

2015

**Aspenwood Real Estate Corporation, Elite Legacy Corporation,  
and Hilary "Skip" Wing, Plain Tiffs/ Appellants, vs. Cathy Code  
Defendant/ Appellee.**

Utah Court of Appeals

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UTAH COURT OF APPEALS

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ASPENWOOD REAL ESTATE  
CORPORATION, ELITE LEGACY  
CORPORATION, AND HILARY "SKIP"  
WING,

Plaintiffs/Appellants,

vs.

CATHY CODE

Defendant/Appellee.

APPELLANT'S BRIEF

APPELLATE CASE NO. 20130854-CA

DISTRICT CASE NO. 060906802

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This is an appeal from a ruling and order entered on June 6, 2013 granting Defendant/Appellee's motion for attorney fees; and a ruling and order entered on July 22, 2013 denying Plaintiffs'/Appellants' motion to clarify the order and ruling regarding attorney fees, which were final judgments from the Second Judicial District Court, Weber County, Ogden Department, the Honorable Judge Michael D. Lyon and the Honorable Judge Noel S. Hyde.

---

Karra J. Porter (#5223)  
Philip E. Lowry (#6603)  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Ste. 1100  
Salt Lake City, Utah 84111  
Karra.porter@chrisjen.com  
Attorneys for Cathy Code,  
Defendant/Appellee

L. Miles LeBaron (#8982)  
Dallin T. Morrow (#13812)  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd., Ste 230  
Layton, Utah 84041  
Telephone: (801) 773-9488  
miles@lebaronjensen.com  
Attorney for Hilary "Skip" Wing,  
Plaintiff/Appellant

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Philip E. Lowry (#6603)  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Ste. 1100  
Salt Lake City, Utah 84111  
Karra.porter@chrisjen.com  
Attorneys for Cathy Code,  
Defendant/Appellee

L. Miles LeBaron (#8982)  
Dallin T. Morrow (#13812)  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd., Ste 230  
Layton, Utah 84041  
Telephone: (801) 773-9488  
miles@lebaronjensen.com  
Attorney for Hilary "Skip" Wing,  
Plaintiff/Appellant

## PARTIES

Elite Legacy Corporation;  
Aspenwood Real Estate Corporation;  
and Hilary "Skip" Wing,

Plaintiffs,

v.

Still Standing Stables, LLC;  
Chuck Schvaneveldt; and  
Cathy Code,

Defendants.

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Emmett Warren, LC; and  
WBL Development LLC,

Respondent, Crossclaim Plaintiff, and Third-Party Plaintiff,

v.

Still Standing Stables, LLC; and  
Chuck Schvaneveldt,

Third-Party Defendants, Third-Party Plaintiffs,

v.

Skip Wing;  
Shane Thorpe;  
Scott Quinney;  
Tim Shea;  
Aspenwood Realty, LLC;  
ReMax Realty; and  
Aspenwood Elite Legacy Corporation,

Third-Party Defendants.



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## JURISDICTIONAL STATEMENT

Jurisdiction existed in the district court under Utah Code § 78A-5-102(1).

Appellate jurisdiction exists under Utah Code § 78A-4-103(2)(j).

## STATEMENT OF THE ISSUES & STANDARD OF REVIEW

**APPELLANT'S ISSUE NO. 1:** Did the trial court err in concluding that Plaintiff Hilary "Skip" Wing was personally liable to Defendant Cathy Code under Utah's reciprocal attorney-fee statute (§ 78B-5-826) where Skip was a party to the litigation as a representative only, where Skip was not a party to the contract with the attorney-fee provision, and where Skip could not have been awarded attorney fees personally?

**STANDARD OF REVIEW FOR ISSUE NO. 1:** A determination regarding whether § 78B-5-826 applies to a request for attorney fees is a matter of law that appellate courts review for correctness. *Bilanzich v. Lonetti*, 2007 UT 26, ¶ 10, 160 P.3d 1041.

**PRESERVATION OF ISSUE NO. 1:** This issue was preserved below in Appellants' Memorandum in Opposition to Cathy Code's Motion for Attorney Fees (R. at 6340-43); Appellants' Memorandum in Support of Motion to Clarify Ruling and Order on the Parties' Motions for Attorney Fees (R. at 6780-89); and Appellants' Reply Memorandum in Support of Motion to Clarify Ruling and Order on the Parties' Motions for Attorney Fees (R. at 6810-16).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code § 78B-5-826:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

## STATEMENT OF THE CASE

### *NATURE OF THE CASE*

This appeal arises out of a real estate brokerage's attempt to collect a commission. The real estate brokerage consists of Aspenwood Real Estate Corporation, Elite Legacy Corporation, and their principal broker Skip Wing. This brief refers to these entities as the Brokerage. The Brokerage sued Defendants/Appellees Still Standing Stables LLC, Chuck Schvaneveldt, and Cathy Code to collect a commission under a for-sale-by-owner commission agreement (FSBO). Code was dismissed from the case during trial, and was awarded attorney fees based on the FSBO's attorney-fee provision.

### *COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW*

This case has a long and complicated history, but the proceedings relevant to this appeal are actually very limited.

In November, 2006, "Remax Elite" (a dba designation) filed a Petition seeking declaratory relief regarding a contract dispute and whether the buyer or seller was entitled to earnest money. R. at 1-4. Several counterclaims, third-party complaints, and other



pleadings followed. R. at 6732–44. The pleading relevant to this appeal originally appeared as Remax Elite suing Still Standing for a commission under the FSBO. R. at 660–64. Eventually Chuck and Cathy were added as individual defendants. R. at 1232–44.

Immediately after it appeared that Remax Elite would be suing Still Standing, Still Standing began challenging Remax Elite’s capacity to do so. R. at 591–605. Still Standing, and later Chuck and Cathy, argued that Remax Elite did not have standing to sue for two reasons: 1) under the law only Skip Wing as principal broker could bring the claim; and 2) Remax Elite cannot maintain an action because it is an expired dba. *E.g.*, R. at 2070–105.

The Defendants’ persistence in using these standing arguments was beyond tenacious. From the initial Complaint until the Complaint was amended to list the Brokerage as a plaintiff, the Defendants filed at least:

- 9 motions asserting that Remax Elite did not have standing (including 3 summary judgment motions);
- 16 memoranda supporting those motions (including 4 “supplemental” and 1 “additional” memoranda for the same motion); and
- 7 memoranda opposing actions taken by Remax Elite, asserting that Remax Elite could take no action at all because it was not a principal broker or was only an expired dba.

R. at 591–605; 927–46; 1166–96; 1256–83; 1303–25; 1373–85; 1407–62; 1493–504;

1615–39; 1699–714; 1715–25; 1829–68; 2068–104; 2120–36; 2173–89; 2289–98; 2306–14; 2390–414; 2417–18; 2548–53; 2614–22; 2645–52; 2653–60; 3365–93.

Approximately half of these filings occurred after the trial court’s provisional ruling that Remax Elite had standing as a principal broker despite the expiration of the dba. R. at 1885–94.

To stem the tide of repetitive motions on the already-decided standing issue, the Plaintiffs amended their Complaint so that the named plaintiffs were the Brokerage (i.e., Aspenwood Elite Legacy Corporation, Elite Legacy Corporation, and their principal broker). R. at 2324–27; 3591–603. Once the Brokerage was officially named as the party seeking a commission, Still Standing, Chuck, and Cathy abandoned their standing arguments. R. at 7015.

The case then proceeded to trial, where the jury found for the Brokerage in its commission claim against Chuck. R. at 5388–89. The Brokerage also received an award of attorney fees against Chuck under the FSBO’s attorney-fee provision. Add. Ex. 1; R. at 6770.

Cathy, however, was dismissed from the case with prejudice. R. at 5423–25. After Cathy was dismissed, she moved the trial court for an award of attorney fees. R. at 5977–6066. The trial court granted Cathy’s motion, ruling that Cathy was a prevailing party under the FSBO and under Utah Code § 78B-5-826. Add. Ex. 1; R. at 6744–53. The trial court later ruled that the award was enforceable against Skip Wing personally, even though Skip never signed the FSBO and was never personally involved in this lawsuit.

Add. Ex. 2: R. at 4481–82; 7009–11; 8246–47.

After trial, Chuck submitted several motions, including a motion under Rule 52 to amend factual findings. R. at 6864–66; 6987–93; 7088–90; 7287–93; 8110–22. The trial court denied the motion in part and granted the motion in part. R. at 8245–47. In its ruling, the court clarified four critical factual findings:

- Skip Wing was identified in this case as a party, but not in his individual capacity;
- to the extent that Skip is identified as a party in this case, that identification refers to Skip in his representative capacity;
- Skip, in his individual capacity, did not have or bring any claims in this case; and
- Skip was involved in this case only as an agent or representative of his brokerage.

Add. Ex. 3; R. at 8246–47. Cathy has not appealed this ruling.

On August 21, 2013, the Brokerage timely submitted a Notice of Appeal, asserting that the trial court erred by holding Skip Wing personally liable under the FSBO's attorney-fee provision. R. at 7220–22.

#### STATEMENT OF FACTS

On January 20, 2006, Chuck Schvaneveldt entered into a For-Sale-By-Owner Commission Agreement (FSBO) with Tim Shea. Add. Ex. 4. Tim Shea signed the FSBO in his capacity as agent for "ReMax Elite." *Id.*, § 1. ReMax Elite is a dba designation that was used by the real estate brokerages Aspenwood Real Estate Corporation and Elite Legacy Corporation. *See* R. at 20–21; 2321; 2364–76.

The FSBO required the “Seller” to pay the Brokerage a commission if the Seller accepted an offer to buy an isolated property in Ogden owned by Still Standing. Add. Ex. 4, § 2. “Seller” is defined in the FSBO as “Chuck and Cathy Code.” *Id.*, § 2. The FSBO also contains a reciprocal attorney-fee provision, awarding attorney fees to the prevailing party. *Id.*, § 8. The FSBO does not mention Skip and Skip never signed it. *Id. passim.*

Soon after Shea and Chuck signed the FSBO, Shea sent a Real Estate Purchase Contract to Chuck with an offer to purchase the property. Add. Ex. 5. Chuck signed the REPC and accepted the offer. *Id.*

The deal did not go through because Chuck refused to provide a general warranty deed as required by the REPC. Add. Ex. 5, § 10; R. at 8389, pp. 8:4–7, 15:7–19, 20–21:21–18, 41–42:24–8, 52–53:25–7. After the deal did not go through, litigation commenced and resulted in the award of attorney fees now before this Court. R. at 6744–53. Throughout litigation, Skip maintained that he was involved in the litigation merely as a representative for his brokerage. R. at 7106–08; 8246–47; 8384 pp. 169–70, 182–83.

#### SUMMARY OF ARGUMENTS

##### **I. The trial court interpreted Utah’s reciprocal attorney-fee statute incorrectly.**

When a litigant is not a party to a contract, that litigant is liable under the reciprocal fee statute only if the litigant claimed to be a party to the contract. Skip is not a party to the FSBO and never claimed to be a party to the FSBO. Skip is not liable under the reciprocal fee statute and the trial court committed legal error by ruling that Skip is personally liable.

**II. Skip cannot be personally liable in this litigation because he is involved in a representative capacity only.**

Under Utah law, representatives in litigation cannot be personally liable for attorney fees resulting from the litigation. The trial court expressly found, and the record reflects, that Skip was involved in this case as a representative or agent of a real estate brokerage, not as an individual. Nevertheless, the trial court held that Skip was personally liable for an award of attorney fees. The trial court's factual finding that Skip is involved in this case as a representative conflicts with the trial court's legal conclusion that Skip is personally liable for attorney fees. Where Skip was not personally involved in this lawsuit, it is reversible error to hold Skip personally liable.

**III. Skip cannot be liable under the contract if Skip cannot benefit from the contract.**

Under Utah law, Skip, as an agent of his brokerage, cannot enforce the FSBO for his own benefit. Skip will not and legally cannot receive any personal benefit from this lawsuit, including attorney fees. Holding Skip personally liable where he could not benefit personally is unjust.

**ARGUMENT**

**I. SKIP WING CANNOT BE PERSONALLY LIABLE UNDER § 78B-5-826.**

Skip Wing is not personally liable under the FSBO's contractual attorney-fee provision because Skip was not a party to the FSBO and never asserted that he was a party to it. Under Utah's reciprocal fee statute, litigants are liable for attorney fees only if they assert that they are a party to the contract upon which the litigation is based.



*A. In Utah, contractual attorney-fee provisions apply to all parties to a contract.*

Utah Code § 78B-5-826 makes contractual attorney-fee provisions reciprocal: “A court may award costs and attorney fees to either party that prevails in a civil action based upon any . . . written contract . . . when the provisions of the . . . written contract . . . allow at least one party to recover attorney fees.” Utah Code Ann. § 78B-5-826 (2015).

This statute serves two purposes: First, it levels the playing field between parties to a contract of adhesion by eliminating the unequal allocation of litigation risk often found in such contracts. *Bilanzich v. Lonetti*, 2007 UT 26, ¶ 18, 160 P.3d 1041. Second, it eliminates situations where a party seeking to enforce a contract has a significant bargaining advantage over a party seeking to invalidate a contract; previously the party claiming enforcement could demand attorney fees if it prevailed, while the party seeking to invalidate could not. *Id.*

Neither purpose is served by holding Skip Wing personally liable here. This case does not involve a contract of adhesion and Skip is not seeking to enforce a contract. Indeed, Utah case law clarifies that Skip—who is not even a party to the contract and has never claimed that he was—cannot be personally liable under § 78B-5-826.

*B. Under Utah law, a litigant that is not a party to a contract may be liable for contractual attorney fees only if that litigant claimed to be a party to the contract.*

§ 78B-5-826 does not apply to Skip. That statute applies only if a litigant’s claim is based upon a written contract. Utah Code Ann. § 78B-5-826 (2015). An action is based

on a written contract when a litigant is a party to a contract or the litigant claims to be a party to a contract upon which litigation is based. *Hooban v. Unicity Int'l, Inc.*, 2012 UT 40, ¶ 32, 285 P.3d 766.

The litigation in *Hooban* was based upon a distribution agreement between a multilevel marketer called Unicity and one of Unicity's distributors. *Id.* ¶¶ 1–6. The distribution agreement limited the distributor's right to transfer its interest in the distribution agreement by giving Unicity the right to purchase the agreement before it could be transferred. *Id.* ¶ 4.

Later the distributor declared bankruptcy. *Id.* ¶ 5. All the distributor's assets, including the distribution agreement, were sold to Mr. Hooban. *Id.*

After purchasing the distribution agreement, Mr. Hooban sued Unicity, asserting that he was the distributor's successor in interest. *Id.* ¶¶ 5–6. Mr. Hooban sought to enforce the distribution agreement and to collect damages and attorney fees for Unicity's failure to honor the agreement. *Id.* ¶ 6. The distribution agreement provided that the prevailing party was entitled to an award of attorney fees. *Id.*

The trial court granted Unicity's motion for summary judgment, holding that Mr. Hooban was not a party to the distribution agreement. *Id.* ¶ 7. The court then denied Unicity's motion for attorney fees under § 78B-5-826, reasoning that because Mr. Hooban was not a party to the contract, he could not be bound by an attorney-fee provision in that contract. *Id.* ¶¶ 8–9.

On appeal, the Utah Court of Appeals reversed the trial court's ruling on attorney

fees. *Id.* ¶ 10. The Utah Supreme Court affirmed the Court of Appeals, and provided additional guidance concerning when § 78B-5-826 applies. *Id.* ¶¶ 15, 31–32.

In reaching its decision, the Utah Supreme Court clarified the analysis for determining whether litigation is based upon a contract as required by § 78B-5-826. *Id.* The Court stated that Mr. Hooban’s case was based upon a contract—even though Mr. Hooban was not a party to the contract—because Mr. Hooban had sought to establish that he was a party to that contract:

A party is entitled to reciprocal fee-shifting by statute “when the provisions” of a contract would have entitled at least one party to recover its fees had that party prevailed “in a civil action based upon” the contract. That condition is met in this case because, had Hooban prevailed in this suit, he would have been a party to the contract upon which the suit is based and would have been contractually entitled to attorney fees.

*Id.* ¶ 32.

