

2015

Hilary "Skip" O. Wing, Dba Re/Max Elite, Tim Shea, Dba Re/Max Elite, Aspenwood Real Estate Corp., Dba Re/Max Elite, Elite Legacy Corporation, Dba Re/Max Elite, Et Al., Appellees, Petitioners/Counterclaim Defendants/Third-Party Defendants, vs. Still Standing Stable, I.c., Appellant, Respondent/Counterclaim Plaintiff.

Utah Court of Appeals

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HILARY "SKIP" O. WING, DBA
RE/MAX ELITE, TIM SHEA, DBA
RE/MAX ELITE, ASPENWOOD REAL
ESTATE CORP., DBA RE/MAX ELITE,
ELITE LEGACY CORPORATION,
DBA RE/MAX ELITE, *et al.*,

VS.

Appellant,
Respondent/Counterclaim
Plaintiff.

District Court Civil No. 060906802

Appeal from the decisions of the Second Judicial District Court
Weber County, State of Utah, Hon. Michael D. Lyon and Hon. Noel S. Hyde

Robert R. Wallace
Michael D. Johnston
KIRTON & MCCONKIE
60 East South Temple #1800
Salt Lake City, Utah 84145
Attorneys for Appellees Skip Wing, et al.

Robert J. Fuller (#10061)
FULLER LAW OFFICE, LC
1090 North 5900 East
Eden, Utah 84310
Telephone (801) 791-7736
Attorney for Appellant
Still Standing Stable, L.C.

FILED
UTAH APPELLATE COURTS

JUN 11 2015

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Petitioners/Counterclaim
Defendants/Third-Party Defendants,

vs.

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Eden, Utah 84310
Telephone (801) 791-7736
Attorney for Appellant
Still Standing Stable, L.C.

PARTIES TO THE PROCEEDING

Additional Re/Max Elite Appellees: Brokers SHANE THORPE and SCOTT QUINNEY along with ASPENWOOD REALTY, LLC, ASPENWOOD ELITE LEGACY CORPORATION, and REMAX REALTY.

Registered "Re/Max Elite" owner: A third person DALE QUINLAN, was the sole registered owner/applicant of RE/MAX ELITE.

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STATEMENT OF JURISDICTION

Jurisdiction is now provided under Utah Code §78A-4-103(2)(j), from Utah Code §78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

ISSUE I - BREACH OF FIDUCIARY DUTIES: Did the Re/Max Elite real estate agent Tim Shea, as well as the brokers, breach a fiduciary duty as a matter of law when the agent (1) failed to pass the easement information from the Seller to the Buyer causing the Buyer to believe there was no access when in fact there was, and (2) failed to disclose critical material information to the Seller while operating under the Seller's Confidentiality Agreement and while serving as the Seller's real estate agent?

In the alternative, should the issue of breach of a fiduciary duty by the real estate agent and broker as well as the resulting damages have been submitted to a jury for a factual determination?

In dismissing all of the Seller's claims, did the trial court err in concluding "Still Standing's claims fail because it cannot prove that Shea and Remax caused any damage to Still Standing?"

Summary Judgment Standard of Review: Correctness.

An appellate court reviews a [lower] court's legal conclusions and ultimate grant or denial of *summary judgment* for *correctness* and views the facts and all reasonable inferences drawn therefrom in the light *most favorable to the nonmoving party*.

Jones & Trevor Mktg., Inc. v. Lowry, 2012 UT 39, ¶ 9, 284 P.3d 630, 635

(emphasis added).

Confidentiality Agreement and Statutes Standard: Correctness.

The *interpretation of a contract* is a question of law, which we review for *correctness*, giving no deference to the ruling of the district court.

Interpretation of our case law is also reviewed for *correctness*, . . . as is the interpretation of a *statute* . . .

Salt Lake City Corp. v. Big Ditch Irr. Co., 2011 UT 33, 258 P.3d 539, 544

(emphasis added, internal citations and punctuation omitted).

Preserved. Memo. Seller's Cross-Motion Summ. J. Issue of Breach of Fiduciary Duty, Mar. 11, 2011, R.3094-3193; Seller's Ex. A-O, R.3194-3350; R. 3707-14, Exhibits P-W, R. 3715-58; Oral Trans., Mar. 22, 2012, R.8389, 16:7-41:22; 47:8-52:8; R.8389, 55:14.

ISSUE II - NEGLIGENCE AND MISREPRESENTATIONS: Did the Re/Max Elite real estate agent Tim Shea, as well as the brokers, including Skip Wing, operate in an "honest, ethical, and competent" manner or did their conduct related to the transaction at issue constitute negligence?

In dismissing all of the Seller's claims, did the trial court err in concluding "Still Standing's claims fail because it cannot prove that Shea and Remax caused any damage to Still Standing?"

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Salt Lake City Corp. v. Big Ditch Irr. Co., 2011 UT 33, 258 P.3d 539, 544

(emphasis added, internal citations and punctuation omitted).

Motion to Reconsider Standard of Review: Abuse of Discretion

Conclusions of Law: Correctness

We review the trial court's denial of a motion to reconsider summary judgment under rule 60(b) of the Utah Rules of Civil Procedure for *abuse of discretion*. . . . In reviewing such a motion, *we accord no deference to the trial court's conclusions of law* but review them for *correctness*.

Lund v. Hall, 938 P.2d 285, 287 (Utah 1997)(emphasis added, citations omitted).

Preserved. Seller's Memo. Opp. Remax Summ. J., March 14, 2011, R.3130-89; Schvaneveldt Decl., March 10, 2011, R.3190-93; Exhibits R.3194-3350; Oral Trans., R.8389; R.4285-87; 4290-99. Mot. Recon., R.4280-4299, R.4288-89.

ISSUE III - JURISDICTION AND OWNERSHIP OF REMAX:

Should Seller's fiduciary duty, negligence, and misrepresentation claims against the brokers and agent be remanded for further consideration based on the post-trial discoveries Seller made as to the actual ownership of Re/Max Elite, forged documents that were recorded, and the false discovery responses provided by the broker?

Grounds for seeking issue not preserved: Seller's claims against the Remax side and all claims against SSS had been dismissed before the trial. None of the rulings had been certified as final. After the trial, Seller and others

discovered the true owner of Remax was actually Dale Quinlan. This in turn led to the discovery that multiple discovery responses provided by Remax through Skip Wing were false. In addition, Seller discovered the existence of multiple forged Remax documents filed with the Division the month after the REPC in this case was signed. All of the admitted and alleged discoveries constitute a breach of the duties owed by the licensees to the public.

DETERMINATIVE STATUTES AND REGULATIONS

Additionally, although not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be *honest, ethical, and competent* and is *answerable at law for breaches* of his or her statutory duty to the public. Moreover, real estate agents have a duty to *deal fairly and honestly, despite the fact that the broker is acting primarily as the seller's agent*. One of the purposes for imposing a *duty to disclose accurate or complete information* [is] to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient *accurate information to make an informed decision* whether to purchase.

West v. Inter-Fin., Inc., 2006 UT App 222, 139 P.3d 1059, 1064 (emphasis added, citations and punctuation omitted). R.3184.

[U]se an approved addendum form to make a counteroffer or *any other modification* to a contract;

R162-2f-401a (17). Affirmative Duties Required of All Licensed Individuals (emphasis added)(see current number 18).

STATEMENT OF THE CASE AND FACTS

Entities & Abbreviations

Allen, Jarl R. Contiguous land owner, sold land/easement to Seller after *Stable v. Allen*.

Allen, Ross. Contiguous land owner, defendant in *Stable v. Allen*.

Aspenwood Real Estate Corp. Defunct, non-party to FSBO, FSBO judgment creditor.

Code, Cathy. Third-party commission defendant, dismissed during trial, directed verdict.

Elite Legacy Corporation. Defunct, non-party to FSBO, FSBO judgment creditor.

Quinlan, Dale. Prior sole owner of DBA "Re/Max Elite," sold all FSBO claims to SSS.

Schvaneveldt, Chuck. Commission claim judgment debtor based on FSBO.

Shea, Tim. Real estate agent who never sold SSS land at issue, FSBO claims dismissed.

Still Standing Stable, L.C. Seller, purchased DBA "Re/Max Elite" and all FSBO claims.

Wing, Hilary "Skip." Alleged broker, non-party to FSBO, FSBO judgment creditor.

Division = Utah Dept. of Commerce, Division of Corporations and Comm. Code.

FSBO = Re/Max Elite *For Sale By Owner* commission agreement, Jan. 20, 2006.

R. = Reference to the case record.

RE/MAX ELITE. Utah DBA name, Registration No. 5800619-0151, owned by SSS.

REPC = Real Estate Purchase Agreement, Feb. 7, 2006.

Nature of the Case, Proceedings, Disposition

This is a dispute between the Seller of land on one hand, and licensed real estate brokers along with an agent on the other. Still Standing Stable, L.C. ("SSS"), through one of its members, Chuck Schvaneveldt ("Chuck"), was contacted by Tim Shea, a Re/Max Elite real estate agent. The agent initially viewed and "presented" a parcel of land owned by Chuck to potential buyers. Then, without ever visiting the two Ogden Valley land parcels at issue, Tim produced an impressive \$6 million REPC dated January 20, 2006. It failed. A second REPC for \$4.3 million signed in February, 2006, trigger about a decade of this current litigation.

When the Buyer, who turned out to be an LLC used in this land "flip" scheme, failed to appear at the closing, a flurry of complaints and counterclaims followed. SSS and Chuck were sued by the Buyer for some \$20 million. R.61. Buyer's complaint referred to "TBD" in "Section 2 of the REPC." R.54, ¶4. The REPC Chuck signed didn't have "TBD" in Section 2, it was blank. This is confirmed by the REPC copy Metro Title preserved (R.3230) and in the First American Title file. R.3245. Tim Shea eventually admitted he changed the REPC after it was signed by the Buyer and Seller. When compared to the title company

copies, about 10 changes were made to the REPC without permission and after it was signed. SSS counterclaimed against Remax and Shea, then settled with the Buyer. The *lis pendens* was removed so SSS could sell the land to others. Land values by that time were deflating rapidly.

Tim Shea and Remax later amended and sued SSS for a real estate commission related to the \$4.3 million failed sale. All of SSS's counterclaims against the brokerage, brokers and agent were dismissed early in a summary judgment order at issue in this appeal.

Broker Skip Wing joined as a commission claim plaintiff. Chuck and his then girlfriend, now wife, Cathy Code endured a jury trial. Cathy was dismissed via directed verdict. Cathy had signed the FSBO at issue, not Chuck. The "Seller" was defined as "Chuck *and* Cathy Code." R.P-3 (emphasis added). Chuck accepted a REPC referring to "Land LLC Still Standing Stables." R.3223. There is a blank area after his signature on the REPC followed by the LLC address. R.3227. The FSBO provision "[I]f the Seller [Chuck *and* Cathy] accepts an offer" was deemed satisfied by the court without Cathy ever accepting "an offer." After being instructed that "Plaintiffs . . . have earned a commission" (R.5346), the jury awarded \$30,000 against Chuck. R.5389. The trial court later changed the verdict

to more than \$130,000. *See* Chuck's \$362,485 supersedeas bond secured by cash. R.7041.

Multiple appeals followed, including this appeal. Still Standing Stable, L.C. is now respectfully requesting that the summary judgment entered against it be reversed and its claims remanded for consideration by a jury.

Statement of Facts and Timeline

Seller's memorandum in response to the Remax summary judgment motion as well as Seller's summary judgment memorandum include these same numbered facts and reference to the same set of Exhibits A- O. Factual points and attached exhibits are reduced to remove issues irrelevant to the appeal. The "R" citations related to each fact are from the Fiduciary Duty Memorandum, R.3096-3114. *See* R.3131-3149, same facts.

1. Confidentiality Agreement. On April 13, 2006, the parties entered into the Confidential Disclosure Agreement. The Agreement is between "Tim Shea, employed with ReMax Elite" (Recipient) and "Stake Center Locating, Inc. and Still Standing Stables, LLC" (Discloser). Confidential Agreement, p. 1, April 13, 2006; Exhibit A. The Agreement was "*for the purpose of providing Real Estate Services.*" *Id.* R.3096, Add.4.

A. Tim claimed the Confidentiality Agreement that he signed “has nothing to do with the purchase of the property *outside of the fact of not wanting to tell the Allens what the purchase price was.*” Shea Depo. I, 246:17-19. (There are two depositions of Tim, the first is noted as “Shea Depo. I.”) R.3096.

B. The name “Allens” does not appear in the Confidentiality Agreement. R.3096.

C. The Agreement covered all of the real estate deals that Tim worked on for both of the specified disclosing parties: Stake Center and Still Standing. R. 3097.

2. Tim was retained as the “go-to man for real estate services” on behalf of the Seller. Schvaneveldt Decl., p.1. R.3097.

3. Seller relied on Tim Shea’s claims that the agent had all sorts of experience on complex land deals. Schvaneveldt Decl., p.1. R.3097; Declaration is at R.3126-29, Add.3.

4. “It has been my experience that land deals are always tricky.” Email Shea to Code, Feb. 1, 2006, Code Depo, Ex. 55; Exhibit B. R.3097.

5. Tim Shea had only had his real estate license for about a year and a half, “approximately year and a half you’d been selling real estate before you

entered into this transaction? A (Shea): Approximately.” Shea Depo. I, 82:24-83:3. R.3097.

6. “I don’t know that I’ve ever had anyone instruct me on how to fill that [FSBO] out.” Shea Depo. I, 83:19-20. R.3098.

7. “Did anybody at ReMax sit down with you and say, This is how we fill out real estate purchase contracts with this group? A (Shea): No.” Shea Depo. I, 96:18-21. R.3098.

8. Tim Shea had actually never received a “six-figure commission.” Answer: “True to say.” Shea Depo. I, 206:6-8. R.3098.

9. The agent’s real estate knowledge was believed to be far superior to that of the Seller’s members. Schvaneveldt Decl., p.1. R.3098.

10. Tim was Chuck/Still Standing/Stake Center’s real estate agent on multiple properties. R.3098.

A. **The First Property Presented by Tim - Chuck’s 15 Acres.** Tim served as Chuck’s agent and presented the 15 acre parcel on Chuck’s behalf. This was the first property that Tim ever visited when he met Chuck: “I actually *presented both* . . . but Chuck kind of took the 15 acres off the table.” Shea Depo. I, 42:23-43 (emphasis added). R.3098.

B. Salt Lake Property. Tim was Chuck and Still Standing's agent on the Salt Lake property that Stake Center/Still Standing acquired (Salt Lake Property Contract, Exhibit C):

Q (Fuller): You are Chuck's agent on the sale of the Salt Lake property, right?

A(Shea): Yes.

Q: – you had a fiduciary obligation to him on?

A: On that specific transaction.

* * *

A. On – my duty was to Chuck on that specific transaction.

Q: Okay. Chuck an individual?

A: On that transaction.

Shea Depo. I, 297:15-298:4. R.3098-99.

11. Tim considered Chuck and Still Standing, LC to be one and the same: “you see Chuck Schvaneveldt as one and the same with the LLC; is that right? A(Shea): I – I think so. . . Q: Do you see him as one and the same? A(Shea): Yeah.” Shea Depo. I, 297:1-298:12. R.3099.

12. Tim filled out the Seller's Disclosures (Schvaneveldt Decl., p.3) and added the typing to the REPC that were presented to the Seller to sign. Shea Depo. I, 48:13-14. ("I typed it up at my office.") R.3099.

13. **Second Property Presented by Tim - First Contract for \$6 Million Failed.** Tim originally prepared the first purchase contract with a sales price of \$6,090,000 along with a FSBO. Original Contract, Jan. 20, 2006, Shea Depo. I, Ex. 27. The counteroffer was not accepted and the transaction failed. After the original \$6 million-plus offer failed, Tim Shea expressed an interest in doing more business with Seller. Tim began working on the Salt Lake property (Fact 10(b)) acquisition the same month he brought a new offer (Fact 14) on the land at issue, February 2006. Schvaneveldt Decl., pp.3-4. R.3099.

14. **Second Real Estate Purchase Contract for \$4.3 Million.** On behalf of the Seller and after the earlier transaction terminated, Tim circulated a second real estate purchase contract (hereafter the "REPC"), the contract at issue for \$4,362,500, which was allegedly signed by Seller on February 7, 2006. Shea Depo I, Ex. 32; Wing Depo. Ex. 98; Exhibit D, Add.4. *See also*, Schvaneveldt Decl. ¶27, developed interest in having Tim represent Seller on multiple properties. R. 3099.

15. There was no agency disclosure circulated with the February 2006 REPC. Schvaneveldt Decl., p. 1. R.3100.

16. No Agency Disclosure Notation Completed in REPC that Seller Signed.¹

A. Paragraph 5 (agency disclosure) of the REPC signed by the Buyer and Seller, as well as the brokerage disclosures, are blank. Shea Depo. I, Ex. 32; Exhibit D, Add.4. The REPC copy that Metro Title produced in response to the subpoenas have no Seller initials in paragraph 5 either. Wing Depo. Ex. 99; Exhibit E, Add.4, Metro National Title copy of REPC. R.3100.

B. Tim Shea made a *false statement in his deposition* regarding the initials in the REPC paragraph 5:

Q (Fuller): Mr. Shea, I'll ask you to look at Exhibit 28, which is a real estate purchase agreement. Shea Depo. I, 127:2-4
* * *

Q: [W]hen it came from seller, it had seller's initials by the confirmation of agency disclosed here and from the buyers when it came from back from them?

A: Yes.

¹ Remax never produced any original REPC nor FSBO.

Shea Depo. I, 152:8-11; Remax Complaint REPC, Exhibit F, Add.4. (Compare to Exhibits D and E, which have no agency disclosures noted nor Seller's initials next to paragraph 5). R.3100.

C. Seller's *initials were forged* in the Paragraph 5 box of the REPC. Initials were not added until after Tim Shea received the earnest money. See and compare Exhibit D (Shea Depo. Ex. 28), the REPC that Chuck signed; Exhibit E, the copy from Metro Title; and Exhibit G, the copy from First American Title in contrast to Exhibit F, the copy that was attached to the Remax complaint. R.3100.

D. Tim Shea made another *false statement in his deposition* by claiming he added the notation "FSBO" to the REPC (see the handwriting "FSBO Agreement" on Shea Depo. I, Ex. 28, page 2 of REPC; Exhibit F) before he sent it to the Seller to sign:

Q (Fuller): Was that [FSBO agreement] put on before or after it went over to this Chuck and Still Standing?

A (Shea): Before.

Q: That would have been before. Tell me what that – is that your writing?

A: Yeah.

Q: . . . Was that on there when you went sent it to the buyers?

A: Yeah.

Shea Depo, I, 154:1-3 (bracket added). Notation is not on page 2 of Exhibit D, the REPC that Chuck signed. R.3101.

E. The REPC copy supplied by Metro Title had been signed by the buyer and seller, but Tim's handwritten "FSBO" notation was not on Metro's copy. Exhibit E, Add.4. A similar *false statement* is included on page 154:14-17 of Tim's first deposition. ("that was filled out before you sent it to the buyer . . . Either the buyer or seller? A (Shea): Yeah.") Tim eventually admitted to filling in the blanks *after* the buyer and seller had signed the REPC:

Q (Fuller): It was afterwards, after Chuck signed it, right?

A (Shea): Right.

Shea Depo, I, 315:22-24. R.3101.

F. Another *false statement* by Tim includes the following while referring to the initials on the bottom of the REPC page 5 (Shea Depo. I, Ex. 28; Exhibit F): "seller's initials and the buyer's initials, that would have been sent back to you . . . after they initialed those, it would have come back to you, right? . . . A(Shea): Yes." Shea Depo. I, 160:20-161:1. The Metro Title copy of the REPC (Exhibit E) did not have Chuck's initials on the bottom nor the date of "2-7-06." (Compare the

date next to Chuck's initials on page 4 of Exhibit F, Add.4, to the date on page 5.)
R.3101.

G. The REPC copy produced by First American Title in its subpoena responses, Exhibit G, Add.4, is also missing, *inter alia*, the paragraph 5 initials, multiple check marks, the "TBD" modification, page 5 initials and date. R.3102.

17. The Buyer, Emmett Warren, LLC, through its member, attorney John Lish (Utah Bar since 1998, Lish Depo. 5:23), testified that he thought Tim Shea was working for Chuck (Seller's member):

Q: Tell me, as of May 1, 2006, did you feel like you had a broker agreement and agency disclosure with Re/Max or Tim Shea at that point in time?

A (Lish): No. I – I would assume this whole time that – you know, that – *I believed that he was working for Chuck.*"

Lish Depo. 51:14-18 (emphasis added). R.3102.

18. Skip Wing, contrary to the Buyer, thought Tim was working for the Buyer:

Q. Hypothetically, if he sat up there in the house of the Allens and there were discussions about right-of-way problems and the possibility of acquiring a right-of-way and talking about the land and talking about Chuck and talking about whatever people sit around and talk about when they're visiting, is that an important event that he should have gone to the sellers and said, I've just been at the Allen's house?

MR. WALLACE: Objection, compound, vague.

Q. Is that an important element that he should have disclosed?

A. And the buyers were with him?

Q. With him, yes.

MR. WALLACE: Same objection.

THE WITNESS: I don't know. *He represented the buyers.* They were his first duty.

Wing Depo. 209:1-16 (emphasis added). R.3102.

19. Closing was scheduled for May 3, 2006, the day the Seller's side did close (pursuant to instructions from Seller's counsel Gretta C. Spendlove, retained to work with Seller's other attorney Nina Cleere on the large transaction). *See* Seller's Attorney Gretta C. Spendlove, Durham, Jones, Pinegar, Escrow and Closing Instructions to First Am. Title, May 3, 2006, Bates No. SSS 088; Signed Deeds, SSS 091-095; FATCO Final Statement SSS 096-098. R.3102.

20. On May 1, 2006, only days before the scheduled closing (Seller closed its side on May 3), Tim Shea faxed a Broker Agreement & Agency Disclosure to John Lish with a request for his signature, which was apparently never signed by the Buyer. *See* Fax Cover Sheet with Unsigned Brokerage Agreement to Lish, May 1, 2006, Lish Depo. Ex. 1, Exhibit H. A notation (star)

was included requesting that the Buyer agree to a *limited agency* arrangement and to sign the back page. Buyer never signed the agreement. R.3103.

