

2012

Aaron Clark, Plaintiff/Appellant, v. Alpine Marketing, Inc., a Utah Corporation, Andrew M. Friedman, an Individual, Defendants/Appellees, and Jill Johnson, Extreme Holding LLC, Dba Prudential Utah Real Estate, Defendants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AARON CLARK,

Plaintiff/Appellant,

v.

ALPINE MARKETING, INC., a Utah
corporation, ANDREW M. FRIEDMAN,
an individual, Defendants/Appellees

-and-

JILL JOHNSON, EXTREME HOLDING
LLC, dba PRUDENTIAL UTAH REAL
ESTATE,

Defendants.

Trial Court Case No.: 060919234

Appellate Case No.: 20110234

BRIEF OF APPELLANTS

Appeal from the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable Denise Lindberg

Sean A. Monson
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Drive, Suite 500
Salt Lake City, UT 84121
Attorneys for Appellees

Keith W. Meade
COHNE, RAPPAPORT & SEGAL, P.C.
257 East 200 South, Suite 700
Salt Lake City, UT 84111
*Attorneys for Jill Johnson and Extreme
Holdings, LLC*

Jeffery J. Owens, #10973
Jesse A. Frederick, #12514
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
Attorneys for Aaron Clark

Oral Argument and Published Decision Requested

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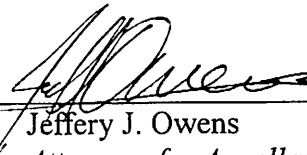
UTAH COURT OF APPEALS

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

Jeffery J. Owens, attorney of record for Appellant in the above-referenced matter hereby certifies that the Brief of Appellant filed herein complies with Rules 24, 26, and 27 of the Utah Rules of Appellate Procedure. The Brief of Appellants contains 13,942 words, exclusive of Table of Contents, Table of Authorities, and addenda.

DATED this 28 day of March, 2012.

STRONG & HANNI

By: 
Jeffery J. Owens
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2012, a true and correct copy of the foregoing **CERTIFICATE OF COMPLIANCE** was served by the method indicated below, to the following:

Sean A. Monson
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Drive, Suite 500
Salt Lake City, UT 84121

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Keith W. Meade
COHNE, RAPPAPORT & SEGAL, P.C.
257 East 200 South, Suite 700
Salt Lake City, UT 84111

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
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COHNE, RAPPAPORT & SEGAL, P.C.
257 East 200 South, Suite 700
Salt Lake City, UT 84111
*Attorneys for Jill Johnson and Extreme
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Jeffery J. Owens, #10973
Jesse A. Frederick, #12514
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
Attorneys for Aaron Clark

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	v
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW.....	1
STATEMENT OF CASE	4
Nature of the Case.	4
Course of Proceedings.	11
Disposition in the Third Judicial District Court.	13
Statement of Facts.	13
SUMMARY OF ARGUMENT.....	20
ARGUMENT.....	21
I. THE TRIAL COURT ERRED BY DENYING.....	21
APPELLANT’S MOTION TO CONFORM THE PLEADINGS TO THE EVIDENCE PURSUANT TO UTAH R. CIV. P. 15 (B) & 54(C)	
II. THE TRIAL COURT ERRED BY FAILING TO FIND.....	32
THAT APPELLEES REPUDIATED THE SECOND REAL ESTATE PURCHASE CONTRACT WHEN APPELLEES REFUSED TO CLOSE WITHOUT CHANGING MATERIAL TERMS OF THE CONTRACT	
III. THE TRIAL COURT ERRED BY REFUSING TO.....	35
AWARD ATTORNEYS’ FEES TO APPELLANT	
IV. THE TRIAL COURT ERRED BY REFUSING TO.....	40
GRANT RESCISSION OF THE SALE OF THE HOME	
V. THE TRIAL COURT’S AMOUNT OF PUNITIVE	42
DAMAGES WAS ERROR	

VI.	THE TRIAL COURT’S DENIAL OF APPELLANT’S.....	49
	RULE 59 MOTION TO ALTER OR AMEND THE	
	JUDGMENT WAS ERROR.	
	CONCLUSION.....	50
	ADDENDA.....	51

