

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 St Anding Stable, I.c., Appellant, Respondent/Counterclaim Plaintiff.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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, L.C.,

Appellant,
Respondent/Counterclaim
Plaintiff.

Appellate Case No. 20130768-CA

District Court Civil No. 060906802

REPLY BRIEF OF APPELLANT STILL STANDING STABLE, L.C.

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

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REPLY INTRODUCTION

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

Ruling and Order on Pending Motions, July 17, 2012, Addm.6, R.5050. This Court should not hold that "marketable title requires guaranteed access." The trial court formed the opinion that because the title commitments included an exception as to the private ingress and egress, the seller was therefore unable to provide "marketable title." Having concluded there was no "guarantee," none of SSS's liability nor damage theories were even explored:

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.

Oral. Trans., R.8389, 53:18-54:13(emphasis added, hereafter "emphasis"), Addm.2. As the trial court noted, "there are undoubtedly factual issues that exist." *Id.* The primary claims of Still Standing Stable, L.C. ("SSS") are based on acts and omissions related to the way the expired REPC story started as opposed to the way it ended, unrelated to any access "guarantee."

RESPONSE TO STATEMENT OF THE CASE

There are at least three disputed fact-intensive theories of why the transaction in this case failed, with little relevance to SSS's tort claims against the Remax brokerage, brokers and agent ("Remax"). First, the trial court concluded that "[L]ack of a *guaranteed* access was the *sole reason* for the -- that the transaction failed." Oral Trans., R.8389, 53:1-3(emphasis). Second, Remax now offers an alternative two-part theory:

[T]he sale fell through because of the seller; that is, the *seller would not provide a general warranty deed* as required by the REPC, and the Property had *no access*.

Remax Opposition Brief ("Remax Opp."), p.x (emphasis). Third, SSS argued that the sale fell through because the buyer's attempt to flip the land failed. *See* Buyer's Flip Docs., R.3730-33. The buyer never showed up at the closing in order for SSS to produce any deed "to Buyer at Closing" per the REPC paragraph 10.1 provision. The buyer *never demanded a general warranty deed*, never objected to the Gretta Spendlove escrow instructions (R.3039-41), and both parcels did have access. The buyer "waived" all access and financing issues when the due diligence period passed with no objection. Buyer Emmett Warren's attorney-member filled out a separate Seller's Property Disclosure on April 12, 2006, after the due diligence

period, apparently pursuing \$100,000 in earnest money (R.3730, 3733), and indicated "direct access to the Property through [x] Private Easement." Addm.9, R.3728, ¶6(G). Remax has never proved its defense theory.

DETERMINATIVE STATUTES AND REGULATIONS

It is difficult to see how the standard set by the courts for real estate agents, above, applies to the agent for the buyer, as RE/MAX was.

Remax Opp., p.25.

Additionally, although not occupying a fiduciary relationship with prospective purchasers,...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.*

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

RESPONSE TO REMAX FACTS

SSS disagrees with this statement by Remax:

"The *court found* that the cause of the failure of the sale was not RE/MAX, but the *lack of access* . . ."

Remax Obj., xii(emphasis). "[L]ack of a *guaranteed* access was the *sole reason* for the -- that the transaction failed." Oral Trans., R.8389, 53:1-3(emphasis).

"[T]he actual existence or non-existence of an *access is irrelevant.*" Ruling and Order on Pending Motions, July 17, 2012, R.5050, Addm.6 (emphasis).

"[T]here was no access to the landlocked Property other than by helicopter." Remax Obj., x. An alternative to the use of a "helicopter" would be the gate key Mr. LeBaron described: "Seller took the Buyer to the private property *using a key to get through the private gate...*" Buyer's Answer, Crossclaim and Third Party Complaint, ¶¶15-16, R.0056-57(emphasis)(Filed by Remax co-counsel L. Miles LeBaron.)

"Mr. Quinlan had no ownership interest in RE/MAX to assign." Remax Opp., xii. SSS is now the current registered sole owner of Re/Max Elite based on the Quinlan sale and assignment. *See* Cert. of Fact, Utah Div. Corp., Sept 4, 2014, R.8123.

Remax Facts 6-7. SSS properties for sale were not "landlocked."

Fact 12. The Jarl Allen five acre parcel SSS purchased did make a "difference as to access to the Property," because it provided a private easement to cross, among other parcels, the Allen land. *See* Deeds, Addm.5, R.3736, 3739, 3745, 3747.

Facts 13-30. First American Title states "There is no means of access from a public roadway to the land, but it is *assumed there exists a valid and subsisting*

easement over and across an adjoining land for that purpose." First Am. Title Comm. ¶18, R.2996 (emphasis).

Facts 59-60. The agreement with Shea for a commission was conditional: "I will give you three percent *if we sell* that, that piece of property or this 15-acre piece, or any other piece. You find a buyer, *we sell it*, I'll give you three percent." Schvaneveldt Depo., 56:11-14, R.3480(emphasis).

