compensation for services as sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated.

U.C.A § 61-2-18 (now Utah Code § 61-2f-305).⁹

The purpose of this brokerage provision is to closely regulate the real estate industry to protect the public. *Global Recreation, Inc. v. Cedar Hills Development Co.*, 614 P.2d 155, 158 (Utah 1980); 12 *AmJur 2d* Brokers § 8. Consistent with the statute, Utah courts deny nonbrokers statutory standing to sue for commissions. *See, e.g., Diversified Gen. Corp. v. White Barn Golf Course*, 584 P.2d 848 (Utah 1978). Likewise, the trial court barred one of the original plaintiffs, Tim Shea, from suing for a commission under this statute. (R. 1885.)

Because only a principal broker can collect a real estate commission in Utah, the number of persons who can bring such actions is small. Apart from this unique privilege of suing to collect commissions, a broker is free to conduct business as he

⁹ The Utah statutory scheme in place at the time of the REPC and FSBO contemplated a "principal broker" as the person who engages in the selling or listing for sale real estate for commission. A principal broker must be licensed by the state. Utah Code § 61-2-1 (2006). An associate broker is an independent contractor engaged by the principal broker. Utah Code § 61-2-2 (2006). A brokerage is the business activity (or office) of the broker, whether it be in the form of an entity or collection of entities and independent contractors that is supervised by the broker.

or she sees fit under the various options provided for by law, for example, as a corporation, limited liability company, limited partnership, or the like. A common tool used by business entities to enhance their brand and to make doing business easier is an assumed name.

State statutes allow persons and entities to do business under assumed names, commonly known as a “doing business as” or “dba” names. However, the legislature also requires central registration of dbas to provide notice to the world that someone or something is acting under a fictitious identity. *See generally* Utah Code § 42-2-5, *et seq.*

By statute, any person or entity who fails to properly register a dba is barred from bringing or maintaining an action:

any person who carries on, conduct, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter complied with: (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross-complaint, or proceeding in any of the courts of this state

Utah Code § 42-2-10.

Often, this defect can be cured through proper registration while the action is pending. *See, e.g., Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶¶ 15-16, 979 P.2d 363 (allowing amendment of pleadings after failure to register dba was cured). In this case, however, there was no cure and, as discussed below, there can never be one.

As noted above, the action was commenced by a dba, ReMax Elite. The FSBO itself was also in the name of "ReMax Elite dba." *See* pp. 16-17 *supra* (Add.Exh.5, p. 1 § 1.) ReMax Elite was originally registered by a principal broker, Dale Quinlan, on December 28, 2004. (R. 6904, 6922.) Quinlan owned the dba ReMax Elite from the time he registered it in 2004 until it expired in January 2008. (R. 1702-03, 8044.) Normally, there would be nothing particularly noteworthy about a principal broker utilizing a dba. Here, however, Quinlan ceased functioning as a principal broker in late 2005. (R. 7305, 7353.) Skip Wing came in as a successor principal broker for the group of individuals and entities that comprised his brokerage. *Id.* Significantly, however, Wing was never assigned any interest in the ReMax Elite dba, which Quinlan continued to own. *See* pp. 11-12, *supra*.

Thus, at the time of the transaction concerning Schvaneveldt (both the execution of the FSBO and the REPC), Skip Wing was functioning as a principal broker – but not for the entity named on the two contracts (ReMax Elite). The only individual signing the two documents was the agent Tim Shea, who was incapable of binding the owner of the dba, since he was not acting on behalf of that owner

(Quinlan) and was not in any event able to act in any capacity on behalf of Quinlan, who was no longer acting as a principal broker.¹⁰

This disconnect between the ReMax Elite dba and a principal broker is dispositive. Only a principal broker can contract for and seek a commission under Section 61-2-18; accordingly, for a dba to do the same, it must be a properly registered dba of a principal broker, as provided in Section 42-2-5, *et seq.* In short, the principal broker statute significantly narrows the class of individuals who might seek a real estate commission. The dba statute narrows that class even further, in this case, down to one person: Dale Quinlan.

Schvaneveldt raised standing concerns early on in the litigation, putting the appellees on notice that the dba was not a proper party plaintiff. (*E.g.*, R. 601 (filed June 23, 2008).) The dba's lack of standing later became the gravamen of a motion for summary judgment. (R. 1702-03.)

There is ample evidence that Wing or the other plaintiffs realized that the dba under which they were purporting to sue was never registered to Wing, and the ramifications thereof. Wing filed a declaration stating that, in the spring of 2006, Quinlan had approached the other owners of his company, Aspenwood Real Estate

¹⁰ There are instances when naming individually the owners of a dba may cure a defective dba registration. *See, e.g., Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901, 905-06 (Utah Ct. App. 1988); *Utah Valley Bank v. Tanner* 636 P.2d 1060, 1062 (Utah 1981). That, however, did not occur here. Quinlan was never named as a party. Even if he had been, it would have cured nothing, when he was not a principal broker at the time of the transaction.

Corporation, and had transferred the ReMax Elite dba to Aspenwood. (R. 7495, ¶¶ 7-12.) However, after an investigation, the State of Utah determined that the documents purporting to transfer the dba from Quinlan to Aspenwood were forgeries, and that ownership of the dba had never been transferred. (R. 7318, 7332-7350, 8146.) The Plaintiffs did not appeal or otherwise challenge the State's ruling. Record, *passim*.

In short, no party with standing brought this action. The plaintiff ReMax Elite dba was owned by Dale Quinlan, who never sued under the contract, and who is not a party to either the FSBO or the REPC. At the time the claim for a commission was first made in this action, the dba had expired. While this defect might have been curable, that never happened. Even joinder of additional parties (such as Wing) later on did not cure the dba's inability to sue, since (1) the dba was expired, and (2) none of the added plaintiffs owned the dba anyway.

B. The Plaintiffs cannot cure the standing defect or show standing on appeal because one of the defendants, Still Standing Stables, has now acquired both the ReMax Elite dba and all rights of its former owner, Dale Quinlan.

After the verdict was entered in this case, Quinlan assigned all of his interest and the interest of his dba, ReMax Elite, in the FSBO agreement to Still Standing Stables. (R. 8138.) Quinlan also settled with the defendants all disputes regarding the FSBO, both personally and on behalf of the dba that he owned when the

contracts at issue were signed. (R. 8126, 8142.) Additionally, in 2014, Still Standing Stables registered the available ReMax Elite dba. (R. 8199, p. 3 ¶ B.)

Through these events, Still Standing Stables now is the only entity with the standing to pursue ReMax Elite's commission claim against itself and Schvaneveldt. This Court has recognized that such an assignment, and, *a fortiori*, disposition of a cause of action, can occur. *Lamoreaux v. Black Diamond Holdings*, 2013 UT App 32, 296 P.3d 780. Such a transfer of rights "cuts off the former plaintiff's right to pursue" judgment. *Id.*, ¶ 22. With the registration of the ReMax Elite dba, and assignment of the former owner's rights and other choses in action, Still Standing Stables now has the right to cut off permanently any further proceedings relating to the judgment. Accordingly, the Plaintiffs lack standing to maintain this action against the Defendants.

II. THE TRIAL COURT ERRED IN TAKING FROM THE JURY THE QUESTION OF WHETHER A COMMISSION HAD BEEN EARNED.

A. The Plaintiffs were required to show seller default under the FSBO.

As noted, the Plaintiffs filed a motion for partial summary judgment arguing entitlement to a commission as a matter of law. (R. 1508 (motion to have court rule that "ReMax Elite performed its duties pursuant to the For Sale By Owner Commission Agreement & Agency Disclosure such that ReMax Elite should be paid a commission.").)