21. Seller believed Tim Shea was working for Chuck/Still Standing (Schvaneveldt Decl., p. 1), and the Buyer also “*believed that he was working for Chuck.*” Lish Depo. 51:14-18. R. 3103.

22. Just days before the proposed closing, Tim Shea attended a meeting with the Buyer and Mr. Shea’s attorney Miles LeBaron. Tim then drove with the Buyer to view the road. “Approximately 2 days before the proposed closing . . . Tim Shea came upon a meeting among Miles LeBaron, John Lish, and Ryan Wilde in which they were discussing the road at issue . . . *Tim Shea heard part of the discussion* for a few minutes and then left with Mr. Wilde to try to view the road.” Shea Interrogatory No. 22, Oct. 24, 2008 (emphasis added). Tim testified that “I got the impression that they [Buyer] had begun to think that Chuck was not telling us the truth.” Shea Depo. I, 245:5-6 (bracket and emphasis added). R.3103.

23. Tim Shea Never Told Chuck About “Not Telling Truth” Meeting.

This is key testimony by Tim:

Q (Fuller): Did you call – *did you call Chuck and say*, Chuck, listen, I’ve been to this meeting, *these buyers think you’re not telling the truth, they think there’s a problem with the right-of-way*, and I just drove up there with Wilde, let me tell you what’s going on? Did you ever call and have that type of conversation?

A (Shea): *Never needed to.*

Q: Why wouldn't you need to?

A. *Because I represented the buyer, not the sellers.*

Q: Strictly buyers and seller? Okay.

A: Right.

Q: So that's – would you agree that that would be a material term? *If you did represent Chuck, that would be something you better be telling him; is that right?*

A: *Yeah. If I had some fiduciary responsibility*, which I didn't have with him.

* * *

Q (Fuller): Okay. *Did you or didn't you have a confidential agreement with Chuck at the time this meeting took place with the parties we just talked about in interrogatory number 22?*

Mr. Wallace: Objection; it's asked and answered, and I object to the extent it calls for a legal conclusion there was an agreement.

A(Shea): I – based on those dates that – *that confidentiality agreement would have been in place.*

Q (Fuller): Would have been in place. Okay. To make it clear, *you never called Chuck to tell him that you'd been up to that property with Mr. Wilde to look at that right-of-way and, by the way, the buyers are starting to wonder if you didn't tell them the truth* or –

A(Shea): Well, no, as to whether –

Mr. Wallace: Let me –objection; compound; asked and answered. Why are we keep going over the same thing? Time after time he answered that.

Q: You can answer.

Mr. Wallace: Did you call Chuck and tell him that?

A (Shea): *No*.

Shea Depo. I, 245:12-248:7; Exhibit J (emphasis added). R.3104-05.

24. Tim could not remember when he talked to Chuck after getting the impression that the Buyer thought the Seller was not telling the truth: “And from the time you got the feeling that the buyers thought Chuck may not be telling the truth, when did you next talk to Chuck? A. (Shea) I don’t remember.” Shea Depo. I, 245:8-11. R.3105.

25. Tim testified as follows: “But in terms of a fiduciary responsibility, it would be to the buyers, not to Chuck.” Shea Depo. I, 234:6-8. R.3105.

26. Meeting in Ross Allen’s Home. Tim describes encountering David Allen while walking on the property right of way and a meeting in Ross Allen’s home: “So we got in the truck with him, and he drove us to – to speak with the father, and I don’t remember his name. It might have been Ross.” Shea Depo. I, 37:17-19. “And did you go in their cabin? A: yes.” *Id.*, 37:23-24. “Did they say, There’s no right- of- way to that land?

A(Shea): I believe they did say that. *I believe they said* that the land – or that that road passes over not just their land but several others, the monastery, and I believe there's two other landowners there, that it passes over, and that *Chuck doesn't have a right over that land.*"

Shea Depo. I, 39:11-16 (emphasis). Exhibit J. Tim remembers the meeting in the Ross Allen house with the Buyer in great detail, including the type of drink he was given from the Allens:

A(Shea): It was a Sprite.

Q(Fuller): Good. Okay. Was there –

Mr. Wallace: Quit volunteering information.

The Witness (Shea): Sorry.

Mr. Wallace: That's on the record.

Q (Fuller): Was there – was there a discussion about the – about the right of way?

A. You know I'm sure there was. I'm sure there was. There would be no way that Ross Allen was not going to bring up the fact that there was no right-of-way.

Q: And do you remember the specifics of it?

A: Outside of them saying that *Chuck purchased a piece of land that he thinks he has access* and he has no access. *There's no access over this land.* He has to – he doesn't have written consent from the monastery. Yeah, they said stuff like that.

Shea Depo. I, 305:6-22 (emphasis added). Exhibit J. R.3105-06.

27. Tim did not know if he told Chuck or “anybody from the seller’s side that you had been up there to look at that” land with Mr. Wilde: “A (Shea): I don’t know, I don’t remember, I don’t know.” Shea Depo. I, 238:17-23. R.3106.

28. Tim had been given a copy of the earlier litigation between Still Standing and the Ross Allen family by Seller’s in-house attorney, Ms. Cleere: “I gave Tim a copy of this – the appeal, . . .” Cleere Depo. 37:25-38:1; “I believe I did because I gave that to him, by itself.” *Id.*, 97:7-8. Seller expected and relied on Tim to pass the document to the Buyer. Schvaneveldt Decl., p.1 . R.3106-07.

29. Tim claims he was never given a copy of the *Stables v. Allen* case:

Q: They [Seller] never gave you a copy of the case?

A(Shea): Not to my knowledge.

Q: Is it your testimony that Nina never gave you a copy of the Allen case?
[Objection]

A: I don’t recall any – ever receiving the actual copy of the case. They [Chuck and Nina] both told me about the case.

Shea Depo. I, 189:18-189:25. R. 3107.

30. Tim, who testified he was not given a copy of the case (Fact 29), did not pass the copy of *Stables v. Allen*, 2005 UT 46, to the Buyer. Instead, the Buyer was made aware of the case by its attorney Miles LeBaron: “[T]he lawyer

found a Utah Supreme Court case . . . dealing with the issue of the Seller's access." Buyer's Amd. Answer and Crossclaim, ¶21, April 20, 2007. "This law firm then discovered . . . Supreme Court's Opinion on appeal details this battle . . ." Miles LeBaron Letter to Skip Wing, Remax Elite, June 1, 2006; Exhibit K. R.3107.

31. Buyer's attorney, now Tim Shea and Remax's attorney Miles LeBaron sent Skip Wing, Remax Principal Broker, a letter describing all sorts of serious allegations that "The Seller lied about the access," the Seller's actions constituted a "default" and "not to mention outright fraud perpetrated by the Seller." See Miles LeBaron, LeBaron & Jensen, P.C., letter to Skip Wing Remax Elite, June 1, 2006; Quinney Depo. Ex. 77; Exhibit K. Before commencing the litigation, *Remax did not pass the LeBaron Letter to Chuck* (Schvaneveldt Decl., p.1), and the broker testified as follows:

Q (Fuller): Do you admit that letter you're looking at, Exhibit 77, was never passed or transferred to Chuck Schvaneveldt or the sellers [sic]group?

A (Wing): I don't know if it was or wasn't.

Q: Was it ever given by you to him personally?

A: Personally no.

* * *

Q: The question is, do you feel like you had a duty to pass that on to Chuck or the sellers [sic]group?

Mr. Wallace: The written words?

Q: The letters.

A (Wing): I don't know.

Skip Wing Depo. 238:20-239:12. R.3107-08.

32. Tim did not tell Chuck or anyone on the Seller's side about the meeting in Ross Allen's home which Tim attended and heard Ross Allen tell the Buyer that "Chuck doesn't have a right over that land." Schvaneveldt Decl., p.1. R.3108.

33. Buyer's member, attorney Ryan Wilde, was Tim's Neighbor. R. 3108.

34. Tim Had Represented the Buyer and its Members in the Past. R. 3108.

35. Tim never disclosed to the Seller that he had represented the Buyer members in the past. Schvaneveldt Decl., p.2. R.3108.

36. Mr. Lish, Mr. Wilde, and Mr. Bosco (Arizona) are all attorneys. When asked if Tim sat down with the buyers to fill out the paperwork he testified: "They're real estate attorneys so they're pretty familiar with how it works." Shea Depo. I, 48:12-13. R.3109.

37. Mr. Lish and Mr. Wilde operated Utah Commercial Title (UCT issued the Commitment for Title Insurance in the amount of \$4,362,500 in the deal. *See* John Lish Depo., Nov. 24, 2008, Ex. 2, UCT Insurance Commitment.) R.3109.

38. Tim never disclosed the fact that the Buyer members were real estate lawyers who operate a title company. Schvaneveldt Decl., p. 2. R.3109.

39. Tim failed to specify the new loan dollar amount on the REPC when it was circulated for the Buyer and Seller to sign. REPC, Shea Depo. I, Ex. 32; Exhibit D. R.3109.

40. After the REPC was signed by both parties, *Tim later added the acronym "TBD" to the REPC* in the new loan dollar amount blank: "[W]ho put the TBD there, is that – is that your handwriting? A (Shea): I believe it is my writing." Shea Depo. I, 309:1-3; Exhibit F, Add.4, R.3109.

41. "TBD" means "To be determined." Shea Depo. I, 149:23. R.3109.

42. After comparing the REPC (Exhibit D) to the copy of the REPC attached to the Remax complaint (Exhibit F), Tim eventually had to admit in his deposition that he added the "New Loan" term change and specification to the REPC *after* Chuck signed the REPC:

Q: So the *TBD was added after Chuck signed that sheet* with his initials on it?

A (Shea): Could be.

Q (Fuller): Necessarily have to be wouldn't it?

A: It looks that way.

Shea Depo, I, 311:20-24 (emphasis added). R.3109.²

43. Tim's Principal Broker Skip Wing agreed with the following sentence:

[A] real estate agent should never fill in the blanks on a REPC after the buyer and seller have signed the contract, except for noting the receipt of earnest money. Is that true?

A (Skip Wing): True.

Skip Wing Depo., 233:3-7. R.3109-10.

44. An addendum to the REPC needs to be used if the REPC is modified. "[U]se an approved addendum form to make a counteroffer or *any other modification* to a contract;" R162-2f-401a (17)(emphasis added). There is no addendum to the REPC. See Exhibit L, Administrative Rules (latest numbering). R.3110.

45. Branch broker Scott Quinney described the two ways to make changes to the REPC:

A (Quinney): Two ways. Redo the document completely or by addendum.

² Remax "RESPONSE: Admitted, ... " R.3436.

Q: Would that make –

A: Or initial the change the – depending on what the changes are you could initial the changes.

Defendant Broker Scott Quinney Depo. 189:1-5. R.3110.

46. There are no initialed changes on the REPC Seller signed (Exhibit D) nor the *forged REPC* that Remax attached to its complaint (Exhibit F), nor the copies provided by the title companies (Exhibits E, G). R.3110, Add.4.

47. Seller should have been given but was never given a final copy of the REPC with Tim's signature noting the receipt of earnest money. Schvaneveldt Decl., p.2. *See also*, "An individual may not: (2) require parties to acknowledge receipt of a final copy of any document prepared by the licensee prior to all parties signing a contract evidencing agreement to the terms thereof;" R162-2f-401b, Exhibit L. R.3110.

48. Tim claims he is permitted to shift gears from fiduciary to non-fiduciary in mid-sentence:

Q (Fuller): And were there times when you talked to Chuck about the Huntsville property and then in the *same period of time* you talked to him about the Stake Center Locating property?

A (Shea): Yeah.

Q (Fuller): So when you talked to Chuck about the Salt Lake Stake Center
Locating property –

A (Shea): Right.

Q. – then you shifted gears from, I'm his agent, now we're going to talk
about the other property, I'm not your agent?

A. Right.

* * *

Q. And you just *automatically shift gears and go from being the agent*
then you turn – no, you –

A. *It's an amazing thing but I did it.*

Shea Depo. I, 181:6-182:24 (emphasis added); Exhibit J. R.3111.

49. Remax Principal Broker Skip Wing testified as follows regarding
fiduciary duties:

Q. Let's go to the confidentiality agreement. Is this the first day you've ever
looked over that confidentiality agreement?

A. Yes.

Wing Depo. 222:11-14.

Q (Fuller): [C]ould Tim Shea [] meet with Chuck and discuss *as Chuck's agent* that Salt Lake property, and then *switch in the middle of a sentence* or a conversation *and not disclose information* about the Huntsville property?
[Objection]

A (Wing): Yes.

Wing Depo. 228:10-16 (emphasis added, typo and objection omitted); Exhibit M.

Q (Fuller): We have a *confidentiality agreement with Tim Shea*. We have two purchase contracts that are in executory phase. And you're telling me that Tim Shea could go out and talk to Chuck about all sorts of *confidential and private information about Chuck's personal and the company financial business*, but when he switches to this land sale in the valley, in Ogden Valley, *he doesn't have a duty*, he can clam right up and *not tell Chuck* the details of what is going on up there? Is that your testimony?

[Objection]

THE WITNESS: In my opinion, yes.

Wing Depo. 269:20-270:7 (emphasis added); Exhibit M. R.3111-12.

50. Tim testified that he thought toward the very, very end that the transaction was still going to close. R.3112.

51. The Buyer told Tim that the lenders would not loan money under certain circumstances: "Did any of the buyers state to you that any of the proposed lenders weren't going to loan money on the property because of the right-of-way issue? [Objection]"

A (Shea): Yes. . . they said at the end if there is no access, they're not going to lend to us on it."

Shea Depo. I, 267:22-268:6. R.3113.

52. Tim never informed Chuck that there were lenders involved in the transaction. Schvaneveldt Decl., p. 2. Tim left the impression with Chuck that the Buyer had its own cash for the purchase price. *Id.* Similarly, the REPC has no dollar amount specified in the “new loan” blank. *See* Exhibit D. R.3113.

53. Tim never passed on information to Chuck or alerted the Seller that the Buyer had notified Tim that lenders weren’t going to loan money on the property under certain circumstances related to the right-of-way. Schvaneveldt Decl., p. 2. R.3113.

54. Right after the due diligence period passed, Tim assured Chuck that if the buyer didn’t close then Chuck would be able to keep the \$25,000 of earnest money, and Tim told Chuck that the Buyer’s money was “on the line” if the Buyer didn’t close. Schvaneveldt Decl., p.2. R.3113.

55. Tim admits there was a conversation about Chuck keeping the earnest money: “And at that point I said, If they default, they would probably pay you their earnest money . . . It would have been just after due diligence.” Shea Depo. I, 304:14-20. “He asked me, Is there – so now their check’s on the line.” *Id.*, 304:20-21. R.3113.

56. On May 3, 2006, the ***Buyer did not close*** the Buyer's side of the transaction. This missed closing appointment was the ***first indication Seller had*** that the Buyer had reservations about the land deal and was not going to be appearing with the purchase price. Schvaneveldt Decl., p.2. R.3113-14.

57. After the sale failed, Tim never met with Chuck to disclose and explain the details surrounding the "not telling the truth" meeting with the Buyer nor the "Ross Allen no right of way" meeting. There were no conversations between the two after May 3, 2006: "After – I don't think so." Shea Depo. I, 302:8-11. "I never met with them in the month of May." *Id.*, 302:20-21. R.3114.

58. The property at issue depreciated from over \$4 million to about \$1 million (when the *lis pendens* was removed and the land was finally sold to Millennium) during the executory phase of the fraudulent REPC and subsequent litigation. Seller was harmed by Remax/Shea when it lost the opportunity to pursue a cash buyer after relying on Tim's representations and false statements. Seller relied on the real estate agent and entered into the REPC at issue believing the terms were correct. R.3114.

The REPC terms were changed by Tim from no dollar amount in the "new loan" section to "TBD," with no notice to the Seller. A 1031 real estate exchange

opportunity was lost because of the agent's omissions and false statements that induced the Seller to enter into the contract. Litigation commenced that prevented the property from being sold and subjected the Seller to substantial legal fees. Schvaneveldt Decl., ¶22 at R. 3127-28; R.3114.

SUMMARY OF ARGUMENTS

Seller Still Standing Stable, L.C., alleges that the Re/Max Elite (or "Remax") brokerage, brokers, and real estate agent Tim Shea are responsible and liable for Seller's financial damages. SSS's damages exceed \$3 million related to the failed land transaction at issue. Licensed real estate professionals owe the public a duty, and are "expected to be *honest, ethical, and competent* and [are] answerable at law for his or her statutory duty to the public." There is a common factual bases to support both of SSS's primary liability theories as well as the resulting damages under either or both theories and related claims. Misrepresentations suggesting there was no access to the land when it was offered for sale misled the trial court.

All of SSS's claims were disposed of at the summary judgment stage:

[T]he Court finds that there is undisputed -- or that it is undisputed that that lack of a guaranteed access was the sole reason for the -- that the transaction failed.

Oral Trans., R.8389, 53:1-3. Seller disputed this argument and factual conclusion:

Seller *disputes* the argument that the failure of the transaction was the inability to ensure access.

R.3180 (emphases added). SSS's equally valid alternate factual theory of why the sale failed should have been adopted:

It is just as likely that the Buyer backed out *because it decided it could not "flip" the land ...*

R.3186 (emphasis added).

An appellate court reviews a [lower] court's legal conclusions and ultimate grant or denial of *summary judgment* for correctness and views the facts and all reasonable inferences drawn therefrom in the light *most favorable to the nonmoving party*.

Jones & Trevor Mktg., Inc. v. Lowry, 2012 UT 39, ¶ 9, 284 P.3d 630, 635

(emphasis added). SSS now appeals, claiming the trial court erred in reaching a disputed factual conclusion that destroyed all of SSS's claims. SSS's liability theories having nothing to do with access issues were also swept aside. The heart of SSS's claims are based on the acts and omissions of the agent who negligently or fraudulently induced SSS to enter into the REPC under false pretenses then failed to pass critical information between the Buyer and Seller.

SSS was led to believe it had entered into a REPC with a "cash buyer" who owned the Arizona Diamondbacks ball team and had \$4.3 million cash on hand. The "new loan" dollar amount on the REPC was blank when Chuck considered the terms and decided to sign on behalf of SSS. The Seller showed up for closing on the designated day having *no reason to believe there were any problems brewing*. A 1031 real estate exchange was in the works. The Buyer, who apparently had about \$26 in its account, never appeared at the closing.

ARGUMENTS

The licensed real estate brokers and agent owed the Seller a duty:

Specific to the duties of a real estate agent to those persons to whom the agent owes no fiduciary duty, we stated in *Dugan v. Jones* that “[t]hough not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be ***honest, ethical, and competent*** and is answerable at law for his or her statutory duty to the public.”

Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 235, 241(emphasis added). R.3713.

Failure to include the true terms of the REPC presented to SSS for consideration constitutes a breach, as does changing the terms without notice thereafter. Remax was incompetent by failing to disclose material information to the Seller before and after the REPC signing, and failing to pass documents between the parties.

The trial court erred in concluding as a matter of law that SSS "cannot prove that Shea and Remax caused any damages." Multiple factual disputes exist on the issue of negligence as well as damage claims. In granting the Remax summary judgment motion and denying SSS's motion, *all* of the SSS's claims against the brokers and agent were incorrectly dismissed as follows:

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

Even if Shea and Remax acted improperly in some way as Still Standing suggests, the simple truth is that the actions of Shea and Remax did not *cause the transaction to fail*; therefore, *Still Standing cannot prove that they were damaged in any way by the actions of Shea or Remax*.

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

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

Oral. Trans., R.8389, 53:18-54:13 (emphasis added), Add.2. As the trial court noted, "there are undoubtedly factual issues that exist." The agent and brokers' dishonest, unethical, and incompetent acts and omissions specified in detail by SSS directly caused severe economic damages. Many damage allegations are completely unrelated to any access issue. SSS's damages commenced the moment ink was applied on "2.7.06" to the REPC that had already expired on "January 23, 2006." R.0072. The initial damages sprung directly from Tim Shea's blatantly false misrepresentations regarding the buyer's cash position.

ISSUE I - BREACH OF FIDUCIARY DUTIES

BECAUSE TIM SHEA WAS SERVING AS A REAL ESTATE AGENT FOR STILL STANDING, PRESENTING MULTIPLE PROPERTIES ON BEHALF OF THE SELLER, AND BECAUSE HE SIGNED A CONFIDENTIALITY AGREEMENT “*FOR THE PURPOSE OF PROVIDING REAL ESTATE SERVICES,*” HE OWED THE COMPANY A FIDUCIARY DUTY WHICH HE BREACHED AS A MATTER OF LAW.

A. Fiduciary Duties and Breach Elements.

The elements of breach of fiduciary duty based upon the failure to disclose material information, each of which must be proven by a preponderance of the evidence, are (1) a fiduciary duty to disclose material information, (2) knowledge of the information, and (3) failure to disclose the information.

Gilbert Dev. Corp. v. Wardley Corp., 2010 UT App 361, 246 P.3d 131, 139. R. 3115.

1. **A fiduciary duty to disclose material information.** Tim Shea (licensee) assumed the role of a trusted real estate agent, a fiduciary, and advisor for Still Standing:

An individual licensee shall: (1) uphold the following *fiduciary duties* in the course of representing a principal: (a) *loyalty*, . . . (b) *obedience* . . . (c) *full disclosure*, which *obligates the agent to inform the principal of any material fact* the agent learns

R162-2f-401a. (emphasis added), Exhibit L. R.3115.

a. Agent for Still Standing Under the Confidential Agreement for Real Estate Services. On April 13, 2006, the parties entered into the Confidential Disclosure Agreement “*for the purpose of providing Real Estate Services.*” Fact 1. “Tim Shea, employed with ReMax Elite . . . (hereinafter “Recipient”) and Stake Center Locating, Inc. *and Still Standing Stables, LLC* . . . (hereinafter “Discloser”).” Confidentiality Agreement, Seller’s Exhibit A (emphasis added). R. 3711. Seller was included as a Discloser. “[I]n Utah, a *fiduciary relationship and a confidential relationship are considered one and the same.* . . . (using the terms interchangeably and citing cases for the proposition that fiduciary relationship and confidential relationship are ordinarily convertible terms).” *d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, 147 P.3d 515, 527 (emphasis added, citations omitted). R. 3712. Tim was retained as the “go-to man for real estate services” on behalf of the Seller. Facts 2, 9.

b. Buyer and Seller Believed Shea was Agent for Still Standing. Chuck, on behalf of Seller, signed the REPC on February 7, 2006, and believed Tim was working for Chuck and Chuck’s companies. Fact 21. The Buyer, Emmett Warren (actually an LLC) through its member who signed the REPC, attorney John Lish, testified that he also thought Tim Shea was working for Chuck. Fact 17:

“I believed that he was working for Chuck.” Unlike the prior contract (Fact 13), there was no agency disclosure circulated with the REPC at issue (Fact 15), which violated an administrative rule: “(8) ***when executing*** a binding agreement in a sales transaction, ***confirm the prior agency disclosure***: . . .” See R162-2f-401a (8)(emphases added), Exhibit L. Paragraph 5 (agency disclosure) of the REPC signed by the Buyer and Seller, as well as the brokerage disclosures, are blank. Fact 16(a). The REPC was unlawfully changed by Remax/Shea after the buyer and seller signed. Fact 16. Tim had no agency agreement with the Buyer. Fact 20. Tim Shea, an inexperienced incompetent with no broker supervision, did not think he needed to have a any brokerage disclosure: “Q: I’m back on Exhibit 1 of Lish’s deposition. Tell me what that is that’s being sent over to John Lish. A (Shea): The buyer/broker agreement.” Shea Depo. I, 198:10-12.

