

2001

Marie Bingham v. Kal Rasekh : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARIE BINGHAM,)	
)	Case No. 20010651-CA
Plaintiff and Appellant)	
)	
vs.)	
)	
KAL RASEKH,)	
)	
Defendant and Appellee)	
_____)	

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE TIMOTHY R. HANSEN DISTRICT COURT JUDGE

APPELLANT'S ADDENDUM TO THE BRIEF

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APPELLANT'S ADDENDUM OF EXHIBITS

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1 Q And is that the only one in existence, or any
2 written acknowledgment of any prospective buyer that
3 visited the property?

4 A I believe so.

5 Q Are you aware of any others?

6 A Other than this particular one?

7 Q Yes.

8 A Oh, Randal Roberts.

9 Q Okay. Other than Randal Roberts and this
10 person, are you aware of any?

11 A I'm not.

12 Q Did VRUtah ever generate a prospective buyer
13 that visited the property?

14 A VRUtah did.

15 Q With who?

16 A Gordon Olson.

17 Q Gordo Olson wasn't brought in by the agency you
18 co-listed with?

19 A No.

20 Q Okay. So that was generated by you?

21 A Right.

22 Q And how did this individual come to look at the
23 property?

24 A She responded to advertisements that we had
25 placed, and was interviewed about different business types

1 MR. GEORGE: Okay. So this --

2 MR. DYER: If we can find them. This is 1994.
3 I don't know that we'll have kept them from that time
4 frame.

5 Q (BY MR. GEORGE) This Gordon Olson then
6 responded to just a general ad that didn't mention the
7 Hirschi Center?

8 A He responded to an ad that could have mentioned
9 a brief description or a blind description of the Hirschi
10 Center.

11 Q What's a blind description?

12 A It could say day care/wedding reception center
13 with real estate.

14 Q Do you know if he responded specifically --

15 A I don't.

16 Q Did he call you initially?

17 A He did.

18 Q And what was the result of his visit to the
19 facility?

20 A He felt that it was dated and would take a
21 significant amount of dollars to upgrade to the use he
22 wanted to use it as.

23 Q What was his potential use?

24 A I'm not sure.

25 Q Did he do anything other than make one visit to

1 and only to expose buyers that could have an interest in
2 the specific property we're marketing.

3 Q How about the financial ability to perform?

4 A We screen buyers -- we screen buyers' financial
5 qualifications as well.

6 Q Would that apply to Randal Roberts?

7 A That buyer was handled by Steve Tate.

8 Q So you would have no obligation to Marie Bingham
9 to screen Randal Roberts?

10 MR. DYER: I will object as calling for a legal
11 conclusion when you say an obligation, Counselor.

12 A Steve Tate was working with Randal Roberts,
13 brought him as a purchaser. He felt that he -- I'm not
14 sure of Steve Tate's policy on screening buyers. He felt
15 Randal Roberts was qualified to make a proposal. Randal
16 Roberts was introduced to Marie Bingham. She felt he was
17 qualified to make a proposal.

18 Q How do you know that?

19 A She said she was comfortable with him.

20 Q Okay. So you nor VRUtah, to the best of your
21 knowledge, neither did any screening of Randal Roberts?

22 A I met him and learned about his skills and
23 interest about the property, and they seemed to match.

24 Q Did you do any checking on his financial
25 ability?

1 A I did not.

2 Q Did anybody else in your agency that you know
3 of?

4 A I don't believe so.

5 Q When did you become a real estate agent?

6 A May of 1993.

7 Q And who did you work for first?

8 A VRUtah.

9 Q And when did you cease your employment with
10 VRUtah?

11 A September 3rd, 1998.

12 Q And who did you work for next?

13 A Self-employed.

14 Q How?

15 A Self-employed selling businesses.

16 Q Are you a broker?

17 A I am.

18 Q So you're a real estate broker now?

19 A Right.

20 Q You got your a broker's license in September of
21 1998?

22 A 19 -- I believe 1996. June of '96, I believe.

23 Q And in September you decided to start your own
24 business?

25 A Right.

1 in here, though. I need to have him read it at the same
2 time I read it.

3 MR. DYER: He's got one.

4 Q (BY MR. GEORGE) Do you have a copy? Okay. I'd
5 like to have you read the first line of paragraph no. 2.

6 A "Broker hereby accepts employment and promises
7 to use its best efforts in brokers's ordinary course of
8 business to offer for sale and to procure a ready,
9 willing, and able purchaser for the business."

10 Q Is that a contractual provision that binds you
11 and the agency to use the best efforts to market and sell
12 the property?

13 MR. DYER: I'll object as calling for a legal
14 conclusion, and it's also incomplete because the sentence
15 says "ordinary course of business."

16 Q Was it a commitment on your behalf to use your
17 best efforts to market the property?

18 A It was.

19 Q And was it a commitment on behalf of the agency
20 to use their best efforts to market the property?

21 MR. DYER: I'll object as calling for a legal
22 conclusion, and I don't believe he has authority to offer
23 that in behalf of the company.

24 A In the ordinary course of business, yes.

25 Q Okay. So as far as you're concerned, there was

1 agency can terminate a listing agreement early, or is
2 that -- or do you believe that's just company policy?

3 A I don't know by law. That would be real estate
4 law.

5 Q Did you have any input at all in the decision to
6 release or not release Marie Bingham early?

7 A At a given point in time in spring I had
8 recommended that I would agree to not market the property
9 anymore.

10 Q That you would agree to release her from the
11 listing agreement?

12 A I didn't have any authority to release her, but
13 I had given -- I had given my input that I thought it was
14 a troublesome listing at that point and that it would be
15 to the benefit of the agency to terminate the listing.

16 Q Who did you tell that to?

17 A Bob Miller and Bill Tate.

18 Q In the spring of 1996, right? '95. Yeah, '95.

19 A Somewhere in there in the spring of '95.

20 Q So this would have been when Marie sent the
21 letter that we've talked about telling you that she was
22 going to terminate the listing agreement?

23 A Well, she sent a couple letters. We need to be
24 specific as to which one you're talking about.

25 Q Okay. Well, the first one we already discussed

1 was on February 22nd of 1995, and there was a letter or
2 two after that as well, right?

3 A Right.

4 Q When the subsequent letters came, did you have
5 any discussion with anybody in the agency about releasing
6 or not releasing her?

7 A Should we refer to those specific exhibits?

8 Q Yeah, let's do. A letter from Findlay I believe
9 is --

10 MR. DYER: Eighteen.

11 Q Okay, Exhibit 18 is a letter from an attorney
12 named Delano S. Findlay dated April 10th, 1995.

13 A Right.

14 Q And do you acknowledge that that was received by
15 the agency on or about April 10th, 1995?

16 A I believe so.

17 Q A letter dated May 24th, 1995 from Marie to you,
18 No. 52. Would you examine Exhibit 52. Is that a letter
19 that was hand delivered to you and the agency on or about
20 May 24th, 1995?

21 A I believe so.

22 Q Are those the three letters that you have
23 knowledge of that were sent by or on behalf of Marie
24 Bingham desiring to be released?

25 A Right.

1 would return the \$200,000 that she said she had invested
2 in the property.

3 Q And that's what she wanted to obtain from the
4 sale of the property, right?

5 A Right.

6 Q The assumptions and the purchase price of
7 \$600,000, that information came from Ms. Bingham?

8 A Right.

9 Q The balance of \$700,000 payable at \$6,143 per
10 month for 30 months including 10 percent interest came
11 from Ms. Bingham?

12 A I calculated that for her.

13 Q And how did you calculate that?

14 A We talked about a reasonable payment that would
15 be satisfactory to her and tried some different figures in
16 the calculator, and that was the one that she picked.

17 Q She agreed to those terms?

18 A Right.

19 Q Going down the document, Exhibit 10 on page 1,
20 it says "reasons for sale," and there's handwriting there
21 that says "family problems."

22 A Right.

23 Q Do you recall the reason for placing the term
24 "family problems" on this form?

25 A I asked her what was the reason for sale, and

1 MR. GEORGE: Yes.

2 Q (BY MR. GEORGE) Do you remember meeting with
3 Marie and her brother before the listing agreement was
4 entered into? Daryl I think was his name.

5 MS. BINGHAM: My son.

6 Q Or son, I'm sorry. Son.

7 A I remember that.

8 Q Where did that occur?

9 A At the property.

10 Q And how long before the listing agreement was
11 signed did that occur?

12 A I believe the previous afternoon.

13 Q And do you recall at that meeting a conversation
14 where Marie Bingham was very concerned that the property
15 had to be sold within three months?

16 A I remember she was very concerned and was
17 anxious to sell the property.

18 Q That particular meeting and whatever went on was
19 witnessed by Daryl, was it not?

20 A I believe so, and her boyfriend.

21 Q Okay, Ron? Stan? Do you remember -- so there
22 was an individual named Stan there as well?

23 A I believe so. That's the name that sounds
24 familiar.

25 Q Okay. And you deny that you made any

1 A I actually did sit down with Randy Roberts and
2 learned of the specific uses he was planning to make of
3 the property and his business plan, and then did help him
4 write up a proposal.

5 Q What was his business plan? What was his
6 proposed use?

7 A To rezone the property and allow to build a
8 steakhouse.

9 Q S-t-e-a-k?

10 A Right.

11 Q All right. And what was his business plan? How
12 was he going to accomplish this?

13 A He had a business plan that he had proposed that
14 he had showed me which was geared to attract investors to
15 help purchase the property.

16 Q What did he show in the way of the financial
17 ability to even make a down payment?

18 A I did not -- I did not ask him.

19 Q Where were his investors going to come from?

20 A Personal banking relationships from his work.

21 Q That's what he told you?

22 A Right.

23 MR. GEORGE: I'd like to take a couple of
24 minutes, and I might be done.

25 (Brief Recess.)

1 review of the property by Mr. Olson?

2 A Yes.

3 Q As I recall your testimony was that he made one
4 visit to the property.

5 A Correct.

6 Q Do you have any knowledge if he ever made an
7 offer to purchase the property?

8 A He did not.

9 Q So while you were trying to sell the property
10 for Ms. Bingham, would it be fair to say that the offers
11 to purchase came from Randal Roberts?

12 A Correct.

13 Q You're not aware of anybody else making an
14 offer?

15 A I'm not.

16 Q During the time that you were trying to sell the
17 property for Ms. Bingham, did she ever discuss with you
18 the fact that she was being foreclosed upon by the
19 Hirschis?

20 A No.

21 Q Did she ever talk to you at all about trying to
22 get money for the property by seeking financing from a
23 bank or other financial institution?

24 A No.

25 Q Look at Exhibit 78, which is Consolidated Realty

Page 9

1 Q. How long have you worked for Living
2 Scriptures?
3 A. Three years.
4 Q. When did you begin working for Living
5 Scriptures?
6 A. Well, almost three years. In January
7 of '96.
8 Q. Where did you work before that?
9 A. I worked for T-shirts, T-Shirts Delsol.
10 Q. I'm sorry. I didn't hear the spelling.
11 A. Delsol, D-e-l-s-o-l.
12 MR. GEORGE: Marie, speak louder if you
13 can.
14 Q. (BY MR. LOVE) That's a T-shirt company?
15 A. Uh-huh (yes), and Susan Schone owned it.
16 I started to work there.
17 Q. What did you do --
18 A. Before that I worked at Hirschi Center.
19 Q. What did you do for the T-shirt company
20 Delsol?
21 A. Sold T-shirts at a cart next to Living
22 Scriptures.
23 Q. In the ZCMI mall?
24 A. Crossroad Mall.
25 Q. How long did you do that?

Page 10

1 A. Two months.
2 Q. When did you begin working for Delsol?
3 Which month; do you remember?
4 A. In December.
5 Q. Of 1995?
6 A. Yes.
7 Q. Where did you work before that?
8 A. At Hirschi Center.
9 Q. And you began work at the Hirschi Center
10 in October of 1994?
11 A. That is correct.
12 Q. Where did you work before that?
13 A. I worked at Century Dental one night a
14 week.
15 Q. What did you do at Century Dental?
16 A. A receptionist at the dentist one night a
17 week, and I took care of my elderly father in my
18 home for two years.
19 Q. How long did you work for Century Dental?
20 A. The two years I took care of my dad.
21 Q. What are the dates of that employment,
22 approximately?
23 A. Well, the two years before the Hirschi
24 Center.
25 Q. Approximately October of 1992 to October

Page 11

1 of 1994?
2 A. (Witness nodding head affirmatively.)
3 Q. Where did you work before that?
4 A. I lived in Mesa, Arizona. I worked for
5 my brother-in-law in a dental office and went to
6 school, Mesa Community School.
7 Q. How long did you live in Mesa, Arizona?
8 A. Three years.
9 Q. Did you work in the dental office the
10 entire time?
11 A. Those three years, yes. Very part time.
12 I was going to school full time, worked part time.
13 Q. What were you studying at school?
14 A. I went to school many times trying to get
15 through possibly R. N.
16 Q. R. N., being a nurse?
17 A. Uh-huh (yes). Those were my goals. I
18 never got close.
19 Q. Were you studying to be a nurse while you
20 were in Mesa, Arizona?
21 A. No. I was just taking prerequisites.
22 Q. Where did you live prior to the time you
23 lived in Mesa, Arizona?
24 A. 2388 Cavalier Drive for 28 years.
25 Q. Do you remember the years that you were

Page 12

1 there? What year you started living there, what
2 year you stopped living there?
3 A. Let's see. My son was six months old.
4 Thirty years ago, what would that be?
5 Q. Approximately 1969 to approximately 1987
6 or '88?
7 A. Twenty-nine years ago.
8 Q. During that period of time from 1968 to
9 1989, were you employed?
10 A. I was employed at Somebody's Mother.
11 Q. At Somebody's Mother?
12 A. Yes.
13 Q. What --
14 A. Maternity/children's store part time two
15 nights a week.
16 Q. When were you employed there?
17 A. I worked there for ten years.
18 Q. What years were those?
19 A. I think I started -- these are
20 approximates. My memory's -- I can't tell you
21 exactly what the date is, but approximately '76 to
22 the time that I left to go to Mesa, Arizona.
23 Q. Again, what was the name of the store?
24 A. Somebody's Mother.
25 Q. You say that was two nights a week?

Page 13

1 A. Two nights a week.
2 Q. During that period of time from 1976
3 until the time you left for Mesa, Arizona, did you
4 have any other employment?
5 A. I also sold independently baskets for
6 three years.
7 Q. What years did you sell baskets?
8 A. At basket parties. You're just
9 self-employed.
10 Q. What years did you do that?
11 A. I did that for three years before the
12 Somebody's Mother.
13 Q. That would have been about 1972 or
14 1973 --
15 A. Right.
16 Q. -- to 1976 or so?
17 A. (Witness nodding head affirmatively.)
18 Q. During that period of time, did you have
19 any other employment --
20 A. No.
21 Q. -- other than at Somebody's Mother or
22 selling baskets?
23 A. No.
24 Q. Prior to the time you worked at
25 Somebody's Mother, when were you employed?

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1 five years I would have done it. Maybe in one of
2 the years I may have done it twice a week for the
3 whole year, and the next year I might have just done
4 it once in a few months. It depended on where I was
5 at with my children. I wanted to stay at home and
6 be with my children, but I also needed employment.
7 Q. Did you ever at any time from 1969
8 forward work in a day-care facility, children's
9 day-care?
10 A. I have never worked in a day-care
11 facility.
12 Q. Have you ever operated a day-care
13 facility?
14 A. Not until Hirschi Center.
15 Q. Have you ever operated one in your home?
16 A. No. I babysat on occasion people in the
17 neighborhood, kids in the neighborhood.
18 Q. I'm really not asking about babysitting.
19 I'm asking about day-care.
20 A. I only babysat. I never did day-care.
21 Q. Have you ever had any experience with
22 day-care in your home?
23 A. No, only babysitting.
24 Q. You're certain of that?
25 A. I'm certain of that. In order to do

Page 14

1 A. Can I backtrack that?
2 Q. Sure.
3 A. I'm sorry. I did do substitute teaching
4 off and on for the Jordan School District for five
5 years. I did very little, but I did that for five
6 years. I was on call.
7 Q. What years did you substitute teach in
8 the Jordan School District?
9 A. I did it right before I left for Mesa,
10 and when I came back from Mesa I did it just a
11 little bit, but it was in a five year period. It
12 wasn't a consistent.
13 Q. What grades did you teach?
14 A. Kindergarten through high school.
15 Q. If you could estimate how many days a
16 month you taught, what would the estimate be, or do
17 you know?
18 A. In a five year period, during the five
19 years I didn't work even on a weekly basis, but when
20 I was working, I'd do it one or two days a week, but
21 then I may go months and not do it at all.
22 Q. Would you do it as many as ten days a
23 year or fewer than ten days a year? Can you
24 estimate it?
25 A. I can't say in an entire period of the

Page 16

1 day-care, you have to have a license.
2 Q. You produced documents relating to
3 properties you'd purchased. I'd like to ask you
4 some questions about those, properties you'd bought
5 or sold.
6 You currently reside you said at 656
7 South 10th West?
8 A. 642.
9 Q. 642. Is that a different property than
10 656 South 10th West?
11 A. I've never heard of 656 South 10th West,
12 unless it was --
13 MR. LOVE: Let's mark this.
14 (Whereupon, Exhibit No. 1
was marked for identification.)
15
16 Q. (BY MR. LOVE) I show you what's been
17 marked as Deposition Exhibit 1, which is an Earnest
18 Money Sales Agreement dated October 19, 1993.
19 Have you seen this document before?
20 A. Have I what?
21 Q. Seen this document before?
22 A. Yes, I have.
23 Q. Is that your handwriting?
24 A. It's not my handwriting, but it's my
25 signature.

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<p>1 A. No, I don't.</p> <p>2 Q. When did you sell it?</p> <p>3 A. When I was losing Hirschi Center, I was</p> <p>4 forced to sell to the people that I bought it from.</p> <p>5 Q. Why did you buy it?</p> <p>6 A. Why did I buy it? When I was with Kal</p> <p>7 Rasekh, he was in real estate, and I had moved up</p> <p>8 from Arizona without a job, and I was at a</p> <p>9 crossroads in my life, and Kal Rasekh came to our</p> <p>10 home as a friend to our families, got very involved</p> <p>11 in our family actively, and he knew about my</p> <p>12 father's house and that I had made \$20,000, and in</p> <p>13 the course of our relationship, you know, he, of</p> <p>14 course, knew what was going on in real estate, and</p> <p>15 I'm not sure exactly how it all got started, but</p> <p>16 there was several loans -- I couldn't qualify for</p> <p>17 anything, and I of course was interested, and he</p> <p>18 just had a way of having a power over me, and he</p> <p>19 came to me with two condos and said this is a great</p> <p>20 deal, only \$5,000 down, assumables.</p> <p>21 I was too scared to do two, but with</p> <p>22 \$5,000 down I could do one. I only did the one, and</p> <p>23 it came about because of my situation and my</p> <p>24 relationship with Kal Rasekh.</p> <p>25 Q. What I'm really asking is did you buy it</p>	<p>1 to live in it or did you buy it as an investment to</p> <p>2 rent out?</p> <p>3 A. As an investment at his advice. I wasn't</p> <p>4 looking for anything.</p> <p>5 Q. You didn't buy it to live in, though?</p> <p>6 A. No. Neither one were ever bought to live</p> <p>7 in.</p> <p>8 Q. You said when you bought the condominium</p> <p>9 unit at Incline Terrace you assumed a mortgage or a</p> <p>10 loan of some kind?</p> <p>11 A. Uh-huh (yes), paid \$5,000.</p> <p>12 Q. Did you inspect the condominium before</p> <p>13 you bought it?</p> <p>14 A. I relied very heavily on Kal Rasekh.</p> <p>15 Q. Did you inspect it?</p> <p>16 A. When he said it, it was done. I went in</p> <p>17 and looked at it. I went in each room and looked at</p> <p>18 it, and then I relied on Kal's judgment for what</p> <p>19 kind of shape it was.</p> <p>20 Q. Did Mr. Rasekh look at it with you?</p> <p>21 A. If my memory serves me well, he took me</p> <p>22 to both places at once and showed me the place.</p> <p>23 They were not per se an inspection you're talking</p> <p>24 about. We went into the rooms and looked at it. I</p> <p>25 relied on Kal Rasekh totally.</p>
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<p>1 Q. What inspection do you think I'm talking</p> <p>2 about?</p> <p>3 A. I'm not sure.</p> <p>4 Q. Did you consider having a professional</p> <p>5 inspection of the condominium unit before you bought</p> <p>6 it?</p> <p>7 A. I didn't. I relied on Kal Rasekh.</p> <p>8 Q. Is that the reason you didn't get a</p> <p>9 professional inspection?</p> <p>10 A. Absolutely.</p> <p>11 Q. Is it fair to say that had you not relied</p> <p>12 on Kal Rasekh you would have gotten a professional</p> <p>13 inspection?</p> <p>14 A. I don't know. I don't think I would have</p> <p>15 bought them.</p> <p>16 Q. I beg your pardon?</p> <p>17 A. I don't think I would have purchased</p> <p>18 them, so I can't think back farther than that.</p> <p>19 Q. Let's go to what has been marked as</p> <p>20 Deposition Exhibit 4. This is a Real Estate</p> <p>21 Purchase Contract dated 9-20-94 at the bottom of the</p> <p>22 first page, and I would just ask you if you've seen</p> <p>23 it before?</p> <p>24 (Witness examining document.)</p> <p>25 THE WITNESS: What this does recall my</p>	<p>1 memory is Kal Rasekh dominated my ability to think,</p> <p>2 and I relied totally on Kal Rasekh, and it's</p> <p>3 familiar, and I just signed it, and I have seen it.</p> <p>4 Q. (BY MR. LOVE) That is your signature --</p> <p>5 A. Yes, it is.</p> <p>6 Q. -- on the bottom of page 2 dated</p> <p>7 September 21, 1994?</p> <p>8 A. That's my signature.</p> <p>9 Q. Is that also your signature on Addendum</p> <p>10 No. 2, the following page?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Is this the real estate contract by which</p> <p>13 you sold your home on Cavalier Drive?</p> <p>14 A. It must be. It's in front of me.</p> <p>15 Q. Did you review this contract before you</p> <p>16 signed it?</p> <p>17 A. With Kal Rasekh it was very hard to</p> <p>18 review.</p> <p>19 Q. Why was that?</p> <p>20 A. Because Kal Rasekh dominated everything I</p> <p>21 did and influenced me and did it for me.</p> <p>22 Q. Did he provide you with a copy of this to</p> <p>23 sign?</p> <p>24 A. Yes, he did.</p> <p>25 Q. Did you read it before you signed it?</p>

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1 A. My memory doesn't tell me that I read it
2 word for word because Kal Rasekh, our relationship
3 was very one of trust, and it would irritate him if
4 I did not trust him.
5 Q. So is it your testimony that you didn't
6 read this contract before you signed it --
7 A. No.
8 Q. Let me finish.
9 A. My memory will not let me. I don't know.
10 Q. You have to let me finish asking the
11 question before you answer, okay, because she can't
12 take us both down at the same time.
13 A. Okay.
14 Q. Let me just rephrase the question. Is it
15 your testimony that you did not review this contract
16 because you thought it would irritate Kal Rasekh if
17 you did?
18 A. My memory does not tell me if I read this
19 or not.
20 Q. You don't recall one way or another?
21 A. (No audible response.)
22 Q. Go to paragraph 2.2 on the first page of
23 that contract. It says that "Buyer and the property
24 must qualify for a loan for which application has
25 been made under Section 2.1 within 40 calendar days

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1 after acceptance."
2 Do you see that?
3 A. Where's that?
4 Q. Paragraph 2.2 on the first page
5 (indicating).
6 (Witness examining document.)
7 THE WITNESS: All I can tell you is I
8 trusted Kal Rasekh explicitly. I was under his
9 control, and anything he said I accepted and I did.
10 MR. LOVE: Could you read the question
11 back, please?
12 THE WITNESS: I cannot say. I mean, my
13 memory doesn't remember the 40 calendar days.
14 Q. (BY MR. LOVE) Do you recall whether the
15 people who bought your house on Cavalier Drive
16 applied for a loan to buy it?
17 A. I have no idea. I don't know anything
18 about it except they were Kal's friends.
19 Q. The next sentence says, "The property is
20 deemed qualified if, on or before the qualification
21 date, the property, in its current condition and for
22 the Buyer's intended use, has appraised at a value
23 not less than the total purchase price."
24 Do you recall whether the buyers obtained
25 an appraisal of your home on Cavalier Drive?

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1 A. I have no idea.
2 Q. Do you recall reading this at the time
3 and coming to any conclusion that the buyers had the
4 right to get an appraisal of your home?
5 A. I relied on Kal Rasekh.
6 Q. Do you recall reading this at the time
7 and coming to a conclusion that the buyers had a
8 right to obtain an appraisal of your home?
9 A. I relied totally on Kal Rasekh, on his
10 judgment.
11 Q. Do you recall reading this and coming to
12 any conclusion as to whether the buyers had a right
13 to get an appraisal of your home? Yes or no?
14 A. I relied on Kal Rasekh. That's all I can
15 say. I didn't get involved in any of it.
16 Q. Go down to No. 7, please, where it says
17 Seller Disclosures. It says, "No later than five
18 calendar days after acceptance, seller will deliver
19 to buyer the following seller disclosures." Then it
20 lists A, B, C and D.
21 Do you see that paragraph?
22 A. Yes.
23 Q. Do you recall whether or not you provided
24 the seller disclosures identified in paragraph 7?
25 A. I don't recollect anything. I totally

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1 relied on Kal Rasekh 100 percent.
2 Q. So the answer is no, you don't recall
3 whether you provided those disclosures or not?
4 A. I do not recall. I did not do it. Kal
5 Rasekh did everything, I did nothing.
6 Q. Go back to paragraph 5 where it says
7 Confirmation of Agency Disclosure. It says, "At the
8 signing of this contract, the listing agent, Kal
9 Rasekh, represents seller, buyer, and the selling
10 agent, Kal Rasekh, represents seller and buyer."
11 Did I read that correctly?
12 A. Yes, he represented seller and buyer.
13 Q. And you understood that at the time you
14 signed this agreement?
15 A. I think.
16 Q. Are those your initials at the end of
17 paragraph 5?
18 A. Kal always told me where to initial my
19 name.
20 Q. My question is are those your
21 initials --
22 A. Yes, they are.
23 Q. Are those your initials under seller's
24 initials in paragraph 5?
25 A. Yes, they are.

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1 THE WITNESS: No, I do not.
2 Q. (BY MR. LOVE) Do you have an
3 understanding today what that means, paragraph 14?
4 A. I have an understanding.
5 Q. What's your understanding today as to
6 what paragraph 14 means?
7 A. By reading this, my sense tells me that
8 this would be complete. If I needed anything more,
9 I would have to add to it.
10 Q. And that you're not doing anything in
11 selling this house that is not contained in this
12 contract. Isn't that fair?
13 A. (Witness nodding head affirmatively.)
14 Q. Whatever terms you've agreed to are
15 stated in this contract. That's what paragraph 14
16 says; is that correct?
17 A. Nothing could be added to it without my
18 signing.
19 Q. And that's your understanding of
20 paragraph 14 based on reading it; correct?
21 A. That's correct.
22 MR. DYER: Counsel, is now a good time to
23 take a quick break?
24 MR. LOVE: Yeah. We're going to switch.
25 I was now going to go into the negotiations of the

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1 maybe have Ashley involved in it.
2 Anyway, he called me on the phone and he
3 said it's a super deal and it was the perfect thing,
4 and he said it would have to be signed fast,
5 somebody else is going to grab it up, fantastic
6 deal.
7 Q. What happened next?
8 A. If my memory recall is good, he wanted me
9 to meet him at his office. . He never did anything
10 outside the Coldwell Banker office.
11 Q. Did you meet him at his office?
12 A. My recollection tells me that I met him
13 at his office, and he told me the price was
14 \$900,000. I said no way. I mean, it was just
15 overwhelming. I didn't even consider it, but then
16 he justified it saying that -- again, he repeated I
17 made my dad exempt, it was such a fantastic deal,
18 you can walk right in, everything is just
19 ready-made. You know, his sister, you know, and I
20 was going in partners.
21 Q. You were going in partners or he was
22 going in partners?
23 A. He wanted his sister to come from Egypt.
24 She couldn't speak English, and she and I would run
25 it what his impression to me was.

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1 Hirschi property.
2 MR. GEORGE: So five minutes?
3 MR. LOVE: Five minutes is fine.
4 (Recess taken at 10:20 a.m.)
5 Q. (BY MR. LOVE) I want to ask you now
6 questions about the negotiations to buy the Hirschi
7 property.
8 Can you tell me how you decided to make
9 the offer on the property?
10 A. How to make what?
11 Q. How you decided to make an offer for the
12 Hirschi property. How did that come about?
13 A. I had a telephone call, and when I
14 answered the phone, Kal Rasekh was on the phone. He
15 said I am leaving the Hirschis at this moment, and
16 I'm on my cell phone, and I have the most super deal
17 for you. He said there's a day-care center. It's
18 such a super deal, Marie, that I made my father
19 exempt, and I thought it might be something that --
20 he wanted to bring his sister from Egypt is what he
21 told me. His sister and I could run it. I knew
22 that I was in a position -- my dad had Alzheimer's,
23 my dad had to go to an Alzheimer's home, and he knew
24 that I was looking possibly for some bit of income
25 where I could still be home and raise my family and

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1 Q. Just so I understand it, excuse me for
2 interrupting, but did he want you to buy half of it
3 with his sister, or did he want you to buy all of it
4 and employ his sister?
5 A. I understood he wanted me to buy half of
6 it. So he, of course, talked me into signing it.
7 He said it's not a big deal, we'll just sign it and
8 we'll negotiate and figure it all out afterwards.
9 I was very skeptical of signing
10 something, but he assured me, and by this time my
11 relationship with Kal Rasekh was one of complete
12 trust, and everything he told me to do I did, and he
13 was irritated if I didn't do it.
14 Q. What would happen if he was irritated at
15 you?
16 A. He would just keep telling me to trust
17 him because, you know, he was successful, he was my
18 friend. Always trust me, Marie, always trust me,
19 Marie.
20 Q. So you had a meeting in his office in
21 which he said these things to you and --
22 A. He said them over the phone to me. I
23 went to the office and signed.
24 Q. What did you sign?
25 A. I didn't read anything. I know he told

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1 me it was \$900,000, and he said we'll negotiate
2 after. That didn't mean a whole lot.
3 Q. What document did you sign?
4 A. I don't know. He put it in front of me,
5 I signed it. I never read anything.
6 Q. Was it an earnest money agreement?
7 A. I don't know.
8 Q. Was it an offer to purchase the property?
9 A. (No audible response.)
10 Q. Let's go to this. Mark that.
11 (Whereupon, Exhibit No. 5
was marked for identification.)
12
13 Q. (BY MR. LOVE) I show you what's been
14 marked as Deposition Exhibit 5 and ask you if this
15 is the document you signed in Kal Rasekh's office
16 that you just referred to?
17 A. My signature's on it. I've never read
18 it.
19 Q. So that's your signature on the second
20 page where it says Marie Bingham? I believe it says
21 7-20-94.
22 A. That's it.
23 Q. Do you know if this is the document you
24 signed in his office or not?
25 A. It's got my signature on it, so it must

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1 be the document.
2 Q. Are you aware of any other document that
3 you might have signed in his office?
4 A. That same day?
5 Q. Well, what I'm trying to get at --
6 A. I signed a lot of documents in his
7 office.
8 Q. What I'm trying to get at is you said you
9 went over to his office and you signed a document.
10 A. Uh-huh (yes).
11 Q. You're not sure what the document was.
12 It might have been this one, Deposition Exhibit 5.
13 Am I correctly stating your testimony?
14 A. Yes, for \$900,000.
15 Q. Is there any other document you're aware
16 of that could be the document that you signed when
17 you went to his office initially?
18 A. No.
19 Q. What I'm asking you --
20 A. I'm sure it's this one.
21 Q. If it's not this one, could it be
22 anything else?
23 A. It would be this one.
24 Q. What happened after you signed --
25 MR. GEORGE: May I make a clarification?

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1 MR. LOVE: Sure.
2 MR. GEORGE: By this document here,
3 including every page on that?
4 MR. LOVE: Yeah, let's clarify that
5 because there are addenda here and a counteroffer.
6 Q. (BY MR. LOVE) So the document you would
7 have signed I gather in Kal Rasekh's office would
8 have been the first two pages and perhaps the first
9 Addendum?
10 MR. GEORGE: And only answer if you know,
11 if you have any idea.
12 THE WITNESS: I would have signed these
13 two right here (indicating).
14 Q. (BY MR. LOVE) And you signed the
15 handwritten page that's also dated 7-20-94, Addendum
16 No. 1, which is Bates stamp No. CB00284?
17 A. I remember him telling me there was a
18 balloon payment.
19 MR. DYER: I'm sorry. I didn't hear the
20 answer.
21 MR. LOVE: Yes, it is the same date.
22 MR. DYER: Thank you.
23 Q. (BY MR. LOVE) So the first three pages
24 are all dated July 20, 1994, and all bear your
25 signature or your initials. Is that fair?

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1 A. Yes.
2 Q. Do you conclude from that that you would
3 have signed the first three pages of Deposition
4 Exhibit 5 in Kal Rasekh's office?
5 A. Yes.
6 Q. You're not aware of anything else you
7 would have signed other than these three pages?
8 A. No.
9 Q. Did you read the first three pages of
10 Deposition Exhibit 5 --
11 A. No, I didn't.
12 Q. -- while you were in Mr. Rasekh's office
13 that day?
14 A. No, I didn't.
15 Q. What happened after you signed the first
16 three pages of Deposition Exhibit 5?
17 A. I signed them and went home.
18 Q. Then what happened? What was the next
19 thing that happened in connection with your purchase
20 of the Hirschi property?
21 A. My memory -- I cannot tell you exactly
22 in detail how --
23 Q. I understand. Just tell me the best of
24 your recollection what you can remember step-by-step
25 in connection with the purchase.

1 A. I don't know if he called me on the phone
2 after that. I mean, he would come to my house many
3 times. I don't know if it was at my house or on the
4 phone, but, of course, we would discuss it. I had
5 signed this, and I said there's no way in the world
6 I'd ever do anything for \$900,000. I would just
7 never do it, and it was based upon -- I said my
8 house isn't even up for sale. He said, well, if we
9 could sell your house. He always said his sister
10 was coming, so in that time I guess he was working
11 to find a buyer for my house. My house was never up
12 for sale. I wasn't even selling it. This all
13 happened -- then at a particular time he said his
14 sister couldn't come, couldn't come to the country.
15 Q. When did he tell you that, to the best of
16 your recollection?
17 A. I don't know, just in the course of my
18 house, telephone calls. I said there is no possible
19 way, I would never do anything like this, and he
20 just kept reassuring me that it was -- you know,
21 just move in, everything was there, it's a cushy
22 job, just walk in, work hard, everything was already
23 there. I said I would never do it, but each time I
24 would say I wouldn't do it, he would say, Marie,
25 trust me, there is no risk, and numerous, numerous,

1 this way: You signed an agreement or a document of
2 some kind in his office on the 20th of July, 1994;
3 correct?
4 A. Correct.
5 Q. What happened to that document? What was
6 it used for, if you know?
7 A. I don't know. All I know is I signed it.
8 Q. Do you know if Mr. Rasekh gave that
9 document to the Hirschis?
10 A. I have no idea.
11 Q. Were you ever presented with a
12 counteroffer from the Hirschis for the purchase of
13 their property?
14 A. I know that Kal was dealing with the
15 Hirschis, and there were types of offers because it
16 did not end up being \$900,000. First of all, I
17 didn't go for this, and they were never ever
18 explained to me. Kal Rasekh would just have me come
19 into his office and trust me, Marie, and he
20 negotiated it, getting it down, and he took care of
21 all of my things, and I did trust him.
22 Q. When was your understanding that you had
23 a deal with the Hirschis to purchase their property?
24 A. The deal was at \$800,000.
25 Q. When did you have a deal?

1 numerous, numerous times, any time I would even have
2 any doubt in my mind he would tell me trust me,
3 there is no risk. I mean, why wouldn't I do it if
4 there's no risk?
5 He assured me and promised me and
6 convinced me that there was no risk or I never ever
7 would have ventured into this. He harassed me many
8 many times. He was constantly at me.
9 Q. How did he harass you?
10 A. By telling me just to trust him and that
11 there was no risk --
12 Q. Why was that harassment?
13 A. -- the whole time.
14 Q. Why do you consider that harassment?
15 A. I shouldn't use the word harassment.
16 Take that off.
17 MR. VEASY: I'm sorry.
18 THE WITNESS: I said the word harassment
19 wasn't a good word to use. He just was constantly
20 in every conversation trust me, there's no risk.
21 You just walk into it. Everything's done. The
22 plans are there, the kids are there. All you have
23 to do is go in and work hard.
24 Q. (BY MR. LOVE) I want to try and go
25 through this step-by-step if we can, so let's try it

1 A. I don't know.
2 Q. When did you make the earnest money
3 payment?
4 A. I don't remember.
5 Q. Do you recall whether it was shortly
6 after the 20th of July, 1994, or long after?
7 A. I can't remember when I made it.
8 Q. Do you recall making the payment?
9 A. I remember giving it to Kal.
10 Q. Do you recall how much it was?
11 A. Five thousand, I believe.
12 Q. At the time you gave the \$5,000 earnest
13 money payment to Mr. Rasekh, did you understand that
14 you had an agreement to purchase the Hirschi
15 property?
16 A. No. Kal told me I could negotiate with
17 it and that I could get my \$5,000 back. I didn't
18 feel locked in.
19 Q. Did he tell you under what
20 circumstances --
21 A. I didn't even have the money, and my
22 house wasn't even --
23 Q. You have to let me ask the question. I
24 understand you want to tell your story, but you have
25 to let me ask the question.

Q. Now, if you look at the next four pages, do you see at the top they're identified as Counteroffer No. 1, Counteroffer No. 2, Counteroffer No. 3, Counteroffer No. 4 -

A. I wasn't -

Q. You have to let me ask the question, please. I'll try again.

A. Sorry.

Q. You have counsel Counteroffer No. 1, Counteroffer No. 2, Counteroffer No. 3 and Counteroffer No. 4. They were all signed by the Hirschis on the 23rd of July except for No. 4, which was signed on August 2nd. Okay?

Do you recall that the Hirschis made a counteroffer to the offer you made on July 20, 1994?

A. All I know is that Kal was negotiating with them.

Q. Did Kal tell you that the Hirschis had made a counteroffer?

A. Of some sort, yes.

Q. Did you agree to that counteroffer?

A. At the time I did not know what they were.

Q. Go back to page 288 of Deposition Exhibit 5. You've already identified your signature

1 on August 3rd.

2 Do you see that it says
3 acceptance/rejection of counteroffer?

4 A. Yes.

5 Q. Now, is that your acceptance of the
6 Hirschis' counteroffer?

7 A. All I know is Kal told me I get the baby
8 grand piano, the white closet were included and the
9 dolphins, and I signed it. He was not there when I
10 signed it, and he just told me to sign it.

11 Q. Where did you sign it?

12 A. To go in his office and sign it. He told
13 me to go in and sign. I trusted his judgment since
14 he was negotiating for my benefit.

15 Q. Now, my question is did you understand
16 that when you signed page 288 on August 3, 1994,
17 that you were accepting the Hirschis' counteroffer?

18 A. He told me what I was signing. He said I
19 was getting the baby grand piano, the white closet
20 and the cement dolphins and I needed to sign it.

21 Q. But as you understand, you were getting
22 the entire Hirschi property, that you were signing a
23 deal for the whole property, including the piano,
24 the closet and the dolphins?

25 A. Yes.

1 Q. Does your signature represent your
2 acceptance of the Hirschis' counteroffer for you to
3 purchase their property?

4 A. On August 3rd; is that what you're
5 saying?

6 Q. Yes.

7 A. So by August 3rd did I know I was buying
8 it by myself?

9 Q. Well, that I don't know. I'm just asking
10 you if you were buying it one way or the other on
11 August 3rd?

12 A. That is true, I was buying it. We were
13 negotiating buying it. If it all worked out right,
14 I was buying it.

15 Q. I thought somewhere I had a copy of the
16 earnest money check. I think it's dated August 4th,
17 but I can't find it.

18 MR. VEASY: Is that what you're looking
19 for?

20 MR. LOVE: Yeah, that's it.
21 (Whereupon, Exhibit No. 6
22 was marked for identification.)

23 Q. (BY MR. LOVE) I show you Deposition
24 Exhibit 6 and ask you if you've ever seen that
25 before?

1 A. Yes, I have. I gave it to Kal Rasekh.

2 Q. Deposition Exhibit 6 is a copy of a check
3 of your earnest money check to purchase the Hirschi
4 property?

5 A. (Witness nodding head affirmatively.)

6 Q. And it's dated August 4, 1994?

7 A. Uh-huh (yes).

8 Q. Does that indicate to you that as of
9 August 4, 1994, that you had reached an agreement to
10 buy the Hirschi property?

11 A. On August 4th I still believed I was
12 negotiating.

13 Q. Why did you then make an earnest money
14 payment if you believed you were still negotiating?

15 A. Because Kal told me I had to.

16 Q. What did you say to him and what did he
17 say to you about that? That's compound.

18 Let me just ask you what did you say to
19 him about making an earnest money agreement if you
20 didn't have a deal?

21 A. When I gave this to him, I said am I
22 locked in? He said no, not unless it works out, I
23 mean, I sell my house. I didn't even have a sale on
24 my house. I didn't have a dime in my pocket. I had
25 to sell my house, and my house wasn't even for

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1 sale. Obviously, I couldn't be buying something
2 without money. What if my house didn't sell?
3 Q. Was there a contingency in the contract
4 for the sale of your house on Cavalier Drive?
5 A. There was. He told me there was.
6 Q. Assuming that contingency went through,
7 did you have an understanding on or about August 3rd
8 that you had an agreement?
9 A. That I could have an agreement.
10 Q. To purchase the Hirschi property?
11 A. If it worked out, right.
12 Q. What else remained to be worked out
13 besides the sale of your home as of August 4, 1994?
14 A. This was totally out of my realm,
15 something I would have never considered on my own.
16 I think at this point I was so dominated by Kal
17 Rasekh that I didn't really have rational thinking.
18 Q. All right. Let's go back to my
19 question.
20 What remained to be worked out for you to
21 buy the Hirschi property other than the sale of your
22 home on Cavalier Drive?
23 A. At this point on August 4th he was
24 domineering my actions. I know now that I was never
25 qualified. I wasn't capable of it.

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1 A. I didn't want to jeopardize anything or
2 risk anything, but any time I ever opened my mouth,
3 he always came back and said there is no risk. He
4 assured and promised me there was no risk involved
5 or I never would have done it.
6 Q. So you had to sell your house on Cavalier
7 Drive, you had to have a lower price in order to
8 have a deal.
9 Anything else for you to have a deal to
10 purchase the Hirschi property?
11 A. I needed to be assured and promised that
12 I couldn't fail. That's something I never asked
13 for. He gave it to me.
14 MR. DYER: I didn't hear that.
15 MR. VEASY: Will you read back that
16 statement?
17 MR. DYER: I didn't hear what you said.
18 MR. LOVE: Go ahead and read it back.
19 THE WITNESS: Sorry.
20 (Record read.)
21 Q. (BY MR. LOVE) Is it your testimony that
22 you never asked Kal Rasekh for that promise that you
23 couldn't make?
24 A. He assured and promised me there was no
25 risk. He would either sell it or buy it.

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1 Q. Never qualified in what sense?
2 A. I've never even held a full-time job.
3 Q. You're saying you weren't qualified to
4 manage or operate a day-care business?
5 A. Right. He convinced me. He justified
6 it.
7 Q. Let's still go back to my original
8 question.
9 You said on August 4th that you had a
10 deal if everything went through; is that right?
11 Including one of those things was the sale of your
12 home on Cavalier Drive?
13 A. (Witness nodding head affirmatively.)
14 Q. What other things had to happen before
15 you had a deal to purchase the Hirschi property?
16 A. It had to be a lower price.
17 Q. Did you tell Kal Rasekh it needed to be a
18 lower price?
19 A. Absolutely.
20 Q. When did you tell him that?
21 A. All along.
22 Q. Did you tell him what the price had to
23 be?
24 A. No. It had to be lower.
25 Q. How much lower?

Page 8

1 Q. Was that all the assurance you needed in
2 order to go forward?
3 A. He dominated my actions. I trusted him
4 more than I trusted my brother and my friends.
5 Q. You were relying on him, in other words?
6 A. A hundred percent.
7 Q. When was the first time you met the
8 Hirschis?
9 A. Kal took me to the Center, and I don't
10 know the time he took me over. I went twice and
11 then they came over to my house. They drove by my
12 house when I was in the yard the first time. They
13 came over twice.
14 Q. You said Mr. Rasekh and you went over to
15 the Hirschi Center, to the property?
16 A. Or he might have sent me over there, or
17 if I came with Kal the first time, I'm not really
18 sure.
19 Q. Had you met the Hirschis or visited the
20 Hirschi property prior to the time that you provided
21 the earnest money check on August 4th?
22 A. I don't know the first time I met the
23 Hirschis. I know I made an appointment and I went
24 over to see what I was buying. I'm sure I drove by
25 it if I didn't go up to it. I made an appointment

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1 A. Uh-huh, yes.
2 Q. What does he do for a living, if you
3 know?
4 A. He worked for Utah Power & Light as a
5 salesperson.
6 Q. Is he retired now?
7 A. I heard that he was.
8 Q. Do you know what he sold?
9 A. No.
10 Q. Did you take Mr. Spafford through the
11 Center, or showed him the Center?
12 A. I don't remember that I showed it to ^{whether}
13 him. He was involved in it. I don't know ^{whether} I
14 showed him or -- I know I showed him.
15 Q. Did you show him the house?
16 A. I don't know.
17 Q. When you say that he was involved in it,
18 how was he involved?
19 A. He was my boyfriend.
20 Q. Did he have any financial involvement in
21 the purchase?
22 A. At the closing I did not even have enough
23 money to pay the \$181,000. If my memory serves me
24 right, I was short about \$300. I took every dime
25 out of my pocket and was still short about \$300, and

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1 he loaned it to me.
2 Q. Did he have any other financial
3 involvement other than loaning you \$300?
4 A. No.
5 Q. Did you walk through the Center with
6 Mr. Spafford; do you recall?
7 A. I don't recall.
8 Q. Did you walk through --
9 A. I know I showed it to him. You couldn't
10 be there during hours and walk someone through it.
11 They didn't want anyone to know they were selling
12 it.
13 Q. Now, you said you went a couple times to
14 visit the Center on your own.
15 When did you do that?
16 A. In August, September.
17 Q. What did you do while you were there when
18 you went by yourself?
19 A. What did I do?
20 Q. When you went by yourself?
21 A. I would walk in and be inconspicuous. I
22 couldn't really look at anything or do anything or
23 see anything. I just walked in there.
24 Q. You went back a second time by yourself?
25 A. Uh-huh (yes), went a few times.

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1 Q. Did you talk to anybody while you were
2 there?
3 A. I don't know.
4 Q. How many times prior to the closing did
5 you meet with the Hirschis face to face?
6 A. I don't know. There was a few times. I
7 know I had the meeting when Kal came back from Egypt
8 and I said I wasn't going to buy this. We had that
9 meeting with the Hirschis, then we had another
10 meeting with them, and then when it got close to my
11 buying it they showed me some of the things they
12 did.
13 Q. I'm sorry. I didn't hear that. Close to
14 what?
15 A. They showed me some of the things they
16 did. They took me down and showed me where they
17 bought their bread and showed me a few things.
18 Q. So you had a meeting with them the first
19 time you went out to visit the property. That's
20 one. You had a meeting with them when Kal Rasekh
21 came back from Egypt, that's two, and there was a
22 third meeting --
23 A. I'm not sure.
24 Q. -- where they showed you where they
25 bought bread and other things?

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1 A. I went to the Center and I went to their
2 home and the missionary was there.
3 Q. Did you have another meeting with them at
4 the closing, or shortly before the closing?
5 A. Not that I recall.
6 Q. You don't recall meeting with them at the
7 closing, or you're sure you didn't meet with them?
8 A. I was at the closing with them. I didn't
9 have a meeting before the closing.
10 Q. On the day before or a couple days
11 before?
12 A. Not that I recall.
13 Q. Tell me what you talked about with the
14 Hirschis the first time you met them.
15 A. It was just a very friendly visit showing
16 me around. They were very friendly, I was friendly.
17 Q. Anything else that you recall in that
18 meeting?
19 A. No.
20 Q. Tell me as specifically as you can recall
21 about the meeting after Mr. Rasekh came back from
22 Egypt.
23 That was a face to face meeting?
24 A. Yes, it was.
25 Q. Where did that meeting take place?

1 A. It took place in the home.
 2 Q. The Hirschis' home?
 3 A. Uh-huh (yes). It took place in an office
 4 in the home.
 5 Q. All right. What was the purpose of that
 6 meeting?
 7 A. I told Kal I was not going to buy it, it
 8 was too expensive, I was not going to agree to any
 9 of it, and he got very upset with me and very angry
 10 with me and went in to negotiate with the Hirschis.
 11 Q. You said that you told Kal you weren't
 12 going to do the deal at all?
 13 A. No.
 14 Q. This was in the meeting with the
 15 Hirschis --
 16 A. No.
 17 Q. -- or before the meeting with the
 18 Hirschis?
 19 A. It was at the Center, outside the Center,
 20 and then we went in and -- he first went in and
 21 talked to them, and then he brought me in.
 22 Q. As best as you can recall, what was said
 23 after you came into the meeting? What did you say?
 24 A. Well, I was very upset that day, and Kal
 25 was very mad at me, and he said I had no right to do

1 this at the last minute type thing. He just made me
 2 feel like a jerk, and so at this point in my life
 3 Kal really dominated my actions.
 4 Q. What did you say during this meeting?
 5 A. I remember that they were negotiating. I
 6 remember turning to Lois and looking her in the eye
 7 and saying, "Lois, do you think that I really could
 8 handle this and could I really do this?"
 9 Q. What did she say to you?
 10 A. She just said yes. I feel like it was an
 11 absolute yes.
 12 Q. You say you felt like it was an absolute
 13 yes?
 14 A. Uh-huh (yes).
 15 Q. What do you mean by an absolute yes?
 16 A. It wasn't a wishy-washy yes.
 17 Q. Did she say anything more than yes?
 18 A. I don't remember it. I remember it was a
 19 strong yes.
 20 Q. Did she say anything other than yes?
 21 A. Not that I recall. I asked her that.
 22 Q. What else did you say in the meeting?
 23 A. Kal was doing the talking, negotiating.
 24 Q. What did he say?
 25 A. I don't know. He just renegotiated.

1 Q. How did they renegotiate? What terms
 2 were renegotiated?
 3 A. I believe this is where they made the
 4 payments, made four payments. I don't know. I let
 5 Kal do it. He was very upset with me that I wasn't
 6 going to go through it. He was so upset with me
 7 that he wanted me to even pay him more money.
 8 Q. So do you recall what terms changed in
 9 the deal at that meeting?
 10 A. I remember that they made four payments
 11 and then no payments after that.
 12 Q. They agreed to delay the monthly payments
 13 until the first of January?
 14 A. Yes.
 15 Q. And then the first of February?
 16 A. Something like that.
 17 Q. They agreed to reduce the purchase price
 18 to \$800,000?
 19 A. Uh-huh (yes).
 20 Q. That happened in that meeting?
 21 A. I don't know. I don't think so. I don't
 22 know.
 23 Q. You don't know whether they agreed to
 24 reduce the purchase price?
 25 A. No. The 800 was before that.

1 Q. When was the 800 negotiated?
 2 A. I don't know.
 3 Q. Well, take a look at Deposition
 4 Exhibit 5. Tell me if you can look at that and say
 5 when the \$800,000 was negotiated.
 6 A. The down payment was increased to 200, I
 7 believe. What's the date on this? It says it's
 8 reduced to \$800,000.
 9 Q. You're looking at page 289?
 10 A. Correct.
 11 Q. I think that's undated, but if you look
 12 back at page 291, it says selling price reduced to
 13 \$850,000.
 14 A. I never heard that price.
 15 Q. And you'll notice that is September 22,
 16 1994.
 17 A. I've never seen this. I have never heard
 18 of an 850 price. I never heard of it. I thought it
 19 went from nine to eight hundred.
 20 Q. Would you conclude from your review of
 21 Deposition Exhibit 5 that the price was reduced to
 22 \$800,000 after September 22, 1994?
 23 A. I think it was before September. . No, I
 24 don't think that was when we negotiated 800. I
 25 think that's when we negotiated the payment. That's

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1 canceled check?
2 A. I don't know. I'm sure it's somewhere.
3 I keep everything.
4 MR. VEASY: Could we request that check
5 be produced if it's --
6 THE WITNESS: I'm sure I have it
7 somewhere.
8 MR. VEASY: Is that yes on the record?
9 MR. GEORGE: We will produce it if we
10 find it, yes.
11 Q. (BY MR. LOVE) The meeting we're talking
12 about after Mr. Rasekh came back from Egypt and
13 Mr. Hirschi told you maybe you shouldn't buy the
14 property, or something to that effect, who else
15 attended that meeting, if anybody?
16 A. I'm not sure. I can't remember.
17 Q. Were either Steve or Marleen Hirschi at
18 that meeting?
19 A. I know you were there, I know Kal was
20 there, you were there and I was there.
21 Q. When you say "you" in that last answer,
22 were you referring to both Mr. and Mrs. Hirschi?
23 A. Right. He was sitting here (indicating),
24 Kal was sitting at the table and she was sitting
25 here (indicating) and I was sitting here

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1 (indicating), and it seems like somebody was sitting
2 here (indicating), but I'm not sure. I can't
3 recall.
4 Q. Do you recall any meetings that you had
5 with Mr. or Mrs. Hirschi that either Steve or
6 Marleen Hirschi also attended? I mean prior to the
7 closing.
8 A. I'm not sure. Maybe that's when Marleen
9 was there. I'm not sure.
10 Q. She could have been at the meeting after
11 Mr. Rasekh came back from Egypt, but you're not
12 certain?
13 A. I'm not certain. I feel like someone
14 else was there, but I'm not sure.
15 Q. Is there any other reason you increased
16 the earnest money payment other than what you've
17 already testified to?
18 A. Not that I know of.
19 Q. Who attended the meeting you had with
20 Mr. Tilby, the Hirschis' accountant?
21 A. I don't know. It might have been Stan,
22 it might have been my son. I'm not sure.
23 Q. Your son Daryl?
24 A. I know somebody else was there.
25 Q. Your son Daryl?

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1 A. Uh-huh (yes). I'm not sure.
2 Q. Where did that meeting take place?
3 A. Tilby's office.
4 Q. What was the purpose of the meeting?
5 A. To go over the papers.
6 Q. Did you request the meeting?
7 A. I can't remember.
8 Q. I'm sorry. What else did you say? To go
9 over the papers and what else?
10 A. He was their accountant.
11 Q. How long did you meet with Mr. Tilby?
12 A. I don't know. A meeting in his office.
13 I don't know how long it was.
14 Q. More than an hour?
15 A. I wouldn't think so. I'm sure it wasn't
16 more than an hour.
17 Q. Did the Hirschis also attend that
18 meeting?
19 A. Not to my knowledge.
20 Q. What documents or papers did you review
21 in Mr. Tilby's office?
22 A. Hirschis gave me some documents and
23 papers of all of the expenditures and the money that
24 was brought in and the money that was spent.
25 Q. They gave you accounting statements for

Page 10

1 the Hirschi Center, didn't they?
2 A. Uh-huh, but they included their own
3 personal, so it was hard to read.
4 Q. Did they give those accounting statements
5 to you before you went to meet with Mr. Tilby?
6 A. Yes.
7 Q. When did they give those to you?
8 A. I don't know.
9 Q. Did you review those accounting
10 statements with Mr. Tilby?
11 A. That's why we went there.
12 Q. Do you recall what you asked him?
13 A. He certainly didn't call me.
14 Q. My question is what did you ask him?
15 A. I just know we went over the documents,
16 and they were very hard to read, because even
17 Hirschis said that two families lived off of it, you
18 know, so it showed they had no profit, so we were
19 trying to figure out how much profit. We couldn't
20 figure it out because their papers showed no profit,
21 and they justified it because they said it was
22 supporting two families.
23 Q. What did you ask Mr. Tilby to show you?
24 A. Same thing. We wanted to see if he
25 could. He couldn't do it either.