TABLE OF AUTHORITIES

CASES

<i>Alexander v. Meduna</i> , 47 P.3d 206 (Wyo. 2000);	44
<i>Anderson v. Doms</i> , 2003 UT App 241, 75 P.3d 925;	3,40
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559, 134 L.Ed 2d 809 (1996);	45
<i>Campbell v. State Farm Mut. Auto. Ins. Co.</i> , 2001 UT 89, 65 P.3d 1134 (Utah 2001);	45,46,47
<i>City of Grantsville v. Redevelopment Agency of Tooele City</i> , 2010 UT 38, 233 P.3d 461;	30
<i>Cobabe v. Stanger</i> , 844 P.2d 298 (Utah 1992);	31,34
<i>Colman v. Colman</i> , 743 P.2d 782 (Utah App. 1987);	27
<i>Crookston v. Fire Ins. Esch.</i> , 860 P.2d 937, 938 (Utah 1993).	4,43,44,46,47,48,49
<i>DeBry & Hilton Travel Servs. v. Capitol Int'l Airways</i> , 583 P.2d 1181;	36,39
<i>Dejavue , Inc. v. United States Energy Corp.</i> , 1999 UT App 355, 993 P.2d 222;	37,38
<i>Diversified Holdings, L.C. v. Turner</i> , 2002 UT 129, 63 P.3d 686 (Utah 2002);	43,44,48
<i>Draper v. Walker</i> , 244 P.2d 360 (Utah 1952);	23
<i>Dugan v. Jones</i> , 615 P.2d 1239 (Utah 1980) (<i>Dugan I</i>);	40,49
<i>Dugan v. Jones</i> , 724 P.2d 955 (Utah 1986) (<i>Dugan II</i>);	40
<i>Durant v. Independent Sch. Dist. No. 16</i> , 990 F.2d 560 (10 th Cir. 1993);	37
<i>Fibro Trust, Inc. v. Brahman Financial, Inc.</i> , 974 P.2d 288 (Utah 1999);	1,21,25
<i>First Sec. Bank v. Colonial Ford, Inc.</i> , 597 P.2d 859 (Utah 1979);	29
<i>General Inc. Co. of America v. Carnicero Dynasty Corp.</i> , 545 P.2d 502 (Utah 1976);	25
<i>Gudmundson v. Del Ozone</i> , 2010 UT 33 ¶40, 232 P.3d 1059;	30
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983);	37
<i>Hughes v. Cafferty</i> , 2004 UT 22, 89 P.3d 148;	38

<i>Hurwitz v. David K. Richards Co.</i> , 436 P.2d 794, (Utah 1968).	31,32,34,35,40,42
<i>Jane L. v. Bangerter</i> , 61 F.3d 1505 (10 th Cir. 1996);.	37
<i>John Holmes Constr. v. R.A. McKell Excavating</i> , 2005 UT 83 (Utah 2006);.	2,35
<i>Ong Int'l, Inc. (U.S.A.) v. 11th Ave. Corp.</i> , 850 P.2d 447 (Utah 1993);.	40
<i>Scott v. Majors</i> , 1999 UT App 139, 980 P.2d 214;.	2,24,33,34
<i>Smith v. Fairfax Realty, Inc.</i> , 2003 UT 41, 82 P.3d 1064;.	4
<i>Stewart v. Utah Pub. Serv. Comm'n</i> , 885 P.2d 759 (Utah 1994);.	39
<i>Truong v. Holmes</i> , No. 20080385-CA, 2009 Utah App. LEXIS 250 (Utah Ct. App. July 30, 2009) (unpublished opinion);.	35,37
<i>Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.</i> , 795 P.2d 658 (Utah 1990);.	23

STATUTES

UTAH R. CIV. P. 15.	1,20,21,22,23,24,35
UTAH R. CIV.P. 54.	1,21,21
UTAH R. CIV P. 59.	4,11,12,21,41
UTAH CODE ANN. § 78A-4-103.	1

STATEMENT OF JURISDICTION

The Appellate Court has jurisdiction of this appeal pursuant to UTAH CODE ANN. § 78A-4-103.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

I. The Trial Court erred by denying Appellant's Motion to Conform the Pleadings to the Evidence Pursuant to UTAH R. CIV. P. 15(b) & 54(c).