The Plaintiffs argued that this case was governed by *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, 94 P.3d 292, and Schvaneveldt agrees. In *Fairbourn*, the Utah Supreme Court applied some governing legal principles. First, as a general or default principle, “a real estate broker is entitled to its commission when it has procured a buyer who is ‘ready, willing and able and who is accepted by the seller.’” 2004 UT 54, ¶ 7. Under this standard, the underlying real estate transaction need not be consummated because “absent a contractual provision conditioning a broker’s commission on a buyer’s performance, ‘the broker is not an insurer of the subsequent performance of the contract.’” *Id.*

“The default ready, willing, and able rule may, however, be avoided by agreement.” 2004 UT 54, ¶ 8. In *Fairbourn*, the parties had done so, using language that eliminated any requirement that the specified buyer actually be able to purchase the property, and instead allowing a commission if any offer was “procure[d]” from the buyer. *Id.*, ¶¶ 8-9.¹¹

In light of the parties’ wording choice, *Fairbourn* concluded, a statement later in the contract that the commission was “due and payable upon closing” could

¹¹ The commission agreement in *Fairbourn* read, “If Fairbourn procures, or presents an offer to purchase said property from Rochelle, at the price and upon the terms and conditions set forth herein, or at any other price or upon any other terms or conditions acceptable to me, I agree to pay a commission equal to \$1,500.00 per lot.” *Id.*, ¶ 8 (court’s ellipse and brackets omitted).

not have been intended to impose a condition that the sale actually close. To read it otherwise would negate the parties' modified language requiring only that the broker "procure or present an offer from Rochelle". 2004 UT 54, ¶ 11. The due and payable provision in that contract was required to be read "in relation to all of the others, with a view toward giving effect to all and ignoring none." *Id.*, ¶ 10.

In this case, ReMax initially argued that it was entitled to a commission regardless of whether the sale fell through due to a default of Buyers or a default of Seller. Thus, the Plaintiffs said, the court need not decide, whether Seller had defaulted. *See* R. 1520-1522 ("Default by the Seller or Buyer is irrelevant to earning the commission. . . . Any fault or blame for the eventual failure to close is irrelevant to whether ReMax brought a ready, willing, and able buyer to the table. . . . Any subsequent problems with the closing and sale are irrelevant regardless of fault.... While ReMax would contend that the Seller breached, and therefore the commission is due and owing, such an argument is really irrelevant to deciding whether the commission is due and payable because the closing date has passed, and according to the Utah Supreme Court's analysis in *Fairbourn*, that is all that is necessary.").

By the time their motion was argued, the Plaintiffs had refined their earlier argument, and were now acknowledging that, under *Fairbourn*, the court needed to find a default of the seller. The Plaintiffs argued (correctly) that, under the

wording of the FSBO itself, the correct standard was not a general “ready, willing, able, and accepted” standard, but rather seller default:

[Schvaneveldt’s trial counsel] is trying to argue that *Fairbourn* stands for the proposition that we have to find a ready, willing and able buyer, that the seller accepts and I disagree, respectfully, your Honor.

I think that the *Fairbourn* case stands for the proposition that, you know, they’re citing the general rule and then saying, here’s why the general rule doesn’t apply and that’s how *Fairbourn* applies to this case. And so, you know, in looking at *Fairbourn*, what we think the Court can do is say, I don’t even have to think about ready, willing and able, all I have to do is look at this document and say, did they find a buyer that the seller accepted and did they default? And if that’s the conclusion that the Court comes to, then the Court can say there’s a commission due and payable by somebody, we don’t – the Court still has to rule on that as a matter of law, but somebody owes a commission.

(R. 8382, p. 53.)

The Plaintiffs’ interpretation of *Fairbourn* was correct, and is dispositive not only of this appeal but of all claims against Schvaneveldt as a matter of law. Under the plain language of the FSBO, because the sale did not go through (and therefore there were no proceeds of the seller from which to pay a commission and no recordation of closing documents), Plaintiffs could claim a commission only if the sale was “prevented due to default of seller.” But the trial court ruled as a matter of law – and the Plaintiffs did not appeal – that it was *Buyers* who defaulted, not the seller.

As *Fairbourn* directs, whether a commission was payable starts with the wording of the FSBO. Unlike the agreement in *Fairbourn*, the FSBO here

expressly included language contemplating that a sale would have to be completed for a commission to be payable. The relevant language states:

2. BROKERAGE FEE. The Seller agrees to pay the Company, irrespective of agency relationship(s), s compensation for services, a Brokerage Fee in the amount of \$_____ or 3% of the acquisition price of the Property, if the Seller accepts an offer from Emmett Warren and or Assigns (the "Buyer"), or anyone acting on the Buyer's behalf, to purchase or exchange the Property. The Seller agrees that the Brokerage Fee shall be due and payable, from the proceeds of the Seller, on the date of recording of closing documents for the purchase or exchange of the Property by the Buyer or anyone acting on the Buyer's behalf. If the sale or exchange is prevented by default of the Seller, the Brokerage Fee shall immediately be due and payable to the Company.

(Add.Exh. 5, § 2.)

Within the Brokerage Fee provision itself, ReMax Elite agreed that its payment would be from "the proceeds of the seller." If there were no proceeds – if the sale fell through – then no payment was due and payable. Similarly, if there was no "recording of closing documents for the purchase...by the Buyer or anyone acting on the Buyer's behalf," then no payment was due and payable.

The parties agreed to one exception to this provision: *"If the sale or exchange is prevented by default of the Seller, the Brokerage Fee shall immediately be due and payable to the Company."* Under this language, if the Plaintiffs could

show that 1) the Seller defaulted, and 2) the sale was prevented because of this default, then it could seek a commission.¹²

B. There was no basis upon which the trial court could find “default of the seller” as a matter of law.

Although the Plaintiffs did not address seller default in their moving papers, a number of the parties’ motions overlapped, incorporated each other, or were argued simultaneously. The Plaintiffs might therefore contend that one of the trial court’s rulings on another motion amounted to a finding of seller default. In response to a motion for summary judgment filed by Tim Shea, the agent, against Still Standing Stables, the trial court found as a matter of law that the sale fell through because the seller could not guarantee “insurable” access. The trial court later stated that this ruling was law of the case as to all parties. *See* p. 28, *supra*.¹³

¹² The Plaintiffs’ moving papers did not attempt to establish seller default. Summary judgment was thus inappropriate on the face of the Plaintiffs’ motion. *See Orvis v. Johnson*, 2008 UT 2, ¶ 10, 177 P.3d 600 (moving party must make initial showing that he is entitled to judgment and that there is no genuine issue of material fact that would preclude summary judgment in his favor); *Frisbee v. K & K Constr. Co.*, 676 P.2d 387 (Utah 1984) (summary judgment is inappropriate if moving papers fail to establish the absence of fact issues; summary judgment reversed where document relied on by moving party showed ambiguity on its face even though non-moving party failed to respond).

¹³ The court did not rule that there was no access to the property. The court held that, regardless of potential issues of fact as to access, “this case has never been about whether access *actually existed*; rather it is about Still Standing’s undisputed inability to *obtain insurance* on an access to the property.” (R. 5049-50 (emphasis in original).)

For two independent reasons, this ruling did not – and could not – establish “default of the Seller” as a matter of law. First, as the court later ruled, Buyers had waived any objections to the access issue, and had assented to purchase the property in its present condition. *See* pp. 27 and 28, *supra*. Therefore, as a matter of law, it was Buyers who defaulted when they failed to show up at the closing.

The trial court certainly could not rule otherwise as a matter of law. *See Cooper Enterprises v. Brighton Title Co., LLC*, 2010 UT App 135, ¶ 16, 233 P.3d 548 (buyer was not entitled to return of earnest money where it knew of questions regarding owner’s title before the due diligence deadline but did not cancel). That is particularly true when the FSBO itself – the commission agreement upon which the Plaintiffs rely – incorporated the Seller’s disclosures regarding access, to which the court found the Buyers had assented.

Additionally, the trial court conflated “insurable access” and “good and marketable title.” Both the FSBO and the REPC require a Seller to transfer “marketable” or “good and marketable” title. *See* Add.Exh. 5 (FSBO) § 4 and Add.Exh. 6 (REPC) § 10.1. Plaintiffs argued, and the trial court accepted, that a buyer’s inability to find insurance that will include guaranteed access means that the seller failed to deliver “good and marketable title” as a matter of law. That is not consistent with Utah law.

Allegedly landlocked property can be and is sold all the time. As Plaintiffs themselves pointed out, Still Standing Stables had purchased this very land without a guarantee of access. The Utah Supreme Court has defined “marketable title” as “one that may be ‘freely made the subject of resale’ and that can be sold at a ‘fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for the loan money.’” *Booth v. Attorneys’ Title Guaranty Fund, Inc.*, 2001 UT 13, ¶ 33, 20 P.3d 319, *quoting Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1243 (Utah 1992).