In this case, unlike Mr. Hooban, Skip has never asserted that he was a party to a contract. Skip never signed the FSBO. He never asserted that he was a party to the FSBO, that he individually was entitled to enforce the FSBO, or that he individually should be awarded attorney fees under the FSBO.

As a result, under the Utah Supreme Court’s analysis in *Hooban*, Skip has done nothing to trigger the reciprocal fee statute and that statute does not apply to him. This conclusion is further bolstered by a similar Utah case, *Bushnell v. Barker*, 2012 UT 20, 274 P.3d 968.

*C. The reciprocal fee statute applies only when a claim relies on establishing that a litigant is a party to a contract.*

Skip is not personally liable under the reciprocal fee statute because neither party attempted to establish that Skip was a party to the FSBO and because no claim relied on establishing that Skip was a party to the FSBO. When a claim does not seek to establish that a litigant is a party to a contract, the reciprocal attorney-fee statute does not apply against that litigant. *Id.* ¶ 13.

In *Bushnell*, the client of an accounting firm sued the firm for breach of contract. *Id.* ¶¶ 2–3. The client also filed a third-party complaint against the firm’s owner individually as the firm’s alter ego. *Id.* ¶ 3. The client’s claim against the firm was successful, but the claim against the owner was dismissed. *Id.* ¶ 4.

After being dismissed, the owner moved for attorney fees under § 78B-5-826. *Id.* ¶¶ 5–6. He claimed that while he was not a party to the contract, he would have been liable under the contract if the client’s claim against him was successful. *Id.* ¶ 6. The trial court denied the motion. *Id.*

On appeal, the Utah Court of Appeals affirmed and held that neither party could have invoked § 78B-5-826 in the third-party complaint. *Id.* ¶ 8. The Court of Appeals explained that § 78B-5-826 did not apply because the third-party complaint did not assert that the owner was a party to the contract. *Id.*

The Utah Supreme Court affirmed the Court of Appeals:

We agree with the court of appeals . . . that [the client’s] alter ego theory—even if successful—would not have made [the owner] a defaulting party to

the contract . . . . Thus, [the owner] would not have been a defaulting party even if [the client] had prevailed, and the terms of the contract would not entitle at least one party to recover attorney fees in the sense required to trigger the statute.

*Id.* ¶ 13.

In this case, like the client's claim against the owner in *Bushnell*, the Brokerage's claim did not and could not have made Skip a party to the contract. The Brokerage never even attempted to establish that Skip was a party to the FSBO. Indeed, attempting to do so would have been futile, as Skip is not mentioned in the FSBO and Skip never signed the FSBO. As a result, under *Bushnell*, Skip did not trigger the reciprocal fee statute because no result in this case would have established Skip as a party to the FSBO.

In short, under Utah law the reciprocal fee statute applies to a litigant only if that litigant was a party to a contract or if a claim depended on establishing that the litigant was a party to a contract. Here Skip is not a party to the FSBO and no claim depended on establishing—or even attempted to establish—that Skip was a party to the FSBO. Thus Skip has not triggered the statute and it does not allow an attorney-fee award against him. As a result, the trial court committed reversible error by applying the reciprocal fee statute to Skip. This is especially true where Skip was never personally involved in this lawsuit.

## **II. SKIP WING IS INVOLVED IN THIS CASE IN A REPRESENTATIVE CAPACITY ONLY.**

Skip cannot be personally liable for an award of attorney fees because Skip is not personally involved in this lawsuit. The true plaintiffs in this case are the real estate brokerages: Aspenwood Real Estate Corporation and Elite Legacy Corporation. Skip was



added to this litigation as a representative only. This is what the trial court found and this is clearly established in the record.

*A. If Skip is involved in litigation as a representative only, Skip cannot be personally liable for attorney fees.*

Representatives involved in litigation are not personally liable for attorney fees resulting from the litigation. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 20, 221 P.3d 845 (stating that trustees in representative capacities not personally liable for attorney fees).

Thus, the trial court's factual finding that Skip is involved in this case as a representative conflicts with the trial court's legal conclusion that Skip is personally liable for attorney fees. Both of those things cannot be true. In this instance it is the trial court's legal conclusion that fails, because Skip is clearly involved in this litigation as a representative only.

*B. Both the record and the trial court's findings establish that Skip was not personally involved.*

Skip's involvement as a party in this litigation extended only to his role as a representative—Skip, individually, was simply never a plaintiff. The record makes this abundantly clear. Skip testified both in his deposition and at trial that he would not receive anything from this litigation even if the Brokerage prevailed:

Q [Mr. Duncan]. Okay. So in this particular case, are you personally asking for any money, as Skip Wing?

A [Mr. Wing]. Personally, as myself. No. There's—

Q. Okay. Are you asking for money as Skip Wing, as the broker and on behalf of the brokerage?

A. Yes.

R. at 8384, pp. 169–70.

Q [Mr. Duncan]. [A]s Skip Wing, you, Mr. Wing, married to your wife, not a principal broker, are you asking for anything in this case?

A [Mr. Wing]. No.

R. at 8384, p. 182.

Q [Mr. Duncan]. As—as Remax—as principal broker representing the underlying entity, are you seeking a commission for the brokerage?

A [Mr. Wing]. Yes.

R. at 8384, p. 183.

Q [Mr. Fuller]. Do you claim that anything is due to you or payable to you related to this whole purchase agreement?

A [Mr. Wing]. No.

Q. You're not claiming a penny from this thing?

A. No.

R. at 7107–08.

Q [Mr. Fuller]. Did you ever consider yourself as the owner, I own this dba ReMax Elite, I Skip Wing personally own it?

A [Mr. Wing]. No.

R. at 7106.

The trial court agreed, finding that Skip was identified in the pleadings as a representative for a brokerage, not as an individual:

[T]o the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims. . . . [T]o the extent that his name is included, that is a representation of his role in connection with the business entity, and that that role was the role of principal broker, representative, agent, or authorized representative of the brokerage.

R. at 8246–47.

The trial court made this clarification “to avoid any conclusion that the claims that are identified are individually and separately owned by Mr. Wing, independent of his role in connection with the business entity.” R. at 8247.

*C. The trial court’s findings reflect Utah law’s preference for substance over form.*

Utah law prefers substance over form when evaluating pleadings and captions. *Downtown Athletic Club v. Horman*, 740 P.2d 275, 279 (Utah Ct. App. 1987) (“We are controlled by substance, not captions.”) (citing *Armstrong Rubber Co. v. Bastian*, 657 P.2d 1346, 1348 (Utah 1983)).

By considering substance over form, courts ensure that claims are justly resolved on the merits while avoiding “gotcha” scenarios that unfairly punish litigants. *See Barrientos v. Jones*, 2012 UT 33, ¶ 53, 282 P.3d 50 (Lee, J., dissenting); *Salcedo v. Asociacion Cubana, Inc.*, 368 So. 2d 1337, 1339 (Fla. Dist. Ct. App. 1979) (“[C]ourts will not allow the practice of the . . . 'gotcha!' school of litigation to succeed.”).

If there is any doubt about whether Skip is involved in this litigation personally or as a representative, that doubt should be resolved in accordance with the substance of this case. The substance of this case is that Skip never stood to gain anything from this case personally, but was simply assisting his brokerage in recovering a commission due to the brokerage. In fact, Skip’s role representing another entity in litigation is not uncommon.

*D. Litigation often involves plaintiffs in a representative capacity.*

Situations like Skip's are far from unique; plaintiffs often appear in litigation in a representative capacity. For example, a litigant can bring an action as a representative of an LLC to enforce the LLC's rights. *Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 16, 216 P.3d 944. If the representative prevails then the LLC—not the representative personally—reaps the benefits. And in such an action the LLC, not the representative, would be liable for attorney fees.

Similarly, probate litigation often involves the personal representative of an estate as a plaintiff. *See, e.g., Cazares v. Cosby*, 2003 UT 3, 65 P.3d 1184. The personal representative is a named party, but has no individual rights or claims separate from the estate. The personal representative recovers nothing for himself personally in estate litigation and likewise would not be personally liable for the estate's obligations. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 20, 221 P.3d 845 (stating that trustees are not personally liable in estate litigation).

Such is the case here. Skip Wing is involved in this litigation in a representative capacity only. Like the representative parties in the examples above, Skip is not asserting his own rights, he will receive no benefit—including attorney fees—even though the Brokerage prevailed, and therefore he cannot be personally liable.

### III. AS A MATTER OF LAW AND POLICY, SKIP IS NOT LIABLE UNDER THE FSBO IF HE CANNOT BENEFIT FROM THE FSBO.

Skip should not be personally liable for attorney fees under the FSBO because Utah law does not allow Skip to seek attorney fees under the FSBO. *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 24, 100 P.3d 1200.

#### A. Under Utah law, Skip cannot benefit from the FSBO.

In *Fericks*, a seller and a potential buyer signed a REPC, with the seller represented by a real estate agent. *Id.* ¶ 3. The deal did not go through, and the potential buyer sued both the real estate agent and the seller. *Id.* ¶¶ 4–6. The real estate agent later argued for an award of attorney fees under the REPC, which contained an attorney-fee provision. *Id.* ¶ 23.

The Utah Supreme Court held that the real estate agency could not enforce the REPC for the agency's own benefit. *Id.* ¶ 24. The Court explained that only a party to the contract—in other words, the seller, not the seller's agent—could reap the benefit of that contract:

[O]ne of the most basic principles of contract law is that, as a general rule, only parties to the contract may enforce the rights and obligations created by the contract. . . . [A]n agency relationship with a principal to a contract does not give the agent the authority to enforce a contractual term for the agent's own benefit.

*Id.*

Skip is like the real estate agency in *Fericks*. The real estate agency was only an agent. It could not enforce the REPC—including the attorney-fee provision—because the



REPC belonged to the agency's principal. Like the real estate agency, Skip is only an agent. Skip cannot enforce the FSBO because the FSBO belongs to Skip's principal, the real estate brokerage. That means that Skip cannot enforce the attorney-fee provision for his own benefit.

In contrast, Skip can enforce the contract, including the attorney-fee provision, for the benefit of his principals, Aspenwood and Elite Legacy. Aspenwood and Elite Legacy won an award of attorney fees against Chuck while Cathy won an award of attorney fees against Aspenwood and Elite Legacy. This result is fair because Aspenwood and Elite Legacy, not Skip, sought to enforce the FSBO. Skip's role enforcing the FSBO sought only to enforce the those entities' rights under the FSBO, not to enforce his own rights or even to establish that he had any rights under the FSBO.

***B. Skip was added to the case only to bolster Elite Legacy's and Aspenwood's claim to standing.***

It's unfair to hold Skip personally liable for attorney fees because Skip was added to this case only as a representative to ensure that his principals could claim standing. Under Utah law, only a principal broker may bring an action to recover a commission based on the sale of real estate. Utah Code Ann. § 61-2f-409(1) (2015).<sup>1</sup> Utah courts have impliedly held (and the trial court concluded) that a brokerage qualifies as a principal broker under § 61-2f-409. R. at 1886–88; *see also Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, 94 P.3d 292 (successful claim to recover a commission

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<sup>1</sup> Formerly codified at § 61-2-18.

with only brokerage named as plaintiff); *C.J. Realty, Inc. v. Willey*, 758 P.2d 923 (Utah Ct. App. 1988) (claim for commission remanded with only brokerage named as plaintiff).

This issue came up again and again in the trial court. Chuck, Cathy, and Still Standing filed numerous documents asserting that the named plaintiff, ReMax Elite (a dba designation), did not have standing to recover a real estate commission. R. at 591–605; 927–46; 1166–96; 1256–83; 1303–25; 1373–85; 1407–62; 1493–504; 1615–39; 1699–714; 1715–25. The trial court resolved this question through a provisional ruling stating that ReMax Elite did have standing. R. at 1886–88. Despite the trial court’s provisional ruling, Chuck, Cathy, and Still Standing continued to file motions and memoranda based on the same lack-of-standing argument. R. at 1829–68; 2068–104; 2120–36; 2173–89; 2289–98; 2306–14; 2390–414; 2417–18; 2548–53; 2614–22; 2645–52; 2653–60; 3365–93. This caused significant expense and delay.

The Plaintiffs proposed, through a motion to for leave to amend, that it would be more efficient to simply add the real estate brokerages that had owned the name ReMax Elite to the case, thereby eliminating the drawn-out arguments over standing. R. at 2321. The trial court agreed, and suspended decision on the nine pending motions until the motion for leave to amend was decided. *See* R. at 2784–87.

When the Plaintiffs amended their complaint, they added every party that could possibly be needed to give the real estate brokerages standing. This would ensure that Chuck, Cathy, and Still Standing would finally cease pursuing the already-decided standing issue. R. at 2324–27. The added plaintiffs were Aspenwood Real Estate

Corporation, Elite Legacy Corporation, and their principal broker Skip. R. at 3591–603.

As explained in Section II, *supra*, Skip was not added in his individual capacity, but as a representative of Aspenwood and Elite Legacy.

In other words, Skip was added only in his role as representative and only to solidify his principal's claim to standing. Where Skip's role in this litigation is limited to assisting his principal, it is unjust to hold Skip personally liable.

***C. Holding Skip liable under the FSBO while he cannot benefit from the FSBO is unfair.***

Skip acknowledges that Cathy should receive an award of attorney fees. The FSBO expressly awards attorney fees to a prevailing party. Cathy was a prevailing party. Indeed, the trial court also awarded attorney fees to the Brokerage against Chuck under the same attorney-fee provision. Clearly it would be unfair to award attorney fees to the Brokerage while denying attorney fees to Cathy.

On the other hand, it is just as unfair to hold Skip personally liable for attorney fees where Skip will not and never could have personally been awarded any attorney fees. The award of attorney fees against Chuck illustrates this point. The Brokerage has obtained an award of attorney fees against Chuck for approximately \$150,000. R. at 6770. Skip, personally, will never collect a dime from this award; the award goes exclusively to Aspenwood and Elite Legacy. *See* Section II, Part B, *supra*. It is manifestly unjust to hold Skip personally liable under the reciprocal fee statute when Skip never could have benefitted from that statute personally.

*D. As a matter of public policy, real estate brokers should not be personally liable when acting on a brokerage's behalf.*

Holding a broker personally liable under the circumstances in this case would have a chilling effect on real estate transactions. Concern over personal liability will prevent principal brokers from pursuing commission, which in turn will discourage principal brokers from entering into deals to begin with. This is especially true when the principal broker is not even a party to the contract and will not receive a commission under the contract. As a matter of public policy, this Court should not set the precedent that a principal broker representing his brokerage is personally liable for attorney fees under the brokerage's contract.

**CONCLUSION**

This appeal could be resolved with a quick look at the For-Sale-By-Owner Commission Agreement. Skip Wing did not sign it. No one ever claimed that he signed it. And no claim in this case depended on whether Skip signed it, was bound by it, or was entitled to enforce it. In this case Skip is merely representing a real estate brokerage. Skip has not and indeed under the law cannot benefit personally from the attorney-fee provision central to this appeal. As a result, Skip has not triggered the reciprocal fee statute and enforcing that statute against him would be manifestly unjust. Skip respectfully requests that this Court reverse the trial court's ruling that Skip is personally liable for an award of attorney fees.

DATED and SIGNED this 7 day of April, 2015.

LEBARON & JENSEN, P.C.

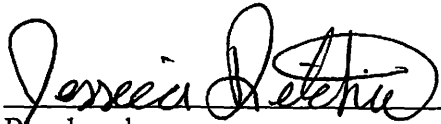
  
L. Miles LeBaron

CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the foregoing *Brief of Appellant* to be served via first class U.S. mail, postage pre-paid, to the following:

Karra J. Porter (#5223)  
Philip E. Lowry (#6603)  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Ste. 1100  
Salt Lake City, Utah 84111  
Attorneys for Cathy Code, Defendant/Appellee

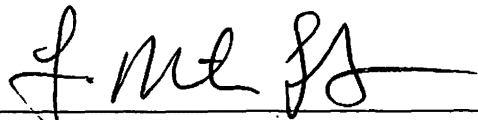
on this 1 day of April, 2015.

  
Paralegal

### CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 5,501 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman, 13 size font.