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1 Q. Did the Hirschis do anything to indicate
2 to you that you did not have the right to have an
3 inspection?
4 A. No.
5 Q. Did they cooperate with any
6 inspection --
7 A. I don't know. I wasn't involved in any
8 of that. We never even talked about that with
9 Hirschis when negotiating.
10 Q. Never talked to the Hirschis about
11 inspection?
12 A. No.
13 Q. Did you ever talk to the Hirschis --
14 excuse me.
15 A. I asked questions myself. I asked, you
16 know, if everything had been passed. They assured
17 me that by June everything had been passed, such as
18 the Health Department, the Fire Department. They
19 said there was a new roof on the house, so I asked
20 all those kind of questions, maybe more.
21 Q. We'll come back to that after lunch.
22 A. My son also asked questions.
23 Q. When would your son have asked questions?
24 A. I don't know.
25 Q. Was this Daryl?

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1 A. No.
2 Q. -- this exhibit?
3 A. No.
4 Q. Did you ever make an inspection and
5 decide in your sole discretion whether an inspection
6 of the property was acceptable?
7 A. No.
8 Q. Look at paragraph 8.2 down at the very
9 bottom of that page. "If buyer does not deliver a
10 written objection to Seller regarding a Seller
11 Disclosure or the property inspection within the
12 time provided in subsection 8.1 above, that document
13 or inspection will be deemed approved or waived by
14 the Buyer."
15 Did you review paragraph 8.2 --
16 A. No.
17 Q. -- when you signed Exhibit 7?
18 A. No.
19 Q. Did you ever provide a written objection
20 to the Hirschis regarding either the seller
21 disclosures or the property inspection?
22 A. No.
23 Q. Go to the next page, please, of
24 Exhibit 7, paragraph 10, Seller's Limited
25 Warranties.

Page 1

1 A. Uh-huh (yes).
2 Q. Was this when he inspected the property?
3 A. I think we just asked questions, and he
4 trusted Hirschis, trusted Kal.
5 Q. Decided not to do an inspection?
6 A. We didn't decide. We didn't even read
7 this.
8 Q. Did you talk to Mr. Rasekh about
9 conducting an inspection?
10 A. No.
11 Q. Did you ever say anything to him about I
12 think we need to do inspection?
13 A. No. He told me what to do. He dominated
14 my world. I didn't tell him what to do.
15 Q. If you look at paragraph 8.1 at the
16 bottom of No. 7, it says, "Buyer shall have 20
17 calendar days after acceptance in which to review
18 the content of Seller Disclosures, and, if the
19 inspection contingency applies, to complete and
20 evaluate the inspection of the property and to
21 determine if, in Buyer's sole discretion, the
22 content of all Seller Disclosures, including the
23 property inspection, is acceptable."
24 Did you review paragraph 8.9 when you
25 signed --

Page 1

1 Did you review paragraph 10 when you
2 signed Exhibit 7?
3 A. No.
4 Q. I'm sorry. I didn't hear that.
5 A. No.
6 Q. Did you ever review it at any time after?
7 A. No.
8 Q. Go down to paragraph 14. Did you review
9 paragraph 14 at the time you signed Exhibit 7?
10 A. No.
11 Q. Did you ever review it afterward?
12 A. No.
13 Q. Did you ever discuss any of the
14 paragraphs in Exhibit 7 with Mr. Rasekh?
15 A. Not from this document, no.
16 Q. And by this document, are you referring
17 to either the first three pages of Exhibit 5 or
18 Exhibit 7?
19 A. We're talking about Exhibit 7.
20 Q. Did you ever ask him any questions about
21 what any of the terms meant, anything like that?
22 A. No.
23 Q. Go to page 284 of Exhibit 5, which is
24 Addendum No. 1. It says the first contingency is
25 subject to the buyer review of all documents

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1 regarding maintenance, utility, wages, salaries.
2 Do you see that?
3 A. Yes.
4 Q. Whose handwriting is this?
5 A. It's not my handwriting.
6 Q. Is that Mr. Rasekh's handwriting; do you
7 know? If you don't know, just say so.
8 A. I don't know.
9 Q. Did you review any documents that are
10 subject to paragraph No. 1 on page 284?
11 A. No.
12 Q. Did you review any maintenance documents,
13 utilities documents, wages documents or salaries
14 documents?
15 A. No.
16 Q. Did you ever ask to see any?
17 A. No.
18 Q. Did the Hirschis ever refuse to provide
19 you any?
20 A. No.
21 Q. Further on in Exhibit No. 5, going to
22 page 288, which is Counteroffer No. 4 with your
23 acceptance signature at the bottom, do you see that?
24 A. Yes.
25 Q. Do you see item No. 1 on that page says,

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1 "In case buyer sales [sic] property in the future,
2 the sellers agree to let the underline mortgage to
3 be assumed by a qualified buyer with a full credit
4 check and a financial STMT," I'm assuming statement,
5 "made by the seller."
6 Do you see that?
7 A. Yes, I do.
8 Q. Had you had any discussions with either
9 the Hirschis or with Kal Rasekh at this time about
10 selling the property in the future?
11 A. No.
12 Q. Had you considered selling the property,
13 the Hirschi property, in the future?
14 A. On August 3rd?
15 Q. Yes.
16 A. No. Only if it did not work Kal promised
17 me and assured me he would sell it.
18 Q. What do you mean by did not work? If it
19 did not work he promised you?
20 A. I would not lose anything. If I went in
21 and it didn't work, he'd buy it or sell it. He
22 assured me and promised me.
23 Q. You testified earlier that you weren't
24 going to pay \$900,000. How did you determine that
25 the \$900,000 purchase price was too high?

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1 A. Because I wouldn't have bought it at
2 \$900,000. I wouldn't have even bought anything at
3 800.
4 Q. You would not have bought anything at
5 \$800,000?
6 A. Huh-uh (no).
7 Q. Did you ever consider getting an
8 appraisal on the property?
9 A. Yes, I did.
10 Q. When did you consider that?
11 A. When I listed with VR Brokers, they
12 wanted me to get an appraisal.
13 Q. Prior to the closing when you bought the
14 property from the Hirschis, did you consider getting
15 an appraisal?
16 A. No. I trusted Kal's judgment.
17 Q. Did you understand prior to the closing
18 that you had the opportunity to get an appraisal if
19 you wanted one?
20 A. No.
21 Q. Were you unfamiliar at the time of the
22 closing with people obtaining appraisals on property
23 they were purchasing?
24 A. No. I just trusted Kal. I never thought
25 it was -- I trusted Kal.

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1 Q. Did you ever discuss getting an appraisal
2 with Mr. Rasekh?
3 A. No.
4 Q. You never raised the issue with him?
5 A. No.
6 Q. Did you ever discuss an appraisal with
7 the Hirschis?
8 A. No.
9 Q. Did they do or say anything to you to
10 dissuade you from getting an appraisal?
11 A. No.
12 Q. Did you ultimately get an appraisal on
13 the property?
14 A. Did I what?
15 Q. Did you ever get an appraisal on the
16 property?
17 A. Yes, I did. I called a company,
18 appraisal company. They wanted \$2,000 to appraise
19 it. I gave them \$1,000. They came in to appraise
20 it. They called and told me they did not want to
21 take my second thousand dollars, they would stop the
22 appraisal, because they could not appraise it and
23 they could not appraise it mainly for what I wanted
24 them to appraise it for. They could not appraise it
25 for what I paid.

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1 increase wedding receptions?
2 A. No. He just told me that I would have to
3 do wedding receptions in the long run.
4 Q. Did the Hirschis tell you that wedding
5 bookings were generally available only for persons
6 seeking very low rental rates?
7 A. I think the Hirschis knew that.
8 Q. Did they tell you that?
9 A. They weren't doing wedding receptions.
10 Maybe a friend or once in awhile they booked one.
11 They had one booked while I was there that they had
12 booked.
13 Q. I thought you just told me in response to
14 paragraph 47 that they were supplementing their
15 income with wedding receptions.
16 Were they or weren't they?
17 A. That's what they told me.
18 Q. They told you they were supplementing
19 their --
20 A. At periods of time while they were
21 running the Hirschi Center, yes, they were. At that
22 moment I don't know what they were doing. I think
23 they had one or two. They had one booked while I
24 was there.
25 Q. All right.

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1 A. I didn't have any receptions there after
2 those people.
3 Q. So you quit trying to have any wedding
4 receptions there?
5 A. You couldn't, absolutely, till I fixed it
6 up.
7 Q. And I presume the Hirschis couldn't have
8 had any wedding receptions there before the closing
9 for the same reasons. Wouldn't that be true?
10 A. I don't know. That's my business. They
11 can do anything they want. If they're not
12 embarrassed, fine. I was. Very rundown.
13 Q. "Following this discovery," in paragraph
14 49 now, "Plaintiff considered it necessary to paint
15 the exterior and interior and to replace the carpets
16 to make the Hirschi Center more marketable."
17 Did you paint the exterior?
18 A. Yes, I did.
19 Q. Did you paint the entire exterior?
20 A. I couldn't finish. My property was
21 bought on October the 10th. I felt very panicky
22 about getting the exterior painted or I would not be
23 able to have wedding receptions, and it was going to
24 be cold weather, so I hurried as fast as I could to
25 paint the exterior. I did get the exterior painted.

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1 A. They told me in advance that there was
2 one booked.
3 Q. Did that one take place?
4 A. Uh-huh, yes. It was embarrassing for
5 them to have it there. They did it because it was
6 low.
7 Q. Are you continuing your answer?
8 A. I beg your pardon?
9 Q. Continue your answer.
10 A. They went ahead and booked it because of
11 the low rental rate.
12 Q. Was it your understanding that the
13 Hirschis were charging those same rates or similar
14 rates when --
15 A. I don't know.
16 Q. You didn't have any understanding they
17 were charging high rates and all of a sudden when
18 you took over you were charging low rates, did you?
19 A. They already rated it.
20 Q. Rated it?
21 A. They already talked to the people and
22 figured out how much the people were paying.
23 Q. So the rates that you could charge after
24 the closing were pretty much the same rates that
25 they charged before the closing, weren't they?

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1 not the home.
2 Q. Did you paint the exterior of the entire
3 Center building?
4 A. Most of it.
5 Q. You painted it white?
6 A. Cream.
7 Q. Had it been a natural stain, wood stain,
8 part of that?
9 A. Very dark wood stain. I guess it was. I
10 don't know if it was paint. I don't think so. Dark
11 wood.
12 Q. Again, where did you paint the interior?
13 A. I only painted the interior of the home.
14 I had to paint the bedroom for my children before
15 they could move in, so I painted that bedroom, and I
16 started to paint the bedroom that I was in and got
17 it half painted. I couldn't do everything.
18 Q. When did you get your bedroom half
19 painted?
20 A. During the course of me being there.
21 Q. What period of time? Did this get done
22 in November? You got it done in June?
23 A. I only got a wall painted. I was too
24 overwhelmed with the work. I was painting day and
25 night. I started painting it is all.

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1 Q. It also says in paragraph 49 that you
2 found it necessary to replace the carpets to make
3 the Hirschi Center more marketable.
4 You did replace the carpets --
5 A. No.
6 Q. -- or you didn't?
7 A. No.
8 Q. That paragraph's in error?
9 A. It is in error.
10 Q. And if you'll notice, you go back to
11 paragraph 25 in the Complaint, you can read
12 paragraph 24 to put that in context as well.
13 Paragraph 25 says that Rasekh did not explain that
14 he was acting as the agent for the seller.
15 Is that statement correct in that
16 Complaint, or did you, in fact, know that Rasekh was
17 acting as agent for the seller?
18 A. I don't know the words acting for the
19 seller. All I know is he called me and told me that
20 he left Hirschis, that he listed this property with
21 them.
22 Q. Did you conclude from that that he was
23 acting as the agent for the Hirschis?
24 A. Call it whatever you want. I don't know.
25 Q. That makes paragraph 25 wrong, doesn't

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1 it?
2 A. Huh-uh (no).
3 Q. Paragraph 25 is correct as far as you
4 understand it?
5 A. It's legal terms. I rely on my
6 attorney. The legal terms I don't know. I can only
7 tell you what I know.
8 Q. Look at paragraph 51.
9 A. Which one?
10 Q. Paragraph 51.
11 A. Okay.
12 Q. Read paragraph 51 to yourself, please.
13 (Witness examining document.)
14 THE WITNESS: True.
15 Q. (BY MR. LOVE) The State came in and
16 inspected on October 26, 1994?
17 A. Yes.
18 Q. That's the day they came?
19 A. I don't have it in front of me. If it's
20 on here, you know, it's probably what date it was.
21 Q. What would you look at to determine
22 whether that date was accurate or not?
23 A. I don't know exactly how I got that date,
24 but it sounds pretty accurate, either on or around
25 or about.

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1 Q. Did they provide you with a document or
2 anything --
3 A. They provided me with a document.
4 Q. Would this have been the first time the
5 State inspected the property after you took over?
6 A. Yes. I'm not sure where that date came
7 from.
8 Q. Well, now, if they came on the 26th, that
9 would be approximately three weeks after you
10 purchased the property.
11 A. I'm looking at that time and wondering if
12 that's correct. It might be earlier. I would think
13 it would maybe be earlier. I'm not really sure
14 where that date came.
15 Q. Is it still your testimony that the State
16 came and inspected the day after you took over?
17 A. The day after?
18 Q. Yes.
19 A. No. I never said that.
20 Q. You never said that? You're certain you
21 never said that?
22 A. I just know that after I moved in I said
23 within an immediate time. Could have been a day,
24 day after, the Fire Department, the State
25 Department, they wanted to close me down.

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1 Q. Did they all come the same day?
2 A. No.
3 Q. You said that "the Hirschi Center was
4 inspected by the State and the Plaintiff was
5 informed that the Center ceased to be licensed as a
6 day care center upon her takeover and that to stay
7 open she would need to meet new qualification
8 standards by October 31, 1994."
9 Did you meet those standards?
10 A. No. There's no way I could.
11 Q. What was required, to your knowledge?
12 A. They wanted me to have a commercialized
13 dishwasher.
14 Q. What else?
15 A. They wanted me to have the entire Center
16 hooked up to the Fire Department, security system,
17 emergency exits, lighting. They wanted the
18 playground completely redone. They didn't want peat
19 gravel. Those were the main things.
20 Q. Anything else that you can think of?
21 A. Those are the major things.
22 Q. Did you obtain a commercialized
23 dishwasher?
24 A. No.
25 Q. At any time ever?

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<p>1 A. No.</p> <p>2 Q. Did you ever obtain a new dishwasher</p> <p>3 after you moved in?</p> <p>4 A. Yes, I did.</p> <p>5 Q. Where did you get the dishwasher from?</p> <p>6 A. I got it out of Stan's brother's home.</p> <p>7 Q. Was it adequate for your purposes?</p> <p>8 A. It filled my purpose, but not for Health</p> <p>9 Department purposes as well. They extended my time</p> <p>10 till June.</p> <p>11 Q. The State did?</p> <p>12 A. Yes. I fought for it.</p> <p>13 Q. Did you pay for the dishwasher you got</p> <p>14 from Stan's brother's house?</p> <p>15 A. I'm not sure. He might have paid a</p> <p>16 hundred. Maybe he did. I don't know.</p> <p>17 Q. Possibly you got it for free?</p> <p>18 A. Yes.</p> <p>19 Q. You said that you had to have the entire</p> <p>20 Center hooked up to the Fire Department?</p> <p>21 A. Yes.</p> <p>22 Q. Did you have that done?</p> <p>23 A. No.</p> <p>24 Q. Why not?</p> <p>25 A. Very expensive.</p>	<p>1 Q. How expensive?</p> <p>2 A. Thousands.</p> <p>3 Q. How many thousands?</p> <p>4 A. I don't know.</p> <p>5 Q. What did you do to determine it cost</p> <p>6 thousands of dollars?</p> <p>7 A. I made calls.</p> <p>8 Q. To who?</p> <p>9 A. To a security place.</p> <p>10 Q. Which one?</p> <p>11 A. I made a call to the security place plus</p> <p>12 Ron Orban, my friend, and he worked for a security</p> <p>13 company. I did not rely on him. I also made calls.</p> <p>14 Q. Do you remember who you called?</p> <p>15 A. No.</p> <p>16 Q. When did you make those calls?</p> <p>17 A. Everything that I did, as soon as I found</p> <p>18 out, I was making calls.</p> <p>19 Q. So you tried to get a Fire Department</p> <p>20 qualification with regard to the emergency system</p> <p>21 shortly after October 26, 1994?</p> <p>22 A. After October 10th.</p> <p>23 Q. Shortly after October 10th you tried to</p> <p>24 get the entire Center hooked up to the Fire</p> <p>25 Department?</p>

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<p>1 A. I didn't try to get it hooked up. I</p> <p>2 tried to get information about it, what it would</p> <p>3 take to get it hooked up.</p> <p>4 Q. When did you get the information you</p> <p>5 needed?</p> <p>6 A. During that time. When I made the calls,</p> <p>7 what I got from Ron Orban, he came in and put</p> <p>8 emergency lights in the exits. There wasn't</p> <p>9 anything in that building that I know of that</p> <p>10 actually met qualifications or standards of what the</p> <p>11 Fire Department and the Health Department wanted.</p> <p>12 They were like waiting for it to be closed and to</p> <p>13 pounce on me.</p> <p>14 Q. So you found within days, weeks after</p> <p>15 October 10th that it was too expensive to install</p> <p>16 the necessary equipment?</p> <p>17 A. Too expensive. I had till June.</p> <p>18 Q. But when did you discover it was too</p> <p>19 expensive?</p> <p>20 A. It was just expensive. To do all the</p> <p>21 qualifications would have been over \$10,000 and</p> <p>22 more.</p> <p>23 Q. And you determined that in October of</p> <p>24 1994?</p> <p>25 A. Pretty much, yes, October or November.</p>	<p>1 Q. It says here that you were informed that,</p> <p>2 among other things, to stay in business the State</p> <p>3 required you to have a licensed, certified director</p> <p>4 on your staff of employees.</p> <p>5 When did you discover that?</p> <p>6 A. The same time, same period of time.</p> <p>7 Q. Late October/early November, 1994?</p> <p>8 A. Yes, early November.</p> <p>9 Q. What did you do to get a certified</p> <p>10 director on your staff?</p> <p>11 A. Put an ad in the paper.</p> <p>12 Q. When did you start doing that?</p> <p>13 A. I still had a time frame to get it, and</p> <p>14 Marleen was there, and she was acting director, and</p> <p>15 she was not qualified under those qualifications.</p> <p>16 Q. How do you know she wasn't qualified?</p> <p>17 A. Because they said.</p> <p>18 Q. Who said it?</p> <p>19 A. The Department. She had to have certain</p> <p>20 qualifications to be an acting director, and she</p> <p>21 didn't have the qualifications.</p> <p>22 Q. When did they tell you she didn't have</p> <p>23 the qualifications?</p> <p>24 A. During this time that I found all this</p> <p>25 out. During October/November.</p>

1 property with Michael Drury initially?
2 A. No, because I put it -- I listed it for
3 a short time that I was open, but I realized Michael
4 Drury was not doing anything at all to bring
5 qualified buyers and nothing was happening, and of
6 course I just maintained the facility.
7 Q. So about the time you realized Michael
8 Drury wasn't selling the property, within three
9 months you decided to continue maintaining it?
10 A. Probably. I listed it one week after
11 October the 10th, so I gave him a couple of months.
12 Q. So this is January or February you quit
13 seeking students for the day-care center?
14 A. (Witness nodding head affirmatively.)
15 Q. How many students did you have there in
16 December; do you know?
17 A. I'd have to look at my records.
18 Q. Where are those records?
19 A. They're in storage.
20 Q. Would this document tell you how many
21 were enrolled? I'm going to show you what's in
22 handwriting a roll of August, 1994, through --
23 A. Do you want me to count them?
24 Q. No. I just want to know if you could
25 look at that document and tell how many students you

1 had, say, in December of 1994?
2 A. On my document I have it written down.
3 MR. LOVE: I request production of any
4 documents that indicate how many students were
5 enrolled.
6 THE WITNESS: You can count that if you
7 want.
8 Q. (BY MR. LOVE) Is that a complete list?
9 A. I don't know. I haven't looked at it. I
10 don't know exactly. You know, maybe there's pages
11 missing. I have no idea. I have no way to know.
12 It looks like it probably is.
13 Q. Do you know as you sit here how many
14 students you had in day-care in December of 1994?
15 A. No. It was four years ago.
16 Q. Would you be surprised if you had 88?
17 A. I know it was too many for the Center.
18 Q. You had too many children for the Center?
19 A. Absolutely.
20 Q. Were you receiving income or payment or
21 fees from all those students?
22 A. Are you asking me if I received payments.
23 Q. Yeah. Did they pay? You said there were
24 too many students for the Center in December of
25 1994. Did some of them go for free, or did they all

1 pay?
2 A. I don't want to answer that.
3 Q. I don't believe you have a choice.
4 A. Because I don't know really exactly what
5 you're saying. I mean, if people are in day-care,
6 they pay; right? Sometimes it's hard to collect,
7 you know, so it's just an irrelevant question as far
8 as I'm concerned.
9 Q. Really? You think that question's
10 irrelevant?
11 A. Yeah, because if people are in day-care,
12 that's what they do; right?
13 Q. And they're paying their way, 250 bucks a
14 month each one of them; right?
15 A. (Witness nodding head affirmatively.)
16 Q. You have too many students in the
17 day-care to handle, you claim each of them are
18 paying, and you say you couldn't make ends meet.
19 You think that's irrelevant.
20 Is that your testimony?
21 A. No. You're putting words in my mouth,
22 and I won't comment on that.
23 Q. How long did you operate the Hirschi
24 Center, the day-care?
25 A. From October through September, a year.

1 Q. September of 1995?
2 A. Uh-huh (yes).
3 Q. Do you know how many students you had in
4 the day-care center in September, 1995?
5 A. I don't have that. It's four years ago,
6 and I don't have that in front of me.
7 Q. Was it more than the Center could handle?
8 A. I feel that way, and Marleen confirmed
9 it. She said that at times they increased their
10 children that much and they would always go back to
11 decreasing it.
12 Q. So in September of 1995 there were still
13 more children enrolled at the day-care than the
14 Center could handle. Is that accurate?
15 A. I feel that way. I feel that was more
16 than what we should have had in there. If you're
17 asking me my feelings or the facts, this is not
18 facts. This is my feeling.
19 Q. And those were all paying students?
20 A. As far as I know.
21 Q. Turn to paragraph 61 on page 14. "In
22 late November, 1994, the Plaintiff engaged a friend
23 to assist her in setting up books of account, and
24 upon a review of the prior income the plaintiff's
25 friend informed her that in his opinion the business

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1 conducted at Hirschi Center had been
2 misrepresented."
3 A. Stan.
4 Q. Stan Spafford?
5 A. Yes, told me so.
6 Q. And he did that in late November, 1994?
7 A. (Witness nodding head affirmatively.)
8 Q. Is he an accountant?
9 A. Not that I know of. He works for Utah
10 Power as a salesman.
11 Q. It says here that "upon a review of the
12 prior income."
13 Do you know what prior income he reviewed
14 in late 1994?
15 A. He might have been basing it on the
16 papers, I don't know, the documents. You'd have to
17 ask him. I don't know.
18 Q. Do you know whether he was referring to
19 the information --
20 A. That's what I was wondering.
21 Q. -- that was provided in Exhibit 8?
22 A. I don't know. You'd have to ask him.
23 Q. To your knowledge, did he review anything
24 other than the information that's in Deposition
25 Exhibit 8?

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1 A. It was misrepresented by the grandfather
2 clause. It was said to be something it wasn't.
3 Q. This is what Stan told you in this
4 conversation in late November, 1994?
5 A. I can't remember the exact conversation.
6 He told me about the misrepresentation.
7 Q. How was it misrepresented to be something
8 it wasn't?
9 A. Had leaks.
10 Q. Any other way in which it was
11 misrepresented to be something it wasn't?
12 A. It was misrepresented to me because I was
13 told that I could walk right in and take over and
14 everything was just ready for me to walk in and take
15 over.
16 Q. Who told you that?
17 A. And it was not.
18 Q. Is that what Mr. Rasekh told you?
19 A. Kal Rasekh.
20 Q. What representations, if any, did the
21 Hirschis make to you about the licensing?
22 A. Grandfather clause.
23 Q. What did they tell you?
24 A. They didn't. They told me everything had
25 been passed and I could walk in and all I have to do

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1 A. Any other documents?
2 Q. Yes.
3 A. No. These are the only documents we
4 have.
5 Q. He told you in his opinion the business
6 conducted at the Hirschi Center had been
7 misrepresented?
8 A. Yes.
9 Q. Is that exactly what he told you?
10 A. Yes.
11 Q. Did he tell you how it had been
12 misrepresented?
13 A. You'll need to ask him. I can only speak
14 for myself.
15 Q. I know, but I'm asking you what he told
16 you.
17 Did he tell you how it had been
18 misrepresented?
19 A. You'd need to ask him. He felt like it
20 was misrepresented.
21 Q. Well, my question is did he tell you
22 anything other than what you've already told me?
23 Did he tell you how it had been misrepresented in
24 any way? Anything more specific than is stated in
25 paragraph 61?

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1 is relicense, and I asked them -- I knew I had to
2 relicense, and I asked them if everything had been
3 passed so that I knew when I walked in there that I
4 could relicense with just what I told you earlier of
5 the measuring and all the qualifications that they
6 needed. Would there be any reason that I could not
7 relicense, and that's when this representation was
8 made by the Hirschis.
9 Q. What did they say to you?
10 A. They told me everything had passed, to
11 walk in and relicense, just do my paperwork.
12 Q. What did you later find out hadn't been
13 passed?
14 A. I just went over that. The playground,
15 the director, the washer, all the new qualifications
16 that were not in the grandfather clause, Fire
17 Department.
18 Q. Did they ever discuss with you the fact
19 that they were grandfathered?
20 A. No.
21 Q. Did they make representation to you about
22 that one way or another?
23 A. Never.
24 Q. When did you have this discussion with
25 the Hirschis regarding licensing? Which meeting?

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1 A. I don't know when, but before. I knew
2 I'd have to go in and relicense it in my name
3 because we were going to change the name of the
4 day-care. I had like six months to change it, so
5 changing the name and putting it in the name of the
6 new owner.
7 Q. Did you ever talk about any information
8 to indicate that the Hirschi Center hadn't passed
9 with respect to licensing requirements?
10 A. Never. I was totally informed that
11 everything had passed and all I had to do was my
12 paperwork to make the change.
13 Q. My question was did you ever learn any
14 information to indicate that the Hirschi Center had
15 not passed all its licensing requirements and all
16 its inspection requirements --
17 A. No.
18 Q. -- prior to the time you took over?
19 A. I don't know. I left all that to Kal
20 Rasekh.
21 Q. For all you know, the Hirschi Center may
22 very well have passed all its inspections, may have
23 passed all its licensing reviews when the Hirschis
24 owned it?
25 A. All I know is when I talked to the

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1 Hirschis, they told me everything had passed by
2 June.
3 Q. Did you ever learn anything that
4 indicated that it hadn't passed by June?
5 A. I started investigating it. The reason
6 they passed it was because of the grandfather
7 clause. I've never heard of a grandfather clause in
8 my life until this time.
9 Q. And my question is simply this: Are you
10 aware of any information to indicate that the
11 Hirschi Center had not passed all of its licensing
12 or inspection requirements in June of 1994?
13 A. They told me it had. I relied on them.
14 Q. My question is did you ever learn any
15 information that they were not telling you the truth
16 that they passed?
17 A. I never questioned the truth of the
18 Hirschis. They were my Bishop and my patriarch, and
19 I trusted Kal, and I felt very confident in what
20 Hirschis -- everything that they told me was true.
21 Q. Here's my question, Ms. Bingham. Did you
22 ever learn anything after you took over to indicate
23 that what the Hirschis told you wasn't true, and, if
24 so, what did you learn?
25 A. I learned that there was a grandfather

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1 clause and that that was why it was passed. It
2 wasn't passed because it met qualifications. It was
3 only passed because of the grandfather clause.
4 That's what I learned.
5 Q. Did you learn anything else other than
6 what you've already testified to with regard to the
7 grandfather clause about whether the Hirschi Center
8 had passed or not passed its licensing inspection?
9 A. (No audible response.)
10 Q. So is it fair to say the basis for your
11 claim of misrepresentations by the Hirschis is that
12 they didn't tell you there was a grandfather clause?
13 A. I feel like that is one of them, yes.
14 Q. What other misrepresentation did they
15 make to you in connection with the --
16 A. Referring back when I said it wasn't what
17 it was said to be, I feel like the "rundownness" of
18 it, the leaks, I feel that --
19 Q. I'm only talking about licensing. Are
20 you talking about licensing?
21 A. Are we talking about licensing?
22 Q. My question specifically had to do with
23 any other misrepresentations the Hirschis made to
24 you --
25 A. On licensing.

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1 Q. -- on licensing other than they didn't
2 tell you there was a grandfather clause?
3 A. That's it.
4 Q. So as far as licensing's concerned, the
5 only issue that you're raising is the fact that
6 there was a grandfather clause and you didn't know
7 it. Is that fair?
8 A. You could label it as grandfather clause,
9 but it didn't meet qualifications either way. If
10 you want to call it grandfather clause or it didn't
11 meet the qualifications that I had to meet, I was
12 promised I was walking into a business that was all
13 ready to go, that I did not have to go back and do
14 anything but just walk in.
15 Q. Did the Hirschis provide you copies of
16 any inspection reports?
17 A. No.
18 Q. Did they ever show you anything that
19 required inspection or anything else?
20 A. They told me it was inspected in June.
21 Not that I recall. I don't know. It's five years
22 ago.
23 Q. All right. Look at paragraph 62 of the
24 Complaint. You say that you believe you could no
25 longer trust Rasekh; is that correct?

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1 A. Yes.
2 Q. And your friend advised you to put the
3 Hirschi Center up for sale; is that correct?
4 A. Yes.
5 Q. And recommended you contact Michael Drury
6 of VRUtah?
7 A. I was in his home, Ron Orban's home, and
8 he wouldn't let me leave the house. He looked up
9 the VR brokers phone number and dialed the number
10 himself and handed the phone to me.
11 Q. Just so I'm clear, when you say your
12 friend advised you to put it up for sale, that's Ron
13 Orban. It's not Stan Spafford?
14 A. I think. When we're talking about
15 calling VR Brokers.
16 Q. And that happened in late November, 1994?
17 A. No.
18 Q. Did it happen earlier than that?
19 A. It happened between October the 10th and
20 October 17th.
21 Q. So is it fair to say that you decided to
22 put the Hirschi Center up for sale before Stan
23 Spafford told you that the business had been
24 misrepresented?
25 A. I think Stan Spafford told me that

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1 before.
2 Q. Before what?
3 A. What day are you saying? When did you
4 tell me this?
5 Q. Well, look at paragraph 61. It says that
6 you engaged Stan Spafford to set up books of account
7 in late November, 1994.
8 A. This doesn't mean it's the very first
9 time.
10 Q. So he told you that it had been
11 misrepresented earlier than that?
12 A. Yes.
13 Q. Did he tell you that --
14 A. Everyone told me.
15 Q. Who else told you?
16 A. Ron told me, Stan told me. They're the
17 closest friends that told me.
18 Q. Did Stan tell you that before you went to
19 visit Vincent Tilby?
20 A. Vincent who?
21 Q. Vincent Tilby, the accountant?
22 A. No. He said he was suspicious of.
23 Q. He told you he was suspicious before you
24 went to visit Vincent Tilby?
25 A. I think during this time.

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1 Q. When you say this time, what time are you
2 referring to? The period of time you went to visit
3 Vincent Tilby?
4 A. Otherwise I don't think I would have
5 visited Vincent Tilby.
6 Q. So Stan Spafford was suspicious of the
7 financial statements --
8 A. Not suspicious, but --
9 Q. Leery?
10 A. Yeah, like anybody would be.
11 Q. Yeah, like anybody would be.
12 A. Yeah.
13 Q. You went to visit Vincent Tilby, and
14 after that did Stan Spafford tell you he was
15 suspicious?
16 A. In September I remember telling Stan
17 Spafford that I'll have to buy it, and if it doesn't
18 work, I'll sell it.
19 Q. Why did you tell him you had to --
20 A. Because of the pressure I was under and
21 the domineering influence I had from Kal Rasekh.
22 Q. Did you have pressure from the Hirschis?
23 A. No. I think the only pressure I had from
24 the Hirschis was Kal Rasekh.
25 Q. When you had this conversation --

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1 A. He played them against me.
2 Q. When you had this conversation with
3 Stanley Spafford and you told him you had to buy the
4 Hirschi property, did he tell you at that time that
5 he thought the business had been misrepresented?
6 A. I think he was suspicious of it then.
7 Q. Did he tell you he was suspicious?
8 A. I don't know.
9 Q. Did you have any conversations with him
10 about it after you left Vincent Tilby's office?
11 A. I don't know. I don't remember.
12 Q. Do you recall him giving you any advice
13 one way or another after you left Vincent Tilby's
14 office?
15 A. I don't know.
16 Q. Did you disregard that advice and rely on
17 what Kal Rasekh told you?
18 A. Kal Rasekh told me not to rely on the
19 documents. I trusted him, and he told me not to
20 rely on the documents.
21 Q. Did you follow that advice?
22 A. Yes, I did.
23 Q. You did not rely on any of the documents?
24 A. No. I relied on Kal Rasekh.
25 Q. Just so the record's clear, at the time

1 Do you see that?
2 A. I do.
3 Q. How did you decide to list the property
4 for a million dollars?
5 A. I didn't.
6 Q. You didn't make that decision?
7 A. No. The VR broker decided it, Drury.
8 All I wanted was my money back. I only wanted it
9 sold for exactly what I paid.
10 Q. Did you tell him all you wanted was your
11 money back?
12 A. Yes.
13 Q. What did he say?
14 A. He said, well, you need to make a little
15 bit of money. I said I don't want to. I just want
16 my money back. My son was there, I believe.
17 Q. Why did you decide to list the property
18 for sale a week after you took possession?
19 A. Because I knew that there's no way that I
20 could make it.
21 Q. As of October 17th, what had you learned
22 that led you to the conclusion that you couldn't
23 make it?
24 A. The requirements of the Fire Department,
25 plus I knew that I couldn't financially make it.

1 Q. How did you know you couldn't financially
2 make it?
3 A. Because I didn't have one dime to put
4 back into it.
5 Q. Any other reason that you knew that you
6 could not financially make it?
7 A. I couldn't meet all those qualifications.
8 Q. Is it your testimony by October 17th the
9 Fire Department had come and inspected the property?
10 A. Yes.
11 Q. Is it your testimony by October 17th the
12 State Licensing Review had come and inspected the
13 property, or met with you?
14 A. I need dates.
15 Q. By October 17th, is your testimony that
16 you had learned that you were going to have to have
17 a new director?
18 A. Also, I don't know what the date is. I'd
19 have to look up the dates.
20 MR. VEASY: Can we go off the record?
21 (Discussion held off the record.)
22 (Whereupon, Exhibit 10 was
23 re-marked and Exhibit 11 was
24 marked for identification.)
25 Q. (BY MR. LOVE) Let me show you what's
been marked as a new Exhibit 10, which is the

1 October 17 listing agreement with both the front and
2 the back page.
3 Do you see that? We've marked as
4 Exhibit 11 the Addendum to that agreement dated
5 March 8, 1995.
6 Just so the record's clear, the new
7 Exhibit 10 is the agreement you entered with Michael
8 Drury and VRUtah on or about October 17, 1994?
9 A. Yes.
10 Q. And that's your signature --
11 A. Yes.
12 Q. -- on the seller line --
13 A. It is.
14 Q. -- on the first page of Exhibit 10?
15 A. Yes.
16 Q. Exhibit 11 now is the Addendum to that
17 agreement dated March 8, 1995?
18 A. Yes.
19 Q. And that's your signature --
20 A. Yes.
21 Q. -- on the bottom of Exhibit 11?
22 A. Yes.
23 Q. All right. You were testifying earlier
24 before we switched the exhibits as to how you
25 arrived at the purchase price of one million

1 dollars, and you testified, I believe, that Michael
2 Drury suggested that number.
3 A. Yes.
4 Q. Did he tell you what that number was
5 based on?
6 A. I don't know. I didn't care. I didn't
7 want to make any money. I just wanted my money
8 back. That's all I wanted.
9 Q. At the time you entered this agreement,
10 had you requested the appraisal from the Jorgensen
11 Appraisal group?
12 A. No.
13 Q. How long after?
14 A. I don't know.
15 Q. Within days? Weeks?
16 A. I'm sure weeks, not days. He didn't say
17 anything about appraisal at this time.
18 Q. When did he first --
19 A. He called me and recommended an
20 appraisal. I can't remember. It had to be after
21 November.
22 Q. You didn't discuss an appraisal with
23 Michael Drury --
24 A. No.
25 Q. -- till after November?

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1 A. Not at this time, no.
2 Q. Now, at the time you entered this lease
3 agreement or, excuse me, this listing agreement with
4 Mr. Drury, is it your testimony that you believed
5 that the value of the Hirschi Center had been
6 misrepresented to you?
7 A. The reason I'm hesitating is there's a
8 difference to me on misrepresentation and knowing
9 that I can't do something, and I realized reality
10 that I could not do this. I was not qualified, I
11 could not do this, and that's why I was a little
12 squeamish before because I was scared, so it's hard
13 when you keep using the word misrepresentation.
14 Q. That's the word in the Complaint.
15 A. I just realized at closing that I could
16 not do this. I was not qualified to do this and was
17 scared.
18 Misrepresentation was after closing
19 whereas I got in and worked at it, as I realized how
20 run down it was, the grandfather clause, all this
21 came to a head where I felt that I had been
22 misrepresented.
23 Q. All right. So is it your testimony you
24 realized that the Hirschi Center was rundown after
25 you entered this listing agreement?

1 A. After the listing agreement? After I
2 moved in I realized how rundown it was.
3 Q. Was that before you entered this listing
4 agreement?
5 A. Yes. I had it for a week.
6 Q. At the time you entered this listing
7 agreement on October 17th, you knew the Hirschi
8 Center was rundown; is that fair?
9 A. Yes.
10 Q. No doubt about that, is there?
11 A. No doubt about it.
12 Q. And even though you knew it was rundown,
13 you agreed to list it for a million dollars;
14 correct?
15 A. All I wanted was my money. That's all I
16 told him.
17 Q. Did you tell him --
18 A. I didn't want one dime more.
19 Q. At the time you listed this with Michael
20 Drury, did you indicate anything to the effect that
21 you believed the Hirschi Center was rundown and not
22 worth what you paid for it?
23 A. I just don't remember thinking that way
24 at this time. At the meeting at this moment all I
25 was thinking is I wanted my money out of it.

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1 Q. So you did not tell Mr. Drury that the
2 Hirschi property was not worth what you paid for it?
3 A. I might have said that.
4 Q. You might have. You don't know?
5 A. I can't tell you for sure. All I know is
6 I wanted my money out of it, not one dime more.
7 Q. If you look halfway down the left-hand
8 column here where it says Reason for Sale
9 (indicating), and it says family problems.
10 Is that your handwriting?
11 A. No.
12 Q. How did you fill this out? Were you and
13 Mr. Drury present when he wrote this up?
14 A. And my son.
15 Q. Your son was there, too?
16 A. Yes.
17 Q. Did you tell Mr. Drury when you met with
18 him that the reason that you were selling this
19 property was family problems?
20 A. All I told Mr. Drury to my knowledge is I
21 wanted my money out of it, not one dime more. I did
22 not want to sign any more than a three month
23 listing. He gave me every assurance that it would
24 be closed within three months.
25 Q. For a million dollars? He told you you

1 could sell it for a million dollars?
2 A. I didn't care. All I wanted was my money
3 back.
4 Q. Did he tell you he could sell it for a
5 million dollars?
6 A. He might have. I don't know. All I know
7 is I only wanted my money back.
8 Q. Do you know where he would have gotten
9 this reference to family problems on the reason for
10 sale?
11 A. All I told him was I wanted my money
12 back. I did not want to sell it for more than three
13 months.
14 Q. Are you certain you didn't tell him you
15 wanted to sell it because of family problems?
16 A. All I told him was I wanted my money
17 back. I was very adamant about that. All the other
18 things were very insignificant to me. All I wanted
19 was to have it sold and to have my money returned.
20 Q. So you don't recall one way or another
21 the reason you told Mr. Drury you wanted to sell was
22 family problems?
23 A. Maybe my son did. I don't know. Maybe
24 they had to put something. I'm certain I did not
25 say family problems.

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1 termination is further based on the fact that I no
2 longer desire to sell the day care business and am
3 withdrawing the day care business from the market."
4 Why did you decide to withdraw the
5 day-care business from the market?
6 A. To get out from under him.
7 Q. And at the time you sent this letter to
8 him on or about February 22, 1995, was it your
9 intention to continue to operate the day-care
10 business?
11 A. I wanted out of this so that Kal could
12 list it. Kal would not list this as long as it was
13 with VR brokers. For what reasons, I don't know,
14 unless he didn't want to share commission, but he
15 adamantly -- I called Kal almost on a daily basis.
16 He told me when I was out of this listing he would
17 list it, so what I'm saying here is I terminated --
18 I did not want VR brokers to sell this.
19 Q. So as of February 22, 1995, was it your
20 desire to sell the Hirschi property, or was it your
21 desire to keep it and operate the day-care center?
22 A. I couldn't do it. I wanted out of VR
23 brokers, because Kal promised me at this point on
24 February 22nd, as this letter states, that if I got
25 out of VR brokers he would sell it for me, but he

Page 23

1 would not do it as long as I'm listed with VR
2 brokers. I don't know why. I can't imagine why he
3 couldn't have sold it.
4 Q. So when you say in that last sentence
5 that you no longer desire to sell the day-care
6 business, that's not accurate. Is that true?
7 A. I don't know if it was typed in here
8 because I no longer desired to sell the day-care
9 business per se. It's accurate because I really
10 wanted to just sell the Hirschi Center.
11 It says day-care business. You're
12 right. I did not want to sell the day-care
13 business. I wanted to sell the Hirschi Center.
14 Q. What's the difference in your mind?
15 A. What's the difference?
16 Q. Yeah.
17 A. The Hirschi Center property.
18 Q. So you wanted to sell the property?
19 A. The day-care business wasn't being built
20 up. It was only being maintained. I wasn't there
21 to sell to anyone the day-care business. I was only
22 there to sell it as a property.
23 Q. And that's the same way you purchased the
24 property; correct?
25 A. With the business thrown in.

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1 Q. So is it fair to say that as of February
2 22, 1995, you withdrew the day-care business from
3 the market?
4 A. I wasn't really selling it as a day-care
5 business, except VR brokers is a business. It sells
6 businesses.
7 Q. Well, as of February 22, 1995, was it
8 your intention to withdraw the day-care business
9 from the market and just sell the property?
10 A. True.
11 Q. That's what you intended to do?
12 A. I was never there to sell the day-care
13 business.
14 Q. Was it your intention as of February 22,
15 1995, to continue to operate the day-care business?
16 A. Maintain it.
17 Q. After February 22, 1995, when you sent
18 this letter to Mike Drury, did you do any of the
19 things that you had postponed in order to operate
20 the business?
21 A. No.
22 Q. You didn't do anything with regard to the
23 fire and alarms?
24 A. No.
25 Q. Didn't do anything with regard to getting

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1 a certified director --
2 A. No.
3 Q. -- anything like that?
4 A. Well, I kept trying to get a certified
5 director, yes. I needed to maintain. That may have
6 been when I had to.
7 (Whereupon, Exhibit No. 18
was marked for identification.)
8
9 Q. (BY MR. LOVE) I show you correspondence
10 from Del Findlay to VRUtah dated April 10, 1995,
11 with a copy to you.
12 Have you seen this correspondence before?
13 A. Yes, I have.
14 Q. Do you know whether Mr. Findlay provided
15 it to VRUtah on or about April 10, 1995?
16 A. Yes.
17 Q. When did you, to the best of your
18 recollection, retain Mr. Findlay?
19 A. I had spoken to him before April 10th,
20 but I hadn't for sure retained him. I was doing
21 every single thing possible to get out of that
22 listing. I called Drury every single day.
23 Q. I notice in the first paragraph
24 Mr. Findlay states that "Ms. Bingham was induced to
25 enter into the agreement based upon

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<p>1 misrepresentations and omissions." 2 Do you see that reference? 3 A. Yes, I see that. 4 Q. Is that an accurate statement of your 5 position with regard to your disagreements with 6 Mr. Drury and VRUtah? 7 A. Yes. 8 Q. Is that true with the rest of the 9 paragraph as well? 10 A. That's true. The next sentence is true. 11 That's true. True. 12 MR. DYER: Counsel, so that we have a 13 clear record, what's she referring to as being 14 true? 15 THE WITNESS: True. 16 MR. LOVE: I think she's referring to 17 every sentence in the first paragraph of Exhibit No. 18 18. 19 Q. (BY MR. LOVE) Is that correct? 20 A. Yes. 21 Q. Every sentence is true in that paragraph? 22 A. Yes. 23 Q. Is the same true of the second paragraph? 24 A. Absolutely. 25 Q. What was the low price that he wanted you</p>	<p>1 to sell that? 2 A. All I wanted was my money out. Whatever 3 his commission had to be and to get my money, that's 4 all I wanted. 5 Q. Do you recall what the low price was of 6 the offer he brought to you as referenced in Exhibit 7 18? 8 A. Are you talking to me about Mr. Roberts? 9 Q. I don't know what I'm talking about. I 10 didn't draft the letter. It just says here "You 11 have only brought her one offer in all of this time 12 and he is attempting to muscle her into selling at a 13 low price." 14 Do you know who he is referring to? 15 A. Yes. Randy Roberts. 16 Q. Do you know what the price was? 17 A. I'm not sure. I think it was around 18 700. I'm not sure. 19 Q. You rejected that offer? 20 A. I don't remember the paperwork on it. 21 Q. If you look at the last sentence of that 22 paragraph, it says, "She will also hold you 23 financially responsible for any losses she 24 experiences as a result of your asserting whatever 25 rights under the agreement you think you have,"</p>
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<p>1 et cetera." 2 Was that your position on or about April 3 10, 1995, that you would hold Michael Drury and 4 VRUtah responsible for any financial losses? 5 A. Where is that? Am I agreeing to that 6 sentence? 7 Q. Yeah. Was that your position -- 8 A. Yes. 9 Q. -- on or about April 10, 1995 -- 10 A. Yes. 11 Q. -- that you would hold Mr. Drury 12 responsible for any financial losses? 13 A. Yes, because he admitted that he wasn't 14 doing anything, but he wouldn't let me go. He held 15 me hostage. 16 Q. Now, this letter, as we talked about, 17 accuses Mr. Drury and VRUtah of misrepresentations 18 and omissions and was sent by a lawyer; correct? 19 A. Correct. 20 Q. At about the time that you sent this 21 letter to Mr. Drury, did you consider sending any 22 kind of a letter to the Hirschis accusing them of 23 making misrepresentations and omissions? 24 A. Did I think about it? 25 Q. Uh-huh (yes).</p>	<p>1 A. You're going to have to understand the 2 focus of this. I'm working 28 hour days and I'm 3 going to have Kal Rasekh sell this for me so I don't 4 lose any money if I can get out of VR brokers, so my 5 focus was here after my 28 hour day. 6 Q. So is the answer to my question you did 7 not consider sending a similar letter to the 8 Hirschis accusing them of misrepresentations and 9 omissions and holding them responsible for any 10 financial losses at about the time you sent this 11 letter to Michael Drury and VRUtah? 12 A. I could have been thinking about it, but 13 this is what I did. 14 Q. You didn't send one? 15 A. I did not send anything to Hirschis. 16 Q. Did you ever send anything to the 17 Hirschis prior to the time the First Amended 18 Complaint was filed in this action accusing them of 19 misrepresentations and omissions or otherwise 20 attempting to hold them responsible for any 21 financial losses you suffered? 22 A. No. I never spoke to the Hirschis only 23 on one occasion when Lois said the only person that 24 you better get to sell this property is Kal Rasekh, 25 and I said that's what I'm trying to do, and you</p>

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1 told me that.
2 Q. When did she tell you that?
3 A. In the spring.
4 Q. Of which year?
5 A. She said, "There's only one person that
6 can sell this," and that's Kal Rasekh.
7 Q. When did she tell you that?
8 A. In the spring.
9 Q. Which year? Of 1995?
10 A. Yes.
11 Q. Was that in a face to face meeting?
12 A. That was over the phone.
13 Q. Do you recall what prompted the phone
14 call?
15 A. Well, I think the conversation for the
16 phone call was that I was trying to sell it. It was
17 VR brokers that was trying to sell it. She told me
18 the only one that could sell it would be Kal Rasekh
19 should be the only one I should get, and I said I'm
20 trying to get out of the listing so he will sell it.
21 Q. Is it fair to say that in the spring and
22 summer of 1995 you received Notices of Default from
23 counsel for the Hirschis, Robert Poulsen?
24 A. For default of what?
25 Q. Default on payment of taxes or rent, or

1 actually it wouldn't be rent. It would be mortgage
2 payments.
3 A. It would be the taxes.
4 Q. Payments on the note and tax payments.
5 Do you recall receiving Notices of Default?
6 A. I do. I did receive them.
7 Q. And that you were in breach of your
8 obligations under the note?
9 A. I received them.
10 Q. When you received those Notices of
11 Default, did you ever send a letter back to the
12 Hirschis telling them that they had made
13 misrepresentations and omissions to you and that
14 they were responsible for any losses you suffered on
15 the property?
16 A. No.
17 Q. Ultimately, the Hirschis entered
18 foreclosure proceedings against you; is that
19 correct?
20 A. Did they?
21 Q. Yes, they did. Did they? Do you know
22 whether they did or not?
23 A. At that time did they? I did not know
24 that.
25 Q. No. At any time ultimately?

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1 A. Should I answer it?
2 Q. Yes.
3 A. I went to sue Kal Rasekh to a meeting in
4 his office with his supervisor.
5 Q. You went to sue him?
6 A. Because he wouldn't follow through, and
7 this was in October.
8 Q. Of 1995?
9 A. Right, and my girlfriend and I went
10 together. You know, I was up upset because he
11 hadn't made any effort to sell the property, and he
12 promised me he was doing it and he wasn't, and so we
13 sat with his supervisor, and we just wanted
14 confirmation that they would do everything possible
15 to sell the property.
16 They both agreed. Even the supervisor
17 said they would do every possible thing, and so I
18 had Lois and Harvey come over to my home with my
19 attorney, Del Findlay, and Del Findlay did all the
20 talking, and he said that we had spoken with Kal and
21 his supervisor and he was willing to sell, and we
22 asked the Hirschis if they would give more time to
23 Kal, and I remember Del Findlay saying you don't
24 have to, but will you give more time, and Harvey
25 Hirschi said yes. At that time I did not know this,

1 but foreclosure was already started is what
2 someone -- what I've heard since, and they did give
3 a verbal word to Del Findlay that they would allow
4 more time for Kal Rasekh to sell the property, but
5 they were already in foreclosure. I did not know
6 that.
7 Q. During that --
8 A. As far as I know, they were in
9 foreclosure.
10 Q. In that meeting, did Del Findlay threaten
11 legal action against the Hirschis?
12 A. No.
13 Q. Did he accuse the Hirschis of making any
14 misrepresentations or omissions?
15 A. Not that I know of. We just asked if
16 they would give us more time. That was the purpose.
17 Q. Did Mr. Findlay tell the Hirschis in so
18 many words that you considered them responsible in
19 any way for any financial losses you had suffered?
20 A. I just told you the purpose of it. We
21 were just asking for an extension. Del Findlay did
22 the talking. You need to ask him.
23 (Whereupon, Exhibit No. 19
24 was marked for identification.)
25 Q. (BY MR. LOVE) Exhibit 19 is

1 was reduced," and it was because I felt like I
 2 couldn't make it and I felt like I didn't have money
 3 to put into it. It needed money put into it. It
 4 was rundown.
 5 Q. My question is where you say you
 6 expressed to Mr. Rasekh that you were concerned the
 7 price was too high, it looked rundown and it would
 8 take a lot of money to fix it up, you expressed that
 9 concern to Mr. Rasekh before he left for Egypt; is
 10 that correct?
 11 A. I think I did that after.
 12 Q. At the bottom of that first full
 13 paragraph on the top of page 2 it says, "I told you
 14 that I had talked to my brother and others who kept
 15 telling me the price was too high."
 16 Those are conversations you had with your
 17 brother, David Weston?
 18 A. Yes.
 19 Q. And who else? Stan Stafford?
 20 A. Ron Orban.
 21 Q. All three of them?
 22 A. Susan Schone, who has passed away.
 23 Q. You had those conversations before the
 24 closing; correct?
 25 MR. DYER: I didn't hear who all the

1 others were.
 2 THE WITNESS: Yes, and then Kal kept
 3 telling me not to listen to them. He said are they
 4 financially successful? Look at me. I'm the one
 5 that you trust. Took me to his office at Coldwell
 6 Banker, which is the best office in the entire
 7 building, and showed me how successful he was and I
 8 need to trust him, not to trust these other people.
 9 MR. LOVE: Off the record.
 10 (Discussion held off the record.)
 11 MR. LOVE: Back on the record.
 12 Q. (BY MR. LOVE) In that last sentence,
 13 last two sentences in that paragraph, you say "You
 14 told me that you were well informed and your
 15 projections were certain that I could make the
 16 payments and a modest profit."
 17 What projections were you referring to?
 18 A. That it would be a money maker.
 19 Q. Did he give you projections, pro formas,
 20 any kind of written accounting statements showing
 21 how you could make money on it?
 22 A. No.
 23 Q. Did he give you a dollar projection of
 24 any kind?
 25 A. No.

1 Q. When you say projections, specifically
 2 what do you mean? I guess I don't understand.
 3 A. What I'm maybe guessing here is
 4 projections meant he did not have on paper, he
 5 couldn't say documents. He didn't document it.
 6 These projections are on what he's telling me what
 7 he is projecting.
 8 Q. Okay. Look at the last page. Look at
 9 that second full paragraph. It begins: "I worked
 10 myself, almost to death."
 11 Do you see that paragraph?
 12 A. "I worked myself, almost to death"?
 13 Q. Uh-huh (yes). That last sentence in that
 14 paragraph says, "I downsized the size of the day
 15 care based on the promises of Mr. Roberts to convert
 16 the Center to a restaurant with the help of his
 17 'investors.'"
 18 Do you see that sentence?
 19 A. Yes.
 20 Q. What did you do to downsize it?
 21 A. Anyone that wanted to -- I had a for
 22 sale sign up in front of the Hirschi Center. I had
 23 a for sale sign. What would you do if you had a
 24 child in a day-care with a for sale sign?
 25 Q. When did you put up the for sale sign?