The trial court erred in ruling that, as a matter of law, a buyer’s inability to obtain insurance that includes access means that the seller breached an obligation to convey good and marketable title. In fact, this Court has rejected that very contention. In *Mostrong v. Jackson*, 866 P.2d 573 (Utah Ct. App. 1993), a buyer sought rescission of a real estate purchase by arguing, among other things, that

the lack of legal access to the property precluded the Jacksons [sellers] from conveying marketable title. Furthermore, the Mostrongs [buyers] argue that their exposure to litigation, in attempting to obtain legal access to the property, is evidence of the property’s unmarketable title. They assert that the Jacksons failed and refused to cure this breach of contract. In addition, they claim they were unable to finance the property because it was “landlocked.”

Id. at 577.

Those circumstances did not mean that, as a matter of law, the sellers failed to offer good and marketable title, this Court held. *Id.* at 578, *citing Sinks v.*

Karleskint, 130 Ill.App.3d 527, 85 Ill.Dec. 807, 810, 474 N.E.2d 767, 770 (1985) (court noting that access problems do not impair the right to possess property and that only defects related to title as guaranteed to the purchaser and affecting market value will render title unmarketable); see 11 *Couch on Insurance* § 15959 Access to Parcel Insured (ability to access parcel of real estate is not technically a defect in the title to the property).

“The Mostrongs failed to establish either factually or as a matter of law that marketable title in this instance necessarily included legal access to the property,” the court stated. *Mostrong*, 866 P.2d at 578. Among other things, they adduced no evidence that the alleged lack of access affected the market value of the property. Additionally, the seller was entitled to undertake reasonable efforts to cure defects. *Id.*¹⁴

C. If the Plaintiffs only had to show that it produced a “ready willing, able, and accepted” buyer, issues of fact existed on those elements.

¹⁴ Actual access would, of course, preclude any argument that good and marketable title could not be conveyed in this case. Accordingly, the fact that the trial court declined to rule on whether access in fact existed, and instead focused only on *insured* access, meant that the court could not rule on “good and marketable title” as a matter of law. See, e.g., *Mostrong*, 866 P.2d at 579, citing *Brown v. Yacht Club of Coeur d’Alene, Ltd.*, 111 Idaho 195, 722 P.2d 1062, 1065 (Idaho App. 1989) (“Insurable title merely means that property is capable of being insured, not that the title is good or marketable.”) and *Holmby, Inc. v. Dino*, 98 Nev. 358, 647 P.2d 392, 394 (1982) (noting that insurance may be “evidence” of marketable title).

As the Plaintiffs themselves argued, a general “ready, willing, able, and accepted” standard did not apply in this case. Even under that standard, however, the trial court could not properly grant summary judgment.

Were the Buyers ready? That is unclear. The Plaintiffs claimed that a hard money lender had agreed to finance \$3,580,000 of the purchase price, and that another individual named Mark Bosco was providing the remaining \$782,500 of the purchase price. (R. 1516.) But no affidavit or other testimony from Mr. Bosco was adduced. (R. 1548-49.) Under *Orvis, supra*, the lack of such affirmative evidence precluded summary judgment.

Were Buyers able? Buyers said they were unable to obtain financing because of a condition (alleged lack of insurable access) that Buyers waived. (R. 1554.) If anything, this establishes that they were *not* able.

Were Buyers willing? No; they waived all objections yet did not show up. (See R. 1630 (Buyers unwilling).)

Were Buyers accepted by Seller? That one is a bit more complicated. Shea admits that, when meeting with Schvaneveldt, he (Shea) represented that this would be a “cash” transaction. (R. 3268, p. 22.) Schvaneveldt thought that was why the space next to “loan” was left blank. See p. 19, *supra*.

Plaintiffs successfully argued, however, that Schvaneveldt could not dispute acceptance on this ground because a box containing the word “Conventional”

under New Loan was marked with an X. (R. 3421; *see* p. 23, *supra*.) As a matter of law, it was immaterial that the space for the loan amount was left blank, the Plaintiffs argued. But there was evidence to the contrary, including the fact that, after Schvaneveldt signed the original REPC, Shea went back and hand wrote “TBD” in the blank. Shea himself admitted that, to him, “TBD” could mean either cash or a conventional loan. (R. 3274, pp. 149-150:21-1 (TBD meant “We put conventional but they had the right to determine whether it was cash, conventional.”).)

Plaintiffs argued, and the court ruled, that Shea’s alterations were meaningless, that Shea just made them for “internal” purposes. (R. 8384, p. 72:9-14.) There was no difference at all between a blank space and TBD, Plaintiffs said; TBD was “equivalent to” a blank space. (R. 3436.)

That suggestion seems perplexing on its face. If TBD literally made no difference at all, and was exactly the same as a blank space, then why did Shea add it? If a blank space could *only* mean one thing (non-cash transaction), then why go back and state that the amount of the loan was To Be Determined? What was there that needed to be determined?

Whether a transaction is cash or financed is material, particularly given the greater restrictive lending practices that may come into play with a financed

purchase. Under the circumstances of this case, the trial court erred in ruling as a matter of law that Buyers were “accepted” by Schvaneveldt.¹⁵

In sum, issues of fact existed as to whether the Plaintiffs produced a buyer who was ready, willing, able, and accepted by the seller, and summary judgment was inappropriate.

III. THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT ANY LIABILITY OF SCHVANEVELDT WAS IN HIS PERSONAL CAPACITY.

A. The facts and law show that Schvaneveldt was acting as a member of the LLC.

By statute and Utah Supreme Court precedent, the trial court erred in ruling as a matter of law that any liability of Schvaneveldt for the commission was in his personal capacity. The Utah Revised Limited Liability Company Act provides that no member of a limited liability company is personally liable for an obligation of the company. Utah Code § 48-2c-601 (“[N]o organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.”).

¹⁵ The fact that Shea’s other modifications were unmistakably material – for example, identifying himself for the first time as an agent for the Seller as well as the Buyer – suggests materiality to this change as well. *See* p. 18, *supra*.

Applying this clear statute, the Utah Supreme Court has held that an individual member of an LLC is “personally liable for a signed contract only if he executed the contract ‘in a manner clearly indicating that the liability was his alone.’” *Daines v. Vincent*, 2008 UT 51, ¶ 40, 190 P.3d 1269 (quotation omitted). In *Daines*, the court held that a signing party was not liable in his individual capacity because the language of the contract and surrounding circumstances evidenced that he was executing the contract on behalf of the LLC rather than in a personal capacity, and the contract did not “clearly indicate” the liability was an individual one of the signor. *Id.*

For example, the contract in *Daines* included the name of the LLC, and prefatory documents executed in relation to the contract made it “apparent that Daines recognized that he would be dealing with [the LLC] ASC through Vincent and not with Vincent in his individual capacity.” *Id.* at ¶ 41. The conclusion that the signor was acting in his capacity as a member of the LLC rather than individually was also supported by the other side’s deposition testimony wherein he testified to “his continued understanding that Vincent was acting on behalf of ASC[.]” *Id.*; see also, *Krogh v. Nielsen*, 2012 U.S. Dist. LEXIS 175087, 9 (D. Utah Dec. 10, 2012) (dismissing claims against individual corporate officers because “a corporate officer[] is not personally liable under contract unless ‘he

executed the contract in a manner clearly indicating that the liability was his alone.”).

The same is true in this case. It was Shea – Buyers’ own agent – who identified “Land LLC Still Standing Stables” when defining the Property in the initial offer. (Add.Exh. 6 at ¶ 1). Two days after the offer was accepted, Shea filled out a Seller’s Disclosure form that identified the property owner as Still Standing Stables, LLC. (R. 2952.) The REPC stated, “If...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...Seller.” (Add.Exh. 6 at ¶ 13). And under the LLC act, “any member in a member-managed company, ... may sign, acknowledge, and deliver any document transferring or affecting the company’s interest in real or personal property.” Utah Code § 48-2c-802.

Other evidence abounds in the record that Schvaneveldt was acting on behalf of the LLC – and that everyone knew it. When ReMax Elite filed the initial interpleader action to resolve entitlement to the earnest money deposit, it sued only Still Standing Stables, not Schvaneveldt. (R.1.) Documents filed by Plaintiffs themselves included records showing that title insurers only searched for liens and judgments against Still Standing Stables, not Schvaneveldt individually (R. 2977, 2996), that Buyers directed correspondence to “Still Standing Stables, Attn: Chuck

Schvaneveldt” (R. 393), and that Skip Wing directed correspondence to “Chuck Schvaneveldt, Still Standing Stables,” at its Directors Row address that is also listed on the REPC. (R. 21; Add.Exh. 6.)