  
\_\_\_\_\_  
L. Miles LeBaron

Dated: 04/01/15

# **ADDENDUM**

**EXHIBIT 1:** June 6, 2013 Ruling (Attorney Fees)

**EXHIBIT 2:** July 22, 2013 Ruling (holding Skip Wing personally liable for attorney fee award)

**EXHIBIT 3:** October 4, 2014 Ruling (trial court's finding that Skip Wing is not personally involved in the lawsuit)

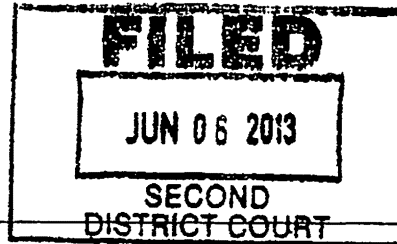
**EXHIBIT 4:** For-Sale-By-Owner Commission Agreement

**EXHIBIT 5:** Real Estate Purchase Contract



EXHIBIT 1

June 6, 2013 Ruling (Attorney Fees)



JUN 06 2013

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

HILARY "SKIP" WING, et al.,

Plaintiffs,

vs.

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

Defendants.

**RULING AND ORDER ON THE  
PARTIES' MOTIONS FOR  
ATTORNEY FEES**

Case No. 060906802

Judge Michael D. Lyon

This matter is before the court on three separate issues: (1) Defendants Still Standing Stables and Cathy Code's Memorandum of Costs; (2) Defendant Cathy Code's Motion for Attorney Fees; and (3) Plaintiffs' Motion for Determination and Award of Attorney Fees. Issues 2 and 3 have been fully briefed and the court has heard evidence and oral argument. Plaintiffs failed to file an objection to issue 1, but made oral arguments in opposition during a hearing on this matter. Pursuant to the following, each motion is granted in part and denied in part.

**Background**

This case started on November 17, 2006, when Petitioner ReMax Elite ("ReMax"), through its attorney Timothy Stewart of the firm Smart, Schofield, Shorter & Lunceford filed a Petition ("Original Petition") naming Still Standing Stables L.C. ("Seller" or "SSS") and Emmett Warren/Assign WBL Development LLC ("Buyer") as Respondents. The Original Petition sought declaratory relief regarding a contract dispute between Buyer and Seller in which ReMax was holding \$25,000.00 earnest money and did not know to whom the money should be given.

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The Original Petition states that ReMax was "willing to deliver the Earnest Money to such persons as the Court may direct, or to pay or deliver it over to the Court." There is no mention of a claim for a commission earned. Complaint/Interpleader at ¶ 10 (November 17, 2006).

On January 5, 2008, Seller, through its attorney Nina Cleere, filed its answer, counterclaimed against ReMax, and filed a third-party complaint against Tim Shea ("Shea") asserting that it is entitled to the \$25,000.00 earnest money because Buyer backed out of the Real Estate Purchase Agreement and "[Buyer was] in collusion with Tim Shea and/or Remax Elite to have the property recorded in [Buyer's] name without payment to [Seller] and that Remax Elite then refused to release the Earnest Money as required under the Purchase Agreement due to this collusive relationship . . . ." Answer/Counterclaim at ¶ 10 (January 5, 2007).

On January 18, 2007, Buyer, through its attorney L. Miles LeBaron of the law firm Lebaron & Jensen, P.C., filed its answer, crossclaimed against Seller, and filed a third-party complaint against Seller's principal Chuck Schvaneveldt ("Schvaneveldt"). Buyer's complaint alleged seven causes of action each relying on the assertion that Seller breached the Real Estate Purchase Contract by misrepresenting that the property included an easement which provided access to the property, failing to provide a "standard owner's policy of title insurance," and failing to provide a warranty deed. Answer, Crossclaim and Third Party Complaint at ¶¶ 27-29 (January 18, 2007).

On February 7, 2007, Attorney Robert Fuller ("Fuller") entered his appearance as counsel for Seller and Schvaneveldt. Notice of Appearance (February 7, 2007).<sup>1</sup> On April 16, 2007, Fuller filed Seller's and Schvaneveldt's "First Amended Counterclaim and Third-party

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<sup>1</sup> Nina Cleere never filed a Notice of Withdrawal, but, as far as the court is aware, she has not been involved in this case since she filed Seller's January 5, 2007, "Answer/Counterclaim."

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Complaint" to specifically include claims of Negligent Misrepresentation and Breach of Contract against ReMax and Shea. "First Amended Counterclaim and Third-party Complaint" (April 16, 2007).

On April 24, 2007, Buyers amended their "Crossclaim and Third Party Complaint." There were not any substantive changes. Amended Answer, Crossclaim and Third Party Complaint (April 24, 2007).

On May 14, 2007, both ReMax and Shea, through attorney Robert Wallace ("Wallace") of the law firm Kirton & McConkie, filed their Answers to Seller's and Schvaneveldt's "First Amended Counterclaim and Third Party Complaint." Answer of ReMax Elite to The Counterclaim of Still Standing Stables, L.C. and Chuck Schvaneveldt (May 14, 2007) and Answer of Tim Shea to the Third Party Complaint of Still Standing Stables, L.C. and Chuck Schvaneveldt (May 14, 2007).

After these pleadings, Buyer and Seller conducted discovery and negotiated settlement. ReMax and Shea also participated in discovery. On March 21, 2008, Buyer and Seller filed a stipulated motion to dismiss the claims between Buyer and Seller, which the court granted on March 31, 2008. Seller's and Schvaneveldt's claims against ReMax and Shea survived. All other claims were dismissed. Order on Stipulated Motion to Dismiss Claims Between Buyer and Seller (March 31, 2008).

On June 9, 2008, ReMax and Shea, through LeBaron & Jensen, filed a "Motion for Leave to Amend" the November 17, 2006, Original Petition arguing that "ReMax and Timothy Shea . . . have claims against [Seller] that they would like to join in this action regarding a sales commission that was never paid to them after bringing a ready, able and willing buyer to

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Defendant [Seller]." Memorandum in Support of Motion for Leave to Amend at 2 (June 9, 2008). ReMax and Shea justified their delay in bring this claim stating:

... [T]hey originally hoped that [Seller] and [Buyer] would settle this case and that ReMax and Shea could just move on with life. This is primarily because the insurance provider for ReMax Elite and Shea only provides representation for defensive claims and not for ReMax Elite and Shea's offensive claims. ReMax and Shea were hoping to avoid litigation because when the complaint was originally filed they did not want to commit the financial resources to obtain counsel as they perceived this fight to be between [Seller] and [Buyer]. Since that time, the above parties reached a settlement, but [Seller] has continued to pursue its claims against ReMax and Shea. In addition, ReMax and Shea have reached an agreement with counsel and are being represented in their offensive claims by LeBaron & Jensen, L.C.

Id. at 2-3. Despite the fact that the Motion to Amend was brought by both ReMax and Shea, the proposed Amended Complaint attached to the motion only named Shea as a plaintiff.

Sellers opposed the amendment for several reasons. Two of its principal reasons were (1) under Utah law, Shea was not allowed to advance a claim for a real estate commission, and (2) LeBaron & Jensen could not represent ReMax or Shea in pursuing the commission because they had previously represented Buyer. Memorandum in Opposition to ReMax and Tim Shea's Motion for Leave to Amend at 2 & 7 (June 23, 2008).

On September 2, 2008, the court granted ReMax's and Shea's Motion to Amend. The court, however, did not allow adoption of the proposed amended complaint that had been attached to the memorandum in support because the court agreed with Seller that Shea could not bring a claim for the commission in his own name. Instead, the court instructed: "[I]f Remax wishes to file its own counterclaim to collect the commission, it may do so." Ruling Granting Motion For Leave to Amend" at 4-5 (September 2, 2008). The court did not accept Seller's argument that there was a conflict of interest between LeBaron & Jensen representing ReMax

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and Shea and its previous representation of Buyer.<sup>2</sup> At this point LeBaron & Jensen began representing ReMax in its claim to obtain the commission. Attorney Wallace continued to represent both ReMax and Shea in defending Seller's claims against them.

On September 10, 2008, ReMax, through LeBaron & Jensen, filed an Amended Complaint stating three causes of action against Seller seeking the commission. Amended Complaint (September 10, 2008). Shea's name does not appear on the Amended Complaint. *Id.*

Seller did not immediately answer the Amended Complaint, and ReMax brought a Motion to Compel Answers. Ultimately, on February 6, 2009, Seller filed "Seller's Answer to ReMax Elite's Amended Complaint and Amended Counterclaim and Third-Party Complaint." Seller, having already asserted its claims against ReMax and Shea in its previous "First Amended Counterclaim and Third-party Complaint," did not reassert its claims against ReMax and Shea. It did, however, add "the Principal Broker and Remax owner's group . . . as additional Third-Party Defendants." Seller's Answer to ReMax Elite's Amended Complaint and Amended Counterclaim and Third-Party Complaint at 3 (February 6, 2009). This is the first time that Hilary "Skip" Wing's name appears on any pleadings.

On June 23, 2009, Attorney Wallace, ReMax and Shea's defense counsel, filed a Motion to Strike Seller's Amended Third-Party Complaint because it added new third-party defendants without obtaining leave from the court. Memorandum in Support of Motion to Strike Still Standing Stables' Amended Counterclaim and Third-Party Complaint" (June 23, 2009). The Motion was briefed, but was never submitted for decision.

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<sup>2</sup> No party raised any potential conflict of interest issue concerning joint representation of Shea and ReMax at this time.

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On June 1, 2009, ReMax and Shea filed a "Second Motion for Leave to Amend" their complaint. This time they desired to add Schvaneveldt and Cathy Code ("Code") as Defendants. ReMax and Shea argued that during the course of discovery they learned new information concerning Schvaneveldt's and Code's signatures on the For Sale By Owner Commission Agreement that justified adding them as parties. Memorandum in Support of Second Motion for Leave to Amend at 2-4 (June 1, 2009). Seller opposed the motion, arguing that it was untimely, that it attempted to make individual representatives of an LLC personally liable for the claim, and that ReMax, as a defunct dba, did not have standing to sue for a commission claim. Memorandum in Opposition to Second Motion for Leave to Amend (June 23, 2009).

On June 12, 2009, Timothy Stewart filed a Notice of Withdrawal from representing ReMax. This Notice appears to be a mere formality as all of ReMax's filings after the Original Petition were submitted by either Attorney Wallace or LeBaron & Jensen.

On August 12, 2009, the court granted ReMax and Shea's Second Motion for Leave to Amend. The court, however, did not allow Shea to assert a claim for the real estate commission or allow ReMax's claim for quantum meruit. Ruling Granting Second Motion for Leave to Amend (August 12, 2009). Wallace and LeBaron & Jensen filed the "Second Amended Answer and Counterclaim of Timothy Shea . . . and Third Party Complaint Against Cathy Code" ("Second Amended Answer and Counterclaim") adding Schvaneveldt and Code as defendants on September 10, 2009. Despite the court's plain direction to the contrary, the complaint was brought in Shea's and ReMax's name and asserted a claim for quantum meruit. It is ambiguous whether ReMax was included on the claim of breach of contract for the real estate commission because page 9 paragraph 10 does not assert the cause of action on ReMax's behalf, but page 9

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paragraph 9 refers to the commission as "their commission," referring to both ReMax and Shea. Second Amended Answer (September 10, 2009). This is the first time that ReMax or Shea filed any claim against Schvaneveldt and the first time Code appeared as a party in any respect.<sup>3</sup> On October 8, 2009, the Second Amended Answer was served on Schvaneveldt and Code. Return of Service (October 16, 2009).

On October 13, 2009, Seller, through Attorney Fuller, filed its answer to ReMax and Shea's Second Amended Answer and Counterclaim and moved to strike portions of the Counterclaim and Third-Party Complaint against Cathy Code. The Motion to Strike asserted multiple reasons to strike the complaint, including an argument that ReMax and Shea violated the court's order not to include any claims by Shea and not to include a claim for quantum meruit. On October 30, 2009, Schvaneveldt filed his own answer and joined Seller's Motion to Strike. On November 5, 2009, Code, through her attorneys Robert Sykes ("Sykes") and Allison Carter ("Carter"), filed her Answer to ReMax's Third-Party Complaint. This was the first action by Code in this case.

On January 19, 2010, the court issued an order rejecting all of Seller's and Schvaneveldt's arguments asserted in their Motion to Strike, but also stated: "The Court has already ruled that [Shea's claim for a commission and the claim for quantum meruit] are futile, and they have been stricken. No further action by the Court is necessary." Ruling Denying Motion to Strike (January 19, 2010).

Sykes and Carter, along with other employees of Sykes' firm, represented Code until she terminated them in July 2010. During that time Sykes filed Code's Answer, drafted and argued a

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<sup>3</sup> Buyer had previously brought a third-party complaint against Schvaneveldt, but those claims were dismissed as part of the March 31, 2008 "Order on Stipulated Motion to Dismiss Claims Between Buyer and Seller."



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rule 56(f) motion in response to ReMax's Motion for Partial Summary Judgment, conducted discovery, and monitored the progress of the case as advanced by Seller and Schvaneveldt's counsel, Fuller.

On July 12, 2010, after Code discharged Sykes, William O. Kimball ("Kimball"), an in-house attorney for Stake Center Locating, Inc., a company in which Schvaneveldt owns a fifty percent interest, filed a Notice of Appearance as counsel for Code. He brought himself up to speed on the case, and on September 3, 2010, Code moved for summary judgment on the issue of attorney fees related to Shea's claim against Code. Memorandum in Support of Cathy Code's Motion for Summary Judgment for Attorney Fees Against Timothy Shea (September 3, 2010). Code relied on Shea's admission in his responses to her First Request For Admissions to establish that Shea had sued her on or about September 8, 2009, for recovery of a commission owed under a For Sale By Owner Commission Agreement which contained a provision for attorney fees to the prevailing party of any action or proceeding arising out of the agreement.<sup>4</sup> Code argued that Shea's claims against Code had been dismissed in a ruling dated August 12, 2010.

On September 7, 2010, Shea, through LeBaron & Jensen, filed a Memorandum in Opposition to Defendant Cathy Code's Motion for Attorney Fees. Shea did not dispute that he had sued Code for a commission or that the court had ruled on August 12, 2010, that he could not recover a commission. Rather, Shea argued that he was not a party to the contract.

On November 1, 2010, the court issued an "Interim Ruling on Defendant Cathy Code's Motion for Attorney Fees." The court, reciting the background of the issue, stated:

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<sup>4</sup> Code's Request for Admissions states: "Request 2: Admit that you sued Cathy Code on or about September 8, 2009. Request 2. Admit."

RULING AND ORDER ON CHUCK SCHVANEVELDT'S MOTION FOR NEW TRIAL AND MOTION TO STRIKE

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In September of 2009, Shea and Remax filed a third-party complaint, asserting four causes of action against Code arising from the commission agreement . . . . The breach of contract claim was brought solely by Shea, while the other three claims were brought jointly by Shea and Remax. Though Remax's claims still remain, all four of the claims brought by Shea were dismissed through summary judgment. Code then filed her motion for attorney fees.

Interim Ruling on Defendant Cathy Code's Motion for Attorney Fees at 2 (November 1, 2010).

The court then proceeded to evaluate the motion for attorney fees and because it had difficulty understanding guidance provided by *Hooban v. Unicity Int'l, Inc.*, 220 P.3d 485 (Utah Ct. App. 2009), *cert. granted*, 225 P.3d 880 (Utah 2010), the court acknowledged that it was unsure how to proceed.<sup>5</sup> Ultimately, the court ruled:

If the parties feel they can provide the Court with additional insight, they are encouraged to further brief the narrow issue of how the court should exercise its discretion in this motion, once this case has reached a final resolution. If the parties choose not to brief this issue further, the Court will take the position that the motion for attorney fees is denied.

Interim Ruling on Defendant Cathy Code's Motion for Attorney Fees at 5. Code never submitted any supplemental memoranda on this particular motion, and the matter was never resubmitted for decision.

On December 13, 2010, Code, through Attorney Kimball, again moved for an award of Attorney Fees against Shea pursuant to the bad faith statute, Utah Code Ann. § 78B-5-825. Memorandum in Support of Cathy Code's Motion for Summary Judgment for Attorney Fees in Accordance with U.C.A. § 78B-5-825 (December 13, 2010). Code argued that Shea had filed his claims against her in bad faith because he had knowledge that they were meritless when the court told him so in its September 8, 2008 ruling, among other factors. On January 7, 2011, there were

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<sup>5</sup> *Hooban* has since been reviewed by the Utah Supreme Court. The Supreme Court decision is much clearer concerning the issues raised by Code's claim for Attorney Fees.