Facts 76-79. Facts relate to the Declaration of plaintiff Hilary "Skip" Wing, now claiming that "while the *testimony I gave* about Aspenwood being the owner of the dba may have been *mistaken*, it was not deliberately false." Wing Decl., Sept. 16, 2013, R.7810 (emphasis). SSS never had a chance to depose Skip regarding the post-trial Declaration.

SUMMARY OF REPLY

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

[T]he Court finds that...lack of a *guaranteed* access was the *sole reason* for the -- that the transaction failed.

Oral Trans., R.8389, 53:1-3(emphasis). 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). In response, Remax states "it is undisputed that the failure of the transaction at issue resulted from SSS's *inability to provide access* to the Property..." Remax Opp., p. 11(emphasis). As the trial court noted, "there are undoubtedly factual issues that exist." *Id.* SSS now raises three general objections to the Remax Appellee's Brief ("Remax Obj.):

1. **Remax Now Admits the Seller was SSS.** Plaintiff's \$362,485.96 judgment (R.7017) against Chuck was based on the Remax argument that Chuck signed the REPC in his personal capacity as opposed to signing on behalf of the true seller Still Standing Stable, L.C. *See* Schvaneveldt Appeal Case No. 20130746-CA. Now, after the trial, Remax clarifies that the seller was in fact the land owner indicated on the first paragraph of the REPC, "Land LLC Still Standing Stables" (R.3237), not Chuck the individual (emphasis added to quotes):

Did RE/MAX have no contract duties in relation to the *seller, SSS*, let alone any which were breached,...

Remax Opp., p.ix.

The *seller, Still Standing Stables* (hereafter "SSS") then cross-claimed...

Id., ix.

[T]he *seller*, Appellant *Still Standing Stables, LC* (hereafter SSS) refused...

Id., x.

The **FSBO** was *between* RE/MAX and **SSS agents**...

Id., xi.

(**REPC**), but that was *between* the *seller SSS* and the buyers.

Id., xii.

9. On or about February 7, 2006, a Real Estate Purchase Contract (hereafter **REPC**) was entered into *between* Emmett Warren and/or Assigns, as *buyers*, and **SSS as seller**, concerning the Property. R.at 3223.

Remax Fact 9, xv.

A For Sale By Owner Agreement (**FSBO**) existed *between SSS and RE/MAX* and its agent.

Remax Fact 57, xxviii.

63. Cathy Code, who signed the FSBO was the girl friend of **Mr. Schvaneveldt**, who acted *as an intermediary for Still Standing*. R.at 3043.

Remax Fact 63, xxx.

RE/MAX represented the buyers in the transaction, and not the *seller, SSS*.

Remax Opp., p. 9.

SSS was *selling* the Property "by owner". See the For Sale By Owner agreement (**FSBO**) *between SSS and RE/MAX*. R.at 3238-3239.

Remax Opp., p. 9.

Remax should have admitted to Judge Lyon that **SSS** was the *seller*:

Defendants **Chuck Schvaneveldt and Cathy Code** are the *sellers* of the property, which is owned by Still Standing Stable, L.C... The **REPC**

between Schvaneveldt and the buyer is a binding contract and satisfies the terms of the FSBO.

Jury Inst. 2, Addm.10, R.5346. The trial court invaded Chuck's attorney/client privileges,¹ Remax violated Chuck's attorney/client privileges,² the confidential dollar amount of Chuck and SSS's mediation offer was used against Chuck³ and disclosed on the public docket (R.5101) in violation of *Reese v. Tingey Const.*, 2008 UT 7, 177 P.3d 605, 611(R.5093); U.R.App.P.8A appeal, Case No. 20120656-CA. After all the litigation and hardship for Chuck to try and raise

¹ "THE COURT: Mr. Schvaneveldt, *did you ever tell your lawyer* prior to him hearing it in this courtroom that the-- somebody had whited out your title? THE WITNESS: Yesterday. But you told me I had to wait--" R.8385, 28:16-20(emphasis).

²"Q And did he approve the for sale by owner agreement as it was prepared? MR. FULLER: And--and your Honor, I've got to lodge the objection before she answers it to preserve that. Thank you. THE COURT: And it's noted for the record and *her response is subject to a later connection* with Tim Shea. MR. DUNCAN: Thank you, your Honor. Q (By Mr. Duncan) And did he approve that? A[Chuck's attorney Nina] Yeah." *Id.*, 52:16-25(emphasis).

"[D]id Chuck ever expressly waive any attorney/client privilege he had with you? A[Nina] No." *Id.*, 64:18-20.

³ COURT: "I'm going to rule that the parties met, that there was an offer that exceeded [dollar amount redacted], which would go to the broker and therefore, it's immaterial whether Mr. Wing was --was consulted or involved . . ." R.8382,76:24-77:2.