The Trial Court erred when it denied Appellant's Motion to Conform the Pleadings to the Evidence. It refused to consider critical evidence that was presented at trial without objection that establishes alternative theories of recovery. By denying Appellant's Motion to Conform the Pleadings to the Evidence, the Court prevented Appellant from electing his remedy, including: rescission of the sale and recovery of attorneys' fees. The Trial Court made no findings with respect to Plaintiff's Motion to Conform the Pleadings to the Evidence at the end of Plaintiff's case-in-chief, and the Trial Court refused to hear argument regarding that issue.

Standard of Review

A district court's ruling on a Rule 15(b) Motion is reviewed for correctness. *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶8, 974 P.2d 288 (Utah 1999). Issue preserved at R. 1550, and R. 1890.

II. The Trial Court erred by failing to find that Appellees repudiated the Second REPC when Appellees refused to close without changing material terms of the contract.

By failing to find that Appellees repudiated the Second REPC when Appellee Friedman admitted that he would not have closed without adding a material term to the

already executed contract, the Trial Court erred because such a finding was clearly supported by the evidence introduced at trial. The Trial Court's error prevented Appellant from recovering damages for repudiation of the Second REPC. Specifically, Appellant was foreclosed from electing his remedy, including rescission, and recovering attorneys' fees as provided in the Second Real Estate Purchase Contract.

Standard of Review

An appellate court "give[s] the trial court's legal conclusions no deference and review[s] them for correctness." *Scott v. Majors*, 1999 UT App 139, ¶8, 980 P.2d 214. Issue preserved at R. 1550, and R. 1890.

III. The Trial Court erred by refusing to award attorneys' fees to Appellant.

The Trial Court erred by denying Appellant's request for attorneys' fees. Appellant was foreclosed from collecting attorneys' fees even though: attorneys' fees were available under the contract which was breached; the fraudulent nondisclosure claim was based upon a common core of facts with the breach of contract claims (thereby entitling Appellant to recover for attorney fees and costs expended in pursuing all claims); the Appellees engaged in fraud; the Appellees' conduct was so egregious that punitive damages were awarded against them; and the laws of equity demand such an award under the facts of this case.

Standard of Review

The award or denial of attorneys' fees is a question of law which is reviewed for correctness. *John Holmes Constr. v. R.A. McKell Excavating*, 2005 UT 83 (Utah 2006). Issue preserved at R. 1550, and R. 1890.

IV. The Trial Court erred by refusing to rescind the sale of the home.

The Trial Court erred by refusing to rescind the sale of the home. It is well-settled that in cases of repudiation, the non-breaching party is entitled to elect his remedy. One of the available remedies is rescission of the contract. By denying Appellant's request for rescission of the sale of the home, Appellant has been saddled with a materially defective home that was fraudulently sold to him and which was not what he bargained for. Allowing Appellees to take advantage of Appellant and walk away with a profit of more than \$162,000.00 was an abuse of discretion under the egregious circumstances of this case. Appellant should have been afforded the opportunity to elect his remedy based upon Appellees' repudiation of the contract. In addition, the sale should have been rescinded based on Appellees' fraud.

Standard of Review

"[R]escission is an equitable remedy, subject to an abuse of discretion standard of review." *Anderson v. Doms*, 2003 UT App 241, ¶22, 75 P.3d 925. Issue preserved at R. 1890.

V. The Trial Court's amount of punitive damages was error

The Trial Court's award of only \$15,000.00 in punitive damages was error when Appellees were allowed to retain a profit on the transaction of at least \$162,000.00 from

their fraudulent sale of the home. The established standard in Utah is a ratio of punitive damages to actual damages of approximately 3:1. However, in this case, an even higher amount is justifiable. Such an award does not in any way further the goals of deterrence and punishment.

Standard of Review

Utah appellate courts have “adopted a *de novo* standard for reviewing jury and trial court conclusions under the *Crookston* factors.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶31, 82 P.3d 1064 (citations omitted). Issue preserved at R. 1890.

VI. The Trial Court’s denial of Appellant’s Rule 59 Motion to Alter or Amend the Judgment was error.

The Trial Court erred in denying Appellant’s Rule 59 Motion to Alter or Amend the Judgment. Appellant identified several errors of law that should have been corrected by the Trial Court.