1 A. I don't know. Kal Rasekh put it up.
 2 Q. So this for sale sign you're referring to
 3 is one that Kal Rasekh put up?
 4 A. They knew that I was selling it. I'm not
 5 going to have people bring their children in when
 6 I'm selling it to day-care.
 7 Q. Do you remember the scope of the
 8 downsize, from how many students to how many
 9 students, how big of downsize?
 10 A. Over a period of months it was quite a
 11 bit because all my teachers knew I was going, knew I
 12 was selling it. My very loyal parents stayed with
 13 me. I'm not going to say I did day-care during the
 14 summer, but I babysat. A lot of parents didn't want
 15 their children to be anywhere but with me.
 16 Q. Did you receive income from the day-care
 17 operations from October through September, October,
 18 '94, through September, '95? Did you have students
 19 paying you during that period of time?
 20 A. During the summer, June, July and
 21 August?
 22 Q. Uh-huh (yes).
 23 A. I had a few students.
 24 Q. Did you have students prior to that time,
 25 from October through May of '95? October, '94,

1 Q. (BY MR. VEASY) Let's go back on the record.
2 We've been having a discussion off the record and it's
3 my understanding that we've agreed that if you have
4 these documents that you've been requested at a prior
5 deposition that they will be produced on or before
6 December 1, 1999. Is that agreeable?

7 A. With me, yes.

8 MR. VEASY: How about you, counsel?

9 MR. GEORGE: Yes.

10 Q. (BY MR. VEASY) Okay. Let me ask you about a
11 few other documents before we get into the substance of
12 my questions. Do you have any other accounting records
13 in your possession which you have not produced in this
14 lawsuit to date dealing with the Hirschi Center?

15 A. Do I? I do not have any.

16 Q. Do you have any tax returns related to the
17 Hirschi Center or yourself which relate to the Hirschi
18 Center showing income from the Hirschi Center?

19 A. No, I don't.

20 Q. Did you file personal tax returns for those
21 years?

22 A. No.

23 Q. Is there a reason why you did not?

24 A. I guess, yes, there's a reason.

25 Q. Tell me.

1 Q. Checks, any accounting at all or account
2 statements for any type of account at Draper Bank.

3 A. I don't know. If I do I will have that
4 December 1st.

5 Q. Okay, thank you.

6 A. Because I'm not sure.

7 Q. Including any personal accounts you may have
8 at that bank.

9 A. Okay.

10 Q. Did Vincent Tilby continue to prepare
11 accounting statements for you after you purchased the
12 Hirschi Center?

13 A. Yes, he is my accountant.

14 Q. Would you produce any of those accounting
15 statements--

16 A. I don't know what account statements, though,
17 he just was my accountant and--

18 Q. Any documents he prepared on behalf of the
19 Hirschi Center would you produce?

20 A. Let me check. I don't have anything about
21 that in my possession. I think I would have given all
22 of that to you.

23 MR. GEORGE: Anything that Marie has given to
24 us we have given to you. She says she doesn't have
25 anything more.

1 A. Okay. The reason is I was going to see Tilby,
2 he was going to help me sort out all my-- the sale of my
3 house and my losses and then his right-hand lady left
4 and left him kind of in a bind and he couldn't help me
5 at that time and so I'm still in the process of doing
6 that.

7 Q. Still in the process of preparing tax returns
8 for those years?

9 A. Uh-huh (affirmative). I haven't done it yet.

10 Q. When do you think you will have those
11 prepared?

12 A. Probably in the next two years.

13 Q. Have you filed for extensions?

14 A. No, I didn't.

15 Q. I would like for you to check your records as
16 part of these other documents you're going to look for
17 and if you have any tax returns or extensions I would
18 like those also produced by December 1. Is that
19 agreeable with you?

20 A. Yes. Because I do not have any.

21 Q. Is that a yes for the record?

22 A. Yes, because I do not have any.

23 Q. Do you have any documents indicating account
24 numbers at Draper Bank?

25 A. Like are you talking about checks or--

1 Q. (BY MR. VEASY) Would you check again and--

2 A. I'll check again.

3 Q. --if you determine that there are no other
4 accounting documents, indicate that in your response by
5 December 1st?

6 A. I will check that.

7 Q. What is your educational background?

8 A. I have probably almost about two years of
9 college.

10 Q. So you did graduate from high school?

11 A. I did.

12 Q. Where did you graduate from?

13 A. Langley High School in Whithy Island,
14 Washington.

15 Q. And you did go to two years of college?

16 A. Over the last 30 years, yes.

17 Q. And where have you taken courses at
18 different-- is it more than one college?

19 A. Yes.

20 Q. Tell me where you've gone to college.

21 A. Two quarters at Everett Junior College right
22 out of high school and then I got married. And then I
23 got back to school on many occasions. I went to Salt
24 Lake Community College for a quarter, I went to BYU
25 Extension, Mesa Community College.

1 Q. Can you tell me the types of courses that you
2 took during that two-year period?

3 A. I took anatomy, physiology, communications,
4 sociology, psychology.

5 Q. Did you take any business courses?

6 A. No.

7 Q. Did you take any English courses?

8 A. I think at Everett I might have had one
9 English course. I did take an English course over 30
10 years ago, yes.

11 Q. Did you have to draft any papers in
12 conjunction with any of these courses?

13 A. It was so many years ago I don't recall what I
14 did.

15 Q. Do you recall if you had to do any papers for
16 any of these courses?

17 A. I don't believe so. I think I did a research
18 paper for psychology, is all I remember.

19 Q. Okay. Let me do a little background
20 information to make sure that I understand based on your
21 prior day's deposition as to, first of all, the types of
22 properties you have purchased during your life. It's my
23 understanding that you purchased a home at 2388 Cavalier
24 Drive; is that correct?

25 A. That's correct.

1 Roberts; is that correct?

2 A. No.

3 Q. Are you certain of that?

4 A. We were going to do that, but it never ever
5 developed.

6 Q. Is it your testimony that you never entered
7 into a commercial property lease with Randal Roberts
8 with your signature on it?

9 A. May I consult with my attorney?

10 Q. Just answer the question, please.

11 A. I don't know. That's what we were proposing
12 to do. We were leasing it to Randal Roberts, but it
13 never went through.

14 Q. Do you recall signing a commercial property
15 lease with Randal Roberts?

16 A. Well, can I see it so I know?

17 Q. I'm asking you a simple question.

18 A. I don't know.

19 Q. Do you have any understanding or recollection
20 that you entered into a lease with Randal Roberts?

21 A. He signed a lease.

22 Q. Do you recall you signed the lease?

23 A. I don't recall me signing the lease.

24 Q. This lawsuit was filed in March of 1997. My
25 clients, Coldwell Banker and Kal Rasekh, were not

1 Q. You also purchased a condominium at the
2 Incline Terrace?

3 A. That's correct.

4 Q. You also purchased the home you're living at
5 now at 642 South 10th West?

6 A. That's correct.

7 Q. And that's the home you continue to reside in
8 now?

9 A. That's right.

10 Q. You also purchased the Hirschi Center?

11 A. Yes.

12 Q. As to homes or structures you have sold, based
13 upon your prior testimony, I understand that you sold
14 your father's home in Arizona?

15 A. That's correct.

16 Q. You've got to make sure the court reporter
17 hears you.

18 A. Yes.

19 Q. You also sold the home at 2388 Cavalier Drive?

20 A. Yes.

21 Q. And with respect to the Hirschi Center, once
22 you purchased the Hirschi Center you subsequently leased
23 it; is that correct?

24 A. I leased it?

25 Q. Yes. Under a commercial lease with Randal

1 involved in this lawsuit until May of 1998. Can you
2 tell me why you did not sue them in your initial filing
3 of the lawsuit?

4 A. I thought it was all at the same time.

5 Q. Do you have an answer to that question?

6 A. No.

7 Q. Do you recall the types of claims you made
8 against Randal Roberts?

9 A. I would have to read it. I would have to
10 recall my memory on that, I think.

11 Q. Do you recall suing him for fraud?

12 A. No.

13 Q. Do you recall that he brought a countersuit
14 against you?

15 A. I don't know the details on it. I mean, I
16 just don't know how to answer these questions really.

17 Q. You settled with Mr. Roberts, didn't you?

18 A. I what?

19 Q. You settled your claim? The claims between
20 the two of you, you settled them?

21 A. Yes, I did.

22 Q. What were the terms of the settlement?

23 A. The terms of the settlement, \$15,000.

24 Q. Did he pay you or did you pay him \$15,000?

25 A. Did I pay him?

1 Q. Why?

2 A. I feel that I was very vulnerable. I feel

3 like-- like I said, I feel like, first of all, Kal lured

4 me, you know, into it. He came into our family as a

5 friend and knew my finances, got my trust, got my

6 loyalty, played on my emotions. So, you know, but I am

7 an adult so yes, I do bear some responsibility.

8 Q. Do you believe that when you sign an agreement

9 you're bound by its terms?

10 A. Yes. Just as Randal Roberts. I mean, he's an

11 adult too, he's vice president of a bank. He's a very

12 successful businessman and, you know, he signed a legal

13 document just as well as I signed a legal document.

14 Q. Do you think the failure of the Hirschi Center

15 has to do with anything with respect to how you ran the

16 operations of the Hirschi Center once you purchased it?

17 A. Absolutely not.

18 Q. Absolutely not?

19 A. I think it was doomed from day one.

20 Q. Okay. Do you know how long your brother David

21 Weston has worked for Mr. George's office?

22 A. How long has he worked with Mr. George?

23 Q. Yes.

24 A. I do not know.

25 Q. Let's go to the time period of 1992. In the

1 A. Uh-huh (affirmative).

2 Q. Is that a yes?

3 A. I disclosed them to him, yes.

4 Q. As part of your Amended Complaint you talked

5 about the sale of property located at 1351 East Fort

6 Union Boulevard. Do you recall that property?

7 A. Absolutely.

8 Q. And it was your choice to purchase that

9 property or at least enter into an agreement to purchase

10 that property; is that correct?

11 A. Yes.

12 Q. Then I believe that the sale did not go

13 through?

14 A. That's correct.

15 Q. Who was the seller on that property?

16 A. Who was the seller?

17 Q. Yes.

18 A. I don't-- I can't remember their names. I

19 would have to look it up.

20 Q. In fact, as I recall in your Amended

21 Complaint, your brother told you not to purchase that

22 property, didn't he?

23 MR. GEORGE: Which paragraph are you referring

24 to?

25 Q. (BY MR. VEASY) I'm asking if she has a

1 Amended Complaint, which is before you, you state

2 beginning at paragraph 10 that there was a relationship

3 between you and Mr. Rasekh concerning your financial

4 affairs. Is that correct?

5 A. Am I reading this now and saying it's correct

6 or--

7 Q. I'm just asking you.

8 A. Okay. Ask me something, please.

9 MR. VEASY: Please read the question back.

10 (Pending question read.)

11 THE WITNESS: Yes.

12 Q. (BY MR. VEASY) Then you itemize different

13 things in this paragraph 10 as to what you disclosed to

14 Mr. Rasekh, correct?

15 A. Uh-huh (affirmative).

16 Q. You chose to disclose those items to Mr.

17 Rasekh, did you not?

18 A. Over a time period, yes. I mean, it's not

19 just one day I opened up my papers and said, "These are

20 my financial statements." With the trust that I had

21 with Kal and with him being in my home and many numerous

22 conversations, yes, he learned of all my financial

23 affairs.

24 Q. And you chose to disclose that information to

25 him, correct?

1 recollection with respect to the property at 1351 East

2 Fort Union Boulevard, if she had advice from her brother

3 to not purchase that property.

4 A. I don't recall that. Kal was very upset--

5 Q. Ma'am, that's not the question. Listen to my

6 question.

7 A. --that it didn't go through.

8 Q. I believe you testified earlier that on page

9 39 of this Exhibit you did verify the truth and

10 correctness of the information in this Amended

11 Complaint; is that correct?

12 A. Is this the page?

13 Q. 39. That's your signature, right?

14 A. And what was the question?

15 MR. VEASY: Would you please read the question

16 back?

17 (Pending question read.)

18 THE WITNESS: Yes, that's my signature.

19 Q. (BY MR. VEASY) With respect to the property

20 at 1351 East Fort Union Boulevard, you're not making any

21 claim for damages in this lawsuit against Coldwell

22 Banker--

23 A. No.

24 Q. --or Mr. Rasekh; is that correct?

25 A. That's correct.

1 '94?

2 A. Are you talking about when I first became
3 acquainted with the property?

4 Q. Yes.

5 A. In the summer, in July.

6 Q. July of 1994?

7 A. Uh-huh (affirmative).

8 Q. At the time you closed, would it be correct to
9 state that you knew that at that center was being
10 operated a child day care business?

11 A. Yes.

12 Q. By the same token, is it fair to state that at
13 the time you closed you knew that also in conjunction
14 with the Hirschi Center there were wedding receptions?

15 A. No.

16 Q. You didn't know?

17 A. There were not wedding receptions.

18 Q. So as of the date of closing, you had no
19 information as to that business also conducting wedding
20 receptions?

21 A. It wasn't actively conducting wedding
22 receptions when I bought it. Maybe one a year, is my
23 understanding.

24 Q. With respect to all of your dealings with Mr.
25 Rasekh and other than what you've already produced as

1 part of this lawsuit, documents as part of this lawsuit,
2 do you have any personal notes or Day Timers reflecting
3 any conversations for your version of the facts of the
4 events of this lawsuit?

5 A. I wish I did, but I do not.

6 Q. So your answer is no?

7 A. No.

8 Q. You understood that Mr. Rasekh was a real
9 estate agent, correct?

10 A. Yes.

11 Q. During your first day's deposition you told us
12 on more than one occasion how Mr. Rasekh totally
13 dominated your life, correct?

14 A. That's true.

15 Q. Is it your testimony that if you would have
16 told Mr. Rasekh that you did not want to purchase the
17 Hirschi Center that you could not have done that?

18 A. That's true.

19 Q. Why?

20 A. Well, I'm a mother of nine kids, I am not out
21 looking-- I'm not a career woman, I'm not a business
22 woman. I did not have-- the way that my lifestyle has
23 been my whole life, I wasn't looking for \$900,000
24 properties.

25 Q. It's quite an overwhelming amount, isn't it?

1 A. It's way over my head. I don't even relate.

2 Q. In your mind, is there a difference between
3 800,000 and 900,000?

4 A. 800,000 is too much.

5 Q. How about 700,000?

6 A. I would have never ever in my lifetime ever
7 looked for anything in this realm of seven, six, five or
8 whatever.

9 Q. \$300,000 would have been too much too, right?

10 A. I never.

11 Q. You understood, did you not, that you were the
12 purchaser of this property?

13 A. Yes.

14 Q. You testified earlier that you didn't read
15 these contractual documents; is that correct?

16 A. That's correct.

17 Q. Did you think you had no duty to read any of
18 these documents?

19 A. No what?

20 Q. No duty to read any of these documents?

21 A. I never thought about duty.

22 Q. So you simply signed what was ever put in
23 front of you?

24 A. I signed it after Kal Rasekh convinced me.

25 Q. But you have no notes to show your version of

1 the facts as to how he convinced you, it's just simply
2 your oral testimony, right?

3 A. That's right. He was my friend.

4 Q. Did you think you had no duty to investigate
5 this property to make a determination by yourself that
6 you were signing these papers?

7 A. I believed Kal Rasekh was doing it and I
8 trusted him that he was and he gave me the impression
9 that he was doing that.

10 Q. You understood, did you not, that you had a
11 duty to comply with the terms of the contract?

12 A. I did what Kal told me to do. I trusted Kal
13 and I did what he told me to do.

14 MR. VEASY: Please read back my question.
15 Would you listen to the question and answer it.

16 (Pending question read.)

17 THE WITNESS: I want to say yes, I have a duty
18 because I feel I should say yes, I have a duty to that,
19 but at the time that I signed it I did not think about a
20 duty because I trusted Kal Rasekh, I trusted his
21 expertise, I trusted that he was looking out for my
22 welfare and so I did not look at it in the way that
23 you're asking me the question.

24 Q. (BY MR. VEASY) Would it be your testimony
25 that if Mr. Rasekh at this time had brought you a

purchase contract for this building that we're in today you would have purchased it?

A. If he had brought me the contract?

Q. For this building that we're in today and said "Buy it," you would have bought it?

A. No. I did a stupid thing, but I'm not stupid.

MR. VEASY: Let's take a break for just a second.

(Short recess.)

Q. (BY MR. VEASY) Turn to Exhibit 9, paragraph 27. Please read that paragraph to yourself.

A. (Reviewing document.) Okay.

Q. Have you had an opportunity to read that paragraph?

A. Yes.

Q. And as I read this paragraph, the time frame where these allegations occurred was after Mr. Rasekh had come back from Egypt but prior to the closing on October 10, 1994, correct?

A. This happened before that.

Q. Prior to the closing?

A. No. This happened before Kal Rasekh went to Egypt.

Q. Let's clarify that, then.

A. Okay.

Q. Yes.

A. I am not sure if my daughter might have heard it. You would have to ask her if she heard him say it. I'm not sure.

Q. Do you have any independent recollection as we sit here today that any of these statements that there was no risk or that Mr. Rasekh would sell or buy it was made to your daughter?

A. I don't know.

Q. Which daughter?

A. Brittany.

Q. And refresh me. Brittany is the daughter that lives where?

A. Right now she lives in Columbus, Ohio.

Q. Turn to Exhibit 10, please. They're on tabs down the side, Mrs. Bingham.

A. Oh, I see.

Q. Do you recall this Exhibit?

A. What's that?

Q. Do you recall this Exhibit, do you remember this Exhibit?

A. Yes, I do.

Q. In looking at this Exhibit and the date of the Exhibit, which is 10-17 of '94 or one week after the closing, can you tell me why that if Kal Rasekh had told

1 Q. When he told you that Mr. Rasekh would
2 guarantee that you would not lose any money, and in any
3 event you lost money, he would either sell the property
4 or purchase the property from you, that was the
5 statement he made to you?

6 A. That was said from day one. That was through
7 the whole time, throughout the whole time.

8 Q. When did he first make that statement to you?

9 A. I said there was no possible way I would ever
10 venture into anything like this and he said, "Marie,
11 there is no risk because if it didn't work out I would
12 sell it or buy it," or I would never have even put it on
13 an agenda, I would never have done anything--

14 Q. Do you have one document--

15 A. No, but I have--

16 Q. No. I'm sorry, listen to my question. Do you
17 have one document signed by Mr. Rasekh indicating either
18 that there was no risk with this transaction or that he
19 would sell it or buy it?

20 A. No.

21 Q. Do you have one individual, other than
22 yourself, that ever heard this statement made or the
23 statements made which you allege Mr. Rasekh said to you?

24 A. That they heard it out of Rasekh's mouth, is
25 that what you're asking?

1 you there is no risk and that he would sell or buy it,
2 that why on October 17, 1994 you're not going back to
3 him and telling him to sell it or buy it?

4 A. At closing Kal gave me a \$19,000 loan from
5 Coldwell Banker and at that time I was-- I just wasn't
6 sure what was going on. And right after closing I was
7 at my friend's house, Ron Orban, and all of my friends
8 and people around me were very angry with how-- with Kal
9 Rasekh because they feel like he took me. And he-- when
10 I was in Ron Orban's house he got the phone book, he
11 dialed VRBrokers, I had never even heard of VRBrokers,
12 he dialed VRBrokers' phone number and said, "You're not
13 leaving my house until you call, you're getting out of
14 this."

15 And so he handed me the phone, Michael Drury
16 answered. And I wasn't calling to list, I wasn't
17 calling for any other reason but I was handed the phone
18 and I was asking questions. And Michael Drury said,
19 "Oh, I know all about the Hirschi Center. I just met
20 with the Hirschis and I"-- I mean, what was I supposed
21 to think? I mean, so that's how it came about that--
22 you know, and Michael Drury said, you know, "I can get
23 that sold for you," and he was over to my house
24 immediately wanting a listing, of course.

25 Q. I'm not sure you've answered my question.

1 A. Okay.

2 Q. Exhibit 10 is a document dated October 17,
3 1994, one week after closing. You allege that Mr.
4 Rasekh said, among other things, there was no risk and
5 that if this Hirschi Center did not work out he would
6 either sell it or buy it. So my question is: As of
7 October 17th, 1994, why did you not call Mr. Rasekh and
8 state to him, "Per your promise, sell it or buy it"?

9 A. Because my friend wouldn't let me. He dialed
10 VRBrokers, he wouldn't let me be around Kal or go back
11 to Kal.

12 Q. Did you have any call to Mr. Rasekh where you
13 said "sell it or buy it" on October 17th?

14 A. Almost every single day.

15 Q. On October 17, 1994.

16 A. Before October 17?

17 Q. No. Approximately at the time you entered
18 into Exhibit 10--

19 A. On this very day did I Kal Rasekh?

20 Q. On or about the month of that time period, did
21 you ever tell Mr. Rasekh, "Sell it or buy it"?

22 A. I don't know what day.

23 MR. GEORGE: Did you say within a month?

24 Q. (BY MR. VEASY) Yes.

25 A. I said it constantly. Almost every day I

1 if this-- what I'm doing did not work out.

2 Q. And that would--

3 A. There would be no risk at all.

4 Q. Now, you previously mentioned that there had
5 been a \$19,000 loan from Coldwell Banker to you.
6 Explain that to me, what the purpose of that loan was.

7 A. I told Kal many times before closing, I said,
8 "Kal, I do not have \$200,000," and he would not discuss
9 it. He said, "Do not worry about it." Honestly, I
10 assumed he was taking it out of his commission, that was
11 my assumption. I did not know anything about a loan of
12 \$19,000 from Coldwell Banker until closing, until I was
13 at the closing and he handed me these papers and said,
14 "You have to pay Coldwell Banker \$19,000 in three
15 months."

16 Q. Okay. Do you recall what those papers were
17 that he handed you?

18 A. I was really upset. I have no idea.

19 Q. Do you recall if one of those documents was a
20 promissory note?

21 A. I don't know any-- I don't know or have any
22 recollection of the paper, what they said at all.

23 Q. Do you recall signing anything?

24 A. I was very upset.

25 Q. Do you recall signing anything?

1 would call him.

2 Q. What was his response?

3 A. "Get out of VRBrokers." I told him I listed
4 it with VRBrokers.

5 Q. Would you tell me why a real estate agent
6 would commit to sell or buy a piece of property worse
7 approximately \$800,000?

8 A. You mean why Kal would buy it?

9 Q. Yes.

10 A. Because he promised me that there would be no
11 risk in my purchasing. That was the only reason I ever
12 did it.

13 Q. And you have no writing to the effect of this
14 promise, right?

15 A. No, I don't.

16 Q. So as I understand the arrangement, you had
17 purchased the property from the Hirschis and you had
18 monetary obligations with respect to that purchase,
19 correct?

20 A. Correct.

21 Q. And what you're telling us is that if you were
22 unable to satisfy those monetary obligations that Mr.
23 Rasekh would sell, buy or take care of that obligation?

24 A. I didn't say he would take care of the
25 obligation. He said he would either buy it or sell it

1 A. I don't recall what I did. I was so hurt, I
2 was just so devastatingly hurt.

3 Q. Do you just sign documents to be signing them?

4 A. No, absolutely not. Kal Rasekh, I called Kal
5 Rasekh and said, "There's no reason I'm going to pay
6 this, I don't what you're doing." I got really upset
7 it. And then all I know is that three months changed to
8 something else and I have never heard from Coldwell
9 Banker, I have never heard another thing about this.
10 Only at that moment of closing.

11 Q. So it was your testimony that you simply did
12 not want to buy the Hirschi Center?

13 A. I did not want to buy the Hirschi Center?

14 Q. Yes. Is that your testimony?

15 A. Yes.

16 Q. But you did buy it, didn't you?

17 A. I did.

18 Q. And you signed contractual documents to buy
19 it, didn't you?

20 A. I did, when I was in it. And that's different
21 telling you now and back when I was in it.

22 Q. You mentioned previously that you had a brain
23 tumor, correct?

24 A. That's correct.

25 Q. What were the years of your brain tumor?

A. Correct.

Q. Let's turn to paragraph 4(a) and again read that to yourself.

A. "The child day care business"?

Q. Yes.

A. (Reviewing document.) I'm through.

Q. Can you give me a date prior to purchase when this representation was made to you by the Hirschis?

A. No, I can't give you a date.

Q. Do you recall if it was one month before the purchase, two months before?

A. I don't know when it was.

Q. Okay. With respect to paragraph 4(a), can you tell me a date when you found out that this representation was incorrect?

A. I can't tell you an exact date, but on the papers that they provided us, we went over them and over them and over them that showed no profit, and we were trying to figure out by the papers that they gave us what kind of profit, but they said that they were covering two families.

Q. And this was--

A. And so there was no way that they could show profit.

Q. This is what you testified to in your last

back to a smaller amount of students because it was very, very difficult to have that amount of students.

Q. When did Marleen have this conversation with you?

A. I don't know. Just after when I was running it and she was there.

Q. This was after the closing of October 10 of 1994?

A. Uh-huh (affirmative).

Q. Do you have any documents or writings to verify this conversation with Marleen?

A. No, I don't.

Q. Let me have you look at paragraph 4(b) and I'll ask you some questions on that.

A. (Reviewing document.) Okay.

Q. When was this representation made to you?

A. You know, I didn't do this typing. What I'm understanding this to be when it says "fully permitted," even though I have read it--

Q. It was prior to the purchase, is it not?

A. Does that mean the permit? Are they talking about permits?

Q. I don't know. That's what I'm here to ask you about.

A. Because I didn't write this word for word so--

deposition as the documents that were provided by the accountant Tilby?

A. That's true.

Q. So as to paragraph 4(a), in your review of those documents, as far as you were concerned, was paragraph 4(a) a misrepresentation which you knew about prior to closing?

A. Yes, I feel.

Q. Okay. How was paragraph 4(a) inaccurate?

A. I just didn't have any paperwork that could tell me the true-- you know, the profits. At the time they were running the day care they had this amount of students and they were going to up the students quite a number because they would have had to or I would not have been able to have made my payment because, of course, my payment was higher than their payment. They did show me on this paper that at different times of running the day care they had more students than what they had at this moment.

Q. This was all prior to the closing, right?

A. Right. So that represented to me that, you know, they've done more students, so if I do more students I could make it. But after closing Marleen told me that they were never very-- they were never comfortable with that many students and they always went

Q. Ma'am, listen to me. In this paragraph 4(b) you are stating that prior to your purchase of the Hirschi Center that Mr. and Mrs. Hirschi represented to you that the day care business was fully permitted with permits the plaintiff could assume?

A. That's true.

Q. So was this made prior to the closing?

A. Prior.

Q. Do you recall when it was made, specifically when this representation was made to you?

A. I don't know.

Q. You don't know if it was a month, two months, three months before?

A. I know it would have been at least a month.

Q. Okay. Do you have a date that you can tell me when this representation that was made to you prior to the purchase became, in your mind, not correct?

A. I didn't know this until after I took over.

Q. So it would have been after the closing?

A. Yeah, after I took over is when I found out.

Q. When and how did you find this out?

A. You know, when the whole-- every place was trying to close me down, the health department, the fire department, everybody just came in on me the minute I bought it. That's when I found out.

1 investment, I think I would have needed some money to
2 have put into the business. But what he told me before
3 closing is I would not need anything, I could step right
4 in, everything is there to run it. After closing I
5 realized I did need money.

6 Q. Do you have any information in your possession
7 that shows you that prior to closing Mr. Rasekh knew
8 that this representation was false?

9 A. No.

10 Q. Let me ask you look at paragraph 6(f). That
11 states that Mr. Rasekh represented to you prior to your
12 purchase that Marleen, the Hirschi's daughter who was
13 managing the Hirschi's child day care business, was a
14 duly qualified manager and would teach her how to manage
15 and operate the business. When was this representation
16 made to you?

17 A. The very same time, the beginning, that was
18 one of the advantages. Because when I moved in Marleen
19 was still running it and then as I worked there I could
20 learn from her.

21 Q. Do you have any writing confirming this
22 representation to you?

23 A. No.

24 Q. Do you have a date in mind when you learned
25 that this representation was incorrect?

1 A. Right immediately after closing I realized
2 that she was not a qualified manager. I think she
3 probably was still willing to, you know, as long as she
4 was there help me in any way she could to learn it, but
5 she only stayed there six weeks and I was under the
6 impression she would be there longer.

7 Q. Do you have any information that would
8 establish that prior to the closing that Mr. Rasekh knew
9 that this information was incorrect?

10 A. No.

11 Q. I'm sorry?

12 A. No, I don't know.

13 Q. Let's turn to paragraph 6(g). In here you
14 state that Mr. Rasekh, prior to closing, represented to
15 you that both Marleen and the present employees had
16 agreed to stay for a minimum of six months.

17 A. Kal said she would probably stay for six
18 months. He didn't make a promise of a minimum of six
19 months.

20 Q. When was this representation made to you?

21 A. At the beginning, July.

22 Q. Prior to closing?

23 A. Yes.

24 Q. Do you have any writing confirming this
25 representation?

1 A. No.

2 Q. I'm sorry?

3 A. No.

4 Q. Do you have a date when you allege that you
5 learned that this representation was not correct?

6 A. Probably a month after closing.

7 Q. What triggered that event in your mind?

8 A. When I realized that Marleen gave her notice
9 that she was only going to be there for six weeks.

10 Q. How is paragraph 6(g) false?

11 A. How is it what?

12 Q. How is it incorrect?

13 A. I feel it was incorrect because she didn't
14 actually stay as long as Kal represented that she would.

15 Q. Do you have any information to show that prior
16 to the closing Kal knew that this representation was
17 incorrect?

18 A. No.

19 Q. Paragraph 6(h) you state that prior to closing
20 Kal represented to you that the employees were willing
21 to stay longer if she was willing to continue their
22 employment. I'm assuming "she" means you?

23 A. Me.

24 Q. When was this representation made to you?

25 A. July, August when we were talking about it.

1 Q. And you're certain that Mr. Rasekh made this
2 representation to you?

3 A. Uh-huh (affirmative).

4 Q. Do you have any writing to confirm this
5 representation?

6 A. No.

7 Q. When did you find out this representation was
8 incorrect?

9 A. This is not as significant maybe as all the
10 others. One of the employees left right when Marleen
11 left so it was probably not as significant as some of
12 the others.

13 Q. You don't have any writing to confirm this
14 representation?

15 A. No.

16 Q. Do you have any information that Mr. Rasekh
17 knew prior to closing that this information was not
18 correct?

19 A. No.

20 Q. 6(i) you state that Mr. Rasekh represented
21 "that all lesson plans respecting the day care of the
22 children were all in place?"

23 A. That was a big thing.

24 Q. Do you recall when he made that representation
25 to you?

1 A. Yes, the same time, July, August.
 2 Q. Why was this a big thing to you?
 3 A. It was a big thing to him. He says this is so
 4 important because you walk in and the lesson plans are
 5 all there. You know, for somebody with no experience to
 6 have the lesson plans already there is a big benefit.
 7 Q. Do you have a date in mind when you learned
 8 that this alleged misrepresentation was not true?
 9 A. Thanksgiving day when Marleen went down and
 10 took them all.
 11 Q. Do you have any information with respect to
 12 this representation that Mr. Rasekh knew about it prior
 13 to closing?
 14 A. No.
 15 Q. You don't have any writing to confirm this
 16 representation?
 17 A. I do not have it in writing, no.
 18 Q. (j), you state here that Mr. Rasekh told you
 19 prior to closing "that Marleen and the present staff
 20 would instruct her in the teaching methods such that
 21 before Marleen left she would be proficient in the use
 22 of the lesson plans." When was this representation made
 23 to you by Mr. Rasekh?
 24 A. The same time.
 25 Q. The same time as when?

1 A. That's true.
 2 Q. When did he make this representation to you?
 3 A. Right at the same time, all at the same time
 4 as July/August when he was talking me into it.
 5 Q. July, August?
 6 A. Yes. He's like, "This is the reason for doing
 7 it."
 8 Q. When did you find out that this alleged
 9 misrepresentation was not true?
 10 A. A day or two after I started running it when
 11 they came to close me down.
 12 Q. Do you have any writing to confirm this
 13 representation?
 14 A. No.
 15 Q. Do you have any information that shows prior
 16 to closing that Mr. Rasekh knew that this representation
 17 was not correct?
 18 A. I don't have anything.
 19 Q. Turn the page to page 15. We're on paragraph
 20 6(l). The misrepresentation you state that Mr. Rasekh
 21 told you prior to your purchasing the business "that the
 22 day care business was in compliance with all state codes
 23 and regulations."
 24 A. It was just a big deal. He said, "Marie, you
 25 move in and it's all there, you just move in. So

1 A. July, August.
 2 Q. When did you find out this was incorrect?
 3 A. You know, this isn't my exact typing and I
 4 think proficient--
 5 Q. None of this typing is yours, is it?
 6 A. You know, she was very willing to be there and
 7 teach me what I needed to be taught.
 8 Q. She was willing?
 9 A. She was willing. She just didn't stay long
 10 enough.
 11 Q. So is this not false?
 12 A. It's-- it just didn't happen so.
 13 Q. When did you find out that it just didn't
 14 happen?
 15 A. Marleen and Hirschis weren't as willing to
 16 help as what it was-- when I was buying it, they were a
 17 little more willing than after I had purchased it.
 18 Q. Do you have any information that Mr. Rasekh
 19 knew prior to closing that this representation was
 20 false?
 21 A. No.
 22 Q. 6(k), you state here that prior to closing Mr.
 23 Rasekh told you "that all permits for operating the
 24 business were in place and would not have to be changed
 25 or altered?"

1 absolutely.
 2 Q. When did he make this representation you?
 3 A. The same time, July/August.
 4 Q. Prior to closing?
 5 A. Yes.
 6 Q. When did you fine find out that this
 7 representation was incorrect?
 8 A. The day I started running it.
 9 Q. Do you have any writing to confirm this
 10 representation?
 11 A. No.
 12 Q. I'm sorry?
 13 A. No.
 14 Q. Do you have any information that Mr. Rasekh
 15 had that prior to closing this representation was not
 16 correct?
 17 A. I don't have anything in writing.
 18 Q. Paragraph 6(m), prior to purchase of the
 19 building you represent that Mr. Rasekh told you "that
 20 the buildings comprising the Hirschi Center were in a
 21 good state of repair." When was that representation
 22 made to you?
 23 A. Probably August. It's the same thing. You
 24 know, that's why I didn't need other money because I
 25 could just walk right in and take right over.

1 Q. (BY MR. VEASY) Do you recognize Exhibit 32?
 2 A. No.
 3 Q. It's your signature, is it not?
 4 A. Yes, it is.
 5 Q. You didn't read this one either, did you?
 6 A. No, I didn't.
 7 (Exhibit 33 marked for identification.)
 8 Q. (BY MR. VEASY) Take a moment to look at
 9 Exhibit 33.
 10 A. (Reviewing document.)
 11 Q. Do you recognize this document?
 12 A. Well, I'm not sure because I know I have
 13 seen-- well, this, just-- and this. I could have, I'm
 14 not sure. My memory doesn't-- I'm just not sure, there
 15 was a lot of documents.
 16 Q. Page 1 indicates that, in fact, you're the
 17 purchaser of this title insurance policy, are you not,
 18 ma'am? Is that correct?
 19 A. What are you-- would you tell me again, what
 20 am I reading?
 21 Q. Page 1 of Exhibit 33 indicates that the
 22 purchaser is Marie Bingham, correct?
 23 A. Correct.
 24 Q. Do you recall ever receiving a copy of this
 25 title insurance policy?

1 know if this is what Kal gave me. Kal really would not
 2 allow me to read them.
 3 Q. He would preclude you from reading a document
 4 on the purchase of a piece of property, is that what
 5 you're telling me?
 6 A. A lot of the times he would tell me to go into
 7 his office and he would go like this and say, "Sign here
 8 and sign here and sign here and initial here." He was
 9 in a hurry or else he wasn't there and I just-- that's
 10 what he would have me do.
 11 Q. Let me try and have you answer my question.
 12 Is it your testimony that Mr. Rasekh precluded you from
 13 reading any of these documents concerning the purchase
 14 of the Hirschi Center?
 15 A. Yes.
 16 Q. And he precluded you how?
 17 A. I just told you.
 18 Q. Tell me again.
 19 A. He-- when I would go, he would say, "Well, go
 20 into the office." Sometimes it would be after hours and
 21 then he would just go like this and say, "Sign here,
 22 initial here, sign here," and that's what he would do.
 23 Q. Is it your testimony that you never asked him
 24 to be able to read it before you signed it?
 25 A. That's true.

1 A. I'm not sure. I could have.
 2 Q. Do you recall ever reviewing it once you
 3 received it?
 4 A. Well, I know I haven't reviewed this page so I
 5 don't know.
 6 Q. What page are you referring to, ma'am?
 7 A. This one right here.
 8 Q. Do you want to give me the number at the
 9 bottom? That's 144 on the Bates stamp number?
 10 A. Right.
 11 Q. And 142? You just don't recall seeing that?
 12 A. No.
 13 (Exhibit 34 marked for identification.)
 14 Q. (BY MR. VEASY) Let me hand you Exhibit 34.
 15 Do you recognize that document?
 16 A. (Reviewing document.) I could have seen it, I
 17 don't know. There were just so many documents, I don't
 18 know which ones I have seen and which ones I haven't.
 19 There's a lot of them I haven't seen.
 20 Q. Let me have you turn to page 3 of the
 21 document. Is that your signature?
 22 A. Yes, it is.
 23 Q. Did you read this document at the time you
 24 signed it?
 25 A. Not very many documents did I read. I don't

1 (Exhibit 35 marked for identification.)
 2 Q. (BY MR. VEASY) Ms. Bingham, let me hand you
 3 Exhibit 35. Take a moment and review that document.
 4 A. I don't know which ones I have seen and which
 5 ones I haven't.
 6 Q. I want you to take a moment and I want you to
 7 review Exhibit 35. Let's take a break for a second.
 8 A. Well, I have never seen this one.
 9 Q. Do you want to take a moment to review it?
 10 A. I have never seen or read one that says
 11 "assumed by a qualified purchaser." I never heard that.
 12 I did not know that.
 13 Q. Turn to page--
 14 MR. LOVE: Can I have that answer read back?
 15 (Answer read back.)
 16 MR. LOVE: Where is she referring to?
 17 THE WITNESS: Right here. Isn't it
 18 interesting that they want it so adamantly, but yet they
 19 didn't do it for me. I don't understand that.
 20 Q. (BY MR. VEASY) Maybe you better answer Mr.
 21 Love's questions. Where are you referring to in the
 22 statement "assumed by a qualified purchaser"? Is it not
 23 the second typed paragraph?
 24 A. Yes. And I notice there's been a few other
 25 documents you put in front of me and I have never ever

right?

A. Right.

Q. So you had nine of these instead of one of these?

A. Yes.

Q. So that puts us at \$160,000. You still have--

A. I had savings, I had just different little money markets that I had saved.

Q. I would like you to produce all documents showing me that you had those savings.

A. I'll try.

MR. VEASY: Is that okay with you, counsel?

MR. GEORGE: Yes.

MR. VEASY: Thank you.

Q. (BY MR. VEASY) And could you try and produce those-- what's a reasonable time period for you to find those, ma'am?

A. Yes.

Q. No. What's a reasonable time period to find those? I want some commitment.

MR. GEORGE: The same as the other?

Q. (BY MR. VEASY) Give me a date. Just tell me a date that's reasonable for you folks.

A. On this particular one, would you care if I waited until the end of December? Would that be too

1 long?

2 Q. I would like to have it before that, if it's
3 possible.

4 A. I'm going to try everything I can, but I hate
5 to put a date on it. I'll do everything I can to locate
6 it.

7 MR. VEASY: Off the record.

8 (Discussion held off the record.)

9 Q. (BY MR. VEASY) Let's go back on the record.
10 With respect to what I have requested, the parties have
11 agreed they will try and produce that by December 20th.
12 Is that acceptable?

13 A. Okay.

14 MR. GEORGE: Yes.

15 Q. (BY MR. VEASY) Now, with respect to these
16 money markets that you've talked about, how many of
17 those do you have?

18 A. Three or four. Four of them. Three or four.

19 Q. Are they all the same amount?

20 A. No.

21 Q. And where are they deposited at?

22 A. Different banks.

23 Q. Draper Bank?

24 A. No.

25 Q. Tell me the banks.

A. I don't know. I'm not sure what banks they are.

Q. Give me the amounts of them.

A. I don't know. I know one was like three thousand something. Whatever it did, that's what I used to equal up to the amount that I had. And I remember--

Q. So there probably were three or four or five of these money markets?

A. Three or four.

MR. VEASY: And as part of the request can you produce also evidence of these money markets?

MR. GEORGE: I think that's what we had already agreed to do, yes.

Q. (BY MR. VEASY) I want to make sure that's covered.

A. And I'll get it as quickly as I can.

Q. Are the accounts still in existence, these money market accounts?

A. No. I took everything out to put in here.

Q. What I want to get to, I want to see how you came up with this 176. I want all documents that show you came up with the 176, okay?

A. Okay.

(Exhibit 42 marked for identification.)

Q. (BY MR. VEASY) Let me hand you Exhibit 42 and

1 ask you if you recognize that document?

2 A. I'm pretty sure I saw this.

3 Q. And this is your signature?

4 A. Yes, it is.

5 (Exhibit 43 marked for identification.)

6 Q. (BY MR. VEASY) Do you recognize Exhibit 43?

7 A. Yes, I do.

8 Q. Do you recognize receiving it on or about--

9 A. What's that?

10 Q. Do you recognize receiving this letter in
11 December 1994?

12 A. I do.

13 Q. Did you ever respond to this letter?

14 A. I can't remember that I responded to it.

15 (Exhibit 44 marked for identification.)

16 Q. (BY MR. VEASY) Do you recognize this
17 document?

18 A. Yes, I do.

19 Q. And it's a letter that was sent to you by Mr.
20 Hirschi?

21 A. Right.

22 Q. Did you ever respond to this letter?

23 A. I don't remember if I responded to this
24 letter.

25 (Exhibit 45 marked for identification.)

1 A. Kal Rasekh.

2 Q. I talk slow, I'm originally from the south,
3 it's in my genes. What happened to cause you to change
4 or at least not listen to your brother David Weston's
5 opinion to purchase--

6 A. I told Kal that my brother told me not to do
7 it. The first thing he said, "Is your brother
8 financially successful?" And I said no. He said, "Then
9 you don't listen to him, you listen to those who are
10 financially successful. You listen to me, you trust
11 me."

12 Q. Was there anyone else besides your brother who
13 advised you against purchase of the Hirschi Center-- and
14 I'm excluding Mr. Hirschi because I think you already
15 testified to him-- prior to your purchase of the Hirschi
16 Center?

17 A. Well, Ron Orban. I mean, he wasn't very
18 involved at all, but, you know, no one was in favor of
19 it. They didn't like that I was listening to Kal so
20 much, that I would turn to Kal.

21 MR. GEORGE: Marie, speak up a little bit
22 more. I'm even having a hard time hearing you now.

23 THE WITNESS: All right.

24 Q. (BY MR. DYER) As I understand the
25 negotiations between you and the Hirschis, originally

1 you put \$5,000 down as earnest money?

2 A. Yes.

3 Q. And where did you come up with that \$5,000?

4 A. Out of my savings. I had some money markets.

5 Q. Do you recall how many money market accounts
6 you had?

7 A. I know I had like three or four that I took
8 out of for my-- so that could have probably been a
9 fifth, a fourth or fifth account. I can't remember
10 exactly.

11 Q. I'm curious as to why you had more than one.

12 A. Because I worked part-time at Somebody's
13 Mother or whatever, and as I-- I saved about \$17,000
14 over probably about 30 years.

15 Q. But you still didn't answer my--

16 A. You know, as I earned money I would try to
17 save a little bit and as I accumulated it then I put it
18 in a money market and that's why there were different
19 rates. Because wherever I worked close by or wherever I
20 lived I would put it in that.

21 Q. When you say "money market account," are you
22 referring to a checking account or a certificate of
23 deposit?

24 A. A certificate, a money certificate.

25 Q. So when you were talking to Mr. Veasy today

1 about money market funds you weren't referring to a
2 checking account that says--

3 A. Not a checking account, it would be like a
4 year certificate or two year or three-year certificate.

5 Q. So you're talking about savings certificates,
6 that's what you've been referring to?

7 A. Not a savings account.

8 Q. A certificate of deposit?

9 A. Uh-huh (affirmative).

10 Q. Is that correct?

11 A. Right. I couldn't take the money out for like
12 three years or however many it is.

13 Q. So at the time that you closed the deal on the
14 Hirschi Center you had certificates of deposit, more
15 than one we know of--

16 A. Yes.

17 Q. -- that you cashed in and used to--

18 A. Yes, I did. I cashed every one that I had.

19 Q. Okay. But when you say "money market
20 accounts," you didn't have checking accounts? That's
21 what I want to understand.

22 A. Right, they were not checking accounts.

23 Q. As I understand, in the course of the
24 negotiations you also came up with an additional \$9,000
25 in earnest money. Did I understand your testimony

1 correctly on that?

2 A. Wasn't it ten?

3 Q. I understood it as nine. As I looked at the
4 documents it appeared that you had \$14,000 which you had
5 paid down.

6 A. Nine.

7 Q. Could you tell me where you came up with this
8 that additional earnest money?

9 A. The same thing.

10 Q. So you cashed in certificates of deposit?

11 A. Yes, right.

12 Q. I also understood that you were speaking
13 routinely with Mr. Rasekh on a cell phone. Did I
14 understand your testimony in that regard?

15 A. Many, many times.

16 Q. Do you remember his phone number?

17 A. No, I don't. I certainly had it memorized
18 then, but--

19 Q. Now, as I understood, the first time that you
20 obtained the earnest money you used a cashier's check.
21 Do you recall that?

22 A. That's correct.

23 Q. Take a look at Exhibit No. 6, if you would,
24 please.

25 A. What bank is that drawn on?

Q. Take a look at Exhibit 6. That's a cashier's check dated August 4, 1994 in the sum of \$5,000 payable to Coldwell Banker Premier. I believe your testimony previously in the first day of depositions was this was the initial earnest money payment; is that correct?

A. Correct.

Q. And this was drawn on Zions First National Bank. Is that any indication as to where one or more of your CDs may have been?

A. That's where I'm thinking it might have been in that particular instance. I'm not really sure. I know Zions was very close to my home. I don't know if that's where it was.

Q. Do you remember which Zions First National Bank? It says Cottonwood is the office.

A. No. It would have been on 7800 South and 23rd East.

Q. So 7800 South?

A. Right, and 23rd East.

Q. So as you're looking for copies of these documents, is that a place that you're going to look to try to find these certificates of deposit?

A. Uh-huh (affirmative).

Q. That would be a yes?

A. Is this somewhere I'm going to go find my--

1 Q. Right.

2 A. Yes, I'm going to look in my papers and see if
3 I can find my certificates.

4 Q. Do you recall whether or not you kept those
5 records at all of any kind?

6 A. Since I've moved into my home I have seen
7 them. So I don't know if I have all of them, but I know
8 I have seen one.

9 Q. What was the last year you filed a state and
10 federal income tax return?

11 A. What was the last time what?

12 Q. What was the last year that you filed a state
13 and federal income tax return?

14 A. Before I moved from Cavalier.

15 Q. Before you moved from Cavalier?

16 A. To the Hirschi Center. So it would be in
17 '92-'93.

18 Q. Would that have been the last year you would
19 have filed a tax return?

20 A. Right. I haven't filed it since I lost my
21 house.

22 Q. So you haven't filed a tax return since 1994?

23 A. That's correct.

24 Q. Did you owe taxes when you purchased the
25 Hirschi Center?

A. No.

Q. Are you sure of that?

A. Well, I'm positive. My ex-husband did owe some taxes and they went back on me.

Q. So you had to pay your ex-husband's taxes?

A. Yes, I did.

Q. That was part of the closing on the Cavalier property?

A. It wasn't part of it-- yes, that's correct. Yes. I think that's the way, yes.

Q. When did you get divorced?

A. Let's see. It's been like 13 years so-- about 13 years ago.

Q. 1986?

A. I hope that's the right date.

Q. Where did you get divorced?

A. Salt Lake.

Q. Here in the Third District in Salt Lake County?

A. Yes.

Q. That's a yes?

A. Yes.

Q. What's your ex-husband's name?

A. Merlyn.

Q. Merlyn?

1 A. M-E-R-L-Y-N Bingham.

2 Q. Do you know where he lives?

3 A. In Seattle, Washington.

4 Q. Do you keep in contact with him?

5 A. Not much.

6 Q. You don't have an address on him, do you?

7 A. Yes, I do.

8 Q. Do you know it?

9 A. 6403-- Let's see 225th South-- 225th Place
10 S.W., Mount Lake Terrace, Washington.

11 Q. Do you know a Zip?

12 A. 155, I think, so I think it's maybe 98-- I
13 don't know. I'm not sure.

14 Q. Do you know the phone number?

15 A. He lives with his mother there and that's why
16 I know the address. She's lived there her entire life.

17 Q. What's her name?

18 A. Her name is Laura, L-A-U-R-A, Bingham. And
19 he's not able to take care of any of his affairs.

20 Q. Because?

21 A. He's disabled.

22 Q. What happened to him?

23 A. He has no short-term memory and he cannot take
24 care of himself very well.

25 Q. What happened to him?

1 was signed?

2 A. I would still say he and I both, I think, not
3 just 100 percent him.

4 Q. Do you recall if your brother David Westor
5 reviewed this release agreement with you on or about
6 June 22nd, 1995?

7 A. I believe so. I just know I didn't agree with
8 it, but I didn't know what else to do. I was desperate.

9 Q. Did you accept the release unconditionally?

10 MR. GEORGE: She said she didn't already.

11 THE WITNESS: No, no.

12 MR. DYER: Well, counsel, I didn't ask you, I
13 asked her. If you want to object, object.

14 Q. (BY MR. DYER) My question to you--

15 MR. GEORGE: Okay. I object, she already
16 answered the question.

17 Q. (BY MR. DYER) Okay. My question to you is,
18 Exhibit No. 56, does it reflect your agreement with
19 VRUtah to terminate the listing agreement or not?

20 A. No, that not what I wanted.

21 Q. That wasn't not my question. Did it reflect
22 your agreement with VRUtah to terminate the listing
23 agreement or not?

24 A. Did it reflect my agreement?

25 Q. Yes.

1 A. It's not my agreement. This release was not
2 my agreement.

3 Q. Then did you ever have an agreement to
4 terminate the listing agreement with VRUtah?

5 A. No, I fought for it.

6 Q. Did you ever obtain one?

7 A. That one.

8 Q. "That one" being Exhibit No. 56, correct?

9 A. Right.

10 Q. So Exhibit 56 reflects your agreement with
11 VRUtah to obtain a release of the listing agreement,
12 true?

13 MR. GEORGE: I object, she already answered
14 it.

15 MR. DYER: Counsel, let her answer.

16 MR. GEORGE: I object. She's already
17 testified it does not reflect her agreement.

18 MR. DYER: No, she hasn't.

19 MR. GEORGE: Yes, she has.

20 MR. DYER: No, she hasn't. She said she
21 wouldn't agree to it. I asked her if it reflected her
22 agreement.

23 Q. (BY MR. DYER) Did you accept Exhibit 56?

24 A. I never accepted it, no.

25 Q. So from your perspective there never was a

1 release of the listing agreement, was there?

2 A. All I know is when that came I called Kal
3 Rasekh and said, "You sell this because VRBrokers is
4 getting me out of the listing." I did not agree on how
5 they did it, no. So I do not accept that.

6 MR. DYER: Counsel, I'm going to make a record
7 here right now. We're either going to get an answer
8 straight up to my question or I'm going to continue
9 this. I'm going to have a transcript and I'm going to
10 go to Judge Hanson. Now, this is either a release of
11 her agreement or it's not. You can't have it both ways.
12 Would you like to consult with her or would you like to
13 make a record?

14 MR. GEORGE: Sure. I'll consult with her and
15 we'll be back in in a minute.

16 (Discussion held off the record outside the
17 deposition room.)

18 Q. (BY MR. DYER) We're back on the record.

19 Ma'am, you've had a chance to consult with your lawyer.
20 What would be the answer to my last question?

21 A. No.

22 Q. You're certain of that answer?

23 A. Yes, I am.

24 Q. And you're certain of it because?

25 A. First of all, to backtrack, Del Findlay, my

1 attorney, wrote a letter to VRBrokers to get a release
2 or sue VRBrokers.

3 Q. Or sue, is that what you said?

4 A. I don't know. I'm not going to say if that's
5 in the letter or not. I'm not sure if it says that or
6 not in the letter.

7 Q. Let's see. Take a look at the Exhibit 18. I
8 believe that's the letter from Del Findlay. Is that the
9 letter you're referring to dated April 10, 1995?

10 A. Yes, it is.

11 Q. Can you show me in this letter where it says
12 that Mr. Rasekh is the one that's going to be listed?

13 A. May I just read this one sentence, please?

14 Q. Sure, go ahead.

15 A. "However, if you do not agree to release her
16 and allow her to seek other help in selling the centers
17 she will seek a resolution through litigation."

18 Q. Keep going. What else does it say?

19 A. "She will also hold you financially
20 responsible for any losses she experiences as a result
21 of your asserting whatever rights under the agreement
22 that you think you have and at the same time performing
23 less than par on her behalf."

24 Q. And what losses have you suffered as a result
25 of them not releasing you?

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1 A. \$181,000.
2 Q. And explain to me how you've suffered that
3 loss, ma'am.
4 A. Because they held me hostage.
5 Q. No. Explain to me how you've lost the money.
6 A. I am explaining.
7 Q. No, ma'am, you're not. You're giving me the
8 same song and dance we've heard for the last two days.
9 A. That's the answer.
10 Q. My question to you is this: Who brought you
11 potential buyers? VRUtah did. They brought you two;
12 isn't that correct?
13 A. No.
14 Q. Did they bring you Gordon--
15 A. The first one was not a potential buyer and
16 Randal Roberts went to VRBrokers and offered nothing.
17 Q. Ma'am--
18 A. Number one--
19 Q. No, ma'am, listen. This is our deposition.
20 A. Okay, sorry.
21 Q. I get to ask the questions.
22 A. Sorry.
23 Q. He brought you one prospective buyer, Gordon
24 Olsen; true?
25 A. I would like you to change it to qualified.

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1 Q. Ma'am, I ask the questions. If you don't want
2 to answer my questions, don't answer my questions. I
3 asked if he brought you a prospective buyer, Gordon
4 Olsen; yes or no?
5 A. He brought an individual to the center, yes.
6 Q. He also brought you Randal Roberts, did he
7 not?
8 A. Yes, he did. He was not qualified.
9 Q. And that's two more persons than Kal Rasekh
10 had brought you after the release of the listing
11 agreement; is that correct?
12 A. Yes. And I don't know what that matters.
13 Q. So when you say that Mr. Drury didn't work up
14 to par, in fact, Mr. Drury brought you more potential
15 buyers than Kal Rasekh did during the time he had it
16 listed after the release of the listing agreement; true?
17 A. No, because today--
18 Q. That's a yes or no question. Is it true or
19 not?
20 A. No.
21 Q. So tell me the names of the people that Mr.
22 Rasekh brought you after the release of --
23 A. Drury--
24 Q. I'm not done, ma'am.
25 A. I'm sorry.