\$362,485.96 to post a personal bond, Remax now unequivocally states in its Fact 9 that the REPC was between the "*buyers*, and *SSS as seller*" after all.

2. **Remax Exhibit C.** Facts 64-74 relate to documents exceeding 50 pages that were *never made part of the record*, but should have been produced.

"[A]ppellate courts of this state do not consider new evidence on appeal."

Finlayson v. Finlayson, 874 P.2d 843, 847 (Utah Ct. App. 1994). The Franchise Agreement was not even signed by Re/Max Mountain States Region until "**5-16-06**," meaning after the January 2006 FSBO and February 2006 REPC at issue. See Remax Ex. C, p. 41. The Franchise Agreement states "*you must obtain any* trade, fictitious or *assumed name registrations* as may be required under applicable law..." Remax Ex. C, p.6(emphasis). None of the commission plaintiffs obtained the name and admit "it appears that *Dale Quinlan was the owner of the dba when the documents were signed.*" R.8087.

3. **Remax Overlength Brief.** U.R.App.P. Rule 11(f)(1)(A) states "no more than 14,000 words." One Remax Certificate of Compliance in the hard copy, p.38, states **18,442** words; the CD Certificate of Compliance states **10,076**. It is prejudicial for SSS to respond to such a large brief within the allowed reply type-volume limitation.

REPLY ARGUMENT

ISSUE I - BREACH OF FIDUCIARY DUTIES

A. **Fiduciary Duties and Breach Elements.** SSS alleged an express breach and "breach of implied fiduciary duties." Remax Opp., p. 28.

The elements of breach of fiduciary duty based upon the failure to disclose material information, ... 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.** Remax quotes *First Sec. Bank of Utah N.A. v. Banberry Development Corp.*, 786 P.2d 1326, 1333 (Utah 1990):

"[T]here is *no invariable rule* which determines the existence of a fiduciary relationship, but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other." *Id.*

Remax Opp., p.29 (emphasis). This is a fact-intensive subjective test. Every one of SSS's factual assertions alleged in its Complaint, summary judgment briefs, and

the Schvaneveldt Declaration (Addm.3, R.3190-93), should have been accepted as true for purposes of summary judgment consideration, including these examples:

- SSS had confidence in Remax when Tim was retained as the “go-to man for real estate services.” Schvaneveldt Decl., Addm. 3, ¶3, R.3190.
- SSS depended upon the agent's business intelligence with "complex land deals." *Id.*, ¶4.
- "The agent's real estate knowledge was believed to be far superior." *Id.*, ¶5.
- Seller depended on the agent during the time that SSS thought Tim was working for the Seller: SSS Fact 21. The buyer also "*believed that he was working for Chuck.*" SSS Fact 17.
- Seller gave Tim copies of the earlier *Stables v. Allen* case (SSS Fact 28), "expect[ing] and rely[ing] on Tim." Fact 29.
- Agent acquired knowledge and facts from interacting with lawyers and the Buyer that SSS was not aware of. SSS Facts 22, 26.
- Agent Shea had an advantage over SSS because the agent knew but did not disclose the true terms of the Buyer's offer, and the agent/brokerage made at least 10 changes or additions to the REPC *after* the buyer and seller signed. SSS Facts 39-40 ("I believe it is my writing.").

In addition, Tim admits he was Chuck's agent on the Salt Lake Property (Fact 10(B), "Yes."), admits the Confidentiality Agreement was in place during the Miles LeBaron meeting and the Ross Allen meeting (Fact 23, "*that confidentiality agreement would have been in place.*"), and Remax collected a commission on the Salt Lake property purchase (Shea Depo. I, 23:14).

a. Agent for Still Standing Under the Confidential Agreement.

Because there was no contract or agency, there certainly were no fiduciary duties.

Remax Opp., p. 29. Remax ignores the confidentiality agreement it signed. On April 13, 2006, the parties entered into the Confidential Disclosure Agreement "*for the purpose of providing Real Estate Services.*" SSS Fact 1. "Tim Shea, employed with ReMax Elite . . . (hereinafter "Recipient") and Stake Center Locating, Inc. *and Still Standing Stables, LLC* . . . (hereinafter "Discloser")." See Confidential Disclosure Agreement, SSS Addm. 4, R.3198-3200 (emphasis added). SSS was expressly included as a Discloser.⁴

SSS is mentioned along with Stake Center Locating in the first paragraph of the confidentiality agreement, but SSS did not sign off on it.

⁴ "[I]n Utah, a *fiduciary relationship and a confidential relationship are considered one and the same...*" *d'Elia v. Rice Dev., Inc.*, 2006 UT App 416, 147 P.3d 515, 527 (emphasis added, citations omitted). R. 3712.