Standard of Review

Utah appellate courts review a denial of a Rule 59 Motion to Alter or Amend under an abuse of discretion standard. However, “if the trial court has made a determination of law that provides a premise for its denial of a new trial, such a legal decision is reviewed under a correctness standard.” *Crookston v. Fire Ins. Esch.*, 860 P.2d 937, 938 (Utah 1993). Issue preserved at R. 1890.

STATEMENT OF CASE

1. NATURE OF THE CASE AND SUMMARY OF FACTS

This appeal is from a final judgment of the Third District Court, Judge Denise P. Lindberg, finding in favor of Appellant and against Appellees Andrew M. Friedman (“Friedman”) and Alpine Marketing, Inc. (“Alpine”) for Appellant’s claims of fraud (fraudulent nondisclosure) and determining that piercing the corporate veil of Appellee Alpine was appropriate. The Court awarded Appellant \$31,208.70 in actual damages against Appellees. In addition, the Trial Court awarded punitive damages against Appellees in the amount of \$15,000.00. The Trial Court found that Appellant was unsuccessful on his claims for unjust enrichment and breach of contract as against Appellees. Jill Johnson (“Johnson”) and Extreme Holding, LLC d/b/a Prudential (“Prudential”), Defendants below, are not parties to the instant appeal.

In September of 2006, the then 27 year-old Appellant moved to Salt Lake City from Nashville, Tennessee. Appellant was interested in purchasing his first home and hired Extreme Holding, LLC d/b/a Prudential Utah Real Estate (“Prudential”) to assist him in finding and purchasing a home that would fit his needs. Prudential’s employee, Jill Johnson (“Johnson”) became Appellant’s real estate agent. With Johnson’s assistance, Appellant purchased a home owned by Appellees Alpine Marketing, Inc. (“Alpine”) and Andrew M. Friedman (“Friedman”) (collectively “Appellees”) for \$489,000.00. The home had been recently remodeled by Friedman, and (at the time) appeared to suit Appellant’s needs. Friedman told Appellant that the home had been extensively repaired and remodeled by Friedman. In fact, unbeknownst to Appellant,

Friedman was in the business of “flipping” homes. That is, Friedman bought homes that needed remodeling work, performed such work at minimal cost, and sold the homes for a profit. Friedman had flipped numerous homes prior to the one in question.

Appellant visually inspected the property several times before deciding to purchase it. In addition, Appellant hired a professional home inspector who did not discover any major defects after a reasonable inspection. Based upon the representations of Friedman, the results of his own inspections, and those of his professional home inspector, Appellant believed the home was in good condition.

On or about September 21, 2006, Appellant and Friedman entered into a Real Estate Purchase Contract (the “First REPC”) (R. 1615) (Addendum 1). Appellant and Friedman did not close on the First REPC because Appellant could not get the proper financing in time for closing. However, Appellant was still interested in purchasing the home and Friedman was still interested in selling it. Appellant, Friedman, and Johnson engaged in further discussions and renegotiated the sale of the home. On October 24, 2006, they drafted an entirely new Real Estate Purchase Contract (the “Second REPC”) (R. 1631) (Addendum 2) which contained several material changes from the First REPC. The Second REPC increased the purchase price by \$30,000.00, increased the earnest money deposit by \$8,000.00, and required that the earnest money deposit be non-refundable. In exchange for those concessions, Appellant understood that the Second REPC would not contain an “as-is” addendum. In addition, Section 14 of the Second REPC specifically stated that it was the entire contract between the parties and specifically “supersede[d] and replace[d] any and all prior negotiations, representations,

warranties, understandings or contracts between the parties.” The Second REPC was agreed to and executed by all parties that same day.

The closing for the Second REPC was set for October 26, 2006. Because Appellant was planning to travel to Tennessee to attend a wedding that day, he went to the closing early in the morning on October 26, 2006, and signed all of the documents. That morning, pursuant to the terms of the Second REPC, Appellant remitted the remaining balance of the purchase price to Friedman and completed his end of the sale resulting in full performance by Appellant. Appellant then immediately left for the airport. Friedman was scheduled to close late in the afternoon of October 26, 2006.