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1 Q. Tell me the names of the individuals that Mr.
2 Rasekh brought to you after the release of the listing
3 agreement on June 22, 1995.
4 A. He brought me none.
5 Q. He brought you none?
6 A. That's correct.
7 Q. So yet despite the fact that Mr. Drury brought
8 you two, two potential buyers, whether or not they're
9 qualified or not is a subject of debate, you claim that
10 Mr. Drury caused you to lose your \$181,000?
11 A. Yes. He did not release me when I asked him
12 to.
13 Q. And I want you to tell me specifically the
14 first date that you asked him to release you.
15 A. Three months over the phone.
16 Q. What's the date?
17 A. Three months after I purchased it. I gave him
18 three months.
19 Q. Okay. Let's talk about that. That's Exhibit
20 No. 11. Excuse me, it's not 11. Let me ask you this.
21 The release that's Exhibit No. 56, did you act in
22 reliance on that document as though the agreement, the
23 listing agreement had been terminated?
24 A. On this particular one--
25 Q. That's a yes or no. Did you act in reliance

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1 on it?
2 A. To Kal Rasekh or what? What do you mean?
3 Q. Let me ask you a better question. You needed
4 a release from VRUtah in order for Mr. Rasekh to list
5 the property, correct?
6 A. Mr. Roberts? You mean for Kal Rasekh to
7 list--
8 Q. For Mr. Rasekh to list the property?
9 A. I needed a release, yes.
10 Q. And did 56 constitute the release to Mr.
11 Rasekh's satisfaction?
12 A. He didn't read this.
13 Q. That wasn't my question. Under your
14 understanding, did Exhibit 56 constitute a sufficient
15 release so that Mr. Rasekh would list the property again
16 for you?
17 A. Over the phone, yes.
18 Q. Okay. So you used this release to get Mr.
19 Rasekh to list the agreement then; is that true?
20 MR. GEORGE: I believe she already testified
21 that Mr. Rasekh didn't see Exhibit 506.
22 Q. (BY MR. DYER) I didn't ask you that. I asked
23 you if you used it. Did you use Exhibit 56--
24 A. I did tell Kal Rasekh over the phone that I
25 got a release from VRBrokers.

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1 Q. What would it take for you to be more
2 knowledgeable? Do you need to consult with your brother
3 on this?
4 A. I probably would, yes.
5 Q. In other words, you weren't handling--
6 A. Because he figured that out and I agreed. And
7 yes, I would probably have to talk to him before I could
8 tell you a yes or no answer.
9 Q. After May 8 of 1995 had you signed a power of
10 attorney for Mr. Weston to act in your behalf on this
11 matter? Do you know what a power of attorney is?
12 A. Yes.
13 Q. Had you signed one for the benefit of your
14 brother so that he could act as your agent to conduct
15 this negotiation?
16 A. I didn't give power of attorney to my brother.
17 Q. And so the reality of this is that between May
18 8 of 1995 and when the release was signed on June 22,
19 1995, you don't know what happened, do you? Your
20 brother handled it all, didn't he?
21 A. He handled most of it.
22 Q. And so as we sit here right now, you don't
23 have any idea whether or not there was an actual release
24 agreement made with VRUtah as set forth in Exhibit 56,
25 do you?

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1 A. I can't tell you. I might have talked to
2 Michael, I don't know. I can't tell you if I talked to
3 him after that, I don't know.
4 Q. But as we sit here--
5 A. I did talk to my attorney and he told me not
6 to sign this.
7 Q. And your attorney would be Del Findlay?
8 A. That's correct.
9 Q. So after June 22nd of 1995 you spoke with Mr.
10 Del Findlay about Exhibit 56?
11 A. I did.
12 Q. But you relied upon that document in telling
13 Mr. Rasekh that you had a release?
14 A. Yes, I did.
15 Q. But you don't really know what happened
16 between May 8, 1995 and June 22, 1995 in discussions
17 between your brother and VRUtah, do you?
18 A. I'm not sure. I don't know.
19 Q. As we sit here today you don't know, do you?
20 A. I don't know. I don't know from June-- from
21 May 22 to June 22, is that what you said?
22 Q. May 8, 1995 when you told Mr. Roberts and Mr.
23 Drury to deal solely with your brother.
24 A. Are you talking May 8th? I would have spoken
25 to Michael Drury after May 8.

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1 A. I know I have seen this and I acted on calling
2 Kal Rasekh because of this.
3 Q. But my question to you is, you didn't
4 negotiate Exhibit 56, did you?
5 A. I didn't negotiate it?
6 Q. Yes. You didn't negotiate what was in it?
7 A. You mean I didn't read it? What do you mean
8 by "negotiate what was in it"?
9 Q. Do you understand what "negotiate" means,
10 ma'am?
11 A. Yes.
12 Q. That means you talk with someone?
13 A. Exactly.
14 Q. And say here's what it's going to be.
15 A. Right.
16 Q. Did you negotiate at all between--
17 A. Are you saying did I negotiate to my brother?
18 Q. Let me finish. Did you negotiate at all
19 between May 8, 1995 and June 22, 1995 when the release
20 agreement identified here as Exhibit 56 was signed by
21 VRUtah directly with any person at VRUtah?
22 A. At VRUtah, I negotiated-- I consulted with my
23 attorney Del Findlay.
24 Q. But you didn't talk to anyone at VRUtah
25 between May 8th when you said, "Deal direct"--

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1 Q. May 8, 1995, Exhibit 65, is a letter bearing
2 your signature, is it not?
3 A. Yes.
4 Q. It's addressed to Mr. Randal Roberts and to
5 Mr. Drury, VR Business Brokers, correct?
6 A. Right.
7 Q. And if you read that document it says you are
8 to deal exclusively with Mr. W. D David Weston?
9 A. That's right.
10 Q. Who prepared that document, by the way?
11 A. My brother.
12 Q. Did you read it before you signed it?
13 A. Yes, I did.
14 Q. And that was your direction, then, that that
15 occur?
16 A. That is true.
17 Q. So what we have here is between May 8, 1995,
18 which is Exhibit 65, and June 22, 1995, which is the
19 release of the listing agreement evidenced by Exhibit
20 56. My question to you is, did you have any personal
21 contact with anyone at VRUtah; yes or no?
22 A. I still may have talked to Michael Drury. My
23 business was handled by my brother, I might have still
24 talked to Michael Drury.
25 Q. Would that have been at the restaurant?

A. No.

Q. Do you recall what you might have talked to Mr. Michael Drury about?

A. Yes. I want to be released.

Q. Is that all the discussion that would have been had?

A. Yes.

Q. How long would the discussion have occurred?

A. It would have been a phone call.

Q. But you're not certain of whether--

A. And it would not have been very long.

Q. And you're not certain of whether or not such a phone call ever occurred, though, are you?

A. No.

Q. Take a look at Exhibit No. 11 which is an addendum to the employment agreement, if you would, please. Does that document bear your signature?

A. Yes, it does.

Q. Did anyone force you to sign that document?

A. No one, I was not forced to sign that document.

Q. You signed it voluntarily?

A. Yes.

Q. And by that document you agreed to continue with the listing agreement, did you not, because you

1 reduced the price from a million to \$900,000?

2 A. Yes, I did. At Michael Drury's request.

3 Q. And this was after the three months that you
4 said Mr. Drury had agreed to on the listing agreement;
5 true?

6 A. He said he would not release me, he was very,
7 very ornery and admitted it.

8 Q. In your Complaint don't you allege that he
9 said we're not going to do a three month listing
10 agreement, we'll only do a year listing agreement?
11 Isn't that's what you're alleging?

12 A. To get my listing he promised me a three
13 months listing if I would. And I did say that and
14 that's what he promised me.

15 Q. Take a look at Exhibit No. 10, if you would,
16 please. It's a two-page document dated October 17,
17 1994. It appears to bear your signature down in the
18 lower left-hand corner in a box, does it not?

19 A. That is my signature.

20 Q. Did you read this document before you signed
21 it?

22 A. I'm not sure what I did.

23 Q. Your son Daryl was present with you when this
24 document was filled out, was he not?

25 A. Yes.

Q. Do you know if he read this document?

A. I don't know actually if he was with me when I signed it. He was with me when we were negotiating it. You would have to ask him, but I'm not positive on that. All I know is I was adamant about getting my 181 back and not one penny more.

Q. Okay.

A. And Michael Drury did everything he could to get this listing.

Q. Well, as I understood your answers to Interrogatories, Mr. Drury was the result of a recommendation from Mr. Orban; is that correct?

A. Mr. who?

Q. Mr. Orban.

A. No, VRBrokers was a recommendation.

Q. From Mr. Orban?

A. Yes.

Q. And as I understand it, that was from looking in the newspaper; is that correct?

A. No. He looked it up in the phone book.

Q. Are you certain of that?

A. I know I got the phone book, he looked up the number and called VRBrokers and handed the phone to me. If he found it in the newspaper, I don't know.

(Exhibit 66 marked for identification.)

1 Q. (BY MR. DYER) Ma'am, I'll show you what we
2 have marked here today as Exhibit 66 which I'm going to
3 represent are your answers to defendant Michael Drury
4 and VRUtah, Inc.'s First Set of Interrogatories to
5 plaintiff. I ask you to look at page 20.

6 MR. GEORGE: Did you have a copy for me?

7 Q. (BY MR. DYER) I'm sorry. I ask you to look
8 at page 20. Do you see that signature there above your
9 typewritten name?

10 A. Yes.

11 Q. Is that your signature?

12 A. Yes, it is.

13 Q. The last sentence says, "I declare under
14 penalty of perjury that the foregoing is true and
15 correct?"

16 A. That is correct.

17 Q. Do you understand what that means?

18 A. Yes, I do.

19 Q. Do you understand that these proceedings are
20 under the same penalty?

21 A. Absolutely. And I'm here to be honest and
22 give you what I know.

23 Q. And let's go back to page 4. Answer C(2)
24 talks about "After explaining her financial
25 circumstances to Mr. Orban, he advised her to

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1 paragraph 13-- that you were obligated to pay VRUtah's
2 attorney's fees if VRUtah prevails in this matter? Do
3 you understand that?
4 A. I understand that Michael Drury told me in
5 order to have this sold in three months I had to sign a
6 12-month listing, which I did.
7 Q. That wasn't--
8 A. And he breached his promise and he would not
9 let me out when I asked him. He did not bring people to
10 my center and he did not try to sell it. This was an
11 agreement that he would actively sell it.
12 Q. Show me where it says that. Show me in
13 Exhibit No. 10 where it says that he will do what you
14 think he did wrong.
15 A. So you mean to tell me that your brokerage
16 firm just has people sign a 12-month listing, but
17 they're not obligated to do any work and honor what they
18 said they're going to do? I don't understand.
19 Q. Well, ma'am, I don't understand because every
20 time I ask you a question you don't answer. My question
21 to you was, when you started your soliloquy, was this:
22 Do you understand in paragraph 13 that if VRUtah
23 prevails that you're going to owe their attorney's fees,
24 yes or no?
25 MR. GEORGE: Read paragraph 13.

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1 MR. GEORGE: That's not what it says, counsel.
2 MR. DYER: I asked her if it was her
3 understanding, counsel.
4 THE WITNESS: It is my understanding that one
5 of your VR broker people come into my home--
6 Q. (BY MR. DYER) Tell me if you understand
7 paragraph 13. I don't want the rest of your
8 understanding.
9 A. --and told me they will have my place sold in
10 three months because their company will put a lot of
11 money up front to entice me to sign a 12-month listing,
12 and that's what I did.
13 Q. Did you just say that under oath that Mr.
14 Drury came to your house?
15 A. He did, he came to my home.
16 Q. The listing agreement was signed at your
17 house? Be careful because you've already testified to
18 this previously in your deposition.
19 A. He came to my house and we talked about it and
20 I believe he came back the next day to sign it, but I'm
21 not sure exactly when I signed it.
22 Q. You're not sure?
23 A. But he did come to my house while my son was
24 there to negotiate this.
25 Q. Ma'am, I--

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1 THE WITNESS: Which paragraph is it?
2 Q. (BY MR. DYER) Number 13.
3 A. I hope I can read it. (Reviewing document.)
4 It's hard to read.
5 Q. Would you like me to read it to you?
6 A. Explain it to me.
7 Q. No, I'm not going to explain it to you, that's
8 your lawyer's obligation.
9 A. All right, read it.
10 Q. It says, "Broker and sellers agree that in the
11 event any litigation is hereafter commenced by either
12 party against the other or such litigation arises out of
13 the enforcement of the terms of this agreement, the
14 litigation is incident to this agreement and/or arises
15 from the subsequent sale or the business, the broker in
16 such litigation shall be entitled to recover reasonable
17 attorney's fees, together with all other costs and
18 expenses reasonably incurred, whether statutory or not.
19 Broker and sellers further agree that the county in
20 which broker's office is located is proper venue for any
21 such litigation." Do you understand that paragraph?
22 A. Uh-huh (affirmative).
23 Q. Do you understand that that means in this
24 litigation that VRUtah is entitled to its attorney's
25 fees against you in this litigation?

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1 A. I said I would not sign a 12-month listing.
2 Q. So he gave you an opportunity to review this
3 exclusive listing agreement--
4 A. I don't know if he left it with me, I can't
5 remember.
6 Q. So let's see what you are certain of, ma'am.
7 How many visits did you have with Mr. Drury before you
8 signed Exhibit No. 10? How many times did you see him
9 or talk to him?
10 A. I just remember he came to my house with my
11 son, I was very adamant that all I wanted was my 181, I
12 did not want any more than a three-month listing.
13 Q. Just tell me how many times.
14 A. I'm not sure.
15 Q. Let's back up. We had one time that Mr. Orban
16 picked up the phone and dialed the number, right?
17 A. That's right. And then the next time he came
18 to my home.
19 Q. So you're certain you didn't go with your son
20 Daryl first to Mr. Drury's office?
21 A. I don't think so. I think he came to my house
22 first.
23 Q. When did you go to Mr. Drury's office with
24 your son Daryl?
25 A. I don't remember.

1 A M-a-h-a.
 2 Q Rasekh?
 3 A Uh-huh.
 4 Q And did she ever move to the United States?
 5 A No.
 6 Q Is she presently involved in the Hirschi Center
 7 in any way?
 8 A No.
 9 Q She's not involved in ownership in any way?
 10 A Nope.
 11 Q Has she ever been?
 12 A Nope.
 13 Q Did you discuss with your sister potentially
 14 being a purchaser of the Hirschi Center in conjunction
 15 with Marie Bingham?
 16 A Nope.
 17 Q Never?
 18 A Never.
 19 Q Did you tell Marie Bingham that you intended
 20 your sister to be a partner with her in a purchase of --
 21 A Nope.
 22 Q Let me finish, please. -- with the purchase of
 23 the Hirschi Center?
 24 A No.
 25 Q Never?

1 A Never.
 2 Q Did she ever -- did you ever have a discussion
 3 with her about the fact that shown on the listing
 4 agreement was an exemption for your father and your
 5 sister?
 6 A Discussed it with who?
 7 Q Marie Bingham.
 8 A That there is a listing that my dad is exempt,
 9 yes, I did.
 10 Q Okay. When did you have that discussion?
 11 A I believe prior of her seeing the property or
 12 looking at the property.
 13 Q Prior to her making an offer, correct?
 14 A Yes.
 15 Q And what did you tell her about that?
 16 A That I put my dad exempt from this listing
 17 because I thought my dad might be interested in buying it,
 18 and there could be a good opportunity for him if he moved
 19 here to own this property and my sister to manage it.
 20 Q Did you in fact tell Marie Bingham that you put
 21 your dad and your sister as exemptions because this was
 22 such a great opportunity and such a great deal?
 23 A Yes.
 24 Q What did you mean to portray to Marie by telling
 25 her that?

1 A I was just saying the truth. That's what
 2 happened.
 3 Q So you thought the property was a great deal?
 4 A I think the property was a good deal, yes.
 5 Q In your opinion at the time you entered into the
 6 listing agreement, did you believe that the property was
 7 worth more than the amount that it was listed for?
 8 A I think the property was worth what it was
 9 listed for.
 10 Q So what makes that a great deal if it's worth
 11 what it's listed for, in your mind?
 12 A Great opportunity to have a lot of options.
 13 Q By that, then, you mean great potential in the
 14 future in the right hands?
 15 MR. VEASY: Objection, vague and ambiguous.
 16 Q Is that what you mean?
 17 A It's a great opportunity, it's a good location.
 18 I think it was a good deal at that time.
 19 Q Was it a good enough deal that you yourself
 20 would consider making that investment?
 21 MR. VEASY: Objection, calls for speculation.
 22 Q Go ahead.
 23 A I didn't.
 24 Q You did not think it was that good a deal?
 25 A No, I didn't buy it because I wasn't in a

1 position to buy it.
 2 Q That's not my question. My question is not
 3 whether you were in a position to do so. My question
 4 is -- and let me back up just a minute. In addition to
 5 being a real estate agent, you also bought and sold real
 6 properties yourself, did you not?
 7 A (Witness nods head.)
 8 Q And because of that, I presume that you
 9 considered yourself to be knowledgeable in the field of
 10 buying and selling real estate in Salt Lake?
 11 A Uh-huh.
 12 Q And prior to your dealings with Marie Bingham,
 13 how long had you been a real estate agent?
 14 A I think I started in '91.
 15 Q All right. And prior to the closing of the sale
 16 with Marie Bingham, how many real properties had you
 17 bought and sold yourself in your own name?
 18 A I don't remember.
 19 Q Approximately.
 20 A In my name I owned -- prior to what day? The
 21 Hirschi or --
 22 Q Hirschi closing in October of '94.
 23 A Five, six, seven, eight. I can't really
 24 remember right now.
 25 Q Does that include any properties in which you --

1 an entity owned it in which you had an interest, or only
2 the ones in your name?

3 A No, only in my name.

4 Q And to expand that list, how many would be on
5 the list if it were properties held in another entity or
6 person's name in which you held an interest?

7 A Zero.

8 Q I'm sorry?

9 A Nothing, zero.

10 Q Okay. So every property you dealt with you
11 dealt in your own name?

12 A Yes.

13 Q Okay. Were any of those businesses, by the way?

14 A No.

15 Q Just all plain old real estate?

16 A Yup.

17 Q You told Marie on a number of occasions that you
18 in fact had great expertise in the real estate field,
19 didn't you?

20 A In buying and selling real estate and
21 residential and a little investment property, yes, I had
22 some experience there.

23 Q In fact, you told her not that you had a little
24 experience but that you had great expertise, didn't you?

25 A I don't remember the exact wording, but at that

1 Q Do you remember by chance an occasion after
2 Marie Bingham had presented an offer on the Hirschi
3 property when she came to you and said that her brother
4 had told her not to do it? Do you remember that?

5 A No.

6 Q Not at all?

7 A No, not at all.

8 Q So you don't remember telling her, is your
9 brother successful in the real estate field? Do you
10 remember that conversation?

11 A Okay, there is a little bit confusion here.
12 This happened long time ago.

13 Q Yes.

14 A And what you're saying here, I might have said
15 it but I don't think it was related to the Hirschi Center.
16 It was related to something else. It was an elderly home
17 that she was buying before that. Put an offer on it and
18 she kept extending -- after we got the offer accepted, she
19 kept extending for a period of time. And at that time
20 someone was helping her, I believe either her boyfriend or
21 someone else.

22 Q It was her boyfriend on that one, wasn't it?

23 A I'm not sure.

24 Q Okay.

25 A She had more than -- I don't remember what was

1 time, yes, I had good experience as a real estate agent.

2 Q Would you deny if I represented to you that
3 Marie says you told her that you had great expertise in
4 that field?

5 A I don't know.

6 Q Well, either -- you have to answer that yes or
7 no.

8 A I think, like everybody, I think that I was a
9 very good agent. That's all what I said to everybody. I
10 said, I'm a very good agent, I know what I'm doing, and I
11 try as much as I can to help my clients.

12 Q My question to you is, would you deny --

13 A Yes.

14 Q You deny her testimony in that regard?

15 A That I am great real estate agent?

16 Q No, that you had great expertise in the real
17 estate field.

18 A I do.

19 Q My question is --

20 A I'm not denying it.

21 Q Okay, thank you. And in fact you told her that
22 she should rely on your expertise, didn't you?

23 A No.

24 Q You did not?

25 A No.

1 happening at that time, but when she told me at that time,
2 she said someone is telling her that the elderly home is
3 not a good deal and she shouldn't close on it. And I
4 asked her, if the person who is telling you that bought or
5 sold or owned real estate property, if someone give you an
6 advice in a field like that, you listen to if he has this
7 kind of experience, and I will respect that, and I really
8 like to meet him. And at that time she lost the elderly
9 home. She delayed the closing and the seller took the
10 property off the market.

11 Q So you recall a conversation where she had
12 indicated she had been given advice not to enter into a
13 real estate transaction and that you responded to her,
14 does the person who is giving you that advice have
15 expertise in real estate?

16 A Yes, I asked her that.

17 Q And did you then follow up by saying, well, then
18 don't rely on that person, rely on me because I do have
19 expertise in the real estate field?

20 A No, no, no. What I said -- I show Marie or show
21 my buyers a lot of properties. My job is to show them a
22 lot of properties and tell them my opinion of what the
23 projection of what each property, what I think the market
24 is doing in general. Just data that we get from them and
25 I use. After that the buyer decide whether they want to

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1 property. When someone want to sell a property in 60
 2 days, different than someone want to have a whole year to
 3 sell a property.
 4 Q You took a year listing the second time with the
 5 Hirschis, did you not?
 6 A I don't recall that.
 7 MR. GEORGE: I don't believe that listing
 8 agreement's in. I've looked and didn't see it. If not,
 9 let's get it marked.
 10 (Exhibit 81 marked for identification.)
 11 Q (BY MR. GEORGE) Can you identify Exhibit 81?
 12 A Yeah.
 13 Q What is Exhibit 81?
 14 A I believe it's the listing.
 15 Q What listing?
 16 A Listing to list the day care center.
 17 Q Which time?
 18 A It says here expires July 20th, 1996. Was
 19 signed in January 20th, listing agreement for six
 20 months -- five months, six months.
 21 Q Is this the first listing agreement after the
 22 foreclosure that you signed, that the Hirschis signed?
 23 A I'm sorry?
 24 Q Is this the first listing agreement that the
 25 Hirschis signed after the foreclosure, to the best of your

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1 knowledge?
 2 A As far as I recall, yes.
 3 Q Were there any others that you know of?
 4 A From the Hirschis?
 5 Q Yes.
 6 A I don't remember any. I think this is the only
 7 one. Why would you sign two listings?
 8 Q I don't know. Is there a sales price indicated
 9 on this listing agreement?
 10 A Usually we don't put it on this, we put it on
 11 another agreement, another form.
 12 Q Okay. So there's another form with this that
 13 will indicate what their sales price was?
 14 A Yeah.
 15 Q There appears to be some unintelligible writing
 16 kind of interposed throughout the agreement. Do you have
 17 any idea what any of that is?
 18 A Where?
 19 Q In the middle portion.
 20 A I can't see anything here on my copy. Can I see
 21 yours?
 22 Q Actually shows up better on that one.
 23 A No idea.
 24 MR. DYER: Counsel, where are you referring to
 25 on the middle of the first page? Paragraph 4 and 5, is

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1 that what you're talking about?
 2 MR. GEORGE: 4, 5, 5.1, 5.2, 5.3, sort of
 3 written over it.
 4 Q (BY MR. GEORGE) You can't read it, can't
 5 describe what it is?
 6 A Yeah.
 7 Q And you don't have a recollection of any
 8 extraneous writing on the listing agreement?
 9 A Nothing -- this is -- no.
 10 Q On the left-hand column under the brokerage fee,
 11 7 percent is scratched out and it looks like 6 percent,
 12 your initials KR?
 13 A Uh-huh.
 14 Q And what's that right below it?
 15 A The date, 1-20-96.
 16 Q All right. The purchaser actually this time
 17 around in 1996 apparently was a group of investors; is
 18 that correct?
 19 A Yes.
 20 Q And who were they?
 21 A Nancy Adair, Raed Salem. R-a-e-d, and the last
 22 name is S-a-l-e-m.
 23 Q Is he related to you?
 24 A No.
 25 Q In no way?

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1 A No.
 2 Q Okay.
 3 A And the third person, her name is Nivin Abuzeid,
 4 which is A-b-u-z-e-i-d, I think.
 5 Q Is she related to you?
 6 A Yes.
 7 Q And how?
 8 A She's my sister-in-law.
 9 Q Is she the wife of --
 10 A My brother.
 11 Q -- Salem?
 12 A Salem and I have no relationship.
 13 Q Your sister-in-law, at that time did she reside
 14 in the United States?
 15 A No. She was here, and before that.
 16 Q Was she here at the closing?
 17 A No.
 18 Q And how about Mr. Salem?
 19 A Salem.
 20 Q Did he reside here?
 21 A Yeah.
 22 Q And still does?
 23 A Uh-huh.
 24 Q Anybody else involved?
 25 A Not that I know of.

1 Q How much earnest money did this group come up
2 with to close the sale?

3 A No idea. Should be in the sale agreement that
4 you guys have.

5 Q You don't have a recollection?

6 A No.

7 Q Do you know how they raised the money?

8 A No idea.

9 Q Did any of the money come from you?

10 A Nope.

11 Q None of it?

12 A Nope.

13 Q Did you have any interest whatsoever in this
14 group that purchased?

15 A Nope.

16 Q Did you make any money from this transaction
17 other than your real estate commission?

18 A No.

19 Q You remained very active in the development of
20 the property after the purchase, didn't you?

21 A I started -- I started it when I was marketing
22 the property, yes, and I finish it later on. I was
23 helping, help almost all my buyers and seller in and after
24 transaction most of this time.

25 Q So all you were doing, then, is providing

1 A No.

2 Q When did you first meet the Bingham family?

3 MR. VEASY: Let's take a break here. I think I
4 can -- off the record.

5 (Discussion off the record.)

6 Q (BY MR. GEORGE) First thing, we have
7 substituted the front page on Exhibit 79 which eliminated
8 the blank block at the top. Can you see that? So let's
9 get back the old 79. Can you look and make sure that the
10 new 79 is the same except for the front page?

11 A This has an extra page. This is a listing
12 agreement.

13 Q Okay, so we need to attach to make them the
14 same --

15 MR. VEASY: Either that or just mark it as a new
16 exhibit and say the first three pages are --

17 Q All right. So Exhibit 79 is what we discussed
18 previously in your testimony, correct?

19 A Uh-huh.

20 Q So we'll mark --

21 MR. VEASY: Hang on a second. Just keep that as
22 79, and if you want to make this new one 30 or 31, you can
23 just compare the first page of it.

24 MR. GEORGE: Keep all the old ones?

25 MR. VEASY: Yeah, I suggest we keep the same one

1 assistance that you would normally provide as the real
2 estate agent involved in the transaction afterward?

3 A With that deal was a little bit more because my
4 sister-in-law was involved.

5 Q And you didn't supply the money that your
6 sister-in-law put up?

7 A No.

8 Q Did Nancy Adair remain involved in the group
9 after the sale?

10 A I know that she got a divorce later on and she
11 got out, and Raed and Nivin bought her out and something
12 like that.

13 Q Your sister bought her out?

14 A Raed and Nivin.

15 Q Both of them?

16 A Both of them, yes.

17 Q And it's your testimony that you were receiving
18 no compensation for the services you provided after the
19 closing, never received any compensation?

20 MR. VEASY: Objection, asked and answered.

21 Q Is that your testimony?

22 A What did you say? Objection, I don't have to
23 answer?

24 MR. VEASY: I said it's been asked and answered.
25 Now it's being asked a second time.

1 exactly as it is. We've all got the example of it. And
2 then what we can do is, if you just want to put in the one
3 page, you can do that.

4 MR. GEORGE: Okay.

5 MR. LOVE: Wait. Off the record.

6 (Discussion off the record.)

7 (Exhibit 82 marked for identification.)

8 Q (BY MR. GEORGE) I'm now handing you a new
9 Exhibit 82. Is that a new front page for 79?

10 A Looks like it.

11 Q Without the blank on it.

12 MR. LOVE: Off the record.

13 (Discussion off the record.)

14 Q By the way, Mr. Rasekh, before you married --
15 what was her name again?

16 A Gina.

17 Q -- Gina, you asked Marie if you could marry her
18 daughter, didn't you? Jeannie?

19 A I'm not sure that I asked, but maybe I discussed
20 it.

21 Q You discussed the fact that you would desire to
22 marry her daughter Jeannie?

23 MS. BINGHAM: Jennifer.

24 Q Jennifer, I'm sorry. Jennifer.

25 A I think maybe.

1 Q And the purpose that you discussed with her was
2 so you could obtain your citizenship, wasn't it?
3 A It was a lot of things. I was at a time in my
4 life that I wanted to get married, I wanted to have
5 children. At the same time, I want to have the ability to
6 stay and continue working here. A lot of things, not just
7 one.
8 Q But you needed -- it was your desire to marry
9 somebody so you could stay here, correct?
10 A My desire to get married.
11 Q And one of the reasons you wanted to get married
12 is so you could stay in the United States, correct?
13 A That's why I wanted to marry an American.
14 Otherwise I could have married an Egyptian. I just wanted
15 to get married have a family and stay here.
16 Q And did you tell Marie that if you married her
17 daughter that you could turn right around and get an
18 annulment?
19 A I said that?
20 Q Did you?
21 A I don't recall that.
22 Q Was that your intention if you had married
23 Jennifer?
24 A I don't remember. I don't recall that.
25 Q Do you recall telling Marie that you would buy

1 Jennifer a brand new car if she married you?
2 A I will buy my wife anything she wants.
3 Q That's not my question.
4 A I don't recall that.
5 Q Do you deny telling Marie that if she consented
6 to allowing Jennifer to marry you that you would turn
7 right around and obtain an annulment after the marriage?
8 A I don't recall that. Why would I do that?
9 Q All I'm asking you is, do you deny that as being
10 truthful?
11 A Yes.
12 Q Okay. How old was Jennifer at the time?
13 A I remember that Jennifer and Brittany were
14 pretty close.
15 Q About what age at the time?
16 A Early twenties.
17 Q So is it your testimony today that you
18 considered a legitimate marriage to Jennifer that you
19 wanted to be long term and have children?
20 A Yeah, I was thinking of getting married and
21 having children.
22 Q So you had an actual desire to marry Marie's
23 daughter?
24 A I had -- I dated tons of girls.
25 Q That's not my question.

1 A Okay, so what's your question? I don't know.
2 Every time I meet a girl that I like, my first thing is
3 yes, if it works I will get married.
4 Q What I'm asking -- I believe you have admitted
5 that you had discussions with Marie about marrying her
6 daughter Jennifer.
7 A Uh-huh.
8 Q And were you serious about that? Did you intend
9 and did you desire to marry her daughter Jennifer?
10 A I have to answer that with not yes or no. Can I
11 do that?
12 Q Yes, you may do that.
13 A Good. I date a lot of girls, and every time I
14 meet someone I hope she's the right one to be the right
15 one. And yes, in the beginning that's my intention to do
16 that. Later on if it doesn't work, no. Yes, every girl I
17 meet, every girl I go out with I hope that she's the right
18 one, and yes, every girl, my first intention with Marie's
19 daughter, I figured they were nice girls, both of them.
20 Q Did you discuss marriage during 1993 or '4 with
21 anyone else besides the one you actually married and
22 Marie's daughter? Did you have discussions of marriage
23 with anybody else?
24 MR. VEASY: Objection. What's the relevance of
25 this?

1 MR. GEORGE: If you want to instruct him not to
2 answer --
3 MR. VEASY: I'll instruct him not to answer. It
4 has nothing to do with this lawsuit.
5 MR. GEORGE: It has a heck of a lot to do with
6 this lawsuit.
7 MR. VEASY: If you want to get Hanson on the
8 phone, let's get him on the phone.
9 MR. GEORGE: Okay, let's do it.
10 MR. VEASY: Go right ahead.
11 MR. GEORGE: Let me explain first on the record
12 the significance. Part of our claims are that Mr. Rasekh
13 was attempting to endear himself to the Bingham, and one
14 of the things he did was discuss marriage to Marie's
15 daughter.
16 MR. VEASY: And he's asked you questions on
17 that.
18 MR. GEORGE: Well, our testimony is that he
19 wanted it as a matter of convenience so he could get his
20 citizenship, and I want to explore that further.
21 MR. VEASY: You have. You've asked him.
22 MR. GEORGE: Well, I need to explore it
23 further --
24 MR. VEASY: I'll allow you a few more questions.
25 MR. GEORGE: -- to see if he had a legitimate

1 desire to marry her daughter or not.

2 MR. VEASY: He's answered that.

3 MR. GEORGE: Well, then I want to find out if he
4 had that same desire with anybody else, and it is relevant
5 to that question. And if on that basis you instruct him
6 not to answer, then let's go make the phone call.

7 MR. VEASY: Answer the question.

8 THE WITNESS: Okay, can you repeat the question?

9 Q (BY MR. GEORGE) During this same period of time
10 were you interested in marrying any other specific
11 individuals?

12 A Maybe. I'm not sure. I don't remember. Yes, I
13 guess.

14 Q Who?

15 MR. VEASY: Don't speculate.

16 A I don't know. I did it in '92 and '93 --

17 Q Not '92, I'm talking '93 or '94, since you met
18 the Bingham family.

19 A Not after I got married. I got married in March
20 12th.

21 Q Of 1993?

22 A Yes.

23 Q Okay.

24 A So after that, no. Before that, yes.

25 Q When did you meet the Bingham family?

1 A I was door knocking. I don't know. I don't
2 know. I don't remember. '92, '93. I don't know.

3 Q Prior to the time you got married?

4 A Yeah, prior. That's why I talked to her about
5 her daughter.

6 Q Right, because obviously you wouldn't be
7 discussing marrying Jennifer --

8 A If I'm married.

9 Q Right. So how long had you known Jennifer when
10 you broached this subject to Marie about potentially
11 marrying her daughter Jennifer?

12 A I don't know how long. I don't recall that.

13 Q Well, let's see if you recall, then, when you
14 first got to know the Bingham family.

15 A I don't remember dates. I knocked on her door.
16 That's how I first met them.

17 Q How long before you entered into the listing
18 agreement with the Hirschis in months did you first get to
19 know the Bingham family? Let's go from June of 1994
20 backward.

21 A Okay. So I got this in June -- I got the
22 listing in '90 --

23 Q June of 1994. We haven't got that in yet.

24 A So I got it in June '94. I don't know when I
25 met the Bingham family. It was before that.

1 Q How long before? If you remember.

2 A I don't know. You guys know. I don't know.

3 Q Okay. So approximately how long --

4 A It's before -- for sure it's before my marriage.

5 Q Right.

6 A Because I would discuss that. So it has to be
7 before March of '93.

8 Q Okay.

9 A How long before that, I don't know.

10 Q Okay. How long do you believe that you had
11 known Jennifer before you broached the subject of marriage
12 to her mother?

13 A Like -- I don't know. I don't remember.

14 Q Okay. Had you ever dated Jennifer?

15 A We went out once or something.

16 Q To do what?

17 A Once or twice. I don't know. Lunch or talk. I
18 don't remember. Something like that.

19 Q Did you have the same discussion about
20 potentially marrying Jennifer with Jennifer that you had
21 with Marie?

22 A I think so. Why should I ask Marie if I don't
23 ask Jennifer?

24 Q I can't answer that question for you.

25 MR. VEASY: Listen to his question and just

1 answer it.

2 Q You believe that you had the same conversation?

3 A As far as I remember, yes.

4 Q Would it be your custom -- I don't know what
5 your customs are, but would it be your custom to ask
6 permission of the parent before asking a girl to marry
7 you?

8 A In Egypt, yes.

9 Q And would you abide by that custom over here, in
10 your opinion?

11 A The first few years I think I was.

12 Q And would that include during this period of
13 time when you were considering marrying Jennifer?

14 A I would assume that.

15 Q All right. So it would make sense, would it
16 not, for you to discuss it first with Marie?

17 A I don't know. During this period of time, I
18 don't know.

19 Q Do you recall what Jennifer told you?

20 A No.

21 Q You indicated your first contact with the
22 Bingham family was when you were knocking on doors.

23 A Uh-huh.

24 Q And you knocked on the door and who answered?

25 A One of her daughters.

1 Q All right. And Marie wasn't in town, was she?
 2 A No.
 3 Q What discussion did you have at that time with
 4 one of her daughters?
 5 A Just asked a simple question, do you -- I don't
 6 remember the phrase that we used to use -- any intention
 7 to sell your home or something like that.
 8 Q And what were you told?
 9 A And she said, I don't know, my mom is out of
 10 town.
 11 Q Did she then give you her mother's number?
 12 A I'm not sure. I don't remember. It was a long
 13 time ago.
 14 Q Well, you called Marie while she was still out
 15 of town, did you not?
 16 A I did?
 17 Q Did you?
 18 A I don't know. It's like I knock doors about a
 19 hundred houses every day.
 20 Q Okay. So you don't remember?
 21 A Yeah. If they gave me her phone number out of
 22 town, I would have called the owner of the house out of
 23 town.
 24 Q Did you talk to Marie the first time by
 25 telephone or in person?

1 A I don't know. I don't recall that.
 2 Q When do you recall first meeting or talking to
 3 Marie Bingham?
 4 A Before sometime in '92, I think.
 5 Q And do you recall what you discussed at all with
 6 her at that time?
 7 A If she wanted to sell her house.
 8 Q And what did she say?
 9 A I don't know. This is a long time ago. I don't
 10 remember what she said at that time.
 11 Q All right. In any event, from the time you
 12 first met Marie in over a period of months, a pretty close
 13 relationship developed between you and she and her family,
 14 didn't it?
 15 A Just a normal relationship I develop with any
 16 buyer, seller I work with.
 17 Q That's all it was?
 18 A Yes, that's all it was.
 19 Q Have you ever proposed marriage to a buyer's
 20 daughter before, potential buyer's daughter?
 21 A None of the buyer that I worked with they have a
 22 daughter that I was interested in.
 23 Q You visited the Bingham family often during this
 24 period of time at their home, didn't you?
 25 A I don't know what you call often.

1 Q By the way, you took another of Marie's
 2 daughters, Brittany, to Egypt, didn't you?
 3 A I did.
 4 Q Tell us about that.
 5 A Do you remember what time was that? That was
 6 summer.
 7 MR. VEASY: Answer his question.
 8 A Yes.
 9 Q You took Marie's daughter Brittany to Egypt.
 10 A Uh-huh.
 11 Q For how long?
 12 A Two weeks, four weeks, somewhere there.
 13 Q And what was the purpose of that visit?
 14 A I was going to Egypt. She wanted to go. I
 15 liked two of Marie's daughters, Jennifer and Brittany, and
 16 I wanted to get a chance to know her, and it was a good
 17 occasion for me to take her with me to Egypt. I paid for
 18 the whole trip. In a way I wanted my family to see,
 19 because my family opposing me marrying an American.
 20 Q So this was a prospect that you wanted to show
 21 to your family?
 22 A Yes.
 23 Q And also a family member was getting married at
 24 that time, correct?
 25 A Yes.

1 Q And isn't that the reason that you told Marie
 2 that you would like to take Brittany to Egypt is a member
 3 of your family was getting married and you'd like her to
 4 see that?
 5 A No. Maybe. I don't know. I don't know the
 6 exact wording of what happened at that time. I was
 7 interested in both of them. In my tradition, I couldn't
 8 have get married without the permission of my family. I
 9 want my family to know that Americans, the idea that they
 10 have are different. And I figured that Brittany and
 11 Jennifer, either one could be a good wife, either one
 12 could be a good -- someone, a partner for me; and she was
 13 nice and cute, and that's all what happened.
 14 Q How old was Brittany at the time you took her to
 15 Egypt?
 16 A I don't know. She was younger than Jennifer, a
 17 couple of years younger, I think.
 18 Q Was she an adult?
 19 A What do you mean by an adult?
 20 Q Was she of age, do you know?
 21 A Over 18?
 22 MR. VEASY: What do you mean over age?
 23 Objection, vague and ambiguous.
 24 Q Do you know what the legal age is in Utah?
 25 A Eighteen.

1 Q Was she over 18?
 2 A Yeah, I think she was over 18.
 3 Q You're sure of that?
 4 A Yeah, she was over 18. I think.
 5 Q Okay. When you married Gina, did you get the
 6 prior approval of your family?
 7 A Yes.
 8 Q Did you take her over there first?
 9 A No.
 10 Q Did they come over here first?
 11 A No.
 12 Q So they weren't really acquainted with her when
 13 you married her?
 14 A Actually my family didn't like the fact that I'm
 15 marrying an American, period.
 16 Q Okay.
 17 A They came, my dad came after that.
 18 Q You told Marie after marrying -- well, let me
 19 back up. After you broached the subject of marriage to
 20 Jennifer, did Marie approve or disapprove of that?
 21 A I don't remember. I think she approved it.
 22 Q Did Jennifer approve or disapprove of it?
 23 A I think both approved.
 24 Q So why didn't it happen?
 25 A Because I didn't like -- a lot of things that

1 was going on, I didn't want to --
 2 Q I'm sorry?
 3 A There was a lot of things I didn't like -- I
 4 don't want. Like there are certain things that I would
 5 like to have in my wife, and it wasn't there.
 6 Q So it's your testimony that even though Marie
 7 would have been agreeable and Jeannie would have been
 8 agreeable, you changed your mind?
 9 A Uh-huh.
 10 Q And tell me the reason you changed your mind.
 11 A Some principle that I have in my wife that she
 12 has to have.
 13 Q Just explain to me why you changed your mind.
 14 A What do you mean why I changed my mind? I want
 15 my wife to have certain standard, certain education.
 16 There are certain things I didn't like about the family
 17 that I didn't want to be that close.
 18 Q Tell me what that is, please.
 19 MR. VEASY: What is the relevance of this,
 20 Counsel?
 21 MR. GEORGE: I think this whole line of
 22 questioning is absolutely relevant.
 23 MR. VEASY: He didn't marry Ms. Bingham's
 24 daughter.
 25 MR. GEORGE: I'm exploring the relationship that

1 this individual had with Marie and the family, and that's
 2 all a part of it.
 3 MR. VEASY: That's not what your question is.
 4 You're asking now as to why he didn't marry her, and he
 5 said he didn't marry her.
 6 MR. GEORGE: He said there were certain things
 7 he didn't like about the family, and I want to know what
 8 they are.
 9 MR. VEASY: Telling what he thinks.
 10 A Just what I like in my wife and what I like in
 11 general things.
 12 Q Jennifer?
 13 A No, not talking Jennifer, I'm talking my partner
 14 that I want to have. I want her to be honest, be a mother
 15 to my kids, one that I can trust. Her family going to
 16 turn to be my family. I'm talking education wise,
 17 standard wise, a family that I can feel comfortable with.
 18 Q Okay. By the way, you referred to Marie during
 19 this period of time as your American mom, didn't you?
 20 A I don't recall that.
 21 Q You don't recall ever calling her that?
 22 A I don't. But maybe if she said, I'm like your
 23 mother here, it could be a different story, because I was
 24 alone here.
 25 Q Okay. Did she ever indicate to you that she

1 felt like your mother here?
 2 A Maybe she did. A lot of people, they felt that
 3 way. They felt like I'm single here, I have no family,
 4 and they consider me like their son, or they say, you are
 5 like a son to us, or something like that.
 6 Q Were you like a son to the Bingham family?
 7 A I don't know. Not now.
 8 Q I know.
 9 A Not at that time.
 10 Q What?
 11 A Not at that time. Not at the closing.
 12 Q Prior to the closing?
 13 A Uh-huh.
 14 Q Okay. So something happened in between an
 15 earlier time and the closing where you no longer felt like
 16 their son?
 17 A Right before closing, the way I dealt with all
 18 my clients is based on honesty and how to be -- you don't
 19 take advantage of someone. And when Marie, Ms. Bingham --
 20 prior to closing I went -- left to Egypt, and I came back
 21 and I knew that the Hirschs, they decided to leave on a
 22 mission to Russia. And they had everything, the
 23 expiration of an inspection and everything, and
 24 Ms. Bingham prior to leaving Egypt. And when I was in
 25 Egypt, Ms. Bingham was going forward with the purchase,

1 state, county, and federal regulations or laws so that a
2 new buyer would not have to do anything differently than
3 you were doing?

4 A Oh, I don't think that was discussed about that.

5 Q Do you know whether or not Kai --

6 A He was told that it was in full compliance.

7 Q Was he told -- okay. Who told him it was in
8 full compliance?

9 A Well, we did, and we showed him -- I mean, he
10 was showed the certificates of you are now licensed for
11 such-and-such.

12 Q Did you or anybody that you know of tell Kai
13 Rasekh, not only are we in full compliance with all laws
14 and regulations, but a new buyer if they stepped right in
15 would be as well?

16 A No.

17 Q You did not tell him that?

18 A (Shaking head no.)

19 Q Did you believe that to be the case?

20 A I stated it once before that on the regs that
21 was posted on the wall it was stated that a new buyer
22 would need to check for licensing and go through all that
23 process. And that's all it says.

24 Q So my question is, at or up to the time of the
25 closing, was it your belief that Marie Bingham could step

1 be the case?

2 A From the former questions you asked when he was
3 talking about day cares and so forth, that he was somewhat
4 familiar with it.

5 Q So you believe that Mr. Rasekh made statements
6 in your presence that would indicate that he had a
7 familiarity with the requirements for licensing and
8 maintaining a day care business?

9 A I don't know his full knowledge of that. He was
10 aware that there would have to be re-licensing.

11 Q And was he aware of that because you had told
12 him so?

13 A And he saw -- discussed with my wife and he saw
14 the information they had posted, so forth. I'm just
15 assuming that.

16 Q What is the information you're talking about
17 that he saw posted?

18 A It's regulations of the state. I mean, it's
19 right there. Might talk to --

20 MR. LOVE: For the record, I brought copies --

21 A -- my wife.

22 MR. LOVE: Go ahead and complete your answer. I
23 didn't mean to interrupt.

24 THE WITNESS: My wife is probably familiar with
25 those, because she was running it.

1 right into the facility and continue running it as a day
2 care without having to do any updating or modernizing to
3 comply with code or any other federal, state, county, or
4 city law or regulation?

5 A As I stated, no, she would have to apply and get
6 her licensing, and she knew that.

7 Q We'll get to that in just a moment. So at the
8 time of the closing, it was your belief that Marie Bingham
9 would have to re-license and that there may be new and/or
10 additional conditions imposed upon her to be able to
11 continue running the day care center?

12 A Yes.

13 Q And what new or additional requirements did you
14 believe might be imposed upon her?

15 A I didn't know.

16 Q And you didn't check?

17 A No, I wasn't aware. We had licensed it each
18 year.

19 Q And to the best of your knowledge, Mr. Rasekh
20 did no independent checking of what new or additional
21 requirements would be imposed upon Marie Bingham?

22 A I can't answer that. I don't know. I think he
23 was aware that there would be requirements and she would
24 have to license it herself, whatever.

25 Q And what makes you believe that he knew that to

1 MR. LOVE: And for the record, I've brought --
2 the Hirschs have brought to me a copy of the licensing
3 materials, and I only have one copy but I can produce
4 those for everybody.

5 MR. GEORGE: Let's go off the record for a
6 second.

7 (Discussion off the record.)

8 (Exhibit 67 marked for identification.)

9 Q (BY MR. GEORGE) I'm now going to hand you
10 what's been marked as Deposition Exhibit 67. This is
11 material that your counsel just handed to us this morning,
12 correct?

13 A That's correct, yes.

14 Q Did you supply this information to your counsel?

15 A Yes.

16 Q Let's go through and identify each page of
17 Exhibit 67 starting with the first page, which appears to
18 be a letter from the Department of Human Services dated
19 June 14th, 1994. Could you tell me what that is?

20 A That's a license approval for the next year. I
21 mean, about every June they gave us the -- you had to
22 renew your license, and that's the approval.

23 Q And this is part of your business records and
24 was in your file as of June of 1994?

25 A That's right.

1 them. I've given them a rough draft of -- these figures
2 are taken out of that initial one that was given in
3 September. It's just highlighting like salaries and
4 maintenance and utilities and payroll.

5 Q Do you know why you prepared it?

6 A Only if it's to give a summary of these three
7 items.

8 Q Do you know when you prepared it?

9 A I don't have a date on that.

10 Q But it is your handwriting?

11 A It is my handwriting and it is my preparation,
12 and I think I took the numbers out of those financial
13 deals.

14 Q Okay. And No. 70. Does Exhibit 70 refresh your
15 recollection that you actually conveyed those items of
16 personal property to Marie by a bill of sale?

17 A Yes, it does, and we signed it.

18 Q That's your signature?

19 A And that's my signature.

20 Q And you would authenticate that as a bill of
21 sale for those items that you conveyed to Marie Bingham
22 that are contained in Exhibit 70?

23 A That's what it says. Now, I was thinking of it
24 along the -- when we had the addendums, you know, to the
25 contract. But that's the bill of sale.

1 Q Okay. Do you remember an occasion prior to
2 closing where you were there and your wife was there and
3 Marie Bingham was there and she asked your wife whether or
4 not your wife thought she could make it in this
5 transaction? Do you remember that?

6 A I don't know. I always remember her telling us
7 that she could make it. I don't know whether that was a
8 conversation between Lois or --

9 Q You don't remember that at all?

10 A I don't remember that.

11 Q And so I take it you don't remember your wife
12 replying, yes, you can, I believe you can or you can?

13 A Well, it seems at this time as I reflect that my
14 wife is always stating "you can make it." And I guess
15 that's why she was perplexed when I said, I don't think
16 you ought to have this place, a little bit. I might have
17 reflected on that, you know, when I told her in that
18 meeting that I don't think you ought to buy it.

19 Q When you reviewed the financial statements that
20 comprise Exhibit 8, do they indicate that in most years
21 the Hirschi Center had a net loss or a very minimal
22 profit?

23 MR. LOVE: They speak for themselves. You don't
24 have to characterize them, but you can answer.

25 A That is reflected -- that was printed out and --

1 and that's always what we presented.

2 Q And did Marie ask -- do you recall Marie asking
3 if those accurately represented the profitability of the
4 center or not, Exhibit 8?

5 A I don't know of the question, but I do know that
6 every time we referred to this, and this is what we
7 referred to, that's the information of the financial
8 statements, receipts and disbursements of the center.

9 Q Do you recall telling Marie that she could not
10 rely on the documents in Exhibit 8 as showing the
11 profitability of the center because within those figures
12 you were supporting three families or two families?

13 A No. I had indicated we had two families working
14 in this, and those are the actual figures of the business.

15 Q So you never at any time indicated that you
16 couldn't rely on the seeming lack of profits shown by
17 Exhibit 8?

18 A The figures speak for themselves. I don't think
19 I would have submitted an accountant's run-out and then
20 say, but this isn't accurate.

21 Q So you don't think you did that at all?

22 A No, that's right, I don't.

23 Q So you never, I presume, represented in any way
24 either to Kal Rasekh or to Marie Bingham that the business
25 was in fact profitable?

1 A No. And that's really why I was selling it as a
2 real estate only. I wasn't selling the business.

3 Q Okay. Because the documentation that you
4 supplied showed it not to be profitable, correct?

5 MR. LOVE: Again, they speak for themselves.

6 Q Is that correct?

7 A It shows some losses and some gains some years,
8 yes.

9 Q But the gains are minimal, aren't they?

10 MR. LOVE: Again, they speak for themselves.
11 You asked him to characterize the document.

12 But you can answer.

13 A Yeah, they speak for themselves. It's the
14 accurate portrayal of the business at the center.

15 Q Okay. And if Kal Rasekh represented to Marie
16 otherwise, you have no knowledge of that one way or the
17 other?

18 A No, because Mr. Rasekh worked with me and he
19 worked with Marie. I don't recall his ever being together
20 too much with both of us.

21 Q Based on what you observed the relationship
22 between Kal Rasekh and Marie Bingham, would it be fair to
23 say that you could observe that he exerted a great deal of
24 influence over Marie in this transaction?

25 MR. LOVE: Well, you can answer that after I

1 \$600,000.

2 MR. DYER: That's all the questions I have.

3 MR. GEORGE: I just have a couple.

4 FURTHER EXAMINATION

5 BY MR. GEORGE:

6 Q Referring back to Exhibit 76.

7 A Yes.

8 Q Could you read the entry for 9-11-95 on page 16?

9 A Yes, 9-11-95. I read paragraph 10 to Bob and
10 asked questions about it. Bob was the attorney. Must I
11 wait until she has sold everything? No, because she was
12 in the process of selling. If someone wants to assume
13 loan, must I sell under the same conditions? No, I don't
14 need to.

15 Talked with Bob, answers to the two questions
16 above noted. I can do two things right now: send letter
17 of further intimidation not to sell any personal property,
18 go before a judge and get a bond, mortgage home for ten
19 thousand, then we can go to court. And if she proves she
20 didn't sell personal stuff, we could lose some of the
21 bond. Bob feels it's just better to send a letter of
22 intimidation now.

23 He also said I could go to her now and have her
24 sign over the deed to me, but I would then be responsible
25 for any attachments, that is, money she owes Kal Rasekh,

1 Q So he was familiar with your property even prior
2 to the time that you sold it to Marie; is that correct?

3 A Oh, yes. He had walked through and he knew the
4 property.

5 Q Okay. Other than a conversation at a basketball
6 game where he told you that he was going to lease but
7 didn't, have you had any other conversations with Randal
8 Roberts that you can recall?

9 A No, because they moved out of the area. I just
10 have lost contact with him.

11 MR. GEORGE: I don't have any more.

12 MR. LOVE: Just a minute.

13 (Witness and counsel consult off the record.)

14 THE WITNESS: Oh, yes, I --

15 Q (BY MR. GEORGE) Okay, do you need to add --

16 A Yes. Can I respond again?

17 Q Sure.

18 A Because he reminded me of something else. I met
19 Mr. Roberts, oh, man, just maybe a month ago or sometime,
20 or less than a month just on the street, and he had told
21 me that he had settled with Marie. And I was -- settled?
22 I mean, I didn't know, you know, I thought he was being
23 along with the rest of us, but he said he had settled
24 outside that.

25 Q That's all he said?

1 income tax she may owe or any other attachments to the
2 property, so be aware of. However, if we wait another
3 month for foreclosure, we get the deed back clear of all
4 attachments.

5 Q All right. When you said that Bob had -- Bob
6 feels it's just better to send a letter of intimidation
7 now, what was he referring to?

8 MR. LOVE: What did he tell you?

9 Q What was he referring to?

10 A That's in relationship to the selling of the
11 property she was doing.

12 Q So he wanted to intimidate her; is that correct?

13 A Well, I mean, that's the word he used. I guess
14 tell her that she had to cease and desist, yes.

15 Q Okay. Did you personally know Randal Roberts?

16 A Yes. He lived in our area.

17 Q Did you know that he was interested in buying
18 your property prior to the time that he presented an
19 offer?

20 A He had always spoken of a steakhouse, but I
21 thought it was just dreams in the air. I mean, he kind
22 of --

23 Q He had indicated a desire to turn your facility
24 into a steakhouse?

25 A He talked of that one time.

1 A Yeah. He didn't tell me how much or anything,
2 because he was just passing by in the street. So I
3 thought, oh, man, he settled. But I didn't know the
4 details of it.

5 MR. GEORGE: I don't have any further questions.

6 MR. DYER: I don't have any further questions.

7 (Deposition was concluded at 12:28 p.m.)