RULING AND ORDER ON CHUCK SCHVANEVELDT'S MOTION FOR NEW TRIAL AND MOTION TO STRIKE

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nine motions awaiting decision by the court including ReMax's "Third Motion to Amend" and Code's motion for attorney fees. The court ordered that it would

not rule on any of the pending motions until a request to submit for decision is filed on ReMax's motion to amend and the Court has issued its ruling on that motion. . . . [I]f any party determines that any of the remaining motions necessitates a ruling from the Court, that party must file a new request to submit for decision.

Order at 3 (January 7, 2011). Code objected to the November 7, 2011 ruling, arguing that her second motion for fees was ripe for decision but did not file a new request to submit. Cathy Code's Objection to This Court's Order Dated January 7, 2011 (January 18, 2011).

On December 7, 2010, ReMax filed its "Third Motion to Amend" its complaint. ReMax argued that Defendants had repeatedly asserted that it did not have standing to bring the claims against them, and "[w]hile these particular motions are not well taken, the Plaintiff requests that this Court allow the plaintiff to amend to cut off the incessant filing of memoranda and motions about this issue that have bogged this case down." Memorandum in Support of Third Motion for Leave to Amend at 2 (December 7, 2010). On December 17, 2010, the court granted Seller's motion to enforce a mandatory dispute resolution agreement. Ruling Granting Defendant's Motion to Enforce Mandatory Dispute Resolution Agreement (December 17, 2010). This ruling, along with a stay of proceedings to deal with Shea's pending bankruptcy, caused a delay in proceedings for nearly two years. Ultimately, the matter of ReMax's Third Motion to Amend came before the court in a January 27, 2012 hearing. The court granted the motion to amend, and ReMax filed its "Third Amended Answer and Counter Claim of Timothy Shea . . . and Third Party Complaint Against Code" on January 31, 2012. Despite the title of the document, Shea did not reassert any counterclaims. All of the counterclaims were brought by "Elite Legacy

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Corporation D/B/A ReMax Elite, Aspenwood Real Estate Corp. D/B/A Re/Max Elite, and Hilary Owen "Skip" Wing, principal broker D/B/A as Re/Max Elite . . . ." The complaint again brought a claim for Unjust Enrichment/Quantum Meruit, which the court had previously dismissed.

Over the next year, there were various motions for summary judgment and other matters. These motions narrowed the issues to be presented at trial. Kimball eventually stopped representing Code, but never filed a notice of withdrawal. Accordingly, it is unclear when his representation stopped. The last memorandum that Kimball filed with the court was a March 28, 2011 "Memorandum in Opposition to [Plaintiff's] Motion for Protective Order." The last hearing he participated in was a September 27, 2011 telephone conference. Around September 2011, Attorney Kenneth Childs ("Childs") began representing Code. Affidavit of Kenneth P. Childs (February 27, 2013). Childs is also in-house counsel for Stake Center Locating, Inc. His affidavit reflects that he spent significant time reviewing the case and helped Fuller prepare for trial, do legal research, and strategize. Child's affidavit attributes 63.5 of the 104.75 hours that he worked on the case to defending Code. Beginning in 2012, it appears that Fuller began representing Code because from February 2012 until the trial in August 2012 Fuller filed several motions on behalf of Seller, Schvaneveldt, and Code. Code's current motion for attorney fees, however, does not request any of Fuller's fees.

On May 22, 2012, the court granted ReMax's and the remaining Counterclaim Defendants' Motion for Summary Judgment, dismissing all of Still Standing Stables' claims against them. Order on Motions for Summary Judgment (May 22, 2012). On July 17, 2012, the court declined to reconsider the dismissal and indicated that the ruling also applied to

Schvaneveldt's and Code's Third Party Complaints which they tried to add by amendment.

Rulings and Order on Pending Motions (July 17, 2012).

About two weeks before the August 2012 trial, Attorney Scott Edgar ("Edgar") joined as counsel for Code and worked with Fuller and Childs throughout the trial. Defendant Cathy Code's Combined Motion and Memorandum in support of Motion for Attorney Fees at Exhibit 8 (January 2, 2013).

On August 3, 2012, the parties met for a pretrial conference. For reasons the court cannot recall at this time, the claims against Still Standing Stables were released. Order Dismissing Defendant Still Standing Stable, L.C. with Prejudice (October 3, 2012). Accordingly, at the time of trial, only ReMax's claims against Chuck Schvaneveldt and Cathy Code survived. The jury trial was held on August 6, 7, 8, and 10. At the close of Plaintiff's case, Code moved for a directed verdict, which the court later granted. Order Dismissing Cathy Code With Prejudice (August 24, 2012). The jury found Schvaneveldt liable for ReMax's commission, but in response to the special verdict form's request for a determination of damages entered judgment in an amount incongruous with the contract.

After the trial both ReMax and Schvaneveldt moved for a new trial. On February 28, 2013, the court denied Schvaneveldt's Motion for New Trial. Ruling Denying Defendant's Motion for New Trial (February 28, 2013). That ruling was reaffirmed on May 16, 2013. Ruling and Order on Chuck Schvaneveldt's Motion for New Trial and Motion to Strike (May 16, 2013). On December 21, 2012, instead of granting a new trial to Plaintiff on the issue of damages, the court found that the jury's damage award was inconsistent with the jury's answers to the interrogatories contained on the special verdict form. Accordingly, the court "enter[ed]"

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judgment in accordance with the jury's answers to the interrogatories notwithstanding the jury's inconsistent damages award." Order and Judgment on Plaintiffs' Motion for New Trial (December 21, 2012).

On November 30, 2012, ReMax filed the instant Motion for a Determination of Attorney Fees, and on January 3, 2013, Code filed her Motion for Attorney Fees. ReMax, Code, and Still Standing Stables have also asserted that they are entitled to an award of costs.

**Code's Motion for Attorney Fees**

Having prevailed in her defense of Plaintiffs' claims against her, Code now claims that, pursuant to the For Sale By Owner Commission Agreement's attorney fees provision, she is entitled to an award of \$83,375 in attorney fees from "plaintiffs, Tim Shea, Hilary 'Skip' Wing, dba ReMax Elite, Elite Legacy Corp., dba ReMax Elite and Aspenwood Real Estate Corp., dba ReMax Elite . . . ." During the course of this litigation, Code was represented by four different attorneys: Sykes, Kimball, Childs, and Edgar. Fuller filed some motions on Code's behalf, but is not claiming that he ever represented her. Code has submitted affidavits by each attorney detailing their fees charged for their services.

At the outset, the court notes that despite some confusion by all of the parties to this proceeding, Shea never filed any complaints against Code that became an official part of the record. Shea's claims contained in his September 10, 2009 Second Amended Answer and Counterclaim against Cathy Code were stricken. This court confirmed the nullity of these alleged claims both when it granted Shea's Second Motion to Amend and when SSS moved to strike their inclusion in Shea's Second Amended Answer and Counterclaim. Because Shea never filed any claims against Code, Code cannot recover any attorney fees from him.

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With respect to the other plaintiffs, Utah Code Ann. § 78B-5-826 provides:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any . . . written contract . . . when the provisions of the . . . written contract . . . allow at least one party to recover attorney fees.

Here, ReMax filed a claim against Code seeking a commission based on the For Sale By Owner Commission Agreement, which contained a provision providing for an award of attorney fees to the prevailing party for any action brought to enforce the agreement. Accordingly, Code, as the prevailing party, is entitled to her reasonable and necessary attorney fees. *Hooban v. Unicity Intl., Inc.*, 285 P.3d 766 (Utah 2012). To the extent that Code's counterclaims for negligent infliction of emotional distress and other torts were dismissed, the court does not see that any of the fees requested by Code pertain to those claims.

Having determined that Code is a prevailing party entitled to a reasonable and necessary attorney fee, the court must analyze the affidavits and testimony provided by Code's attorneys to determine if their fees are reasonable and necessary. Some principles that the court will follow include: (1) A client has the right to discharge and hire as many lawyers she deems necessary at her own discretion. An opposing third party, however, cannot reasonably be expected to pay for a new attorney to rehash old ground every time a new attorney is hired. (2) During the course of litigation, attorneys spend time discussing administrative details of the case, such as in a firm meeting. Some of this discussion is properly billable. However, to the extent that attorneys repeatedly engage in meetings which discuss attorney client relationships or other administrative matters, an opposing third party should not be required to pay for those fees. (3) The burden is on the party seeking attorney fees to show that the fees are reasonable and necessary. To the extent

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that attorneys' affidavits and testimony fail to clarify what they are billing for, the court will not allow an award of those fees.

In *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988), the Court listed four questions that should be answered when determining the reasonableness of an attorney fee. Those factors are: (1) what legal work was actually performed; (2) how much of the work performed was reasonably necessary to adequately prosecute the matter; (3) is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services; and (4) are there circumstances which require consideration of additional factors. *Id.*

The court will review each of Code's Attorneys' requested fees in turn.

**A. Attorney Robert B. Sykes & Associates**

Attorney Robert Sykes has practiced law in Utah since 1974, and has appeared before this court on numerous occasions. At the time that he worked on Code's case, his billing rate was \$350.00 per hour. Although the court feels this rate is a little high for the local legal community, it cannot find that the fee is unreasonable.

Sykes' associate Alyson Carter is a young attorney with a few years experience in complex litigation. At the time she worked on Code's case, her billing rate was \$225.00 per hour. The court finds that this rate is typical of attorneys with similar experience and training in this legal market and is reasonable.

Sykes' associate Scott Edgar is a young attorney that from the court's own observations performed well in his representation of Code. At the time he worked on Code's case, as an associate for Sykes, his billing rate was \$175.00 per hour. The court finds that this rate is typical of attorneys with similar experience and training in this legal market and is reasonable



On May 10, 2013, Sykes testified regarding his time expended representing Code. During the hearing, Sykes provided the court with a "Statement of Costs," dated May 13, 2013.<sup>6</sup> This document was received and considered during the evidentiary hearing on fees, and is hereby made a part of the record.

With respect to page 1 of 3 of Sykes' "Statement of Costs," the court makes the following findings: First, Sykes was the first attorney to represent Code. Accordingly, the court will allow recovery of fees for time spent reviewing the case in order to gain an understanding of its history. Second, the court will not allow recovery for time spent related to a motion to dismiss that was not ultimately filed. Indeed, the court finds that Sykes was confused regarding the purpose of the alleged motion to dismiss and could not clearly remember working on it. Third, the court will not allow recovery of fees for time discussing the case, without more detail provided. It is this court's judgment that such discussions are most likely administrative in nature; it is not reasonable to expect an opposing party to pay for them without greater detail concerning the purpose of the discussion.

Following the principles outlined above, the court will allow an award of all of Sykes' fees listed on page 1 of 3 of Sykes' "Statement of Costs" except the following: (1) "10/20/2009 RB Sykes Discuss in firm meeting 0.10"; (2) "01/12/2010 RB Sykes Discuss in firm meeting 0.10"; (3) "01/29/2010 Paralegal VAD – Drafting M and MM to Dismiss as to Code 0.80"; (4) "02/17/2010 Read various documents, including potential motion to dismiss, docket from the court, etc. 0.50"; (5) "02/23/2010 RB Sykes Review status in firm meeting 0.10"; and (6) "05/04/2010 RB Sykes Discuss in firm meeting 0.10."

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<sup>6</sup> Although Sykes' Statement of Costs is dated after the May 10, 2013 hearing, the court did receive it during the hearing and consider it.

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With respect to page 2 of 3 of Sykes' "Statement of Costs," the court makes the following findings: First, from June 9, 2010, to June 15, 2010, Sykes and Edgar worked on briefing a supplemental memorandum to SSS's Motion for Summary Judgment on the Issue of Commission Counterclaims, which Code had previously joined. The court permitted this briefing in its May 27, 2010 hearing when it granted Code's rule 56(f) motion. Given that this was Code's first attempt to have the case dismissed on the theory that ReMax lacked standing, the court finds that it was reasonable and necessary. Despite the fact that Code ultimately lost this motion, it helped to narrow the legal issues in dispute. Second, on July 2, 2010, Sykes billed five and a half hours to attend a deposition conducted by his associate Scott Edgar. During the May 10, 2013 hearing, Sykes testified that he participated to help train Edgar. The Court will not allow an award of fees for time spent training Sykes' associate.

Following the principles outlined above, the court will allow an award of all of Sykes' fees listed on page 2 of 3 of Sykes' "Statement of Costs" except the following: (1) "06/02/201 RB Sykes Review bill. Make changes. Discuss in firm meeting 0.10"; (2) "06/16/2010 SR Edgar TC to Fuller re Quinney and legal strategies to possibly sue for bringing action w/out merit"; (2) "06/22/2010 RB Sykes Discuss case in firm meeting. 0.10"; (3) "06/24/2010 RB Sykes TC Bill Kimball re status. 0.20"; (4) "06/29/2010 SR Edgar discuss strategy in Litstat 0.10"; and (5), 07/02/2010 RB Sykes Attend Scott Quinney deposition. Attend Tim-Shea deposition. Meet w/Counsel to discuss strategy."

With respect to page 3 of 3 of Sykes' "Statement of Costs," the court makes the following finding: on July 8, 2010, Sykes worked on dictating a "lengthy letter providing status of the case" because Code had terminated Sykes' representation of her. It is certainly

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appropriate as an act of professionalism for Sykes to help ease the transition between himself and new counsel. It is not, however, reasonable to expect an opposing party to pay the fees associated with Code's choice to change counsel; that financial burden should remain with Code. Accordingly, because all of the fees listed on page 3 of 3 are related to this transition, the court will not allow Code to recover them.

Having reviewed all of the billing in Sykes' "Statement of Costs," and accounting for the above deductions, the court orders that to the extent Code's Motion for Attorney Fees seeks compensation for the representation of Robert B. Sykes & Associates, Code may recover attorney fees in the amount of \$21,135.50.

Sykes' "Statement of Costs" also includes \$251.87 in costs for copies, faxes, and travel. These costs are expenses that are "ever so necessary, but are nonetheless not properly taxable as costs." *Young v. State*, 16 P.3d 549, 554 (Utah 2000). Accordingly, Code cannot recover these costs.

**B. Attorney William Kimball**

Attorney William Kimball is an experienced attorney who is in-house counsel for Stake Center Locating, Inc., which is a company in which Schvaneveldt, Code's husband, owns a fifty percent interest. Kimball testified that his billing rate was \$200.00 per hour, but also provided a "cost-plus rate" of \$156.73 per hour. The court finds that a client is not permitted to recover a billable rate in accordance with the legal market for representation by in-house counsel.

*Softsolutions, Inc., v. Brigham Young Univ.*, 2000 UT 46. Accordingly, to the extent Code can recover her fees for Kimball's representation, that fee shall be calculated according to the cost-

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plus rate provided. Further, the Court finds that \$156.73 per hour is a reasonable rate for in-house counsel in the local legal market for an attorney of Kimball's experience.

On December 10, 2010, Kimball filed an affidavit listing his hours worked in representing Code. That affidavit was submitted in support of Code's second motion for attorney fees, which this court never issued a ruling on. On May 10, 2013, Kimball submitted another affidavit setting forth his cost-plus rate and stating that there was an "Exhibit A" attached that reflects the time he spent working on Code's case. The court, however, has been unable to locate any exhibit attached to Kimball's May affidavit. Given that the May 10, 2013 affidavit requests \$14,536.70 in attorney fees, i.e., compensation for 92.75 hours of legal work, and the December 10, 2010 affidavit also requests compensation for 92.75 hours of legal work, the court finds that the information listed in the December 10, 2010 affidavit is the same information which Kimball intended to attach to his May 10, 2013 affidavit. This finding is supported by Kimball's references to the document during his May 10, 2013 testimony.

Kimball's affidavit reflects that he spent 92.75 working for Code. This time was spent almost entirely on three motions: (1) Code's first Motion for Attorney Fees against Shea, (2) Code's opposition to a Motion to Strike a portion of his Reply in Support of Code's Motion for Attorney Fees, and (3) Code's second Motion for Attorney Fees against Shea. In short, Kimball did nothing but attempt to recover Code's fees for a claim that Shea filed against her.