After Appellant had closed, but before Friedman closed, Friedman communicated with Johnson and unequivocally told her he would not close on the sale of the home unless an “as-is” addendum, among other things, was added to the REPC. During the afternoon of October 26, 2006 (after Appellant had already closed), Friedman faxed a back-dated¹ addendum to Johnson (with the date and time of Appellant’s signature line already completed) and instructed unequivocally that it must be signed or he would not close on the transaction. The addendum purported to specify that, among other things, the home was being sold “as-is.” Because Appellant was on an airplane to Tennessee, he was unreachable. Appellant was not aware of any such discussions and never agreed to add the provisions contained in the addendum, and in fact, had already closed and fully performed. Neither Friedman nor Johnson tried to communicate with Appellant about

¹ The addendum was back-dated to October 24, 2006, the date of the Second REPC.

Friedman's refusal to close on the Second REPC as it had been negotiated and agreed upon.

Once Johnson received the fax from Friedman on October 26, 2006 at 2:03 p.m., Johnson followed Friedman's instructions and affixed Appellant's initials on the backdated addendum without Appellant's knowledge or consent. Johnson faxed the completed document back to Friedman on October 26, 2006 at 3:40 p.m. for inclusion into the Second REPC. Appellant did not give Johnson permission to sign the addendum on his behalf and was unaware that she had done so at that time. Friedman closed on the sale after receipt of the addendum from Johnson, and the transaction was purportedly completed.

Still unaware of what had transpired on October 26, 2006, Appellant moved into the house and began to discover several serious and major latent defects which were not disclosed to him prior to the sale. Appellant discovered, among other things, the living room floor had been improperly and shoddily built over an existing indoor swimming pool, the roof leaked severely, the house contained serious mold problems, and there were serious electrical, heating ventilation and cooling ("HVAC") problems. In addition, Appellant learned that building permits had not been obtained or requested by Friedman, no inspections had been performed, and that there were serious building code violations and safety concerns relating directly to the remodel work which was performed by Friedman.

Since the time of closing, and because of Friedman's fraudulent conduct and Johnson's willingness to perpetuate Friedman's fraud, Appellant has been stuck with a

home that has serious and dangerous defects. Moreover, the house was not what Appellant bargained for. On the other side of the transaction, Appellees, through their fraudulent activity, have profited from the flipped home by at least \$162,000.00 from Appellant.²

Once Appellant discovered the various defects and what had transpired, he immediately contacted Appellees and demanded that they refund his money and take the home back. Appellees refused to rescind the sale or refund any of Appellant's money. Because of Appellees' refusals, Appellant's only recourse was to pursue legal action against Friedman and Alpine for their fraudulent conduct. Appellant alleged unjust enrichment, breach of contract, fraud, and sought to pierce the corporate veil. The breach of contract claim alleged that Appellees breached the contract by "including but not limited to," stating that the repairs/remodeling were performed in a professional and workmanlike manner and for failing to make seller disclosures. A five-day bench trial was held in the Third District Court before Judge Denise P. Lindberg on August 30, 2010 through September 2, 2010, and on September 7, 2010.

Prior to trial, in order to give notice to the court and all Defendants and to make sure his Pleadings were more precise, Appellant submitted a Rule 15(b) Motion for Conform the Pleadings to the Evidence obtained during discovery based upon deposition testimony obtained. During Friedman's deposition, he clearly admitted that he would not have closed on the purported sale if the "as-is" addendum was not included. Johnson confirmed Friedman's statement and believed that if the "as-is" addendum was not

² See R. 1795h at ¶ 84.

added, the sale would have fallen through. Friedman's statement was so positive, unequivocal, and believable that Johnson actually signed Appellant's signature on the back-dated "as-is" addendum, without Appellant's knowledge or consent, in order to ensure that Appellees would perform on their obligations under the Second REPC. Even though Appellant had already alleged a breach of that same contract, Appellant requested that the Court amend his breach of contract claim to include the alternative theory of breach of contract by anticipatory breach or repudiation, i.e., that Appellee breached the contract by unequivocally refusing to close absent some additional concessions not supported by consideration. The Trial Court considered the Motion merely as a standard Motion to Amend the Complaint pursuant to Rule 15(a), and denied it from the bench. Thereafter, the parties proceeded to trial.