8 * * *

OFFER FOR PURCHASE AND SALE OF ASSETS

(WITH EARNEST MONEY PROVISION)

Control No. _____

#45

The terms and conditions appearing on the back hereof and addenda are part of this agreement.
 Received from Randall Roberts (PURCHASER) on 3-2-95 (date) for 2732 AMLO MOTOR the sum of Five Thousand DOLLARS (\$ 5,000) in the form of a check as a deposit on the purchase price of all the equipment, fixtures, goodwill, inventory, trademarks, trade names, lease and other intangible assets but not the cash or accounts receivable of that certain business known as Steve's Hair Center 2465 So. 1300 E. (city) Sandy (county) SLC County (state) Utah (zip) 84010

2. The total purchase price of \$ 62,000 shall be paid as follows

- \$ 1,000 Deposit on the date of this agreement included in down payment
- \$ _____ Additional deposit by PURCHASER on removal of contingencies and included in down payment
- \$ 49,000 Balance of down payment to be deposited with escrow agent at closing in cash or certified funds
- \$ 5,000 Total down payment
- \$ _____ Assumption of existing obligation, or paid through SELLER, payable as follows \$ _____ per month (including _____ % interest) evidenced by a Secured Promissory Note
- \$ 600,000 Assumption of existing obligation, or paid through SELLER, payable as follows \$ 5,300 per month (including 10 % interest), evidenced by a Secured Promissory Note
- \$ _____ Balance of purchase price to be paid to SELLER pursuant to a personally guaranteed and Secured Promissory Note in said amount, payable at \$ _____ or more per month for _____ months with interest thereon at _____ % per annum, together with a security agreement and a financing statement as provided by the Uniform Commercial Code of The State of Utah which shall be filed with the Utah Department of Commerce
- \$ _____ Additional payment terms
- \$ 5,000 TOTAL PURCHASE PRICE

3. ADDITIONAL CONDITIONS OF SALE See Addendum of _____ Pages

See Attached Addendum
2% of Gross Sales of new business for 24 months paid to Seller

4. CLOSING For purposes of completing this transaction Broker is directed (upon receipt of The Authorization to Close) to supply all relevant documentation to escrow agent, Mise Nender, who shall prepare final closing documents, and closing shall take place at said agent's office at 10:00 o'clock AM on or before 6-15, 19 95. The parties hereto consent to an extension of the date of closing for reasonable unforeseen conditions on which consummation of the transaction depend. Closing costs shall be shared equally by PURCHASER and SELLER. PURCHASER and SELLER agree to execute all documents necessary to consummate this transaction including, where applicable, such documents as are necessary to comply with the Bulk Transfer provisions of the Uniform Commercial Code of the State of Utah.

5. INVENTORY The full purchase price shall include inventory of \$ None at SELLER's cost. If the actual amount is more or less, the note to seller shall be adjusted accordingly. Inventory to be counted by an independent service, charges to be shared equally between PURCHASER and SELLER. Inventory to be counted, priced and extended by PURCHASER and SELLER. In the event that PURCHASER and SELLER request Broker's assistance in counting inventory, the principals agree that they will jointly verify and approve Broker's services. SELLER agrees and warrants that between the time agreement is reached on this Offer and closing that he/she will maintain the normal inventories, customary pricing policies, standard hours, and promotional programs to maintain the goodwill of the business.

6. CONDITIONS SELLER will supply a Covenant Not to Compete for 0 years for the area of None and training for _____ hours to be completed within the first _____ weeks following closing.

7. CONTINGENCY PURCHASER's offer _____ is contingent ☒ is not contingent upon SELLER proving to PURCHASER's satisfaction of financial information for subject business no later than _____ days from acceptance of this Offer. If this contingency or any other contingency which is a part of this Offer, is not removed in a timely manner, all funds deposited by PURCHASER shall be returned by Broker to PURCHASER.

8. LEASE In the event this Offer involves the transfer of SELLER's leasehold interest, SELLER hereby guarantees to deliver to PURCHASER a valid lease assignment, sublease of existing lease or new lease which has a base rent of \$ _____ per month for a period of _____ years with additional terms of None.

by the date of closing. SELLER's failure to so deliver shall relieve PURCHASER from its purchase agreement hereunder, in which event all funds deposited by PURCHASER shall be returned by Broker to PURCHASER.

9. AGENCY DISCLOSURE By the signing of this Offer the listing agent, Michael Dwyer, represents SELLER and the selling agent, Steve Tate, represents SELLER. PURCHASER and SELLER confirm that prior to signing this Offer, written disclosure of the agency relationship(s) was provided him/her.

10. ACCEPTANCE When signed by PURCHASER, this deposit receipt is an Offer on the part of PURCHASER to purchase the above business on the terms stated and should the SELLER fail to accept this Offer by his signature hereon prior to 6:00 PM 3-13, 19 95, the PURCHASER shall revoke this Offer and all funds deposited by PURCHASER shall be returned by Broker.

Dated 3-2-95 At _____ AM PM, Dated _____ At _____ AM PM

Purchaser Randall Roberts Seller _____ SSN _____

Purchaser _____ SSN _____ Seller _____ SSN _____

Address 41 E 10050 Corporate Name _____ TIN _____

City, State, Zip SLC, Utah 84111 Address _____

Phone 801 246-5604 City, State, Zip _____

Purchaser acknowledges receipt of a seller-signed copy Phone (_____) _____

Dated _____ At _____ AM PM Agent for Broker (print) Michael Dwyer

Signature _____ Principal Broker William J. Taylor

MB000336

THIS IS A LEGALLY BINDING DOCUMENT. READ FRONT AND BACK CAREFULLY.
 IF YOU DO NOT UNDERSTAND IT, CONSULT AN ATTORNEY.

VRUtah

WE SELL MORE BUSINESSES
 IN UTAH THAN ANYONE

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Page 1 of 1

ADDENDUM

Manager's Initials _____

Date _____

To that certain contract dated 2-3-95 1995, identified below between:

Hirschi Center - Marie Bingham as Seller(s)

and: Randal Roberts as Purchaser(s)

on that business known as: Hirschi Center

and located at: 9425 S. 1300 E. Sandy, Utah
(Address, City, County, State)

This ADDENDUM shall constitute an integral part of the

☒ Offer for Purchase and Sale of Assets

☐ Employment Agreement for Exclusive Right to Sell

executed by the undersigned on the date thereof

Agreement to be transferred to R.E. Sales Agreement.
Purchaser to assume note of
approximately 600,000 with 10% interest.

Sale is contingent upon purchasers
satisfactory approval of existing note.

Seller should supply purchaser with a detailed
Floor Plan and Plat Map of property.

Sale includes Piano and Two Water
Fountain Dolphins

Seller should keep and remove all
other existing equipment.

Contingent upon any state and county
regulations that would affect new business.

Date: 2-3-95 AM PM

Purchaser: Randal Roberts

Purchaser: _____

Date: _____ At: _____ AM PM

Seller: _____

Seller: _____

This ADDENDUM taken for Broker by:

Agent for Broker: [Signature]

Date: 2-3-95

VRUtah

WE SELL MORE BUSINESSES
IN UTAH THAN ANYONE

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MB0000337



April 20, 1995

#49

Hirschi Center
Ms. Marie Bingham
9825 South 1300 East
Sandy, UT 84092

RE: Offer to lease for Randall Roberts at the Hirschi Center

Dear Marie:

This shall serve as a offer to lease for Randall Roberts at the property located at 9825 South 1300 East, Sandy, Utah, otherwise known as the Hirschi Center, upon the following terms and conditions.

1. Lessee (Randall Roberts or assigns) wishes to lease the Hirschi Center for a period of 24 months at the rate of \$5,500.00 per month.
2. Lessee shall have a first right of refusal and option to purchase the property at a purchase price of \$865,000.00.
3. In the event that Lessee decides to exercise its first right of refusal and purchase the property prior to termination of the lease (24 months), Lessee shall give Lessor 90 days notice prior to exercising the option.
4. Lessee will give 90 days notice before the end of the lease on Lessee's decision to vacate or exercise the option.
5. Lessee will pay the pro rata share of the taxes based on the square footage of both buildings.
6. Lessee will pay for all maintenance on the property and the leased building excluding the Lessor's home.
7. Lessor will keep all leasehold improvements in the event the Lessee does not exercise the option.
8. Lessee will pay utilities for both buildings.
9. Lessee will give Lessor first and last month's rent at the signing of the lease.

VRU000028



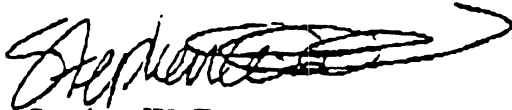
10. All rental payments will go through an Escrow Attorney as agreed to by both parties.

11. Lessee agrees to close on May 31, 1995 and take possession on June 1, 1995.

This proposal is not contractual in nature, but upon your acceptance of this proposal leases will be furnished with the above approved terms and conditions for execution by both parties.

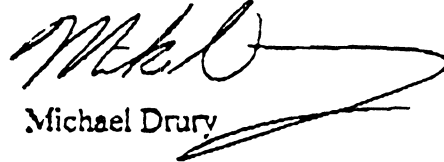
Sincerely,

CONSOLIDATED REALTY GROUP



Stephen W. Tate
Retail Specialist

VR UTAH



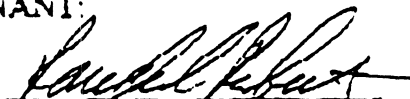
Michael Drury

Agreed to this _____ day of _____, 1995

LANDLORD:

By: _____
Date: _____

TENANT:

By: 
Date: 4-25-95

VRU000029

#152

MARIE BINGHAM
9824 South 1300 East
Salt Lake City, Utah

May 24, 1995

HAND DELIVERY

Mr. Michael Drury
VRUtah
5242 College Drive, #350
Salt lake City, Utah 84123-2653

Re: Finders Fee - Lease

Dear Mr. Drury,

Please find enclosed a copy of a lease agreement that was delivered to Mr. Randal Roberts. In April I instructed my attorney Mr. Delano S. Findlay to give you notice of my termination of the listing agreement to sell my business. Since then you have referred Mr. Randy Roberts to me who has made an offer to lease some of my property. With respect to his offer I have submitted to him the attached lease agreement. Should he exercise the lease provided I will be moving my day care business into my home and will gradually phase out my Day Care business. As a result I no longer desire to sell my Day Care business.

I have decided to voluntarily pay to you a finders fee with respect to Mr. Roberts lease. I have provided in the lease agreement that a finders fee of 6% of the amount of the lease up to the sum of \$8,000 is to be paid to you as and when recieved. I have placed instructions in the lease agreement (Article 37) that all lease payments will be paid into an escrow by Mr. Roberts and the escrow agent to automatically pay your commission from this account.

To resolve any differences and to assure you the finders payment, I have enclosed a Release Agreement for your signature. Please sign the same and return it to me at your earliest convenience.

Sincerely,



Marie Bingham

MB000190

RELEASE

This Release Agreement is made this 24th day of May, 1995 by and between Marie Bingham of 9825 South 1300 East, Sandy, Utah, and Mr. Michael Drury and VRUtah Business Brokers, of Murray, Utah hereinafter called VRUtah.

WITNESSETH

That Michael Drury and VRUtah Business Brokers (hereinafter mutually "VRUtah") for and in consideration of ten dollars and other valuable consideration consisting of a finders right to a fee of 6% of all lease amounts to be paid Marie Bingham by Randal Roberts, as and when the same are paid, pursuant to that certain lease agreement between Marie Bingham and Randal Roberts, a copy of which is attached hereto, VRUtah hereby remise, release and forever discharge and do by these presents for themselves, their heirs, executors, administrators and assigns, remise, release and forever discharge the said Marie Bingham, her heirs, executors, administrators, successors and assigns of and from all, and all manner of action suits, debts, specialties, covenants contracts, controversies, agreements, promises, variances, damages, claims and demands whatsoever, in law, in admiralty, or in equity, which against the said Marie Bingham, they ever had, now have or which their assigns, executors, administrators hereafter can shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

This release may not be changed orally.

Marie Bingham hereby agrees to see to the establishment of an escrow account into which shall be paid the lease sums as paid by Mr. Randal Roberts with instructions to the escrow agent to pay over 6% of all amounts when received to Mr. Michael Drury, VRUtah in satisfaction of the finders amounts due Mr. Drury and/or VRUtah.

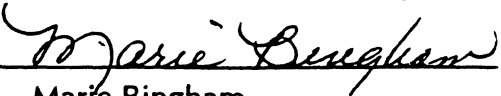
MB000185

IN WITNESS WHEREOF, the parties hereby and set their hand and seals this
day of May, 1995.

VRUtah

By _____
(hereunto duly authorized)

Michael Drury



Marie Bingham

MB000186

#53

Interphase Corporation

560 West 1700 South • Salt Lake City, Utah 84115 • (801) 978-2415 • Fax: (801) 9782415

May 24, 1995

Mr. Randal Roberts
41 East 100 South
Salt Lake City, Utah

Re: Hirschi Center Lease/Option

Dear Mr. Roberts:

Please find enclosed two copies each of a Commercial Property Lease agreement and Option to Purchase Real Estate along with a representation letter.

Marie Bingham has executed the documents and would be enforceable upon your signing a witnessed copy and returning the same.

Should you have any questions please advise me.

Sincerely,

W. David Weston
President

MB000191

#55

W. David Weston

560 West 1700 South • Salt Lake City, Utah 84115 • (801) 978-2415 • Fax: (801) 978-0909

June 3, 1995

Mr. Randal Roberts
41 East 100 South
Salt Lake City, Utah

Dear Mr. Roberts:

Please find enclosed two copies of the respective Commercial Lease Agreement on the Marie Bingham property and the Option to purchase the said property. With the receipt of this new lease agreement and option all prior executed leases and options are by this notice void. You have my and Ms. Bingham's assurance that upon receipt of an executed copies of the enclosed documents prior to June 16, 1995 that she will immediately execute the same copies to complete the lease and option.

I have made the changes to the lease and option agreement you requested, i.e. a ninety day right to assign the lease to a corporation without the necessity of obtaining Ms. Bingham's consent following the completion of your restaurant funding program, the ninety day option to lease the excluded home area, and within the option to purchase the right to acquire the dolphins, piano organ and sound systems for \$10.00.

Marie has informed me that she has received another offer with regard to the premises and in consideration of the mutual effort to consummate a lease she will give you an exclusive right to the property so long as you execute the lease and option prior to June 16, 1995, with an effective date of June 1, 1995, following which your exclusive right to lease will terminate and she will thereafter be free to accept all offers from any source.

Should you have any questions or should there be any way in which I might assist you further please advise.

Kindest regards,



W. David Weston

MB000215

6/13/95

#54

COMMERCIAL PROPERTY LEASE

THIS COMMERCIAL PROPERTY LEASE dated this 1st day of June, 1995 by and between Marie Bingham, (hereinafter called "Lessor" or "Landord"), and Randal Roberts, or assigns, (hereinafter called "Lessee" or "Tenant.")

WITNESSETH:

ARTICLE 1 - Premises

Lessor does hereby demise and let to Lessee, and Lessee does hereby lease from Lessor, the commercial property located at 9825 South 1300 East, Sandy, Utah, (exclusive of the residence building as occupied by Marie Bingham also located at the same address), comprising approximately 2.42 acres as depicted on Exhibit "A" attached hereto - together with two cement dolphins, piano, organ and sound system located on the premises, and to include all the parking, improvements, easements, rights and privileges thereunto belonging or in any way appertaining thereto ("Leased Premises") unless otherwise reserved by the Lessor, on the terms and conditions contained herein.

ARTICLE 2 - Use of Premises

Lessee shall use the leased premises solely for the purpose of conducting a restaurant business and such general offices as related thereto and for no other purpose.

ARTICLE 3 - Term

The term of this Lease shall be for 30 months, to commence on June 1, 1995 and ending on November 1, 1997 during which term the lessee is obligated to pay the monthly lease amount.

ARTICLE 4 - Monthly lease amount

Lessee agrees to establish an escrow account, with an escrow agent acceptable to the lessor, (which acceptance shall not be unreasonably withheld), at no cost to the lessor, for the sole purpose of recieving lessees lease payments to be paid by lessee pursuant to

MB000195

6/1/95

this agreement during the term of this agreement. Upon receipt of each monthly lease payment, which lessee is required to pay during the term of this lease, the escrow agent will pay from the amount received the amounts required to be paid under that certain Deed of Trust dated the 3rd day of October, 1994, pursuant to the terms thereof, as executed by Marie Bingham, as Trustor, to secure certain obligations in favor of Founders Title Company, as Trustee and Harvey C. Hirschi and Lois R. Hirschi as Beneficiary, recorded October 6, 1994, as Entry No. 5938920 in Book 7033 at pages 0568-0573 of official records in the office of the County Recorder of Salt Lake County, Utah describing land which is also the subject of this lease (hereinafter "Deed of Trust"). It is understood by the parties that the escrow account is established for no other reason than to provide for the regular and orderly payment of the monthly obligations as required by the Trust Deed. Following the disbursement of all amounts required under the said Deed of Trust, the escrow agent shall forthwith disburse all amounts remaining for the lease amounts received to the Lessor, Marie Bingham, at the home of Lessor, located on the same premises at 9825 South 1300 East, Sandy, Utah, or at such other place designated by Lessor. The lessee agrees to make the said lease payments and other amounts payable by the lessee hereunder to the escrow agent, acting on behalf of the lessor, when the same are due without any prior demand therefor and without any deduction or set-off whatsoever. Lessee shall pay to Lessor during the entire lease term, through the said escrow, as the base lease month amount ("rent") hereunder the following amounts:

\$ 5,600.00 per month

As used herein, the term "lease month" shall mean the first day of the month in which the obligation to pay the lease month amount ("rent") commences hereunder, and ending on the last day of the month thereof. All monthly rent shall be payable in advance, on the first day of each month during the term of this Lease. Simultaneously with the execution of this lease, Lessee shall pay to Lessor the first full calendar month's rent in advance.

ARTICLE 5 - Lease Adjustments

In addition to the monthly base lease month amount ("rent") the Lessee shall also be obligated to provide and pay for the following defined items and hereby agrees to hold Lessor harmless with respect to any such obligation or expense with respect thereto.

(1) Operating Expenses means the actual expense incurred by Lessee for the operation and maintenance of the Leased Premises, its buildings and open areas, in accordance with accepted principles of sound management practices as applied to first class commercial buildings, including, without limitation, the following:

- (i) building supplies, janitorial services and trash and snow removal;
- (ii) all general and special real estate or ad valorem taxes (or any tax in lieu of or in addition thereto), assessments levied by any governmental or quasi governmental authority, which shall include, but not be limited to, any and all taxes assessed for the calendar year 1995 ;
- (iii) utilities (including, without limitation, water, sewer, electricity, gas and any other energy used for heating, cooling or other purposes);
- (iv) maintenance, of the Leased Premises's systems, fixtures, property areas, including landscaped areas, parking areas and similar improvements;
- (v) salaries, wages, fringe benefits, workmen' compensation and disability insurance, and payroll taxes of lessee's employees or contractors.
- (vi) insurance (including, without limitation, fire and extended coverage, public liability and business interruption insurance).
- (vii) Security against theft and vandalism;
- (viii) expenses for any capital improvement made to the leased premises buildings and property.
- (iv) expenses for painting, redecorating or other work which Lessee performs on or for the leased premises.
- (v) expenses for repairs or other work occasioned by fire, windstorm or other insurable casualty;
- (vi) legal expenses incurred in enforcing the terms of this lease;

(2) Base Rent ("lease month amount") means the monthly lease month amount ("rent") as stated in Article 4. The annual rent is computed as the lease month amount times twelve.

(b) Lessee shall make and hold lessor harmless with respect to Lessee's Operating

Expenses as referenced above.

ARTICLE 6 - Additional Lease ("Rent") Amounts

Lessee shall pay as additional lease amounts ("rent") any and all sums of money or charges required to be paid by Lessee under this Lease, whether or not the same are designated as "additional lease amounts" or "additional rent." If such amounts or charges are not paid at the time provided in this Lease, they shall nevertheless, if not paid for when due, be collectable as additional rent with the next installment of rent thereafter falling due hereunder, but nothing herein contained shall be deemed to suspend or delay the payment of any amount of money or charge at the time the same becomes due and payable hereunder, or limit any other remedy of Lessor.

ARTICLE 7 - Past due lease amounts ("Rent") and Additional lease amounts ("Rent")

If Lessee shall fail to pay, as of the fifth day of the month when the same is due, any rent or additional rent or amounts or charges of the character described in Article 6 hereof, Lessee shall pay to Lessor as a late charge five percent (5%) of such unpaid amounts. In addition to the foregoing, all unpaid amounts and late charges shall bear interest from the fifth day of the month when the same is due to the date of the payment at the rate of eighteen percent (18%) per annum. All late penalties prescribed in the All Inclusive Trust Deed attached hereto and referenced herein shall apply to all payments required to be paid thereunder from the escrow set forth above.

ARTICLE 8 - Operation of Business

Lessee shall not perform any acts or carry on any practices which may injure the leased premises, or which shall violate any applicable law, rule or regulation or the terms of the All Inclusive Deed of Trust dated October 3, 1994 by and between Marie Bingham, as Trustor, and Finder Title, as trustee, a copy of which is attached hereto and incorporated herein by this reference.

ARTICLE 9 - Lessor's Excluded Area and Retained Rights

Lessor specifically excludes from the leased premises, subject to the option to lease the same hereafter as set forth below - the south building which lessor presently occupies as a residence, and until August 30, 1995 or at such time as the restaurant shall open for business whichever event is first, the playground area within the fenced area behind and to the east of the buildings, and without limitation retains for herself, family, friends and quests, the right to the access and use of all automobile parking areas, driveways, entrances

and exits thereto, including pedestrian sidewalks, ramps and landscaped areas. This exclusion does not abrogate the lessee requirements to make all utility payments with respect to the said excluded property as provided for herein.

ARTICLE 10 - Lessee's Option and Right to Lease Excluded Area

Lessee shall have the option and right 90 days following written notice to Lessor along with payment of the additional monthly lease sum of \$1,250 for the first months additional lease payment, and an additional security deposit of \$1,250, to lease the Lessor's Excluded Area for the remaining term of this Commercial Lease. The exercise of this lease option shall require an additional monthly rental of \$1,250.00 to be added to the Base Rent hereunder and to be paid for the remaining term of this lease. Following the receipt of the said written notice by lessee and the first months additional lease amount and security deposit, lessor shall have ninety days to vacate the said excluded area. Any lease of the Lessor's Excluded Area shall be subject to all the terms and conditions of this lease.

ARTICLE 11 - Control of Leased Premises - Installations by Lessee

Lessee shall have the right to construct, maintain and operate lighting facilities and to make improvements; and from time to time to change the area, level, location and arrangement of parking areas, pedestrian sidewalks and ramps and other facilities as, in the use of good judgment, Lessee shall determine to be advisable and necessary to the conduct of its restaurant business, but in no event shall Lessee have the right to diminish or degrade the value of the property. Lessee shall not make or cause to be made any alterations, additions or improvements to the leased premises which will in any way reduce the value of the leased premises without first obtaining Lessor's written approval and consent, which will not be unreasonably withheld. Prior to the commencement of any alterations, additions or repairs which will exceed individually or in the aggregate the sum of \$5,000, Lessee agrees to provide lessor a lease hold improvement completion bond or other guarantee of the completion of such alterations or addition or repairs in a form approved by lessor, the acceptance of which form will not be unreasonably withheld.

ARTICLE 12 - Alterations

All alterations, decorations, additions and improvements made to the leased premises by Lessee pursuant to this Lease shall remain the property of Lessor. At the expiration of the tenancy hereby created, Lessee shall surrender the leased premises in the same condition as the leased premises were in upon delivery of possession thereto under this Lease, reasonable wear and tear excepted, and shall surrender all keys for the leased premises to Lessor at the place then fixed for the payment of rent and shall inform Lessor of

all combinations on locks, safes and vaults, if any, in the leased premises. All of Lessee's installations or additions to the leased premises, which cannot be removed without damage to the leased premises, shall be deemed Lessor's property; provided, however, that Lessor may elect prior to the termination of the Lease, or within ten days thereafter, to require Lessee to remove any installation or addition at Lessee's expense. Upon termination of this Lease, Lessee shall remove from the leased premises all of Lessee's furniture, trade fixtures, and other personal property of every kind whatsoever not becoming Lessor's property as hereinbefore specified, and if it fails to do so, all such property and every interest of Lessee in the same shall be conclusively presumed to have been conveyed by Lessee to Lessor under this Lease as a bill of sale without compensation, allowance, or credit to Lessee.

ARTICLE 13 - Lessee Shall Discharge All Liens

Lessee shall promptly pay all contractors and materialmen hired by it, so as to minimize the possibility of a lien attaching to the leased premises, and should any such lien be made or filed, Lessee, if it has not already done so, shall bond against or discharge the same within ten days after written request by Lessor. Nothing herein contained shall empower Lessee to do any act which can, may or shall cloud or encumber Lessor's title to the leased premises.

ARTICLE 14 - Holdover

Any holdover beyond the termination of this Lease (Article 3) without Lessor's prior written consent, and any acceptance of rental beyond the term of this Lease, shall be deemed to have established a month to month tenancy as between Lessor and Lessee. Said month-to-month tenancy shall be upon the same terms and conditions as those herein specified, except that the monthly rental shall be 125% the rental in effect at the expiration of the term of this Lease.

ARTICLE 15 - Liability and Casualty Insurance

Lessee shall, at all times during the term of this Lease, and at its own cost and expense, procure and continue in force the following insurance coverage: bodily injury and property damage liability insurance with a combined single limit for bodily injury and property damage of not less than \$2,000,000, and fire and extended coverage insurance, including vandalism and malicious mischief coverage, in an amount equal to the full replacement value of all buildings, fixtures, furniture on the lease premises and all improvements installed by or at the expense of Lessee. The aforementioned minimum limits of policies shall in no event limit the liability of Lessee hereunder. The aforesaid

insurance shall name Lessor as an additional insured. Said insurance shall be with companies having a rating of not less than AA in "Best's Insurance Guide." Lessee shall furnish from the insurance companies or cause the insurance companies to furnish to Lessor certificates of coverage. No such policy shall be cancelable or subject to reduction of coverage or other modification or cancellation except after thirty days' prior written notice to Lessor by the insurer. All such policies shall be written as primary policies. Lessee shall, at least twenty days prior to the expiration of such policies, furnish Lessor with renewals or binders. Lessee agrees that if Lessee does not take out and maintain such insurance, Lessor may (but shall not be required to) procure said insurance on Lessee's behalf and charge Lessee the premiums therefor together with a twenty-five percent (25%) handling charge, which shall be payable upon demand. Lessee shall have the right to provide such insurance coverage pursuant to blanket policies obtained by Lessee, provided such blanket policies expressly afford coverage to the leased premises and to Lessee as required by this Lease. Lessee waives its right of subrogation against Lessor for any reason whatsoever, and any insurance policies herein required to be procured by Lessee shall contain an express waiver of any right of subrogation by the insurer against Lessor, if such waivers are available. Any mortgage lender or trust deed holder interested in any part of the Building may, at Lessor's option, be afforded coverage under any policy required to be secured by Lessee hereunder, by use of a mortgagee's endorsement to the policy concerned. Lessee hereby waives any right of recovery from Lessor for any loss or damage (including consequential loss) resulting from any of the perils insured against in the standard forms of public liability, property damage and fire insurance policies.

ARTICLE 16 - Fire and Other Casualty

If the leased premises shall be damaged by fire or other casualty, but are not thereby rendered untenable in whole or in part, Lessee shall at its own expense cause such damage to be repaired, and the rent shall not be abated. If by reason of such occurrence, the leased premises shall be rendered untenable in whole or in part, Lessee shall at its own expense cause the damage to be repaired, and the rent meanwhile shall not be abated.

ARTICLE 17 - Indemnification of Lessor

Lessee will indemnify Lessor and save her harmless from and against any and all claims, actions, damages, liability and expense in connection with any of lessee's alterations or improvements or in connection with loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon or at the leased premises, or the occupancy or use by Lessee of the leased premises or any part thereof, or occasioned wholly or in part by any act or omission of Lessee, its agents, contractors,

employees, servants, lessees or concessionaires, except for any claims caused by the negligence or willful misconduct of Lessor. In case Lessor shall, without fault on its part, be made a party to any litigation commenced by or against Lessee, Lessee shall protect and hold Lessor harmless and shall pay all costs, expenses and reasonable attorney's fees incurred or paid by Lessor in enforcing the covenants and agreements in this Lease, except for any claims caused by the negligence or willful misconduct of Lessor.

ARTICLE 18 - Utility Charges

Lessee shall procure and be solely responsible for and promptly pay all charges for heat, gas, electricity or any other utilities used or consumed in the leased premises including all charges for heat, gas, electricity or any other utilities used or consumed in the home occupied by the Lessor where the same is attached to the Leased Premises. In no event shall Lessor be liable for an interruption or failure in the supply of any such utilities to the leased premises, unless caused by Lessor's negligence or willful misconduct.

ARTICLE 19 - Maintenance by Lessee

Lessee shall, except as to the extent prevented by practical impossibility, and except as otherwise provided herein, keep the exterior of the leased premises and the foundation, walls and supporting framework, ceilings, exterior entrances and doors, glass, heating, ventilating and air conditioning equipment, and plumbing systems, in good condition and repair except for reasonable wear and tear.

ARTICLE 20 - State or Governmental Regulations

Lessee shall, at Lessee sole cost and expense, comply with all requirements and regulations for federal, state, county, municipal or other applicable governmental authorities, now in force or which may hereafter be in force, pertaining to Lessee's use of the leased premises, and shall at all times observe and use the leased premises according to municipal and county ordinances and state and federal statutes now in force or which may hereafter be in force.

ARTICLE 21 - Waste or Nuisance

Lessee and Lessor agree they shall not cause nor permit any waste upon the leased premises or any nuisance or other act or thing which may disturb, annoy or vex any customer of the lessee or any invited guest of the lessor coming upon the leased premises.

ARTICLE 22 - Assignment and Subletting

The lessor hereby gives her consent for the Lessee above named to assign this lease within ninety days of the date hereof to another entity or corporation without her written consent so long as lessee provides an acceptable substitute guarantor of the lease. Thereafter the lessee will not assign this Lease in whole or in part without the prior written consent of Lessor, which consent shall not be unreasonably withheld. Lessee shall not subject all or any part of the leased premises to any lien or encumbrance, without the prior written consent of Lessor, which consent may be given or withheld in Lessor's sole and absolute discretion. The consent by Lessor to any assignment shall not constitute a waiver of the necessity for such consent to any subsequent assignment. This prohibition against assigning or subletting shall be construed to include a prohibition against any assignment or subletting by operation of law. If this Lease is assigned, or if the leased premises or any part thereof be underlet or occupied in part or whole by anyone other than Lessee, Lessor may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, under-tenant and occupant as tenant hereunder. In the event of any permitted assignment or subletting hereunder, beyond the first authorized lease assignment as set forth above, the then Lessee and any guarantor shall remain fully liable on this Lease and shall not be released from performing any of the terms, covenants and conditions of this Lease.

ARTICLE 23 - Successors

All rights and liabilities herein given to, or imposed upon the respective parties hereto, shall extend to and bind the several respective heirs, executors, administrators, and assigns of said parties; and if there shall be more than one Lessee, they shall be bound jointly and severally by the terms, covenants and agreements herein. With the exception of the right to assign one time with the lessors written consent as set out in Article 22 above, No rights, however, shall inure to the benefit of any assignee of Lessee unless the assignment to such assignee has been approved by Lessor in writing as provided above.

ARTICLE 24 - Estoppel Certificate

Within ten days after request therefor by Lessor, or in the event that upon any sale, assignment or hypothecation of the leased premises and/or the land thereunder by Lessor an estoppel certificate shall be required from Lessee, Lessee shall deliver in recordable form a certificate to any proposed mortgagee or purchaser, or to Lessor, certifying (if such be the case) that this Lease is in full force and effect and that there are no defenses or offsets thereto, or stating those claimed by Lessee, and also certifying as to such other matters as may be

reasonably requested by any such mortgagee or purchaser.

ARTICLE 25 - Attornment

In the event any mortgagee requests in the certificate described in Article 26 hereof, Lessee shall certify that it agrees that if proceedings are brought for the foreclosure of, or in the event of exercise of the power of sale under any mortgage made by the Lessor covering the leased premises, Lessee shall attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as the Lessor under this Lease, provided such purchaser agrees to abide by all the terms of this Lease and to perform all of the obligations of Lessor hereunder. The Lessor grants the lessee the right to cure any default with respect to any indebtedness which has attached to the premises and to deduct the amounts paid from any amounts owing to lessor under the terms of this lease.

ARTICLE 26 - Subordination

Lessee agrees and acknowledges that this Lease is and shall be subordinate to the lien of any mortgages or deeds of trust on the leased premises. Upon request of Lessor, Lessee will evidence the subordination of its rights hereunder to the lien of any mortgage or deed of trust, and the lien resulting from any other method of financing or refinancing, now or hereafter in force against the land and/or buildings of which the leased premises are a part, and to all advances made or hereafter to be made upon the security thereof

ARTICLE 27 - Examination of the Leased Premises

Lessee hereby acknowledges that prior to the execution off this lease he has fully examined the leased premises and this acknowledgement shall be conclusive evidence that at the time thereof the leased premises were in good order and satisfactory condition.

ARTICLE 28 - Access by Lessor

Lessor or Lessor's agents shall have the right to enter the leased premises at reasonable times upon reasonable notice to examine the same and may open and permit an entry into the leased premises, at any time, when for any reason an entry therein shall be necessary or permissible, without in any manner affecting the obligations and covenants of this Lease.

ARTICLE 29 - Condemnation

If the whole of the leased premises shall be acquired or condemned by eminent

domain for any public or quasi-public use or purpose, then the term of this Lease shall cease and terminate as of the effective date of the condemnation order, and all rentals shall be paid to that date, and Lessee shall have no claim against Lessor nor the condemning authority for the value of any unexpired term of this Lease. If any part of the leased premises shall be acquired or condemned as aforesaid, and in the event that such partial taking or condemnation shall render the leased premises unsuitable for the business of Lessee, then the term of this Lease shall cease and terminate as of the effective date of the condemnation order. Lessee shall have no claim against Lessor nor the condemning authority for the value of any unexpired term of this Lease and rent shall be adjusted to the date of such termination. In the event of a partial taking or condemnation which is not extensive enough to render the leased premises unsuitable for the business of Lessee, then Lessor shall promptly restore the leased premises to a condition comparable to its condition at the time of such condemnation less the portion lost in the taking, and this Lease shall continue in full force and effect without any reduction or abatement of rent except for that portion lost, which will be adjusted on a square foot basis. If the whole of the common parking areas in the Building shall be acquired or condemned as aforesaid, then the term of this Lease shall cease and terminate as of the effective date of the condemnation order unless Lessor shall take immediate steps to provide other parking facilities substantially equal in convenience and number to the previously existing ratio between the common parking areas and the leased premises. In the event of any condemnation or taking as aforesaid, whether whole or partial, Lessee shall not be entitled to any part of the award paid for such condemnation and Lessor shall receive the full amount of such award, Lessee hereby expressly waiving any right or claim to any part thereof Although all damages in the event of any condemnation are to belong to Lessor whether such damages are awarded as compensation for diminution in value of the leasehold or to the fee of the leased premises, Lessee shall have the right to claim and recover from the condemning authority, but not from Lessor, such compensation as may be separately awarded or recoverable by Lessee in Lessee's own right on account of any and all damage to Lessee's business by reason of the condemnation and for or on account of any cost or loss to which Lessee might be put in removing Lessee's merchandise, furniture, fixtures, leasehold improvements and equipment.

ARTICLE 30 - Default of Lessee

In the event of any failure of Lessee to pay any rental or other sums due hereunder within ten days after the same shall be due, or any failure to perform any other of the terms, conditions, covenants of this Lease to be observed or performed by Lessee for more than thirty days after written notice of such default shall have been given to Lessee, or if Lessee or any guarantor of this Lease shall become bankrupt or insolvent, or file any debtor proceedings, or take or have taken against Lessee or any guarantor of this Lease a petition

in bankruptcy or insolvency or for reorganization, or for the appointment of a receiver or trustee for the benefit of creditors, or petitions for or enters into an arrangement for the benefit of creditors, or if Lessee shall abandon the leased premises, or suffers this Lease to be taken under any writ of execution, then Lessor, besides other rights or remedies it may have; shall have the immediate right of re-entry and may remove all persons and property from the Premises and such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of Tenant, all without service of notice or resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby. Should Landlord elect to re-enter, as herein provided, or should she take possession pursuant to legal proceedings or pursuant to any notice provided for by law, she may either terminate this Lease or she may from time to time without terminating this Lease, make such alterations and repairs as may be necessary in order to relet the Premises, and relet the Premises or any part thereof for such term or terms (which may be for a term extending beyond the term of this Lease) and at such rental or rentals and upon such other terms and conditions as Landlord in her sole discretion may deem advisable; upon each such reletting all rentals received by Landlord for such reletting shall be applied first, to the payment of any obligations other than rent due from Tenant to Lessor; second, to the payment of any costs and expenses of such reletting, including brokerage fees and attorneys' fees and costs of such alterations and repairs - third, to the payment of rent due and unpaid hereunder, and the residue, if any, shall be held by Lessor and applied in payment of future rent as the same may become due and payable hereunder. If such rentals received from such reletting during any month be less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of the Premises by Lessor shall be construed as an election on her part to terminate this Lease unless a written notice of such intention be given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate this Lease for such previous breach. Should Lessor at any time terminate this Lease for any breach, in addition to the right to obtain redress for any damages which may or have occurred by reason of such breach, Lessor shall be entitled to the cost of recovering the Premises, reasonable attorneys' fees, and the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then reasonable rental value of the Premises for the remainder of the stated term. All of the foregoing amounts shall be immediately due and payable from Tenant to Lessor. In case a suit shall be brought for recovery of possession of the Premises, for the recovery of rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant herein contained on the part of Tenant to be kept or performed, and a breach shall be established, the defaulting party shall pay to the other party all expenses incurred

therefor, including reasonable attorneys' fees.

ARTICLE 31 - Lessee's Property

Lessee shall be responsible for and shall pay before delinquency all municipal, county or state taxes assessed during the term of this Lease against the leased premises or any leasehold interest or personal property of any kind, owned by or placed in, upon or about the leased premises by Lessee. Lessor shall not be liable for any damage to the property of Lessee or of others located on the leased premises, nor for the loss of or damage to any property of Lessee or of others by theft or otherwise except for Lessor's negligence or wrongful acts or omissions. Lessor shall not be liable for any injury or damage to persons or property resulting from fire, explosion, steam, gas, electricity, water, rain, or snow or leaks from any part of the leased premises or from the pipes, appliances or plumbing works or from the roof, street or sub-surface or from any other place or by dampness or by any other cause of whatsoever nature except for Lessor's negligence or wrongful acts or omissions. Lessor shall not be liable for any such damage caused by other tenants or persons in the leased premises, occupants of adjacent property, of the Building, or the public, or caused by operations in construction of any private, public or quasi-public work. Lessor shall not be liable for any latent defect in the leased premises or in the building of which they form a part. All property of Lessee kept or stored on the leased premises shall be so kept or stored at the risk of Lessee only and Lessee shall hold Lessor harmless from any claims arising out of damage to the same, including subrogation claims by Lessee's insurance carrier.

ARTICLE 32 - Waiver

The waiver by Lessor of any breach of any term covenant or condition herein contained shall not be deemed to be a waiver of any other term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant or condition of this Lease, other than the failure of Lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach, at the time of acceptance of such rent. No covenant, term or condition of this Lease shall be deemed to have been waived by Lessor unless such waiver be in writing by Lessor.

ARTICLE 33 - Accord and Satisfaction

No payment by Lessee or receipt by Lessor of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated

rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance of such rent or pursue any other remedy in this Lease provided.

ARTICLE 34 - Entire Agreement

This Lease and Exhibits, and Riders, if any, attached hereto and forming a part hereof, set forth all the covenants, promises, agreements, conditions and understandings between Lessor and Lessee concerning the leased premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this Lease shall be binding upon Lessor or Lessee unless reduced to writing and signed by them.

ARTICLE 35 - No Partnership

Lessor does not, in any way or for any purpose, by virtue of this Lease, become a partner of Lessee in the conduct of its business, or otherwise, or joint venturer or member of a joint enterprise with Lessee. This Lease does not create any relationship between Lessor and Lessee other than a landlord-tenant relationship.

ARTICLE 36 - Notice

Any notice, demand, request or other instrument which may be or are required to be given under this Lease shall be delivered in person or sent by United States certified mail postage prepaid and shall be addressed (a) if to Lessor at the address set forth in Article 5 hereof or at such other address as Lessor may designate by written notice and (b) if to Lessee at the leased premises or at such other address as Lessee shall designate by written notice. If notice is mailed, such notice shall be deemed effective three days after being mailed in the manner provided herein.

ARTICLE 37 - Lessee Defined

The word "Lessee" shall be deemed and taken to mean the person or party mentioned as a Lessee or tenant herein, any notice required or permitted by the terms of this Lease may be given to the Lessee or his guarantor, if there be one, and shall have the same force and effect as if given by or to the Lessee himself. The use of the neuter singular pronoun to refer to Lessor or Lessee shall be deemed a proper reference even though Lessor or Lessee are individuals. If there be a guarantor(s) hereunder, all such

persons shall be jointly and severally liable for Lessee's obligations hereunder.

ARTICLE 38 - Captions and Article Numbers

The captions, article numbers and index appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such articles or contents of this Lease, nor in any way affect this Lease.

ARTICLE 39 - Partial Invalidity

If any term, covenant or condition of this Lease or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term, covenant or condition to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this Lease shall be valid and be enforced to the fullest extent permitted by law.

ARTICLE 40 - Execution of Lease

The submission of this Lease for examination does not constitute a reservation of or option for the leased premises and this Lease becomes effective as a Lease only upon execution and delivery thereof by Lessor and Lessee.

ARTICLE 41 - Security Deposit

Lessee will upon execution of this Lease, deposit with Lessor the security deposit equal to one month's rent, receipt of which is hereby acknowledged by Lessor, said deposit being given to secure the faithful performance by Lessee of all of the terms, covenants and conditions of this Lease by Lessee to be kept and performed during the term hereof Lessee agrees that if it shall fail to pay the rent herein reserved promptly when due, or any other amount hereunder when due, said deposit may, at the option of Lessor (but Lessor shall not be required to) be applied to any such amounts, and if Lessee violates any of the other terms, covenants and conditions of this Lease, said deposit shall be applied to any damages suffered by Lessor as a result of Lessee's default to the extent of the amount of the damages suffered. Nothing contained in this Article 42 shall in any way diminish or be construed as waiving any of Lessor's other remedies as provided herein, or by law and applied by Lessor for the payment of overdue rent or other sums due and payable to Lessor by Lessee hereunder. Upon any such application by Lessor of the security deposit to Lessor's damages hereunder, Lessee shall, on the written demand of Lessor, forthwith remit to Lessor a sufficient amount in cash to restore said security deposit to its original amount, and

Lessee's failure to do so within ten days after receipt of such demand shall constitute a breach of this Lease. Should Lessee comply with all of the terms, covenants and conditions of this Lease and promptly pay all of the rental herein provided for as it falls due, and all other sums payable by Lessee to Lessor hereunder, said security deposit may at the written request of Lessee be applied to the last month lease amount ("rent") required to be paid hereunder, otherwise the security deposit shall be returned in full to Lessee at the end of the term of this Lease, or upon the earlier termination of this Lease pursuant to the provisions hereof

ARTICLE 42 - Recording

Lessee shall not record this Lease without the written consent of Lessor and any attempt by Lessee to do so shall be void and shall constitute a default hereunder.

ARTICLE 43 - Limitation on Lessor's Liability

Anything in this Lease to the contrary notwithstanding, Lessee agrees that it shall look solely to the estate and property of Lessor in the Building's land, buildings and improvements thereto, and subject to the prior rights of any mortgagee, for the collection of any judgment (or other judicial process) requiring the payment of money by Lessor in the event of any default or breach by Lessor with respect to any of the terms, covenants or conditions of this Lease to be observed or performed by Lessor, and no other assets of Lessor shall be subjected to levy, execution, or other procedures for the satisfaction of Lessee's remedies.

ARTICLE 44 - Governing Law

This Lease shall be governed by and construed in accordance with the laws of the State of Utah, without giving effect to the choice of law provisions thereof

ARTICLE 45 - Guaranty

Lessee's obligations hereunder shall be guaranteed, if required by Lessor, pursuant to any Guaranty Rider attached hereto.

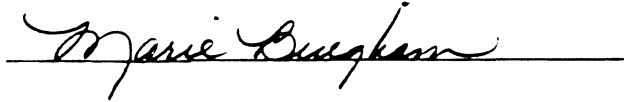
ARTICLE 46 - Exhibits; Incorporation by Reference

Lessor and Lessee shall have the right to attach to this Lease other exhibits and riders as may be necessary. All exhibits and riders attached to this Lease are hereby incorporated

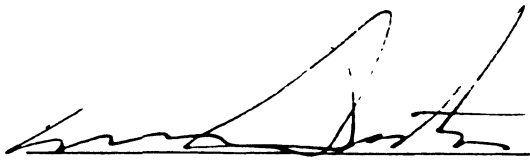
herein by reference and made a part hereof

IN WITNESS WHEREOF, Lessor and Lessee have executed this Lease as of the day and year first above written.

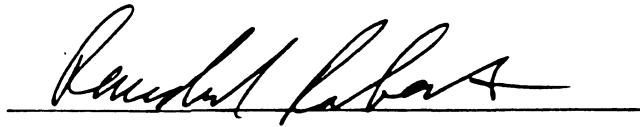
LESSOR:
MARIE BINGHAM

A handwritten signature in cursive script, appearing to read "Marie Bingham", written over a horizontal line.

Witness:

A handwritten signature in cursive script, written over a horizontal line.

LESSEE:
RANDAL ROBERTS

A handwritten signature in cursive script, appearing to read "Randal Roberts", written over a horizontal line.

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PARCELS OF LAND ARE IN REMAINDER
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SOUTH RESIDENCE (EXCLUDED)

28-8-42

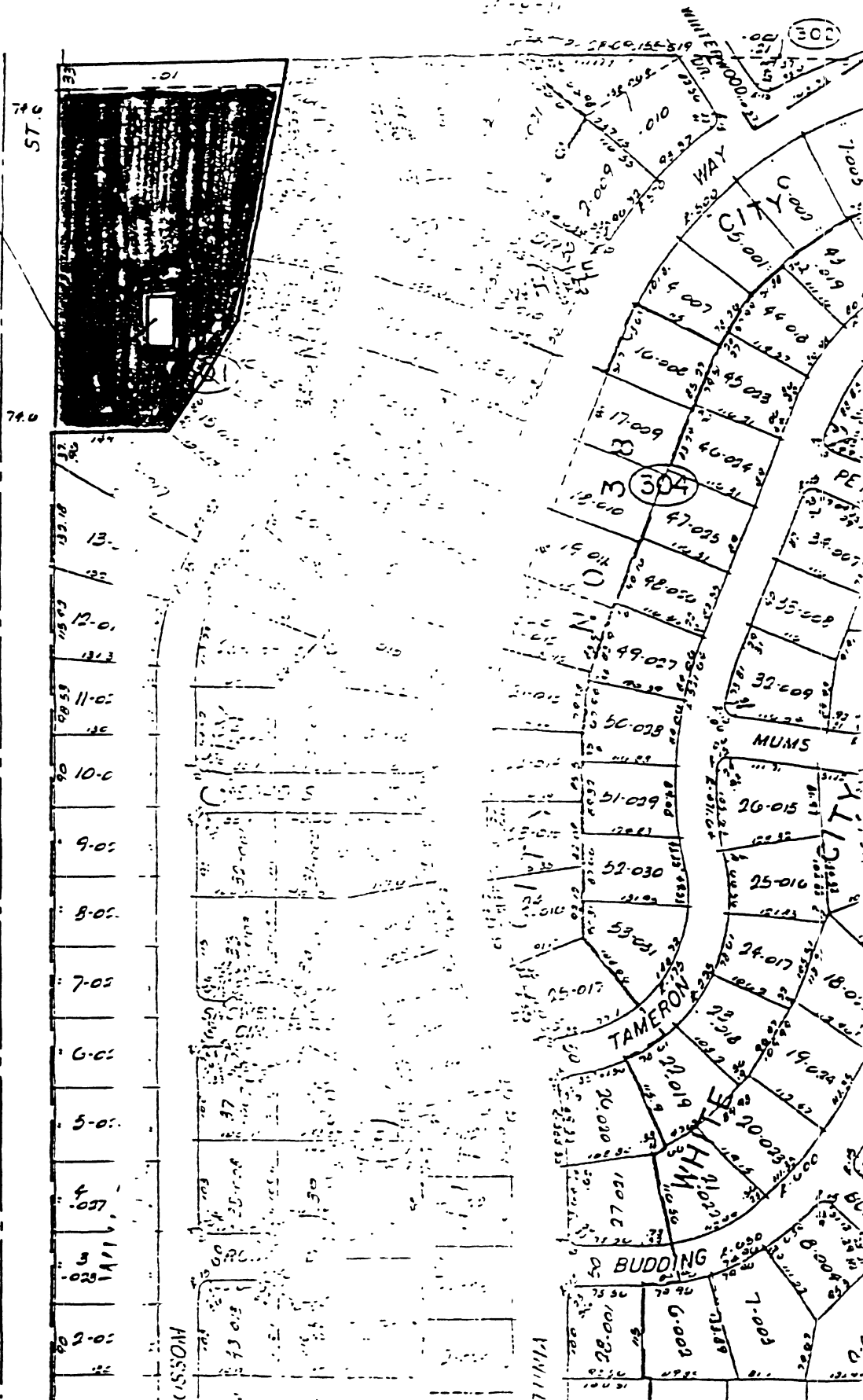


EXHIBIT A

SCALE 1/8"

OPTION TO PURCHASE PROPERTY

OPTION AGREEMENT made this 1st day of June, 1995, by and between Marie Bingham, hereafter referred to as the "Seller," and Randal Roberts hereinafter referred to as the "Purchaser." This option agreement is conditional upon the Purchaser entering into a 30 month lease agreement between the Seller and the Purchaser dated June 1, 1995 with respect to the property the subject of this Option to purchase and further subject to the condition that the said lease not go into default prior to the time this Option may be exercised.

1. In consideration of the sum of \$ 5,000 paid by the Purchaser to the Seller, the receipt of which is hereby acknowledged by the Seller, the Seller hereby grants to the Purchaser the right and option, upon the terms and conditions hereinafter set forth, to purchase the property consisting of approximately 2.42 acres and located at 9825 South 1300 East, Sandy, Utah (hereinafter called "Bingham Property"). The sum of \$5,000 paid by the Purchaser to the Seller is the consideration solely for the granting of this option, and such sum shall not be applied against any purchase price required to be paid by the Purchaser hereunder, and shall not be repaid to the Purchaser except as hereinafter specifically provided.

2. If the Purchaser exercises the option to purchase the Bingham property on or before November 30, 1997, the purchase price shall be the sum of \$865,000.00 in cash upon closing. Upon receipt of the cash sum of \$865,000 in purchase of the Bingham property, the Seller hereby agrees to sell and assign and transfer to the purchaser for an in consideration of \$10.00 two cement dolphins, a piano, organ and sound system located on the premises and described in the Commercial Property Lease of the optioned property as entered into between the Seller and Purchaser dated June 1, 1995.

3. This option to purchase the Bingham Property may be exercised by the Purchaser on or before November 30, 1997 following which this option shall terminate.

4. In the event of the failure of the Purchaser to exercise this option, or in the event of a default by the Purchaser after giving notice of the exercise of this option, all money paid by the Purchaser to the Seller upon the execution of this agreement shall be retained by the Seller as consideration for the granting of this option to the Purchaser, and all rights of the Purchaser under this Agreement shall terminate.

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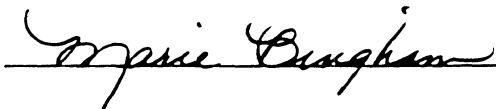
5. The closing under this agreement shall take place at 10 A.M. in the office of the Seller's attorneys, Delano S. Findlay 923 East 5350 South, Suite E, Salt Lake City, Utah, on the fifth day after the Purchaser's has obtained a preliminary title report which has identified that Seller has good and marketable or insurable title to the optioned property. If such fifth day falls on a Saturday or Sunday, the closing shall take place on the following Monday.

6. At the closing, the Seller shall convey the property described in paragraph 1 to the Purchaser by good and sufficient warranty deed.

7. It shall be the Seller's and Purchaser's mutual obligation to pay for the cost of closing and for any title insurance.

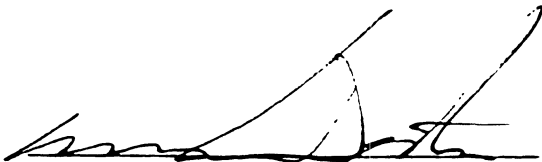
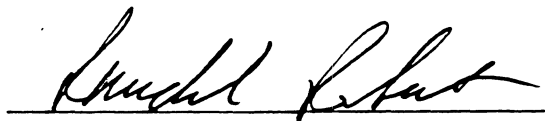
In witness whereof the parties have executed this agreement the day and year first above written.

SELLER:
MARIE BINGHAM



Witness:

PURCHASER:
RANDALX ROBERTS


_____

MB000006

**FIRST AMENDMENT TO
COMMERCIAL PROPERTY LEASE
AND OPTION TO PURCHASE AGREEMENTS**

This amendment agreement dated this 1st day of June, 1995 by and between Marie Bingham, (hereinafter called "Lessor" or "Landord"), and Randal Roberts, or assigns, (hereinafter called "Lessee" or "Tenant.") is made as a modification or amendment to that certain lease agreement (hereinafter "lease") by and between the Lessor and Lessee dated the 1st day of June, 1995 and that certain Option to Purchase Property agreement (hereinafter "Option") made by and between the Lessor and Lessee also dated the 1st day of June, 1995, copies of which agreements are attached hereto as Exhibits "A" and "B" respectively and incorporated herein by this reference.

Whereas, Lessee has agreed to enter into and effectuate the said lease and option agreements as of June 1, 1995, and

Whereas, Lessee is seeking additional time within which to secure funding for a restaurant project which lessee contemplates constructing on the property described in and covered by the lease and option agreement, and

Whereas, Lessor is willing to grant an extension of time for 90 days with respect to certain payments required under the lease and option agreements in order to grant lessee additional time to secure the initial funding necessary to complete his restaurant project.

Now Therefore, in consideration of ten dollars and other valuable consideration, in hand paid the receipt of which is hereby acknowledged the lessor and lessee hereby agree to amend the lease and option agreement as follows :

1. The lease agreement upon execution requires the lessee to pay, in addition to the base rental and any additional rental as set forth in Articles 4 through 6 of the lease, a security deposit pursuant to Article 41 equal to one months rent in the amount of \$5,600.00. The Lessor hereby agrees to extend the time under the lease agreement within which the said security deposit must be paid for a period of ninety days from June 16, 1995 or until September 16, 1995.

2. The Option agreement requires the payment of \$5,000 as the necessary consideration to option the right to purchase the property consisting of approximately

MB000001

2.42 acres and located at 9825 South 1300 East, Sandy, Utah and referred to in the said option agreement as the "Bingham Property." The Lessor hereby agrees to modify the terms of the said option agreement to permit the lessee to pay \$500.00 to secure the option as of June 1, 1995 and to defer the balance of the required \$4,500 for a period of ninety days from June 16, 1995 or until September 16, 1995. It is expressly understood by the Lessee that in the event the \$4,500 amount is not paid on or before September 16, 1995 all option rights to purchase the Bingham property as provided by the option agreement shall terminate forthwith and the lessor shall retain the said \$500.00 as liquidating damages.

3. Other than the modification of the provisions for the payment of the security deposit under the terms of the lease and the balance of the full option price under the terms of the Option Agreement, this amendment does not amend or modify either the lease or option agreement in any other particular.

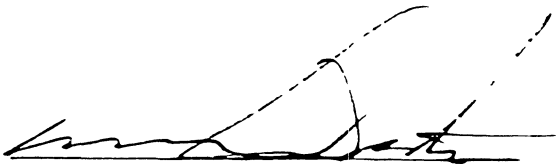
In witness whereof the lessor and lessee have hereunto set their hand and seal as of June 1, 1995.