A. (Shea) The purpose is that if I’m representing somebody – ***to be candid with you, you don’t have to have this*** –

Mr. Wallace: Just tell him the purpose.

A. The purpose is – the purpose is simply to –

Mr. Fuller: Okay. No coaching –

Mr. Duncan: ***We’re coaching him to answer your question.***

Mr. Fuller: No, you’re coaching him – you’re just cutting him off on that question.

Shea Depo. I, 201:11-202:1(emphasis added). R. 3116-17. State regulations require the following:

An individual licensee *shall*: (2) for the purpose of defining the scope of the individual's agency, *execute a written agency agreement* between the individual and the individual's principal, including: . . .

R162-2f-401a. (emphasis added). R.3117.

c. **Agent for Still Standing on Salt Lake Land Acquisition.** On February 24, 2006, Tim Shea, acting as “Buyer’s Agent,” together with “Remax Elite Scott Quinney” as Buyer’s Broker, presented an offer to purchase a parcel of land in Salt Lake City on behalf of Stake Center Locating.³ Fact 10(B). *See* Salt Lake Purchase Contract, Feb. 24, 2006, Exhibit C, Add.4. Under Addendum 4, *Still Standing Stables, LLC became the buyer* and the closing was moved to May 3, 2006. R.3117; Addendum No. 4 is at R.3213. Tim Shea did receive a sales commission. Shea Depo. I, 23:14. *Tim admitted he was a Chuck’s fiduciary.* Fact 10. Tim considered Chuck and Still Standing one and the same. Fact 11. The executory phase of the Still Standing Huntsville land REPC (at issue) as well as the Still Standing Salt Lake Purchase Contract overlapped each month, both running from February 2006 with the same May 3, 2006, closing dates. R.3117.

³ Stake Center Locating, Inc. was another company Chuck was managing.

d. **Seller's Agent Presented the First Piece of Land.** Chuck also had a 15 acre parcel: "And so they took me, first, to . . . 15 acres." Shea Depo. I, 16:22-17:3. Fact 10. Agent Tim Shea "sat down" and presented the first parcel to a buyer: "A (Shea): Yes. Well, both. *I actually presented both* to them ..." Fact 10(A). Tim was the agent of Chuck because Chuck was the property owner:

In Utah, as elsewhere, a real estate broker is held to be the *agent of the property owner* for whom he acts. As an agent, he owes a fiduciary duty to his principal.

Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743, 748 (Utah 1982). R. 3117-18.

2. **Knowledge of the information.** Seller had no idea of the problems brewing with the pending land sale, but Tim Shea was privy to the issues. R.3118.

a. **Meeting with Buyer and Attorney.** From attending the meeting with the Buyer and an attorney, Tim testified that "I got the impression that they [Buyer] had begun to think that Chuck was *not telling us the truth.*" Fact 22. This critical meeting and the agent's impression should have been disclosed to the Seller's side immediately.

b. **Meeting in Ross Allen's Home.** Tim also describes encountering David Allen while walking on the property right-of-way and a meeting in Ross

Allen's home: "So we got in the truck with him, and he drove us to – to speak with the father, and I don't remember his name. It might have been Ross." Shea Depo. I, 37:17-19. "And did you go in their cabin? A: yes." *Id.*, 37:23-24. "Did they say, There's no right-of-way to that land?"

A(Shea): I believe they did say that. *I believe they said . . . Chuck doesn't have a right over that land.*"

Fact 26.⁴ Shea was also made aware of financing concerns. Fact 51.

3. Failure to disclose the information. The following deposition testimony, including the "never needed to" comment, establishes as a matter of law that Tim Shea violated the fiduciary duties that he owed the Seller. This is the key testimony:

Q (Fuller): Did you call – *did you call Chuck and say*, Chuck, listen, I've been to this meeting, *these buyers think you're not telling the truth, they think there's a problem with the right-of-way*, and I just drove up there with Wilde, let me tell you what's going on? Did you ever call and have that type of conversation?

A (Shea): *Never needed to.*

Q: Why wouldn't you need to?

A. *Because I represented the buyer, not the sellers.*

⁴ Ross Allen may not have known that Seller's attorney Gretta C. Spendlove, Durham, Jones, Pinegar, had facilitated the purchase of land and access from Jarl Allen in 2005 after the *Stable v. Ross Allen, et al.* litigation.

Q: Strictly buyers and seller? Okay.

A: Right.

Q: So that's – would you agree that that would be a *material* term? *If you did represent Chuck, that would be something you better be telling him; is that right?*

A: *Yeah. If I had some fiduciary responsibility*, which I didn't have with him.

* * *

Q (Fuller): Okay. *Did you or didn't you have a confidential agreement with Chuck at the time this meeting took place with the parties* we just talked about in interrogatory number 22?

* * *

A (Shea): I – based on those dates that – *that confidentiality agreement would have been in place.*

Q (Fuller): Would have been in place. Okay. To make it clear, *you never called Chuck to tell him that you'd been up to that property with Mr. Wilde to look at that right-of-way and, by the way, the buyers are starting to wonder if you didn't tell them the truth* or –

* * *

Mr. Wallace: Did you call Chuck and tell him that?

A (Shea): *No.*

Fact 23. Multiple REPCs pending with Seller, the confidentiality agreement in place, first-hand knowledge that the Buyer is doubting the truthfulness of the Seller, knowledge of financial concerns, yet the agent does not inform his client.

Facts 23, 24. The Confidential Disclosure Agreement (R. 3198-3200) between the

parties to the contract covered all of the real estate deals that Tim/Remax worked on for both Stake Center and Still Standing. Exhibit A. R.3120.

The agent also failed to pass information between the buyer and seller. Seller gave Tim copies of the earlier *Stables v. Allen* case (Fact 28) with the expectation and reliance that the agent would pass the cases to the Buyer, which Tim did not do. Fact 29. Buyer was apparently made aware of the case by its attorney Miles LeBaron. Fact 30. R. 3121.

The agent failed to specify the “new loan” dollar amount on the REPC. *After* the REPC was signed by the parties (buyer and seller), Tim later added the vague acronym “TBD” to the REPC in the new loan dollar amount blank. Facts 40-43. The breach was Tim’s failure to inform his client that not only was there to be a new loan as opposed to cash, but when “TBD” was added to the contract the agent should have informed Seller regarding the critical term. An addendum should have been used. Fact 44.

Similarly, the agent should have informed the Seller that Chuck’s initials were *forged* in multiple places on the REPC, boxes were checked after the fact, dates were added, and agency disclosures were modified on the contract over a period of time. Facts 43-47.

The agent testified he could simply shift fiduciary gears in the same period of time:

Q. – then you shifted gears from, *I'm his agent*, now we're going to talk about the other property, *I'm not your agent*?

A (Shea). *Right.*

* * *

Q. And you just *automatically shift gears and go from being the agent* then you turn – no, you –

A. *It's an amazing thing but I did it.*

Fact 48. R.3122. In other words, full disclosure and loyalty punctuated by gaps of conflict and split duties – breach of fiduciary duties as a matter of law. Remax produced no limited agent agreements. The principal broker also thinks a fiduciary can "*switch in the middle of a sentence* or a conversation *and not disclose information.*" Fact 49. "A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another." *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1990)(footnote omitted).

R.3122. The Seller relied on Tim's representations. Facts 3-9. Tim knew there were lenders involved who may not loan money. Fact 51. Tim never told Chuck about the lenders or their concerns. Fact 52-53. Tim told Chuck this was a cash deal and the Buyer owned the Arizona Diamondbacks professional baseball team.

Schvaneveldt Decl., p. 3. R. 3122. These were absolute false statements and fraudulent misrepresentations designed to induce SSS to sign the REPC. Tim assured Chuck that the Seller was entitled to the earnest money. Fact 54-55.

B. Implied fiduciary duties present a question of fact for the jury. In the alternative, there is at least an implied fiduciary duty and factual basis to constitute a breach for the jury to consider. "We therefore . . . remand for a factual determination whether, under the totality of the circumstances, the Normans reasonably believed that Arnold represented their interests." *Norman v. Arnold*, 2002 UT 81, 57 P.3d 997, 1002 (attorney-client case). R.3122-23.

C. Trial court erred regarding damage claims and access.

Still Standing's claims fail because it *cannot prove that Shea and Remax caused any damage* to Still Standing. The transaction failed because Still Standing could not *guarantee* an access to the property.

Oral. Trans., R.8389,54:6-9 (emphasis added). Damages are related to the way the transaction *started* as well as the way it ended. Regardless of how or why the transaction failed, SSS was improperly induced into entering into the REPC in the first place under false pretenses:

[W]e think the seller *entered into under these false pretenses*, thinking they had a cash buyer with all the cash when, in fact, they didn't. And whenever Tim Shea, who testified that's his writing, whenever it became apparent to Tim Shea there weren't cash buyers, *he put to be determined*, he should have--he had a duty to go to these sellers and say, *by the way, these guys*

aren't cash buyers, they have to borrow a lot of money from this group up there. That's a critical term.

Oral Trans., R. 8389, 29:11-19 (emphasis added). Many of SSS's claims are based upon acts and omissions while entering into the REPC, prior to the transaction failure:

Our claims, seller's claims against the agent is the misrepresentation and the misconduct and the facts and circumstances that were present *when the seller entered into the real estate purchase contract in the first place*. We believe there were misrepresentations and there were these--there were these--

THE COURT: How does that affect at all the--the inability to provide an access and have it insured?

MR. FULLER: Because for one thing, the sellers shouldn't have--under the actual circumstances, the *seller wouldn't have entered into the purchase agreement in the first place*. And the second part of it, the real estate purchase contract--contract, doesn't guarantee access to the property. It guarantees--it guarantees the--the ownership of the land. What it--what it--what the real estate purchase contract warrants is, good and marketable title. Says sellers represents, in the real estate purchase agreement, Seller represents that sellers will convey good and marketable title to buyer. *Buyer agrees, however, to accept the title to the property subject to the following matters of record: easements*, and then it goes on, and *right-of-way* and subject to the contents of the commitment for title insurance as agreed to by the buyer under Section 8.

* * *

I'll also note that when the lis pendens was lifted in this case, it was only about 90 days later that the same, exact property, with the same circumstances, was sold to the Millennium group, that's in--in my exhibits there, to the Snow, Christensen, Martineau group and they bought it just like it was with the same sellers' disclosures. The seller stated on there two days after they entered into this real estate purchase contract that there was no

access for a public road. Everybody knew that. Two days aft--the same day they got the earnest money, the sellers' disclosures were provided there. They knew there was no access to public road and it said, Chuck said to the best of his knowledge that he thought that there was an easement to it.

Oral Trans., R. 8389, 16:21-18:18 (emphasis added).

[Mr. Fuller, for SSS]: "Could he [agent Shea] have made all kinds of -- of outrageous misrepresentations and fraud, but all that is -- he is forgiven, as long as the [buyer] never came to close because there was a right of way issue. Do all of these issue with that -- with that agent and the brokerage just drop off? And they -- and they shouldn't, because that's what bound the -- the property up."

Oral Trans., R.8389, 51:3-9 (brackets added), Add.2.

1. **Seller did have access to the land.** SSS has *always* maintained there was access to the property. *See* Seller's Property Condition Disclosure, SSS identified as Seller, Feb. 9. 2006. R.3709; Exhibit P, Add.4, R. 3718, ¶6(G), private easement.

I remain of the opinion that since acquiring the additional property from the Allen family, *after* the *Stables v. Allen* litigation, Still Standing did have a right-of-way to the Allen parcel and the original parcel.

Schvaneveldt Decl., ¶25. R.3128, Add.3. Still Standing acquired an easement along with the additional five acre parcel it purchased from Jarl Allen, *et al.*, on October 1, 2005. *See* Warranty Deed, Allen to Stable, Dec. 9, 2005 and Agreement, p. 2, ¶7, Exhibit T, Add.5, R.3711. The second parcel was acquired *after* a judicial

determination that the 170 acres did not have access across property owned by Ross Allen and others. *See* Exhibit U, Add.5, R.3711, chain of ownership of ingress/egress easement. SSS disputed the Remax argument that "the reason for the failure of the transaction was the lack of access to the property." R.3709. SSS replied "Disputed. One reason for the failure is the fact the Buyer never appeared at the closing to tender the purchase price." R.3709.

2. Buyer land flip scheme failed and lender refused to lend money.

The Buyer did not have "its own cash for the purchase price" as Tim Shea led Chuck to believe. Schvaneveldt Decl. ¶ 16, R.3127. The Buyer, Emmett Warren, LLC, had only \$26 on February 28, 2006. *See* Emmett Warren LC Business Checking, Feb. 28, 2006, Exhibit Q, Add.5. R.3722. Clark Real Estate "***did not make the loan*** to WBL Development, L.L.C." Aff. Gary Clark, ¶ 12, Dec. 14, 2009 (emphasis added). R. 3709-10. Contrary to the trial court's factual opinion of why the "transaction failed," SSS maintains that "The sale failed in part because Emmett Warrens strategy to flip the land for \$8.9 million melted down and its financing apparently failed." R.3710.

Skip Wing's attorney Robert Wallace explained buyer's plan: "They -- they want the property, they're trying to turn around and make a huge profit, they call it

a *flip*, where they sell it very quickly to someone else." Oral Trans., R.8389, 7:17-19 (emphasis added).

3. **The transaction never contemplated "guaranteed access."** Seller did provide "good and marketable title:"

Seller represents that Seller . . . will convey *good and marketable title* to Buyer . . . Buyer agrees, however, to accept title to the Property *subject to the following matters of record*: easements, . . . and *rights-of-way*; and *subject to the contents of the Commitment for Title insurance* as agreed to by Buyer under Section 8.

REPC, Seller Warranties and Representations, Feb. 7, 2006, Plaintiff Exhibit D (emphasis added). R.3710. Good and marketable title does not include any absolute guarantees regarding access to the land: "Marketable title is title that may be freely made the subject of resale . . ." *Mostrong v. Jackson*, 866 P.2d 573, 577 (Utah Ct. App. 1993)(citations omitted). R.3710. Summary judgment should also be reversed because the issue of "marketable title" is a *question of fact*, and the trial court also made a *legal error* in concluding:

Still Standing could not *guarantee access* to the property, *and thus provide marketable title*.

See Ruling and Order on Pending Motions, July 17, 2012, R. 5050, Add.6. "The ability to access a parcel of real estate . . . is not technically a "defect" in the title to the property." 11 Couch on Ins. §159:59. Access to Parcel Insured, Updated Nov.

2011. R.3711. SSS's sale to Millennial Partners on July 16, 2008, proves it could provide *insurable* "marketable title," just like the standard REPC requires. *See* Stewart Title Guarantee Co., Amount of Ins. \$950,000, Ex. V, Add.5, R.3755. SSS pointed out to the trial court that "Still Standing, never made any guarantee to guarantee access to the property." R.8389, 23:5-6; 39:16-17. Any conclusion that SSS made or breached any access "guarantee" under the REPC is wrong and would have necessarily involved a question of fact. There is no evidence that Seller was *ever* asked to "guarantee" nor insure access, nor remedy *any* condition or concern.

4. SSS bought and sold the property notwithstanding the access.

Seller purchased the land from the State of Utah Trust Lands Administration. R. 3711. In December 2005, *before* the February 2006 REPC, SSS acquired an additional parcel (5 acres) from the Allen family "together with an unrestricted easement for ingress and egress 66 ft. wide over existing roads . . . " Warranty Deed, Ex. T, R.3736-39, Add. 4. Shortly after the lis pendens was removed in this case, Seller sold the same land at issue (without any involvement by Remax) to Millennial Partners North, LLC. on July 16, 2008. *See* Snow Christensen & Martineau Letter, June 20, 2008 (Ex. V, R. 3749), Special Warranty Deeds from

Still Standing to Millennial Partners, Hickman Title, Recorded July 8, 2008, and ALTA Owner's Policy. R.3711, Exhibit V. R.3749-57.

5. Any and all of SSS alleged damages should be presented to a jury.

SSS argued that the agent and broker caused a variety of damages, including among other things, at least part of the \$3 million loss SSS claims it has experienced. The depreciated market loss occurred while the *lis pendens* applied. Fact 58; SSS Schvaneveldt Decl., ¶22, R. 3127-28.

“[T]he courts . . . may employ their equitable powers to enforce the contract via specific performance.” *Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980). R. 3123. Tim Shea's attitude that he “never needed to” keep his client informed deprived the Seller of the opportunity to remedy any and all of the Buyer's conceivable excuses for refusing to close on May 3, 2006 and possible specific performance remedies. R.3123.

Had Tim informed the Seller that the REPC, while in the exclusive possession of Remax, had been forged, modified, augmented, and otherwise changed significantly, the Seller could have bypassed the entire Remax group and communicated directly with the Buyer. R.3124. Seller could have considered the

option of turning to a better qualified buyer. R. 3124. Seller lost its competitive advantage and 1031 exchange opportunities due to Remax/Shea's conduct.

SSS could seek fees if there is a breach of the fiduciary duties. *Kealamakia, Inc. v. Kealamakia*, 2009 UT App 148, 213 P.3d 13, 15. R. 3124. The agent continued to increase Still Standing's damages in bringing prohibited commission claims in his own name multiple times. *See* Utah Code § 61-2-18 (2006). R. 3124. A punitive damages claim may also exist. *Norman v. Arnold*, 2002 UT 81, 57 P.3d 997, 1006 (internal citations omitted) ("breach of fiduciary duty. . . can serve as the basis for punitive damages.") R.3124.

ISSUE II - NEGLIGENCE AND MISREPRESENTATIONS

BASED ON THE AGENT'S BREACHES AND MISREPRESENTATIONS, THE SELLER WAS LED TO BELIEVE IT WAS CONTRACTING WITH A CASH BUYER, WHICH WAS NOT TRUE, AND THE AGENT'S FAILURE TO COMMUNICATE MATERIAL INFORMATION MADE A BAD SITUATION WORSE, CAUSING DAMAGES TO THE SELLER.

A. Duties and Breach of Duties. A variety of duties were owed by the brokerage, brokers, and agent to the Seller regardless of who Remax actually represented.

Additionally, although not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be *honest, ethical, and competent* and is *answerable at law for breaches* of his or her statutory duty to the public. Moreover, real estate agents have a duty to *deal fairly and honestly, despite the fact that the broker is acting primarily as the seller's agent*. One of the purposes for imposing a *duty to disclose accurate or complete information* [is] to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient *accurate information to make an informed decision* whether to purchase.

West v. Inter-Fin., Inc., 2006 UT App 222, 139 P.3d 1059, 1064 (emphasis added, citations and punctuation omitted). R.3184. All of Chuck's Declaration facts (R. 3190-93) should have been accepted as true for the purposes of summary judgment considerations. SSS also properly alleged claims for negligent misrepresentations and satisfied all of the elements.

Similarly, a claim for *negligent misrepresentation* requires a party to demonstrate that (1) a party carelessly or negligently makes a false representation “expecting the other party to rely and act thereon,” (2) the plaintiff actually relies on the statement, and (3) suffers a loss as a result of that reliance. . . . “[I]n addition to affirmative misstatements, an omission may be actionable as a negligent misrepresentation where the defendant has a duty to disclose.”

Moore v. Smith, 2007 UT App 101, 158 P.3d 562, n.12, 579 (emphasis added, citation omitted), R.3183. SSS specified in detail a variety of nondisclosure claims:

To support a claim of *fraudulent nondisclosure* a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate. *Mitchell v. Christensen*, 2001 UT 80, ¶ 9, 31 P.3d 572.

Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 235, 241-42 (emphasis added). R.

3186. All of the elements were pled. R.3186-88. "Tim told Chuck that the buyer was cash buyer, no “new loan” amount was specified in REPC (Fact 52), Tim said the buyer owned the Arizona Diamondbacks professional baseball team.

Schvaneveldt Decl., p. 3. Tim later changed the “new loan” specification from no dollar amount to “TBD” (Fact 40, 42) without informing Chuck. Schvaneveldt

Decl. Para. 22. . . . He omitted facts about meetings. Fact 26 (Allen’s house); Facts 22-23 (meeting with Buyer and attorney)." R. 3187. Shea never passed the

easement information nor the *Stable v. Allen* case (Facts 28-29) from the Seller to the Buyer, causing the buyer to doubt there was access when Buyer's lawyer "found" the case (Fact 30), and the Buyer's side began to "think that Chuck was not telling us the truth." Fact 22. These problems were all caused by Shea's omissions and failure to convey information. In the alternative, Remax committed a constructive fraud that a jury should consider:

To demonstrate constructive fraud in Utah, a party need only demonstrate "two elements: (i) a confidential relationship between the parties; and (ii) a failure to disclose material facts."

d'Elia v. Rice Dev., Inc., 2006 UT App 416, 147 P.3d 515, 526 (citations omitted).

R. 3188. See Confidential Agreement, Fact 1, and R.3188.

Seller's complaint specifies in detail the facts that form the particulars of the negligence and fraud claims, which far exceed the requirements of U.R.Civ.P. 9(b).