Remax Opp. p.7 (emphasis added). SSS's former attorney Nina Cleere, on behalf of Stake Center and SSS *did* sign under "DISCLOSER." Remax refers to Nina as "SSS's own in-house lawyer." Remax Opp., p.12. The critical signature on the Confidentiality Agreement is that of Tim Shea, signing under "RECIPIENT" (SSS Addm. 4, R.3200), "Tim Shea, employed with ReMax Elite ..." *Id.*

A fiduciary relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *City of Grantsville v. Redevelopment Agency of Toole City*, 233 P.3d 461, 472 (Utah 2010).

Remax. Opp., p. 28. The Remax/Shea signature is evidence of consent by Remax to act on behalf of SSS "***for the purpose of providing Real Estate Services,***" subject to SSS's control and conditions. The Agreement *is* relevant because it establishes the fiduciary relationship. Because SSS was party to the agreement, "Yeah," Remax committed a breach of the fiduciary duty as a matter of law:

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.

SSS Fact 23. The agreement *was* in place when the agent learned of the critical material information that he never disclosed to SSS:

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

Fact 23.

b. Buyer and Seller Believed Shea was Agent for Still Standing.

Chuck, on behalf of Seller, believed Tim was working for Chuck and Chuck's companies. SSS Fact 21. Buyer Emmett Warren (actually an LLC) through its member-attorney John Lish also testified that "*I believed that he was working for Chuck.*" SSS Fact 17.

As noted above, *the REPC* clearly states there is no agent for the seller. Apt.'s Br. Exh. 4, page 2, para. 5 (REPC).

Remax Opp., p. 30(emphasis). Is Remax referring to the forged REPC with 10 alterations that it attached to its complaint (SSS Addm. 4, R.3236-41), including the "CS" initials forged in paragraph 5 (bottom of R.3237) and "FSBO AGREEMENT" added to the two top blanks (top of R.3238)?

Or is Remax referring to the REPC that the trial court insisted be used as an exhibit that has no "CS" in paragraph 5 (Addm. 4, bottom of R.3223) and *nothing* added to the two top blanks of paragraph 5 (top of R.3224)?

Or is Remax referring to the hybrid REPC that First American Title produced from its scanned files with no "CS" in paragraph 5 (Addm. 4, bottom of

R.3245) and "FSBO AGREEMENT" added only to the first blank (R.3246) but not the second? Paragraph 5 (Agency) should have been filled out *before* the REPC was signed by the parties.⁵ Remax had no agency agreement with either party. *See* R162-2f-401a(2) ("shall:...execute a written agency agreement..."), R.3117; Morgan Report, Addm.7, R.4291, 4296. There are no limited-agent agreement(s) with any party. Two days before SSS closed its side of the transaction, Remax faxed a "Buyer-Broker Agreement" (R.3252) to the buyer, requesting that the buyer initial by "Limited Agents." R.3253. Buyer never signed the limited agency agreement. The agent testified he could simply shift fiduciary gears:

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.

⁵ Remax was never required to produce the original REPC with Tim Shea's ink on the earnest money receipt.

c. Agent for Still Standing on Salt Lake Land Acquisition.

"RE/MAX was not the agent of SSS regarding the sale or *any sales contract*."

Remax Opp., p. 30. 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.⁶

Fact 10(B). See Salt Lake Purchase Contract, Feb. 24, 2006, Addm.4, R.3205-06.

Under the REPC Addendum 4, *Still Standing Stables, LLC became the buyer* and the closing was moved to May 3, 2006 (same closing date as Huntsville land).

R.3117; REPC Addendum No. 4 is at Addm.4, R.3213. Tim Shea did receive a sales commission. Shea Depo. I, 23:14. *Tim admitted he was Chuck's fiduciary*.

Fact 10(B). Tim considered Chuck and Still Standing one and the same. Fact 11.

d. Seller's Agent Presented the First Piece of Land. Remax argues it

"had no fiduciary obligation." Remax Opp. p.28. As soon as Tim *presented*

Chuck's 15 acres to buyers, he was Chuck's agent. "I actually *presented* both to

them ..." Fact 10(A). See *Hal Taylor Associates v. Unionamerica, Inc.*, 657 P.2d

743, 748 (Utah 1982)("agent of the property owner"), R. 3117-18.

⁶ Stake Center Locating, Inc. was another company Chuck was managing.

2. Knowledge of the information.

a. Meeting with Buyer and Attorney. Remax does not deny that Tim learned critical information from the meeting with buyers and attorneys. Fact 22.

b. Meeting in Ross Allen's Home. Remax does not deny Tim attended the Ross Allen meeting and learned critical information. "*I believe they said . . . Chuck doesn't have a right over that land.*" Fact 26. Remax does not deny that "Shea was also made aware of financing concerns." Fact 51.

3. Failure to disclose the information. Remax does not deny that Remax failed to disclose the information.

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.*

Fact 23.