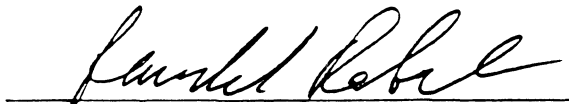
LESSOR/SELLER:
MARIE BINGHAM



Witness:

LESSEE/PURCHASER:
RANDAL ROBERTS





SAN MICHAEL

RELEASE

#56

VRUtah, Inc. (BROKER) hereby agrees to modify the Sole and Exclusive Listing dated October 17, 1994 related to the business known as the Hirsch Center.

Because the marketplace will not support the price and terms of the agreement, the agreement is being terminated. It is agreed that if the Owner(s) sell the Hirsch Center prior to October 17, 1996, the Owner(s) agree to pay BROKER its minimum Transaction Fee of \$8,000.00.

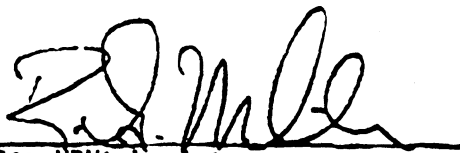
BROKER and the undersigned Owner(s) further release each other from any and all obligations, claims and causes of action in any way arising from said terminated agreement. On a periodic basis, our business representatives will contact the qualified individuals who have been shown your property. Should anyone's interest in purchasing the property rekindle, we will advise you to determine if you may still be interested in selling. We retain the right to a full Transaction Fee in the event that any one of these individuals purchase the property within two years after the termination of the Listing Agreement, as stated in the third paragraph of the Agreement. However, this does not mean that you are obligated to sell to them after the termination of the Agreement.

Date

6-22-95

Date

For VRUtah, Inc.



Owner

Owner

CB000204

WHEN RECORDED, return to:
ASHTON, BRAUNBERGER, POULSEN & BOUD, P.C.
302 West 5400 South, Suite 103
Murray, Utah 84107

#157

NOTICE OF DEFAULT

NOTICE IS HEREBY GIVEN:

That Attorney Robert J. Poulsen is Successor Trustee under a Deed of Trust dated the 3rd day of October, 1994, executed by Marie Bingham, as Trustor, to secure certain obligations in favor of Founders Title Company, as Trustee and Harvey C. Hirschi and Lois R. Hirschi as Beneficiary, recorded October 6, 1994, as Entry No. 5938920 in Book 7033 at pages 0568-0573 of official records in the office of the County Recorder of Salt Lake County, Utah describing land therein as:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE

Said obligations include a note of even date with the above referred to Deed of Trust for the principal sum of \$600,000.

The beneficial interest under such Deed and the obligations secured thereby are now owned by Harvey C. Hirschi and Lois R. Hirschi.

Presently, the payment of \$5,275.98 due June 1, 1995 has not been paid, plus attorney fees and costs (pursuant to Paragraph 16 of the Trust Deed) which are presently \$1,300.00, plus late charges of \$1,312.70 (pursuant to the Trust Deed Note).

A breach of and default in the obligations for which such Deed is secured has occurred in that payments have not been made as required.

By reason of such default, Robert J. Poulsen, as Successor Trustee, and Harvey C. Hirschi and Lois R. Hirschi, as Beneficiary under said Deed of Trust, hereby declare all sums secured thereby immediately due and payable and have elected and hereby elect to cause the trust property to be sold to satisfy the obligation secured thereby.

DATED this 10 day of July, 1995.

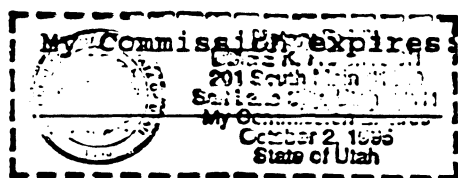

Robert J. Poulsen, Successor Trustee

MB000231

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

On the 10 day of July, 1995, personally
appeared before me Robert J. Poulsen, the signer of the foregoing
instrument, who duly acknowledged to me that he executed the same.

Dee Robinson
Notary Public
Residing in Salt Lake County,
State of Utah



doc.13-956/vg

MB000232

4158

WHEN RECORDED, return to
Marie Bingham
9825 South 1300 East
Sandy, Utah 84092

NOTICE OF DEFAULT
(This is Not a Notice of Termination of Lease)

NOTICE IS HEREBY GIVEN:

That pursuant to Article 30, (but not limited to such Article) of that certain Commercial Property Lease, dated June 1, 1995, Mr. Randall Roberts, the lessee thereunder, residing at 9889 So. Blossom Dr. Sandy, Utah 84092, is in default of the provisions of the said lease and in default of that certain Deed of Trust, made a part of the said lease, dated the 3rd day of October, 1994, executed by Marie Bingham, as Trustor, to secure certain obligations in favor of Founders Title Company, as Trustee and Harvey C. Hirschi and Lois R. Hirschi as Beneficiary, recorded October 6, 1994, as Entry No. 5938920 in Book 7033 at pages 0568-0573 of official records in the office of the County Recorder of Salt Lake County, Utah both of which describe the land, as part of the lease, set out in Exhibit "A" attached hereto and incorporated herein by this reference.

The amount in default is \$26,154.07

The obligations in default under the lease include.

Pursuant to Lease Article 4:

- (a) the failure to make the base lease monthly rental amount for the months of June, July and August 1995, in the total amount of \$16,800.
- (b) late penalties and interest is accordingly due in the amount of \$1,092.00.
- (c) late charges under the All Inclusive Deed of Trust are also due in the amount of \$1,312.70 along with \$1,300 in attorneys fees.

Pursuant to Lease Article 5:

- (a) Pro rated 1995 property taxes \$4,326.00
- (b) Utilities, including Utah Power, (\$600.73); Mountain Fuel, (\$60.18); White City Water, (\$150.46); Cottonwood Sanitary District, (\$12.00) in the total amount of \$823.37.

Pursuant to Lease Article 41 and Amendment:

- (a) Security Deposit in amount of \$500.

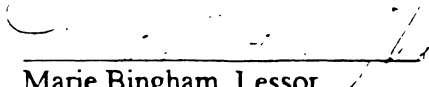
The Lessor to whom the amounts are owed is Marie Bingham..

MB000241

A breach of and default in the obligations under the said lease has occurred in that payments have not been made as required.

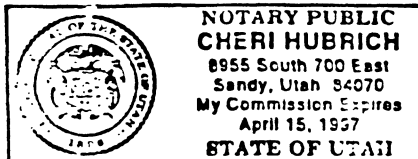
Further Notice: If by reason of such default, and the failure of the Lessee to establish the required escrow as provided under the lease agreement and to fund the escrow sufficient to pay amounts required under the All Inclusive Deed of Trust as provided in the lease agreement and should Robert J. Poulsen, as Successor Trustee, and Harvey C. Hirschi and Lois R. Hirschi, as Beneficiary under said Deed of Trust, elect to cause the leased property pursuant to the All Inclusive Deed of Trust to be sold such action shall constitute a cause of action for damages against the lessee under the lease.

DATED this 16th day of August 1995.


Marie Bingham, Lessor.

STATE OF UTAH)
)ss.
County of Salt Lake)

On the day of August, 1995, personally appeared before me Marie Bingham, the signer of the foregoing Notice of Default, who duly acknowledge to me that she executed the same.





Notary Public, Residing in Salt Lake County,
State of Utah

Exhibit "A"
PROPERTY DESCRIPTION

Beginning on the East line of a 100 foot street and the South line of a 66 foot street at a point South 0° 15' 35" East 33.00 feet and East 74.70 feet from the Northwest corner of the Southwest quarter of Section 9, Township 3 South, Range 1 East, Salt Lake Base and Meridian, the true point of beginning; thence South 0° 3' 0" East along the East line of said 100 foot street, 435.60 feet; thence East 500 feet; thence North 0° 3' 0" West 435.60 feet to the South line of said 66 foot street; thence West 500 feet to the true point of Beginning.

LESS AND EXCEPTING therefrom the followg described parcel of land: BEGINNING at a point South 0° 15' 35 " East along Section line 33.00 feet and South 89° 58' 05 " East 368.28 feet from the Northwest corner of the Southwest quarter of Section 9, Township 3 South, Range 1 East, Salt Lake and Meridian, and running thence South 89° 58' 05" East 206.32 feet; thence South 0° 03' East 435.60 feet; thence North 89° 58' 05" West 350.05 feet; thence North 32° 04' 35" East 163.48 feet; thence, North 10° 46' 39" East 302.33 feet to point of BEGINNING.

Acknowledgment and Agreement

Memo Record of Showing

#64

Broker/Mgr. Initials <i>GN</i>	Date <i>1-26-95</i>	BLS No. List. Agent <i>MD</i>	Company Name VR UTAH, INC.	133 <i>291</i>	161 325
Business Name <i>Hirsch Center</i>			Office Name		
Business Address			Office Address		
Submitted To		By Authorized Agent <i>MD</i>	City, State, Phone		

I/We, the undersigned prospective purchaser(s), hereby acknowledge receipt of Confidential Information about the business here described on the date indicated above. PLEASE, do not contact owner or employees.

In consideration of your having provided the above information, I/We hereby agree, (1) not to reproduce or divulge such information to others, except to secure their advice and counsel, in which case I/we agree to obtain their consent to maintain such confidentiality, and (2) to conduct all further inquiries into the above opportunities exclusively through the office of the above named broker, which I/we acknowledge to be the agency first providing such information to me.

I/We understand that Broker has entered into a listing agreement or contract with the owner or their authorized agent to represent the aforesaid business, which provides for commission payment to Broker.

I/We hereby agree to retain in strictest confidence all information provided regarding the business listed above as being available for sale and any information regarding the operation of same.

Receipt of a copy of this ACKNOWLEDGMENT and AGREEMENT is hereby acknowledged.

Signature *Gordon Olsen* et al *1-26-95*
Date
Printed Name
Address *740 E. 3900 S. Suite #200*
SLC Utah 84107
City State Zip
Telephone *801 761-9100*

Signature *Scott Olsen* et al *1-26-95*
Date
Printed Name
Address
City State
Telephone
Signature Agent of Broker *MD*

VRUTAH Business Brokers

White Listing Office • Yellow Agent • Pink Purchaser

65

MARIE BINGHAM
9825 South 1300 East
Salt Lake City, Utah

May 8, 1995

To: Mr. Randal Roberts
Mr. Drury, VRUtah Business Brokers

Gentlemen,

This letter is to advise you that I have retained W. David Weston to act as my agent with respect to any and all matters dealing with the leasing and/or other disposition of the property known as the Hirschi Center.

Mr. Weston may be contacted:

W. David Weston
560 West 1700 South
Salt lake City, Utah 84115
Phone: (801) 978-2415
Fax: (801) 978 0909

Please deal with Mr. Weston directly. Please direct all future correspondence, inquiries or negotiable demands to Mr. Weston.

Thanking you in advance for your cooperation and attention in this matter.

Sincerely,

Marie Bingham

Marie Bingham

cc: W. David Weston
Attorney Delano Findlay

Extra Copies
Oct 1 1995

Marie Bingham
9825 South 1300 East
Salt Lake City, Utah 84092
Phone: 553 9664

Kal Rasekh
Coldwell Bankers
2180 South 1300 East, Suite 140
Salt Lake City, Utah, 84106

Dear Kal,

Thank you for your letter of September 13 explaining your sales ideas. Some of the concerns I have are listed below.

At the time you sold my home as my broker you were aware of my financial situation. I was divorced with still young children at home, unemployed and living in part off welfare. Prior to the time that you sold my home you approached me and tried to convince me to buy the Hirschi Center property, claiming it would be a live in business that would provide me employment. At the time you said you were interested in my being a partner in the Hirschi Center purchase with your sister so she could come from Egypt. Later you determined that your sister could not leave Egypt. Nevertheless when this wasn't possible you were still aggressive that I purchase the property. I told you at the time that in my circumstances it was too high of risk. To convince me to make the purchase you told me because of your investigations of the money the business was making that you had made your Dad exempt from the listing as you were possibly interested in it for yourselves. I still was skeptical as I was not looking for an investment and certainly not one as large as this because it was way beyond my means.

I was in a vulnerable position because you knew I wanted to sell my house and you knew that the equity was all I had. You also knew that I would have to get a full time job by fall in order to provide for my security. Even though I felt the Hirschi Center was too high a risk, you convinced me to purchase it by stating that I should try it, work hard and that if anything went wrong that you would either buy it or would sell it in the spring with no commission. Each time I expressed my concerns and doubts you would reassure me that it was a great deal and it would be sold in the spring if it didn't work out.

When I told you that I had never been in business for myself and certainly did not know the Day Care business you said this deal was perfect because Marlene Hirschi would stay and train me for awhile and since everything was already in place as a day care business, I could just walk in and take over. You also induced me to buy it by telling me that I could alternatively sell the front property in the future which would take away any risk. You also said that the business would be very profitable if I worked hard and got the day care enrollment up to 96 children. I,

EXHIBIT
19

HIR00045

expressed to you my concern as I looked into it that the price was too high and it looked rundown and would take allot of money to fix it up. I also told you that the purchase price was beyond my means because it would take every dime of equity I was getting out of my home. When I finally got the final figures It was obvious to me that I would not have near enough to pay the \$200,000 required to close and you assured me several times when I said "I don't have the money " that I shouldn't worry about that now. While you were in Egypt I decided I would not purchase this property unless it was reduced. When you returned you were very put out and you reminded me that Hirschi's were going to Russia and time was of the essence. There never was a time in all the discussion and final negotiations that I did not feel very pressured. You kept telling me that I should just trust you. I told you that I had talked to my brother and others who kept telling me the price was too high. You told me that you were well informed and your projections were certain that I could make the payments and a modest profit. I was very naive and lacking in any business experience.

Finally, at closing when you knew I did not have the entire down payment you loaned me the difference through your company and arranged to have the Hirschi's defer the taxes and my first four months payments which left me also additionally obligated to them. I have since learned that if the Hirschi's were to foreclose you could bid in the remaining the purchase price based on the second mortgage you took to get me into the deal. I have since assumed that the loan amount really came from the real estate commission (\$50,000) you obtained. All this occurred at the last minute at closing, and even though I was surprised I went along because I trusted in you. Later, I learned to my surprise, that when I had signed the closing papers I was also obligated to pay the Hirschi's \$2,000 for left over food. This was never explained to me. I thought I had been shown all the papers so I signed without reading each of them.

Now, here I am a year later with my health broken and about to lose all I own if you don't sell this property quickly and get my money back. I believe this property was misrepresented to me from the beginning. In consideration of the promises you made to induce me to purchase I believe that you and Coldwell Bankers should buy the property from me and restore me to the same position I was in financially before you got me into this mess.

In your letter you indicated the time you believed it would take to resell the property. I have some concerns about the time because I believe you should be more aggressive or at least as aggressive as you were with me to get me to buy it. First it has taken over two weeks just to get a sign up in front of the Center. I also do not understand why the entire facilities of Coldwell Banker are not behind an aggressive sale of the Center. You have told me that only you can initiate newspaper adds and other forms of advertising. I didn't know I had only signed an exclusive with you and not Coldwell Bankers such that Coldwell Bankers resources would not be committed to making a sale? I can't wait six months to sell this property when at any moment it might be repossessed. It didn't take you six months the first time to sell it to me

I am a trusting person, but it has gotten me into alot of trouble. Mistakes, I have made them, by myself and with the assistance of others like you and Randy Roberts who takes no

responsibility for the time and money it cost with his ill conceived attempts to purchase and finally for entering into a lease when he didn't have the means to pay the first months payment.

I alone am taking the brunt of the circumstances leading up to this point in time. Others, who have promised support, now take no responsibility for their actions. I don't want to be told that I have "run down the Hirschi Center", because I have broken my back making capital improvements on the property by repainting the exterior and laying carpet in the residence.

I worked myself, almost to death, in keeping the name of the Hirschi Center as a viable source for child care. I agonized over the Randy Roberts lease agreement which he so "conveniently walked away from". I downsized the size of the day care based on the promises of Mr. Roberts to convert the Center to a restaurant with the help of his "investors."

Well, now that your sign is up please tell me what the moto "Every Day Until Its Sold" means to me. What aggressive marketing tactics are you now to use for me that you originally used for Harvey and Lois Hirschi when you sold the property within a week of their sales contract. Is this motto a marketing ploy or just a catchy phrase, or will you utilize every tool you have to help out not only a person with a signed business contract, but also a "friend."

As I said earlier, I believe that you should buy the Center and restore me because of your involvement in my purchase. Please let me know, because I will now check in with your office "Every Day Until Its Sold" to inquire as to what is being done, and that will become my motto.

Sincerely,



Marie Bingham

cc: Randy Roberts
Harvey & Lois Hirschi
Coldwell Bankers

#66

RONALD S. GEORGE, Esq. (Bar # 7721)
Attorney for Plaintiff
3804 Highland Drive # 5
Salt Lake City, Utah, 84106
Phone: (801) 272-5545

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARIE BINGHAM,)	
)	
Plaintiff,	)	Case No. 970901897cv
)	
vs.	)	PLAINTIFF'S ANSWERS TO
	)	DEFENDANT MICHAEL DRURY
RANDAL ROBERTS, MICHAEL DRURY, VRUtah )	)	AND VR UTAH, INC.
Inc., a Utah Corporation, KAL RASEKH, an )	)	FIRST SET OF INTERROGATORIES
individual, COLDWELL BANKER PREMIER )	)	TO PLAINTIFF
REALTY, INC., a Utah Corporation, HARVEY C.))	
HIRSCHI and LOIS R. HIRSCHI, individuals )	)	Judge: Timothy R. Hansen
Defendant.)	

Pursuant to Rule 33 of the Utah Rules of Civil Procedure, the Plaintiff, through counsel Ronald S. George, hereby answers the defendants Michael Drury and VR Utah Inc. First Set of Interrogatories.

In responding to any interrogatory, the Plaintiff does not concede the relevancy, materiality or admissibility of the interrogatory or of the subject matter to which the interrogatory refers. Plaintiff's response to each interrogatory is made subject to, and without in any way waiving or intending to waive, any objections as to the competency, relevancy, materiality, privilege or admissibility as evidence for any other purpose, of any of the information provided or referred to, or of any of the responses given herein, or of the subject

matter thereof, in any proceeding.

All answers contained herein are based only upon such information and documents as are presently available and specifically known to Plaintiff. Further independent discovery, independent investigation, legal research and analysis may supply additional facts and/or meaning to the known facts. The responses hereinafter set forth are given without prejudice to Plaintiff's rights to produce evidence of any subsequently discovered information.

Whereas this case is still in early stages of litigation, and discovery and the defense of this case is ongoing, as this case continues to develop, additional or supplemental information may develop that is responsive to the following interrogatories and Plaintiff reserves the right to supplement her answers accordingly. Accordingly, Plaintiff responds to Defendants interrogatories as follows:

ANSWERS TO INTERROGATORIES

1. Please identify yourself fully, giving your full name, age, social security number, occupation, residence and business address, and if married, the name of your spouse.

Answer to Interrogatory No. 1 Marie Bingham, See Amended Complaint § 7 which is incorporated herein by this reference. Mrs. Bingham is a full time Mother and works for "The Living Scriptures" as a part time salesperson. She works from her home and a carousel in the Cross Roads Mall. Ms. Bingham's social security number is 565560849.

2. Please identify the 'friend' referenced in paragraphs numbered 61 and 62 of Plaintiff's Amended Complaint, including specifically:

- a. The friend s full name, address and social security number;
- b. The friends occupation and place of employment;
- c. The nature and extent of the friend's involvement, if any, in any other matters or incidents referenced or described in the Amended Complaint; and
- d. Whether you intend to call the friend as a witness at trial in this matter.

Answer to Interrogatory No. 2

a(1). Stanley Spafford, 966 E. Tritoma, Ave. Sandy, 84094, Social Security Number unknown.

a(2). Ron Orban, owner/manager of "On-Line Security;" 13842 Nth 65th Ave. Glendale, Arizona 85306, Social Security number is unknown. Who installed the emergency lighting at the Hirschi Center.

b(1). Salesman for Utah Power and Light, Salt Lake City, Utah.

b(2). Former owner and manager of "On-Line Security" in Salt Lake City, Utah, presently employed as a manager by First Security in Glendale Arizona.

c(1). Mr. Spafford set up the accounts payable ledgers for the Plaintiff following her possession of the Hirschi Center. Mr. Spafford attended a meeting between Mr. and Mrs. Hirschi and the Plaintiff. The Plaintiff sought and received some advice from Mr. Spafford with respect to her purchase of the Hirschi Center. Mr. Spafford assisted the Plaintiff, shortly after the purchase in resolving some flood damage resulting from a plumbing failure. Mr. Spafford confronted Mr. Hirschi with respect to the condition of the Hirschi Center building

as a result of his involvement in the plumbing failure. Mr. Spafford advised the Plaintiff to immediately place the Hirschi Center for sale. He stated to the Plaintiff at the time that in his view the building had not been adequately maintained and the costs of maintenance and refurbishing were beyond her financial ability and that the value of the Hirschi Center had been misrepresented at the time of her purchase.

C(2). Approximately one week following the Plaintiff's purchase of the Hirschi Center The Plaintiff was informed by Defendant Rasekh that she was obligated to Coldwell Bankers for the amounts set out in a promissory note Plaintiff had signed at closing under the influence and direction of Mr. Rasekh. The Plaintiff then sought advise from Mr. Ron Orban. Mr. Orban visited the Hirschi center and installed security lighting at the Center for the Plaintiff. He expressed to the Plaintiff that the building was severely in need of maintenance. After explaining her financial circumstances to Mr. Orban, he advised her to immediately attempt to sell the Hirschi Center to reduce her losses. He directed her attention to an advertisement in the newspaper placed by Defendant VRUtah Brokers. Mr. Orban then dialed the number of VRUtah Brokers and upon taking the phone the Plaintiff spoke to Defendant Michael Drury. Mr. Drury then informed the Plaintiff that "he knew all about the Hirschi Center." The Plaintiff was advised that "If this is a business VRUtah can sell it for you."

d. Yes.

3. Please identify, with specificity, each representation made by VR Utah, or any

person associated with VR Utah, which you assert as a basis for your negligent misrepresentation claim. For each such representation, identify

- a. The person making the representation;
- b. The date, time, and circumstances under which the representation was made;
- c. The persons present at the time of the representation; and
- d. The specific factual basis upon which you base your assertion that the representation was false.

Answer to Interrogatory No. 3:

Representation No. 1. Defendant Drury represented to the Plaintiff that previous to her purchase he had considerable dealings with the Hirschi's with respect to their business conducted at the Hirschi Center and was fully informed as to all aspects of the business which the Hirschi's conducted at the Hirschi Center and therefore the value of the Hirschi Center Business and he stated "lets get your money out and make you a profit."

- a. Michael Drury.
- b. See Answer to Interrogatory No. 2c(2) above. This representation was made to the Plaintiff on the phone at the time Mr. Orban called VRUtah and in the follow up meeting held on or about October 17, 1994 at the Hirschi Center.
- c. Michael Drury, Mr. Ron Orban and Mr. Darryl Bingham, who's address is 806 East Kent Drive, Mesa, Arizona, 85204.
- d. Mr. Drury was not informed as to the value of the Hirschi Center Business or that

through either his efforts or VRUtah efforts she would get her money out and make a profit.

Representation No. 2. Defendant Drury represented to the Plaintiff that as a result of his prior dealings with the Hirschi's he had in his possession a large file of facts, figures and financial information he had both researched and obtained with respect to the Hirschi Center, its business and real estate.

a. Michael Drury.

b. This representation was made to the Plaintiff both on the phone at the time Mr. Orban called VRUtah and in the follow up meeting held on or about October 17, 1994, between the Defendant Drury, the Plaintiff and her son Darryl Bingham, at the Hirschi Center.

c. Michael Drury, the Plaintiff, Mr. Ron Orban and Mr. Darryl Bingham.

d. Mr. Drury did not have in his possession a large file of facts, figures and financial information respecting the Hirschi Center business and real estate. Mr. Drury had not personally conducted extensive research respecting the Hirschi Center business and real estate.

Representation No. 3. Defendant Drury represented to the Plaintiff that the Hirschi Center day care and wedding reception business along with the real estate had a commercial value of \$1,000,000.

a. Michael Drury.

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Mr. Drury was not informed as to the value of the Hirschi Center Business and real estate.

Representation No. 4. Michael Drury represented to the Plaintiff that VRUtah Brokers in making an earnest and continued effort could easily sell the Hirschi Center business and real estate within three months and certainly before the end of January 1995.

a. Michael Drury.

b. This representation was made at a meeting held on or about October 17, 1994.

At this meeting the Plaintiff fully disclosed her financial circumstances to Mr. Drury and stated she was unwilling to enter into a listing agreement with VRUtah for longer than three months.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Mr. Drury had no basis in fact to support this representation.

Representation No. 5. Michael Drury represented to the Plaintiff that he required her to sign a one year listing because only then would his employer VRUtah Brokers expend significant amounts of advertisement money to expose the business and property for sale.

a. Michael Drury.

b. This representation was made at a meeting held on or about October 17, 1994.

At this meeting the Plaintiff fully disclosed her financial circumstances to Mr. Drury and stated she was unwilling to enter into a listing agreement with VRUtah for longer than three

months, but would only do so based on his representations of the financial involvement and earnest commitment of his company and his agreement that if the business and property were not sold within three months, a condition that the Defendants had not made an earnest and continued effort to sell the business that she would be released from the agreement.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Mr. Drury had no basis in fact to support this representation.

Representation No. 6. Defendant Drury represented to Plaintiff that if for any reason, including, but not limited to, the fact that the Defendants were not earnest in their attempt to sell the business and the property as represented, such that the business and/or property were not sold by February 1, 1995 he would personally guarantee that the listing agreement would be immediately terminated.

a. Michael Drury.

b. This representation was made at a meeting held on or about October 17, 1994.

At this meeting the Plaintiff fully disclosed her financial circumstances to Mr. Drury and stated she was unwilling to enter into a listing agreement with VRUtah for longer than three months.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Mr. Drury had no intention of terminating the listing agreement at the end of three months if the property were not sold.

Representation No. 7. Mr. Drury represented to the Plaintiff that if the Hirschi Center

was not sold prior to the time the first trust deed note payments were due that, such event would evidence the fact that the Defendants had not made an earnest and continued effort to sell the business and real estate and Plaintiff would be released from the listing agreement.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

At this meeting Mr. Darryl Bingham advised the Defendant Drury that if he did not complete the sale within three months as represented that the Plaintiff would be near bankruptcy. Mr. Drury then stated "that's right, that is why we will either have it sold or will release the listing."

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Mr. Drury had no intention of terminating the listing agreement when the first payment of the trust deed note became due.

Representation No. 8. Michael Drury represented to the Plaintiff that VRUtah had an extensive list of customers who were available to purchase the Hirschi Center.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. VRUtah did not have an extensive list of customers who were available to purchase the Hirschi Center.

Representation No. 9. Michael Drury represented to the Plaintiff that he would

earnestly devote his full time in a continuing effort to sell the Hirschi Center business and real estate with the next following three month period.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Michael Drury did not intend to nor did he at all devote any reasonable effort to sell the Hirschi Center business and real estate with the next following three month period.

Representation No. 10. Defendant Drury represented to the Plaintiff that he had the education and experience to evaluate and would fully evaluate all potential purchasers as to their financial stability and managerial capacity on behalf of the Plaintiff.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Michael Drury did not have the qualified education and experience as represented nor did he intend to nor did he evaluate and would fully evaluate all potential purchasers as to their financial stability and managerial capacity on behalf of the Plaintiff.

Representation No. 11. Defendant Drury represented to the Plaintiff that as part of his earnest and continuing effort to sell the Hirschi Center business and real estate he would produce a sales brochure at no cost to the Plaintiff to aid in the sale of the Hirschi Center which would include an ariel photograph taken from an airplane to illustrate the

advantageous location of the Hirschi Center for the business being conducted.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Michael Drury did not intend to and did not produce a sales brochure to aid in the sale of the Hirschi Center and did not take or cause to be taken any ariel photographs.

Representation No. 12. The Defendants represented to the Plaintiff that they sell more business in Utah than anyone.

a. Defendants Michael Drury and VRUtah

b. This representation was made at all times pertinent hereto.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. The Defendants do not sell businesses in Utah at the stated rate.

Representation No. 13. Defendant Drury represented to the Plaintiff that VRUtah as part of its earnest effort to sell the Hirschi Center business and real estate would select from its customer data base only qualified buyers and would advise against any sale disadvantageous to the Plaintiff.

a. Michael Drury

b. This representation was made at a meeting held on or about October 17, 1994.

c. Mr. Drury, the Plaintiff and Mr. Darryl Bingham.

d. Michael Drury did not have the requisite customer data base nor any qualified

buyers in a data base and such buyer as he did present was wholly unqualified and any sale made to such buyer would have been disadvantageous to the Plaintiff.

Representation No. 14. On or about March 1, 1995, Defendant Drury represented to the Plaintiff that he had met with Randall Roberts whom he had as a buyer and who was ready to make an offer advantageous to the Plaintiff.

a. Michael Drury

b. This representation was made to the Plaintiff in response to her letter of listing termination dated February 22, 1995, as sent to the Defendants.

c. Mr. Drury and the Plaintiff.

d. Randall Roberts was wholly unqualified as a buyer and the offer of Mr. Roberts was disadvantageous to the Plaintiff.

Representation No. 15. On or about March 1, 1995, Defendant Drury represented to the Plaintiff that he needed 30 days within which to close a sale to Mr. Roberts, but required in order to do so an amendment to the listing agreement reducing the amount of the sale price to accommodate an immediate sale to Mr. Roberts, his qualified buyer.

a. Michael Drury

b. This representation was made to the Plaintiff in response to her letter of listing termination dated February 22, 1995, as sent to the Defendants.

c. Mr. Drury and the Plaintiff.

d. Randall Roberts was wholly unqualified as a buyer and the offer of Mr. Roberts

was disadvantageous to the Plaintiff.

4. Please identify, with specificity, each contractual provision you claim has been breached by VR Utah, including specifically:

- a. The contractual duty or provision breached;
- b. The manner in which you believe it to have been breached;
- c. The date upon which you believe the breach occurred;
- d. The date upon which you discovered the alleged breach;

and

- e. How you were harmed by each breach you allege occurred.

Answer to Interrogatory No. 4

a. (1). Failed to make the represented earnest and continued effort to sell the Hirschi Center business and real estate within the time and under the circumstances as defined and represented.

(2). Upon breach of the agreement at the end of three months as defined by the failure to sell the Hirschi Center business and real estate within the time and under the circumstances as represented - refusing and failing to cancel the listing agreement.

(3). Breach of the Implied-in-law Covenant of Good Faith and Fair Dealing governing the conduct of the Defendants as between them and Plaintiff.

b. Defendants breached the promise made to earnestly and continuously fulfill all of the above identified representations as defining their continuing efforts to find a buyer for the

Hirschi Center and real estate as set out in the answers to Interrogatories numbers 1 through 15 above which are incorporated here by this reference.

By virtue of the Defendants representations of experience, ability and knowledge respecting the Hirschi Center business and real estate as a necessary part of their earnest effort and the definitions provided the Plaintiff as to their earnest and continuing efforts to market the Hirschi Center, the Defendants Michael Drury and VR Utah Brokers occupied a position of trust and as a fiduciary to the Plaintiff. This is particularly true where the Defendants were fully apprized as to the Plaintiffs financial circumstances, in particular, her inability to either service the contract debt respecting the Hirschi trust deed and note and that the business had a negative cash flow and that she had no means to provide any operating capital to support the business and therefore was in desperate circumstances such that the sale of the business and real estate had to be consummated within the three months following the listing and certainly prior to the first payment on the trust deed note.

By failing to live up to their defined covenant of earnest and continued effort the Defendants were obligated and had a duty to release the Plaintiff from the listing agreement three months immediately following October 17, 1998 and certainly prior to the date of the first trust deed payment due from the Plaintiff to the Hirschi's.

The listing agreement also contained the Implied in Law Covenant of Good Faith and Fair Dealing governing the conduct of the Defendants as between themselves and the Plaintiff. Accordingly the Defendants were obligated to deal fairly and in good faith with the

Plaintiff, including the obligation to earnestly and continually carry out all that they represented they would do when they obtained the listing agreement. This included, but is not limited to, fully utilizing the large file of facts, figures and financial information, which Defendants represented they already had respecting the Hirschi Center in their earnest marketing efforts, or in the event none existed, to have personally conducted extensive research respecting the Hirschi Center business and real estate as reasonably necessary to earnestly market the same.

In the event the Defendants did not have in house the expertise and experience to fully evaluate the business so as to set an appropriate market value on the business as necessary to make an earnest and continuing effort to sell the business during the first three months, then to have hired the necessary expertise and experience to perform the necessary evaluations. As part of the definition provided the Plaintiff as to Defendants earnestly marketing the property during the first three months of the listing agreement to have expended significant amounts of advertisement money, to include but not be limited to publishing a brochure containing an ariel photographic view of the property as part of the required earnest and continuing effort to sell the Hirschi Center and to have expended such sums in presenting the business and property to their large customer data base as represented.

The Defendants, then misrepresented Mr. Roberts as a qualified buyer in order to obtain an addendum to the business sale listing, and when it was finally determined that Mr. Roberts was not a qualified buyer, refused, when adamantly requested by the Plaintiff, to

terminate the listing agreement where both the three months selling period had ended and the first payment of the trust deed note had become due, upon the breaches as aforesaid.

c. The breaches to the listing agreement were ongoing where the Defendants never fulfilled their commitment to earnestly and continuously market the property under the standards they set for themselves.

d. On or about February 22, 1995 and again on or about April 3, 1995.

e. The Plaintiff's lost the opportunity to sell the Hirschi Center timely before her first trust deed note was foreclosed which resulted in the loss of her entire investment. Furthermore, she was prevented from acting timely upon a guarantee made to her by the original listing broker, Defendant Rasekh, who refused to honor his commitment to safeguard the Plaintiff because of the listing with the Defendants VRUtah and Michael Drury.

Based on Defendants negligence and breach of contract as described above Plaintiff has been damaged in an amount to be proved at trial but which is reasonably expected to be in excess of \$250,000, plus interest at the legal rate.

5. Please identify, with specificity, the means by which you believe VR Utah breached any fiduciary duty and the harm you suffered as a result of such a breach. Include a separate response for each specific fiduciary duty you claim has been breached and identify what you claim to be the source of each specific fiduciary duty.

Answer to Interrogatory No. 5

See Answer to Interrogatory No. 4. At all times relevant hereto as set forth in the

answers to Interrogatories above, there existed a relationship of trust between Plaintiff and Defendants whereby Plaintiff reposed her trust and confidence on the promises, representations, actions, honesty, fidelity, and integrity of the Defendants, thereby creating a fiduciary duty owed by the Defendants to the Plaintiff. At all times pertinent hereto the Defendants were aware and knowledgeable that Plaintiff was wholly unsophisticated in business matters and commercial transactions and that the purchase of the Hirschi Business and her subsequent attempts to sell the same were wholly beyond her experience, education and ability levels.

The above promises and representations as made by the Defendants to the Plaintiff were made without the intent to perform and were made to mislead the Plaintiff, to induce Plaintiff's reliance upon them to enter into a one year listing agreement. At the time the Plaintiff acted, she was unaware of the Defendants' intentions not to perform the promises made. Plaintiff justifiably relied and acted in justifiable reliance upon the representations, promises and inducements made as set forth above.

6. Please state with specificity the factual basis upon which you are relying in denying any request contained in Michael Drury's and VR Utah's First Request for Production of Documents to Plaintiff served on even date herewith.

Answer to Interrogatory No. 6. No requests were denied.

7. Please state with specificity the factual basis upon which you are relying in denying any request contained in Michael Drury's and VR Utah's First Request for

Admissions to Plaintiff served on even date herewith.

Answer to Interrogatory No. 7

REQUEST NO. 3: Admit that Plaintiff Marie Bingham read the original document, as set forth in Exhibit A, before she signed the original document set forth in Exhibit A.

Interrogatory Response to 3: The Plaintiff did not fully read and did not comprehend the import of the documents, but relied with trust on the honesty and integrity of the Defendants representations made in clarification of the document.

REQUEST NO. 4: Admit that Plaintiff Marie Bingham, prior to signing the original document set forth in Exhibit A, understood all the terms and provisions of the parties, agreement, as set forth in Exhibit A.

Interrogatory Response to 4: See response to No. 3 above.

REQUEST NO. 8: Admit that Plaintiff Marie Bingham was not acting under any fraud when she signed the original of the document set forth in Exhibit A.

Interrogatory Response to 8: At the time of the execution of the original document (Exhibit "A") and on several occasions since the Defendants and each of them by their agent Defendant Drury, orally and in writing intentionally made misrepresentations of material facts stating to the Plaintiff, among other things, the representations set forth in Answer to Interrogatories No. 1 through 15 above. These representations were false. When Defendants negligently made the representations or omissions with the intent to defraud and induce Plaintiff to commit to a one year listing agreement. At the time Plaintiff acted in

reliance on the representations. Plaintiff did not know the representations were false and believed they were true. Plaintiff all times justifiably relied on and acted in justifiable reliance upon the truth of the representations when Plaintiff entered into both the listing agreement and any modification to the listing agreement.

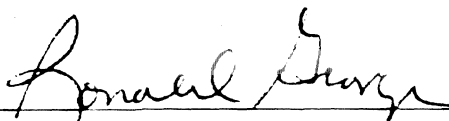
REQUEST NO. 9: Admit that Plaintiff Marie Bingham was not acting under any misrepresentation when she signed the original of the document set forth in Exhibit A.

Interrogatory Response to 9: See Answer to Request No. 8 above, and Answers to Interrogatories 1 through 15 above which are incorporated herein.

REQUEST NO. 17: Admit that Plaintiff Marie Bingham reads each and every contract she signs prior to signing.

Interrogatory Response to 17. The Plaintiff reads some contracts and does not read others fully depending on their complexity and her lack of sophistication, training and experience and depending on her reliance upon the truth, integrity and veracity of the persons with whom she is dealing.

DATED this 9th Day of September, 1998.



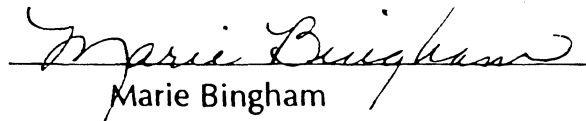
Ronald S. George, Attorney for Plaintiff

VERIFICATION

I, the undersigned say:

I am a party to this action and I know the contents of the Plaintiff's Response to the First Set of Interrogatories of Defendants Michael Drury and VRUtah, Inc. and Requests for Production of Documents. The matters stated therein are true of my own knowledge except as to those matters, if any, which are stated on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 1998, at Salt Lake City, Utah.


Marie Bingham

CERTIFICATE OF SERVICE


The undersigned, hereby certifies that on the 10th Day of September, 1998, a true and correct copy of the foregoing Answers to Defendants' Michael Drury and VR Utah Inc., First Set of Interrogatories mailed, postage prepaid, to the following:

Phillip W. Dyer
Kevin C. Timken
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Douglas Matsumori, Esq.
John W. MacKay, Esq.
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Raymond D. Etcheverry, Esq.
PARSONS, BEHLE & LATIMER
210 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah, 84145-0898

Perrin R. Love
CAMPBELL, MAACK & SESSIONS
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215



VRUtah

Business Resource Center

VRUtah, Inc.
5242 College Drive, Suite 350
Salt Lake City, Utah 84123-2853
801-532-8011
Fax: 801-264-8221

BUSINESS BROKERAGE • MERGERS AND ACQUISITIONS • BUSINESS VALUATIONS

DATE: January 11, 1995

TO: STEVE TATE

FROM: MICHAEL DRURY

RE: HIRSCHI CENTER

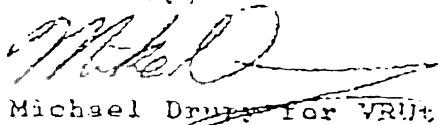
Dear Steve:

Let this letter serve as the confirmation of our understanding regarding a co-listing agreement between Consolidated Realty Group (CRG) and VRUtah, Inc. (VR) on the above referenced property.

1. VR will accept a three per cent (3%) commission of the total selling price for the listing side if CRG or another real estate company sells the Hirschi Center. The remaining seven per cent (7%) will be divided as CRG sees fit.
2. If VR sells the Hirschi Center, then six per cent (6%) will be paid to VR, with CRG retaining four per cent (4%).
3. VR will accept a three per cent (3%) commission of the total selling price for the listing side if CRG sells the Hirschi Center, with CRG retaining the remaining seven per cent (7%) as their commission.
4. With the seller's permission, CRG will place a "FOR SALE" sign in front of the Hirschi Center, and CRG will take of all necessary advertising on the business.

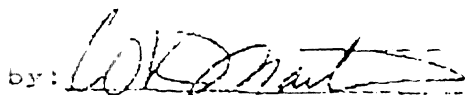
If you are in agreement, please acknowledge below. Thank you for your assistance in this transaction.

Sincerely,


Michael Drury for VRUtah, Inc.

Consolidated Realty Group



by:  1.12.95
Date

OTHER VRUtah INC. OFFICES:
349 South 200 East, Suite 370
Salt Lake City, Utah 84111
801-532-1530
Fax: 801-522-1541

280 25th Street, Suite 102
Ogden, Utah 84401
801-621-2833 (SLC) 531-0347
Fax: 801-621-2836

75 South 100 East #20
St. George, Utah 84770
801-628-6629
Fax: 801-628-6683

We sell more businesses in Utah than anyone - Founded 1981

000123

RANDALL ROBERT'S
STEAK RESTAURANT
PROSPECTUS

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- i. **Warning and Disclaimer**
- I. **MISSION STATEMENT and GOALS - "THE VISION"**
- II. **EXECUTIVE SUMMARY - "THE CONCEPT"**
- III. **START-UP BUDGET - "THE COST"**
- IV. **MANAGEMENT ANALYSIS - "THE PLAYERS"**
- V. **SITE ANALYSIS - "THIS IS THE PLACE"**
- VI. **MARKET ANALYSIS - "THE COMPETITION"**
- VII. **OTHER INFORMATION - "THE REST OF THE STORY"**
- VIII. **FINANCIAL ANALYSIS - "THE NUMBERS"**

WARNING AND DISCLAIMER

Investing in a restaurant of any kind can be a highly speculative and risky investment. THERE ARE NO GUARANTEES that you will get any or all of your investment back. Please invest at your own risk.

RANDALL'S STEAKS

MISSION STATEMENT

Consistently produce and serve the highest quality food and beverage in a relaxed and friendly atmosphere giving only the best service to every customer in an environment where the employees feel secure and satisfied.

GOALS

Become a "World Class" restaurant known for top quality food and beverage, excellent service and immaculate cleanliness.

Establish a working environment that will attract and retain top caliber employees working together as a cohesive team.

Reach or exceed a net profit before tax percentage of 20% of sales in the second full year of operation while averaging \$230,000 in monthly sales.

RANDALL'S STEAKS

EXECUTIVE SUMMARY

THE CONCEPT

In establishing a "World Class" restaurant three ingredients are necessary; consistent high quality food, superior service and a fantastic location.

RANDALL'S will be an independent restaurant featuring the best steaks, seafood and chicken entrees in the Salt Lake Valley and will serve them at its unique hillside location overlooking the Valley, in an upbeat and relaxing atmosphere. The restaurant will be open six days per week for dinner and accommodating groups up to 100 for special occasions.

RANDALL'S will be housed in an existing building that has over 6000 square feet located in the highest per capita zip code in the State of Utah.

The beef will be aged at least 21 days and all entrees will be grilled over a hot bed of mesquite charcoal. Entrees will be supplemented with various types of fresh cooked potatoes and a side of vegetables. A crisp garden salad and hot homemade dinner rolls will accompany each entree.

RANDALL'S will seat 200 guests who will be surrounded by a pictorial history of the State of Utah, who will feel comfortable dressed for the theater or more casual, if desired.

The property has plenty of room for future expansion with almost 2.5 acres of ground and an additional 3300 square foot existing building that can become space for a bar, private dining or other uses.

**RANDALL'S
STEAKS**

START UP BUDGET

Architect,Engineer,Leasehold,Signage	\$ 180,000
Equipment (kitchen, front end, computer)	180,000
Working Capital	108,000
Landscape, Parking repair, Street work	50,000
Beginning Inventory, Supplies	20,000
Deposits (bldg.lease,licence,option)	21,000
Training	15,000
Art Work	15,000
Legal, Accounting	10,000
License, Permits, etc.	<u>1,000</u>
TOTAL INVESTMENT REQUIRED	\$ 600,000

RANDALL'S STEAKS

MANAGEMENT ANALYSIS - THE PLAYERS

RANDALL'S will be managed by an experienced management team consisting of a General Manager, the Restaurant Manager and the Chef.

The General Manager will be responsible for overall management of the Restaurant including financial performance according to budget, hiring and motivating the restaurant manager and chef, keeping the restaurant in compliance with all governmental regulations, planning for future developments and changes and other general supervision requirements.

The Restaurant Manager will be responsible for the "front end" of the restaurant including overseeing of the wait staff, hostesses and valet parking to ensure the highest quality service in the Valley. The manager will also be responsible for the general upkeep of the physical facilities and other day to day needs of the business.

The Chef will be responsible for the "back end" of the restaurant. The chef will manage the kitchen staff to ensure the highest standards of quality and cleanliness. The chef will also be responsible for purchasing and inventory control.

GENERAL MANAGER - RANDAL ROBERTS has over 16 years in commercial banking. During his banking career he has financed various restaurants ranging from \$3mm plus in sales downward. Currently, he manages a department for a Utah bank with 30 employees and approximately \$4mm in sales.

Management Analysis Continued

RESTAURANT MANAGER - FOREST OLIVER has over 22 years of restaurant experience including 12 years of management experience. He has managed and worked at a Chart House restaurant in Honolulu for 16 years and has managed up to 50 employees and had annual revenue of \$6mm. Additionally, Forest has opened 3 new restaurants, one on Maui, one in Honolulu and one in San Francisco.

CHEF - JEFFREY DEJONG, C.E.C. has over 20 years experience in the culinary field and has been head chef at various ski resorts and country clubs in the Salt Lake area. Jeff is an instructor in the Salt Lake Community College Culinary Arts Program and is Chairman of the ACF Beehive Chef's Association Apprentice Chefs Program. Jeff was awarded Chef of the Year in 1991 and received the President's award in 1994.

In addition to the management team listed above, an agreement has been obtained with a steak restaurant in Texas to train the management team in the "secrets" that has been theirs for over 40 years of successful restauranting. This Texas steakhouse has similar prices and top quality food and is one of the premier steak houses in Texas.

**RANDAL ROBERTS
SANDY, UTAH 84092
801-576-0656 RESIDENCE**

QUALIFICATIONS SUMMARY

Over sixteen years of solid financial management in the banking industry involved specifically in commercial lending, international banking, branch manager, and real estate lender.

Skilled In:

- * Developing goals and objectives
 - * Negotiating sound solutions for profit
 - * Building trust and motivating employees
 - * Using innovative ideas to improve procedures
 - * Analyzing financial data
 - * Making tough business decisions
-

CAREER HIGHLIGHTS

VICE PRESIDENT

1993 - Present

Manager International Banking
First Security Bank
Salt Lake City, Utah

Manage over 30 employees in a multi-state international banking group with over \$230mm in international credit relationships. Improved net profit over 100% in the first full year.

VICE PRESIDENT

1991 - 1993

Manager International Banking
West One Bank
Salt Lake City, Utah

Assumed management of the bank's International department under distressed circumstances. Managed nine employees and \$70mm to \$80mm of International monetary transfers monthly and \$15mm plus, in letters of credit, both import and export.

RANDAL ROBERTS

PAGE 2

Vice President	1984 - 1990
Senior Branch Officer	1988 - 1990
Gross Bank, N.A.	
San Antonio, Texas	

Expanded portfolio over 300% from \$5mm to \$16mm in five years. This was accomplished under extremely adverse economic conditions. Regularly selected by senior management to present concepts and ideas to motivate employees.

Vice President	1982 - 1984
Credit Officer	1979 - 1982
Frost National Bank/Liberty Frost Bank	
San Antonio, Texas	

Developed and implemented a computerized financial analysis spread sheet which expedited the credit granting process. This process was a new and innovative approach.

Volunteer Chairman	1988 - 1990
Board Member	1986 - 1990
YMCA of San Antonio	

Motivated teams of volunteers to aggressively raise funds for the San Antonio YMCA. Set records three consecutive years exceeding estimated goal by 40% the second year.

Was presented a coveted community award for top fund raiser for the YMCA 1990; which had a \$5mm budget.

EDUCATION AND PROFESSIONAL TRAINING

Bachelor of Science, Business Management
Brigham Young University (1977)

Formal Bank Credit Training (1979 & 1992)

RESUME

NAME:	Forrest Oliver
CURRENT ADDRESS:	10900 Pleasant View Drive Sandy, Utah 84092
TELEPHONE:	(801) 571-5956
OBJECTIVE:	Seeking a challenging position in restaurant management with a progressive and result-oriented organization.
SUMMARY:	Over sixteen years experience as head waiter and assistant manager of multi-state three star restaurant. Performed all training, setup and initiation in opening three new restaurant locations. Owned and operated successful janitorial cleaning service for five years. Owned and operated successful floor treatment/handyman service for two years. Assistant manager of franchise restaurant for one year.
PROFESSIONAL EXPERIENCE	
Headwaiter/Assistant Manager	Chart House Restaurant Honolulu, Hawaii Trained, scheduled and supervised 50 personnel in all aspects of food service, customer service, restaurant preparation, operation and cleaning. Performed opening and closing of restaurant, monetary accounting, and provided chefs with menu inputs. Traveled to Maui and San Francisco to train and prepare staff prior to and during restaurant opening at those locations.
Owner/Operator	Janitorial cleaning Service Honolulu, Hawaii Performed interior and exterior cleaning service for numerous major businesses and restaurants in the Honolulu area. Supervised and trained over twenty personnel in all aspects of commercial building and exterior cleaning. Directed all payroll, inventory and daily supply activities.

**PROFESSIONAL
EXPERIENCE**

(Continued)

Owner/Operator

OWCO Floor Treatment and Handyman Service
Salt Lake City, Utah

Performed all aspects of floor anti-slip treatment and handyman services. Estimated, scheduled and provided material support for all contracted jobs.

Assistant Manager

Pancho Villa Restaurant
Salt Lake City, Utah

Hired, scheduled, trained and supervised 35 personnel in service of all meals, including over 650 meals on weekends. Provided customer service and all monetary accounting procedures.

JEFFREY JAMES DEJONG, C.F.C.

11257 South 1700 East
Sandy, Utah 84070
(801) 571-4766

OBJECTIVE: Career position in the culinary field in which my professional skills and experience would serve to benefit my employer while allowing myself further career advancement.

SUMMARY OF QUALIFICATIONS: Professional individual offering a diversity of skills and qualifications in the culinary field. Areas of expertise include all facets of kitchen operations and management, personnel supervision and training, ice carving and Garde-Manger.

EXPERIENCE:

1991 - Present **Willow Creek Country Club, Sandy Utah**
Executive Chef

Responsible for daily operations of banquet and kitchen facilities. These include ordering supplies, budgeting labor and food costs, and scheduling and training staff. Created new menus and assisted in design of new kitchen in 1991.

1993 - Present **Ice Art, Sandy Utah**
Owner/Designer-Carver

Established ice sculpting business serving major hotels, resorts, restaurants, commercial clients and banquet halls. Direct and control all facets of business operations including designing and carving, marketing of services, budgeting and client relations.

1990 - Present **Salt Lake Community College Culinary Arts Program**
Instructor

Design curriculum and instruct apprentice chefs in basic and advanced food preparations as well as Garde-Manger.

1989 - 1991 **Oakridge Country Club, Farmington Utah**
Executive Chef

Responsible for daily operations of kitchen and banquet facilities. These included menu planning, equipment purchasing, ordering supplies, controlling labor and food costs, staff training and scheduling. Planned new kitchen in 1989.

1980 - 1989 **Snowbird Resort, Snowbird Utah**

Held several positions of increasing responsibility culminating in the **Convention Center Chef** position of the **Cliff Hotel**. Responsibilities of this position included all banquets within the Snowbird Resort, Plaza Brunch and all ice carvings. Budget for labor and food costs. Controlled all ordering, hiring, training and scheduling of kitchen staff.

Jeffrey J. DeJong

AWARDS AND PROFESSIONAL ASSOCIATIONS:

Chairman - ACF Beehive Chef's Association Apprentice Chefs Program 1990 - Present

Beehive Chef's Association 1984 - Present

Presidents Award 1994

Professional of the Year 1992

Chef of the Year 1991

Best of Show Silver Medals 1989 and 1990 ACF Sanctioned Competitions.

References and Portfolio available upon request

RANDALL'S STEAKS

SITE ANALYSIS

The Restaurant will be located at 9825 South 1300 East in Sandy, Utah. The property is currently used as a day care/reception center in a 6000 square foot building on 2.42 acres of land. Additionally, there is a 3300 square foot building that is currently used as a personal residence and 75 parking stalls. Listed below are some of the major features of the property.

- * The property faces west to take advantage of the magnificent sunsets and the valley view.
- * The existing parking can accommodate over 300 guests.
- * In the corner of the main building is a large fireplace to add warmth to a cold crisp night.
- * The 2.42 acres allow for extensive expansion or just breathing room and ambiance.
- * The location is in the heart of the highest per capita income zip code in the State.
- * The traffic count on 13th East in front of the location is 32,234 per day, according to the city of Sandy.
- * There are two existing buildings; the restaurant building with a 4800 \pm square foot footprint and about 1200 square foot loft and a residence building that has approximately 3300 square feet. The property currently has a fenced tennis court.

Site Analysis Continued

Lease Terms - The lease terms that have been secured call for a triple net lease with \$5,600 per month payments, which include the entire property except the residence. The term of the lease is 30 months with an option to purchase the entire property for \$865,000 with a 90 day notice. If the business failed the landlord can be given a 90 day notice and the lease will terminate with no further obligation. The landlord would be able to keep leasehold improvements and landscape improvements. Other terms are of a common nature to commercial leases.

Attached is an aerial plat map of the property that was taken in 1980. This is the most current plat map available. Also attached are several current pictures of the property and surroundings.

LOOKING WEST FROM BUILDING FRONT



ENTRANCE AND FRONT OF BUILDING



FRONT OF BUILDING & GAZEBO (valet drop)



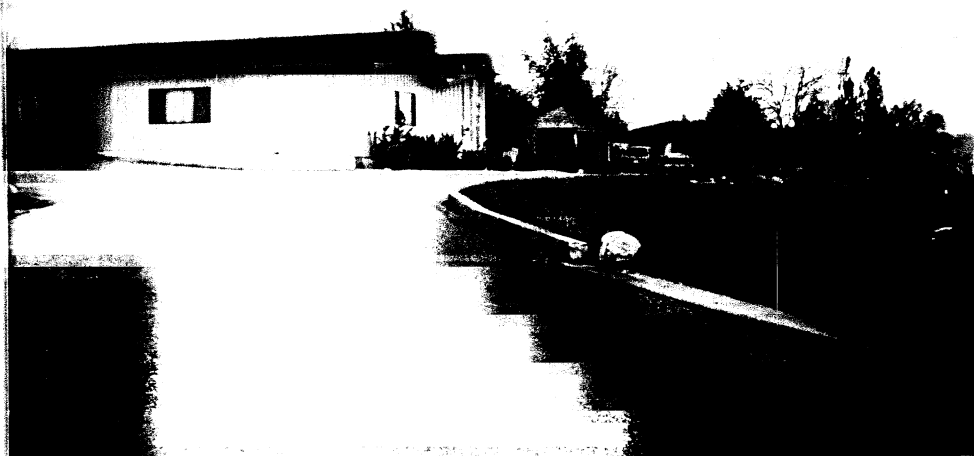
LOOKING N.W. TOWARD ENTRANCE AND G.S. LAKE



LOOKING SOUTH; PARKING LOT BELOW ALONG 13TH E.