Shea never filed any claims against Code. Although the Second Amended Answer and Counterclaim served on Code technically asserted claims by Shea against Code, the court struck those claims from the beginning. As noted above, on January 19, 2010, this court denied Seller's Motion to Strike Plaintiffs' Second Amended Answer and Counterclaim stating: "The Court has

already ruled that [Shea's claim for a commission is] futile, and they *have been stricken*. No further action by the Court is necessary." (Emphasis added). Accordingly, the court erred in accepting Code and Shea's representations that Shea had filed a claim against Code when it issued its November 1, 2010 "Interim Ruling on Defendant Cathy Code's [First] Motion for Attorney Fees." Indeed, Code should have known that the court had previously stricken Shea's complaints against her a mere two months after she filed her answer, and, arguably, should have known that they were stricken when the court denied Shea's attempts to have them added in the "Second Motion to Amend."

Accordingly, Kimball's motions for attorney fees against Shea were completely without merit and unnecessary. For this reason, to the extent that Code's Motion for Attorney Fees seeks compensation for fees incurred during Kimball's representation, Code's Motion is denied.

C. Attorney Kenneth Craig

Attorney Kenneth Craig, like Kimball, is in-house counsel for Stake Center Locating, Inc. Accordingly, to the extent Code may recover any fees for his service, it shall be calculated at Craig's cost-plus rate of \$172.06. The Court finds that \$172.06 per hour is a reasonable rate for in-house counsel in the local legal market for an attorney of Craig's experience.

Craig's affidavit sets forth 104.75 hours working on this case. Craig attributes 63.5 hours of that time to working on Code's behalf. From September 2011 to May 2012, Craig's affidavit reflects nothing more than work reviewing the case to familiarize himself with it. As noted previously, the court does not believe it is reasonable for an opposing party to pay attorney fees incurred for a new attorney to learn about the case when the party voluntarily replaces an attorney.

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In July 2012, Craig spent time doing some research and also helped prepare for trial. In early August 2012, Craig assisted in preparation for trial and attended the trial. During trial, Craig sat in the back of the courtroom and did not assist Fuller or Edgar, who presented the Defendants' case, in any manner.

As noted above, Code is entitled to hire as many attorneys as she deems necessary. It appears, however, that with respect to Craig, she has done nothing more than hire a person to help Fuller, who was not Code's attorney. Further, although Craig's affidavit claims to separate out the time Craig spent on behalf of Code from the time he spent on behalf of other defendants. The court finds that there was no meaningful distinction. Indeed, Craig is in-house counsel for a company partially owned by Schvaneveldt, the losing party in this case.

Accordingly, the court finds that Code has not met her burden to show that the fees incurred by Code pursuant to Craig's representation were reasonable and necessary. To the extent that Code's Motion for Attorney Fees seeks compensation for fees incurred during Attorney Craig's representation, Code's Motion is denied.

**D. Attorney Scott Edgar**

At some point after Code discharged Sykes, Attorney Scott Edgar left Sykes' firm and began his own practice. About one week before trial, Code hired Edgar to help with trial preparation and other matters. At the time of Edgar's representation, Edgar's hourly fee was \$180.00 per hour. This fee is a mere \$5.00 higher than Edgar's fee when he was Sykes' associate. The court finds that it is reasonable.

Edgar's affidavit reflects that from July 23, 2012, to July 27, 2012, Edgar spent 14.2 hours familiarizing himself with the case and discussing strategy with Fuller. Code may not recover for Edgar's time familiarizing himself with the case, as previously explained.

From July 27, 2012, to August 7, 2012, Edgar spent 99.8 hours preparing for and attending the trial, and helping prepare a motion for directed verdict which was granted. The Court finds that this time was reasonable and necessary to the ultimate resolution of the case in Code's favor with one exception. On August 2, 2012, Edgar spent fifteen hours preparing for final pretrial and discussing trial strategy with Fuller. The court finds that this amount of time is unreasonable because Code's interest in the action are different than those of the other defendants and it should not have been necessary for Edgar to participate in trial preparation to the extent that he did. Accordingly, the 99.8 hours shall be reduced by seven hours.

Edgar is Code's current counsel arguing this motion for attorney fees. Edgar's affidavit, submitted prior to the May 10, 2013 hearing, reflects that he has spent 35.5 hours researching and preparing the instant motion. The court finds that this time is reasonable and necessary.

Having reviewed all of the billing in Edgar's affidavits, and accounting for the above deductions, the court orders that to the extent Code's Motion for Attorney Fees seeks compensation for Scott Edgar's representation, Code may recover attorney fees in the amount of \$23,094.00.

**Plaintiff's Motion for Attorney Fees and Costs**

Plaintiffs, i.e., Hilary 'Skip' Wing, dba ReMax Elite; Elite Legacy Corp., dba ReMax Elite; and Aspenwood Real Estate Corp., dba ReMax Elite (collectively "ReMax") have also

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filed a motion seeking an award of attorney fees against Schvaneveldt based on the attorney fees provision of the For Sale By Owner Commission Agreement.

ReMax first brought its claim against Schvaneveldt in its September 10, 2009 Second Amended Answer and Counterclaim. Prior to that time, however, ReMax had done significant work progressing its case for a commission. That work included filing its September 10, 2008 Amended Complaint seeking the commission from Still Standing Stables and conducting extensive discovery, among other things. During the course of discovery, around April 2009, ReMax discovered evidence indicating that Schvaneveldt was personally liable for the commission. Accordingly, ReMax moved to amend its complaint and add Schvaneveldt as a defendant. Over the next few years LeBaron & Jensen represented ReMax in its efforts to obtain the commission.

During the August 2012 jury trial, ReMax prevailed on its claim for the commission against Schvaneveldt. Further, prior to the trial, all of the defendants' claims against ReMax and Shea were dismissed. Accordingly, ReMax is the prevailing party with respect to Schvaneveldt and is entitled to a reasonable and necessary attorney fee for its efforts to collect from Schvaneveldt. ReMax is not the prevailing party with respect to Still Standing Stables or Code, and is not entitled to recover attorney fees for its efforts to collect from Code or Still Standing Stables. In the case of ReMax's claim, however, the court finds no reasonable distinction between the efforts expended to assert a claim against the various defendants; accordingly, the fee will not permit recovery of any work that was clearly directed at either SSS or Code individually.



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During the course of litigation, there was some confusion about whether LeBaron & Jensen represented ReMax or just Tim Shea. This confusion was compounded by LeBaron & Jensen's consistent involvement with Shea, even though Shea was not a party to this litigation. LeBaron & Jensen's communication with Shea is understandable because Shea, pursuant to an Assignment of Claim agreement with ReMax, had authority concerning the direction and resolution of the case. Nonetheless, because Shea was not the party in interest, LeBaron & Jensen should not have filed motions on his behalf.<sup>7</sup>

The court does not find any of the evidence presented by Schvaneveldt arguing that LeBaron & Jensen did not represent ReMax in its pursuit of the commission claim persuasive. Since ReMax filed its initial Motion to Amend in June 2008, all of the filings related to ReMax's efforts to obtain the commission were filed by LeBaron & Jensen. LeBaron & Jensen appeared as counsel for ReMax at multiple hearings and during the jury trial. Those snippets of evidence reflecting Skip Wing's mistaken understanding of the attorney client relationship are insignificant given the overwhelming amount of times that LeBaron & Jensen appeared on his behalf without his objection. Further, Attorney Duncan's statements in emails concerning the fact that he did not represent Skip Wing were a result of the confusing relationship, not an expression of the actual state of affairs. Lastly, the "Assignment of Claim" signed by Skip Wing clearly states: "ReMax will assign its claims to Tim Shea and authorize Tim's lawyer [LeBaron & Jensen] to act as co-counsel to ReMax's counsel on ReMax's behalf . . . ." This agreement

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<sup>7</sup> To the extent that such motions were pertaining to Shea's defense of the counterclaims brought against him, it was entirely appropriate to include his name on the filings. However, it is the court's impression that such motions were filed by Attorney Wallace.

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established an attorney-client relationship that was never terminated. Motion to Strike and Response to Plaintiffs' Motion for Determination and Award of Attorney Fees at Exhibit 2.

Schvaneveldt has argued that ReMax should not be permitted to obtain its attorney fees because LeBaron & Jensen had a conflict of interest representing both Shea & ReMax. The court agrees that there was a conflict of interest in representing both Shea and ReMax. Specifically, ReMax's interest in the commission was limited to \$10,000, but Shea's interest was much greater. This created a natural conflict of interest. Any settlement offers around \$10,000 would have been reasonable for ReMax to accept, except out of consideration for Shea. Pursuant to rule 1.7(b) of the Utah Rules of Professional Conduct, however, this conflict was waiveable. ReMax arguably waived this conflict when it assigned its claim to Shea. The "Assignment of Claim" agreement states:

... Tim Shea may in his own name and for his own benefit prosecute, collect, settle, compromise and grant releases on said claim as he, in his sole discretion, deems advisable. However, the parties agree that it will be best if Tim prosecutes, collects, settles, compromises, and grants releases in ReMax's name, but do so for Tim's benefit, except for the consideration amount mentioned above. Accordingly, the parties agree that Tim's lawyer may represent Tim's interests and act as co-counsel for ReMax in pursuing ReMax's offensive claim against Still Standing Stable, LLC, but that any and all strategy decisions and settlement decisions made as to the offensive claim for commission will be made by Tim Shea and his lawyer(s), and that the parties will cooperate with each other in making strategy and settlement decisions generally.

Motion to Strike and Response to Plaintiffs' Motion for Determination and Award of Attorney Fees at Exhibit 2.

Given the presence of this language in the Assignment of Claim, and the lack of evidence concerning other discussions between ReMax and LeBaron & Jensen. The court cannot conclusively state that LeBaron & Jensen has violated the rule against conflicts of interest.

Schvaneveldt also asserts that LeBaron & Jensen violated rule 1.5(c) of the Utah Rules of Professional Conduct by failing to obtain ReMax's approval in writing for their contingency fee arrangement. LeBaron & Jensen did not address this argument in their briefing and appeared to concede Schvaneveldt's point during oral argument. The Assignment of Claim, however, directly states the terms of LeBaron & Jensen's fee agreement with ReMax. It states:

... after the consideration amount is paid to ReMax, . . . Tim Shea and Tim's lawyer will thereafter receive the remainder of whatever is recovered, to be split in accordance with the agreement between Tim Shea and Tim's lawyer.

This language is somewhat ambiguous. The court, however, finds that the mutual intent of Remax and LaBaron & Jensen was that ReMax was to pay for LeBaron & Jensen's services pursuant to a preexisting fee agreement between Shea and LeBaron & Jensen. Schvaneveldt has not presented any evidence that the contingency agreement between Shea and LeBaron & Jensen was not in writing.<sup>8</sup> Accordingly, this court cannot determine that LeBaron & Jensen has violated rule 1.5.

Even if the court did find a violation of the rules of professional conduct, the court does not believe imposing a sanction denying a client's motion for attorney fees is an appropriate sanction for a client's attorneys' violations of the Utah Rules of Professional Conduct, especially when that client has not raised the issue or objected.

Schvaneveldt also argues, without citing any supporting authority, that ReMax is not entitled to fees incurred prior to December 17, 2010, when this court granted Still Standing Stables' Motion to Enforce a Mandatory Dispute Resolution Agreement. The court is not

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<sup>8</sup> Shea's contingency fee agreement with LeBaron & Jensen is somewhat unique: Shea agreed to pay LeBaron & Jensen's normal hourly rate only if he prevailed on the commission claim. Though an unusual contingency agreement, it is a bargain the parties could make; it is, therefore, reasonable.

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persuaded. ReMax is entitled to those fees which are reasonable and necessary. Despite the fact that ReMax's initial claims were dismissed in favor of enforcing the dispute resolution agreement, the dismissal was without prejudice, and the effort expended on this case prior to that time was equally reasonable and necessary to pursuing its case. Additionally, that work performed prior to the Second Amended Answer, which added Schvaneveldt as a defendant, was also reasonable and necessary. Indeed, it was during discovery conducted prior to the time Schvaneveldt was added as a defendant that ReMax learned that Schvaneveldt was personally liable for the commission.

Lastly, Schvaneveldt argues that ReMax is not entitled to attorney fees against him because "There is no mention of Chuck Schvaneveldt . . . in the Assignment." Motion to Strike and Response to Plaintiffs' Motion for Determination and Award of Attorney Fees at 13. Schvaneveldt points to a completely irrelevant document. ReMax asserts that it is entitled to attorney fees under the For Sale By Owner Commission Agreement.

Accordingly, the court determines that ReMax is entitled to an award of attorney fees. ReMax's fees are to be calculated in accordance with Shea's agreement with LeBaron & Jensen, i.e., because Plaintiffs prevailed, ReMax must pay LeBaron & Jensen their hourly rate. The court will analyze LeBaron & Jensen's affidavit of fees utilizing the same principles as outlined in its discussion regarding Code's motion for fees.

Attorney LeBaron's affidavit reflects that five attorneys from his firm worked on ReMax's case: Brian Duncan, Tyler Jensen, Mary Decker, Elicia Hansen, and himself. LeBaron's, Duncan's, and Jensen's hourly rate was \$200.00 per hour. At the beginning of this case, each had practiced law for about eight years. The court finds that \$200.00 per hour is a

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reasonable fee for their services. Decker and Hansen each had one year experience at the time that they helped with the case. Their hourly rate was \$150.00 per hour. The court finds that \$150.00 per hour is a reasonable rate for their services.

With respect to the charges listed in LeBaron's affidavit, the court makes the following findings: (1) LeBaron & Jensen did not represent Tim Shea as a party in this case. This should have been readily apparent to LeBaron & Jensen from the moment this court granted their first motion to amend in 2008, but specifically stated that Shea did not have a claim. (2) This case has been extremely complex. Nonetheless, some of this case's burden could have been avoided if LeBaron & Jensen had heeded this court's directive that Tim Shea could not assert a claim and refrained from repeatedly asserting that motions were being filed both on his behalf and on behalf of ReMax. The court believes ReMax is responsible for its own fees that were generated due to this confusing act. (3) Likewise, LeBaron & Jensen spent a vast amount of time responding to motions brought by Fuller which lacked merit and did nothing more than repeat previously rejected arguments. The court believes Schvaneveldt is responsible for his attorneys' repeated attempts to assert matters the court had already rejected.

Pursuant to the principles outlined above, both in the preceding paragraph and in the discussion of Code's motion for attorney fees, the court finds that all of LeBaron & Jensen's claimed attorney fees are reasonable and necessary with the following exceptions:

1. Page 3, line 4, "05/22/2008 . . . Draft Answer and Counterclaim against Still Standing Stables" shall be reduced from one hour to thirty minutes because ReMax lost the Counterclaim against Still Standing Stables.

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2. Page 3, line 5, "05/28/2008 . . . Revise and draft Tim Shea Answer and Complaint" shall be excised because Tim Shea's "Complaint" was stricken.
3. Page 5, line 11, "02/10/2009 . . . research issue of attorney client privilege and review of Complaint." The court believes this research is likely related to LeBaron & Jensen's own professional obligations. It is unreasonable to expect Scvaneveldt to pay for it.
4. Page 5, line 13, "03/03/2009 . . . Review e-mails and send e-mails out" shall be excised for lack of an explanation concerning the relationship to the case.
5. Page 7, line 7, "06/26/2009 . . . Read and respond to e-mails" shall be excised for lack of an explanation concerning the relationship to the case.
6. Page 9, line 5, "09/10/2009 . . . Researched case law regarding partial motion for summary judgment as to the ready, willing and able buyer issue. Began drafting Memorandum in support of the Motion" shall be reduced from 8 hours to 4 hours. The court feels that this entry, in conjunction with previous billable entries, reflects an excess of time researching a single issue.
7. Page 11, line 14, "04/07/2010 . . . Prepare Motion in Opposition for Motion for more time" shall be excised. The court feels that this is an iconic example of the attorneys' failure to communicate with each other, and give reasonable extensions of time when requested. The court will not reward inflexibility regarding deadlines to be rewarded with a grant of attorney fees. See Utah Standards of Professionalism and Civility, Rules 10 and 14.
8. Page 13, line 3, "07/27/2010 . . . Attend failed deposition for ReMax." Without more information concerning why this deposition failed, the court is not willing to require Schvaneveldt to pay for it.