B. Implied fiduciary duties present a question of fact for the jury.

Remax cites *City of Grantsville v. Redevelopment Agency of Toole City*, 233 P.3d 461, 472 (Utah 2010), and states "The manifestation of consent to form such a relationship can be established by contract or *implied by factual circumstances*. *Id.*" Remax Opp., p. 28 (emphasis added by SSS). The "factual circumstances" should have been presented to a jury. Remax does not explain how SSS's "implied" relationship could have been kicked out of court on summary judgment. All of SSS's evidence of an express fiduciary relationship apply equally to support the alternative implied relationship claims.

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). SSS was damaged the moment its land was bound to the REPC under false pretenses and misrepresentations by the licensed real estate agent/brokers. SSS lost the time value of money, 1031 exchange opportunities (R.3192), and land value while its land was tied up in the buyer's land flip scheme and resulting protracted litigation. Agent/brokers negligence caused the buyer to sue SSS and Chuck, causing damages. *Id.* SSS's

punitive damage demand was ignored. Compl.¶8, R.1281. *Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997, 1006 ("fiduciary duty is an independent tort that, on occasion, arises from a contractual duty, and can serve as the basis for punitive damages."). Damages are related to the way the transaction *started* as well as the way it ended.

1. Seller did have access to the land. The main theme of the Remax opposition is "NO ACCESS TO THE PROPERTY." Remax Opp., p. 1, POINT I.

"Therefore, the actual existence or non-existence of an *access is irrelevant*." Ruling and Order on Pending Motions, July 17, 2012, R. 5050, Addm.6 (emphasis added). Had access been at issue, it would have been a *question of fact* for the jury and SSS *did* provide conclusive evidence and continues to maintain that it did have access to both parcels. *See* Seller's Property Condition Disclosure, SSS identified as Seller, Feb. 9. 2006, Add.5, R.3718, ¶6(G); Schvaneveldt Decl., ¶25, Add.3, R.3128; Add. 5, R.3736-39, R.3747, R.3745.

SSS retained a leading legal expert on real estate issues, attorney Gretta C. Spendlove, with Durham, Jones & Pinegar (R.3736) to make sure SSS acquired access along the existing road when it purchased the Jarl Allen land. Remax leaves a false impression as to "access" testimony from SSS attorney Nina Cleere:

SSS's own in-house lawyer admits that she also was aware that there was *no access*. Facts, above, para. 53-56.

Remax Opp., p.12 (emphasis). The testimony does not say "no access:"

Clearly this isn't a public road. . . but *there was access*, but it was through this private easement, . . .

Cleere Depo., R.3023:2-5 (emphasis). "And so we -- even though we had this, which *we consider to be access* -- " Cleere Depo., 29:7-8 (emphasis), R.3024.

SSS never promised to "guarantee access." The standard REPC does not have a "guaranteed access" provision, and the title insurance provision was satisfied. Q. "[D]id they satisfy their obligations to the title insurance?"

A:[Attorney Cleere]"As far as I'm aware." Cleere Depo., 125:20-22, R.3029. Title insurance is addressed in the REPC at paragraph 6, Addm.4, R.3231. John Doxey with Metro Title testified:

Q. [E]ven with the exclusions that are in there and the exemptions, *you still could have provided the standard-coverage owner's policy*; is that true?

A [Mr. Doxey]. *Yes*.

Doxey Depo., R.2973:18-22(emphasis).

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

However, there was no evidence that the plan to flip the Property caused the buyers not to buy.

Remax Opp., p. 6. The buyers walked away when their "flip" scheme failed.⁷ The Buyer did not have "its own cash for the purchase price" as Tim Shea led Chuck to believe. Schvaneveldt Decl. ¶ 16, R.3127; Shea Depo., 22:14, R.3927 ("I had cash buyers."). The Buyer, Emmett Warren, LLC, had only \$26 on February 28, 2006. See Emmett Warren LC Business Checking, Feb. 28, 2006, Addm.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). R. 3709-10.

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 ¶10.1, Seller Warranties, Addm.4, R.3225(emphasis). 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

⁷ Remax attorney explained: "[T]hey call it a *flip*, where they sell it very quickly to someone else." Oral Trans., R.8389, 7:17-19 (emphasis).

"marketable title" would be 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, Addm.6. SSS did have marketable title regardless of any access "guarantee." Even Remax acknowledges "[S]ome people buy under some circumstances such as no access." Remax Opp., p. 3.

Purchase and *sale of property without access is all right*, as long as the parties know of the lack of access, and agree to proceed notwithstanding.

Remax Opp., p. 3(emphasis). The Seller's disclosures (Addm. 5, R.3718 ¶6(G) "Private Easement"), public records, and commitment for title insurance reports, all available during the due diligence period put the buyer on notice of the private access details. "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.

The buyer also waived any access or financing conditions under the terms of the REPC, "shall be deemed waived by Buyer." ¶¶8.2-8.4 at R. 3224. Applying the REPC waiver provision to the trial court's conclusion would mean that "lack of

a *guaranteed* access was the *sole reason* for the -- that the transaction failed (Oral Trans., R.8389, 53:1-3), which was an access issue that had already been waived by the buyer." If the lack of "guarantee" was the "sole reason," the buyer could have just objected under REPC paragraph 8 and recovered its earnest money. But the buyer was likely still in pursuit of the \$8 million "flip" with \$100,000 of earnest money. R.3733 (wire funds transfer).