NORTHSIDE OF BUILDING FROM ENTRANCE



RANDALL'S
PROFORMA BALANCE SHEET

INCEPTION

ASSETS

CASH ON HAND	\$	1,000
CASH IN BANK		100,000
SUPPLIES		10,000
FOOD AND BEVERAGE INVENTORY		15,000
ACCOUNTS RECEIVABLE - CREDIT CARDS		0
PREPAIDS AND DEPOSITS		<u>21,000</u>
TOTAL CURRENT ASSETS		147,000
LEASEHOLD IMPROVEMENTS		180,000
KITCHEN EQUIPMENT		100,000
FRONT END EQUIPMENT		80,000
LESS: ACCUMULATED DEPRECIATION		<u>0</u>
NET FIXED ASSETS		360,000
OTHER ASSETS-Artwork,Landscape,Road		65,000
START UP COSTS		28,000
TOTAL ASSETS	\$	<u><u>600,000</u></u>

LIABILITIES

ACCRUALS - SALARIES AND BENEFITS	\$	0
ACCRUALS - TAXES		0
ACCRUALS - OTHER		0
TAXES PAYABLE		0
SHORT TERM LOANS		<u>0</u>
TOTAL CURRENT LIABILITIES		0
LONG TERM DEBT		0
NOTES DUE STOCKHOLDERS		<u>0</u>
TOTAL LONG TERM DEBT		0
DEFERRED TAXES		0
TOTAL LIABILITIES		<u>0</u>
STOCKHOLDER'S EQUITY		<u>600,000</u>
TOTAL LIABILITIES & CAPITAL	\$	<u><u>600,000</u></u>

RANDALL'S
PROFORMA BALANCE SHEET

MONTH 13

CASH ON HAND	\$	1,000
CASH IN BANK		281,512
SUPPLIES		10,000
FOOD AND BEVERAGE INVENTORY		15,000
ACCOUNTS RECEIVABLE - CREDIT CARDS		53,429
PREPAIDS AND DEPOSITS		<u>21,000</u>
TOTAL CURRENT ASSETS		381,941
LEASEHOLD IMPROVEMENTS		180,000
KITCHEN EQUIPMENT		100,000
FRONT END EQUIPMENT		80,000
LESS: ACCUMULATED DEPRECIATION		<u>43,214</u>
NET FIXED ASSETS		316,786
OTHER ASSETS-Artwork, Landscape, Road		65,000
START UP COSTS		28,000
TOTAL ASSETS	\$	<u><u>791,727</u></u>
LIABILITIES		
ACCRUALS - SALARIES AND BENEFITS	\$	15,000
ACCRUALS - TAXES		10,000
ACCRUALS - OTHER		7,500
TAXES PAYABLE		35,000
SHORT TERM LOANS		<u>0</u>
TOTAL CURRENT LIABILITIES		67,500
LONG TERM DEBT		0
NOTES DUE STOCKHOLDERS		<u>0</u>
TOTAL LONG TERM DEBT		0
DEFERRED TAXES		25,000
TOTAL LIABILITIES		92,500
STOCKHOLDER'S EQUITY		<u>699,227</u>
TOTAL LIABILITIES & CAPITAL	\$	<u><u>791,727</u></u>

RANDALL'S
PROFORMA BALANCE SHEET

MONTH 24

ASSETS

CASH ON HAND	\$	2,000
CASH IN BANK		940,538
SUPPLIES		15,000
FOOD AND BEVERAGE INVENTORY		20,000
ACCOUNTS RECEIVABLE - CREDIT CARDS		73,036
PREPAIDS AND DEPOSITS		<u>21,000</u>
 TOTAL CURRENT ASSETS		 1,071,574
 LEASEHOLD IMPROVEMENTS		 180,000
KITCHEN EQUIPMENT		100,000
FRONT END EQUIPMENT		80,000
LESS: ACCUMULATED DEPRECIATION		<u>86,429</u>
 NET FIXED ASSETS		 273,571
 OTHER ASSETS-Artwork,Landscape,Road		 65,000
START UP COSTS		28,000
 TOTAL ASSETS	\$	 <u>1,438,145</u>

LIABILITIES

ACCRUALS - SALARIES AND BENEFITS	\$	15,000
ACCRUALS - TAXES		5,000
ACCRUALS - OTHER		5,000
TAXES PAYABLE		25,000
SHORT TERM LOANS		<u>0</u>
 TOTAL CURRENT LIABILITIES		 50,000
 LONG TERM DEBT		 0
NOTES DUE STOCKHOLDERS		<u>0</u>
 TOTAL LONG TERM DEBT		 0
 DEFERRED TAXES		 15,000
 TOTAL LIABILITIES		 65,000
 STOCKHOLDER'S EQUITY		 <u>1,373,145</u>
 TOTAL LIABILITIES & CAPITAL	\$	 <u>1,438,145</u>

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

* * * * *

MARIE BINGHAM,

Plaintiff,

vs.

RANDAL ROBERTS, MICHAEL DRURY,
VRUtah, Inc., a Utah corporation, KAL
RASEKH, an individual, COLDWELL
BANKER PREMIER REALTY, INC., a Utah
corporation, HARVEY C. HIRSCHI and LOIS
R. HIRSCHI, individuals.,

Defendants.

**DEFENDANT KAL RASEKH'S
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

Case No. 970901897CV

Judge Timothy R. Hanson

* * * * *

Pursuant to Rule 4-501(1)(A) and (2)(A) of the Code of Judicial Administration and Rule 56(b) of the Utah Rules of Civil Procedure, defendant Kal Rasekh ("Rasekh") hereby submits this memorandum in support of his motion for summary judgment.

INTRODUCTION

On October 3, 1994, the plaintiff Marie Bingham (“Bingham”) purchased certain property located at 9825 S. 1300 E., Sandy, Utah, that included a home and a day-care/reception facility (the “Hirschi Center”) for \$800,000. The sellers, defendants Harvey C. and Lois R. Hirschi (the “Hirschis”), took back a note and trust deed for \$600,000 of the purchase price. Two weeks after the closing of her purchase, and independent of Rasekh, Bingham listed the Hirschi Center for sale at a price of \$1,000,000 with defendants Michael Drury (“Drury”) and VRUtah, Inc. (“VRUtah”). Five months later, Bingham received from defendant Randal Roberts (“Roberts”) an offer for the purchase of the Hirschi Center for \$650,000. Roberts intended to use the Hirschi Center to open a restaurant. Bingham made a counter-offer to sell the Hirschi Center for \$750,000, plus a percentage of the gross revenues generated by the proposed restaurant. Roberts agreed to pay \$750,000, but would not agree to a percentage of the gross revenues. Bingham did not accept the \$750,000 offer (nor a further offer from Roberts to pay \$785,000). Instead, in June, 1995, Bingham entered into a commercial lease agreement with Roberts that ultimately failed. Bingham did not sell the Hirschi Center, and the Hirschis ultimately foreclosed their trust deed approximately thirteen months after Bingham purchased the Hirschi Center.

On March 17, 1997, Bingham filed her Complaint initiating this action asserting two causes of action solely against Roberts for breach of the lease agreement and for fraud with regard to alleged representations regarding the lease. Over one year later, Bingham filed her Amended Complaint which includes fourteen causes of action against Roberts, the other five defendants and six causes of action against Rasekh.

In Bingham's Third Cause of Action, Bingham asserts a claim for negligent misrepresentation against Rasekh, Coldwell Banker Premier Realty, Inc. ("Coldwell")¹ and the Hirschis based on alleged false representations which induced Bingham to purchase the Hirschi Center. See Amended Complaint ¶¶ 90-101. In Bingham's Fourth Cause of Action, Bingham asserts a claim for breach of fiduciary duty against Rasekh and Coldwell based on Rasekh's work as the real estate agent in connection with Bingham's purchase of the Hirschi Center. See id. ¶¶ 102-115. In Bingham's Fifth Cause of Action, Bingham asserts a claim for conflict of interest against Rasekh and Coldwell based on Rasekh's representation of both the buyer and the seller in connection with Bingham's purchase of the Hirschi Center and another transaction involving Bingham. Id. ¶¶ 116-127. In Bingham's Sixth Cause of Action, Bingham asserts a claim for breach of contract against Rasekh and Coldwell based on an alleged guaranty by Rasekh that Bingham would suffer no loss in connection with her purchase of the Hirschi Center. Id. ¶¶ 128-132. In Bingham's Twelfth Cause of Action, Bingham asserts a claim for unjust enrichment against Rasekh, Coldwell and the Hirschis based on the Hirschis' foreclosure of the trust deed which they took back to secure payment of a portion of the purchase price for the Hirschi Center, and their resale of the Hirschi Center. Id. ¶¶ 182-186. In Bingham's Fourteenth Cause of Action, Bingham asserts a claim for punitive damages against Rasekh. Id. ¶ 191.

¹ Bingham has dismissed her claims against the defendant Roberts, as well as her claims against Coldwell.

By this motion, Rasekh moves this court for entry of an order granting summary judgment dismissing the claims brought by Bingham against Rasekh. Rasekh also seeks an award of his attorneys' fees and costs incurred in defending himself in this action.

STATEMENT OF MATERIAL UNDISPUTED FACTS²

1. On or about June 16, 1994, the Hirschis signed a one year listing agreement, listing the Hirschi Center for sale with a listing price of \$900,000 with Coldwell as the listing broker and Rasekh as the listing agent. Deposition of Harvey C. Hirschi ("Hirschi Depo.") at 20, ln. 7 to 14 and at 21, ln. 15 to 21.

2. In July 1994, Rasekh contacted Bingham and informed her that the Hirschi Center was for sale. Deposition of Marie Bingham ("Bingham Depo.") at 58, ln. 11 to 61, ln. 22. On July 20, 1994, Bingham signed a Real Estate Purchase Contract offering to purchase the Hirschi Center for \$900,000, with certain contingencies and providing for seller financing of a portion of the purchase price (the "Hirschi Center REPC"). Bingham Depo. at 63, ln. 23 to 64, ln. 1, and Exhibit "5."

3. Between July 23 and August 2, 1994, the Hirschis signed Counter Offer # 1, 2, 3 and 4 to the Hirschi Center REPC in which the Hirschis proposed an increased down payment and modification of the financing terms, and certain other modifications to the proposed sale of the Hirschi Center to Bingham, and Bingham signed at least two counteroffers. Bingham Depo.

² Relevant passages from depositions and certain deposition exhibits are included in an Addendum to Defendant Kal Rasekh's Summary Judgment Motions filed concurrently herewith.

at 369, ln. 5 to 371, ln. 4 and Exhibits "5," "24," and "25." On August 3, 1994, Bingham signed Counter Offer # 4 to the Hirschi Center REPC, at which time Bingham understood she was buying the Hirschi Center. Bingham Depo. at 73, ln. 24 to 75, ln. 14 and at 371, ln. 5 to 9.

4. Bingham initialed the Confirmation of Agency Disclosure paragraph in the Hirschi Center REPC, acknowledging that Rasekh represented both the buyer and the seller in the transaction. Bingham Depo. at 113, ln. 13 to 114, ln. 1, and Exhibit "5," ¶ 5. Bingham testified that she understood at the time she signed her initials on the Confirmation of Agency Disclosure paragraph in the Hirschi Center REPC that Rasekh represented both the buyer and seller in connection with the sale of the Hirschi Center. Bingham Depo. at 114, ln. 2 to 6.

5. Between July 20 and October 3, 1994, Bingham visited the Hirschi Center between five and eight times independent of Rasekh. Bingham Depo. at 85, ln. 3 to 9. For the first visit, Bingham had an appointment with the Hirschis and the Hirschis showed Bingham the entire property for sale, including the house and center. Bingham Depo. at 83, ln. 22 to 84, ln. 1. Bingham went and looked at the house on at least two additional occasions and looked at the center several times on her own. Bingham Depo. at 83, ln. 7 to 21. On at least one occasion, Bingham took her boyfriend, Stanley Spafford ("Spafford"), to visit the Hirschi Center. Bingham Depo. at 88, ln. 11 to 89, ln. 1; Deposition of Stanley Spafford ("Spafford Depo.") at 18, ln. 15 to 20 and at 31, ln. 9 to 20. Bingham had access to the buildings prior to the closing, and, in fact, Spafford concluded that the decor was a little outdated, that the carpet needed to probably be replaced and the buildings could have used a fresh coat of paint. Bingham Depo. at 85, ln. 3 to 8, at 86, ln. 8 to 25; Spafford Depo. at 31, ln. 21 to 33, ln. 5. Bingham also testified

that she recognized, prior to the closing, that the buildings needed to be painted, and the carpet replaced. Bingham Depo. at 132, ln. 7 to 133, ln. 22; at 134, ln. 17 to 135, ln. 24.

6. Prior to the closing on the sale of Hirschi Center, the Hirschis provided Bingham copies of financial statements showing annual receipts and disbursements for the Hirschi Center for most years for the period from 1984 to 1994. Bingham Depo. at 127, ln. 8 to 20, and Exhibit “8.”

7. Bingham and Spafford visited with the Hirschis’ accountant, Vincent Tilby (“Tilby”) regarding the financial statements after Bingham received them and before the closing. Bingham Depo. at 85, ln. 10 to 18; at 102, ln. 19 to 104, ln. 22; Spafford Depo. at 26, ln. 1 to 27, ln. 13. Tilby was cooperative and provided Bingham and Spafford with the information they wanted to know, and did not refuse to answer any questions. Spafford Depo. at 27, ln. 9 to 13; Bingham Depo. at 109, ln. 22 to 24. After reviewing the financial statements, Spafford discussed the financial statements with Bingham, and discussed with her the fact that, with the required additional mortgage payment arising from Bingham’s purchase of the Hirschi Center, it would be tough financially or would be a break-even. Spafford Depo. at 21, ln. 14 to 24, ln. 22.

8. Some time prior to closing, upon Bingham’s request, the Hirschis agreed to reduce the purchase price for the Hirschi Center from \$900,000 to \$800,000. Bingham Depo. at 95, ln. 17 to 97, ln. 21. Bingham testified that, the more she looked at the Hirschi Center, she wanted to purchase it for less based on its condition. Bingham Depo. at 137, ln. 22 to 138, ln. 16.

9. Shortly before the scheduled closing and after Rasekh returned from Egypt, Bingham went to a face-to-face meeting with the Hirschis at the house, and Bingham told Rasekh she was not going to buy the Hirschi Center. Bingham Depo. at 92, ln. 20 to 93, ln. 10. The Hirschis were scheduled to leave shortly to Russia on a church mission, and Rasekh was upset that Bingham would try at the last minute to renegotiate. Bingham Depo. at 93, ln. 5 to 95, ln. 19; Rasekh Depo. at 64, ln. 14 to 67, ln. 14. According to Bingham and at Bingham's insistence, Rasekh negotiated some final concessions from the Hirschis, and the final reduction of price to \$800,000. Shortly thereafter, Bingham paid an additional amount in earnest money. Bingham Depo. at 95, ln. 1 to 16; at 99, ln. 20 to 100, ln. 16.

10. The closing of the sale of the Hirschi Center from the Hirschis to Bingham pursuant to the Hirschi Center REPC as amended took place on October 3, 1994. See Complaint ¶ 44. The Hirschis took back an All-Inclusive Trust Deed and All-Inclusive Note Secured by All-Inclusive Trust Deed in the amount of \$600,000, both dated October 3, 1994, for a portion of the purchase price. Bingham Depo. at 378, ln. 14 to 22; at 381, ln. 7 to 19 and Exhibit "28," "34" and "35." Bingham testified that she paid \$181,000 in cash for the purchase of the Hirschi Center, which is the amount she is seeking in damages. Bingham Depo. at 374, ln. 17 to 23, at 362, ln. 2 to ln. 18. Also, Coldwell Banker Premier agreed as an accommodation to defer a portion of its commission, and Bingham signed a note payable to Coldwell Banker Premier and Rasekh in the amount of \$18,762.74. Deposition of Kal Rasekh ("Rasekh Depo.") at 94, ln. 21 to 96, ln. 19; see also Bingham Depo. at 381, ln. 21 to 382, ln. 8; at 383, ln. 4 to 12 and Exhibit "36" and "38."

11. On October 17, 1994, two weeks after closing her purchase of the Hirschi Center, Bingham listed the Hirschi Center for sale with VRUtah, Inc. on a one year exclusive listing with a listing price of \$1,000,000 (the “VRUtah Listing”). Bingham Depo. at 200, ln. 1 to 201, ln. 16 and Exhibit “10.” In the VRUtah Listing, “family problems” is listed as the reason for the sale. Bingham Depo Exhibit “10.” On March 8, 1995, Bingham signed an Addendum to the VRUtah Listing, reducing the listing price to \$900,000. Bingham Depo. at 203, ln. 16 to 22.

12. Bingham testified that she thought the Hirschi Center would sell within three months of listing it for sale. Bingham Depo. at 211, ln. 3 to 13; at 169, ln. 7 to ln. 13. Bingham did not pay her tax obligations, alarm monitoring, and other obligations associated with the Hirschi Center, and just maintained the daycare. Bingham Depo. at 232, ln. 8 to 21; at 234, ln. 2 to 11. Bingham testified that it would have been a very good decision if the Hirschi Center had sold quickly because she would have gotten her money out plus a profit and not had to put any money into it. Bingham Depo. at 234, ln. 18 to 235, ln. 5. The Hirschi Center did not sell within three months for the anticipated price, and Bingham’s obligations, including those to the Hirschis, were past due. Bingham Depo. at 234, ln. 18 to 25 and Exhibit “16.”

13. Defendant Harvey Hirschi sent Bingham a letter dated January 6, 1995, in which Mr. Hirschi informed Bingham that she was obligated to reimburse Mr. Hirschi \$3,846.50 for taxes paid on the Hirschi Center. Bingham Depo. at 392, ln. 15 to 24 and Exhibit “44.”

14. Bingham received an Offer for Purchase and Sale of Assets from Randall Roberts (“Roberts”) dated March 2, 1995, offering to purchase the Hirschi Center for \$650,000 to be used for a restaurant, with a \$50,000 cash down payment, and an assumption of the note from the

Hirschis in the amount of \$600,000. Bingham Depo. at 393, ln. 1 to 10 and Exhibit "45;" at 304, ln. 1 to 11. Bingham had until March 13, 1995 to accept the offer. Bingham Depo., Exhibit "45."

15. By Counter Offer # 1 dated March 8, 1995, Bingham offered to sell the Hirschi Center to Roberts with a purchase price of \$750,000, with a \$150,000 cash down payment and \$600,000 to be financed over 30 years at 10% interest, plus 3% of gross sales generated from the buyer's new business for 24 months or 2% of gross sales for 36 months, which ever was greater. Bingham Depo. at 393, ln. 15, to 394, ln. 2 and Exhibit "46" at 4. Roberts had until March 15, 1995 to accept Bingham's counteroffer. Bingham Depo., Exhibit "46" at 4.

16. Although Roberts did not accept Bingham's counteroffer, Bingham Depo. at 393, ln. 25 to 394, ln. 2, he did submit a new offer which incorporated the terms of Bingham's counteroffer, not including the obligation to pay a percentage of the gross sales. With a new Real Estate Purchase Contract dated March 16, 1995, Roberts presented Counter Offer "C" to Bingham, in which Roberts offered to purchase the Hirschi Center with a purchase price of \$750,000, with a \$150,000 down payment and assuming the \$600,000 note from the Hirschis. Bingham Depo. at 393, ln. 16 to 21 and Exhibit "46." Bingham had until March 20, 1995 to accept this new offer. Bingham Depo., Exhibit "46." Bingham did not accept the new offer

which had deleted from her counteroffer the proposed obligation to pay a percentage of the gross sales from the new business.³

17. On or about April 5, 1995, Bingham received a Notice of Default with regard to the \$600,000 note and deed of trust Bingham had given the Hirschis as part of the purchase price for her purchase of the Hirschi Center, stating that Bingham was in default of her obligation to reimburse the Hirschis \$3,846.59 for taxes, and to pay attorneys' fees and costs in the amount of \$700.00, plus late charges of \$530.96. Bingham Depo. at 394, ln. 21 to 395, ln. 6 and Exhibit "48."

18. Bingham received additional Notices of Default dated April 28, 1995 and May 18, 1995, stating that Bingham was in default of her obligation to reimburse the Hirschis for taxes, and to pay additional attorneys' fees and costs, plus late charges. Bingham Depo., Exhibit "50," and "51."

19. After rejecting Roberts' offers to purchase the Hirschi Center which would have involved \$150,000 cash up front, Bingham entered into a Commercial Property Lease with an option to purchase with Roberts dated June 1, 1995. Bingham Depo. at 401, ln. 24 to 402, ln. 13

³ Roberts presented one additional Real Estate Purchase Contract to Bingham dated April 3, 1995, in which Roberts offered to purchase the Hirschi Center with a purchase price of \$785,000, with a \$185,000 cash down payment and assuming the \$600,000 note from the Hirschis. Bingham Depo. at 394, ln. 8 to 16 and Exhibit "47." Bingham had until April 7, 1995 to accept this further offer. Bingham Depo., Exhibit "47."

and Exhibit “54.” Roberts did not make the lease payment due July 1, 1995 or any subsequent payment. Bingham Depo. at 403, ln. 3 to 8.⁴

20. Bingham received a Notice of Default dated July 10, 1995, stating that Bingham was in default of her obligation to pay \$5,275.98 due June 1, 1995, and to pay attorneys’ fees and costs of \$1,300.00, plus late charges of \$1,312.70. Bingham Depo., Exhibit “57.” Based on this Notice of Default, the Hirschis were statutorily authorized to instruct the trustee on their trust deed to conduct a trustee’s sale of the Hirschi Center in November, 1995, after giving the statutorily required notices of the sale. See Utah Code Ann. §§ 57-1-24 and -25.

21. On or about September 6, 1995, after receiving four notices of default, Bingham listed the Hirschi Center for sale with Rasekh on a one month listing, and again, on October 27, 1995, Bingham listed the Hirschi Center for sale with Rasekh on a listing to expire February 27, 1996. Bingham Depo. at 407, ln. 12, to 409, ln. 18 and Exhibits “61” and “62;” Rasekh Depo. at 189, ln. 25, to 192, ln. 15. In the September 6 and October 27, 1995 listing agreements, the parties agreed that, except with regard to the costs of mediation which Bingham did not pursue, “in case of the employment of an attorney in any matter arising out of this Listing Agreement (including a sale of the Property) the prevailing party shall be entitled to receive from the other

⁴ Bingham sent a Notice of Default dated August 16, 1995 to Roberts declaring the Commercial Property Lease to be in default for failure to make the required payments. Bingham Depo. at 406, ln. 1 to 25. On March 18, 1997, Bingham filed her Complaint initiating this action. The Complaint was solely against Roberts and contained two causes of action, one for breach of the lease agreement, and a second for fraud in connection with the lease. Over one year later, on or about May 11, 1998, Bingham filed her Amended Complaint, asserting fourteen causes of action against seven defendants, including Roberts and Rasekh.

party all costs and reasonable attorney's fees, whether the matter is resolved through court action or otherwise." Bingham Depo., Exhibits "61" and "62," ¶ 8.

22. Bingham did not sell the Hirschi Center. Bingham Depo. at 393, ln. 6 to 394, ln. 19. Thereafter in November, 1995, the Hirschis foreclosed their trust deed taken to secure payment of the purchase price for the Hirschi Center from Bingham. Amended Complaint ¶¶ 69-70.

23. On January 20, 1996, the Hirschis signed a new listing agreement with Rasekh, providing for an exclusive right to sell the Hirschi Center for six months and providing for a 6% commission. Rasekh Depo. at 41, ln. 11 to 42, ln. 7 and Exhibit "81." The Hirschis closed on April 29, 1996 a sale of the Hirschi Center to a group of investors including Nancy Adair, Raed Salem, and Nivin Abuzeid. Rasekh Depo. at 43, ln. 16 to 44, ln. 25; Hirschi Depo. at 58, ln. 18 to 63, ln. 12. None of the money for the April 1996 purchase of the Hirschi Center came from Rasekh, and he did not have any financial interest in the purchase other than acting as real estate agent. Rasekh Depo. at 45, ln. 1 to 18.

ARGUMENT

Rasekh moves the court for summary judgment on the six causes of action alleged in Bingham's Amended Complaint against him. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and . . . it should be interpreted in a way that allows it to accomplish this purpose." Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). Rule 56(e) of the Utah Rules of Civil Procedure requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories and admissions designate "specific facts showing that there is a genuine issue for trial." See id.

I. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM'S THIRD CAUSE OF ACTION. HE NEITHER KNEW THE ALLEGED FALSITY OF ANY ALLEGED MISREPRESENTATIONS, NOR DID RASEKH HAVE A DUTY TO INVESTIGATE.

In Bingham's Third Cause of Action, she has asserted a claim against Rasekh for negligent misrepresentation. Amended Complaint at 18-21. But the undisputed facts in the record show that Rasekh is not liable as a matter of law for any alleged misrepresentations.

Bingham admitted during her deposition that she has no evidence or information that Rasekh knew that the information upon which she is basing this claim was incorrect at the relevant time. During her deposition, when asked regarding each of the alleged misrepresentations forming the basis of this claim, Bingham acknowledged that she does have any evidence that Rasekh knew prior to closing that any of the alleged misrepresentations were untrue. Bingham Depo. at 341, ln. 16 to 358, ln. 6 (in particular, see 343, ln. 9-15; 344, ln. 22 to

345, ln. 1; 346, ln. 1-4; 347, ln. 23, to 348, ln.1; 349, ln. 6-9; 350, ln. 7-10; 351, ln. 15-18; 352, ln. 16-19; 353, ln. 11-14; 354, ln. 18-21; 355, ln. 15-18; 356, ln. 14-17; 357, ln. 8-11; 358, ln. 3-6).

Bingham appears to be basing her claim of negligent misrepresentation on an alleged duty of Rasekh to investigate the condition and viability of the Hirschi Center. Imposing the burden on a real estate agent to thoroughly investigate every possible aspect of properties for sale at the peril of potential liability would increase the risk of selling real estate, making real estate agents insurers for purchasers. As the Utah Court of Appeals has explained,

[r]eal estate agents are not ... home inspectors and should not be required to thoroughly investigate each home they have on the market to discover latent defects. The responsibility to observe patent, and any discoverable latent, defects falls on the buyer of the home and is usually accomplished by hiring a knowledgeable home inspector to scrutinize the home before finalizing a sale. ... [T]he mere fact that the real estate agent has a duty to disclose known defects to potential purchasers does not mean that the agent is liable for all subsequent problems that come to light. ... Only when the purchaser can establish that the agent had both the duty to disclose and knowledge of the defects is recovery appropriate.

Schafir v. Harrigan, 879 P.2d 1384, 1390 (Utah Ct. App. 1994).

Bingham has not and cannot establish that Rasekh had prior knowledge of the alleged defects, and as a matter of law, Rasekh had no duty to investigate to discover the alleged latent defects or to thoroughly investigate the financial viability of the Hirschi Center. Bingham had been given financial statements regarding the Hirschi Center, and had visited with the Hirschis' accountant about the financial statements, independent of Rasekh. After reviewing the financial statements, Bingham's boyfriend discussed with her the fact that, with the required additional

mortgage payment arising from Bingham's purchase of the Hirschi Center, it would be tough financially or would be a break-even.

Further, it is undisputed that Bingham was given access to the Hirschi Center and visited the property on numerous occasions prior to closing, independent of Rasekh, and had the ability to discover any alleged undiscovered defects in the property that Rasekh might have discovered with further reasonable investigation. Bingham had all the information available to determine the financial viability and condition of the Hirschi Center.

Utah law imposes personal responsibility which a purchaser cannot shirk if seeking to impose liability on others.

[O]ne who complains of being injured by ... a false representation cannot heedlessly accept as true whatever is told [her], but has the duty of exercising such degree of care to protect [her] own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if [she] fails to do so, is precluded from holding someone else to account for the consequences of [her] own neglect.

Jardine v. Brunswick Corp., 423 P.2d 659, 662 (Utah 1967). Bingham failed to protect her own interests even after she received the financial statements on the Hirschi Center, and even after she was allowed to inspect the property. The court should grant summary judgment in favor of Rasekh on Bingham's Third Cause of Action.

II. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM'S FOURTH CAUSE OF ACTION. RASEKH OWED NO DUTIES TO BINGHAM THAT WERE VIOLATED.

In Bingham's Fourth Cause of Action, she has asserted a claim against Rasekh for breach of fiduciary duty. Amended Complaint at 22-25. Bingham claims that Rasekh had a duty to

fully investigate the business run in the Hirschi Center, determine it was a bad investment for Bingham, and advise her not to make the purchase. Id. at 25. According to Bingham, Rasekh had a duty to advise Bingham that she did not have sufficient financial resources to operate the business of the Hirschi Center, and that the business would be immediately insolvent. Id. at 24.

As a real estate agent with representation of both the seller and buyer of the Hirschi Center, Rasekh owed no fiduciary duty to Bingham. Under Utah law, the general rule is that no fiduciary obligations exist between a buyer and a real estate agent. Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980). Even when a real estate agent represents a buyer in a transaction, the agent's duties are not fiduciary duties, but are governed by statute. Rogers v. Division of Real Estate, 790 P.2d 102, 107 (Utah Ct. App. 1990). A real estate agent's duties are to be honest, ethical and competent. Id.

Further, even assuming that Rasekh owed fiduciary duties to Bingham, those duties would not include a duty to fully investigate the business run in the Hirschi Center, determine it was a bad investment for Bingham, and advise her not to make the purchase. A real estate agent's primary fiduciary duty, when one arises, is to make full disclosure of known material facts. Hopkins v. Wardley Corp., 611 P.2d 1204, 1206 (Utah 1980). Other fiduciary duties, when owed by a real estate agent, include duties of good faith, integrity, honesty, loyalty, and competence. See Musselman v. Southwinds Realty, Inc., 704 P.2d 814, 816 (Ariz. Ct. App. 1985); Schroeder v. Rose, 701 P.2d 327, 329-30 (Idaho Ct. App. 1985). A real estate agent's fiduciary duties, when they arise, have never extended to a duty to investigate and disclose all possible ramifications of a transaction.

To require the agent to give the principal notice of any conceivable information which might possibly influence the principal would create an oppressive burden on the agent. Such a rule would lead to the consideration of information extraneous to the issues in the case. It would permit speculation and could easily lead to unwarranted results.

Musselman, 704 P.2d at 818.

The agent's fiduciary duty with regard to disclosure only includes the duty to make full disclosure of known material facts, and does not include the duty to fully investigate. See Hopkins 611 P.2d at 1206; Schroeder, 701 P.2d at 330. The court should grant summary judgment in favor of Rasekh on Bingham's Fourth Cause of Action, seeking to impose liability on Rasekh for alleged breaches of unwarranted and nonexistent duties.

III. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM'S FIFTH CAUSE OF ACTION. BINGHAM ACKNOWLEDGED AND CONSENTED TO RASEKH'S REPRESENTATION OF BOTH THE BUYER AND SELLER IN THE APPLICABLE SALES TRANSACTIONS.

In Bingham's Fifth Cause of Action, she has asserted a claim against Rasekh for an alleged conflict of interest in connection with Rasekh's representation of both the buyer and seller in connection with Bingham's purchase of the Hirschi Center. Amended Complaint at 25-27.⁵

⁵ Representation by a real estate agent of both the buyer and seller in a real estate transaction does not involve an impermissible conflict of interest where the real estate agent informs the parties of the dual representation, and receives their consent. See Rohauer v. Little, 736 P.2d 403, 408 (Colo. 1987); see also Utah Code Ann. § 61-2-11(4) (Supp. 1999) (acting for more than one party in a transaction without the informed consent of all parties is grounds for discipline of an agent).

The undisputed evidence in the record indicates that Bingham signed the Hirschi Center REPC, and as a part of that contract, initialed the Confirmation of Agency Disclosure paragraph which shows that Rasekh represented both the buyer and seller. See Bingham Depo. Exhibit “5.” Further, Bingham testified that, at the time she placed her initials at the end of the Confirmation of Agency Disclosure paragraph, she understood that Rasekh represented both the seller and the buyer in the sale. Bingham Depo. at 114, ln. 2-6. The court should grant summary judgment in favor of Rasekh on Bingham’s Fifth Cause of Action.

IV. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM’S SIXTH CAUSE OF ACTION. ANY CONTRACT ARISING FROM RASEKH’S ALLEGED ORAL PROMISE TO REPURCHASE OR SELL THE HIRSCHI CENTER IN THE EVENT IT WAS UNPROFITABLE WAS UNENFORCEABLE UNDER THE UTAH STATUTE OF FRAUDS.

In Bingham’s Sixth Cause of Action, she has asserted a claim against Rasekh for an alleged breach of contract. Amended Complaint at 27-28. The basis of Bingham’s claim is her assertion that Rasekh orally promised to purchase the Hirschi Center from Bingham or sell it in the event it was not profitable. Id. at 27. Rasekh denies making any such promise. However, insofar as Rasekh made the alleged oral promises, they are unenforceable pursuant to the Utah Statute of Frauds.

Utah Code Ann. § 25-5-3 provides that “[e]very contract . . . for the sale . . . of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

The alleged oral agreement in this case that Rasekh would purchase the Hirschi Center or sell it in the event it was not profitable is void or not enforceable. Bingham admitted that she has

no writing with regard to Rasekh's alleged promise. Bingham Depo. at 322, ln. 5 to 15. It is well established in Utah, both by statute and in the case law, that oral promises involving the purchase or sale of real estate must be in writing to be enforceable. See Chadwick v. Arnold, 95 P. 527, 530 (Utah 1908).

Moreover, although Bingham asserts that Rasekh orally promised to purchase the Hirschi Center or sell it in the event it was not profitable, Bingham ignores the effect of her own actions in listing the Hirschi Center with Drury and VRUtah within two weeks of her purchase, with an initial listing price of \$1,000,000. It was not until almost eleven months later that Bingham listed the Hirschi Center for sale with Rasekh, and only after she had deferred paying her financial obligations. Further, it was not until over one year after filing this action that Bingham first asserted any claim against Rasekh. The court should grant summary judgment in favor of Rasekh on Bingham's Sixth Cause of Action.

V. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM'S TWELFTH CAUSE OF ACTION. RASEKH WAS NOT UNJUSTLY ENRICHED BY THE HIRSCHIS' FORECLOSURE.

In Bingham's Twelfth Cause of Action, she has asserted a claim against Rasekh for unjust enrichment. Amended Complaint at 37. Bingham claims that the defendants, including Rasekh, were unjustly enriched as a result of the November, 1995 foreclosure and later dealings with the Hirschi Center. Id. Bingham claims that Rasekh and the Hirschis "have entered into agreements amongst themselves to mutually profit from their unjust enrichment arising from the foreclosure." Id. Bingham's claim fails as a matter of law.

The facts of this case are similar to the facts in Baldwin v. Vantage Corp., 676 P.2d 413 (Utah 1984). In Baldwin, the plaintiffs argued that the seller of certain lots should not be able to foreclose because the seller would thereby be unjustly enriched based on the down payment and interest payments made for the purchase of the lots. The plaintiffs sought rescission of the purchase contract, claiming that, at the time of the sale, the seller had guaranteed that its parent, a lending institution, would provide construction financing, which the parent later refused to provide. Id. at 415. On appeal, the Court affirmed the trial court's determination that no guaranty existed. Id. at 416-17. Further, the Court rejected the plaintiffs' unjust enrichment claim. Id. at 418. The Court stated that,

[b]y foreclosure, the defendant cannot receive more than what the plaintiffs promised to pay in the contract, an amount not disputed by the plaintiffs. Any amount derived from the sale of the lots at foreclosure sale over and above the amount owing to the defendant was directed to be paid to the plaintiffs. In addition, plaintiffs were given six months to redeem the lots from the foreclosure sale. Under these circumstances there is no element of unjust enrichment present.

Id. at 418.

Likewise in this case, Bingham's rights in the foreclosure process were protected by statute. See Utah Code Ann. § 57-1-23 to -34. The Hirschis received what they were entitled to under the law. The Hirschis foreclosed their trust deed, as they were entitled to do, after Bingham chose not to pay her financial obligations with regard to the Hirschi Center. Section 57-1-29 of the Utah Code provides that the beneficiaries of a trust deed, in this case, the Hirschis, can only recover from the proceeds of a trustee's sale the costs of sale plus the amount owing on the trust deed. Bingham could have reinstated the trust deed pursuant to section 57-1-31 of the

Utah Code, or could have purchased the property at the trustee's sale. Whatever benefits a subsequent purchaser of the Hirschi Center received after the trustee's sale, or whatever involvement Rasekh had with the property thereafter is irrelevant to Bingham's claim for unjust enrichment. See Baldwin, 676 P.2d at 418. In any case, it is undisputed that Rasekh had no financial interest in the Hirschi Center after it was resold by the Hirschis who purchased it at the trustee's sale. See Rasekh Depo. at 43, ln. 16 to 45, ln. 18.

As a matter of law, Rasekh was not unjustly enriched as a result of the foreclosure of the Hirschi Center. The court should grant summary judgment in favor of Rasekh on Bingham's Twelfth Cause of Action.

VI. RASEKH IS ENTITLED TO SUMMARY JUDGMENT ON BINGHAM'S FOURTEENTH CAUSE OF ACTION. THE FACTS OF THIS CASE DO NOT JUSTIFY IMPOSITION OF PUNITIVE DAMAGES.

In Bingham's Fourteenth Cause of Action, she has asserted a claim against Rasekh for punitive damages. Bingham claims that Rasekh's actions complained of exhibited a knowing and reckless indifference and disregard toward Bingham's rights. Bingham's claim for punitive damages fails for various reasons.

Entitlement to a punitive damage award in Utah is governed by statute. See Utah Code Ann. § 78-18-1. First, a claim for punitive damages cannot be based on a breach of contract, unless that breach constituted an independent tort. Highland Constr. Co. v. Union Pac. R.R. Co., 683 P.2d 1042, 1049 (Utah 1984). To justify the imposition of punitive damages, the acts constituting the tort must be the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard

of, the rights of others. Utah Code Ann. § 78-18-1(1)(a). In a case involving only negligence, the plaintiff must show that the defendant knew or should have known that its conduct would, in a high degree of probability, result in substantial damage to another, and that the defendant's conduct was highly unreasonable or an extreme departure from ordinary care in a situation where a high degree of potential for damage is apparent. See Gleave v. Denver & Rio Grande Western RR, 749 P.2d 660, 670-71 (Utah Ct. App. 1988), cert. denied, 765 P.2d 1278 (Utah 1988).

The only claims which Bingham asserts which are non-contractual are based on Rasekh's alleged misrepresentations regarding the condition and profitability of the Hirschi Center, and Rasekh's failure to advise Bingham not to invest. As mentioned above, Bingham admits that Rasekh did not knowingly misrepresent anything, and Rasekh did not have a duty to investigate the financial viability of the Hirschi Center.

Second, punitive damages may only be awarded if compensatory or general damages are awarded. Utah Code Ann. § 78-18-1(1)(a). In this case, as discussed above, Rasekh is entitled to summary judgment on the claims asserted by Bingham against him. Accordingly, Rasekh is also entitled to summary judgment with regard to Bingham's claim for punitive damages.

As a matter of law, the actions alleged by Bingham to have been committed by Rasekh, even if proven, do not justify the imposition of punitive damages. The court should grant summary judgment in favor of Rasekh on Bingham's Fourteenth Cause of Action.

VII. RASEKH IS ENTITLED TO RECOVER HIS ATTORNEYS' FEES INCURRED IN DEFENDING HIMSELF IN THIS MATTER.

A party to litigation is entitled to an award of its attorneys' fees "if authorized by statute or by contract." Meadowbrook, LLC v. Flower, 959 P.2d 115, 117 (Utah 1998). Even in the "absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity." Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994). When provided for by contract, attorneys' fees "are awarded as a matter of legal right." Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985).


The Listing Agreements that Bingham entered into with Rasekh in September and October, 1995 provided that the prevailing party in an action arising out of the Listing Agreements shall be entitled to recover from the other party all costs and attorneys fees incurred in the action. This action involves a dispute with Rasekh regarding the relationship between Bingham and Rasekh, including the relationship arising from the Listing Agreements. Rasekh is entitled to recover his attorneys' fees and costs as the prevailing party in this action. In the event the court grants this motion, Rasekh will submit an affidavit of counsel itemizing the fees for the court's review and final award.

CONCLUSION

For the foregoing reasons, the court should grant summary judgment in favor of Rasekh and dismiss the claims asserted by Bingham against Rasekh. The court should also grant summary judgment that Rasekh is entitled to receive reimbursement of reasonable attorneys' fees and costs incurred in this matter.

DATED this 7 day of April, 2000.

PARSONS BEHLE & LATIMER

A handwritten signature in black ink, appearing to read "Paul D. Veasy", is written over a horizontal line.

RAYMOND J. ETCHEVERRY

PAUL D. VEASY

R. DAVID GRANT

Attorneys for Defendants Coldwell Banker Premier
Realty and Kal Rasekh

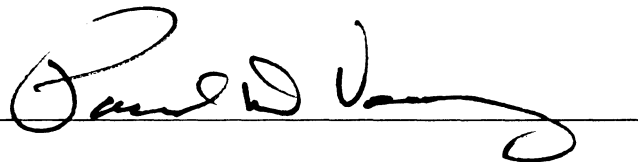
CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of April, 2000, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **DEFENDANT KAL RASEKH'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, to:

Ronald S. George
3804 Highland Drive, Suite 5
Salt Lake City, Utah 84106

Perrin R. Love
Campbell, Maack & Sessions
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215

Phillip W. Dyer
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Phillip W. Dyer", is written over a horizontal line.

[illegible]

SALT LAKE COUNTY, STATE OF UTAH

Case No. 970901897cv

) PLAINTIFF'S MEMORANDUM IN
) OPPOSITION TO DEFENDANT KAL
) RASEKH'S MOTION FOR SUMMARY
) JUDGMENT

) JUDGMENT

Judge: Timothy R. Hansen

Unless otherwise noted, references found to the fact statements herein (Pl Exh pg “ ” or Pl Exh pp “ ” Dep pg “ ”) are to specific pages found in Plaintiff’s Addendum of Exhibits In Support of Her Memorandum In Opposition to Defendant’s Motions for Summary

Summary Judgment on file herein.

**STATEMENT OF MATERIAL FACTS
AND THOSE FACTS TO WHICH A GENUINE ISSUE EXISTS.**

Pursuant to Rule 4-501 of the Code of Judicial Administration, the Plaintiff identifies the following material facts and those facts to which a genuine issue exists for both of the Defendant's Motions for Summary Judgment. For convenience, the Plaintiff states the numbered paragraph or paragraphs for the movant Rasekh's Statement of Facts just prior the Plaintiff's numbered Fact Statement. The Disputed Statement of Fact for the Movant's first Summary Judgment Motion is identified by single ellipses "()" the Disputed Statement of Fact for the Movant's Mitigation of Damages Motion is identified by double ellipses "(())".

In addition the Plaintiff incorporates herein the Statement of Facts as to Which a Genuine Issue Exists as set out in both her Memorandum in Opposition to Defendants Harvey C. and Lois Hirschi's Motion for Summary Judgment and her Memorandum in Opposition to Defendants Michael Drury and VR Utah's Motion's for Summary Judgment and the Affidavits Opposing Summary Judgment on file herein.

(2)((2)) 1. The Plaintiff, Marie Bingham, at the time she purchased the Hirschi Center was an unsophisticated person who had little if any comprehension of the magnitude of the transaction in which she was induced to enter in by the Defendant Kal Rasekh. (Pl Ex pg. 18 Dep pp. 65-66; Pl Ex pg. 20 dep pp. 77-78; Pl Ex pg. 40. dep pp 314-316).

(2)((2)) 2. Mrs. Bingham was a divorcee. (Pl Ex. pg 49 Dep pg. 423). Her family consisted of nine children. Pl Ex pg. 40 dep p. 314). Her working experience had been that of a sales clerk and substitute teacher. (Pl Ex. pp 13-14 dep pp. 9-15). Her education beyond high school had consisted of two years of part time schooling to qualify for entrance into a nursing curriculum. (Pl Ex p. 13 Dep p. 11; Pl Exh. p. 38a - 38b Dep pp. 292-293).

(2,3)((2,3)) 3. Mr. Rasekh ingratiated himself into Mrs. Bingham's family, learned of her financial circumstances and became her financial advisor, (Pl Exh. pp. 39-40, dep. p 305-307, 316) referring to her as his "American mom." (Pl Exh pp. 58 dep pp. 63-64; Pl. Exh p. 38 dep p. 254).

(2)((2)) 4. This relationship of trust and confidence is evidenced by the fact that Mr. Rasekh asked Mrs. Bingham if he could marry either her daughter Jennifer or Brittany as a prerequisite to obtaining U.S Citizenship. (Pl Exh pp. 54-56, dep pp. 48-55, 58).

(2)((2)) 5. As a result of the relationship he cultivated, Mrs. Bingham trusted him with the care of her daughter Brittany whom Mr. Rasekh took to Egypt to attend the wedding of his sister. (Pl Exh. pp. 57, dep pp. 59).

(2,3)((2,3)) 6. Mrs. Bingham relied on Mr. Rasekh to make her business decisions. (Pl. Exh pp. 46, dep pp. 379; Pl Exh p. 48 dep pp. 417)

(2)((2)) 7. In July of 1994, Rasekh contacted Bingham and told her he had just left the Hirschi Center, a day care business, and that it was a perfect investment for her. He told

her that he had exempted his father from the listing agreement so that Bingham and his sister could purchase and operate the day care. He told her he would meet her at his office because it would have to be tied up fast. (Bingham Aff. ¶¶ 14-16)

(2)((2)) 8. When Bingham first learned of the \$900,000 price she was overwhelmed and told Rasekh there was no way she could be involved. He told Bingham there was no risk that he had thoroughly investigated the business and property and if Bingham would go in business with his sister and operate the day care there was enough income to support the both of them. (Bingham Aff. ¶¶ 14-17)

(2)(22) 9. He presented Bingham with a document he had prepared which she did not read and which he said was necessary to tie up the property. Bingham was at first skeptical, but, Rasekh had her sign the document and give him \$5,000 to hold the property until his sister could come. At the time Rasekh told Bingham he would later negotiate the actual price and figure out the business relationship between Bingham and his sister. (Bingham Aff. ¶¶ 14-17)

(2)((2)) 10. At this time Rasekh told Bingham that if he were not able to negotiate a better price that Bingham would get her \$5,000 back. (Bingham Aff. ¶¶ 14-17)

(2)((2)) 11. Bingham signed the document Rasekh prepared without reading it because she fully trusted Rasekh because of their confidential relationship and she believed he instilled in her that he would protect her and was looking out for her best interests. (Bingham Aff. ¶¶ 14-17)

12. Later he came to Bingham's home and discussed the need to sell her home so as to come up with her share of the money to purchase the Hirschi Center. Rasekh told Bingham his sister was coming from Egypt soon and he would start to look for a buyer for her house. (Bingham Aff. ¶ 18)

(3)((3)) 13. During this time Rasekh presented Bingham with several additional offers and counter offers which he was negotiating she believed for both she and his sister.

((5)) 14. Shortly thereafter Rasekh told Bingham his sister was not coming and would not be participating in the purchase. At this time Bingham told Rasekh there was no possible way she could be involved because she knew nothing about operating a day care let alone any other kind of business. (Bingham Aff. ¶ 19)

(2, 3)((2,3,5)) 15. At this time Rasekh, put increased pressure on Bingham to proceed with the purchase by assuring me that he had investigated the business and there was nothing that could go wrong. He told Bingham that she could walk into the Hirschi's shoes and would need no further capital. (Pl Exh. p. 30-32, dep p. 187-190, 192, 196; Pl Exh p. 44, 45, dep p. 349, 356.).

(6) 16. At this time Bingham consulted her brother David Weston who told her she should not purchase the Center because she was not qualified and not until she determined that the business was profitable and would not require any money beyond the purchase price. (Bingham Aff. ¶ ¶ 21)

17. Bingham told Rasekh what her brother had said and at this time he told her

“Marie there is no risk, if it doesn’t work out I will either buy it from you or sell it for you.”

Besides, he said, “why would you not trust my advice over that of your brother or daughters, are they as successful as I am, look at my success Marie, trust me there is no risk and I will not let you down.” (Bingham Aff. ¶¶ 22)

(6) 18. Rasekh told her the Hirschi’s had provided him with all of the financial information about the business and that the day care center and the wedding receptions held there had supported two families for many years. He arranged for her to talk to the Hirschi’s about the profitability of their business. The Hirschi’s then provided her with financial statements. (Bingham Aff. ¶ 23)

(6) 19. She did not know how to read a financial statement so Bingham ask her friend Stan to look at the financial statements and He told her the statements were just break even or showed a loss. (Bingham Aff. ¶ 23)

(6) 20. When she confronted both Rasekh and Mr. Hirschi, they both told her the financial statements were not accurate because the Hirschi’ had commingled the living expenses of two families with the operating expenses of the business and that if she subtracted out the living expenses the statements would show a good profit. (Bingham Aff. ¶ 24)

(7) 21. Rasekh then introduced her to Mr. Tilbey, their accountant, to assure her that he would continue to do the Center’s accounting after she took over. Mr. Tilbey told her he could not extract the personal family living expenses from the operating expenses. She

was again concerned because of what her brother David had told her. When she expressed her concerns to Rasekh he again persuaded her by telling her that he had analyzed the financial statements and if the business could support two families it could assuredly support one. (Bingham Aff. ¶ 25)

(7) 22. At this time, Rasekh again reassured her, “Marie there is no risk, just trust me, if anything goes wrong I will get you out.” (Bingham Aff. ¶ 25)

(8,9) 23. Rasekh then traveled to Egypt and while he was gone Bingham went to the Hirschi Center on her own and came away with the feeling that something was just not right. When Rasekh returned Bingham told him she could not go through with buying the Center. Rasekh got very upset and intimidating and again accused her of not trusting him and that she was harming the Hirschis. He made her feel terrible and she then told him that in the very beginning he had at least promised a lower price. (Bingham Aff. ¶ 27)

(9) 24. Rasekh then met with the Hirschi’s alone and then later included Bingham in the discussions. Rasekh told her the Hirschi’s had agreed to reduce the price and to delay the monthly payments to assure her success. At this time Bingham looked to Mrs. Hirschi, for reassurance and asked her “knowing my lack of experience do you think I could really handle this and could I really do this.” (Bingham Aff. ¶ 28)

(9) 25. Mrs. Hirschi’s response led her to believe that the Hirschi Center day care business would support her family without the requirement for any money beyond the down payment. PI Exh pp. 21-22, dep pp. 92,93; see also PI Exh. p. 60, dep p. 102).

(9) 26. Rasekh also told Bingham that the Hirschi's had agreed that their daughter, would continue to manage the Center and would train Bingham for six months.

He also told Bingham that that all of the trained staff would continue and that all of the day to day lesson and activity programs for the children were fully developed and available for her use. He said "Marie all you have to do is work hard and the Center will take care of all your needs." (Bingham Aff. ¶ 20)

(10)((6)) 27. Because of Rasekh's assurance, among others, that her investment was completely safe because if anything went wrong he would either purchase the property from her or sell it for her such that she would not suffer any financial loss, in early October, 1994, Bingham purchased the Hirschi Center. (PI Exh pg. 41,42 dep pp. 318, 322; PI Exh p. 25 dep p. 122). Prior to October of 1994, she had never worked in a day care center or operated a day care center. (Bingham Aff. ¶ 29)

(10)((6)) 28. At the time of the Hirschi Center purchase her sole assets consisted of time certificates of deposit accumulated from some income savings (PI Ex p 47-49, dep pp. 389-391, 418-421; PI Ex. p.) and some limited capital received from her father and the equity in her home (PI Ex. pg. 20 dep pp. 77-79; PI Ex. pg 15 dep pp. 49-51).

(10)((6)) 29. The \$181,000, Mr Rasekh had Ms. Bingham pay in down payment depleted all of her assets and left her with no operating or emergency capital. (PI Exh. p. 21, dep p. 89; PI Exh p. 33, dep pp. 201-202).

(10)((6)) 30. At the time of closing Mr. Rasekh did require of Mrs. Bingham that she

would have to pay more money than her \$181,000 she had for the down payment, contrary to his prior representations, by surprising her with a \$19,000 note the need for which prior thereto she was unaware. (Pl Exh. p. 42 dep pp. 323-324; Bingham Aff. ¶¶ 30-31)

(11)((7)) 31. Following closing she soon discovered that Mr. Rasekh had misrepresented the Hirschi Center (Pl Exh. p. 24, dep p. 117; Pl Exh. p. 31, dep pp. 189-190), and in order to stay in business she would have to meet costly permitting and safety requirements for which she was unprepared with no means to meet these costs. (Pl Exh. pp. 27-28 dep pp. 147-152; Pl Exh p.43 dep p. 336; Bingham Aff. ¶ 32),

(11)((7)) 32. Following closing It also became apparent to her that the amount of income being received from child day care was insufficient to meet the licensing requirements, mortgage payments and operating expenses and she would be operating at a loss. (Pl Exh. p. 33, dep pp. 201-202; Pl Exh. p. 43 dep pp. 333-335; Bingham Aff. ¶ 33).

(11)((7)) 33. The last minute \$19,000 note and the Hirschi Center misrepresentations caused her to believe that she could no longer trust Rasekh. A friend, she hired to repair the smoke detectors and to install exit signs advised her to immediately sell the Hirschi Center and recover her savings. (Bingham Aff. ¶ 33-34)

(11,12)((7,8)) 34. As a result of her friends advice she entered into an agreement with Defendant Michael Drury and VR Utah to sell the Hirschi Center within three months

which failed and she made a demand upon VR Utah to release her from the listing agreement. (See Plaintiff's Memorandum in Opposition to Defendants Drury and VR Utah Motion for Summary Judgment pages iii - iv ¶¶ 4-10, incorporated herein by this reference.)

(20-21) 35. In desperation, the Plaintiff contacted Rasekh and told him she would not be able to make the monthly payments then due. She insisted he make good his promise to sell the property or buy her out. Defendant Rasekh told the Plaintiff that he would do nothing so long as the property was listed with VRUtah Business Brokers.

(Bingham Aff. ¶¶ 43-44; Pl Exh. p 35, dep pp. 237-238)

(14-16,19)((11-13)) 36. On or about March 2, 1995, Mr. Randall Roberts, a neighbor to the Hirschi's, had Steve Tate of Consolidated Realty Group present an offer to purchase the Hirschi property. (Pl. Exh. pg 62; Bingham Aff. ¶ 45).

(14-16,19)((11-13,16)) 37. Mr. Roberts was never screened as a potential buyer. (Pl Exh p. 11) The only way Mr. Roberts could complete a purchase was through the qualification of a prospectus with the governmental agencies regulating securities offerings in the hope of attracting investors. (Pl Exh. pg. 11; Bingham Aff. ¶ 46) Mr.

Roberts had no means available to him at the time to purchase the property. ((Bingham Aff. ¶¶ 45-46, 50; Weston Aff. ¶¶ 9-10; Pl. Exh pp. 4-5, 11, 62 and Roberts prospectus Pl Exh. pp. 124-169)

(14-16,19)((11-13,16)) 38. Lacking the sophistication to evaluate Mr. Roberts offers,

Mrs. Bingham engaged her brother as her agent. (Pl Exh. pg 49(c)) Mr. Weston then attended a meeting conducted by Mr. Roberts in Mr. Drury's office. After reviewing Mr. Roberts prospectus, (Pl Exh. pp 124-169) her brother advised her that Mr. Roberts did not have the means to fund his offer. (Weston Aff. ¶¶ 9-10,13; Bingham Aff. ¶¶ 45-46)

(20-22)((18-19)) 39. The Plaintiff finally obtained a release from VR Utah in June 1995. She then contacted Rasekh and told him VRUtah Brokers had released and that he need to either buy the Hirschi Center or sell it immediately as I she would lose her life's savings. (Bingham Aff. ¶¶ 52-53)

(20-22)((18-19)) 40. Mr. Rasekh did nothing and she in fact lost her savings as a result of the Hirschi's foreclosure. (Bingham Aff. ¶¶ 52-53)

(23) 41. Rasekh thereafter entered into an agreement with the Hirschis and again sold the Hirschi Center property for \$750,000.