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9. Page 13, line 8, "09/02/2010 . . . Memorandum in Opposition to Code's Motion for Summary Judgment on Attorney Fees. Filed on 09/07/2010." This work was caused by LeBaron & Jensen's own failure to clearly identify their attorney client relationship and continued filings naming Shea as the party in interest despite that his claims had been stricken. Accordingly, neither party shall be compensated for work associated with Code's first two motions for attorney fees.
10. Page 13, line 10, "09/16/2010 . . . Review and initial research of Replay on Code's Summary Judgment Motion." This work pertained to Code's first motion for attorney fees.
11. Page 13, line 10, "09/20/2010 . . . Motion and Memorandum to Strike Reply Memorandum. Filed on 09/22/2010." This work pertained to Code's first motion for attorney fees, and was without merit.
12. Page 13, line 11, "10/06/2010 . . . Reply Brief on Motion to Strike. Filed on 10/12/2010." This work pertained to Code's first motion for attorney fees, and was without merit.
13. Page 14, line 1, "10/07/2010 . . . Phone call with clerk about Motion to Strike." This work pertained to Code's first motion for attorney fees, and was without merit.
14. Page 16, line 1, "12/10/2010 . . . Meeting with Miles and review of Cathy Code's Summary Judgment Motion. Filed 12/13/2010." This work pertains to Code's second motion for attorney fees, which was caused by ReMax's inclusion of Shea's stricken claims in the Second Amended Answer and Counterclaim.
15. Page 16, line 2, "12/13/2010 . . . Read and respond to Mediation e-mail; review of Summary Judgment Motion; work on Response to Motion for Summary Judgment." This shall be

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reduced from 5.7 hours to .3 hours. The work related to the motion for summary judgment is related to Code's second motion for attorney fees.

16. Page 16, line 3, "12/13/2010 . . . Finish draft of Memorandum in Opposition to 2<sup>nd</sup> Code Attorney Summary Judgment; Discuss new SSS Motion fro Summary Judgment; make revisions to Code Motion and review Still Standing Stables' Motion." This shall be reduced from 4.4 hours to 2.2 hours because some of the work is related to Code's second motion for attorney fees.
17. Page 16, line 9, "12/30/2010 . . . Study docket and file and do research on issues of the dismissal; check docket and prepare various objections and responses to current pleadings such as submission and objections; put together game plan and list of pleadings to prepare." This shall be reduced from 4.9 hours to 4 hours. The court believes that some of this work was in anticipation of filing a rule 60(b) motion challenging the court's order enforcing mandatory mediation. This order was sound, and any challenges thereto were without merit. The court will not require Schvaneveldt to pay for ReMax's refusal to accept this court's judgment.
18. Page 16, line 10, "12/31/2010 . . . Research on issues of fraud on court and 60(b)(3) issues." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.
19. Page 16, line 11, "01/03/2011 . . . Revise and file objections and reply to objection (fld on 01/03.2011); prepare Reply Memo as to Code on Motion to Amend; prepare Memorandum in Opposition to time to Extend Answer to our Motion for Summary Judgment or to Strike; Work on 60(b) Motion. Files on 01/10/2011." This work shall be reduced from 5.9 to 3.9



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hours. Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.

20. Page 17, line 2, "01/10/2011 . . . Finish 60(b) Motion and Prepare MOP to Motion to Strike 3<sup>rd</sup> Motion to Amend . . . ." This work shall be reduced from 3.4 hours to 2.4 hours. Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.
21. Page 17, line 4, "01/13/2011 . . . Review of Cathy Code's Reply Memo . . . on Motion for Summary Judgment." This work is related to Code's second motion for attorney fees.
22. Page 17, line 6, "02/01/2011 . . . Read and Draft Opposition to Motion to Extend 60(b) Answer." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.
23. Page 17, line 7, "02/02/2011 . . . Prepare exhibits for Memorandum in Opposition to Motion to Extend Answer to 60(b)." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation..
24. Page 18, line 3, "03/22/2011 . . . Review latest pleading; work on Reply to 60(b) Motion . . ." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.
25. Page 18, line 4, "03/22/2011 . . . Work on reply to 60(b) . . . ." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.

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26. Page 18, line 9, "03/25/2011 . . . Continued work on Reply Memorandum for 60(b) Motion."

Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.

27. Page 18, line 10, "03/28/2011 . . . Prepare for Filing and hand deliver 60(b) Reply

Memorandum to Court." Like those fees described in paragraph 17 above, this work deals with ReMax's rule 60(b) motion challenging the court's order to enforce mandatory mediation.

28. Page 18, line 14, "06/06/2011 . . . Review of various documents regarding bankruptcy of

Tim Shea; review of Bankruptcy code and Utah law regarding interest in contingency fee case, draft objection to Motion to Settle." Work related to Tim Shea's Bankruptcy is unnecessary because Tim Shea was not LeBaron & Jensen's client in this case. While this work may be important with respect to Shea's status as a client outside of this litigation, LeBaron & Jensen have not shown how this work was necessary to pursuing ReMax's claim for a commission.

29. Page 18, line 15, "06/06/2011 . . . Work with Tyler Jensen to get Objection to Settlement put together and filed." This work deals with Shea's bankruptcy proceedings.

30. Page 19, line 1, "06/20/2011 . . . Meeting with Mike Bingham to go over additional research for objection to Motion to settle as filed by David Miller." This work deals with Shea's bankruptcy proceedings.

31. Page 19, line 2, "06/21/2011 . . . Telephone call with David Miller." This work deals with Shea's bankruptcy proceedings.

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32. Page 19, line 3, "06/22/2011 . . . Conducted extensive research and talked with Miles about research findings . . . ." This work deals with Shea's bankruptcy proceedings.
33. Page 19, line 4, "06/23/2011 . . . Prepare for, travel to and from, and appear at hearing in Bankruptcy Court . . . ." This work deals with Shea's bankruptcy proceedings.
34. Page 19, line 5, "06/24/2011 . . . Discussion with Miles LeBaron regarding how to proceed with the Bankruptcy matter . . . ." This work deals with Shea's bankruptcy proceedings.
35. Page 19, line 6, "06/24/2011 . . . Strategy discussion with Tyler Jensen on when to approach David Miller again about abandoning the claim . . . ." This work deals with Shea's bankruptcy proceedings.
36. Page 19, line 8, "08/18/2011 . . . Phone call to heath Isaacs to talk about how the hearing on the objection to Tim Shea's exemption status on the real-estate commissions . . . ." This work deals with Shea's bankruptcy proceedings.
37. Page 20, line 2, "10/12/2011 . . . Phone call from Tim Shea to discuss case status and strategy; Draft email to Heath Isaacs, Bankruptcy counsel . . . ." This work deals with Shea's bankruptcy proceedings.
38. Page 33, line 8, "11/27/2012 . . . Review previous associate's work on attorney fees issue. . . ." The court will not allow recovery of fees for duplicate work due to change of attorneys.
39. Page 35, line 7, "01/04/2013 . . . Review of Code Motion for Attorney fees." This deals with the claim that ReMax lost.
40. Page 35, line 9, "01/04/2013 . . . Draft Memorandum . . . ; Began review of Cathy Code's Motion for Attorney Fees." This work shall be reduced from 6.5 hours to 4 hours because some of the work deals with the claim that ReMax lost.

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41. Page 36, line 2, "01/15/2013 . . . Discussion with Elicia Hansen regarding opposing counsel's Motion for Attorney Fees . . . ." This deals with the claim that ReMax lost.
42. Page 36, line 3, "01/16/2013 . . . Review Motion for Attorney fees (Code's); Discuss case with Miles; review case law; review Affidavits; Review Miles' Reply Memorandum on Motion to Quash." This work shall be reduced from 4.1 hours to 2 hours because some of the work deals with the claim that ReMax lost.
43. Page 36, line 4, "01/16/2013 . . . Work on Memorandum in Opposition to Motion to Quash Supplemental Order; Continued work with Brian Duncan on Memorandum in Opposition to Cathy Code's Motion for Attorney Fees." This work shall be reduced from 2.4 hours to 1.2 hours because some of the work deals with the claim that ReMax lost.
44. Page 36, line 5, "01/21/2013 . . . Continued research and drafting on issue of attorney fees categorizing and reasonableness." This work shall be reduced from 2.8 hours to 1.4 hours because this description does not specify whether this work was done to support ReMax's motion for fees or to defend Code's motion for fees.
45. Page 36, line 6, "01/22/2013 . . . Work on finishing draft of issue of reasonable and categorized attorneys fees." This work shall be reduced from 1.8 hours to .9 hours because this description does not specify whether this work was done to support ReMax's motion for fees or to defend Code's motion for fees.
46. Page 36, line 7, "01/22/2013 . . . Work on research and drafting Memorandum in Opposition to Charles Schvaneveldt's Motion for New Trial; Meet wit [sic] Syracuse City Attorney on issues of alleged criminal conduct." This work shall be reduced from 4.7 hours to 2.5 hours

because this description does not indicate how the meeting regarding criminal conduct related to prosecution of ReMax's claim for a commission against Schvaneveldt.

47. Page 37, line 7, "02/01/2013 . . . Work on Memorandum in Opposition to Cathy Code's Motion for Attorney's Fees . . . ." This work deals with a claim that ReMax lost.

48. Page 37, line 8, "02/06/2013 . . . Discussion with Miles about Attorneys fees Motion (Cathy Code's)." This work deals with a claim that ReMax lost.

Having reviewed all of the billing in LeBaron's affidavit, which amounted \$160,978.50, and accounting for the above deductions, which amount to \$13, 607.50, the court orders that ReMax may recover attorney fees in the amount of \$147,371.00.

Further the court finds that all of LeBaron & Jensen's claimed costs are reasonable and necessary with the following exceptions: (1) Page 13, line 7, "09/01/201 Copies"; and (2) "Page 27, line 7, "08/02/2012 . . . Airfare for Hilary 'Skip' Wing to fly here for the Trial." Copies are not "fees that are required to be paid to the court and witnesses" and are not recoverable.

Further, the costs of a client attending the trial is not a taxable cost. ReMax requested \$2,887.26 in costs, these deductions total \$579.00. Accordingly, ReMax may recover \$2,308.26 in costs.

**Still Standing Stables' and Code's Memorandum of Costs**

On January 9, 2013, SSS and Code, both prevailing parties in this case, filed a Memorandum of Costs pursuant to Utah R. Civ. P. 54(d)(2). Plaintiffs failed to file the required "motion to have the bill of costs taxed by the court," advising the court of their objection to any costs included in SSS's and Code's Memorandum. The court is tempted to award the requested costs based solely on Plaintiffs' failure to object. However, given this court's responsibility to

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do justice and only award those costs permitted under rule 54(d), the court determines that it will evaluate the Memorandum of Costs on the merits.

Rule 54(d)(1) of the Utah Rules of Civil Procedure states that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Accordingly, the costs claimed must be incurred by a prevailing party to the action. Here, Plaintiffs brought claims against three defendants: Still Standing Stables, L.C.; Cathy Code; and Chuck Schvaneveldt. The claims against Still Standing Stables and Code were dismissed, but Plaintiffs prevailed on their claims against Schvaneveldt. Based on the fact that two of the three defendants prevailed, and their costs were shared during the course of litigation, SSS and Code assert that they are entitled to two-thirds of the costs incurred. SSS and Code, however, do not point to any law which allows for such a blunt division of the costs incurred, or explain how the division of costs were billed to the individual defendants. This blunt division is especially troubling because SSS was named as a defendant in ReMax's September 10, 2008 Amended Complaint, but Schvaneveldt and Code were not added as defendants until the September 10, 2009 Second Amended Answer and Counterclaim. Clearly the costs were not equally divided between the defendants.

The only meaningful distinction that the court can conclude is to permit SSS to recover its taxable costs which were incurred during that period when SSS was the only named defendant. Once Schvaneveldt and Code were added as defendants and began sharing their costs with SSS, it becomes impossible to distinguish the costs incurred on behalf of Schvaneveldt, a losing party, from the costs incurred by SSS or Code in any meaningful way, at least based on the cursory information provided by SSS and Code.

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According to the Memorandum of Costs, SSS incurred the following costs before Schvaneveldt and Code were added as defendants: (1) the costs associated with the depositions of Chuck Schvaneveldt, Tim Shea, John Doxey, Nina Cleere, and Cathy Code, totaling \$2,659.73; and (2) \$35.00 to subpoena Metro National Title.

The court may only award the prevailing party its costs of depositions if

it finds that the depositions are taken in good faith, and are essential to the party's development and presentation of its case, either because the depositions were used in a meaningful way at trial, or because the development of the case was of such a complex nature that the information provided in the deposition could not have been obtained through less expensive means of discovery.

*Young v. State*, 2000 UT 91 at ¶ 23. Here, as illustrated above, this case has a long and complex history, and the court believes SSS conducted the five depositions in good faith. Accordingly, in light of Plaintiffs' failure to specifically object to any of the depositions in writing, as required by rule 54(d)(2), the court assumes that SSS's depositions were reasonable and necessary to obtain the information provided, and SSS is entitled to recover those costs.

Regarding the \$35.00 subpoena fee related to Metro National Title, "costs" as defined in rule 54(d) are "fees that are required to be paid to the court and witnesses." *Id.* see also *Beaver v. Quest, Inc.*, 31 P.3d 1147 (Utah 2001) (excluding a contour model, photographs, and certified copies as not taxable costs of court). While the cost of serving a subpoena may be necessary to advance discovery, it is not "fees that are required to be paid to the court and witnesses." Accordingly, SSS cannot recover the \$35.00 costs associated with its subpoena served on Metro National Title.

Accordingly, SSS is entitled to recover \$2,659.73 for those costs associated with the depositions taken prior to the time Schvaneveldt and Code were added as defendants. SSS and

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Code have failed to provide any meaningful way to distinguish their costs from Schvaneveldt's costs after Schvaneveldt was added as a defendant. Therefore, SSS and Code are not entitled to any of their costs incurred after Schvaneveldt was added as a defendant.

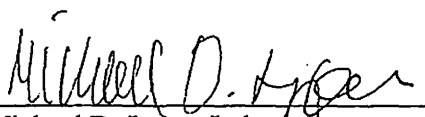
Order

Accordingly, the court orders as follows:

1. Code's Motion for Attorney Fees is granted in part and denied in part. Code may recover \$21,135.50 for the representation of Robert B. Sykes & Associates and \$23,094.00 for the representation of Scott Edgar. In all other respects Code's Motion for Attorney Fees is denied.
2. ReMax's Motion for Determination and Award of Attorney Fees is granted in part and denied in part. ReMax may recover \$147,371.00 in attorney fees and \$2,308.26 in costs.
3. Still Standing Stables and Code's Memorandum of Costs is granted in part and denied in part. Still Standing Stables is entitled to recover \$2,659.73 for those costs associated with the depositions taken prior to the time Schvaneveldt and Code were added as defendants. In all other respects the motion for costs is denied.

This is the Court's final order on attorney fees and costs; no further order pursuant to Rule 7(f) is required.