Additionally, if, as Schvaneveldt testified – and, frankly, seems obvious from the face of the document – another word (“Member”) originally followed his signature on the REPC, that is further evidence of representative capacity. Even absent such testimony, however, the Plaintiffs did not adduce “clear” evidence that Schvaneveldt was signing in his personal capacity. The trial court erred in denying Schvaneveldt’s motion for summary judgment on this ground.¹⁶

B. Alternatively, Schvaneveldt’s tort claims against Shea and Wing should be reinstated.

As argued above, Schvaneveldt is entitled to judgment as a matter of law. If the Court does not so rule, however, then Schvaneveldt’s tort claims against Shea and Wing should be reinstated on remand. The trial court declined to allow Schvaneveldt to pursue negligence or misrepresentation claims against Shea and Wing because it had ruled as a matter of law that the sale fell through due to a lack of insurable access. *See* p. 28, *supra*. In light of the court’s later ruling that this

¹⁶ The Plaintiffs complained that, after the denial of his motion for summary judgment based on the lack of personal liability, Schvaneveldt then asserted an alternative argument, *i.e.*, that he lacked authority to bind the LLC and therefore closure of the sale was an impossibility. But parties are allowed to argue in the alternative, and particularly when their initial (correct) argument has been successfully opposed.

access issue had been waived by Buyers (*see* p. 27, *supra*), that ruling is no longer supportable.

Claims against Shea and Wing should also be allowed because their alleged breaches of duty caused Schvaneveldt concrete harm, not the least of which was getting Schvaneveldt sued. Although Shea contended that his principal duties were owed to Buyers, he undisputedly owed *some* duties to Seller, for whom he also claimed to be acting. *See* p. 18 *supra*; *Cooper Enter. PC v. Brighton Title Co., LLC*, 2010 UT App 135, ¶ 12 n.5, 233 P.3d 548; *Gilbert Dev. Corp. v. Wardley Corp*, 2010 UT App. 361, ¶ 23, 246 P.3d 131. That is especially true when Shea undertook affirmative actions upon which Schvaneveldt relied to his detriment, at which point he was required to perform those acts in a non-negligent manner. *Robinson v. Mt. Logan Clinic*, 2008 UT 21, 182 P.3d 333. As the alleged principal broker, Skip Wing is vicariously liable for Shea's actions.

The record supports several examples of actionable conduct. For example, Shea knew that the property was owned by an LLC. *See* p. 51 *supra* (Add.Exh. 6 at ¶ 1). Yet evidence exists that, at some point before the commencement of litigation, Shea altered the word "Member" that Schvaneveldt had written beside his name on the REPC. *See* p. 19-20, *supra*. The inclusion of that word alone would have prevented these claims against Schvaneveldt individually.

Shea also admits that he (mis)represented to Schvaneveldt that this was a cash transaction, and then drafted an ambiguous REPC that did not contradict that representation. *See* p. 19, *supra*. Because of those actions, Schvaneveldt signed the REPC – which, again, got him sued. Shea prepared the Seller’s disclosures that the Plaintiffs in this case later claimed were incorrect and had caused the sale to fall through. Schvaneveldt’s recoverable damages include the attorney fees incurred in defending the claims against himself caused by Shea’s acts. *See Broadwater v. Old Republic Sur.*, 854 P.2d 527, 535 (Utah 1993) (recognizing third party tort rule).

REQUEST FOR ATTORNEY FEES

The FSBO has an attorney fee provision (the same provision cited by the Plaintiffs when they received an award of attorney fees against Schvaneveldt). Add.Exh. 5 § 8. As noted above, Plaintiffs failed to adduce clear evidence that Schvaneveldt signed in his personal capacity; accordingly, this Court should remand with instructions to enter judgment for Schvaneveldt. In that event, or if the Court remands for other purposes, it should provide that, should Schvaneveldt prevail on remand, he is entitled to attorney fees incurred in this appeal.

CONCLUSION

For the reasons set forth above, Appellant Schvaneveldt respectfully requests that the Court reverse the judgment and instruct the trial court to enter

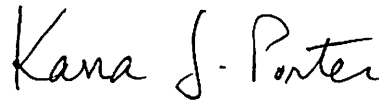
judgment in favor of Schvaneveldt as a matter of law. Alternatively, the Court should reverse the judgment and remand the case for trial.

INCORPORATION

Pursuant to U.R.A.P. 24(i), Schvaneveldt adopts by reference arguments by Still Standing Stables, LLC (which has not yet been filed) which also relate to the liability of Schvaneveldt and coextensive claims.

DATED this 13th day of March, 2015.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in dark ink, appearing to read "Karra J. Porter", is written over a horizontal line.

Karra J. Porter

Phillip E. Lowry

Attorneys for Defendant / Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of **BRIEF OF APPELLANT CHUCK SCHVANEVELDT** were mailed to the following this 13th day of March, 2015:

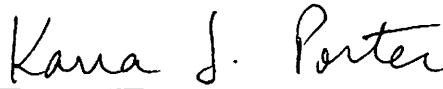
L. Miles LeBaron
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LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., #200
Layton, Utah 84041
Attorneys for Plaintiff/Appellee
Elite Legacy



Karra J. Porter
Phillip E. Lowry
Attorneys for Defendant / Appellant
Schvaneveldt

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for the Defendant / Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 13,973 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



Karra J. Porter

Phillip E. Lowry

Attorneys for Defendant / Appellant

ADDENDUM

- Exhibit 1** March 22, 2012 Ruling (Lack of Insurable Access)
- Exhibit 2** July 12, 2012 Ruling (Granting Plaintiffs' Motion for Partial Summary Judgment that Plaintiffs are entitled to a commission as matter of law)
- Exhibit 3** July 17, 2012 Ruling and Order on Pending Motions
- Exhibit 4** August 8, 2012 Ruling (Buyers waived objections to Seller's access disclosures)
- Exhibit 5** For Sale By Owner Commission Agreement & Agency Disclosure (FSBO)
- Exhibit 6** Real Estate Purchase Contract – Land (REPC)

Exhibit 1
March 22, 2012 Ruling (Lack of Insurable Access)

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT, OGDEN
WEBER COUNTY, STATE OF UTAH A 10:00

-o0o-

REMAX ELITE,

Plaintiff,

vs.

SELLER, STILL STANDING
STABLES, LC, EMMETT WARREN,
PURCHASER WBL DEVELOPMENT
LLC,

Defendants.

Case No. 060906802

ORAL ARGUMENTS

EMMETT WARREN LC and EMMETT
WARREN LC and ASSIGNS,

Third-Party
Plaintiff,

vs.

CHUCK SCHVANEVELDT, TIM
SHEA and CATHY CODE,

Third-Party
Defendants.

-o0o-

BE IT REMEMBERED that on the 22nd day of March,
2012, commencing at the hour of 10:30 a.m., the above-entitled
matter came on for hearing before the HONORABLE MICHAEL D.
LYON, sitting as Judge in the above-named Court for the
purpose of this cause and that the following proceedings were

had.

UTAH APPELLATE COURTS



DEPO

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SALT LAKE CITY, UTAH 84101
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20130746-CA; 20130768-CA;
20130809-CA; 20130854-CA;
20140978-CA & 20141000-CA

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8389

1 lifted, the lis pendens, the land sold virtually immediately
2 thereafter--

3 MR. WALLACE: That was all settled--

4 MR. FULLER: --immediately thereafter, about--about
5 90 days, they were able to sell that exact piece of land for
6 the million dollars.

7 So that's all, your Honor. I appreciate you letting
8 me get all those points in. Thank you.

9 THE COURT: You're welcome.

10 Gentlemen, thank you very much for your preparation
11 and your argument this morning.

12 The Court finds and rules as follows: The Court
13 grants Remax's motion for summary judgment and denies Still
14 Standing's cross-motion.

15 This is how I see this case. These motions can be
16 boiled down to one simple issue, the lack of a guaranteed
17 access to the property. Despite several attempts by various
18 title insurers and attorneys, no one could guarantee the
19 access to the property existed. Still Standing attempts to
20 argue that there was a valid access by way of an easement.
21 While I'm personally doubtful of the legal efficacy of that
22 easement to achieve what you argued, Mr. Fuller, the bottom
23 line is, I think it's irrelevant because on one could
24 guarantee the access to the buyer.