R.3188. See Complaint, included as Remax Exhibit Q: Paragraph 42 (different REPC representation of new loan term changed from original), 45-48 (changes to REPC, forged initials), 49 (new loan changes, TBD added), 50-52, 55 (TBD term issue), 61, 64(relied), 62 (omission), 64 (damaged), 67 (conversations), 125 (a-f) (forgery, changes to REPC), 126 (very specific list of false representations and acts, knowledge of agent), 127 (more specifics, knowledge of agent, failure to pass,

fraudulent scheme to delay cancellation of REPC in order to claim entitlement to largest commission of his career). R.3188.

All of SSS's breach of contract claims were also rejected. The Confidentiality Agreement was a contract. Fact 1. The Agreement was “*for the purpose of providing Real Estate Services.*” *Id.* R. 3178. Seller should be allowed to present its contract claims to a jury. . . All of these implied claims are fact intensive and should be sorted-out by a jury. R.3180.

SSS also claimed that the broker and agent were negligent *after* the sale failed and before Remax filed its complaint against SSS:

The broker should have sat down with Chuck and said, listen, this is what really happened, there were all these omissions, here was a loan out there, they weren't cash buyers and look at this letter from Miles LeBaron, this is why they want their \$25,000 back. And Chuck would have said, well, gosh, if that's the case, I'm going to give--he would have the option to say, well, let's give the \$25,000 back to the buyers since they're an LLC with no money anyway, it's the agent who caused the problem here; instead, they went headlong into this big, protracted lawsuit, the lis pendens was filed and that land was tied up for years.

Oral Trans., R. 8389, 51:15-25; Fact 31. These alternate theories of liability have nothing to do with access and were ignored by the trial court.

B. Causation and Damages. The trial court never even analyzed the negligence and fraud elements nor the factual bases. Instead, it just summarily

dismissed all of SSS's claims: "The transaction failed *because Still Standing could not guarantee an access* to the property. That's the bottom line." Oral. Trans., R.8389, 54:4-10(emphasis added). SSS set this disputed factual position squarely in front of the trial court before the ruling:

Seller *disputes* the argument that the failure of the transaction was the inability to ensure access.

R. 3180 (emphases added). In response, "the Court finds that there is undisputed -- or that it is undisputed that that lack of a guaranteed access was the sole reason for the -- that the transaction failed." Oral Trans., R.8389, 53:1-3. At the summary judgment stage where all of SSS's claims were kicked out, SSS's alternate factual theory of why the sale failed should have been adopted:

It is just as likely that the Buyer backed out *because it decided it could not "flip" the land . . .*

R. 3186 (emphasis added). There was nothing wrong with the land nor the right-of-way. R.3180. SSS also pointed out that the access facts were a matter of record during the due diligence phase of the contract. "Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements . . . and rights-of-way." REPC, Seller's Exhibit D, REPC ¶10.1. R. 3186. Under the REPC, because no notice was given to Seller, "Buyer's objections shall be deemed

waived by Buyer." ¶¶8.2-8.4 at R. 3224. There is no evidence that any notice was given to Seller's side during the due diligence period demanding an "access guarantee" or "access insurance." A jury should decide the disputed facts:

In Utah, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is *answerable at law for breaches* of his or her statutory duty to the public. . . . Given the evidentiary record in this case, that is also *a matter for the jury to determine*.

United States v. Bald Eagle Realty, 21 F. Supp. 2d 1332, 1334 (D. Utah 1998) (emphasis, punctuation omitted). R.3184.

Damages include the same lost opportunities, depreciation, legal fees, and lost claim for specific performance detailed above. Fact 58. R.3184; R.3181. Consequential damages under the contract theories exist. The financial loss was caused by the Remax breaches. R.3182. Damage issues also need to be presented to the jury. R. 3182.

C. Expert witness Thomas M. Morgan Report. The trial court invited a motion to reconsider:

“[I]f issues arise of the finalization of the order the Court will entertain a motion to reconsider.”

Minute Entry, Case Docket, May 3, 2012. R. 4280. After receiving and reviewing the official Remax Transaction File, Seller requested that the trial court

consider SSS's expert witness report before certifying the summary judgment order and included the Thomas M. Morgan Expert Report. R. 4280; Morgan Expert Report at R. 4290-4307, Add.7.

Trial courts have clear discretion to reconsider and *change their position* with respect to any orders or decisions *as long as no final judgment has been rendered*.

Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, 48 P.3d 968, 973

(emphasis added). R.4285. Seller asked the court to allow an evidentiary hearing to question the expert regarding the Seller's claims. R.4288. The Rulings and Order on Pending Motions "denies the motion to reconsider." R.5050, Add.6. The wide gap in judgment between the trial court and Utah law illustrates why the expert's perspective would be helpful:

The *changes Tim Shea made to the REPC after the parties signed it are a red herring*, in the Court's judgment and are irrelevant to the commission claim.

Oral Trans. Comm. Claims, R.8382, 78:13-15 (emphasis added). The expert points out the following:

A real estate agent could face the possibility of a suspension if the agent adds terms to an agreement (i.e. adding "TBD" to the New Loan dollar amount on the REPC) after it had been signed. If in fact Mr. Shea did add "TBD" to the New Loan dollar amount blank without permission *after* the Seller signed the REPC, the act would constitute incompetence in my opinion.

The record reveals substantial evidence to support the Commission's findings. The Commission determined that respondent was "incompetent" in the following instances: (3) He amended an offer without obtaining the buyer's consent. . . (7) He *added terms*, however innocuous, *to an agreement after it had been signed*.

Matter of License of Topik, 761 P.2d 32, 36 (Utah Ct. App. 1988)(emphasis added).

We, therefore, reverse the district court's decision and reinstate the Commission's order to *suspend respondent's real estate broker's license* for one hundred fifty days to be followed by a three year probation.

Matter of License of Topik, 761 P.2d 32, 37 (Utah Ct. App. 1988)(emphasis added).

Thomas M. Morgan Expert Report, May 30, 2013, p. 4, at R. 4293, Add.7.

ISSUE III - JURISDICTION AND OWNERSHIP OF REMAX

THE SUMMARY DISPOSITION OF ALL OF SELLER'S CLAIMS SHOULD BE REVERSED FOR FURTHER CONSIDERATION BY THE TRIAL COURT IN LIGHT OF THE MISREPRESENTATIONS SELLER DISCOVERED AFTER ITS CLAIMS WERE DISMISSED.

After Skip Wing and others sued SSS and Chuck for the payment of a commission, and after the trial, Skip Wing suddenly announced that he was not even a party to the FSBO:

"Mr. Wing was *not a party to the For Sale By Owner Agreement . . .*"

R.6781. Skip Wing now uses the word "mistaken" as to his sworn testimony regarding the ownership of the DBA:

Accordingly, while any *testimony I gave* about Aspenwood being the owner of the dba *may have been mistaken*, it was *not deliberately false*.

Decl. of Skip Wing, ¶ 14, Sept. 16, 2013, R.8094 (emphases added). SSS discovered that the sole owner of the DBA when the contracts (FSBO and REPC) were signed was actually Dale Quinlan. Remax has now admitted this fact:

Second, it appears that *Dale Quinlan was the owner of the dba when the documents were signed*.

R.8087. They also admit that the DBA owner was the actual contracting party:

ReMax Elite is undisputedly a dba, the applicant, or *underlying owner of the dba, is the party to the contract*, doing business as ReMax Elite.

R.6902. None of the plaintiffs were parties to the FSBO and none of them had standing to sue SSS and others for a commission. *See* SSS's Motion for Summary Disposition of Commission Claims Based on Settlement and Standing, April 23, 2015, incorporated by reference, including Fact 12, p. ix. It was "dishonest, unethical, and incompetent" for Skip Wing and others to sue for a commission when in fact it was Dale Quinlan who was the sole owner/applicant of the DBA Re/Max Elite, the "Company" defined in the FSBO.

The Remax group should have also disclosed to SSS and Chuck that after the REPC was signed on February 7, 2006, two forged documents with the *exact* same Dale Quinlan signature were recorded on March 9, 2006, with the Division. See Aff. Decl. of Dale Quinlan, July 5, 2013, attachments at R. 7330 and 7331. See also, G. Matthew Throckmorton Expert Forgery Report, Aug. 2, 2013, R. 7333-51 (compare R. 7346 to R. 7347), Add.8.

The dismissal of SSS's claims against the broker and agent should also be reversed based on the false Remax Elite interrogatory responses (R. 7304), including the following example:

If *Remax Elite* has ever received a *warning or been disciplined* by any agency of the State of Utah, state the date and nature of *every disciplinary action, formal or informal*, within the last 5 years.

R. 7360.

ANSWER TO INTERROGATORY NO. 14: Remax Elite objects . . . Without waiving this objection the answer is, *none*.

Id., R. 7360. After SSS discovered Dale Quinlan, it learned the following:

QUINLAN, ORION DALE, *Re/Max Elite*, Layton. Agreed to *surrender his current broker's license* effective July 20, 2005 . . . for *failing to exercise reasonable supervision* and for *breaching a fiduciary duty* owed to a principal in a transaction. . . Various disputes developed among the licensees concerning *whether the seller had valid contracts* with both buyers . . . #RE23230.

Utah Division of Real Estate News, Vol. 1, No. 1, January 2006, (emphasis added), R. 7373. Skip was working with Dale at Remax. The trial court's summary judgment ruling that dismissed all of SSS's claims should be reversed to address, among other things, all of the foregoing claims and issues in light of the misrepresentations during litigation. Dale Quinlan (now in his 80s) is an important witness, never disclosed in any Remax discovery response. All SSS claims should be reversed with express leave to depose Mr. Quinlan.

An evidentiary hearing to explore the origin of alleged forged documents, including the "9 March 2006" and "7 March 2006" letters (R.7346, 7347, Add.8), and Aspenwood articles signature page with two *exact* same Quinlan signatures (R.7340, Add.8) would also serve a useful public policy. It would help maintain the sacrosanct nature of recorded documents.

REQUEST FOR ATTORNEY FEES & COSTS

SSS respectfully requests an order from this Court specifying that in the event SSS prevails on remand and is awarded fees under the FSBO, the Confidentiality Agreement, or otherwise, that SSS may also submit a request for fees and costs related to this appeal.

CONCLUSION & RELIEF

Based on the foregoing, appellee Still Standing Stable, L.C. respectfully requests that this Court reverse the trial court's summary judgment ruling that dismissed all of the Seller's claims against the brokerage, brokers, and agent and grant the relief requested in this brief.

SSS is also requesting that the order reversing or remanding the claims includes permission for SSS to request fees and costs related to this appeal under appropriate circumstances.

DATED this 11th day of June, 2015.

FULLER LAW OFFICE, LC



ROBERT J. FULLER

Attorney for Still Standing Stable, L.C./Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies, one to each address, of this BRIEF OF APPELLANT STILL STANDING STABLE, L.C., was served to the addresses listed below by mailing on this 11th day of June 2015, to *Attorneys for Appellees*:

L. Miles LeBaron
Dallin T. Morrow
LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., #200
Layton, Utah 84041

Robert R. Wallace
Michael D. Johnston
KIRTON & MCCONKIE
60 East South Temple #1800
Salt Lake City, Utah 84145



Robert J. Fuller
Attorney for Appellant

Type-Volume Limitation Certificate of Compliance

Counsel for Appellant now certifies pursuant to U.R.A.P. 24(f), that the Word 2007 version word count for this document, with 14-point typeface, 13-point on page 11, starting from the Statement of Jurisdiction to the end of this signature block, including all headings and footings is 13,996 words.



Robert J. Fuller
Attorney for Appellant

Addenda

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

1. Order on Motions for Summary Judgment, May 22, 2012, R. 4009-12.
2. Summary Judgment Oral Arguments, March 22, 2012, R. 8389.
3. Chuck Schvaneveldt Declaration, March 10, 2011, R. 3190- 93.
4. Seller's Exhibits from A-O, March 14, 2012, R. 3194-3350.
(Exhibits A, C, D, E, F, G)
5. Seller's Reply Exhibits from P-W, March 20, 2012, R. 3715-3758.
(Exhibits P, Q, T, U, V)
6. Ruling and Order on Pending Motions, July 17, 2012, R. 5047-52.
7. Thomas M. Morgan Expert Report, May 30, 2012, R. 4290-99.
8. Throckmorton Expert Forgery Report, Aug. 2, 2013, R. 7333-51.

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

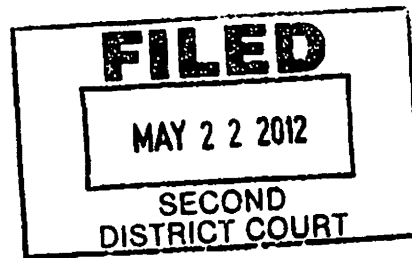
ADDENDUM

1. Order on Motions for Summary Judgment, May 22, 2012, R. 4009-12.

Addendum 1

ROBERT R. WALLACE (#3366)
KIRTON McCONKIE, PC
60 East South Temple, #1800
Salt Lake City, Utah 84145-0120
801-328-3600
rwallace@kmclaw.com

MAY 22 2012



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

RE/MAX ELITE,

Petitioner/Counterclaim Defendant,

v.

TIM SHEA,

Third Party Defendant,

v.

STILL STANDING STABLE, L.C.,

Respondent/Counterclaim Plaintiff/
Crossclaim Defendant, Third Party Plaintiff

v.

EMMETT WARREN, L.C./Assign WBL
DEVELOPMENT LLC., TIM SHEA

Respondent/Crossclaim Plaintiff/
Third-Party Plaintiff,

v.

CHUCK SCHVANELVELDT,
Third-Party Defendant, Third-Party Plaintiff.

v.

TIM SHEA,

...

Third Party Defendant.

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

Civil.No. 060906802

Judge Michael D. Lyon

The Petitioner and Counterclaim Defendants, Remax Realty; Hilary "Skip" O. Wing; Shane Thorpe; Scott Quinney; Tim Shea; Aspenwood Real Estate Corporation, DBA Remax Elite; Aspenwood Realty, LLC; Aspenwood Elite Legacy Corporation; Elite Legacy Corporation, and Re/Max Realty (hereafter collectively "Remax"), through their attorney, Robert R. Wallace, filed with the Court, "Remax's Motion for Summary Judgment on All Claims of Still Standing Stables Against It" along with the supporting memorandum, on or about February 1, 2011. Respondent and Counterclaim Plaintiff, Still Standing Stable, LC., through their attorney, Robert J. Fuller, filed "Seller's Cross-Motion for Summary Judgment on the Issue of Breach of Fiduciary Duty" along with the supporting memorandum, on or about March 11, 2011.

On March 22, 2012 the court held a hearing on the above-mentioned motions for Summary Judgment. Remax was represented by Robert R. Wallace. Still Standing Stable, LC., was represented by Robert J. Fuller. The Court had carefully reviewed all of the memoranda filed with the court concerning both motions for summary judgment. The Court heard extensive oral arguments from both counsel. Being fully advised in the premises, the Court enters the following orders, based upon the supporting and opposing memoranda of the parties on file, the oral arguments, and the findings and conclusions stated by the Court at the close of the above-mentioned oral arguments.

/

/

/

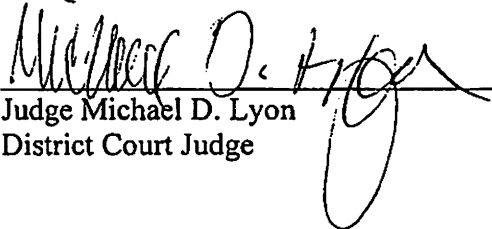
/

IT IS HEREBY ORDERED:

The motion for summary judgment filed by Petitioner and Counterclaim Defendants (Remax) is hereby **GRANTED**;

The motion for summary judgment filed by Respondent and Counterclaim Plaintiff is hereby **DENIED**.

ORDERED this 21 day of May, 2012.



Judge Michael D. Lyon
District Court Judge

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

2. Summary Judgment Oral Arguments, March 22, 2012, R. 8389.
(Cited Quotes Only)

Addendum 2

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

-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.

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UTAH APPELLATE COURTS

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333 SOUTH RIO GRANDE
 SALT LAKE CITY, UTAH 84101
 WWW.DEPOMAXMERIT.COM

DEC 15 2014

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

1 vs.)
2 CHUCK SCHVANEVELDT, TIM)
3 SHEA and CATHY CODE,)
4 Third-Party)
 Defendants.)

- o o o -

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

-000-

A P P E A R A N C E S

11 For the Plaintiff: BRIAN P. DUNCAN
Attorney at Law
12 LeBaron & Jensen
2485 Grant Avenue, Suite 100
Ogden, Utah 84401

For the Defendant,
14 Still Standing: ROBERT J. FULLER
Attorney at Law
15 Fuller Law Office
1090 North 5900 East
16 P.O. Box 835
Eden, Utah 84310

For Third-Party
18 Defendant Shea: ROBERT R. WALLACE
Attorney at Law
19 Kirton & McConkie
60 East South Temple, Suite 1800
20 Salt Lake City, Utah 84111

* * *

1 John Doxie and he wanted him to look at the property because
2 he had faith in him. And that's Paragraph 23 of our
3 memorandum, but he had faith in John Doxie, John Doxie
4 concluded that there was no access and he looked at the strip,
5 he looked at the property, he looked at the whole thing and
6 said there was no access.

7 No. 9, the buyers, Mr. Lish, began to worry. And
8 why? Because Still Standing's policies and the title
9 involved, so they began to worry about it. So the buyers
10 went, this is Mr. Lish again, and had a third title company,
11 Utah Commercial Title and that was their own title company,
12 they were lawyers and owners of the title company. They had
13 their own title company look at it, came to the same
14 conclusion. That's No. 10.

15 No. 11, Mr. Wilde, one of the other buyers, went to
16 Miles LeBaron, a land lawyer, a property lawyer, and had him
17 look at it. They--they want the property, they're trying to
18 turn it around and make a huge profit, they call it a flip,
19 where they sell it very quickly to someone else. They wanted
20 to find access, they were excited to try and find access; so
21 they went to their own lawyer, Miles LeBaron. He could not
22 find access. These are all undisputed facts, nothing of these
23 have ever been disputed.

24 Then they went up to the property about a week
25 before the closing and they met a man by the name of Ross

1 THE COURT: Thank you, Mr. Wallace.

2 Mr. Fuller?

3 MR. FULLER: Your Honor, do you mind if I stand
4 right here?

5 THE COURT: Sure.

6 MR. FULLER: Is that fine?

7 Your Honor, good morning, if it please the Court.
8 Maybe--let me try to cut through this just to--to lay a
9 background and then I'll go over some of the points I thought
10 were important that Mr. Wallace raised; but let me point to
11 four facts and two documents that I think are key to this
12 whole--this whole summary judgment.

13 Let me start with Fact 26 and I'll read it from the
14 response of Remax where it has the response of theirs. So
15 here's--let's to go--excuse me, 10B is where I'll start.

16 10B. Tim was--Tim was Chuck's, Still Standing,
17 Stake Center's real estate agent on multiple properties. And
18 so to lay a background here, we're saying that there's the
19 focus that the problem here is looking at the buyers, they're
20 not closing and access to the land.

21 Our claims, seller's claims against the agent is the
22 misrepresentation and the misconduct and the facts and
23 circumstances that were present when the seller entered into
24 the real estate purchase contract in the first place. We
25 believe there were misrepresentations and there were these--

1 there were these--

2 THE COURT: How does that affect at all the--the
3 inability to provide an access and have it insured?

4 MR. FULLER: Because for one thing, the sellers
5 shouldn't have--under the actual circumstances, the seller
6 wouldn't have entered into the purchase agreement in the first
7 place.

8 And the second part of it, the real estate purchase
9 contract--contract, doesn't guarantee access to the property.
10 It guarantees--it guarantees the--the ownership of the land.
11 What it--what it--what the real estate purchase contract
12 warrants is, good and marketable title.

13 Says sellers represents, in the real estate purchase
14 agreement, Seller represents that sellers will convey good and
15 marketable title to buyer. Buyer agrees, however, to accept
16 the title to the property subject to the following matters of
17 record: easements, and then it goes on, and right-of-way and
18 subject to the contents of the commitment for title insurance
19 as agreed to by the buyer under Section 8.

20 As we go down to--remember, Still Standing bought--
21 bought the property from the State of Utah Trust Lands there
22 and the School Trust Land said we're not guaranteeing this
23 property, they warned them they said, this may not be
24 marketable. Well, that doesn't mean you can't buy it and it
25 doesn't mean that Still Standing didn't have the right of

1 possession of that property.

2 I cited the Monstrong vs. Jackson case, your Honor.
3 It says the Monstrongs have cited no cases holding as a matter
4 of law that the real property lacks marketable title for want
5 of lawful access.

6 I'll also note that when the lis pendens was lifted
7 in this case, it was only about 90 days later that the same,
8 exact property, with the same circumstances, was sold to the
9 Millennium group, that's in--in my exhibits there, to the
10 Snow, Christensen, Martineau group and they bought it just
11 like it was with the same sellers' disclosures. The seller
12 stated on there two days after they entered into this real
13 estate purchase contract that there was no access for a public
14 road. Everybody knew that. Two days aft--the same day they
15 got the earnest money, the sellers' disclosures were provided
16 there. They knew there was no access to public road and it
17 said, Chuck said to the best of his knowledge that he thought
18 that there was an easement to it.

19 And this is a good time to talk about the map there.
20 If you look on--under my Tab U there, the exhibit, what that
21 is is the historical deeds. We have the Allen Ranch Company
22 and it specifies Ross Allen conveying it to Scott D. Allen,
23 who, I think might have been a lawyer, I can't remember, I
24 think he may have been a lawyer. And then from Scott Allen,
25 it goes to Garyl Allen and then back to T, that's where the

1 because it's a very unique--it's a unique piece of property
2 with all kinds of developments and income potential there.
3 And if somebody wants to take the risk and buy that and
4 guarantee the right-of-way, these sellers never--these
5 sellers, Still Standing, never made any guarantee to guarantee
6 the access to the property.

7 And I'm under the impression that going from a--even
8 if they had a general warranty deed as opposed to a special
9 warranty deed, what those deeds are guaranteeing is how far
10 back he was to that chain of title and right of possession.
11 It doesn't necessarily mean that if you go from a general
12 warranty deed, you have a guaranteed access, you go to a
13 special, you have not a guaranteed access.

14 I think that proposed switch to those deeds is
15 irrelevant. And furthermore, the buyers never came to the
16 sellers, via Remax or any other conduit and said, you either
17 provide a general warranty deed or we're going to force you to
18 or we're going to walk away. That never happened.