SSS's post-lis pendens sale to Millennial Partners on July 16, 2008 (Addm.5, R.3750-53, 3749 (Snow Christensen & Martineau letter referring to REPC), also undermines the trial court's conclusion that "guaranteed" access is required in order to produce "marketable title." The sale proves SSS could provide *insurable* "marketable title," just as the standard REPC requires. *See* Stewart Title Guarantee Co., Addm.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.

"[B]uyers would have full use and enjoyment of the property by way of a general warranty deed, however *SSS would not supply one.*" Remax Opp., p.4(emphasis). The deed was to be produced "to Buyer at Closing" per ¶10.1. No place in the record does it show that the LLC buyer showed up at any closing or demanded (1) a general warranty deed in order to close, (2) guaranteed access in

order to close, or (3) any other demands. Instead, the buyer just walked away from the transaction. It defies logic to imagine that SSS would not have simply produced a general warranty deed or paid for some additional insurance coverage had the buyer actually arrived at the scheduled closing with \$4.3 million.

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

Likely, SSS had learned its lesson and *warned the buyer that there was no access*, thus driving the value down.

Remax Opp., p. 3 (emphasis). There was access to the land. The value went down as a result of the falling market conditions, as SSS's expert land transaction/value witness, Doug Russell, was prepared to explain. R.4005.

5. Any and all of SSS's alleged damages should be presented to a jury. Once the trial court reached its access "guarantee" conclusion, and decided "Still Standing's claims fail because it *cannot prove that Shea and Remax caused any damage* to Still Standing (Oral. Trans., R.8389, 53:18-54:13(emphasis), Addm.2), the damage elements were not even considered.

ISSUE II - NEGLIGENCE AND MISREPRESENTATIONS

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. *See West v. Inter-Fin., Inc.*, 2006 UT App 222, 139 P.3d 1059, 1064, R.3184. Many of the acts and omissions that constitute a fiduciary breach, detailed above, also constitute a simple negligence cause of action.

The alleged lack of competence was not demonstrated, nor how any alleged incompetence affected the sale.

Remax Opp., p. 14. SSS didn't get a chance to "demonstrate" that Shea and Remax acted improperly or to present any of its negligence, contract, nor damage claims:

Still Standing raises many other issues, including *agency duties, disclosures* and royalties ... *there are undoubtedly factual issues that exist*, ...

See Oral. Trans., R.8389, 53:18-54:13 (emphases), Addm.2. But for the misrepresentations by the agent, designed to induce SSS to enter into the contract under false pretences, SSS would have avoided the "flip" buyer. SSS would have searched for one of the many true "cash" buyers who were flooding into the "hot spot" (Shea Tr. Tran., R.8385,96:6) Ogden Valley in 2006 before the bubble burst or a contiguous owner interested in more land and water, or a speculator. "[S]ome people buy under some circumstances such as no access." Remax Opp., p. 3.

If Jury Instruction No. 2 (Addm.10, R.5346, bracket added) is correct ("The REPC [is] between Schvaneveldt and the buyer..."), then the agent was incompetent by circulating a REPC with SSS's property specified for sale by an individual as opposed to SSS. On the other hand, if SSS was the intended REPC seller, as Remax is now apparently admitting in Remax Fact 9, the agent and supervising broker(s) should have reviewed the documents to clarify who the seller was. All of these acts and omissions are also relevant to the damage issues.

Tim Shea's experience lead him to appropriately bring a ready, willing and able buyer to SSS. . .

Remax Opp., p. 14. The buyer was never ready to close because it never appeared at any closing; it just went dark and never showed up. The "Buyer...became *unwilling* left shortly before closing, because of the access issue." Wallace Aff., R.0630(emphasis). The buyer was never able to close with only \$26 in its account (Addm.5, R.3723) and a denied loan of \$3,580,000.00 from Clark. Gary Clark Aff., ¶12 ("Clark Real Estate Co. did not make the loan"), R.1554; R.3709-10.

SSS asserts that Mr. Shea added "TBD" on his file copy of the REPC. Aptl.'s Br. at 22, para. 16 g.

Remax Opp., p. 18. Tim Shea didn't just forge his "file copy." The licensed real professional(s) doctored a formal standard form REPC by filling in blanks, adding

check marks, adding initials, and adding dates *after* the buyer and seller had signed. *See Matter of License of Topik*, 761 P.2d 32, 36 (Utah Ct. App. 1988)(He added terms, however innocuous, to an agreement after it had been signed.) Not only was there no "TBD" in the new loan dollar amount blank when the REPC was signed, it should have at least specified the **\$3,580,000.00** that the buyer failed to borrow from Clark. When considering if a REPC offer should be accepted, there is a difference between an empty blank, "\$ _____ (b)New Loan" compared to "**\$3,580,000.00**(b)New Loan," particularly after the real estate agent represents that he has "cash" buyers who own the Arizona Diamondbacks. Shea Depo., 22:14, R.3927 ("I had cash buyers.");Addm.4, R.3192, ¶23. Tim should have at least disclosed that he added "TBD" to the blank.