25 Both the buyer and the seller were well aware of

1 this fact and the Court finds that there is undisputed--or
2 that it is undisputed that the lack of a guaranteed access was
3 the sole reason for the--that the transaction failed.

4 I mean, it strains credulity to think that somebody
5 would fork over over four million without a general warranty
6 deed or at least some kind of a guarantee under a special
7 warranty deed that there would be an access.

8 Still Standing argues that if Shea had made certain
9 disclosures to it, then it could have prevented the
10 transaction's failure. It is my judgment, based on what I
11 have read, that that is not accurate. Still Standing was
12 aware of the access problems from the time it purchased the
13 property and had tried many different avenues to guarantee an
14 access to the property, all of which failed.

15 Shea's failure to communicate or disclose
16 information to Still Standing did not cause the transaction to
17 fail.

18 Still Standing raises many other issues, including
19 agency duties, disclosures and royalties in an attempt to
20 prevent summary judgment. While there are undoubtedly factual
21 issues that exist, none of these issues is relevant because
22 Still Standing cannot show that they were damaged by anything
23 other than the inability to guarantee an access.

24 Even if Shea and Remax acted improperly in some way
25 as Still Standing suggests, the simple truth is that the

1 actions of Shea and Remax did not cause the transaction to
2 fail; therefore, Still Standing cannot prove that they were
3 damaged in any way by the actions of Shea or Remax.

4 As a result, even if Shea did not fulfill some duty
5 owed to Still Standing or even if Shea made some
6 misrepresentation to Still Standing, all of Still Standing's
7 claims fail because it cannot prove that Shea and Remax caused
8 any damage to Still Standing. The transaction failed because
9 Still Standing could not guarantee an access to the property.
10 That's the bottom line.

11 Accordingly, again, the Court grants the--Remax's
12 motion for summary judgment, dismisses Still Standing's
13 affirmative claims.

14 Mr. Wallace, would you please prepare an appropriate
15 order consistent with this ruling?

16 MR. WALLACE: I will do so, your Honor. Thank you
17 for your time.

18 THE COURT: Thank you.

19 MR. FULLER: Your Honor, could I--is there a way--
20 that chart I had there, can I fold that up and put it as part
21 of the record? Is there a way to accommodate the chart?

22 THE COURT: Which one? Yours?

23 MR. FULLER: Yeah. My--it'll fold right up, your
24 Honor, I--

25 THE COURT: Oh, sure.

Exhibit 2
July 12, 2012 Ruling (Granting Plaintiffs' Motion for
Partial Summary Judgment that Plaintiffs
are entitled to a commission as matter of law)

ORIGINAL

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

SECOND DISTRICT COURT
JUL 20 A 11:30

-o0o-

REMAX ELITE,

Plaintiff,

vs.

SELLER STILL STANDING
STABLES, LC, EMMETT WARREN,
PURCHASER WBL DEVELOPMENT,
LLC, STILL STANDING STABLE,
LC,

Defendants.

Case No. 060906802

ORAL ARGUMENTS

EMMETT WARREN, LC, EMMETT
WARREN LCASSIGNS,

Cross-Complainant
and Third-Party
Plaintiff,

vs.

CHUCK SCHVANEVELDT, TIM
SHEA and CATHY CODE,

Third-Party
Defendants.

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FILED
UTAH APPELLATE COURTS

DEC 15 2014

20130746-CA; 20130768-CA;
20130809-CA; 20130854-CA;
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1 broker and therefore, it's immaterial whether Mr. Wing was--
2 was consulted or involved in this case, so that's it.

3 And we're going to try this issue.

4 I need just a minute to clear my head. I don't know
5 whether I can grant something here this morning or not. I'm
6 really tempted, but let me finish with this young lady so she
7 can go.

8 (Off the record.)

9 THE COURT: All right, gentlemen. Let me give you a
10 ruling on Remax's motion for partial summary judgment. The
11 Court grants Remax's motion for partial summary judgment
12 subject to the jury's factual determination as to the offer
13 date contained in the REPC. In doing so, the Court finds and
14 rules as follows:

15 The Court finds no genuine issue of material fact
16 exists regarding whether plaintiff's earned the commission.
17 The FBSO contract provided that, and for the record, that's
18 the for sale by owner contract, provided that seller would owe
19 Remax a three percent commission, and I'm quoting, if the
20 seller accepts an offer from Emmett Warren and/or assigns or
21 anyone acting on behalf--acting on the buyer's behalf to
22 purchase the exchange--or exchange the property, end of quote.
23 It is undisputed that seller did accept an offer from Emmett
24 Warren LC; therefore, Remax earned the three percent
25 commission.

1 The failure of the buyer to close or actually
2 purchase the property is irrelevant to the commission. Given
3 the language of the contract as well as case law regarding the
4 requirement to produce a ready, willing and able buyer. There
5 is no genuine issue of fact that Remax presented a ready,
6 willing and able buyer.

7 The Court has previously ruled that the transaction
8 failed because the defendants--because of the defendants'
9 inability to insure access to the property, not for a lack of
10 funding or any other reason.

11 Under Fairbourne, the commission became due and
12 payable on the date of closing, regardless of the failure of
13 the parties to actually close. The changes Tim Shea made to
14 the REPC after the parties signed it are a red herring, in the
15 Court's judgment and are irrelevant to the commission claim.
16 What is relevant is that the parties agreed to the terms and
17 signed the REPC, which triggered the obligation to pay a
18 commission. Any changes made after the fact had no influence
19 on the buyer and seller's decision to enter into the REPC.

20 And that is something I, where you and I just differ
21 on this issue, Mr. Fuller.

22 Allegations of fraud by Tim Shea are equally
23 irrelevant to the commission claim.

24 Additionally, defendants have not pled a fraud claim
25 and therefore, any claims of fraud have been waived. The

1 Court will now allow any allegations of fraud to be presented
2 at trial as such allegations would only distract and confuse
3 the jury from the issues at hand.

4 Defendants contend that the offer to buy the
5 property as contained in the REPC lapsed because it states
6 that the offer expires January 23rd, 2006, and the REPC was
7 not signed until February 7, 2006. While the Court believes
8 this is a mutual mistake of the parties, out of an abundance
9 of caution, the Court will allow this factual issue to go to
10 the jury.

11 Whether Cathy Code acted personally or as an agent
12 of Chuck Schvaneveldt in signing the FBSO agreement is an
13 issue of fact that is not properly before the Court at this
14 time; therefore, the issue must be decided by the jury at
15 trial.

16 With regard to defendants' arguments on Remax being
17 defunct d/b/a impressions of who the principal broker is, the
18 Court has already addressed those issues in prior rulings and
19 will not address them presently.

20 Now, with respect to the defendants' motion for
21 summary judgment on the issue of--of the Still Standing's
22 liability, this motion is born out of the defendants' attempt
23 to argue both sides of an issue, specifically attempts by
24 Still Standing to lay blame on the other defendant and vice
25 versa. Defendants cannot have it both ways, but neither can

1 plaintiffs; therefore, the Court is not going to grant summary
2 judgment against plaintiff based solely on Mr. Duncan's
3 argument made in a prior brief and no other facts.

4 Accordingly, the Court denies the defendants' motion as to
5 Still Standing's liability. Still Standing's liability is an
6 issue for the jury to decide.

7 Let me just indicate with respect to any possible
8 time that the Court would have. I am not holding a law and
9 motion on Thursday between now and the 9th of August. I am
10 holding a civil law and motion calendar on the 23rd of July
11 and the 3rd of July, but my vacation schedule is such that I
12 will have no time to read anything like this, that I'm--I'm
13 virtually, for the next two weeks working or on vacation
14 throughout the week except just on those Mondays and I can't
15 come in off vacation and handle stuff like this. You know, I
16 can't do it.

17 And there are some judges that may want to just sit
18 and listen and shoot from the hip, but I'm just not capable of
19 doing that. And I've never done it and I won't start now. So
20 I think the issue of liability is just going to have to be
21 decided by a jury.

22 MR. FULLER: Okay.

23 THE COURT: But this issue on whether the commission
24 is earned is done and you can--I can allow you, Mr. Fuller, to
25 explore the factual issues of whether this was a mutual

1 mistake or whether the agreement lapsed and you can go into
2 that issue, but I'm not going to allow any other--I'm going to
3 uphold that--that commission agreement. I think the
4 commission was earned.