19 We recall that sellers showed up on May 3rd of 2006,
20 First American Title, they executed all the deeds, assuming
21 that the buyers were going to show up later that afternoon,
22 didn't have a clue, from the day they entered that purchase
23 agreement on February 7th, 2006, to May 3rd, of 2006, that
24 executory space, they didn't have one clue or one hint that
25 there were these problems brewing there. They thought they

1 now it goes from blank to an even more obscure acronym,
2 T.B.D., to be determined.

3 And in--in the version they filed, it has Chuck's
4 initials under the agency disclosure. As we go on, it has the
5 FSBO agreement filled in up there and the additional terms,
6 there's boxes made here about the addendum and then on the
7 very last page, you can see there's dates filled in there with
8 Chuck's initials, when we compare that to the page behind
9 there, you can see they're not--it doesn't look at all like
10 Chuck's numbers or initials there. That was the--the document
11 that we think the seller entered into under these false
12 pretenses, thinking they had a cash buyer with all the cash
13 when, in fact, they didn't. And whenever Tim Shea, who
14 testified that's his writing, whenever it became apparent to
15 Tim Shea there weren't cash buyers, he put to be determined,
16 he should have--he had a duty to go to these sellers and say,
17 by the way, these guys aren't cash buyers, they have to borrow
18 a lot of money from this group up there. That's a critical
19 term.

20 At that point, the seller could have considered the
21 possibility of either cancelling this contract and maybe
22 looking for somebody like this Millennium group, or the group--
23 -there was either, at least one or two groups that were--that
24 were interested in and making offers on that property to
25 Emmett Warren before Emmett Warren even owned the property.

1 what was sent over to the buyers on--on May 1st of 2006, two
2 days before the seller's close. There was an agency
3 disclosure requesting that these buyers initial down there for
4 the limited agency disclosure; in other words, it became
5 apparent, I think it was obvious that he was representing the
6 two groups and that's when he contacted the buyers to have
7 them fill out this limited agency agreement and it was never--
8 it's never been disclosed that that was ever filled out.

9 So in summary, your Honor, the buyers testified that
10 they thought--that they thought Tim Shea was working for
11 Chuck, that's Mr. Lish who testified to that. Mr. Lish is
12 also the one who signed the real estate purchase agreement and
13 he was the recipient of a lot of these facts covers sheets
14 that are included.

15 And--and so the last point, your Honor, as opposed
16 to looking the right-of-way issue, that Still Standing never
17 guaranteed--guaranteed the access to the property. What--I
18 think the fiduciary duty ad the elements to prove either a
19 breach of a fiduciary duty or a negligent misrepresentation,
20 the step down, or just a general duty as a real estate agent
21 to be honest, ethical and competent. And they sat down that
22 they're cash buyers when they weren't, he changed the terms of
23 the document on Chuck, he went to the meeting with attorneys
24 without telling Chuck, they (inaudible) without telling Chuck,
25 the competence is not adding the five-acre parcel on there.

1 have--necessarily couldn't have done anything wrong. Well,
2 that means--that means, could the agent have done anything?
3 Could he have made all kinds of--of outrageous
4 misrepresentations and fraud, but all that is--he is forgiven,
5 as long as the seller never came to close because there was a
6 right-of-way issue. Do all of these issues with that--with
7 that agent and the brokerage just drop off? And they--and
8 they shouldn't, because that's what bound the--the property
9 up.

10 And when they say they did nothing wrong after
11 close, which I was getting at, after it closed, this letter
12 comes from LeBaron & Jensen with this scathing--scathing
13 letter and it was never passed on to Chuck, so Chuck's like,
14 why didn't these buyers show up to close? I want that \$25,000
15 earnest money. The broker should have sat down with Chuck and
16 said, listen, this is what really happened, there were all
17 these omissions, here was a loan out there, they weren't cash
18 buyers and look at this letter from Miles LeBaron, this is why
19 they want their \$25,000 back. And Chuck would have said,
20 well, gosh, if that's the case, I'm going to give--he would
21 have the option to say, well, let's give the \$25,000 back to
22 the buyers since they're an LLC with no money anyway, it's the
23 agent who caused the problem here; instead, they went headlong
24 into this big, protracted lawsuit, the lis pendens was filed
25 and that land was tied up for years. And when it was finally

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.

Addendum 3

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

3. Chuck Schvaneveldt Declaration, March 10, 2011, R. 3190- 93.

DECLARATION OF CHARLES ("CHUCK") SCHVANEVELDT

RELATED TO THE FOLLOWING:
MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY
JUDGMENT ON THE ISSUE OF BREACH OF FIDUCIARY DUTY.

Remax Elite, et al. v. Still Standing Stable, et al.
Second Judicial District, State of Utah Case No. 060906802

1. I am a member of Still Standing Stable, L.C., a party to the case listed above.
2. Tim never disclosed to the Seller that Mr. Wilde was his neighbor.
3. Tim was retained as the "go-to man for real estate services" on behalf of the Seller.
4. Seller relied on Tim Shea's claims that the agent had all sorts of experience on complex land deals.
5. The agent's real estate knowledge was believed to be far superior to that of the Seller's members.
6. There was no agency disclosure circulated with the February 2006 REPC.
7. My approval and some initials were forged in REPC, particularly the Paragraph 5 box of the REPC.
8. Seller believed Tim Shea was working for Chuck/Still Standing.
9. Seller expected and relied on Tim to pass the *Still Standing v. Allen* case and documents to the Buyer.
10. Before commencing the litigation, Remax did not pass the LeBaron Letter to me.
11. Tim did not tell me or anyone on the Seller's side about the meeting in Ross Allen's home which Tim apparently attended and heard Ross Allen tell the Buyer that "Chuck

doesn't have a right over that land."

12. Tim never disclosed to the Seller that he had represented the Buyer members in the past.
13. Tim never disclosed the fact that the Buyer members were real estate lawyers who operate a title company.
14. Seller should have been given but was never given a final copy of the REPC with Tim's signature noting the receipt of earnest money.
15. Tim never informed Chuck that there were lenders involved in the transaction.
16. Tim left the impression with Chuck that the Buyer had its own cash for the purchase price.
17. Tim never passed on informed to Chuck or alerted the Seller that the Buyer had notified Tim that lenders weren't going to loan money on the property under certain circumstances related to the right-of-way.
18. Right after the due diligence period passed, Tim assured Chuck that if the buyer didn't close, then Chuck would be able to keep the \$25,000 of earnest money.
19. Tim told Chuck that the Buyer's money was "on the line" if the Buyer didn't close.
20. On May 3, 2006, the Buyer did not close the Buyer's side of the transaction. This missed closing appointment was the first indication Seller had that the Buyer had reservations about the land deal and was not going to be appearing with the purchase price.
21. After the sale failed, Tim never met with Chuck to disclose and explain the details surrounding the "not telling the truth" meeting with the Buyer nor the "Ross Allen no right of way" meeting.
22. The property at issue depreciated from over \$4 million to about \$1 million when the lis

pendens was removed and the land was finally sold to Millennium during the executory phase of the fraudulent REPC and subsequent litigation. Seller was harmed by Remax/Shea when it lost the opportunity to pursue a cash buyer after relying on Tim's representations and false statements. Seller relied on the real estate agent and entered into the REPC at issue believing the terms were correct. The REPC terms were changed by Tim from no dollar amount in the "new loan" section to "TBD," with no notice to the Seller. A 1031 real estate exchange opportunity was lost because of the agent's omissions and false statements that induced the Seller to enter into the contract. Litigation commenced that prevented the property from being sold and subjected the Seller to substantial legal fees.

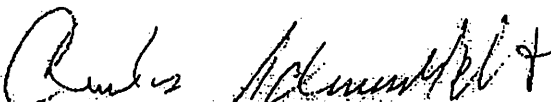
23. Tim Shea told me that the Buyer was a cash buyer and owned the Arizona Diamondback professional baseball team.
24. Tim Shea filled in the Seller's Disclosure forms related to the Salt Lake City property and for the land at issue, then he presented them to be signed. The Disclosures were not created by me, they were produced by Tim.
25. I remain of the opinion that since acquiring the additional property from the Allen family, after the *Stables v. Allen* litigation, Still Standing did have a right-of-way to the Allen parcel and the original parcel.
26. Prior to the litigation commenced, Tim Shea never told me about attorney Miles LeBaron concluding there was a right-of-way problem.
27. After the original \$6 million-plus offer failed, Tim Shea expressed an interest in doing more business with me and my companies and having him represent me and my

companies. Tim began working on the Salt Lake property acquisition the same month he brought a new offer on the land at issue, February 2006.

28. Remax/Shea never passed letters from the Buyer on to me prior to this litigation.

I declare under criminal penalty of the State of Utah that I have read Memorandum facts numbered 1-28 above, I am over the age of 18 and could testify to the facts listed above if called as a witness in this case, and I believe the material in the paragraphs to be true and correct to the best of my knowledge.

DATED this 10th day of March 2011.

BY: 
CHARLES SCHVANEVELDT
Member, Still Standing Stable, L.C.

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

4. Seller's Exhibits from A-O, March 14, 2012, R. 3194-3350.
(Exhibits A, C, D, E, F, G)

Addendum 4

SELLER'S EXHIBIT

**SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON
ALL CLAIMS OF STILL STANDING STABLES AGAINST IT**

- and -

**MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE
ISSUE OF BREACH OF FIDUCIARY DUTY**

**Civil No. 060906802
Judge Michael D. Lyon**

A. Confidential Agreement, April 13, 2006

Confidential Disclosure Agreement.

| | |
|----------------------------------|-----------------|
| Δ π EXHIBIT 30 | |
| Deponent | <u>Shea</u> |
| Date | <u>12-10-08</u> |
| Rptr. | <u>HW</u> |
| <small>WWW.DEPOSBOOK.COM</small> | |

This Agreement is entered into this 13th day of April by and between Tim Shea, employed with ReMax Elite at 579 West Heritage Park Boulevard, Suite 201, Layton, Utah 84041 (hereinafter "Recipient") and Stake Center Locating, Inc. and Still Standing Stables, LLC with offices at 2920 West Directors Row, Salt Lake City, Utah 84104 (hereinafter "Discloser").

WHEREAS Discloser possesses certain information relating to real estate and finances/financial information including tax information that is confidential and proprietary to Discloser (hereinafter "Confidential Information"); and

WHEREAS the Recipient is willing to receive disclosure of the Confidential Information pursuant to the terms of this Agreement for the purpose of providing Real Estate Services.

NOW THEREFORE, in consideration for the mutual undertakings of the Discloser and the Recipient under this Agreement, the parties agree as follows:

1. **Disclosure.** Discloser agrees to disclose, and Receiver agrees to receive the Confidential Information.

2. **Confidentiality.**

2.1 **No Use.** Recipient agrees not to use the Confidential Information in any way, or to manufacture or test any product embodying Confidential Information, except for the purpose set forth above.

2.2 **No Disclosure.** Recipient agrees to use its best efforts to prevent and protect the Confidential Information, or any part thereof, from disclosure to any person other than Recipient's employees having a need for disclosure in connection with Recipient's authorized use of the Confidential Information. It is further agreed that Recipient will be responsible for any office staff or co-workers, or agents that disclose any information that was obtained for the purpose of providing Real Estate services. It is agreed that Recipient will not release this information to the general public nor will it be discussed with any personal friends, family, neighbors, or fellow church members, etc.

2.3 **Protection of Secrecy.** Recipient agrees to take all steps reasonably necessary to protect the secrecy of the Confidential Information, and to prevent the Confidential Information from falling into the public domain or into the possession of unauthorized persons.

3. Limits on Confidential Information. Confidential Information shall not be deemed proprietary and the Recipient shall have no obligation with respect to such information where the information:

(a) was known to Recipient prior to receiving any of the Confidential Information from Discloser;

(b) has become publicly known through no wrongful act of Recipient;

(c) was received by Recipient without breach of this Agreement from a third party without restriction as to the use and disclosure of the information;

(d) was independently developed by Recipient without use of the Confidential Information; or

(e) was ordered to be publicly released by the requirement of a government agency.

4. Ownership of Confidential Information. Recipient agrees that all Confidential Information shall remain the property of Discloser, and that Discloser may use such Confidential Information for any purpose without obligation to Recipient. Nothing contained herein shall be construed as granting or implying any transfer of rights to Recipient in the Confidential Information, or any patents or other intellectual property protecting or relating to the Confidential Information.

5. Term and Termination. The obligations of this Agreement shall be continuing until the Confidential Information disclosed to Recipient is no longer confidential.

6. Survival of Rights and Obligations. This Agreement shall be binding upon, inure to the benefit of, and be enforceable by (a) Discloser, its successors, and assigns; and (b) Recipient, its successors and assigns.

7. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Utah without regard to conflicts of laws or principles requiring application of substantive laws of another jurisdiction. In any dispute involving this Agreement or the Confidential Information, Re/Max Elite and Tim Shea, consent to jurisdiction and venue in a court of competent jurisdiction in Utah, and shall not object to personal jurisdiction or venue in such court. In any proceeding to enforce this Agreement or for its breach or for interim or injunctive relief, the disclosing party shall be entitled to recover from the receiving party all its court costs, expert witness fees, attorneys' and paralegals' fees, and other out-of-pocket costs and fees in the event a Court determines that receiving or one to whom it disclosed confidential information breached the terms of this Agreement in regard to the confidential information.

IN WITNESS WHEREOF, the parties have executed this agreement effective as of the date first written above.

DISCLOSER Stake Center Locating,
Inc.

Signed:



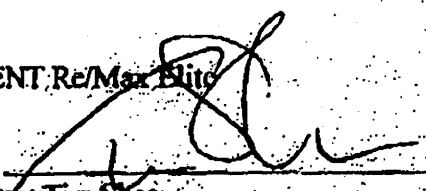
Print Name: Nina Cleere

Title: Corporate Counsel, VP

Date: 4/13/06

RECIPIENT Re/Mar Blitt

Signed:


Print Name: Tim Shea

Title:

Date: 4/13/06

SELLER'S EXHIBIT

**SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON
ALL CLAIMS OF STILL STANDING STABLES AGAINST IT**

- and -

**MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE
ISSUE OF BREACH OF FIDUCIARY DUTY**

**Civil No. 060906802
Judge Michael D. Lyon**

C. Salt Lake Property Contract, Feb. 24, 2006



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 Stake Center Locating offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$10,000 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: 2895 W 900 S also described as: part of parcel no 1509177008 City of Salt Lake City County of Salt Lake State of Utah, ZIP 84104 (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)

[X] Other (specify) All rights pertaining to and attached to the property

2. PURCHASE PRICE The purchase price for the Property is \$2.75 per square foot.
The purchase price will be paid as follows:

\$10,000 (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 [X] OTHER (specify) Seller Finance

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

[X] SPECIFIC LOAN TERMS 20% down 24 equal payments @ 6% interest

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

\$ _____ (d) Other (specify) _____

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

\$2.75 per sqft 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: [X] Upon Closing [] Other (specify) _____

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

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

Listing Agent Mark Smith represents [X] Seller [] Buyer [] both Buyer and Seller

Page 1 of 5 pages Seller's Initials _____ Date _____ Buyer's Initials _____ Date 2-24-06

3205

Listing Broker for Commerce CRG, 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

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)

Environmental 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.

Page 2 of 5 pages Seller's Initials _____ Date _____ Buyer's Initials SC QUINNEY Date 2-24-06



ADDENDUM NO. 4 TO REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of February 23, 2006 including all prior addenda and counteroffers, between Stake Center Locating as Buyer, and Bill McGrath as Seller, regarding the Property located at 2895 W. 900 S. Salt Lake City 84104. The following terms are hereby incorporated as part of the REPC:

- 1) Referring to the land mentioned above, buyers name is being changed from Stake Center Locating to Still Standing Stables LLC.
- 2) Settlement Deadline to be extended from April 29, 2006 to the following Wednesday, May 3, 2006.

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on 4-19-06 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

* Bill McGrath 4-19-06 1205pm
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

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

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

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

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

SELLER'S EXHIBIT

**SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON
ALL CLAIMS OF STILL STANDING STABLES AGAINST IT**

- and -

**MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE
ISSUE OF BREACH OF FIDUCIARY DUTY**

**Civil No. 060906802
Judge Michael D. Lyon**

D. Real Estate Purchase Contract ("REPC") at issue, Feb. 7, 2006



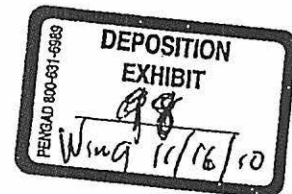
2920 W. Dieters Row, Salt Lake City, Utah 84104 Tel: (801) 364-1063 Fax: (801) 975-7219

To: John Fax: 393-6611
From: Nma @ Stake Center Locating, Inc. Date: 2.15.06
Re: STILL Standing property Pages: 6
CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

John - Per your request here is the purchase contract. If you could provide a letter stating we are working on getting title insurance so as to fulfill § 7 b I would appreciate it.

Thanks
Nma Cleere



CONFIDENTIALITY NOTICE: This transmission is intended for the sole use of the individual or entity to whom it is addressed and may contain information that is confidential, attorney-client privileged, or otherwise exempt, by law, from disclosure. Any dissemination, copying, or taking of any action in reliance on the contents of this transmission, by someone other than the intended recipient, is strictly prohibited. If you have received this transmission in error, please notify Stake Center immediately at the telephone number listed above, or by reply to this transmission.

3222



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 CS ☒ Buyer's Initials _____

Page 1 of 5 pages Seller's Initials CS Date 2-7-06 Buyer's Initials [Signature] Date 2-6-06

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

Page 3 of 5 pages Seller's Initials CS Date 2-7-06 Buyer's Initials J Date 2-6-06

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: 8:00 [] AM [X] 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. Directors Road 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

3227

SELLER'S EXHIBIT

**SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON
ALL CLAIMS OF STILL STANDING STABLES AGAINST IT**

- and -

**MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE
ISSUE OF BREACH OF FIDUCIARY DUTY**

**Civil No. 060906802
Judge Michael D. Lyon**

E. Metro Title Real Estate Purchase Contract Copy



January 20, 2009

Robert R. Wallace
Michael D. Johnston
Kirton & McConkie
60 East South Temple, #1800
Salt Lake City, Utah 84145

Robert J. Fuller
Fuller Law Office, LC
1090 North 5900 East
Post Box 835
Eden, Utah 84310

Dear Gentlemen,

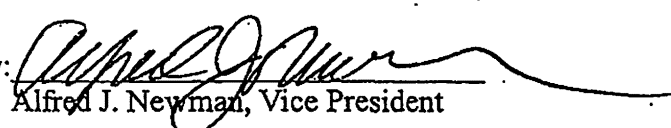
Delivered herewith are complete copies of Metro National Title file number's 06054074 and 05053779, which are provided as full and complete compliance with your subpoena's and personal appearance is not required.

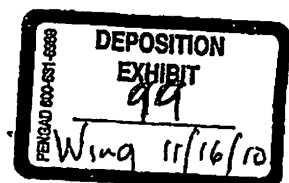
Please call me if you need more information. Our invoice is also enclosed.

Very Truly Yours,

Metro National Title

By:


Alfred J. Newman, Vice President



3229

**REAL ESTATE PURCHASE CONTRACT -- LAND**

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

**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 CS ☒ Buyer's Initials J

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FAX NO.

P. 03

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

CS

2-7-06

JS

2-6-06

3231

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FAX NO.

P. 04

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 use 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)

☐ I 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

FEB-06-2006 MON 02:48 PM

FAX NO.

P. 05

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. ABRIGATION. 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: 8:00 [] AM [X] 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)2-6-06
(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
Associates

(Buyer's Names) (PLEASE PRINT) (Notice Address)

(Zip Code) (Phone)

To: cathy Page 7 of 7

2006-02-07 18:40:22 (GMT)

16018651819 From: cathy code

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

Chuck Schwartz 2920 W. Directors Rd. SLK 84104 801-381-4325
(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

SELLER'S EXHIBIT

**SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON
ALL CLAIMS OF STILL STANDING STABLES AGAINST IT**

- and -

**MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE
ISSUE OF BREACH OF FIDUCIARY DUTY**

**Civil No. 060906802
Judge Michael D. Lyon**

F. Remax Real Estate Purchase Contract Copy from Remax Complaint

EXHIBIT A

| | |
|---------------------|------------|
| PENGAD 800-531-6553 | DEPOSITION |
| | EXHIBIT |
| | 100 |
| Wing 11/16/10 | |

3236

08/01/2008 10:33 FAX 801-814-50

MAY-04-2008 THU 03:39 PM

Utah Commercial Title

FAX NO.

012/028
P. 02/08

cc: cmv. Page 3 of 7

FEB-08-2008 MON 02:48 PM

FAX NO.

P. 02



REAL ESTATE PURCHASE CONTRACT — LAND

This is a legally binding contract. If you require 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 32), shall be deposited in accordance with state law.

Received by: [Signature] on 2-8-05 (Date)
(Signature of agent/broker acknowledging receipt of Earnest Money)

Brokerage: Re/Max Elite (Layton Branch) Phone Number: 801-825-3790

OFFER TO PURCHASE

1. PROPERTY: Land I.L.O. 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)

[X] 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.

3. 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 Items (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: [X] Upon Closing [] Other (specify) _____

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

[X] Seller's Initials: [Signature] Buyer's Initials: [Signature]

Page 1 of 5 pages Seller's Initials

Date 2-7-06

Buyer's Initials

Date 2-6-06

3237

08/01/2008 10:33 FAX 801 814 50

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Utah Commercial Title

FAX NO.

013/029

P. 03/08

FAX NO.

P. 03

FEB-08-2008 MON 02:47 PM

Listing Agent

Listing Broker for

Buyer's Agent Tim Shea

Buyer's Broker for Remax Elite (Scott Quinney)
(Company Name)

represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;

represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
as a Limited Agent;

represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
as a Limited Agent;

8. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. 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 lease 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)

6. 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(d), 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 same warranties

Page 2 of 5 pages Seller's Initials CS Date 2-7-06 Buyer's Initials JS Date 2-6-06

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P. 84

in Section 14.

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&Rs (mapping 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 debts 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)

☐ I 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

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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 16.