A buyer merely needs to provide sufficient funds at the closing from whatever source.

Remax Opp., p.18. An LLC with \$27 is not as likely to "merely" provide sufficient funds at closing as a true "cash" buyer in possession of \$4.3 million. SSS never "accepted" the true terms of the REPC. Seller was induced by the false representations.

As a matter of law, the fraud claims in the counterclaim (R. at 1278-1280) clearly lack sufficient particularity. R. at 1278-1280, paras. 97-102.

Remax Opp., p. 34. The general allegations and specific detailed facts that apply to multiple causes of action should not be ignored under any particular claim, including the fraud based claims. Complaint paragraphs 22(b) and (f), for examples, do include "where the initials were located." R.1270. The public policy and "harm" related to a licensed real estate professional forging initials and changing signed contracts should speak for itself, and is described with specificity.

SSS admits that, "None of the plaintiffs [RE/MAX] were parties to the FSBO and none of the agents had standing to sue SSS . . ." Aplt.'s Br. at 68. Thus the FSBO cannot serve as a basis for breach of contract or contract related claims.

Remax Opp., p.9. Plaintiffs pursued commission claims as if they were parties to the FSBO. *After* the trial, Skip Wing suddenly announced "Mr. Wing was ***not a party to the For Sale By Owner Agreement . . .***" R.6781. SSS then discovered Dale Quinlan was the actual registered owner of Re/Max Elite when the FSBO and REPC were signed, which plaintiffs now admit is true. R.8087. That discovery led to the forged "9 March 2006" and "7 March 2006" transfer letters. *See* Addm.8, R.7346-47. The ***forged letters were recorded*** with the Division as noted on the right margins. Both were "invalidated" after an investigation by the Utah Attorney General's counsel assigned to Director Berg's office. R.7894. It is now apparent that "None of the plaintiffs [RE/MAX] were parties to the FSBO."

B. Causation and Damages.

Although *cause is often a matter of fact*, where facts are undisputed, and at certain other times, the issue of cause can become a matter of law.

Remax Opp., p.10. Virtually all of the causation and alleged damage claims are contested in this case.

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), R.4070; Addm.

7, R.4292. *See* damage discussion above, damage elements were not even considered. Damage claims also include the buyer litigation caused by Remax.

Broadwater v. Old Republic Sur., 854 P.2d 527, 535 (Utah 1993)("[F]ees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages..."); Compl., ¶3, R.1280.

ISSUE III - JURISDICTION AND OWNERSHIP OF REMAX

Besides the former agent of Aspenwood, Dale Quinlan, *never having had any right to use the name RE/MAX*, nor the right to assign the use of the name to the plaintiff, Mr. Quinlan was not even an officer or agent of Aspenwood at the time of his attempted assignment to SSS in 2013.

Remax Fact 74 (emphasis). Remax has already admitted that Dale was the owner of the DBA when the documents were signed:

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

R.8087. It now admits 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. SSS now knows, after the trial, that 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, April 23, 2015.

SSS's claims against the broker and agent should also be reversed based on the false Remax Elite interrogatory responses (R. 7304).

That investigation resulted in Dale Quinlan surrendering his real estate broker's license on July 20, 2005,...

Remax Fact 75, xxxiii(emphasis). Remax should have disclosed this critical discovery fact regarding the Remax principal broker back on October 15, 2007:

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...

Utah Division of Real Estate News, Vol. 1, No. 1, Jan. 2006, (emphasis), R. 7373.

Dale Quinlan was a critical witness and the interrogatory should have been answered truthfully. 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. Remax's false Interrogatory Number 14 response is an additional justification to reverse the case and allow SSS to request fees.

CONCLUSION & RELIEF

Based on the foregoing, appellant 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 appeal, meaning remand. Based on the Confidentiality Agreement and agency relationship SSS had with Remax, along with the agent's admission that "*Yeah. If I had some fiduciary responsibility,*" SSS respectfully requests that this Court grants SSS's motion and rule as a matter of law

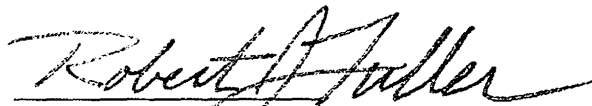
that there was a fiduciary duty and there was a breach, remanding this cause of action for consideration of damages.

SSS should also be allowed to conduct discovery based on the prior misrepresentations by Remax/Skip Wing, depose Mr. Quinlan, and present all of SSS's claims and damages to a jury for consideration.