During the trial, Appellant presented the same evidence obtained during Friedman's deposition, which evidence was admitted and received by the court without objection from Appellants. Friedman unequivocally admitted during trial, and Johnson confirmed, that he would not have closed on the sale absent the "as-is" addendum. Johnson confirmed that admission, and no parties objected to or otherwise challenged their admissions. Those admissions established grounds for an additional breach of contract claim for repudiation of the Second REPC. At the close of Appellant's case, Appellant again asked the Court to conform the pleadings to the evidence, this time which had been elicited in open court during trial without objection under Rule 15(b); however, the court denied the motion from the bench without argument, and without reference to the controlling rules of civil procedure.

Following trial, the Court awarded Appellant \$31,208.70 in actual damages against Appellees for fraudulent nondisclosure. In addition, the Trial Court awarded punitive damages against Appellees in the amount of \$15,000.00. In awarding punitive damages, the Trial Court commented on the egregiousness of Appellants' behavior, holding that "the construction of the floor over the pool was horrendous and indisputably not up to code"³ and that "[t]he pictures of the floor's construction taken from the space underneath the great room are the poorest example of construction this Court has observed in 12 years of trying cases."⁴ Thus, Appellant's total award was \$46,208.70 notwithstanding the Trial Court's express finding that Appellees' profited of at least \$162,000.00 from the transaction. The Trial Court found that Appellant was unsuccessful on his claims for unjust enrichment and breach of contract as against Appellees.

The Trial Court entered its Final Order on or about February 15, 2011. Following disposition, Appellant timely filed a post-trial Rule 59 Motion to Alter or Amend the Judgment with the Trial Court under the Utah Rules of Civil Procedure in order to exhaust all avenues prior to appeal. That Motion was filed on or about March 2, 2011. On June 10, 2011, Judge Lindberg denied that motion. Appellant also herein appeals from the Trial Court's denial of Appellant's Rule 59 Motion to Alter or Amend the Judgment.

³ R. 1795c at ¶66

⁴ R. 1795m at n. 17.

II. COURSE OF PROCEEDINGS

1. Plaintiff-Appellant Aaron Clark filed his original Complaint on December 4, 2006. (R. 1).
2. On January 10, 2007, Clark filed an Amended Complaint. (R. 43).
3. Appellees Alpine Marketing, Inc. and Andrew M. Friedman filed their Answer to the Amended Complaint on January 12, 2007. (R. 54)
4. Defendants Jill Johnson and Extreme Holdings, LLC filed their Answer to the Amended Complaint on January 18, 2007. (R. 67).
5. On August 13, 2010, prior to trial, Clark filed a Motion to Conform Pleadings to the Evidence on the basis of testimony given during depositions. (R. 1550, 1553).
6. On August 30, 2010, prior to the beginning of trial, the court denied Plaintiff's Motion to Conform Pleadings to the Evidence, treating it as a pre-trial motion to amend. (R. 2110, Transcript, Previously Recorded Proceedings, Bench Trial, Volume I of V, 4:14-5:2).
7. A five-day bench trial was held from August 30, 2010 through September 2, 2010, and on September 7, 2010. (R. 2110-2114).
8. At the close of Plaintiff's case in chief, Plaintiff again moved to conform the pleadings to the evidence actually presented at trial pursuant to Rule 15(b) of the Utah Rules of Civil Procedure. That motion was denied without argument. (R. 2113, Transcript, Previously Recorded Proceedings, Bench Trial, Volume IV of V, 78:5-79:7).

9. The Trial Court entered its Findings of Fact, Conclusions of Law and Order on November 18 2010. (R. 1759A).

10. The Trial Court entered its Final Order on or about February 15, 2011. (R. 1808).

11. Following the Final Order, Appellant timely filed a post-trial Rule 59 Motion to Alter or Amend the Judgment with the Trial Court pursuant to the Utah Rules of Civil Procedure on March 2, 2011. (R. 1890, 1817).

12. On June 10, 2011, the court denied the Rule 59 Motion to Alter or Amend the Judgment *in toto*. (R. 21).

III. DISPOSITION IN THIRD JUDICIAL DISTRICT COURT

Judge Denise Lindberg, Third Judicial District Court, Salt Lake County, State of Utah awarded judgment in favor of Plaintiff/Appellant and against Appellees, and awarded actual damages in the amount of \$31,208.70. In addition, the Trial Court awarded punitive damages against Appellees in the amount of \$15,000.00. Thus, Appellant's total award was \$46,208.70. The court denied Appellant's request for attorney fees.