18. **NOTICES.** Except as provided in Section 25, 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, 18 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 5:00 P.M. (X) P.M. 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

(Buyer's Names) (PLEASE PRINT)

(Notice Address)

(Zip Code)

(Phone)

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Utah Commercial Title

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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. _____

[Signature] 2.7.06
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Chuck Schweinhardt 222013 Directors Row SLC 84104 801-381-4325
(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 75

SELLER'S EXHIBIT

SELLER'S MEMORANDUM IN OPPOSITION TO REMAX'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS OF STILL STANDING STABLES AGAINST IT

- and -

MEMORANDUM IN SUPPORT OF SELLER'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF BREACH OF FIDUCIARY DUTY

**Civil No. 060906802
Judge Michael D. Lyon**

G. First American Title Real Estate Purchase Contract Copy



*First American
Title Insurance Company*

BLAKE T. HEINER
VICE PRESIDENT
REGIONAL COUNSEL

VIA OVERNIGHT DELIVERY

February 10, 2009

Robert J. Fuller
Fuller Law Office, LC
1090 North 5900 East
Eden, Utah 84310

RE: Remax Elite, et al v. Still Standing Stable, L.C., et al
Case No.: 060906802

Dear Mr. Fuller:

Pursuant to the Subpoena recently served upon First American Title Insurance Company in connection with the above referenced lawsuit, please find enclosed a copy of First American file no. 4638803.

We assume that the delivery of these documents fully satisfies the obligation of First American Title under the aforementioned subpoena. If this is not the case, please advise immediately.

Thank you.

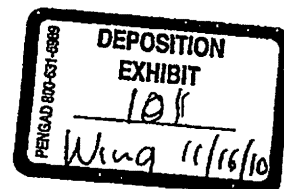
Sincerely,

Blake T. Heiner

BTH/tiz

Enclosures

060906802.subpoena.2



UTAH ORDER OPENING INSTRUCTIONS

| | | | |
|--|--|--|--|
| Branch Number/Name: 330-Layton | | Reserved File No. 4638803 | |
| Escrow Officer: Karen Anderson | | Date/Time: 2/10/2006 2:23 PM | |
| Assistant Name: Tonja Oles | | Type of Escrow: <input checked="" type="checkbox"/> Buyer Escrow | |
| Property type: Vacant Land | | <input type="checkbox"/> Seller Escrow | |
| Transaction Type: Sale w/Mortgage | | <input type="checkbox"/> Both Buyer & Seller | |
| Settlement Date: | | <input type="checkbox"/> Listing/Present Only | |
| Sales Price: \$4,362,300.00 | | Loan Amount: \$ | |
| Title Production Office: 800-FAT Central Title | | Lender: | |
| Product(s) Owners: Eagle Owners | | | |

| | | | |
|-------------------------------------|--|-----------------|-------------------|
| Property Address: Bareground | | County: Weber | APN: 23-006-0006- |
| Plumville, UT 84310 | | | |
| Buyer: Emmett Warren and or Assigns | | Marital Status: | |
| Address: | | Home Phone: | |
| Tax ID/SS No.: | | Business Phone: | |
| Seller: Still Standing Stable, LLC | | Email: | |
| Address: | | Marital Status: | |
| Tax ID/SS No.: | | Home Phone: | |
| | | Business Phone: | |
| | | Email: | |

| | | | | | |
|---|--|--------------------------|--|--------|--|
| Business Source: | | Office Code/Name: 976383 | | Phone: | |
| <input type="checkbox"/> Listing Agent | | Agent Code/Name: 054880 | | Fax: | |
| <input checked="" type="checkbox"/> Selling Agent | | Address: | | Email: | |
| Associated Business Party (if any): | | Office Code/Name: PSBO | | Phone: | |
| <input type="checkbox"/> Listing Agent | | Agent Code/Name: | | Fax: | |
| <input type="checkbox"/> Selling Agent | | Address: | | Email: | |

| | | | |
|--|--|--|--|
| <input type="checkbox"/> Business Source | | <input type="checkbox"/> Business Source | |
| Lender Code/Name: TRD | | Mtg. Broker Code/Name: | |
| Address: | | Address: | |
| Phone/Fax: | | Phone/Fax: | |
| Attn: | | Attn: | |
| Email: | | Email: | |

| | | | | | |
|------------------------|--|--------------|--|----------------|--|
| Existing Encumbrances: | | Payoff (1): | | Payoff (2): | |
| Lender: | | Lender: | | Lender: | |
| Loan Number: | | Loan Number: | | Loan Number: | |
| HQA Mgmt Co: | | HQA Mgmt Co: | | Home Warranty: | |

| | | | |
|--|--|---|--|
| Special Delivery Options: | | Buyer Packages w/o Selling Agent | |
| <input type="checkbox"/> Seller Packages c/o Listing Agent | | <input type="checkbox"/> Send Copy of Buyer Package to: | |
| <input type="checkbox"/> Send Copy of Seller Package to: | | <input type="checkbox"/> Email Buyer Package to: | |
| <input type="checkbox"/> Email Seller Package to: | | <input type="checkbox"/> Fax Buyer Package to: | |
| <input type="checkbox"/> Fax Seller Package to: | | <input type="checkbox"/> Other: | |
| <input type="checkbox"/> All Packages c/o Branch | | | |
| Special Instructions to Title: No Packages | | | |

Completed By: Brandi Cook

FEB-10-2008 FRI 11:55 AM

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P. 02

4438803



REAL ESTATE PURCHASE CONTRACT — LAND

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



EARNEST MONEY RECEIPT

Buyer Ernest Wayne and or Allison 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: [Signature] on 2-8-08 (Date)

Brokerage: Re/Max First (Lynch Branch) Phone Number: 801-526-3700

OFFER TO PURCHASE

1. PROPERTY: Land I.C. Bull Standing Station was described as: Parcel 23-008-0008 City of Huntsville County of Madison 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: 11 shares of stock in the [Name of Water Company]

(X) Other (specify): All rights attached to the property and/or pertaining to the property.

2. PURCHASE PRICE: The purchase price for the Property is \$438,250.00

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 pay 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

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

() Other (specify):

(c) Balance of Purchase Price in Cash at Settlement.

PURCHASE PRICE: Total of these (a) through (c) is

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, rent, and other obligations shall be prorated at Settlement as set forth in this Section. Provisions 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: (X) Upon closing () Other (specify):

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

() Seller's Initials: [Signature] Buyer's Initials: [Signature]

Page 1 of 5 pages Seller's Initials: CS Date: 2-7-08 Buyer's Initials: [Signature] Date: 2-6-08

3245

Listing Agent FRB Agreement represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
 Listing Broker for (Company Name) represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
 Buyer's Agent Tim Shipe represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
 Buyer's Broker for Barney Ellis / Scott Quinney represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller

(Company Name)
(Company Name)
(Company Name)

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

- (a) a Seller Property Condition Disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems;
- (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 (whether or not Buyer is a cash buyer) is:

(a) ☐ **IS NOT** conditioned upon Buyer's approval of the contents of all the Seller Disclosures referenced in Section 7;

(b) ☐ **IS NOT** conditioned upon Buyer's approval of a physical condition inspection of the Property;

(c) ☐ **IS NOT** conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;

(d) ☐ **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 NOT** conditioned upon the Property appraising for not less than the Purchase Price;

(f) ☐ **IS NOT** conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 9 above;

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

Soil Tests

If any of (a) through (g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The tests 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 Buyer's Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 **Buyer's Response Period.** If at 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(f), including any time limit to, and 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 Buyer's 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 any terms warranted

Page 2 of 8 pages Seller's Initials CS Date 2-7-08 Buyer's Initials TS Date 2-6-08

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In Section 10.

5. ADDITIONAL TERMS. There ☐ ARE ☐ ARE NOT addenda to the Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☐ Addenda No. 1 ☐ Seller Financing Addendum ☐ Other (specify):

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has for this is 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&Rs (including covenants, conditions, and restrictions), and other matters of record and subject to the covenants of the Community for Title Insurance as agreed to by Buyer under Section 6. Buyer also agrees to take the Property subject to existing leases existing on 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 advise to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warranties. 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 debts 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 why that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 5.4, 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), accept an amount of 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 require, 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 lease 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 Buyer Disclosures, constitutes the entire Contract between the parties and supersedes 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 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

Page 3 of 8 pages Seller's Initials CS Date 2-7-06 Buyer's Initials S Date 2-6-06

FEB-08-2008 MON 02:48 PM

FAX NO.

P. 05

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 16.

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. **ASSIGNATION.** 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 the companies, brokers, 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 counterparts, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counterparts 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) **Offer Disclosure Deadline**

10 Days From Written Acceptance (Date)

(b) **Due Diligence Deadline**

60 Days From Written Acceptance (Date)

(c) **Settlement Deadline**

30 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 5:00 P.M. (P.M. Mountain Time) on JANUARY 23, 2008 (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"

Enlistment Waiver and/or

Assigns

(Buyer's Name) (PLEASE PRINT) (Notice Address)

(Zip Code)

(Phone)

FEB-10-2008 FRI 11:57 AM

FAX NO.

P. 06/07

FEB-08-2008 MON 02:48 PM

FAX NO.

P. 08

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 modifications or negotiations as specified in the attached ADDENDUM NO. _____

☐ REJECTION: Seller rejects the foregoing offer.

(Seller's Signature) _____ (Date) _____ (Time) _____ (Buyer's Signature) _____ (Date) _____ (Time) _____
(Seller's Name) (PLEASE PRINT) _____ (Notion Address) _____ (Zip Code) _____ (Phone) _____

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

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BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

5. Seller's Reply Exhibits from P-W, March 20, 2012, R. 3715-3758.
(Exhibits P, Q, T, U, V)

Addendum 5

RE/MAX ELITE

579 W. Heritage Park Blvd. #201
Layton, UT 84041
(801) 825-3700

Tim Shea

FAX: (801) 825-3777

Attn: John Lish

TO:

FROM: TIM SHEA (801) 244-8732

FAX: () 614-5051

PHONE: ()

RE:

PAGES: 6

DATE: 3/2/06

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

COMMENTS:

Sellers Disclosures
Ryan Wilde !

Thanks,
Devyn

#774-1623





SELLER'S PROPERTY CONDITION DISCLOSURE -- LAND

This is a legally binding contract. If not understood, consult an attorney.



LISTING AGENT - COMPLETE THIS SECTION ONLY

SELLER NAME STILL STANDING STABLES, LLC ("Seller")

PROPERTY ADDRESS Parcel No 23-006-0000 ("Property")

LISTING BROKERAGE Re/Max Elite (Layton Branch) ("Company")

NOTICE FROM COMPANY

Buyer and Seller are advised that the Company and its agents are trained in the marketing of real estate. Neither the Company nor its agents are trained or licensed to provide Buyer or Seller with professional advice regarding the physical condition of any property or regarding legal or tax matters. The Company and its agents strongly recommend that in connection with any offer to acquire the Property, Buyer retain the professional services of legal and/or tax advisors, property inspectors, surveyors, and other professionals to satisfy Buyer as to any and all aspects of the physical and legal condition of the Property. **BUYER IS ADVISED NOT TO RELY ON THE COMPANY, OR ON ANY AGENTS OF THE COMPANY, FOR A DETERMINATION REGARDING THE PHYSICAL OR LEGAL CONDITION OF THE PROPERTY,** including, but not limited to: the cost, location, availability and quality of water and water service; the cost, location and availability of utility services; the cost of all utility service connection fees; any environmental issues associated with the Property; the boundaries of the Property; any planning, zoning and building restrictions; any private deed restrictions or other restrictive covenants; or the size or acreage of the Property.

INSTRUCTIONS TO SELLER

SELLER IS OBLIGATED UNDER LAW TO DISCLOSE TO BUYERS DEFECTS IN THE PROPERTY KNOWN TO SELLER THAT MATERIALLY AND ADVERSELY AFFECT THE VALUE OF THE PROPERTY THAT CANNOT BE DISCOVERED BY A REASONABLE INSPECTION BY AN ORDINARY PRUDENT BUYER. This disclosure form is designed to assist Seller in complying with these disclosure requirements. Please thoroughly disclose your actual knowledge regarding the condition of the Property. The Company, other real estate agents, and buyers will rely on this disclosure form.

- Complete the remainder of this form.
- Please be specific when describing any past or present issues or defects (location, nature of problem, etc.). Use additional addendum if necessary.
- If a question does not apply to your Property, WRITE "N/A" NEXT TO THE QUESTION.

1. NATURAL GAS, ELECTRICITY, TELEPHONE, CABLE TV

Please describe, to your knowledge, the approximate location of the nearest following utility service lines:

- A. Natural Gas: ☐ Located in _____ (Name of Street/Road) ☐ Stubbed to Lot Line
☐ Other (specify) _____
- B. Electricity: ☐ Located in _____ (Name of Street/Road) ☐ Stubbed to Lot Line
☐ Other (specify) _____
- C. Telephone: ☐ Located in _____ (Name of Street/Road) ☐ Stubbed to Lot Line
☐ Other (specify) _____
- D. Cable TV: ☐ Located in _____ (Name of Street/Road) ☐ Stubbed to Lot Line
☐ Other (specify) _____

2. SEWER/SEPTIC TANK

A. To your knowledge, sewer service for the Property will be provided by (check applicable box):

- ☐ Public Sewer
☐ Septic Tank

B. If Public Sewer, who is the Public Sewer provider: _____

C. If sewer service is Septic Tank, to your knowledge has a percolation test been conducted on the Property?

D. If a percolation test was conducted, to your knowledge, did the Property pass the test?

☐ Yes ☐ No
☐ Yes ☐ No

MAR-02-2006 THU 11:56 AM

FAX NO.

P. 03/06

FEB-08-2006 THU 01:38 PM

FAX NO.

P. uc

Johnnie Jones *Ext #1195*

3. CULINARY WATER

A. To your knowledge, culinary water service for the Property will be provided by (check applicable box):

- ☐ Public Water (Name of water service provider): _____
☐ Private Water Company (Name of water service provider): _____
☒ Private Well Water (2 ACRES FEET)

NOTE: IF WATER SERVICE WILL BE PROVIDED BY PUBLIC WATER, SKIP TO SECTION 4

B. Private Water Company

(1) To your knowledge, what is the approximate location of the nearest private water company water service line?

- ☐ Located in _____ (Name of Street/Road) ☐ Stubbed to Lot Line
☐ Other (specify) _____

(2) Are the water share certificates in your possession? If yes, please attach a copy. CONTRACT NO. 70349

☒ Yes ☐ No
☒ Yes ☐ No

(3) To your knowledge, are water share assessments paid in full?

C. Private Well

(1) Is a well presently located on the Property?

☐ Yes ☒ No

(2) To your knowledge, is your water right for the well represented by a contract with a special improvement or water conservancy district? If "Yes", what is the number of the district contract? 70349 WEBER BASIN WATER CONSERVANCY DISTRICT

☒ Yes ☐ No

(3) If your water right for the well is not based on a contract with a special improvement or water conservancy district, to your knowledge, what is the State Engineer "Index Number" for your water right? _____

4. IRRIGATION WATER

A. Are there any irrigation water rights with the Property?

☐ Yes ☒ No

B. If irrigation water is delivered to you by an irrigation water company, what is the name of the company?

C. Do you have in your possession water share certificates representing your right to receive and use irrigation water? If "Yes", please attach a copy of any such share certificates.

☒ Yes ☐ No

D. If the irrigation water rights are other than shares in an irrigation water company, to your knowledge, what is the State Engineer "Index Number" or numbers for your irrigation water rights? _____

E. Is there an irrigation water source and distribution facility in place for the Property such as canals, ditches or pressurized sprinkler system? If "Yes", what is the name of the water source: _____

☐ Yes ☒ No

5. SOILS

A. Are you aware of any settlement or heaving of soil on the Property (collapsible or expansive soils, poorly compacted fill)? If "Yes", please describe, to your knowledge, the nature and location of any settlement or heaving of soil: _____

☐ Yes ☒ No

B. To your knowledge, is there any fill located on the Property? If "Yes", please describe, to your knowledge, the nature and approximate location of any fill: _____

☐ Yes ☒ No

C. Are you aware of any sliding or earth movement on the Property or on any adjoining property (landslides, falling rocks, debris or mud flows)? If "Yes", please describe the nature and location of the sliding or earth movement: _____

☐ Yes ☒ No

D. To your knowledge, does any portion of the Property contain any subsurface, man-made debris that has been buried, covered or abandoned, including without limitation, any discarded or abandoned construction materials, concrete footings or foundations, trash, etc? If "Yes", please describe the nature and location of such subsurface debris: _____

☐ Yes ☒ No

E. Please describe, to your knowledge, any action taken to repair or mitigate any of the issues described 6A, 6B, 5C or 5D: _____

F. Are you aware of any geologic, soils, engineering, or environmental reports that have been prepared for the Property? If "Yes", please attach a copy of any such reports in your possession. ☐ Yes ☒ No

6. BOUNDARIES & ACCESS

A. To your knowledge, is there anything on your Property (such as a fence or any other improvement) that encroaches (extends) onto any adjoining property? If "Yes", please describe, to your knowledge, the nature and approximate location of any such encroachment: ☐ Yes ☒ No

B. To your knowledge, is there anything on any adjoining property (such as a fence, deck, or any other improvements) that encroaches (extends) onto your Property? If "Yes", please describe, to your knowledge, the nature and approximate location of any such encroachment: ☐ Yes ☒ No

C. Are you aware of any boundary disputes or conflicts involving your Property and any adjoining property or properties? If "Yes", please describe, to your knowledge, the nature of any such boundary disputes or conflicts: ☐ Yes ☒ No

D. Are you aware of any survey(s) that have been prepared for the Property or any adjoining property or properties? If "Yes", please provide a copy of any such survey(s) in your possession. previously provided ☒ Yes ☐ No

E. Are you aware of any unrecorded easements, or claims for easements, affecting the Property? If "Yes", please describe, to your knowledge, the nature and approximate location of any such easement(s): ☒ Yes ☐ No

16 foot wide easement to Garth Allen, Jenna & Jeff Holt, Lesley Ann Becker, Jarl Allen - previously provided

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

G. If direct access to the Property is not from a public street/road, to your knowledge, is there direct access to the Property through (check applicable box): ☒ Private Easement ☐ Private Street/Road ☐ Yes ☒ No

7. FLOODING/DRAINAGE

A. Are you aware of any flooding or lot drainage issues on the Property? If "Yes", please describe, to your knowledge, the nature and approximate location of any flooding or lot drainage issues: ☐ Yes ☒ No

B. If there are flooding or lot drainage issues, are you aware of any work done at the Property to mitigate or to prevent any recurrence of any flooding or lot drainage issues? If "Yes", please describe, to your knowledge, any work done at the Property to mitigate or prevent flooding or lot drainage issues: ☐ Yes ☒ No

C. Are you aware of any wetlands located on the Property? ☐ Yes ☒ No

D. If you are aware of wetlands on the Property, to your knowledge, has the Property been mapped for wetlands? If "Yes", please provide a copy of any wetlands maps and wetlands permits in your possession. ☐ Yes ☒ No

E. Are you aware of any action taken to mitigate any wetland issues through the Army Corps of Engineers? If "Yes", please describe, to your knowledge, the nature of any mitigation work done at the Property: ☐ Yes ☒ No

8. ENVIRONMENTAL ISSUES

A. Are you aware of any past or present hazardous conditions, substances, or materials on the Property, such as methane gas, radioactive material, landfill, mineshaft, buried storage tanks and lines, or toxic materials? If "Yes", please describe, to your knowledge the nature of any such hazardous conditions: ☐ Yes ☒ No

B. If you are aware of any past or present hazardous conditions, substances, or materials on the Property, are you aware of any work done at the Property to mitigate any such hazardous conditions? If "Yes", please describe, to your knowledge, the nature of any mitigation work: ☐ Yes ☒ No

C. Are you aware of any environmental reports that have been prepared for the Property? If "Yes", please attach copies of any such reports in your possession. ☐ Yes ☒ No

9. HOMEOWNERS ASSOCIATION

A. To your knowledge, is the Property part of a Homeowner's Association (HOA)? ☐ Yes ☒ No

LEBARON & JENSEN, P.C.

ATTORNEYS AND COUNSELORS AT LAW

476 West Heritage Park Blvd., Suite 200, Layton, Utah 84041

Telephone: 801-773-9488, Facsimile 801-773-9489

FACSIMILE TRANSMITTAL SHEET

TO: ROBERT FULLER

FROM: MILES LEBARON

FAX NUMBER:
(801) 775-0794

RE: EMMETT WARREN, L.C.

DATE: JANUARY 24, 2008

TOTAL NO. OF PAGES
INCLUDING COVER: 5

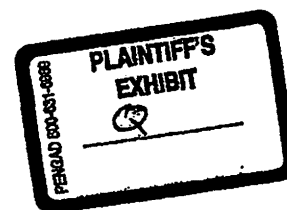
COMMENTS:

Robert,

Attached you will find a copy of my client's bank statement, showing that check #1144 for the \$25,000.00 was debited from the account on February 13, 2006. If your client wants anything more, please let me know.

If you have any questions or concerns, please feel free to contact me.

Miles LeBaron



IMPORTANT: THIS COMMUNICATION IS INTENDED SOLELY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED. IT MAY CONTAIN INFORMATION THAT IS CONFIDENTIAL AND/OR PROTECTED BY THE ATTORNEY-CLIENT OR OTHER APPLICABLE PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, OR IF YOU ARE NOT RESPONSIBLE FOR DELIVERING THIS COMMUNICATION TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT THE DISCLOSURE OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE.

3721



Barnes Banking Co.

33 So. Main, Kayserville, Utah 84037 Phone (801) 644-3424

FDIC



013 00010 00
ACCOUNT:

PAGE: 2
02/28/2006

EMMETT WARREN LC,

BUSINESS CHECKING ACCOUNT 2764

- - - ITEMIZATION OF SERVICE CHARGE PAID THIS PERIOD - - -

TOTAL CHARGE FOR MAINTENANCE FEE: 3.50
TOTAL CHARGE FOR DEBITS: .40

TOTAL SERVICE CHARGE PAID: 3.90

| DATE.....BALANCE | | DATE.....BALANCE | | DATE.....BALANCE | |
|------------------|--------|------------------|-------|------------------|-------|
| 02/07 | 804.21 | 02/13 | 92.53 | 02/28 | 26.27 |
| 02/08 | 454.21 | 02/15 | 30.17 | | |

AFTER RECORDED, RETURN TO:

Gretta C. Spendlove.
Durham, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 415-3000

SEND TAX NOTICES TO:

25 MEADOW GROVE COURT
ALAMO, CA 94507

Part of Parcel
Parcel ID# 23-006-0004

WARRANTY DEED

Jarl R. Allen, AKA

/ Jarl Allen, Jenna Allen Holt, and Lesly Allen Beck, (collectively "Grantors"), of 25 Meadow Grove Court, Alamo, CA 94507, hereby CONVEY AND WARRANT to Still Standing Stable, LLC, a Utah limited liability company ("Grantee"), of 2920 West Director Road, Salt Lake City, UT 84104, Utah, for the sum of Ten and No/100 Dollars (\$10.00), and other good and valuable consideration, the real property in Weber County, State of Utah more particularly described in Exhibit "A" hereto, which is incorporated herein by reference.