5 MR. FULLER: Okay. So the commission--okay. So the
6 commission's earned, so just to--to clarify.

7 THE COURT: Sure.

8 MR. FULLER: We're on track for a trial here. So--
9 so as far as liability, I don't go back and argue that through
10 his acts that he--all that liability stuff is done.

11 THE COURT: No. There--the issue of whose liability
12 it is for that commission, that--that is an open issue for
13 trial.

14 MR. FULLER: Okay.

15 THE COURT: In other words, that can be Cathy Code,
16 Chuck Schvaneveldt or Still Standing's liability.

17 MR. FULLER: Yes.

18 THE COURT: That issue's open and the--and the
19 interpretation of the agreements and you know, I guess the
20 issues of statutes of frauds, those--all those arguments--

21 MR. FULLER: Yeah.

22 THE COURT: --in my perspective, all apply to
23 liability.

24 MR. FULLER: Okay. So would the jury, for example,
25 be asked--we're not going to ask is a commission due, 'cause

1 the judge has that there's a commission due.

2 THE COURT: And what--what I anticipate will be done
3 is that there will be a jury instruction to the jury that,
4 that as a matter of law, the Court has ruled that the
5 commission was earned.

6 MR. FULLER: Okay.

7 THE COURT: And the issue before the jury is who
8 will pay it.

9 MR. FULLER: Okay. That makes sense.

10 Now, and your Honor, you talked about this--the deal
11 about the lapsed--the lapse. If it's a question a fact, it
12 was--

13 THE COURT: Yeah. And I appreciate that.

14 MR. FULLER: Yeah

15 THE COURT: That is a defense. If the agreement
16 lapsed, then there is no commission earned.

17 MR. LeBARON: Understand, your Honor.

18 MR. FULLER: And we're saying it's either lapsed--we
19 can't say it's lapsed as a matter of law, we're saying--

20 THE COURT: No. I--as I tried to explore with Mr.
21 LeBaron this morning, I--I think that is so fact sensitive
22 that I think it would be an error on the Court's part to--I
23 mean, I read the arguments of why it appear to be a mutual
24 mistake and I thought it sounded reasonable to me, but I think
25 that's fact sensitive and I'm not--I don't want to create an

1 error, so I'm going to be very conservative on that issue--

2 MR. FULLER: Yeah.

3 THE COURT: --and so--and I'll let you decide how
4 you want to fashion your jury instruction, but essentially,
5 I'm ruling that--that the commission was earned if in fact,
6 the agreement had not lapsed.

7 MR. FULLER: Okay. If agreement is not--has not--

8 THE COURT: That's--

9 MR. LeBARON: Or can otherwise be directed, I
10 suppose.

11 THE COURT: Yes.

12 MR. LeBARON: By mutual mistake.

13 THE COURT: By mutual mistake.

14 MR. FULLER; But the case where it says you can't
15 ratify it, wouldn't that be a matter of law, where we'd say
16 the Court says you can't ratify it. Are we going to ask the
17 jury that says did they--did they ratify it through mutual
18 mistake?

19 THE COURT: Yes.

20 MR. FULLER: Okay. Okay. With the two issues on
21 those issues, because that's really the meat of it, the
22 liability part, can the--if the parties stipulated or I got a
23 funny feeling you're going to reverse your earlier decision
24 about the right-of-way and any of the negligence claims. With
25 those--with--

1 THE COURT: Yeah. I--that decision, again, I'm not
2 going to re-plow the ground.

3 MR. FULLER: Yeah.

4 THE COURT: I think I have ruled that that's what
5 caused this sale to not close--

6 MR. FULLER: Yeah.

7 THE COURT: --was the absence of a--an insurable
8 right-of-way.

9 MR. FULLER: Yes.

10 THE COURT: And--and that it--

11 MR. LeBARON: There's no damage.

12 THE COURT: And so that's done. And so, as you
13 talk, you know, prepare your--your questions and your
14 arguments, it is a--a settled issue that property didn't,
15 although there was a con--a commission owed, the contract
16 didn't close because there was no insurable interest, but that
17 didn't affect the entitlement of the agent's entitlement or--
18 and the broker's entitlement to the commission.

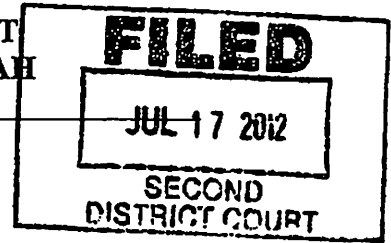
19 MR. FULLER: Okay. And your Honor, so,
20 hypothetically, if the Court grants--Mr. Wallace says we want
21 to make that final and we have this--the real meat of it here,
22 the liability, is there a--is there any circumstance--

23 THE COURT: Let me just tell you that I've looked at
24 some of these others and I haven't had time to--

25 MR. FULLER: Okay.

Exhibit 3
July 17, 2012 Ruling and Order on Pending Motions

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



REMAX ELITE, et al.,

Plaintiffs/Counterclaim
Defendants,

vs.

STILL STANDING STABLE, L.C., et
al.,

Defendants/Counterclaim
Plaintiffs.

**RULINGS AND ORDER
ON PENDING MOTIONS**

Case No. 060906802
Judge Michael D. Lyon

JUL 17 2012

Plaintiffs ("Remax") filed a motion for rule 54(b) certification. In response, Defendants ("Still Standing") filed a motion to enter rule 52 findings and a motion to reconsider. Remax then filed a motion to dismiss Still Standing's third-party complaint, and Still Standing countered by filing a motion to amend its counterclaims. The Court addresses each motion in turn.

I. Remax's Motion for Rule 54(b) Certification

Pursuant to rule 54(b) of the Utah Rules of Civil Procedure, Remax asks the Court to certify as a final judgment its summary judgment ruling dismissing Still Standing's claims. While the Court initially intended to grant the motion and expressed this intention to the parties at oral argument on July 12, 2012, after further consideration, the Court denies the motion.

Rule 54(b) provides that "the court may direct the entry of a final judgment" on a claim "upon an express determination that there is no just reason for delay." Utah R. Civ.

P. 54(b). Upon review, the Court cannot make such a determination in this case.

Following the Court's ruling on Remax's motion for partial summary judgment, there are very few issues left to be resolved in the case. Trial on the remaining issues is set to begin in less than three weeks. To enter final judgment on some claims now would only separate the claims while moving up the appeal deadline by less than a month. This seems like a needless measure that could also prejudice Still Standing, as it would then be required to file an appeal around the same time it is preparing for trial. At this point, the more prudent course is to wait the additional month when all claims will be resolved.

Consequently, the Court denies Remax's rule 54(b) motion.

II. Still Standing's Motion to Enter Rule 52 Findings

On March 22, 2012, the Court heard oral arguments on Remax's motion for summary judgment on Still Standing's affirmative claims, and Still Standing's cross-motion for summary judgment on those claims. At the conclusion of the arguments, the Court granted Remax's motion and denied Still Standing's motion, stating the Court's findings and conclusions in support of those rulings. Counsel for Remax prepared an order based on the Court's oral ruling, and the Court signed and entered it on May 22, 2012. Still Standing now asks the Court to enter a written statement of the grounds supporting its decision. The Court denies the motion.

Still Standing quotes from *Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, 34 P.3d 234, in support of its motion. In that opinion, the Utah Court of Appeals reversed and remanded a ruling that had granted summary judgment base on "the reasons set forth in the City's supporting memorandum," but did not otherwise explain the reasoning behind its decision. *Id.* at ¶ 9. The appeals court held that it was "unable to square the

trial court's ruling with the various arguments asserted in the City's motion." *Id.* at ¶ 10. Based on *Gabriel*, Still Standing asserts that an additional statement from the Court is required.

The present case is distinguishable from *Gabriel*. In *Gabriel*, the trial court gave no explanation for its reasoning other than the reference to the City's memorandum. In our case, although the written order is rather laconic, it does refer to the oral findings and conclusions the Court made at the close of oral arguments in which the Court made very clear the grounds for granting Remax's motion and denying Still Standing's. The Court stated that its ruling was based on the undisputed fact that the transaction failed because Still Standing was unable to guarantee access to the property. The Court further stated that while many factual issues existed, none of those were relevant because Still Standing could not show it was damaged by anything other than the lack of insured access. Consequently, the Court held that Still Standing was not damaged by the actions of Remax or Tim Shea.