DATED this 6 day of June 2013

  
Michael D. Lyon, Judge



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CERTIFICATE OF MAILING

I hereby certify that on the 7 day of June, 2013, I sent a true and correct copy of the foregoing ruling to Plaintiff and Defendant as follows:

Robert J. Fuller  
FULLER LAW OFFICE, LC  
1090 North 5900 East  
Eden, Utah 84310  
*Attorney for Defendants Still Standing Stables & Chuck Schvanveldt*

Brian P. Duncan  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd. #200  
Layton, Utah 84041  
*Attorney for Plaintiff ReMax*

Scott R. Edgar  
EDGAR LAW, P.L.L.C.  
379 North 1075 West, Ste. 226  
Farmington, UT 84025  
*Attorney for Cathy Code*

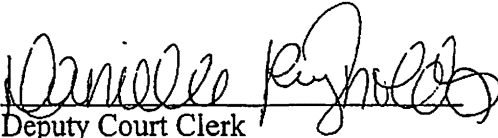
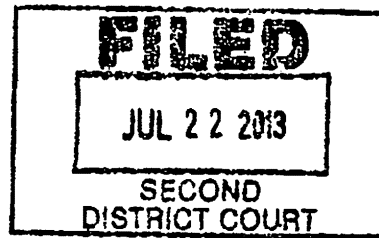
  
Deputy Court Clerk

EXHIBIT 2

July 22, 2013 Ruling

(holding Skip Wing personally liable for attorney fee award)



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

JUL 22 2013

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HILARY "SKIP WING, et al.,  Plaintiffs,  vs.  STILL STANDING STABLE, L.C., et al.,  Defendants.	<b>RULING &amp; ORDER ON MOTIONS TO CLARIFY AND SCHVANEVELDT'S MOTION TO DISMISS COMMISSION CLAIMS BASED ON LACK OF STANDING AND JURISDICTION</b>  Case No. 060906802  Judge Michael D. Lyon
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This matter is before the court on three motions: (1) Plaintiffs' Motion to Clarify, (2) Still Standing Stable's Motion to Clarify and Identify Real Parties, and (3) Chuck Schvaneveldt's Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction.

**Plaintiffs' Motion to Clarify**

On June 6, 2013, this court entered a ruling on Cathy Code's Motion for Attorney Fees, holding that Tim Shea was not liable for Ms. Code's attorney fees because he had not filed an action against Ms. Code. The ruling also held that with respect to the other plaintiffs' claims, Ms. Code is the prevailing party and is entitled to her reasonable and necessary attorney fees. The court's ruling continued a longstanding practice, advanced by Plaintiffs, of asserting that the "plaintiffs" functioned as a singular unit. Plaintiffs now seek to draw a distinction between Hilary "Skip" Wing, and the other Plaintiffs, arguing that Mr. Wing, unlike the other Plaintiffs, never asserted that he was a party to the For Sale By Owner Agreement ("FSBO") on which

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Code's Motion for Attorney Fees was based, and, therefore, he cannot be held personally liable for Ms. Code's attorney fees.

Plaintiffs' January 31, 2012 Third Party Complaint against Cathy Code was filed by "Elite Legacy Corporation D/B/A Re/Max Elite, Aspenwood Real Estate Corporation D/B/A Re/Max Elite, and Hilary Owen "Skip" Wing, principal broker D/B/A as Re/Max Elite (hereinafter "ReMax Elite" collectively) . . . ." Third Am. Answer and Countercl. of Timothy Shea and ReMax Elite to the Third Party Compl. of Still Standing Stables, L.C. and Chuck Schvaneveldt; and Third Party Compl. Against Cathy Code at 8 (Jan. 31, 2012). The Complaint never attempts to draw any distinctions between the various plaintiffs. Indeed, the Complaint collectively refers to the plaintiffs as "ReMax." Accordingly, when the collective "ReMax" asserted its claims against Cathy Code, Mr. Wing was included as a plaintiff, and Mr. Wing, like all of the plaintiffs, based his claim for a commission on the For Sale By Owner commission agreement containing the attorney fees provision. Mr. Wing's claim that he never claimed to be a party to the FSBO is unfounded.

A party is entitled to reciprocal fee-shifting by statute when the provisions of a contract would have entitled at least one party to recover its fees had that party prevailed in a civil action based upon the contract.

*Hooban v. Unicity Int'l, Inc.*, 285 P.3d 766, 772 (Utah 2012). Accordingly, because Mr. Wing, as part of the collective ReMax, asserted a cause of action against Ms. Code based upon the FSBO, and because Ms. Code prevailed on that cause of action, Mr. Wing, like the other plaintiffs, is liable for Ms. Code's attorney fees.

The court finds Mr. Wing's policy arguments unpersuasive. First, it is unclear whether Mr. Wing had any obligation to join himself as a party in this suit. ReMax's corporate entities

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had already asserted their claims for the commission, and, in response to Defendants' arguments that the corporate entities lacked standing, Mr. Wing added himself as a plaintiff. Plaintiffs argue that they only added Mr. Wing as a plaintiff out of an abundance of caution and to avoid continued haranguing over what they viewed as a non-issue being raised by defendants. The reasons that Plaintiffs chose to add Mr. Wing as a party in this action, however, are immaterial. Mr. Wing must accept the natural consequences of naming himself a plaintiff. It was his decision to join himself as a plaintiff, unaided by anything Defendants did and uninfluenced by any order of this court indicating that it was necessary. The court has never ruled that Mr. Wing was a necessary party, and it need not do so now. The fact is, Mr. Wing was added as a plaintiff.

Second, assuming Mr. Wing was a required party, there is no incentive for Mr. Wing not to file this claim. Because Tim Shea was ultimately entitled to recover his commission, Mr. Wing had two choices: (1) he could file this claim and recover the commission on Mr. Shea's behalf, or (2) he could wait for Shea to sue him for the entire commission. The court fails to see how imposing attorney fees will alter this decision-making process.

Lastly, Mr. Wing cannot receive all of the benefits of the FSBO without accepting all of the risks associated with that agreement. Here, Mr. Wing successfully pursued an action against the defendant Chuck Schvaneveldt, and based on the very attorney fees provision he now seeks to avoid liability for, recovered attorney fees against Chuck Schvaneveldt. Allowing Mr. Wing to both recover attorney fees from Mr. Schvaneveldt and avoid liability for Ms. Code's attorney fees would be incongruous.

**Defendants' Motions to Dismiss/Clarify**

On June 25, 2013, Still Standing Stables ("SSS") filed its Motion to Clarify Rulings and Identify Real Parties, and on June 28, 2013, Schvaneveldt filed yet another motion to dismiss for lack of standing and jurisdiction. As both motions were prepared by attorney Robert Fuller and contain similar arguments, the court will address them both here.

At the outset, the court expresses its dismay that Schvaneveldt and SSS continue to raise issues concerning standing after this case has already been through a jury trial and attorney fees have been awarded. Standing is a jurisdictional issue that can be raised at any point during litigation. *Sonntag v. Ward*, 2011 UT App. 122, ¶ 2. This court, however, loses jurisdiction once a final judgment is entered. This court entered a judgment of \$212,806.70 against Schvanveldt on January 2, 2013. This case is over. A jury heard the issues, and the court awarded attorney fees to the prevailing parties. Issues regarding standing should have been raised years ago.

The Court acknowledges that Defendants' current motions regarding standing are partially prompted by Plaintiffs' unmeritorious argument that Mr. Wing is not a party subject to liability for the award of attorney fees, but a simple memorandum in opposition to Mr. Wing's Motion to Clarify should have sufficed. This is precisely the type of cumulative and unnecessary motion that justified the significant attorney fees awarded in this case, and caused this case to languish on the court's docket for years.

Despite the court's hesitancy to even address Defendants' standing arguments, the court, out of an abundance of caution, will briefly address each of Defendants' arguments.

First, on the basis of "recent discoveries regarding the true ownership of Remax Elite" Schvaneveldt argues that none of the plaintiffs were parties to the FSBO or Real Estate Purchase

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Contract ("REPC"), but rather that the dba "ReMax Elite" was registered to Dale Quinlan ("Quinlan") at the time the FSBO and REPC were signed, and that Quinlan never transferred the rights under the agreement to any of the plaintiffs. Raising this question of fact concerning the standing of the plaintiffs at this late date is unwarranted. Utah Rules of Civil Procedure 60(b), governing motions for relief from judgment, is instructive here. It states that relief from judgment based on new evidence is only permissible if (1) the motion is filed within three months after the judgment, and (2) due diligence could not have discovered the new evidence in time for a new trial under Rule 59(b). Judgment against Schvanveldt was entered in January 2013. Further, that judgment was entered based on a jury verdict entered in August 2012. Until this time, all of the parties had agreed that Mr. Wing was the principal broker of ReMax Elite, the contracting party. In fact, Defendants abandoned their previous arguments regarding standing once Mr. Wing was added as a plaintiff. Raising new factual issues nearly a year after a jury trial and six months after entry of judgment will not be permitted. Even if this motion were timely, Schvaneveldt has provided no explanation for why this new evidence could not have been discovered in time for a rule 59(b) motion. This case was filed in 2006, and the issues regarding the commission were first raised in 2008. It is beyond belief that Schvaneveldt could not have discovered this evidence with due diligence.

Even if the court were inclined to consider Schvanveldt's new factual assertions, Schvanveldt's evidence attached to his Motion to Dismiss does not contradict the presumption that has always been present in this case, i.e., that Mr. Wing was the principal broker associated with the FSBO. Schvaneveldt's evidence only shows that the dba Remax Elite was transferred to

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Skip Wing a short time after the FSBO and REPC were consummated. It does not show that Quinlan did not assign the claims at some other time.

Schvaneveldt's tries to establish that Quinlan did not transfer his claims to Mr. Wing by submitting his July 8, 2013 "Supplemental Authority and Exhibits in Support of: Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction" containing an affidavit of Dale Quinlan. Dale Quinlan states, "I do not believe nor do I have any recollection of ever assigning any commission agreement or contract rights between myself, doing business under the assumed name REMA ELITE, and the Seller, specified above, to any other individual nor entity." Based on this statement, and his own observations of the signatures, Schvaneveldt argues that a transfer never occurred and the letters of transfer "appear to be phoney documents filed with the State of Utah Division of Corporations with fraudulent intent."

Even if Rule 60(b) did not bar consideration of Quinlan's affidavit, which it does, the court never granted leave for Schvaneveldt to file "Supplemental Authority and Exhibits" and will not consider it, U.R.C.P. 7(c)(1) ("No other memoranda will be considered without leave of court"), except to note that allegations of forgery and fraud are affirmative defenses which must be raised in Defendants' Answer. U.R.C.P. 8. Although Defendants' Answer raised issues of forgery and fraud with respect to the FSBO and REPC, Defendants never raised any such issues pertaining to any Letter of Transfer; accordingly, such arguments are waived.

Second, SSS argues that because Mr. Wing argues in his Motion to Clarify that he was not a party to the FSBO, Mr. Wing lacked standing to sue for the commission. Having rejected Mr. Wing's arguments, however, this issue is moot. The facts and procedural posture of this case are clear. Mr. Wing, as part of the collective "ReMax," sued the defendants for the



RULING & ORDER ON MOTIONS TO CLARIFY AND SCHVANEVELDT'S MOTION TO DISMISS  
COMMISSION CLAIMS BASED ON LACK OF STANDING AND JURISDICTION

Case No. 060906802

Page 7 of 10

commission based on the FSBO, and Mr. Wing is the principal agent of ReMax, that was named as a party to the FSBO. Accordingly, Mr. Wing has standing to assert the commission claim. Defendants nearly admitted as much by abandoning their standing arguments once Mr. Wing was added as a plaintiff.

Third, SSS argues that Elite Legacy Corporation does not have standing to sue because it was not a party to the FSBO and did not exist when the FSBO and REPC were signed. Elite Legacy Corporation and Aspenwood Real Estate Corporation are separate corporate entities that owned the dba ReMax Elite at different times. Both corporations have been plaintiffs in this action ever since the Third Amended Complaint was filed, and both entities were formed by the same principal agent, Mr. Wing. The court sees no value in drawing a distinction between them at this time, when both entities are ultimately controlled by Mr. Wing, who is jointly liable.

Fourth, SSS argues that Aspenwood Real Estate Corporation does not have standing to sue because it assigned its commission cause of action to Tim Shea. Although "ReMax" executed an Assignment containing language purporting to transfer "any and all claims, demands, and causes of action of any kind whatsoever which ReMax has or may have against Still Standing Stables, LLC," to Tim Shea, it is clear that the parties intended for ReMax to retain the right to pursue the commission claim. Specifically, the Assignment states, "Tim's lawyer may represent Tim's interests and act as co-counsel for ReMax in pursuing *ReMax's offensive claim . . .*" (emphasis added). Further, the Assignment contemplates that Tim Shea did not have the right to bring the commission cause of action, stating ". . . the parties agree that it will be best if Tim prosecutes, collects, settles, compromises, and grants releases in ReMax's name . . . ." Accordingly, the court interprets the Assignment as giving Tim Shea the right to collect the

benefits of the commission claim, minus the first \$10,000, and the right to direct the prosecution of the claim, but ReMax retained the right to stand as the formal party asserting the cause of action. This interpretation is strengthened by the timing of the Assignment, September 2008, the same month that this court granted ReMax and Shea's first motion to amend but clarified that only the principal broker could assert the commission claim. Ruling Granting Motion for Leave to Amend, (September 2, 2008).

Lastly, Defendants insist that Aspenwood and Elite Legacy do not have standing because they are defunct corporations, and are not "principal brokers." This is an exact replica of standing arguments asserted years ago, which Defendants abandoned because Mr. Wing was added as a plaintiff. Defendants were wise to abandon this argument after Mr. Wing was added as a party, and they should not have resurrected it here. Because Mr. Wing is the principal of both corporations, and a party to this action, drawing a distinction between them is meaningless.

The parties' requests for a hearing on these matters are denied; oral argument will not assist the court in deciding the issues herein addressed.

#### **Order & Judgment**

Accordingly, Defendant Chuck Schvaneveldt's Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction is denied. To the extent that Defendant Still Standing Stable's Motion to Clarify seeks dismissal of Plaintiffs' commission claim, it is denied. To the extent that the parties' seek clarification regarding who is a judgment creditor and who is a judgment debtor, the court finds and rules as follows:

RULING & ORDER ON MOTIONS TO CLARIFY AND SCHVANEVELDT'S MOTION TO DISMISS  
COMMISSION CLAIMS BASED ON LACK OF STANDING AND JURISDICTION

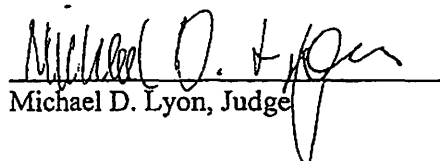
Case No. 060906802

Page 9 of 10

- (1) On January 2, 2013, pursuant to a jury verdict, the court entered judgment for \$212,806.70 against Schvaneveldt and in favor of all three plaintiffs named in this action.
- (2) Pursuant to the court's June 6, 2013 order granting an award of attorney fees, the court now amends the January 2, 2013 judgment to include the attorney fees and costs of \$149,679.26 against Chuck Schvaneveldt and in favor of all three named plaintiffs in this action. The new judgment against Chuck Schvaneveldt shall total \$362,485.96.
- (3) Pursuant to the court's June 6, 2013 order granting an award of attorney fees, the court orders that judgment for \$44,229.50 be entered against all three named plaintiffs in this case, including Hilary "Skip" Wing, and in favor of Cathy Code.
- (4) Pursuant to the court's June 6, 2013 order granting an award of attorney fees, the court orders that judgment for \$2,659.73 be entered against all three named plaintiffs in this case, including Hilary "Skip" Wing, and in favor of Still Standing Stables.
- (5) Post-judgment interest shall accrued at the rate of 2.16%.

No further order pursuant to rule 7(f) is required. The court is satisfied that this case is closed.