This conveyance is made subject to real property taxes for the year 2005.

WITNESS the hand of said Grantors as of the 1 day of October, 2005.

Jarl Allen
JARL ALLEN

Jenna Allen Holt
JENNA ALLEN HOLT

Lesly Allen Beck
LESLY ALLEN BECK

P-2
23-006-0004

STATE OF Utah)
ss.



23

Exhibit "A" to Warranty Deed

The legal description for the property identified in the Warranty Deed to which this Exhibit "A" is attached is as follows:

23-006-0016 (23-006-0004) *W*

The North 165 feet of Lot 10 within Section 2, Township 5 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey, Weber County, Utah.

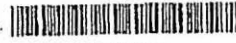
Subject to and together with an unrestricted easement for ingress and egress 66 ft. wide over existing roads on the Subject Property and in the Southeast Quarter of Section 34, T6N, R2E. The Subject Property is described in that Warranty Deed (the "Allen Deed") from the Allen Ranch Company, a co-partnership; Ross L. Allen and Norma H. Allen, his wife; and Garth H. Allen and Lois S. Allen, his wife, grantors, to Scott D. Allen, grantee, dated June 1, 1977 and recorded with the County Recorder of Weber County, Utah on September 26, 1977, as Entry Number 712585, at Book 1200 Page 301. It is the intention of Grantors to grant to Grantee the full extent of rights to access for ingress and egress which Grantors obtained under the Allen Deed and such other rights of access and ingress as Grantors may hold relating to the property which is transferred under this Warranty Deed.

County Recorder in Book 1224 PAGE 30
ENTRY NO: 44031 In Witness Whereof, I hereunto
set my hand and affix my official seal this 14th
day of May 19 2002

Nadine F. Smith (Deputy)

MORGAN COUNTY RECORDER
Morgan, Utah 84050

BOOK 1200 PAGE 301



W1850337

Planned ☒ Recorded ☒
Photocopied ☐ Certified ☐
Microfilmed ☐ Abstracted ☐

WARRANTY DEED

ALLEN RANCH COMPANY, a co-partnership; ROSS L. ALLEN and
NORMA H. ALLEN, his wife; and GARTH H. ALLEN and LOIS S.
ALLEN, his wife, grantors

of Huntsville, County of Weber, State of Utah, hereby CONVEY AND WARRANT to
SCOTT D. ALLEN, grantee

of Salt Lake City, County of Salt Lake, State of Utah, for the sum of TEN (\$10.00)
DOLLARS and other good and valuable consideration the following described tracts
of land in Weber County, State of Utah:

All of the Southwest 1/4, the West half of the Southeast 1/4, the
Northwest 1/4 of the Northeast 1/4 and the Southwest 1/4 of the North-
west 1/4 of Section 2, Township 5 North, Range 2 East, Salt Lake Base
and Meridian.

ALSO a part of the East half of Section 2 and the Southwest 1/4 of
Section 1, Township 5 North, Range 2 East, Salt Lake Base and Meridian,
more particularly described as follows: Beginning at the Northwest
corner of the Northeast 1/4 of the Northeast 1/4 of said Section 2, and
running thence East 224.52 feet to an existing fence; thence Southerly
and Easterly along said fence to the South line of said Section 1 the
following 5 approximate courses: South 3300 feet, more or less; South
21° East 1050 feet, more or less; South 53° East 1100 feet, more or
less; South 84° East 950 feet, more or less; and South 76° East 900 feet,
more or less, to said South line of Section 1; thence South 89° 59' West
1950 feet, more or less, along the Section line to the Southwest corner
of said Section 1; thence South 89° 13' West 1365.21 feet along the Sec-
tion line to the Southwest corner of the Southeast 1/4 of the Southeast
1/4 of said Section 2; thence North 0° 06' 20" West 5294.0 feet to the
point of beginning.

Subject to and together with an unrestricted easement for ingress and
egress 66 ft. wide over existing roads on the subject property and in
the Southeast quarter of Section 34, T 6 N, R 2 E and together with a
undivided thirty per cent (30%) interest in all water rights evidenced
by Right No. A3692, Ogden River Decrees.

WITNESS, the hands of said grantors, this 1st day of June, 1977.

Entry No. 44031 Book 1224
RECORDED 12-27-77 at 9:45 A.M. Page 630
REQUEST of Scott Allen
FEE Mary O. Mecham, Morgan Co. Recorder
105 By [Signature]

ALLEN RANCH COMPANY, a co-partnership,

By: EG 1850337 BK2234 PG2254
DOUG CROFTS, WEBER COUNTY RECORDER
24-MAY-2002 4:21 PM FEE \$12.00 DEP. UPN
REQ FOR: SMITH, KNOWLES, & HAMILTON

Garth H. Allen
Partner

Nadine F. Smith
Partner

[Signature]
Ross L. Allen

[Signature]
Norma H. Allen, his wife





"W2142339"

EH 2142339 PG 1 OF 2

DOUG CROFTS, WEBER COUNTY RECORDER

15-NOV-05 436 BY FEE \$12.00 DEF

I hereby certify this to be a true and correct copy of
the document recorded in the office of the Morgan
County Recorder in Book 182, PAGE 56
ENTRY NO: 70918 In Witness Whereof, I hereunto
set my hand and affix my official seal this 15th
day of November 2005

Debbie P. Smith - Deputy
MORGAN COUNTY RECORDER
Morgan, Utah 84050

Betty D. Allen
9631 Ledgermont Dr.
SLC, Utah 84124

WARRANTY DEED

00070918 BND122 P00036-00057
DEBBIE WEAVER, MORGAN COUNTY RECORDER
1974 AUG 07 13:49 PM FEE: \$12.00 BY DOH
REQUEST: HOLT JENNA ALLEN

SCOTT D. ALLEN and BETTY D. ALLEN, husband and wife, grantors

of Salt Lake City, Utah, County of Salt Lake, State of Utah, hereby convey and warrant
to:

JARL R. ALLEN, JENNA ALLEN HOLT, and LESLY ALLEN BECK,
grantees

of Hayburn, Idaho, Alamo, California, and American Fork, Utah, respectively for the
sum of ten (\$10.00) dollars and other good and valuable consideration the following
described tracts of land in Weber County, State of Utah: (Assessed for taxes in
Morgan County)

23-006-0004 REF

All of the Southwest 1/4, the West half of the Southeast 1/4, the Northwest 1/4 of
the Northeast 1/4 and the Southwest 1/4 of the Northwest 1/4 of Section 2,
Township 5 North, Range 2 East, Salt Lake Base and Meridian.

Also, a part of the East half of Section 2, Township 5 North, Range 2 East, Salt
Lake Base and Meridian, more particularly described as follows: Beginning at
the Northwest corner of the Northeast 1/4 of the Northeast 1/4 of said Section 2,
and running thence East 224.62 feet to an existing fence; thence Southerly and
Easterly along said fence to the East line of Section 2 the following 3
approximate courses: South 3300 feet, more or less; South 21° East 1050 feet,
more or less; South 53° East 910 feet, more or less to the East line of Section 2;
thence South along said line 610 feet, more or less to the Southeast corner of
said Section 2; thence South 89°13' West 1365.21 feet along the Section line to
the Southwest corner of the Southeast 1/4 of the Southeast 1/4 of said Section 2;
thence North 0°06'20" West 5294.0 feet to the point of beginning.

Together with easements for existing roads and water lines in Lots 3, 4, 8, and
of said Section 2 and an unrestricted easement for ingress and egress 66 feet
wide over the existing road in the Southeast quarter of Section 34, T8N, R2E

JUN 23 2008

SNOW, CHRISTENSEN & MARTINEAU

Reed L. Martineau
A. Dennis Norton
Allan L. Larson
John E. Gafis
Kim R. Wilson
Michael R. Carlson
David G. Williams
Max D. Wheeler
David W. Slaughter
Stanley J. Preston
Shawn E. Draney
John R. Lund
Rodney R. Parker
Richard A. Van Wagoner
Andrew M. Moritz
Camille N. Johnson
Elizabeth L. Willey
E. Scott Auerkamp
Dennis V. Dahle
Korey D. Rosenwurst
Terence L. Rooney
Till L. Duggen
David L. Pinkston
Julianne Blaneh
Stephen H. Umphart
Brian P. Miller
Judith D. Wolfers
Keith A. Call
Kara L. Penit
Heather S. White
Robert R. Harrison
Robert W. Thompson
Scott H. Martin
Joseph P. Barrett
Troyan B. Smith
Marilyn M. Reger
Kenneth L. Reich
Bradley R. Blackham
D. Jason Hawkins
Richard A. Vazquez
Sam Haden
David F. Mill
Bryan M. Scott
R. Mughav Cox
Derek J. Williams
Lillian Marshall
R. Scott Young
Joanne M. Jorgensen
Jordan G. Gam
Levi J. Clegg
Marty Warhawk
John S. Tieu

A Professional Corporation
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone (801) 521-9000
Facsimile (801) 363-0400
www.scmjlaw.com

Thurman & Sutherland 1886
Thurman, Sutherland & King 1889
Thurman, Wedgwood & Irvine 1906
Irvine, Slazen & Thurman 1923
Slazen, Thurman, Worsley & Snow 1952
Worsley, Snow & Christensen 1967

John H. Snow 1917-1980

Of Counsel
Harold G. Christensen
Joseph Novak

St. George Office
555 South Bluff Street, Suite 301
St. George, Utah 84770
Telephone (435) 673-8288
Facsimile (435) 673-1444

To Contact Writers:
(801) 322-9279

June 20, 2008

VIA FACSIMILE (801) 975-7219 & US MAIL

Teffen Smith, Attorney
STILL STANDING STABLE, LC
2920 Directors Row
Salt Lake City, UT 84104

Re: *Still Standing Stable, L.C. - Millennial Partners North, LLC Real Estate Purchase
Contract for Property in Weber County*

Dear Mr. Smith:

Please find enclosed the Real Estate Purchase Contract for the above purchase signed by the seller, Still Standing Stable, L.C. countersigned by the buyer, Millennial Partners North, LLC. We look forward to working with you on this transaction.

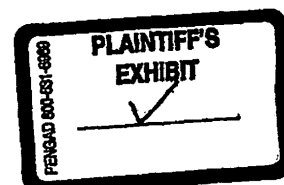
Also, you indicated in our conversation of yesterday that you understand that the judgment listed on the title report to the property you left with us in favor of the Ross and Norma Allen Family Trust has been discharged, and a title report so indicating will be forthcoming. We would appreciate receiving an updated title report as soon as it is available.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

Dennis V. Dahle

DVD/np
Enclosure
24169-0002 888317
cc: David S. Christensen



HLT0036

3749



W2354278

T-52043



E# 2354278 PG 1 OF 3
ERNEST D ROWLEY, WEBER COUNTY RECORDER
16-JUL-08 423 PM FEE \$14.00 DEP SC
REC FOR: HICKMAN LAND TITLE COMPANY
ELECTRONICALLY RECORDED

SPECIAL WARRANTY DEED (CORPORATE FORM)

STILL STANDING STABLE, L.C., a Utah Limited Liability Company
aka

STILL STANDING STABLE, LLC, a Utah Limited Liability Company

a limited liability company organized and existing under the laws of the State of Utah
grantor, with its principal office at Salt Lake City, County of Salt Lake, State of Utah, hereby CONVEYS
and WARRANTS only as against all claiming by, through or under it to

MILLENNIAL PARTNERS NORTH, LLC, a Utah Limited Liability Company

grantee of 10 Exchange Place, 11th Floor, Salt Lake City, UT 84111
for the sum of TEN DOLLARS and other good and valuable consideration
the following described tract of land in Weber County, State of Utah.

See Attached Exhibit "A"

Tax Roll No. 23-006-0016

In witness whereof, the grantor(s) has caused it's name and seal to be hereunto affixed by it's
duly authorized managing member, this 15 day of July A.D. 2008.

STILL STANDING STABLE, L.C., a Utah Limited Liability Company
aka

STILL STANDING STABLE, LLC, a Utah Limited Liability Company

BY:


CHUCK SCHVANEVELDT, Member

dbt

HLT0006

3750

T-52043

Exhibit "A" – Legal Description

The North 165 feet of Lot 10 within Section 2, Township 5 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey, Weber County, Utah.

Subject to and together with an unrestricted easement for ingress and egress 66 feet wide over existing roads on the Subject Property and in the Southeast Quarter of Section 34, Township 6 North, Range 2 East. The Subject Property is described in that Warranty Deed (the "Allen Deed") from the Allen Ranch Company, a co-partnership; Ross L. Allen and Norma H. Allen, his wife, and Garth H. Allen and Lois S. Allen, his wife grantors, to Scott D. Allen, grantee, dated June 1, 1977 and recorded with the County Recorder of Weber County, Utah on September 26, 1977, as Entry Number 712585, at Book 1200 Page 301. It is the intention of Grantors to grant to Grantee the full extent of rights to access for ingress and egress which Grantors obtained under the Allen Deed and such other rights of access and ingress as Grantors may hold relating to the property which is transferred under this Warranty Deed.

Tax Roll No. 23-006-0016

dbt

HLT0008

3752



T-52043



E# 2354277 PG 1 OF 2
ERNEST D ROWLEY, WEBER COUNTY RECORDER
16-JUL-08 4:23 PM FEE \$12.00 DEP SC
REC FOR: HICKMAN LAND TITLE COMPANY
ELECTRONICALLY RECORDED

SPECIAL WARRANTY DEED (CORPORATE FORM)

STILL STANDING STABLE, L.C., a Utah Limited Liability Company

a limited liability company organized and existing under the laws of the State of Utah
grantor, with its principal office at Salt Lake City, County of Salt Lake, State of Utah, hereby CONVEYS
and WARRANTS only as against all claiming by, through or under it to

MILLENNIAL PARTNERS NORTH, LLC, a Utah Limited Liability Company

grantee of 10 Exchange Place, 11th Floor, Salt Lake City, UT 84111
for the sum of TEN DOLLARS and other good and valuable consideration
the following described tract of land in Weber County, State of Utah.

Lots 3, 4, 6, 7 of Section 2, Township 5 North, Range 2 East, Salt Lake Base and Meridian,
Situate in Weber County, State of Utah.

Tax Roll No. 23-006-0006

In witness whereof, the grantor(s) has caused it's name and seal to be hereunto affixed by it's
duly authorized managing member, this 15 day of July A.D. 2008.

STILL STANDING STABLE, L.C.,
a Utah Limited Liability Company

BY:


CHUCK SCHVANEVELDT, Member

dbt
HLT0004

3753

SCHEDULE A

Name and Address of Title Insurance Company:

Stewart Title Guaranty Company
P.O. Box 2029
Houston, Texas 77252-2029

Order No.: T-52043

Policy No.: O-9301-926631

Loan No.:

*Address Reference:

Amount of Insurance: \$950,000.00

Premium: \$3,295.00

Date of Policy: July 16, 2008 at 4:23 PM

1. Name of Insured:

MILLENNIAL PARTNERS NORTH, LLC, a Utah Limited Liability Company

2. The estate or interest in the Land that is insured by this policy is:

Fee Simple

3. Title is vested in:

MILLENNIAL PARTNERS NORTH, LLC, a Utah Limited Liability Company

4. The Land referred to in this policy is described as follows:

PARCEL 1: Lots 3, 4, 6, 7 of Section 2, Township 5 North, Range 2 East, Salt Lake Base and Meridian, Situate in Weber County, State of Utah.

PARCEL 2: The North 165 feet of Lot 10 within Section 2, Township 5 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey, Weber County, Utah.

Subject to and together with an unrestricted easement for ingress and egress 66 feet wide over existing roads on the Subject Property and in the Southeast Quarter of Section 34, Township 6 North, Range 2 East. The Subject Property is described in that Warranty Deed (the "Allen Deed") from the Allen Ranch Company, a co-partnership; Ross L. Allen and Norma H. Allen, his wife, and Garth H. Allen and Lois S. Allen, his wife grantors, to Scott D. Allen, grantee, dated June 1, 1977 and recorded with the County Recorder of Weber County, Utah on September 26, 1977, as Entry Number 712585, at Book 1200 Page 301. It is the intention of Grantors to grant to Grantee the full extent of rights to access for ingress and egress which Grantors obtained under the Allen Deed and such other rights of access and ingress as Grantors may hold relating to the property which is transferred under this Warranty Deed.

*FOR COMPANY REFERENCE PURPOSE ONLY, NOT AN INSURING PROVISION.

stewart
title guaranty company



BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

6. Ruling and Order on Pending Motions, July 17, 2012, R. 5047-52.

Addendum 6

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

FILED

JUL 17 2012

SECOND
DISTRICT COURT

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 based 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.

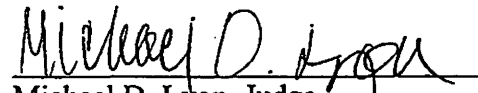
V. Still Standing's Motion to Amend

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

Addendum 7

BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

7. Thomas M. Morgan Expert Report, May 30, 2012, R. 4290-99.

May 30, 2012

Mr. Thomas M. Morgan
Thomas M. Morgan Consulting Group, LLC
Associate Broker/Real Estate Consultant
7730 S. Union Park Ave., Suite 600
Midvale, Utah 84047
(801) 567-4636

Prepared at the request of Attorney for Seller:
Mr. Robert J. Fuller
FULLER LAW OFFICE, LC
1090 N. 5900 E.
Eden, Utah 84310
801 791-7736

RE: *Skip Wing, et al., v. Still Standing Stable, L.C.*
Supplemental Expert Report Regarding Real Estate Agent/Broker Duties

I have been retained as an expert witness by Still Standing Stable, L.C. and others (the "Seller"), through Robert J. Fuller, attorney for Seller. I am providing expert testimony regarding real estate agent/broker duties and obligations imposed by state statutes, administrative regulations, and trade association standards.

My factual preparation has included multiple meetings with Seller's counsel, a review of some of the pleadings and exhibits in this case, a review of some of the deposition testimony and declarations in this case, and a review of some of the forms and disclosures related to the case.

I have reviewed SELLER'S EXPERT WITNESS DISCLOSURE AND PRELIMINARY REPORT FOR THE FOLLOWING EXPERT: THOMAS M. MORGAN, dated May 15, 2012, and incorporate by reference that report and material, including my qualifications, compensation, and list of other cases, into this report.

The following supplemental report is submitted after a review of the latest depositions and disclosures in this case which include the deposition of Mr. Skip Wing (Remax Elite Principal Broker) and the Remax Elite transaction file that was included as Exhibit 2 of Mr. Wing's deposition (page numbered 1-67). I have also reviewed or been read excerpts from the following depositions: Tammi Hill (Remax office administration), Devyn Spencer (Remax assistant), Karen Anderson (First American Title), Daniel Torkelson (attorney for lending group).

EXPERT WITNESS OPINIONS

Each issue addressed below includes two parts as follows: (a) The subject matter on which I intend to testify, and (b) the substance of the opinions to which I intend to testify, and a summary of the grounds for each of my opinions.



DUTIES AND BREACH OF DUTIES AS A LICENSED REAL ESTATE PROFESSIONAL

An individual licensee shall:

- (1) uphold the following fiduciary duties in the course of representing a principal:
 - (a) loyalty, which obligates the agent to place the best interests of the principal above all other interests, including the agent's own;
 - (b) obedience, which obligates the agent to obey all lawful instructions from the principal;
 - (c) full disclosure, which obligates the agent to inform the principal of any material fact the agent learns about:
 - (i) the other party; or
 - (ii) the transaction;
 - (d) confidentiality, which prohibits the agent from disclosing, without permission, any information given to the agent by the principal that would likely weaken the principal's bargaining position if it were known, but excepting any known material fact concerning:
 - (i) a defect in the property; or
 - (ii) the client's ability to perform on the contract;
 - (e) reasonable care and diligence;
 - (f) holding safe and accounting for all money or property entrusted to the agent; and
 - (g) any additional duties created by the agency agreement;

UT ADC R162-2f-401a. Affirmative Duties Required of All Licensed Individuals.

- (2) for the purpose of defining the scope of the individual's agency, execute a written agency agreement between the individual and the individual's principal, including:
 - (a) a seller the individual represents;
 - (b) a buyer the individual represents;
 - (c) a buyer and seller the individual represents as a limited agent in the same transaction pursuant to this Subsection (4); . . .

UT ADC R162-2f-401a. Affirmative Duties Required of All Licensed Individuals.

- (3) in order to represent both principals in a transaction as a limited agent, obtain informed consent by:
 - (a) clearly explaining in writing to both parties:
 - (i) that each is entitled to be represented by a separate agent;
 - (ii) the type(s) of information that will be held confidential;
 - (iii) the type(s) of information that will be disclosed; and
 - (iv) the circumstances under which the withholding of information would constitute a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill their obligations;
 - (b) obtaining a written acknowledgment from each party affirming that the party waives the right to:
 - (i) undivided loyalty;
 - (ii) absolute confidentiality; and
 - (iii) full disclosure from the licensee; and

(c) obtaining a written acknowledgment from each party affirming that the party understands that the licensee will act in a neutral capacity to advance the interests of each party;

UT ADC R162-2f-401a. Affirmative Duties Required of All Licensed Individuals.

Even if there is no fiduciary duty, a real estate agent is expected to be honest, ethical, and competent regardless of who the agent is representing:

Specific to the duties of a real estate agent to those persons to whom the agent owes no fiduciary duty, we stated in *Dugan v. Jones* that “[t]hough not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be *honest, ethical, and competent* and is answerable at law for his or her statutory duty to the public.” 615 P.2d 1239, 1248 (Utah 1980). We apply this reasoning and hold that Terena as the real estate agent owed a duty, independent of any implied or express contracts, to be “honest, ethical, and competent” in her relationship with the Hermansens, although she and Tasulis were hired by the vendor.

Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 235, 241 (emphasis added).

The professional agent is answerable to the public “for breaches of his or her statutory duty,” whether or not a breach results in damage to a client. *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980).

Matter of License of Topik, 761 P.2d 32, 37 (Utah Ct. App. 1988).

At the request of the Seller, I am addressing three elements of this case and offering my opinion. The Seller’s counsel has provided citations to case law listed in this report to see if my opinion is consistent with the reported cases. To the extent the agent’s conduct was negligent or a misrepresentation, the principal broker and brokerage would also be negligent for failure to train and supervise the agent. “I don’t know that I’ve ever had anyone instruct me on how to fill that [FSBO] out.” Shea Depo. 83:19-20. The brokerage had a duty to supervise and train its agents.

1. Unlawful Changes to Signed REPC and Cash Buyer Representation.

Rule: A real estate agent is prohibited from changing terms, adding terms, or otherwise modifying a REPC after the buyer and seller have signed the contract. 162-6.6.1.13.

The REPC includes the following statement: “This Contract cannot be changed except by written agreement of the parties.” REPC, ¶ 14.

A. Adding “TBD” to New Loan Blank. There are a substantial number of differences between the Metro Title (Seller Exhibit E) and First American Title (Exhibit G) REPC copies compared to the Remax REPC (Exhibit F). The letters “TBD” were added to the New Loan dollar amount blank on the Remax REPC.

In response to the question “who put the TBD there,” Mr. Shea stated “I believe it is my writing.” Shea Depo. 309:3. Question: “You did write the TBD on Exhibit 28; is that correct?” Answer: “I believe I did. It’s either my writing or Devyn’s writing.” Shea Depo. 309:15-16. Devyn Spencer denied that she put TBD on the contract: “Nope.” Devy Spencer Depo. 7:1. When asked if the

TBD was added after Chuck signed the sheet with his initials on it, Mr. Shea eventually responded that "It looks that way." Shea Depo. 311:24. As the Remax branch broker testified: "Nothing should be filled in after the contract is signed." Scott Quinney Depo. 34:7-8.

In addition to the New Loan dollar amount blank being changed to "TBD," additional differences include the following: Seller initials added to ¶ 5, Confirmation of Agency Disclosure, "FSBO Agreement," added, boxes checked, including the box after the name Tim Shea. The paragraph 9 "Additional Terms" box was checked, and initials and date were added to the bottom of page 5 of the REPC.

Any changes, modifications, or additions by the agent or brokerage to the REPC after the buyer and seller had signed would constitute a violation of the regulations. Prohibited conduct includes the following from R162-2f-401b. An individual licensee may not:

- (16) make a counteroffer by striking out, whiting out, substituting new language, or otherwise altering:
- (a) the boilerplate provisions of the Real Estate Purchase Contract; or
- (b) language that has been inserted to complete the blanks of the Real Estate Purchase Contract;

UT ADC R162-2f-401b. See also, Regulation 162-6.6.1.13 (earlier version). The agent would have needed a power of attorney from Chuck to add Chuck's initials. Regulation 162.6.1.12 and 162.6.1.11.2 (No Power of Attorney in the Remax file.) Any modifications should have been made as follows: "An individual licensee *shall*: . . . (18) use an approved addendum form to make a counteroffer or any other modification to a contract;" UT ADC R162-2f-401a. (Emphasis added.)

A real estate agent could face the possibility of a suspension if the agent adds terms to an agreement (i.e. adding "TBD" to the New Loan dollar amount on the REPC) after it had been signed. If in fact Mr. Shea did add "TBD" to the New Loan dollar amount blank without permission *after* the Seller signed the REPC, the act would constitute incompetence in my opinion.

The record reveals substantial evidence to support the Commission's findings. The Commission determined that respondent was "incompetent" in the following instances: (3) He amended an offer without obtaining the buyer's consent. . . . (7) He *added terms*, however innocuous, *to an agreement after it had been signed*.

Matter of License of Topik, 761 P.2d 32, 36 (Utah Ct. App. 1988)(emphasis added).

We, therefore, reverse the district court's decision and reinstate the Commission's order to *suspend respondent's real estate broker's license* for one hundred fifty days to be followed by a three year probation.

Matter of License of Topik, 761 P.2d 32, 37 (Utah Ct. App. 1988)(emphasis added).

B. Cash Buyer As Opposed to Borrower. Under the earlier version of the Utah Code (61-2-11) as well as the latest 2012 changes, the first provision remains the same: substantial misrepresentation.

The following acts are unlawful for a person licensed or required to be licensed under this chapter:

- (1)(a) *making a substantial misrepresentation*;
- (b) making an intentional misrepresentation;
- (c) pursuing a continued and flagrant course of misrepresentation;
- (d) making a false representation or promise through an agent, sales agent, advertising, or otherwise; or
- (e) making a false representation or promise of a character *likely to* influence, persuade, or *induce*;

61-2f-401 (emphasis added).

If the agent left a false impression with the Seller that the Buyer was a cash buyer in an effort to induce the Seller to accept the offer, such conduct would be a violation of the Utah Code, a substantial misrepresentation. The misrepresentation also violates the Code of Ethics and Standards of Practice of the National Association of Realtors, Art. 2 ("shall avoid . . . misrepresentation"). The representation of a "cash buyer" is a misrepresentation if in fact the Buyer was not a cash Buyer but needed to borrow the cash from a third-party lender subject to the lender's approval. The agent testified that he had "cash buyers":

"I had cash buyers."

Shea Depo. 22:14.

"The people I would be showing the land to would be cash buyers. We never discussed seller financing, ever."

Shea Depo. 22:17-19. The Seller's agent claimed he was left with the impression that Tim Shea was representing a cash buyer:

"Tim left the impression with Chuck that the Buyer had its own cash for the purchase price."

Schvaneveldt Decl. ¶ 16.

"Tim Shea told me that the Buyer was a cash buyer and owned the Arizona Diamondback professional baseball team."

Schvaneveldt Decl. ¶ 23.

In my opinion, there is a difference between a "cash" buyer, meaning a buyer who has the purchase price in cash as opposed to a buyer who needs to borrow money from a third-party lender subject to the lender's approval. Changing the New Loan dollar amount from blank to "TBD" on line 2(b) of the REPC constituted a material change and was a negligent act in my opinion. I base my definition of "materiality" on the following:

We have held that materiality is something which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell.

Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 235, 242 (punctuation omitted).

Instead, we agree with Defendants that "materiality" is an objective term and is defined as "something which a buyer or seller of ordinary intelligence and prudence would think to be of ... importance in determining whether to buy or sell." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 32, 143 P.3d 283. "Importance ... can be gauged by the degree to which the information could be expected to influence the judgment of a person buying property or assenting to a particular purchase price."

Gilbert Dev. Corp. v. Wardley Corp., 2010 UT App 361, 246 P.3d 131, 141

If the true terms of the REPC included "TBD" in the New Loan dollar amount, the notations should have been made before the REPC was circulated by the agent for signatures. If the true terms of the REPC did not include "TBD," then the notations should not have been added to the REPC after the buyer and seller signed. The true terms must be reflected on the REPC before the buyer and seller sign. An individual licensee may not:

- (4)(a) propose, prepare, or cause to be prepared a document, agreement, settlement statement, or other device that the licensee knows or should know *does not reflect the true terms* of the transaction; or
- (b) knowingly participate in a transaction in which such a false device is used;

UT ADC R162-2f-401b (emphasis). Prohibited Conduct As Applicable to All Licensed Individuals.

C. Unlawful Change of REPC Terms Defeats Commission. As a corollary, if the agent or brokerage changed a material term and added "TBD" to the REPC *after* the Seller signed, then the Seller necessarily did not accept the terms of the REPC with the TBD provision. "An acceptance must unconditionally assent to all material terms presented in the offer, including price and method of performance, or it is a rejection of the offer." *Nunley v. Westates Casing Services, Inc.*, 1999 UT 100, 989 P.2d 1077, 1086.

The financial condition of the prospective buyer is an important aspect for the Seller to consider when deciding if the Seller should accept an offer from a particular buyer. The financial condition of the buyer cannot be misrepresented to the seller even if the agent owes a fiduciary duty to the buyer. See 162.6.2.15.2 (c)-(d), regarding full disclosure requirements and reference to financial condition.

The agent did not present a ready, willing, and able buyer to be accepted by the seller if the actual terms were not on the REPC that the Seller signed.

Although not dispositive in this case, the general rule in Utah is that 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.*" *Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 751 (Utah 1983).

Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc., 2004 UT 54, 94 P.3d 292, 294(emphasis). The Seller did not accept a buyer with the "TBD" provision of the New Loan amount. The Seller accepted a REPC with no New Loan dollar amount specified in paragraph 2(b).

Not only was the agent incompetent by changing the REPC terms and filling in blanks after the buyer and seller signed, in my opinion the broker, through the agent's misconduct, defeated all arguments for the payment of a commission because the Seller did not accept the REPC with "TBD" in the New Loan dollar amount blank.

2. No Signed Agency Agreement in Remax File.

Rule: Remax Elite was required to keep all documents related to a transaction on file and available for inspection by the state regulating entity. 162-4-1.4.1.1.

Q. And do you know, were you required to keep a file by the State of Utah on a transaction where you've had Earnest Money; did you have a regulatory duty to keep everything in that file?

A. Yes.

Q. And is this the file; this Exhibit 2 we've looked at, is that the official Remax file that you turned over to Mr. Wallace?

A. I believe so.

Skip Wing Depo., 19:4-12, April 23, 2012.

Rule: An agent must have a signed Brokerage Agreement in place before an agent can represent a party in a real estate transaction.

There is no signed Brokerage Agreement in the Remax file related to the transaction at issue. Exhibit 1 of the John Lish deposition as well as Exhibit 1 of the Devyn Spencer deposition is a fax cover sheet dated May 1, 2006 (REPC was signed by Seller on February 7, 2006) along with a Broker Agreement directed to the buyer "Emmett Warren and or Assigns." There are stars and an arrow on the Agreement where the Buyer was apparently asked to sign, but there is no signed agreement in the file.

Mr. Lish, who apparently signed the REPC on behalf of the buyer testified "I would assume this whole time that - you know, that - I believed that he was working for Chuck." Lish Depo., 51:17-18. Referring to the agent Tim Shea.

Chuck Schvaneveldt, who apparently signed the REPC on behalf of the seller also testified that "Seller believed Tim Shea was working for Chuck/Still Standing." Declaration of Schvaneveldt, ¶ 8.

The FSBO and REPC only include agency disclosure comments, neither form constitutes an agency agreement. Further, it appears that the REPC that was produced by Metro Title and First American Title did not have the agency disclosures properly filled out when the buyer and seller signed the REPC.

Mr. Shea was asked if he "added for sale by owner onto that contract after the sellers executed that contract and sent it back to you?" Answer by Mr. Shea: "It appears that I wrote in for sale by owner agreement." Shea Depo. 315:17-21. On the Metro Title REPC that was signed by the

buyer and seller (Seller's Exhibit E), there are no Seller's Initials on paragraph 5 "Confirmation of Agency Disclosure," the listing agent and broker blanks are empty on page two, and there is no box checked after Tim Shea's name on page two. On the Remax REPC (Seller's Exhibit F) all of the blanks and boxes have been filled in.

The only signed document that *may* be considered an agency agreement would be the Confidential Disclosure Agreement between Still Standing Stable and others together with Tim Shea and Remax, dated April, 13, 2006, "for the purpose of providing Real Estate Services." Seller's Exhibit A. The Confidential Disclosure Agreement should have been kept in the Remax file but is not in the Remax file. In any case, the Agreement did create duties on the part of the agent.

If the Court determines that the confidential relationship created by the Confidential Disclosure Agreement constitutes a fiduciary relationship applicable to the land transaction sale at issue, that relationship was admittedly breached by Mr. Shea: "If you did represent Chuck, that would be something you better be telling him; is that right? Answer (Mr. Shea): "Yeah. If I had some fiduciary responsibility, which I didn't have with him." Shea Depo. 246:1-5. ¹

Tim Shea presented two properties without any agency agreement in place. "I actually presented both to them and they – but Chuck kind of took the 15 acres off the table . . ." Shea Depo. 42:23:24. In discussing the "exclusive buyer/broker agreement" Mr. Shea testified as follows:

The purpose is that if I'm representing somebody – to be candid with you, you don't have to have this –

Shea Depo. 201:17-19. Prior to presenting an offer, there must be an agency agreement in writing. 162.6.2.6. Mr. Shea and the brokerage were in violation of the real estate regulations for failing to have an agency agreement in place related to this transaction. The agency disclosures on the REPC ("FSBO Agreement"), paragraph five, page two, should have been filled in prior to circulating the offer. 162.6.2.6.1.

Mr. Shea's real estate licence could be suspended based on his failure to have a written agency agreement in place when presenting offers. The brokerage could be disciplined by the Department of Real Estate for failure to have a signed agency agreement in the transaction file. The agent was negligent by presenting an offer without first having a signed Brokerage Agreement in place. The agent should have clarified to the parties, particularly after the Confidentiality Disclosure Agreement was signed by the Seller and Agent, to clarify who the brokerage was representing.

Regardless of who the agent represented, he should have also made the Seller aware of any material issues known to the agent. This would include concerns that the Buyer was experiencing regarding access issues with the land. Access considerations are material to real estate transactions. See *Hermansen v. Tasulis*.

¹
"Thus, the above cases indicate that in Utah, a *fiduciary relationship and a confidential relationship are considered one and the same*. See *First Sec. Bank N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1332 & n. 18 (Utah 1990) (using the terms interchangeably and citing cases for the proposition that fiduciary relationship and confidential relationship are ordinarily convertible terms). *d'Elia v. Rice Dev., Inc.*, 2006 UT App 416, 147 P.3d 515, 527(emphasis added).

The agent should have alerted the Seller to the fact that the agent attended meetings along with the Buyer and an attorney who questioned the access to the property. "Tim Shea came upon a meeting among Miles LeBaron, John Lish, and Ryan Wilde in which they were discussing the road at issue. . . " Shea Depo. 240:10-13. Similarly, the agent should have alerted the Seller to the meeting that was held at Ross Allen's home when the access issue was discussed. Mr. Shea testified that Ross Allen stated that "Chuck purchased a piece of land that he thinks he has access and he has no access." Shea Depo. 305:18-20. The Seller never had the opportunity to remedy any possible or perceived issues with the property access or the Buyer's financing difficulties.

Finally, regardless of who the agent represented, the brokerage should have passed any letters it received from the Buyer's side to the Seller even after the sale failed. This would include any letter from a law office that outlined the Buyer's claim for the earnest money. See LeBaron & Jensen, P.C. letter, June 1, 2006, pages 37-40 of Remax file. See 162-4-2 (Trust Accounts, describes how to handle funds.) 162-4-2 (Disputes over funds.) Both parties should have been made aware of claims to the earnest money and provided copies of any letters from the parties.

3. Lapsed Offer and Defective REPC Circulated.

Rule: A real estate agent is expected to be honest, ethical, and competent and is answerable at law for his or her statutory duty to the public. *Hermansen v. Tasulis*; *Dugan v. Jones*.

Rule: "Where an offer has expired by lapse of time, an attempt to accept is ineffectual to create a contract. *Morrison v. Rayen Investment, Inc.*, 97 Nev. 58, 624 P.2d 11 (1981). As a corollary, an attempt to ratify after the offer has expired by lapse of time is equally ineffectual to revive the contract." *Williams v. Singleton*, 723 P.2d 421, 424 (Utah 1986)

There is not a REPC in the Remax file that was signed by either party prior to the offer lapsing. The agent typed in the dates and circulated a lapsed REPC for the buyer and seller to sign. The REPC at issue lapsed on January 23, 2006, and was signed by the Seller on February 7, 2006. The agent typed the REPC (Who did the typing for you? Answer: "I did." Shea Depo. 48:22-23) and breached his duty of competence by circulating a lapsed offer.

The agent knew there were two parcels of land to be included in the sale ("extra five acres") but did not amend or note the second parcel in the REPC. See Shea Depo. 43:16-19.

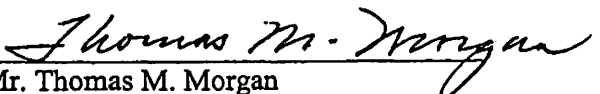
The Property is listed on the REPC as "Land LLC, Still Standing Stables." The FSBO in the Remax file has "Chuck and Cathy Code" listed as the Seller. The agent should have noticed that the REPC and FSBO information does not match. This difference in identities should have been resolved before the agent presented the FSBO to Cathy Code to sign. It has been represented to me by Seller's counsel that Cathy Code was not a member of the LLC. The Remax Branch Broker was asked "Do you think had you noticed back then, when you review it, wouldn't you have put an LLC designation so the purchase agreement matches the FSBO?" Answer (Mr. Quinney): "Yes." Quinney Depo. 196:6-9.

The agent should have taken steps to find out or confirm if any person signing the FSBO had authority to sell land owned by a limited liability company. The Seller limited liability company information is not in the Remax file.

The agent's act of circulating a lapsed REPC that did not list the second parcel of land constitutes incompetence. The agent was negligent when he failed to ask any questions regarding the authority of any person to sign on behalf of the limited liability company. The agent should have asked Cathy Code if she had any authority to sign the FSBO that made reference to land owned by a limited liability company. The LLC information should have been collected and kept in the Remax transaction file.

If called upon to testify, the material listed above is a summary of my opinions in this case.

DATED this 30th day of May, 2012.


Mr. Thomas M. Morgan
Thomas M. Morgan Consulting Group, LLC

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BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

Appellate Case No. 20130768-CA

ADDENDUM

8. Throckmorton Expert Forgery Report, Aug. 2, 2013, R. 7333-51.

Addendum 8

INDEPENDENT FORENSIC LABORATORIES

7103 S. Redwood Road #246, West Jordan, Utah 84084

G. Matthew Throckmorton
Bonnie Stewart

(801) 599-8585
(801) 694-1878

August 2, 2013

Mr. Robert J. Fuller
Fuller Law Office, LC
1090 North 5900 East
Post Box 835
Eden, Utah 84310

Dear Mr. Fuller

RE: Forgeries of Dale Quinlan

This report pertains to my examination of the following documents which I obtained from the "Utah Division of Corporations and Commercial Code" website (<http://www.corporations.utah.gov>).

Summary:

Based on the examination described below, we have concluded that it is **Highly Probable** that the Remax Elite letter (hereafter referred to as Q-1) retrieved from the State of Utah website and dated March 9, 2006 is a "cut-and-paste forgery". Please see details below.

We have also concluded it is **Highly Probable** that at least one if not both of these signatures on the 3rd page of the "Articles Of Incorporation Of Aspenwood Real Estate Corp" FAX ; dated 03/09/06 (hereafter referred to as Q-2) are "cut-and-paste forgeries". Please see details below.

Writing in Question: Signed names "Dale Quinlan" found on...

- Q-1) **Copy** of **FAX** "Transfer Ownership of DBA Re/MAX Elite" page 05/11; dated 03/09/06
- Q-2) **Copy** of five (05) pages of an eleven (11) page **FAX** "Articles Of Incorporation Of Aspenwood Real Estate Corp"; dated 03/09/06

Writing of Known Authorship: QUINLAN, Dale: One (01) signature found on...

- K-1) **Copy** of **FAX** "Transfer Ownership of Aspenwood Real Estate Corp. DBA Re/MAX Elite" page 04/11; dated 03/07/06

(continued on next page)

Specializing in the Scientific Examination of Questioned Documents

7333

Q-2a

I hereby acknowledge and accept appointment as corporation registered agent.


Dale Quinlan

Article V

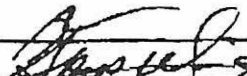
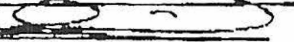
The names and addresses of the incorporators, Officers and directors:
Address: 579 West Heritage Park Blvd, # 201 Layton, Utah 84041

Dale Quinlan- Principal Broker/Owner

Shane Thorpe- President/Owner

Skip Wing Vice President/Owner

Mike Medina Vice President/Owner

In Witness Whereof, We, ASPENWOOD REAL ESTATE Corp., have executed these Articles of Incorporation in duplicate this 1st day of March 2004 and say:

That they are all incorporators herein: that they have read the above and forgoing Articles of Incorporation: know the contents thereof and that the same is true to the best of their knowledge and belief, excepting as to matters herein alleged upon information and belief as to those matters they believe to be true


Incorporator

03-14-C6004 35 RCVD

Q-1

RE/MAX**Outstanding Agents. &
Outstanding Results.**

Line only found on the Questioned document

9 March 2006

RE. Transfer Ownership of DBA Re/MAX Elite


Dale Quinlan
579 W Heritage Park Blvd
Suite 201
Layton, Utah 84041

To The Division of Corporations and Commercial Code,

Please transfer the ownership of RE/MAX Elite from Dale Quinlan to Aspenwood Real Estate Corp. The address of this business is 579 West Heritage Park Blvd, Suite 201, Layton, Utah 84041 RE/MAX Elite is the DBA for Aspenwood Real Estate Corp. Please do not hesitate to contact me if you should have any questions or if you require further information.

Space between text different from known

Sincerely,


Dale Quinlan

Alignment of all of the letters different from two signature areas

03-09-06PC1 35 PCVD

RE/MAX Elite
579 West Heritage Park Blvd.
Layton, Utah 84041
Office (801) 825-3700
Fax (801) 825-3777

Each Office independently Owned and Operated

7346



Letters only found on Known

7 March 2006


RE: Transfer Ownership of Aspenwood Real Estate Corp. DBA Re/MAX Elite

Dale Quinlan
579 W Heritage Park Blvd.
Suite 201
Layton, Utah 84041

To The Division of Corporations and Commercial Code,

Please transfer the ownership of Aspenwood Real Estate Corp from Dale Quinlan to Shane Thorpe. The address of this business is 579 West Heritage Park Blvd, Suite 201, Layton, Utah 84041. Aspenwood Real Estate is DBA RE/MAX Elite. Please do not hesitate to contact me if you should have any questions or if you require further information.

Sincerely,


Dale Quinlan

Alignment of the body of the letter same as the signature area

03-09-06PC1 35 RCVD

RE/MAX Elite
579 West Heritage Park Blvd
Layton, Utah 84041
Office: (801) 825-3700
Fax: (801) 825-3777

Each Office Independently Owned and Operated

7347