As the written order refers to the unambiguous explanation contained in the Court's oral findings and conclusions, the Court sees no need to alter the written order. Accordingly, the Court denies Still Standing's motion.

III. Still Standing's Motion to Reconsider

Still Standing asks the Court to reconsider its ruling granting summary judgment for Remax on Still Standing's affirmative claims. However, Still Standing does not present any new evidence or arguments to support its motion, but rather reasserts that access is a question of fact and that Tim Shea's actions were obviously negligent. Even if both of those assertions are true, this case has never been about whether access *actually*

existed; rather it is about Still Standing's undisputed inability to *obtain insurance* on an access to the property. By all accounts, the transaction failed because Still Standing could not guarantee access to the property, and thus provide marketable title. Therefore, the actual existence or non-existence of an access is irrelevant. Furthermore, as the Court already ruled, Tim Shea's alleged negligence is also irrelevant because Still Standing could not show damages resulting from anything other than the inability to insure an access.

The Court denies the motion to reconsider.

IV. Remax's Motion to Dismiss Third-Party Complaint

Remax moves to dismiss Still Standing's second third-party complaint. The Court grants the motion.

While Remax's motion for summary judgment on the affirmative claims of Still Standing was still pending, Still Standing filed its second third-party complaint in response to Remax's amended pleading. Remax moves to dismiss the claims under the law-of-the-case doctrine because they are essentially identical to the ones the Court dismissed when it granted Remax's motion for summary judgment.

The law-of-the-case doctrine "provides that a decision on an issue at one stage of a case is binding in successive stages of the same litigation." *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990). Still Standing first argues that the law-of-the-case doctrine should not apply because the second pleading adds new third-party plaintiffs, Chuck Schvaneveldt and Cathy Code. This argument is without merit. As sellers in the same position as Still Standing, the deficiencies that doomed the claims of Still Standing, i.e., the inability to guarantee access as the sole reason the transaction failed, also condemn

the same claims when brought by Schvaneveldt and Code. Consequently, the addition of new parties does not save or resurrect the claims that the Court has already dismissed.

Still Standing further argues that these claims should fall under one of the exceptions to the law-of-the-case doctrine, claiming that they are based on new evidence and that the prior decision was clearly erroneous. As Remax displays in its reply, however, the claims are not based on any new evidence. The facts show that the documents in Remax's file were made available to Still Standing over four years ago. Thus, the new evidence exception is unavailing. Additionally, as the Court has already ruled above that it will not reconsider its decision to grant the motion for summary judgment that dismissed the claims, the Court is obviously not convinced that its prior decision was clearly erroneous.

Consequently, under the law-of-the-case doctrine, Still Standing's second third-party complaint must be dismissed because the Court previously dismissed those claims when it granted Remax's motion for summary judgment. The Court grants Remax's motion to dismiss.

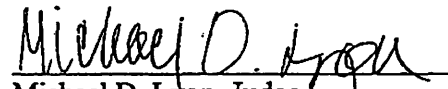
V. Still Standing's Motion to Amend

Still Standing requests in the alternative to its opposition to the motion to dismiss that the Court allow amendment of its pleadings. As the Court has already dismissed the claims that Still Standing seeks to add by amendment, and trial is less than three weeks away, the Court determines that amendment is not in the interests of justice. Accordingly, the Court denies Still Standing's motion to amend.

In summary, the Court denies Still Standing's motion to enter rule 52 findings, motion to reconsider, and motion to amend. The Court also denies Remax's rule 54(b) motion to certify. The Court grants Remax's motion to dismiss the third-party complaint.

This ruling constitutes the order of the Court. No further order under rule 7(f)(2) of the Utah Rules of Civil Procedure is necessary.

Dated this 17 day of July, 2012.


Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of July, 2012, I sent a true and correct copy of the foregoing ruling to Plaintiff and Defendant as follows:

Brian P. Duncan
Attorney for Plaintiff
476 West Heritage Park Blvd., Suite 200
Layton, Utah 84041

Robert R. Wallace
Kirton & McConkie
Attorney for Plaintiff
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
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Robert J. Fuller
Attorney for Defendants
1090 North 5900 East
Eden, Utah 84310



Deputy Court Clerk

Exhibit 4
August 8, 2012 Ruling
(Buyers waived objections to Seller's access disclosures)

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT, OGDEN, UTAH
WEBER COUNTY, STATE OF UTAH
JAN - 7 P 3 02

-o0o-

REMAX ELITE,

Plaintiff,

vs.

SELLER STILL STANDING
STABLES, LC, EMMETT WARREN,
PURCHASER WLB DEVELOPMENT,
LLC, STILL STANDING STABLE,
LC,

Defendants

Case No. 060906802

JURY TRIAL

(Volume Three)

EMMETT WARREN, LC, EMMETT
WARREN LCASSIGNS,

Cross-Complainant

FILED
UTAH APPELLATE COURTS

DEC 15 2014

20130746-CA; 20130768-CA;
20130809-CA; 20130854-CA;
20140978-CA & 20141000-CA



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• A TRADITION OF QUALITY •

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1 seller's disclosures, provided two days after the REPC was
2 signed, revealed that there was an issue with the access. And
3 this is significant and Mr. Duncan mentioned it and while I
4 got a glimpse of it this morning, I'd never had a chance to
5 fully absorb this, but I think it's a very good observation
6 and it's this: At that point, however, the onus was on the
7 buyer, not Tim Shea, to perform its due diligence and
8 investigation the access, to see whether he wanted to proceed
9 with the purchase. The REPC provided for a due diligence
10 period which the buyer could back out of if it--if he had
11 issues--if he had issues with the access, but the buyer did
12 not object during that period.

13 Now, if the buyer had objected during the due
14 diligence period, defendant would have, in the Court's
15 opinion, a much stronger argument that the plaintiffs are not
16 entitled to a commission.

17 In failing to object to the access issue during the
18 due diligence period, the buyer essentially assented to
19 continue with the sale despite the access issue. I mean,
20 that's the natural consequence under the terms of the
21 agreement. This is entirely different from Stewart, where the
22 broker, buyer and seller all knew all along that there was
23 contingency, which, if not met, would derail the transaction.

24 Where the due diligence period passed without
25 objection, the contingency here was apparently waived and the

1 buyer gave up his right to object.

2 Additionally, from that point on, what the seller
3 had to do--had to sell and what the buyer purported to sell
4 were the same, that is a cloud on that access unlike the facts
5 in Stewart. Here, all parties knew of the access issue and
6 all parties were apparently moving forward to closing in spite
7 of the access issue. Consequently, the Stewart case is
8 inapplicable to this case and the failure of the buyer to
9 object to the access during the due diligence period is
10 between the buyer and the seller. It in no way implicates the
11 plaintiff's ability to recover a commission.

12 Now, the Court is not opining on the merits of the
13 case between buyer and seller, as that is not before the
14 Court, but in theory, after the due diligence period, the
15 buyer would not have a right to later back out of the
16 purchase, due only to the access issue. Consequently, any
17 failure to close would give rise to a breach of contract claim
18 by the seller against the buyer. If the buyer did breach, the
19 result of that action between the buyer and the seller would
20 be for specific performance or alternatively, damages.

21 If the seller were awarded specific performance, it
22 would be entirely equitable that the plaintiff recover their
23 commission and you wouldn't argue with that.

24 Additionally, the seller would likely be entitled to
25 recover the commission from the buyer, as it was the buyer's

Exhibit 5
For Sale By Owner Commission Agreement
& Agency Disclosure (FSBO)

JAN-20-2006 FRI 11:50 AM

FAX NO.

P. 07/08



FOR SALE BY OWNER COMMISSION AGREEMENT & AGENCY DISCLOSURE

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.



1. THIS COMMISSION AGREEMENT is entered into on this 20th day of January, 2006, between Re/Max Elite (Layton Branch) (the "Company"), including Tim Shea (the "Agent") as the authorized agent for the Company, and Chuck and Cathy Code (the "Seller") for real property owned by Seller described as follows: Parcel # 23-006-0006 Huntsville Ut 84310 (the "Property").