DATED this 22 day of July 2013

  
Michael D. Lyon, Judge

RULING & ORDER ON MOTIONS TO CLARIFY AND SCHVANEVELDT'S MOTION TO DISMISS  
COMMISSION CLAIMS BASED ON LACK OF STANDING AND JURISDICTION

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CERTIFICATE OF MAILING

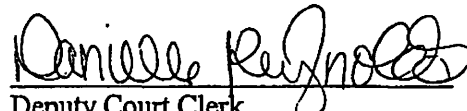
I hereby certify that on the 23 day of July, 2013, I sent a true and correct  
copy of the foregoing ruling to Plaintiff and Defendant as follows:

Brian P. Duncan  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd. #200  
Layton, Utah 84041  
*Attorney for Plaintiff*

Robert R. Wallace  
KIRTON & MCCONKIE  
60 East South Temple #1800  
P.O. Box 45120  
Salt Lake City, UT 84145  
*Attorney for Plaintiff*

Robert J. Fuller  
FULLER LAW OFFICE, LC  
1090 North 5900 East  
Eden, Utah 84310  
*Attorney for Defendant*

Scott R. Edgar  
EDGAR LAW, PLLC  
1379 North 1075 West, Ste. 226  
Farmington, UT 84025  
*Attorney for Defendant*

  
Deputy Court Clerk

**EXHIBIT 3**

October 4, 2014 Ruling  
(trial court's finding that Skip Wing  
is not personally involved in the lawsuit)

The Order of Court is stated below:

Dated: October 04, 2014  
08:30:34 AM

/s/ Noel S. Hyde  
District Court Judge



**L. MILES LEBARON (#8982)  
BRIAN P. DUNCAN (#11487)  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd., Suite 230  
Layton, Utah 84041  
Telephone: (801) 773-9488  
Facsimile: (801) 773-9489**

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**IN THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY,  
STATE OF UTAH, OGDEN DEPARTMENT**

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**Hilary "Skip" Wing, et al,**

**Plaintiffs,**

**vs.**

**Still Standing Stable, L.C., et al.**

**Defendants.**

**Ruling and Order on June 18,  
2014 Hearing on Defendants'  
Rule 52(b) Motion and  
Stipulated Motion to Release  
Bond**

**Civil No. 060906802**

**Honorable Noel S. Hyde**

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On June 18, 2014, the Honorable Noel S. Hyde held a hearing on Defendants' Rule 52(b) Motion and the Stipulated Motion to Release Bond. L. Miles LeBaron of LeBaron & Jensen, P.C. appeared for the Plaintiffs; Robert J. Fuller appeared for Defendant Chuck Schvaneveldt and Still Standing Stables, L.C.; Scott R. Edgar appeared for Third-Party Defendant Cathy Code; and Alan S. Mouritsen of Parsons Behle & Latimer appeared for Defendant Chuck Schvaneveldt.

### **Ruling on Defendants' Rule 52(b) Motion**

The Court considered the Defendants' Rule 52 (b) Motion. Having reviewed the Motion and having heard the statements of the parties, the Court made the following Ruling from the Bench:

The motion has been brought pursuant to Rule 52(b), which does permit amendment of findings, or the making of additional findings, subject to a motion brought within ten days after entry of a final judgment.

The first issue to address in this case is the timeliness of the motion, and the Court rules that the motion is timely.

The final judgment, within the meaning of the rule, was entered in this case on July 22<sup>nd</sup>. And this motion was brought on August 5<sup>th</sup>, which is within the ten-day timeframe as defined by the rule, and the motion therefore is timely and will be considered by the Court.

Motions under Rule 52 permit modification or amendment of findings or additional findings to be judgments that are consistent with those modifications. The request in the present case seeks a modification or amended findings that relate to the ownership interest in a dba, and the involvement of Mr. Skip Wing in connection with the transactions which were the subject of the underlying proceeding.

They also seek modifications with respect to findings or additional

findings with respect to an assignment that has been identified as the Tim Shea assignment.

Having considered all of the arguments and the written materials which have been presented, the Court notes that Rule 52 (b) permits that a motion under 52(b) for amendment may be combined with a motion for new trial under Rule 59. Motions under Rule 59 may also, in appropriate circumstances, address requests for modification of findings or judgments.

And specifically, in reference to Rule 59, the provision that permits modification is found in Rule 59, subparagraph (e), which referenced specifically a motion to alter or amend a judgment.

And then the language with respect to additional or amended findings is found in the second part of subparagraph (a) of Rule 59.

And in that particular section, with respect to Rule 59, the provision is that a court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings of fact and direct the entry of a new judgment, and then there are particular criteria.

However, that particular provision only applies, and that permission is only granted, or discretion is only available to the Court when the motion is for a new trial in an action tried without a jury.



This case was tried with a jury, and so the alternative under Rule 59(a)(4) that the Court is permitted to consider newly discovered evidence, provides that the party bringing the motion can only produce evidence that he could not with reasonable diligence have discovered and produced at the trial.

That is an issue which has been previously addressed, and this Court's ruling is not going to depart from the prior rulings.

And that is, that the information specifically the documentation from the Department of Corporations, and the information contained in that documentation, also challenges with respect to the validity or invalidity of signatures, and whether or not they're forged or have been cut and pasted, all of those kinds of things were information that could, by reasonable diligence, have been discovered and determined well before a trial was conducted in this case.

The record is abundantly clear that these are all public records. They have been available to all of the parties throughout these proceedings.

There have been references to the dba registration during the trial. There is documentation in the record of the Department of Corporations showing registrations in the corporate names of Elite Legacy and Aspenwood Real Estate. Those are all part of the record in the public file, and they were

all available, as well as records including the signature of Dale Quinlan, which would put anyone on notice of his potential interest in those dbas.

And the Court specifically rules that it is under Rule 59 that new evidence may be considered under appropriate circumstances.

In this case, the Court's ruling is that the Rule 59 latitude for modification of findings and conclusions does not apply and is not available. And even if it were available, would not be justified based upon this evidence, which the Court rules is new evidence, which could reasonably have been known prior to the trial being conducted.

With respect to Rule 52, which is the specific focus of the motion, and the motion which the Court has determined to be timely, the Court's ruling is that there is no latitude under Rule 52 to consider new evidence.

The policy underlying Rule 52 is to make sure that the findings and conclusions that are entered in the record are consistent with the record of the trial. And the opportunity to amend or correct, it is the Court's ruling, is an opportunity to ensure consistency with the trial record, not deviate from the trial record based upon consideration of additional evidence which was not considered or presented at trial.

Further, with respect to these particular issues, the Court notes that when a judgment and verdict are entered, particularly when there is a jury

verdict entered, that any construction of the facts which may be considered by the Court requires the Court to construe the facts that are found, consistent with that judgment, and that if there are alternative constructions of the facts that are possible, from the facts as they are presented, the Court is required to construe those facts consistent with the judgment which was entered.

And in this particular case, the Court's ruling with respect to the present motion is that, as has been demonstrated, there is evidence in the record of this trial, which is consistent with the determinations that were made.

There is evidence in the trial in this case, of the registration of the dba in the names Elite Legacy and Aspenwood Real Estate. And while there certainly is documentation with respect to Mr. Quinlan's interest in the dba, the record of the trial, by acknowledgment of movant's counsel is devoid of any reference at all to Mr. Quinlan. And perhaps on that basis alone, it would be inappropriate for this Court to suggest any modification of the finding, to burden those findings with additional information relating to Mr. Quinlan, when none of that information was presented at trial.

Those issues would be issues that may justify a new trial under Rule 59; however that motion is not before the Court today.

They may also possibly be considered under Rule 60 as alternate grounds for relief from judgment, but they do not form a basis for requested modification under Rule 52(b).

Further, the Court will make its ruling with respect to some of the questions relating to the dba.

The Court's ruling is that a dba is an asset. It is a unique and intangible asset, but nonetheless it is an asset.

The arguments of the parties have repeatedly made reference to the dba being owned. That is a reference to its status as an asset, an intangible personal property asset, and the Court rules that a dba is such an asset, and it can be owned.

And a dba, like other assets, may be owned or held or transferred by different parties, under different circumstances, and in different capacities.

The fact that an individual's name is associated with a particular asset does not necessarily mean that it is presumptively established that all rights or attributes of that asset are exclusively held by the individuals in whose name the asset is held.

It is possible, for example, for assets to be held in a representative capacity, or as agents for others.

It is also possible for assets to be held in a somewhat segregated

capacity, where a legal title is held in one particular name, but equitable interests are actually owned by someone else.

There has been nothing suggested in the arguments before the Court that some other alternative explanation of the ownership, or the listings of this asset in the name of Mr. Quinlan, could justify exactly the same record that exists, and support the findings exactly as they were found.

There is evidence, and the evidence has even been discussed, that Mr. Quinlan was a principal broker for one of the business entities that was involved. He may very well have been acting as an agent for that business entity, or his name on that document may be in a representative capacity for that entity.

And the Court is required again to construe the construction of facts to be supportive of the judgment, if such a construction is possible. And the Court rules, in this case, that it is.

With respect to Mr. Quinlan, therefore, the Court finds the argument that simply his appearing on the initial application is conclusive of his ownership interest of all rights associated with that asset, from the time of the original application through the time of the purported assignment to, Still Standing Stable, is simply not a persuasive argument.

And the circumstances of this case, in fact, suggest to the contrary

that he may have been simply functioning in his capacity as a participant in the business entity that owned the dba of Re/Max Elite, when his name was placed on that document.

The Court further notes that many of the entities, Re/Max Elite being one, Elite Legacy being one, Aspenwood Real Estate being one, are all legal fictions. They are not tangible entities. They are not living and breathing. They exist as a bundle of legal rights.

And they may represent individuals, they may represent associations of individuals, they could be represented or effectively owned or controlled by joint ventures or by partnerships. A general partnership can be established by an oral agreement, as can a joint venture.

And all of those are possibilities that could explain the particular name as it appears on the original application, and be entirely consistent with the determinations which had previously been made, and the findings of the Court; and therefore, the Court rules that there has not been a sufficient showing to justify a modification of the findings as they relate to the ownership of the dba.

Further, there has been a request for modification of the findings as it relates to Mr. Skip Wing, based upon his articulation in various statements that he did not individually own or control the rights that were being

asserted in the litigation.

That particular position is not disputed, either in the testimony of Mr. Wing or in the arguments of plaintiff's counsel, and the Court believes that it is appropriate to make a clarification and modification to the existing rulings with respect to that issue.

And that clarification will be that, to the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims.

So the Court is not going to modify the findings to the extent of excluding his name, but will include the modification that to the extent that his name is included, that is a representation of his role in connection with the business entity, and that that role was the role of principal broker, representative, agent, or authorized representative of the brokerage.

And that clarification will be made, to avoid any conclusion that the claims that are identified are individually and separately owned by Mr. Wing, independent of his role in connection with the business entity, and that modification will be approved.

With respect to the reference to the assignment involving Mr. Shea, the Court's ruling on that issue is that plaintiff has simply not presented a sufficiently compelling case to justify any modification of the judgment or findings with respect to that issue.

Whether or not statements as to the scope or extent of a particular assignment may have been reconsidered by parties after the fact, whether that is consistent or inconsistent with the testimony given at trial or considered earlier by the Court, has simply not been sufficiently established for this Court to make any modification of the prior rulings, and the Court simply declines to do so.

The Court declines to make any modification of the findings or ruling as they relate to the purported assignment relating to Mr. Shea.

There was a specific reference in the request that the language referring to a transfer of the dba to Mr. Wing be deleted as inaccurate.

The Court's ruling, I believe has already addressed that.

Any reference to Mr. Wing, whether in his capacity as holding the dba or as holding claims or causes of action, will be modified to refer to his holding those in a representative capacity for the benefit of the business entity or brokerage.

#### **Ruling on Stipulated Motion to Release the Bond**



The Court denies the motion, which is a purported stipulated motion to release the bond or approve the settlement.

And the basis of the Court's ruling is that the purported stipulation does not properly identify the parties holding the judgment.

There have been significant steps taken by the defendant in this case to construct an alternative set of facts which would give Mr. Quinlan certain rights under this judgment and purport to assign those rights to him. None of those have been established properly by the Court, and the findings which were previously made by the Court as to the holders of the claim remain undisturbed. And therefore, Mr. Quinlan does not have authority to act on behalf of the holders of the claim, based upon the Court's denying the request to modify the prior rulings, and therefore is not a proper party with authority to stipulate on issues relating to the bond or any other disposition of the claim. And so that motion is denied.

### **ORDER**

Based upon the Court's Rulings, it is hereby ordered as follows:

1. The Rule 52(b) Motion is denied with respect to Defendants' attempt to introduce the Dale Quinlan dba evidence post-trial, as there is no latitude under Rule 52 to consider new evidence. The policy underlying Rule 52 is to make sure that the findings and

conclusions that are entered in the record are consistent with the record of the trial. The opportunity to amend or correct is an opportunity to ensure consistency with the trial record, not deviate from the trial record based upon consideration of additional evidence which was not considered or presented at trial.

2. Rule 59 is the Rule of Civil Procedure providing that new evidence may be considered under appropriate circumstances. In this case, the Rule 59 latitude for modification of findings and conclusions does not apply and is not available. And even if it were available, would not be justified based upon the Dale Quinlan dba evidence, which the Court rules is new evidence, which could reasonably have been known prior to the trial being conducted.
3. The Court grants the request for modification of the findings as it relates to Mr. Skip Wing, based upon his articulation in various statements that he did not individually own or control the rights that were being asserted in the litigation. That clarification will be that, to the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that

identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims. The Court is not going to modify the findings to the extent of excluding Mr. Wing's name, but will include the modification that to the extent that his name is included, that is a representation of his role in connection with the business entity, and that that role was the role of principal broker, representative, agent, or authorized representative of the brokerage. That clarification will be made, to avoid any conclusion that the claims that are identified are individually and separately owned by Mr. Wing, independent of his role in connection with the business entity.

4. The Court declines to make any modification of the findings or ruling as they relate to the purported assignment relating to Mr. Shea.
5. The purported stipulated motion to release the bond or approve the settlement is denied.

-----END OF ORDER-----

**In accordance with the Utah State District Courts Efiling Standard No. 4, and URCP**

Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.

Approved as to form and content:

/s/ Gary E. Doctorman  
Gary E. Doctorman  
Alan S. Mouritsen  
PARSONS BEHLE & LATIMER  
*Attorneys for Defendant Charles  
Schvaneveldt*

/s/ Robert J. Fuller  
Robert J. Fuller  
*Attorney for Defendant Still  
Standing Stables, L.C.*

/s/ L. Miles Lebaron  
L. Miles Lebaron  
Brian P. Duncan  
LEBARON & JENSEN, P.C.  
*Attorneys for Plaintiffs*

/s/ Scott R. Edgar  
Scott R. Edgar  
*Attorney for Defendant Cathy Code*

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing was submitted for electronic filing, and was thus sent to all counsel of record by email:

Robert R. Wallace  
Kirton McConkie  
60 East South Temple #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120

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

Scott R. Edgar  
1379 North 1075 West, Suite 226  
Farmington, Utah 84025

Gary E. Doctorman  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

on this 3<sup>rd</sup> day of September 2014.

/s/ Jessica Ritchie

---

EXHIBIT 4  
For-Sale-By-Owner Commission Agreement

JAN-20-2006 FRI 11:50 AM

FAX NO.

P. 07/08



## FOR SALE BY OWNER COMMISSION AGREEMENT & AGENCY DISCLOSURE

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



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

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

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

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

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

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

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

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

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

10. **ATTACHMENT.** There ☐ ARE ☒ ARE NOT additional terms to this Commission Agreement. If "yes", see Addendum                      incorporated into this Commission Agreement by this reference.

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

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

JAN-20-2006 FRI 11:50 AM

FAX NO.

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

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

\_\_\_\_\_  
(Seller's Signature)  
Chuck and Cathy Code

\_\_\_\_\_  
(Seller's Signature)

The Company

By: \_\_\_\_\_  
(Authorized Agent)  
Tim Shea

By: \_\_\_\_\_  
(Principal/Branch Broker)  
M. Scott Quinney

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EXHIBIT 5  
Real Estate Purchase Contract

FEB-06-2006 MON 02:46 PM

FAX NO.

P. 02



## 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)

[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.

\$ \_\_\_\_\_ (b) New Loan. Buyer agrees to apply for one or more of the following loans:

[X] CONVENTIONAL [ ] OTHER (specify) \_\_\_\_\_

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

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

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

\$ \_\_\_\_\_ (d) Other (specify). \_\_\_\_\_

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

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

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:

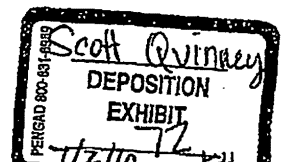
[ ] Seller's Initials [ ] Buyer's Initials

Page 1 of 5 pages Seller's Initials CS

Date 2-7-06

Buyer's Initials EW

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 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)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

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

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon

demand.

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

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

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

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

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

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

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

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

(a) Seller Disclosure Deadline

15 DAYS FROM WRITTEN ACCEPTANCE (Date)

(b) Due Diligence Deadline

60 DAYS FROM WRITTEN ACCEPTANCE (Date)

(c) Settlement Deadline

90 DAYS FROM WRITTEN ACCEPTANCE (Date)

**25. OFFER AND TIME FOR ACCEPTANCE.** Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 [ ] 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 Schwerech 2.7.06  
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Chuck Schwerech 2920 W. Director St. Rm. 500 SLC 84104 801-381-4825  
(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

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

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