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

DATED this 21st day of September, 2015.

FULLER LAW OFFICE, LC

A handwritten signature in cursive script, reading "Robert J. Fuller".

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 REPLY BRIEF OF APPELLANT STILL STANDING STABLE, L.C., was served to the addresses listed below by mailing on this 21st day of Sept. 2015, to *Attorneys for Appellees*:

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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, starting from the Reply Introduction to the end of this signature block, including all headings and footings is 6,785 words.



Robert J. Fuller
Attorney for Appellant

Tab 9

REPLY ADDENDUM

9. Buyer's "Flip" Seller's Property Discl., April 12, 2006, R. 3726-29.



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 Ernest W. Mason and/or assigned ("Seller")

PROPERTY ADDRESS Huntsville, UT - Box ("Property")

LISTING BROKERAGE Equity Real Estate ("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:

- Underground*
- 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?
☐ Yes ☐ No
- D. If a percolation test was conducted, to your knowledge, did the Property pass the test?
☐ Yes ☐ No



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): WEBER BASIN WATER☐ Private Well801-771-1677 own collect**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.

☒ Yes ☐ No

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

☒ Yes ☐ No**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☒ 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 5A, 5B, 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. ☒ 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

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

HOMEOWNERS ASSOCIATION

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

B. If the Property is part of an HOA, does the HOA levy dues or assessments for maintenance of common areas and/or other common expenses?

[] Yes [X] No

C. For questions regarding the HOA, including past, present or future dues or assessments, or regarding financial statements, bylaws, HOA meetings and minutes, information may be obtained from the following:

(Name) _____

(Address) _____

(Phone) _____

BY SIGNING THIS DISCLOSURE FORM, SELLER AUTHORIZES THE RELEASE OF HOA INFORMATION TO BUYER AND/OR TO BUYER'S AGENT.

10. UNPAID ASSESSMENTS

A. Are you aware of any HOA, municipal, special improvement district or other assessments that are presently owing against the Property? If "Yes", please describe, to your knowledge, the nature and amount of any such unpaid assessments:

[] Yes [X] No

B. Are you aware of any HOA, municipal, or special improvement district assessments that have been approved but not yet levied against the Property? If "Yes", please describe, to your knowledge, the nature and amount of any such approved, but not yet levied, assessments:

[] Yes [X] No

11. MISCELLANEOUS

A. To your knowledge, is any portion of the Property presently assessed, for property tax purposes, as "Greenbelt"?

[] Yes [X] No

B. Are you aware of any existing or threatened legal action affecting the Property? If "Yes", please describe, to your knowledge, the nature of any such legal action:

[] Yes [X] No

ACREAGE/SQUARE FOOTAGE

Seller represents that any figures provided by Seller in any documents regarding the square footage or acreage of the Property are not based on any personal measurement by Seller. If the square footage or acreage of the Property is of material concern to Buyer, Buyer is advised to verify the square footage or acreage through any independent sources or means deemed appropriate by Buyer. BUYER IS ADVISED NOT TO RELY ON SELLER, THE COMPANY, OR ANY AGENTS OF THE COMPANY FOR A DETERMINATION REGARDING THE SQUARE FOOTAGE OR ACREAGE OF THE PROPERTY.

VERIFICATION BY SELLER

Seller verifies that Seller has completed this disclosure form and that the information contained herein is accurate and complete to the best of Seller's actual knowledge as of the date signed by Seller below. SELLER UNDERSTANDS AND AGREES THAT SELLER WILL UPDATE THIS DISCLOSURE FORM IF ANY INFORMATION CONTAINED HEREIN BECOMES INACCURATE OR INCORRECT IN ANY WAY. Seller authorizes the Company to provide copies of this disclosure form to prospective buyers, and to real estate brokers and agents. This disclosure form is not a warranty of any kind. If Buyer and Seller enter into a sales contract for the Property, and such sales contract includes, excludes, or warrants the condition of any item referenced herein, then to the extent there is a conflict between the sales contract and any representations contained herein, the terms of the sales contract shall control.

Seller: [Signature] Date: 4-12-06 Seller: _____ Date: _____

ACKNOWLEDGEMENT OF RECEIPT BY BUYER

Buyer's signature below acknowledges Buyer's receipt of a copy of this disclosure form.

Buyer: _____ Date: _____ Buyer: _____ Date: _____

Tab 10

REPLY ADDENDUM

10. Jury Instruction No. 2, R. 5346.

INSTRUCTION NO. 2

Nature of the Case

The case before you today is a dispute over a commission from a failed real estate transaction. Plaintiffs and Defendants were involved in an attempt to sell a piece of property. Defendants Chuck Schvaneveldt and Cathy Code are the sellers of the property, which is owned by Still Standing Stable, L.C. Chuck Schvaneveldt is one of the owners of Still Standing Stable, L.C. Plaintiffs are the real estate brokers who attempted to find someone to buy the land.

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