2. **BROKERAGE FEE.** The Seller agrees to pay the Company, irrespective of agency relationship(s), as compensation for services, a Brokerage Fee in the amount of \$_____ or 3% of the acquisition price of the Property, if the Seller accepts an offer from Emmett Warren and or Assigns (the "Buyer"), or anyone acting on the Buyer's behalf, to purchase or exchange the Property. The Seller agrees that the Brokerage Fee shall be due and payable, from the proceeds of the Seller, on the date of recording of closing documents for the purchase or exchange of the Property by the Buyer or anyone acting on the Buyer's behalf. If the sale or exchange is prevented by default of the Seller, the Brokerage Fee shall immediately be due and payable to the Company.

3. **PROTECTION PERIOD.** If within 6 months after this Commission Agreement is entered into, the Property is acquired by the Buyer, or anyone acting on the Buyer's behalf, the Seller agrees to pay the Company the Brokerage Fee stated in Section 2. The Seller agrees to exempt the Buyer upon entering into a valid listing agreement with another brokerage.

4. **SELLER WARRANTIES/DISCLOSURES.** The Seller warrants that the individuals or entity listed above as the "Seller" represents all of the record owners of the Property. The Seller warrants that it has marketable title and an established right to sell, lease, or exchange the Property. The Seller agrees to execute the necessary documents of conveyance. The Seller agrees to furnish buyer with good and marketable title, and to pay at Settlement, for a standard coverage owner's policy of title insurance for the buyer in the amount of the purchase price. The Seller agrees to fully inform the Agent regarding the Seller's knowledge of the condition of the Property. The Seller agrees to personally complete and sign a Seller's Property Condition Disclosure form.

5. **AGENCY RELATIONSHIPS.** By signing this Commission Agreement, the Seller acknowledges and agrees that the Agent and the Principal/Branch Broker for the Company (the "Broker") are representing the Buyer. As the Buyer's Agent, they will act consistent with their fiduciary duties to the Buyer of loyalty, full disclosure, confidentiality, and reasonable care. The Seller acknowledges that the Company and the Agent have advised the Seller that the Seller is entitled to be represented by a real estate agent that will represent the Seller exclusively. The Seller has, however, elected not to be represented by a real estate agent in this transaction. The Seller further acknowledges and agrees that all actions of the Company and the Agent, even those that assist the Seller in performing or completing any of the Seller's contractual or legal obligations, are intended for the benefit of the Buyer exclusively. This Commission Agreement does not require the Company or the Agent to solicit offers on the Property from the Buyer, nor does it authorize the Company or the Agent to solicit offers from any other person or entity.

6. **PROFESSIONAL ADVICE.** The Company and the Agent are trained in the marketing of real estate. Neither the Company, nor the Agent are trained to provide the Seller or any prospective buyer with legal or tax advice, or with technical advice regarding the physical condition of the Property. If the Seller desires advice regarding: (i) past or present compliance with zoning and building code requirements; (ii) legal or tax matters; (iii) the physical condition of the Property; (iv) this Commission Agreement; or (v) any transaction for the acquisition of the Property, the Agent and the Company **STRONGLY RECOMMEND THAT THE SELLER OBTAIN SUCH INDEPENDENT ADVICE.** IF THE SELLER FAILS TO DO SO, THE SELLER IS ACTING CONTRARY TO THE ADVICE OF THE COMPANY.

7. **DISPUTE RESOLUTION.** The parties agree that any dispute, arising prior to or after a closing related to this Commission Agreement, shall first be submitted to mediation through a mediation provider mutually agreed upon by the parties. If the parties cannot agree upon a mediation provider, the dispute shall be submitted to the American Arbitration Association. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Agreement shall apply.

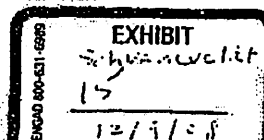
8. **ATTORNEY FEES.** Except as provided in Section 7, in any action or proceeding arising out of this Commission Agreement involving the Seller and/or the Company, the prevailing party shall be entitled to reasonable attorney fees and costs.

9. **SELLER AUTHORIZATIONS.** The Company is authorized to disclose after closing the final terms and sales price of the Property to the following Multiple Listing Service: Wasatch Front Regional MLS.

10. **ATTACHMENT.** There 1 ARE NO ARE NOT additional terms to this Commission Agreement. If "yes", see Addendum _____ incorporated into this Commission Agreement by this reference.

11. **EQUAL HOUSING OPPORTUNITY.** Seller and the Company agree to comply with Federal, State, and local fair housing laws.

12. **FAXES.** Facsimile (fax) transmission of a signed copy of this Commission Agreement, and retransmission of a signed fax, shall be the same as delivery of an original. If this transaction involves multiple owners this Commission Agreement may be executed in counterparts.



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P. 08/08

13. ENTIRE AGREEMENT. This Commission Agreement, including the Seller's Property Condition Disclosure form, contain the entire agreement between the parties relating to the subject matter of this Commission Agreement. This Commission Agreement may not be modified or amended except in writing signed by the parties hereto.

THE UNDERSIGNED do hereby agree to the terms of this Commission Agreement as of the date first above written.

(Seller's Signature)

Chuck and Cathy Code

(Seller's Signature)

The Company

By:

(Authorized Agent)
Tim Shea

By:

(Principal/Branch Broker)
M. Scott Quinney

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Exhibit 6
Real Estate Purchase Contract – Land (REPC)



REAL ESTATE PURCHASE CONTRACT -- LAND

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.



EARNEST MONEY RECEIPT

Buyer Emmett Warren and or Assigns offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$25,000 in the form of CHECK which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Re/Max Elite (Layton Branch) Phone Number: 801-825-3700

OFFER TO PURCHASE

1. PROPERTY: Land LLC, Still Standing Stables also described as: Parcel # 23-006-0006 City of Huntsville County of Morgan State of Utah, ZIP 84310 (the "Property").

1.1 Included Items (specify) _____

1.2 Water Rights/Water Shares. The following water rights and/or water shares are included in the Purchase Price.
☐ Shares of Stock in the _____ (Name of Water Company)
☒ Other (specify) All rights attached to the property and or pertaining to the property.

2. PURCHASE PRICE The purchase price for the Property is \$4362500

The purchase price will be paid as follows:

\$25,000 (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 one or more of the following loans:

☒ CONVENTIONAL ☐ OTHER (specify) _____

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

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)

\$ _____ (d) Other (specify) _____

\$ _____ (e) Balance of Purchase Price in Cash at Settlement.

\$4362500 PURCHASE PRICE. Total of lines (a) through (e)

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(c), 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: ☒ Upon Closing ☐ Other (specify) _____

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

☐ Seller's Initials ☒ Buyer's Initials

Listing Agent _____ represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Listing Broker for _____ represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;
Buyer's Agent Tim Shea represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Buyer's Broker for Remax Elite (Scott Quinney) represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
(Company Name) 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(a), 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;
- (e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and
- (f) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE.** 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;
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;
- (e) ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price;
- (f) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;
- (g) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

Soil Test

If any of Items 8(a) through 8(g) 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 Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 **Due Diligence Deadline.** No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence 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 Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived 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: ☐ Addenda No.'s _____
☐ Seller Financing Addendum ☐ Other (specify) _____

10. SELLER WARRANTIES AND 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. 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.

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

☒ SELLER ☐ BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.

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 free of debris and personal property;
- (b) the Property will be in the same general condition as it was on the date of Acceptance.

11. FINAL PRE-CLOSING INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine only that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property, and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the Property 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 affecting 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.

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, 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) Seller Disclosure Deadline 15 DAYS FROM WRITTEN ACCEPTANCE (Date)

(b) Due Diligence Deadline 60 DAYS FROM WRITTEN ACCEPTANCE (Date)

(c) Settlement Deadline 90 DAYS FROM WRITTEN ACCEPTANCE (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 ☒ PM Mountain Time on January 23, 2006 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

(Buyer's Signature)

(Offer Date)

(Buyer's Signature)

(Offer Date)

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

Emmett Warren and or

Assigns

(Buyers' Names) (PLEASE PRINT) (Notice Address)

(Zip Code)

(Phone)

FEB-06-2006 MON 02:48 PM

FAX NO.

P. 06

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. _____

Chuck Schwensen 2-7-06
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Chuck Schwensen 2920 W. Director Rd SLC 84104 801-381-4825
(Seller's Name) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

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

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UAR FORM 19

Page 6 of 5 pages Seller's Initials _____ Date _____ Buyer's Initials JS Date 2-6-06

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