IV. TRIAL COURT'S FINDINGS OF FACT

1. Aaron Clark ("Clark") moved to Salt Lake City, Utah from Nashville, Tennessee in September of 2006. At that time, Clark was 27 years old and had never owned or purchased any real estate.

2. Clark entered into an Exclusive Buyer-Broker Agreement and Agency Disclosure with Prudential and Jill Johnson ("Johnson").

3. Johnson showed Clark 12 to 15 homes and Clark became interested in a property located at 3325 East Antler Way ("Property").

4. During Clark's first visit to the Property he met Defendant Friedman. Friedman was in the business of purchasing, cosmetically updating, and selling homes (i.e., "flipping"). Friedman represented to Clark that he had done a lot of work on the Property and had "spent almost \$100,000 or more" on the remodel.

5. From 2002 to 2005, Halston Davis and his family occupied the Property. After the Davis family moved out, an intermediary buyer bought the Property with the intent to "flip" it. The intermediary buyer did no work on the Property and it sat vacant for almost a year. Friedman then purchased the Property and began to work on it.

6. The neighbors who saw the Property during the time it sat vacant testified that there was a substantial, visible mold infestation in the two basement bathrooms and in a laundry room, all of which shared a wall. There was also water damage to the ceilings of the upstairs master bedroom and the kitchen. Further, there was a non-functioning indoor swimming pool.

7. Friedman began to "pretty up" the Property without applying for or otherwise obtaining the required building permits. Friedman testified that he hired Donato DeGregorio to act as a general contractor. Friedman stated that he relied on DeGregorio's expertise and that DeGregorio was responsible for pulling the permits. The evidence presented at trial contradicted that testimony, and the Trial Court so held.

8. The Court found that Friedman was clearly acting as the general contractor and would have been the person responsible for securing the required permits and for overseeing the quality of the work.

9. During the course of the remodel, a furnace, new air conditioning, and new water heaters were installed on the Property. Friedman's crew removed and replaced the moldy bathroom vanities and shower surrounds and performed some electrical work. They applied stucco to the exterior of the home. A "great room" was constructed over the existing indoor swimming pool. When the remodel was complete there was no evidence that the pool had ever existed. The only access to the pool was through a two-foot hole that was located in the office closet underneath carpet, which was not discovered until after litigation commenced.

10. Despite the cosmetic changes and upgrades, the neighbors testified that they were concerned that Friedman had "cut corners." For example, one neighbor testified to seeing stones being applied to the pillars of the front of the house by Friedman by means of liquid nails instead of mortar. Several neighbors were concerned that the roof was not replaced and that Friedman was not building the floor over the indoor swimming pool in a safe manner. These neighbors testified that they voiced their concerns to Friedman; Friedman denied ever having such conversations.

11. Friedman's "cosmetic facelift" was completed by July 1, 2006. Shortly after completion Friedman had an open house. All of the neighbors agreed that the remodel of the Property was beautiful. Friedman then listed the Property for sale.

12. Johnson contacted Friedman regarding the Property. At no time throughout the negotiations and the subsequent transaction did Friedman disclose on the Multiple Listing Service⁵ or to Johnson or Clark that the floor of the great room had been constructed over an indoor swimming pool.

13. On about September 19, 2006, Johnson prepared and submitted a Real Estate Purchase Contract (the "First REPC") (R. 1615) (Addendum 1) to Friedman on Clark's behalf. The First REPC contained a number of addenda, including Addendum No. 4, which stipulated that the Property was to be sold "as-is" without warranty, and Addendum No. 5, which stated that the seller would not provide seller disclosures. The settlement deadline for the first REPC was October 19, 2006. Clark was unable to get financing prior to the closing date so the sale fell through. Despite that set back, Clark was still interested in purchasing the Property and Friedman was still interested in selling it to Clark.

14. A few days later, on or about October 23, 2006, Clark, Johnson, and Friedman met at Einstein Bagels on Fort Union Blvd. to renegotiate the purchase of the Property. At that meeting the parties agreed that Johnson would draft a new REPC (the "Second REPC") (R. 1631) (Addendum 2). The Second REPC was signed and fully executed by both Clark and Friedman the following day, on October 24, 2006.

⁵ The Multiple Listing Service (or "MLS") is a service which is available to licensed real estate agents and brokers which collects all known real-estate listings into a central database.