ARGUMENT

I

INTRODUCTION

Plaintiff drops her cause of action against Rasekh pursuant to the FOURTEENTH CAUSE OF ACTION, but maintains that all other causes of action should survive summary judgment and be presented to the jury.

II

CONFLICT OF INTEREST

Rasekh asks to have the Fifth Cause of Action dismissed. Plaintiff concedes that

since Plaintiff signed an agency agreement with Rasekh that disclosed that he also represented the Hirschis that such representation would not be a breach of fiduciary duty because of a conflict of interest. Plaintiff though stands by the claims of that cause of action that Rasekh had a fiduciary duty to Plaintiff because he was her real estate agent, even though a limited agent and that through his actions he breached his fiduciary duty to her.

III NEGLIGENT MISREPRESENTATION

Plaintiff alleges that Rasekh made certain negligent misrepresentations to her that induced her to purchase the Hirschi property. The cause of action for negligent misrepresentation is not based on failure to disclose, but rather on incorrect disclosures. The case of *Schroeder v. Rose*, 701 P. 2d 327 (Idaho Ct. App. 1985), which was cited by Rasekh, makes it clear that misleading or erroneous responses about a sale amounts to misrepresentation. (See also PROSSER AND KEETON ON TORTS §106 at 738 and §107 at 745 (5th ed. 1984). In alleging negligent misrepresentation Plaintiff does not contend that Rasekh had the obligation to investigate everything about the business and report it to Plaintiff, but rather that he had the obligation to properly investigate ^{the} and accuracy of any representations that he did make about the business.

IV. STATUTE OF FRAUDS

Plaintiff claims that Rasekh promised her that if she would purchase the Hirschi property she would have **no risk** because if anything happened he would either sell the Hirschi Center for her or buy it himself. Such promise would be binding on Rasekh whether a confidential relationship existed or not.

Rasekh maintains that his promise to Plaintiff is unenforceable pursuant to the statute of frauds. Obviously the promise that Rasekh would resell the property for Plaintiff if it was not profitable is a promise to provide personal services, not covered by the statute of frauds. In addition the promise to buy the Hirschi Center is a contract not covered by the statute of frauds if in the context of a fiduciary relationship. The statute of frauds is not intended to cover oral representations made in violation of a fiduciary relationship. *W.G. Jenkins & Co. v. Standrod*, (1928) 46 Idaho 614, 269 P. 586; see 72 Am.Jur.2d Statute of Frauds § 176 at 707 (1974) and *Brock & Davis Co., Inc. v. Charleston National Bank*, (S.D. W.Va. 1977) 443 F.Supp. 1175, *Teetling v. Indiana State Bank*, 436 N.E.2d 855, *Jarnigan v. Busby*, 867 P.2d 63, (Colo. 1993). Plaintiff has presented evidence that a confidential and therefore a fiduciary relationship existed between herself and Rasekh and therefore he cannot hide behind the statute of frauds if the finder of fact determines the existence of the confidential relationship. Nowhere in his motion has Rasekh claimed that a confidential relationship did not exist and this remains as a contested issue of fact.

The question should also be raised whether or not a real estate agent, even if he was a dual agent and a confidential relationship did not exist could invoke the statute of frauds to claim a promise that if an investment in property did not work out he would buy it back from his client was unenforceable, pursuant to the statute of fraud, if only oral.

The first argument is that Rasekh should be estopped from raising the statute of fraud based upon the doctrine of promissory estoppel, or part performance. *Ravarino v. Price*, 260 P.2d 570, 123 Utah 559. Plaintiff parted with \$181,000.00, all of the money she had, on the promise that if she would purchase the property and then had any problems, Rasekh would buy it from her so that she would incur no loss. The agreement should be taken out of the statute of frauds on such basis.

Plaintiff and Rasekh had an agreement which was you buy the property and I will then buy it back from you if it is not profitable. Plaintiff performed her end of the bargain when she purchased the property. It work a fraud if Rasekh could hide behind the statute of frauds in such case. In such case the statute of frauds does not apply. *Medesco, Inc. v. LNS Int'l, Inc.*, 762 F. Supp. 920 (D.Utah 1991); Promissory Estoppel as Basis for Avoidance of Statute of Frauds, 56 A.L.R.3d 1037, 1044 (1974), Restatement (Second) of Contracts § 139 comment b (1979).

Also even though Rasekh was a dual agent to the seller and to Plaintiff, only certain fiduciary duties are given up *Wardly v. Welsh*, 962 P.2d 86, 346 Utah Adv. Rep. 44, footnote 5, 1998, and it appears only those fiduciary duties that would create a conflict

between buyer and seller are surrendered. Utah Administrative Code R162-6.2.16.3 et. seq. Rasekh still retained fiduciary duties to Plaintiff that would preclude application of the statute of frauds, even in the absence of a confidential relationship.

V. PUNITIVE DAMAGES

In Utah punitive damages may be awarded when the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others. Utah Code Ann. §78-18-1. Plaintiff concedes that punitive damages cannot be awarded against Rasekh pursuant to the cause of action for negligent misrepresentation, but can be pursuant to the claim for breach of fiduciary duty. Plaintiff has alleged that the actions of Rasekh, which constitute the breach of fiduciary duty exhibited a knowing and reckless indifference and disregard toward the rights of Plaintiff, which if proven would entitle Plaintiff to punitive damages.

Facts as set out on pages i through ix above, as alleged by the Plaintiff in both her deposition, affidavit and answers to interrogatories, which, if proven, would show the knowing or reckless indifference of Mr. Rasekh to the rights of Plaintiff.

Punitive damages are properly awarded for breach of fiduciary duty where the defendant's conduct reaches the requisite level of culpability. *Jerman v. O'Leary*, 701 P.2d 1205, 1210, 145 Ariz. 397, 402. Whether the actions of Rasekh rises to the requisite

level of culpability is a question for the jury.

VII
CLAIM THAT PLAINTIFF WAS NOT ENTITLED
TO RELY ON THE REPRESENTATIONS

Rasekh argues that Plaintiff's recovery should be precluded because she should not have relied on the statements that he made and should have investigated his claims. When one is dealing with a licensed real estate agent though, even with the question of the confidential relationship aside, that person has the right to rest some confidence in the agent's assertions and his honesty and expertise. *Dugan v. Luther*, 615 P.2d 12 (Utah 1980). The rule of caveat emptor does not apply to those dealing with a licensed real estate agent. Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public. *Dugan v. Luther*, *Id.* That a person can rest confidence on the real estate agent is especially true when the purchaser does not have business experience, as is the case with Plaintiff. *Dugan v. Luther*, *Id.*

One has the right to rely on the representations of a fiduciary unless such reliance is irrational. *Field v. Century 21*, 63 Cal.App.4th 18, 73 Cal.Rptr.2d 784, 1998. It is well settled that a representee has a right to rely upon representations where a confidential or fiduciary relationship exists between the parties. *Hugh v. Kennedy*, 22 N.C. App. 509; 207 S.E.2d 301. In such cases a high degree of frankness and fair dealing is required, and

the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or afterward." 37 Am. Jur. 2d, Fraud and Deceit, § 254, p. 342. "It is a well settled principle of the law of fraud, applied particularly by courts of equitable jurisdiction, that it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a contemplated transaction with the other party to such relationship, and any concealment or failure to disclose such facts is a fraud." *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202. Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896. "Intent to deceive is not an essential element of such constructive fraud." *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697.

Rasekh by claiming that Plaintiff had no right to rely on what he said is really making the argument that she should not be able to recover because of her contributory negligence, but where a fiduciary relationship exists the buyer has the right to rely on the representations of the broker and contributory negligence is not a defense. *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (N.M.Ct.App.1976).

VIII THE CLAIM FOR BREACH OF FIDUCIARY DUTY

Plaintiff's claim of fiduciary duty rests on the Utah Administrative Code and upon the existence of a confidential relationship with Rasekh. One alleging a confidential relationship must demonstrate the placement of trust and reliance. *Hal Taylor Associates. v. Unionamerica, Inc.*, 657 P.2d 743 (Utah 1982). The court in *Wardly v. Welsh*, 962 P.2d 86, 346 Utah Adv. Rep. 44, footnote 5, 1998, attempted to determine if a confidential relationship existed between a real estate agent and his purported client under the test enunciated by the court in *Hal Taylor Associates. v. Unionamerica, Inc.* supra, but found none to exist since both parties were real estate agents and sophisticated. In the case now before the court there is clearly a disparity of expertise and experience as well as a very trusting relationship. Confidential and fiduciary relationships are in the law synonymous. *Fipps v. Stidham* 50 P. 2d 680, 174 Okl. 473, and therefore any discussion of either a fiduciary relationship or a confidential relationship involves exactly the same considerations.

Rasekh has not argued in his motion that a confidential relationship did not exist and Plaintiff made numerous claims in her depositions and affidavits that a confidential relationship did exist and therefore the question whether Rasekh owed Plaintiff a fiduciary duty, based upon a confidential relationship, is assumed for this motion and reserved as a question for the trier of fact

Even in the absence of a confidential relationship Rasekh owes Plaintiff a fiduciary duty. Even though Rasekh argues otherwise, a dual agent owes the buyer a fiduciary duty. The only fiduciary duties forfeited by Plaintiff would be those that would conflict with the duties that Rasekh owes to the seller. Utah Administrative Code R162-6.2.16.3 et. seq.

A fiduciary is held to the highest ethical standards of fairness and honest dealings. It is not necessary in establishing a case of fraud to show moral guilt or an actual intent to defraud or that there was a reliance on a misrepresentation or that the victim had the right to rely. *Ornamental & Structural Steel, Inc. v. BBG, Inc.* 509 P. 2d 1053 (Ariz. 1973). Constructive fraud can be found where there is a fiduciary relationship. Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt or intent of the party charged, the law declares to be fraudulent because of its tendency to deceive others, to violate public or private confidence or impair public interests. Dishonesty of purpose and intent to deceive are not elements of constructive fraud. *Rhodes v. Harvey Publications Inc.* 700 P. 2d 840, 145 Ariz. 142. A breach of a fiduciary duty constitutes a "constructive fraud".

In other words if Rasekh induced plaintiff to purchase the Hirschi in breach of his duty to her of the highest ethical standards of fairness and honest dealings, then he breached his fiduciary duty and is liable to her for the return of her down payment which she lost.

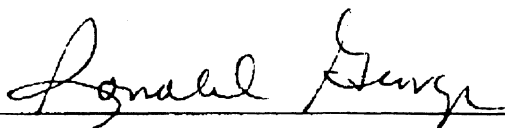
IX PLAINTIFF MADE EVERY EFFORT TO MITIGATE HER DAMAGES

Within days of purchasing the Hirschi Center Plaintiff realized that Mr. Rasekh got her into a deal that would not work. Once she was out of his control and able to think clearly she could see that she had no money and no experience to run a day care center. She could see that she may lose her down payment and she immediately began the effort to mitigate her damages. She never wanted to make a profit, but only to recoup her down payment. When the offer to purchase came from Mr. Roberts Plaintiff approached her brother, who she trusted and asked for his advice. He told her not to accept the offer because Mr. Roberts had no money of his own and the offer was contingent on raising the \$150,000.00 down payment by soliciting investors. Plaintiff's brother advised her that it would be fool hardy to tie up the property for 90 days for Mr. Roberts to attempt to raise money. He advised her to hold Mr. Rasekh to his promise to sell or buy the property. (See Affidavit of David Weston on file herein). The obvious proof of the lack of the bone fides of Mr. Roberts offer was his failure to pay one penny toward the lease obligation that he later signed for the Hirschi Center.

The burden of proving plaintiff has not mitigated its damages and that its award should be correspondingly reduced is on defendant. *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah App. 1990), *Lebaron v. Rebel Enterprises*, 823 P.2d 479 (Utah 1991). Plaintiff cannot be faulted for not accepting a frivolous offer. It is up to

Rasekh to prove that if Plaintiff had accepted the offer from Mr. Roberts he would have been able to come up with the down payment and made the contract payments thereafter. No proof has been made to this court that the offer was bone fide or that Mr. Roberts would have performed any better if that offer had been accepted than he did when his later offer to lease was accepted. If there was any evidence that Roberts was capable of performing on his offer Rasekh could have presented it to this court and did not.

Respectfully submitted this 28th day of April, 2000.



Ronald S. George

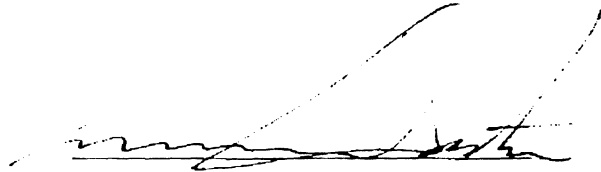
CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on the 28th Day of April, 2000, a true and correct copy of the foregoing Memorandum in Opposition to the Rasekh Motions for Summary Judgment and the Affidavits of Marie Bingham, Jennifer Smith and W. David Weston in Opposition to Summary Judgment and the Plaintiff's Addendum of Exhibits in Support of her Memorandums in Opposition to Defendant's Motions for Summary Judgment was mailed, postage prepaid, to the following:

Raymond D. Etcheverry, Esq.
Paul D. Veasy
PARSONS, BEHLE & LATIMER
210 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah, 84145-0898

Phillip W. Dyer
Kevin C. Timken
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Perrin R. Love
CAMPBELL, MAACK & SESSIONS
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215

A handwritten signature in black ink, appearing to be "Perrin R. Love", written over a horizontal line.

RONALD S. GEORGE, Esq. (Bar # 7721)
Attorney for Plaintiff
3804 Highland Drive # 8
Salt Lake City, Utah, 84106
Phone: (801) 272-5545

FILED
CLERK OF DISTRICT COURT
SALT LAKE COUNTY
03/07/28 PM 7:42
THOMAS J. HANSEN, DISTRICT CLERK
SALT LAKE COUNTY

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

MARIE BINGHAM,	)	Case No. 970901897cv
)	
)	
Plaintiff,)	
	)	AFFIDAVIT OF MARIE BINGHAM
	)	IN OPPOSITION TO DEFENDANTS
vs.	)	MICHAEL DRURY, VR UTAH AND
	)	KAL RASEKH'S MOTIONS FOR
	)	SUMMARY JUDGMENT
RANDAL ROBERTS, MICHAEL DRURY, VRUtah))	
Inc., a Utah Corporation, KAL RASEKH, an))	
individual, COLDWELL BANKER PREMIER))	
REALTY, INC., a Utah Corporation, HARVEY C.))	
HIRSCHI and LOIS R. HIRSCHI, individuals )	)	Judge: Timothy R. Hansen
)	
Defendants.)	

STATE OF UTAH)

ss:

Salt Lake County)

I, Marie Bingham, first being duly sworn deposes and if called upon to testify would testify as follows:

1. I am the plaintiff above named and I reside at 642 So. 10th West, Salt Lake City, Utah.
2. I have read my Affidavit in Opposition to Defendants Harvey C. and Lois R.

Hirschi's Motion for Summary Judgment, dated April 10, 2000 and affirm and attest to the truthfulness of my statements as found within paragraphs 1 through 32 therein and to avoid duplication incorporate the same herein as though fully set forth.

3. I obtained my Father's home in Arizona and in June of 1992 I received a call from Kal Rasekh ("Kal") asking if I intended to sell my home located at 2388 Cavalier Drive, Salt Lake City. Two weeks later, I and my younger children moved back into our home in Salt Lake. I then put up my Father's home for sale.

4. Upon my arrival in Salt Lake, Kal came to my home to again inquire about a listing. He informed us that he had only recently come to America from Egypt. We were intrigued that he was Egyptian and we became good friends.

5. During these summer months he played soccer and often stopped at our home in his soccer attire. From July through October of 1992 he visited our home frequently and spent long hours with our family often referring to me as his "American Mom" and our family as his "American Family."

6. Kal spoke often about his great success in real estate and encouraged me to permit him to investment my money in real estate. His success stories impressed me and I took him into my confidence and divulged to him all of my financial assets.

7. In or about October 1992, Kal told us his sister in Egypt was getting married. He then invited my daughter Brittany to come see Egypt and attend the wedding. We trusted Kal and I agreed to pay \$1,000 for her travel and he agreed to defray her expenses

by allowing her to stay with his parents.

8. During this period Kal learned that I was intending to sell my Father's home in Arizona for which I anticipated I would receive about \$20,000 from the sale. I had never invested and he kept telling me that he could manage my money and make me a great deal of money in the real estate market.

9. I came to trust him and divulged to him all of my finances, including the money market certificates I had purchased from my earnings over time and the equity amount in my home on Cavalier Drive. In late 1993, he then purchased on my behalf two small properties.

10. One property was the home I now reside in at 642 So. 10th West in Salt Lake City for which I paid \$2500 down and assumed an existing mortgage of \$24,500. .

11. The other property was a condominium known as the Incline Terrace for which I paid \$5,000 down and assumed the existing mortgage.

12. In the purchase of each of these properties I totally relied on Kal's judgment as my financial advisor. I signed the purchase documents where Kal told me to sign. I wholly trusted Kal and I did not independently evaluate either the purchased properties or the documents I signed in purchase.

13. About the same time as these property purchases, Kal came to me and asked me if he could marry my daughter Jennifer so he could stay in the United States. He said that if Jennifer would marry him for this purpose he would buy her a new car and soon

thereafter would have the marriage annulled. The proposal was refused.

14. Sometime In July of 1994, Kal contacted me and told me he had just left the Hirschi Center, a day care business, and that it was perfect for me. He said it was such a bargain that he exempted his father from the listing agreement so that I and his sister could purchase and operate the day care. He told me I would need to meet him at his office because it would have to be signed up fast before someone else offered to purchase.

15. When I met him at his office he told me the price was \$900,000. I was overwhelmed by the price he quoted and told him there was no way I could be involved. He told me there was no risk that he had thoroughly investigated the business and property and if I would go in business with his sister and operate the day care there was enough income to support the both of us. He told me there was a very nice home at the Center that was part of the purchase where my family could live.

16. He presented me with a document he had prepared which he said was necessary to tie up the property and I became very skeptical, but then he convinced me I had to sign the document and give him \$5,000 to hold the property until his sister could come. He told me we could then negotiate the actual price and figure out the business relationship between I and his sister. He told me that if we were not able to negotiate a better price that I would get my \$5,000 back.

17. I signed the document he prepared without reading it because I fully trusted

Kal and had confidence in him that he would protect me and was looking out for my best interests.

18. Later he came to my house and we talked about selling my home for me to come up with my share of the money to purchase the Hirschi Center. He told me his sister was coming from Egypt soon and he would start to look for a buyer for my house. During this time Kal presented me with several additional offers and counter offers which he was negotiating. Although I had some ideas I left all the negotiations up to Kal.

19. Shortly thereafter he told me his sister was not able to come. I then told him there was no possible way I could be involved because I knew nothing about operating a day care let alone any other kind of business.

20. But, he kept pressuring me to go ahead by assuring me that he had investigated the business and there was nothing that could go wrong. He told me that I would simply be walking into the Hirschi's shoes and that they had agreed to train me. He told me their daughter, who was the manager, would stay on as the manager for six months, that all of the trained staff would continue with me. He told me that all of the day to day lesson and activity programs for the children were fully developed and all I had to do was work hard and the Center would take care of all of my financial needs.

21. My older daughters became concerned and advised me not to become involved and so I inquired of my brother, David Weston as to his advice. He told me I was not qualified to operate the business and that I should not become involved until I

had determined that the business was profitable and would not require any money beyond the purchase price.

22. I told Kal what my brother had said and at this time he told me "Marie there is no risk, if it doesn't work out I will either buy it from you or sell it for you." Besides, he said, "why would you not trust my advice over that of your brother or daughters, are they as successful as I am, look at my success Marie, trust me there is no risk and I will not let you down."

23. He told me the Hirschi's had provided him with all of the financial information about the business and that the day care center and the wedding receptions held there had supported two families for many years. He arranged for me to talk to the Hirschi's about the profitability of their business. The Hirschi's then gave me some of their financial statements. I did not know how to read a financial statement so I ask my friend Stan to look at the financial statements and He told me the statements were just break even or showed a loss.

24. When I confronted both Kal and Mr. Hirschi, they both told me the financial statements were not accurate because the Hirschi' had commingled the living expenses of two families with the operating expenses of the business and that if I subtracted out the living expenses the statements would show a good profit.

25. Kal then introduced me to Mr. Tilbey, their accountant, to assure me that he would continue to do the Center's accounting after I took over. Mr. Tilbey told me he

could not extract the personal family living expenses from the operating expenses. I was again concerned because of what my brother David had told me. When I expressed my concerns to Kal he again persuaded me by telling me that he had looked at the financial statements and if the business could support two families it could assuredly support one.

26. At this time, he again reassured me, "Marie there is no risk, just trust me, if anything goes wrong I will get you out."

27. Kal then traveled to Egypt and while he was gone I went to the Hirschi Center on my own and came away with the feeling that something was just not right. When Kal returned I told him I could not go through with buying the Center. Kal got very upset and became very intimidating, again accused me of not trusting him and that I was harming the Hirschi's by backing out of the deal. He made me feel terrible and I told him that in the very beginning he had at least promised a lower price.

28. He then met with the Hirschi's alone and then later included me in their discussions. he told me the Hirschi's had agreed to reduce the price and to delay the monthly payments to assure that I would be successful. At this time I looked to Mrs. Hirschi, for reassurance and asked Lois "knowing my lack of experience do you think I could really handle this and could I really do this." Her response was a very affirmative "Yes."

29. Because of Kal' assurance that I would not be at risk and Mrs. Hirschi's assurance that notwithstanding I was inexperienced that I could learn and manage the

business, on October 17, 1994, I purchased the Hirschi Center. Prior to October of 1994, I had never worked in a day care center or operated a day care center.

30. At the time of closing on the Hirschi Center, Kal sold my home on Cavalier Drive to his friends. At closing he also presented me with a note for \$19,000 to his brokerage firm, which he had me sign of which I was not previously aware. In the sale of my home, as in the purchase of the Hirschi Center, I relied on Kal, I did not read the contracts nor would I have understood their legal implications and because of my trust in Kal I simply signed where Kal told me to sign.

31. The \$181,000, Kal had me pay at closing, which included the money from the sale of my home, the liquidation of all of my savings and \$300 I had to borrow from a friend, depleted all of my assets. I became totally dependent on the income being produced at the Center to provide not only for my family but to pay the \$5,600 monthly mortgage payments and to retire the \$19,000 note which had to be paid within six months.

32. Upon moving into the home at the Center and within days of the transfer of management I discovered that the operating permits were no longer valid and I could not continue without a significant investment of additional capital which I did not have. I learned that I could not continue to operate because I did not have a qualified manager. I also discovered to my dismay that the building itself had problems which would require money to repair. I also learned that without investing money in upgrading I could not

make money from wedding receptions. I also learned that the number of student enrollments had been inflated prior to my purchase beyond the capacity of the Center to accommodate. It also became evident that the income would not support the mortgage and indebtedness requirements let alone my living expenses.

33. These immediate problems, all of which required substantial amount of money to resolve, which I did not have, among other circumstances persuaded me that I could no longer trust Rasekh. A friend, I hired to advise me on meeting the code requirements for safety and to repair the smoke detectors and to install exit signs advised me to immediately sell the Hirschi Center so I could recover my savings.

34. My friend recommended I contact VRUtah Brokers for advice and I made contact with one of their agents named Michael Drury. To my surprise, Mr. Drury told me that he knew the Hirschi's and knew all about their day care business and had valued the real estate. I told Mr. Drury that I was interested only in recovering my down payment and that I must do so within three months before the first mortgage payment was due.

35. Mr. Drury told me he could easily arrange a sale for \$1,000,000, which would be necessary to recover my down payment, after commissions. He also assured me that he could sell the Center before the end of January 1995 because VRUtah Brokers was engaged in listing and selling business and had a long list of customers who were then available and qualified to purchase the Center.

36. He told me that He and VRUtah Brokers would select only their best qualified buyers and that their sale efforts would not disadvantage me in any way with respect to the ongoing operation of the day care business.

37. As a result of Mr. Drury's assurances that the Hirschi Center could be sold within three months I believed I would no have to deal with Kal or to rely on his promises since I no longer trusted him.

38. Nevertheless, I told Mr. Drury I could not commit the property for sale through him for a period longer than three months because if it was not sold within that time I would have to seek Kal's help because the purchase note payments were then due and I knew I would not have enough money to make the payments.

39. Mr. Drury then told me I would have to sign a one year listing otherwise he would not be able to convince his employer VRUtah Brokers to spend the kind of money he would need to sell the property within three months.

40. When I then told him I would not sign a listing beyond three months, he assured me that if for any reason the property and business were not sold by February 1, 1995 he would guarantee that the listing would be immediately terminated.

41. I trusted Mr. Drury's representations, in part because he also knew my son, and I was desperate in my need to recover the money I has spent in purchase. Mr. Drury assured me that his listing would net me at least the \$181,000 I had turned over to Kal in purchase.

42. I tried to monitor Mr. Drury's efforts but it became obvious to me that Mr. Drury was making no meaningful efforts to advertise the Center nor to introduced any of VRUtah Broker's existing customers as represented.

43. In desperation, I contacted Kal in February and told him he had misrepresented the Hirschi Center to me and I would not be able to make the monthly payments. I asked him to make good on his promise to me to either sell the property or buy me out.

44. Kal told me that he would do nothing so long as the property was listed with VRUtah . During the first of February I contacted Mr. Drury and asked that the listing be terminated. He made no commitments and finally in desperation, on February 22, 1995, I wrote a letter to Mr. Drury, terminating the listing agreement because Mr. Drury had done nothing to sell the Hirschi property as he had promised.

45. Mr. Drury did not respond to my letter but on March 2, 1995, Drury introduced me to Mr. Roberts who he represented wanted to buy the Center. In talking to Mr. Roberts I also learned that he was a neighbor to the Hirschi's. Mr. Roberts made an offer to me for \$650,000 which would only take over the mortgage payments and leave me with nothing, which offer I refused. Mr. Drury then arranged a meeting for me to meet with Mr. Roberts in his office to which I invited my brother David.

46. At this meeting Mr. Roberts presented his proposal to convert the Hirschi Center into a restaurant and disclosed his plans to bring in investors as necessary to make

the conversion. My brother David informed me that he did not believe Mr. Roberts was a qualified buyer and that he believed that Mr. Roberts offer was contingent on his raising money through a securities offering which was highly speculative.

47. Based on my brother David's advice, I retained an attorney, Delano S. Findlay, who then wrote a letter on my behalf to VRUtah to release the listing agreement within ten days. The response that I received was that Mr. Roberts would like to lease the property and would take over the purchase payments.

48. My purchase note payments were now falling into default, and having no business experience, in desperation I asked my brother David if he would act in my behalf. My brother helped me prepare a release agreement for VRUtah to sign, which I signed and sent to them.

49. On or about June 1, 1995, My brother David negotiated a lease of the property to Mr. Roberts which provided enough money to cure the defaults in the trust deed note payments then owing to the Hirschis.

50. Soon after signing the lease Mr Roberts told me he had no money to make any lease payments and I filed a notice of default.

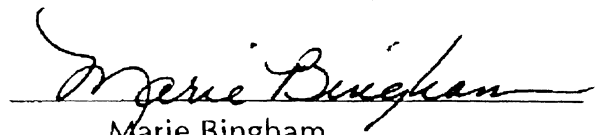
51. Finally, as a result of the efforts of my brother David, on June 22, 1995, VRUtah finally signed a release. On the advice of my brother and Mr. Findlay, I did not agree to the terms of their release and did not sign their release but relied on the release agreement I had signed and sent to them.

52. I then contacted Kal and told him VRUtah Brokers had released me and that he need to either buy the Hirschi Center or sell it immediately as I was losing my life's savings.

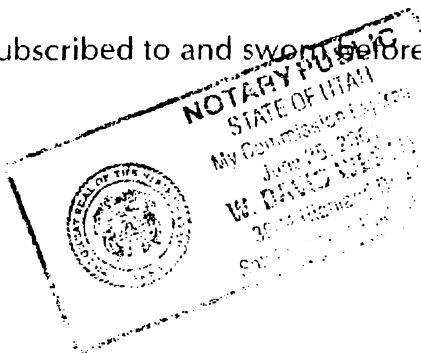
53. Kal did nothing for me and I lost my savings as a result of the Hirschi's foreclosure.

54. I have since learned that Kal thereafter sold the Hirschi Center property for the Hirschi's within a few months for \$750,000.

Further this Affiant sayeth nought.


Marie Bingham

Subscribed to and sworn before me a notary on this 27th day of April, 2000.





Notary Public residing in Salt Lake
County Utah.

RONALD S. GEORGE, Esq. (Bar # 7721)
Attorney for Plaintiff
3804 Highland Drive # 8
Salt Lake City, Utah, 84106
Phone: (801) 272-5545

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARIE BINGHAM,	)	Case No. 970901897cv
)	
)	
Plaintiff,	)	AFFIDAVIT OF JENNIFER WESTON
	)	SMITH IN OPPOSITION TO
vs.	)	DEFENDANT KAL RASEKH'S
	)	MOTION FOR SUMMARY
RANDAL ROBERTS, MICHAEL DRURY, VRUtah )	)	JUDGMENT
Inc., a Utah Corporation, KAL RASEKH, an)	
individual, COLDWELL BANKER PREMIER)	
REALTY, INC., a Utah Corporation, HARVEY C.)	
HIRSCHI and LOIS R. HIRSCHI, individuals)	
	)	Judge: Timothy R. Hansen
Defendants.)	

STATE OF UTAH)

ss:

Salt Lake County)

I, Jennifer Weston Bingham, first being duly sworn deposes and if called upon to testify would testify as follows:

1. I am 28 years of age and reside at 1930 Lucille Lane, Pleasant Hill California 94523. I am the fifth child and fourth daughter of Marie Bingham, the Plaintiff in the above entitled matter.

2. During the second week of June of 1992, I moved with my sister Brittany to our

family home in Salt lake located at 2388 Cavalier Drive. Prior thereto, we had lived in the home of our grandfather located in Phoenix, Arizona.

3. Within the week after my return to Salt lake, Kal Rasekh knocked at our door and inquired as to listing the home for sale. I gave Mr. Rasekh the phone number of my Mother who was still living in Phoenix, Arizona. About two weeks later my Mother and the rest of our family moved back to Salt Lake City.

4. I left Salt Lake for Arizona on or about August 14, 1992 to attend Mesa Community College.

5. After the return of my Mother and prior to my leaving for school, Kal Rasekh visited our home several times a week, there was never a week that went by that Kal Rasekh was not in our home.

6. In December of 1992, I returned to Salt Lake until mid October of 1994, so as to attend the University of Utah with my sister Brittany Bingham. I lived in Salt lake until October of 1994 when I returned to Arizona for employment as a flight attendant.

7. Upon my return to Salt Lake, Kal Rasekh was still just as much a part of our family as before I left. I observed that his pattern of visits to my Mother's home continued for the remainder of the time in which I was in Salt lake. He often referred to my Mother as his "American Mom."

8. I also observed that my Mother and Mr. Rasekh would engage in discussions about how she could invest her money. He was always trying to convince her to invest in

in Real Estate.

9. While living in Arizona and prior to my moving to Utah, I had developed a close relationship with my present husband, Brad Smith and we had often talked of the possibility of my marrying Brad. Mr. Rasekh was well aware of my relationship with Brad.

10. My financial circumstances were wanting and In December of 1992, Mr. Rasekh asked me to work for him and I spent several days working in his office as a telephone solicitor when I terminated the employment for lack of interest. At this time Mr. Rasekh told me that he had another "business deal" for me to consider. His deal was that if I would marry him so he could get a green card, so he would not have to leave the United States, he would buy me a new Saturn automobile. He said I would not have to live with him and that he would have the marriage soon annulled. I was disbelieving and thought the proposal incredulous. I told him I would never marry him under any circumstances.

11. At this time he also talked to my Mother about the proposal and attempted to sell the idea to her. This proposal as made to my Mother was not known to me nor approved by me.

12. In late 1993, My Mother, who is normally very conservative, told me she was investing in real estate with Kal and purchased a small home on Tenth West in Salt Lake and a condominium. My Mother in discussing these purchases with me would not listen

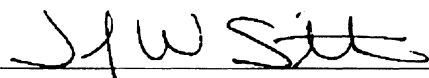
to my advice because she said to me Kal is a smart business man, he is intelligent and is very successful that he was making a lot of money. She told me Kal is my friend and he will not let me down.

13. In July of 1994, Kal told me that about the Hirschi Center and said that he wanted to have my Mother purchase the Hirschi Center along with his sister. He said it was such a great buy that he wanted to buy it for himself, but would give up the opportunity for my Mother and his Sister.

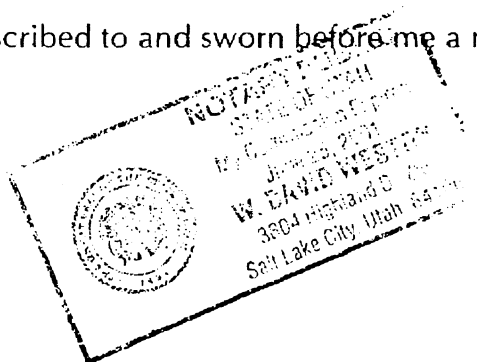
14. At this time I told Kal that my Mother should not purchase a business, because she had been a housewife all of her life and had no business experience.


15. He assured me that if anything where to happen he would sell it for her or buy it himself so that there was no risk for my Mother. He told me he wanted to help my Mother obtain a retirement and provide a better living than she was then receiving.

Further this Affiant sayeth nought.


Jennifer Weston Smith

Subscribed to and sworn before me a notary on this 27th day of April, 2000.




Notary Public residing in Salt Lake
County Utah.

RONALD S. GEORGE, Esq. (Bar # 7721)
Attorney for Plaintiff
3804 Highland Drive # 8
Salt Lake City, Utah, 84106
Phone: (801) 272-5545

FILED
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SALT LAKE CITY
UTAH

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

MARIE BINGHAM,

Plaintiff,

vs.

RANDAL ROBERTS, MICHAEL DRURY, VRUtah)
Inc., a Utah Corporation, KAL RASEKH, an)
individual, COLDWELL BANKER PREMIER)
REALTY, INC., a Utah Corporation, HARVEY C.)
HIRSCHI and LOIS R. HIRSCHI, individuals)

Defendants.)

Case No. 970901897cv

AFFIDAVIT OF DAVID WESTON
IN OPPOSITION TO DEFENDANTS
MICHAEL DRURY, VR UTAH AND
KAL RASEKH'S MOTIONS FOR
SUMMARY JUDGMENT

Judge: Timothy R. Hansen

STATE OF UTAH)

ss:

Salt Lake County)

I, W. David Weston, first being duly sworn deposes and if called upon to testify
would testify as follows:

1. I am 64 years of age and reside at 4388 Inverary Drive #10, Salt Lake City,
Utah.

2. I am the Plaintiff's older brother.

3. In the spring of 1994 my sister Marie, first told me about her friend Kal Rasekh.

At this time I was the trustee with respect to some property our Mother owned in Delta Utah for which I was seeking an appraisal. Marie told me her friend Mr. Rasekh was qualified to appraise the property and she would arrange for him to travel to Delta and evaluate the property for me. I spoke with Mr. Rasekh briefly by phone but, never personally met with him. Marie explained to me that she had a close confidential relationship with Mr. Rasekh and that she trusted his judgment.

4. Later in the summer of 1994, My Sister Marie Bingham came to me and told me that on Mr. Rasekh's advice she was considering moving into a home located at the Hirschi Center and taking over the day care center business. I told her I did not believe she was qualified to operate a day care business, but that in any event she should be most concerned about the profitability of the existing business and whether or not the business would require her to invest any money beyond the purchase price. I offered to assist her in the evaluation.

5. She told me that would not be necessary as Mr. Rasekh had already evaluated the profitability of the business for her. She told me she had known Mr. Rasekh for a couple of years, had invested money in real estate he found for her and that he was very

successful and qualified to make such an evaluation. She told me that Mr. Rasekh's had assured her that she could walk in and take over the business and that the Hirschi's had agreed to provide her the training she would need to manage the business.

6. She further assured me that she was only considering the purchase because Mr. Rasekh had assured her that if anything went wrong he would step in and cure the problem. She said that Kal has lots of money and he is my best friend and he will do anything for me.

7. She seemed so confident in her assurances that I did not discuss the Hirschi Center with my sister until sometime in October of 1994 when she invited me to come see her new home. At this time she informed me that she believed she had made a mistake and was attempting to sell the business.

8. Later in February of 1995, Marie again contacted me and said that she had listed the property with VR Utah for three months but that they had done nothing and would not release her from her listing and asked if I would help her draft a letter to obtain a release.

9. Sometime thereafter, Marie said she thought she had a buyer for the Center and would I attend a meeting in the offices of VRUtah and listen to a proposal being offered. At this meeting I met Mr. Michael Drury and a Mr. Roberts. Mr. Roberts then made a presentation to Marie setting forth his intent to raise money from investors to convert the

Hirschi Center into a Steak Restaurant and sought Marie's willingness to provide him time to accomplish his intent offering her a percentage of the profits. I inquired and Roberts told me he could not personally fund the purchase.

10. I advised Marie that I considered the offer extremely speculative since it relied on the results of a securities offering and entailed risks that she was not in a position to assume and she would be foolish to tie up the property with no evidence of an ability to perform. I advised her to hold Mr. Rasekh to his promise to purchase or sell the property.

11. I also advised her to seek help from her attorney, Delano S. Findlay, to obtain a release from VRUtah.

12. Shortly thereafter, to my surprise Mr. Roberts called me and wanted to discuss his proposal with me further. He inquired as to whether I might be willing to assist him in raising money for the Restaurant, which offer I declined. He informed me that he had a core of investors ready to invest, but that his principal investor was delaying his investment because of a tax problem. I suggested a lease purchase might give him time he needed depending on whether his present investors would support the lease payments.

13. My sister soon thereafter received an offer from Mr. Roberts to lease the property. She contacted me and stated that she was desperate because the Hirschi Center was in foreclosure and asked me if I would represent her in negotiating a lease with Mr.

Roberts to which I agreed.

14. Mr. Roberts subsequently signed a lease agreement which was dated June 1, 1995 to which he thereafter defaulted.

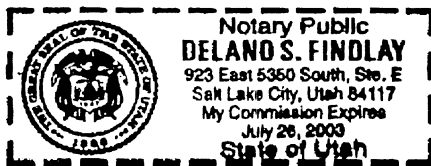
15. Marie then asked my opinion respecting a release she eventually obtained from VR Utah and I advised her not to sign the release.

Further this Affiant sayeth nought.



W. David Weston

Subscribed to and sworn before me a notary on this 27th day of April, 2000.



Notary Public residing in Salt Lake County
Utah.

RONALD S. GEORGE, Esq. (Bar # 7721)
Attorney for Plaintiff
3804 Highland Drive # 8
Salt Lake City, Utah, 84106
Phone: (801) 272-5545

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

MARIE BINGHAM,	)	Case No. 970901897cv
)	
)	
Plaintiff,	)	AFFIDAVIT OF MARIE BINGHAM
	)	IN OPPOSITION TO DEFENDANTS
vs.	)	HARVEY C. AND LOIS R.
	)	HIRSCHI'S MOTION FOR
RANDAL ROBERTS, MICHAEL DRURY, VRUtah )	)	SUMMARY JUDGMENT
Inc., a Utah Corporation, KAL RASEKH, an))	
individual, COLDWELL BANKER PREMIER))	
REALTY, INC., a Utah Corporation, HARVEY C.))	
HIRSCHI and LOIS R. HIRSCHI, individuals )	)	Judge: Timothy R. Hansen
)	
Defendants.)	

STATE OF UTAH)

ss:

Salt Lake County)

I, Marie Bingham, first being duly sworn deposes and says:

1. I am the plaintiff above named and I reside at 642 So. 10th West, Salt Lake City, Utah.

2. On or about October 3, 1994, I purchased from Harvey C. Hirschi and Lois R. Hirschi certain real property known as the Hirschi Center located at 9825 South 1300

East, Sandy Utah. I paid \$181,000 in a down payment and as part of the conditions of purchase I executed a first trust deed note in favor of the Hirschi's requiring a payment of \$5,265.48 per month to retire the note.

3. My husband left me in 1986 with nine children to support and I have since worked as a store clerk at "Somebody's Mother" and sold baskets at home parties to support my nine children. I have also occasionally tended children in my home for extra income.

4. Prior to my divorce any extra income I invested in Time Certificates of Deposit along with some money given to me by my Father through the sale of his home. As a result of my divorce I was awarded our home. These assets represented all of my capital. I cashed in the Time Certificates of Deposit and sold my home and used all of this capital and borrowed three hundred dollars to make the down payment on the Hirschi Center.

5. At the time I was introduced to the Hirschi Center by Mr. Kal Rasekh I had no business experience, had no experience with business financial statements, knew nothing about operating a day care center, had little or no experience in real estate transactions did not know the meaning of a business plan and knew nothing about projecting income and expenses as necessary to analyze profitability over time and have never dealt with a regulatory licensing agency other than to obtain a drivers license.

6. When I purchased the Hirschi center I believed I was purchasing a business that required that I also purchase the business property as part of the business.

7. In all my discussions with Mr. Rasekh and the Hirschi's there was never any idea that I was just buying real estate. The concept in my mind as provided by Mr. Rasekh was that the day care business being conducted at the Center would provide me with a living and a place to live.

8. Just prior to Mr. Rasekh's leaving for Egypt and prior to the closing I made an extended visit to the Center and came away with the feeling that the business was not worth \$900,000 and told Mr. Rasekh of my feelings. Soon thereafter Mr. Rasekh informed me that had been able to renegotiate the purchase price to \$800,000.

9. Soon after my purchase of the Center I learned that (a) the day care business income would not support the mortgage payments (b) the Center ceased to be licensed as a day care center upon my takeover and that to stay open I was being required to meet new qualification standards by October 31, 1994, (c) to stay in business I was required to have a licensed and certified director on my staff of employees, (d) by January 12, 1995 I was required to have operable fire detectors in the Center rewired directly into the fire station, (e) I was immediately required by the Health Department to replace the pea gravel on the play ground provided for the children and that I would be required to purchase a large commercial dishwasher costing several thousands of dollars.

10. I put the Center up for sale in an attempt to recover my down payment when I knew of the licensing requirements and there was no way the income would support my mortgage payments and provide for my family.

11. I never made any attempt after February 11, 1995 with regard to the items referenced in paragraph 9 above because I did not have sufficient money or any means to obtain the capital required to correct the licensing deficiencies. As a result I did not attempt to enroll new students.

12. I did not terminate students directly because I wanted to complete the existing children's contracts and I needed some income to meet my families living expenses. Since I had closed the Center, in June, July and August of 1995 I took a few day care children into my home.

13. I stopped operating any day care business in September of 1995.

14. In July, 1994 Kal Rasekh and the Hirschi's informed me that they had a low average student enrollment at the Center with which the Hirschi's were comfortable but would increase the enrollment so as to increase the business income prior to my taking over the business.

15. Just after my assuming management of the day care business, I expressed the opinion to Marleen Hirschi that we had too many students for the facility. Marleen Hirschi told me that they had previously learned that this number of students was very difficult to manage and cost them more to manage the facility do to the extra staff requirements.

16. I trusted the Hirschi's because I learned that Mr. Hirschi was the Stake Patriarch and their son was the present Bishop of my soon to be new Ward.

17. I never considered obtaining an inspection of the Hirschi Center Property prior to my purchase because I was unfamiliar with the requirement or necessity of doing so and I trusted and relied upon the representations of the Hirschis.

18. Prior to the closing Mr. Hirschi represented to my son Daryl and myself that the roof on the Center had recently been replaced.

19. Mr Hirschi provided me with some financial statement for the period 1984 through 1994 regarding their business not long after our first meeting. It was obvious even to my untrained eye that the bottom line did not show a profit and in most cases showed a loss.

20. When I inquired as to the financial statements poor showing I was told by the Hirschi's that the statements were not accurate and the business was profitable. They told me they had expensed the costs of living of two families into the statements and these family costs were not really expenses attributable to the business. I was told that these expenses caused the business profitability to be understated.

21. I was asked to meet with the Hirschi's accountant to see if he would continue as my accountant. When I met with him I asked him about the financial statements and he told me he was unable to segregate out the so-called family expenses from the business expenses.

22. When I next met with the Hirschi's in Mr. Hirschi's office I was concerned about the financial statements and specifically asked Lois Hirschi "do you really think I

can take over this business and make a profit” and Lois Hirschi said “Yes”! Because I knew that Lois Hirschi had actually managed the day care business and supervised the books I immediately felt more at ease and relied on her representation.

23. At closing, I went ahead with the deal, in part, because of my reliance on my discussions with Lois Hirschi, who confirmed what Mr. Rasekh had told me, that I could step in and take over and the business would support me and my family.

24. Prior to closing I was not aware that the dishwasher was very old or that the licensing requirements would not permit the existing dishwasher and I did not know to ask.

25. As a new licensing requirement I was required to purchase and install a larger commercial dishwasher costing several thousands of dollars which amount I simply did not have since I had paid all of my capital to the Hirschis at closing and had no more money nor did I know of any means to obtain more money.

26. Right after I took over the Center the Sandy City Fire Department ordered me to immediately cease business. I was petrified and went to the Mayor of Sandy City who agreed to grant me a few weeks to obtain estimates and to hire a contractor to repair the smoke detectors and connect them to the fire department and install exit lights.

27. Almost immediately the other regulatory agencies told me that the license held by the Hirschi's was void and that I must comply with their regulations in order to obtain my license. These agencies agreed to give me a limited amount of time to correct

the licensing deficiencies so I could re-license.

28. As a result of the Sandy City Fire Department inspection I learned that not one smoke detector was operable and there were no emergency exit lights.

29. I hired an employee of "Online Securities", with whom I was acquainted, to repair the smoke detectors that were repairable and he also installed emergency exit lights at each outside door. I was unable to install new smoke detectors nor able to connect the smoke detectors to the fire station as required because I did not have any money.

30. I learned from the Hirschi's that when I took over I would have to obtain a new license. Lois Hirschi told me that I could just duplicate their forms for licensing because they had only recently renewed their license and told me they had met all the licensing and safety requirements. Believing that the Hirschi's had qualified for licenses for many years it never entered my mind that I would be expected to meet new and expensive requirements which were different than the Hirschi's requirements.

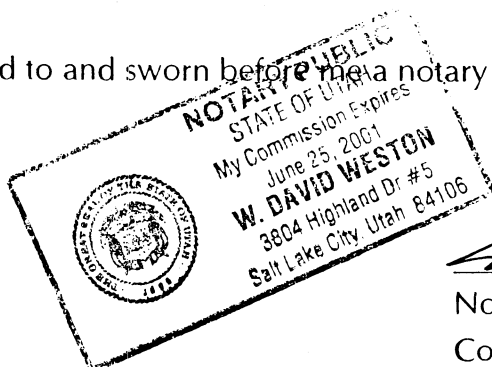
31. It simply never occurred to me to ask the Hirschi's to pay the cost to repair the roof and pipe leaks, to fix the smoke detectors and to install emergency exit lights or to install a new dishwasher and the Hirschi's never offered to either repair or replace the same or to reimburse me for my expenses.

32. I was simply too unknowledgeable at the time to know what avenues were available to me to correct what I could see was a bad situation, selling the property to recover my down payment seemed to me at the time to be my only recourse.

Further this Affiant sayeth nought.

Marie Bingham
Marie Bingham

Subscribed to and sworn before me a notary on this 10th day of April, 2000.



W. David Weston
Notary Public residing in Salt Lake
County Utah.

RAYMOND D. ETCHEVERRY (1010)
PAUL D. VEASY (3964)
PARSONS BEHLE & LATIMER
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Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

* * * * *

MARIE BINGHAM,

Plaintiff,

vs.

RANDAL ROBERTS, MICHAEL DRURY,
VR Utah, Inc., a Utah corporation, KAL
RASEKH, an individual, COLDWELL
BANKER PREMIER REALTY, INC., a Utah
corporation, HARVEY C. HIRSCHI and LOIS
R. HIRSCHI, individuals.,

Defendants.

**DEFENDANT KAL RASEKH'S
ANSWERS TO PLAINTIFF'S
INTERROGATORIES TO KAL
RASEKH SECOND SET**

Case No. 970901897CV

Judge Timothy R. Hanson

* * * * *

Defendant Kal Rasekh ("Rasekh"), through his counsel of record, hereby answers under oath the following second set of interrogatories submitted by plaintiff Marie Bingham.

GENERAL OBJECTIONS

1. Rasekh objects to plaintiff's discovery to the extent it calls for answers which are privileged, including, but not limited to, documents and other items of information prepared in anticipation of litigation or for trial or requests for information or documents which fall within the attorney-client privilege, the work-product doctrine or interrogatories that are vague, overbroad and unduly burdensome.

2. Rasekh objects to answering discovery based on information which has been made available to plaintiff during this lawsuit or which it has obtained by reviewing the records of third parties.

3. Each of the general objections set forth herein shall be deemed to have been made with respect to each specific interrogatory unless otherwise indicated.

4. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by Rasekh to plaintiff's discovery, the answers to follow are given based upon a review of matters to date. Rasekh reserves the right to supplement his answers if and when additional information is obtained.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 44: Concerning an entity known as Property Investment Group, L.L.C., state the following:

- a. The date it was formed.
- b. The purpose for its formation.

- c. The names addresses and telephone numbers of all the original members.
- d. The names, addresses and telephone numbers of all of the original managers or any other officers. Please identify each name listed with their title.
- e. The names, addresses and telephone numbers, with the date they became a member, manager or officer of any such subsequent members, managers or officers from the initial formation until the present date. Please identify each name listed with their title.
- f. The name of the person, date, of contribution and the amount of their initial capital contribution to Property Investment Group, L.L.C.
- g. The name of the person, date, of contribution and the amount of any additional capital contribution to Property Investment Group, L.L.C.
- h. The date purchased and description of any real estate purchased by Property Investment Group, L.L.C.
- j. The date the property located at 9825 S. 1300 E., Sandy, Utah, was purchased and thereafter the date, amount paid and the name of the buyer of any portion of said property that has subsequently been sold. Also the date and terms of the lease of any portion of said property that has been leased. Also the date, name of lender and amount borrowed on said property.
- k. Concerning the property located at 9825 S. 1300 E., Sandy, Utah, state the amount and date of each payment made to the Harvey or Lois Hirschi.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit. Without waiving this specific objection, Mr. Rasekh answers as follows:

a. Unknown.

b. After Ms. Bingham lost her interest in the Hirschi Center, three individuals named Nancy Adair, Raed Salem and Nivin Abu Zeid agreed to purchase the Hirschi Center. They subsequently formed Property Investment Group, L.L.C. Nancy Adair, Raed Salem are in Salt Lake City, Utah. Their specific addresses and telephone numbers are unknown. Nivin Abu Zeid resides in Egypt.

d. Unknown.

e. Unknown.

f. Unknown.

g. Unknown, except that Mr. Rasekh assisted with the refinancing of Property Investment Group, L.L.C. by allowing his credit to obtain this refinancing.

h. Mr. Rasekh believes the Hirschi Center was purchased by Property Investment Group, L.L.C. approximately three to four years ago. The exact date is unknown.

j. The purchasers of the Hirschi Center were the three individuals, Nancy Adair, Raed Salem and Nivin Abu Zeid. The remaining information is not known.

k. Unknown.

INTERROGATORY NO. 45: Concerning any individual by the name of Raed R. Salem, please state the following:

a. His present address and telephone number.

b. Your familial relationship to him, if any.

c. His relationship to Property Investment Group L.L.C. from its formation to the present, including his status as a member, manager or officer. Include the date of each change in status.

d. The amount, and date of any capital contribution to Property Investment Group L.L.C.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit. Without waiving this specific objection, Mr. Rasekh answers as follows:

a. 2301 North in the American Towers Building, his telephone number is 526-1111.

b. None.

c. See Answer to Interrogatory No. 44. Otherwise unknown.

d. Unknown.

INTERROGATORY NO. 46: Concerning an individual by the name of Nivin Mamdou Abou Zib, please state the following:

a. Her present address and telephone number.

b. Your familial relationship to her, if any.

c. Her relationship to Property Investment Group L.L.C. from its formation to the present, including her status as a member, manager or officer. Include the date of each change in status.

d. The amount, and date of any capital contributions to Property Investment Group L.L.C.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit. Without waiving this specific objection, Mr. Rasekh answers as follows:

- a. Egypt.
- b. Sister-in-law.
- c. See Answer to Interrogatory No. 44. Otherwise unknown.
- d. Unknown.

INTERROGATORY NO. 47: Concerning an individual by the name of Nancy Adair, please state the following:

- a. Her present address and telephone number.
- b. Your familial relationship to her, if any, including whether or not you have ever been married to her and if so such dates.
- c. Her relationship to Property Investment Group L.L.C. from its formation to the present, including her status as a member, manager or officer. Include the date of each change in status.
- d. The amount, and date of any capital contributions to Property Investment Group L.L.C.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit. Without waiving this specific objection, Mr. Rasekh answers as follows:

- a. Unknown.
- b. No relationship.

- c. See Answer to Interrogatory No. 44. Otherwise unknown.
- d. Unknown.

INTERROGATORY NO. 48: Concerning your relationship to Property Investment Group L.L.C. please state the following:

- a. Your relationship to Property Investment Group L.L.C. from its formation to the present, including your status as a member, manager or officer. Include the date of each change in status.
- d. The amount, and date of any capital contributions.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit. Without waiving this specific objection, Mr. Rasekh answers as follows:

- a. Mr. Rasekh had no relationship with Property Investment Group, L.L.C. when it was formed. When Property Investment Group, L.L.C. was seeking to refinance the Hirschi Center, Mr. Rasekh assisted with the refinancing. He is presently not a member of record for the limited liability company.
- b. The capital contribution, if any, by Mr. Rasekh was enabling Property Investment Group, L.L.C. to refinance the property.


INTERROGATORY NO. 49: If you have married anyone within the last 5 years state the date of the marriage, the name address and telephone number of the spouse and if subsequently divorced the date of the divorce.

ANSWER: Objection. This interrogatory is not relevant to the subject matter of this lawsuit nor would it lead to admissible evidence.

INTERROGATORY NO. 50: If you have insurance that would provide coverage to you for any of the acts or causes of action complained of herein, state the name of the carrier and the amount of the coverage available.

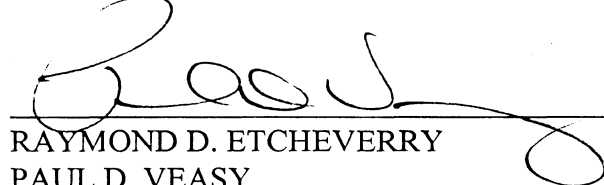
ANSWER: None.

DATED this 9 day of July, 1999.



Kal Rasekh

PARSONS BEHLE & LATIMER



RAYMOND D. ETCHEVERRY
PAUL D. VEASY
Attorneys for Defendants Coldwell Banker Premier
Realty and Kal Rasekh

VERIFICATION

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Kal Rasekh, being first duly sworn, says that he has read the foregoing and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes the same to be true and correct.

DATED this 9 day of July, 1999.


Kal Rasekh

SUBSCRIBED and SWORN to before me this 9 day of July, 1999.

re me this 9 day of July, 1999.

Nelson Wood
NOTARY PUBLIC