15. The Second REPC included only one addendum, which specified that Friedman was to contribute \$6,000 towards Clark's closing costs. At the time Clark and Friedman signed the Second REPC, it did not contain an "as-is" (or any other) addendum.

16. The Second REPC contained the following material changes from the First REPC: (a) a \$15,000 increase in the purchase price, from \$473,900 to \$489,000, (b) a doubling of the earnest money, from \$5,000 to \$10,000, and (c) making the earnest money nonrefundable. In addition, the as-is addendum that had been part of the First REPC was not included in the Second REPC.

17. The above-stated changes were substantive and involved material changes to the Second REPC. They made the Second REPC a very different contract than the First REPC. Additionally, there were a couple of other smaller changes that also belie Friedman's contention that all the parties intended the terms of the two REPCs to be identical.

18. Clark was able to finalize financing, so early in the morning of October 26, 2006, Clark and Johnson went to the First American Title Insurance office. Clark signed all the necessary documents to close the buyer's portion of the transaction. Immediately upon signing the settlement documents at the title company, Clark left for the airport to travel from Salt Lake City to Nashville to attend a wedding. Both Johnson and Friedman knew that Clark would be leaving town that morning.

19. Early in the afternoon of October 26, 2006, while Clark was airborne and unreachable, Friedman contacted Johnson unequivocally demanding that an "as-is" addendum be included as part of the Second REPC or he would not close on the Property.

Friedman then prepared an “as-is” addendum, backdated it to the day of the signing of the Second REPC, and sent it to Johnson. Johnson, without Clark’s knowledge or consent, signed the “as-is” addendum in Clark’s name.

20. Shortly after the sale, Clark learned about the existence of the indoor swimming pool from a neighbor. Clark immediately called Johnson and asked her about it, but Johnson knew nothing about a pool on the Property. It was during that call that Johnson informed Clark that she had signed his name to the backdated “as-is” addendum prepared by Friedman. Clark testified that he was disappointed with Johnson’s actions; he stated, however, that he did not think Johnson signed his name with malice or intent to deceive.

21. Clark’s experts decried the construction of the great room floor over the swimming pool as “tinker toy construction” and “an abomination.” Defendants’ experts charitably described the construction as “unconventional but not unsafe,” and emphasized the great room floor had not yet “failed.” The Court agreed with Clark’s experts on that point.

22. The pictures of the floor’s construction taken from the space underneath the great room are the poorest example of construction the Trial Court had observed in its 12 years of trying cases.

23. The construction of the great room floor supports clearly violated building code requirements; while they may not have yet “failed,” the use of untreated wood in the supporting structures, if left un-remedied, will eventually cause significant problems for Clark.

24. Friedman of course knew about the pool and determined to install a floor over it as a way of increasing the livable square footage of the Property, thereby increasing the value of the Property. When the construction was done, there was no way for any reasonable observer to have known that there was a pool underneath the great room. In fact, Clark's professional home inspector did not discover the existence of the pool.

25. Friedman was the person responsible for the remodeling done on the Property, yet he decided not to secure the required building permits. As a result, the construction of the floor over the pool was horrendous and indisputably not up to Code. Whether or not Friedman knew about the sub-par construction of the great room floor is immaterial; he is charged with the knowledge of his workers and with his own failure to supervise their work appropriately. The foregoing triggered a legal duty on Friedman's part to disclose the information known to him – something he chose not to do.

26. All the problems related to the building of the great room floor, (e.g., the improper supports for the joists, the improperly located and supported water and gas pipes, the improperly installed HVAC system duct runs under the floor, and the improper ventilation issues) were latent defects known to Friedman and not discoverable by a reasonably prudent buyer (or his home inspector) through the exercise of reasonable care. Moreover, the non-disclosed information was material. Clark wanted a house he could move into; he did not want a "fixer-upper." Knowledge of that defect alone would have affected Clark's decision whether or not to buy the Property, or in the alternative, would have affected Clark's decision as to how much to offer for the Property.

27. Friedman violated his duty to disclose known latent defects of the Property.
28. As a result of Friedman's intentional non-disclosure, Clark was damaged.
29. Friedman purchased the Property for \$221,000. The testimony at trial was that Friedman had spent approximately "\$100,000" to upgrade the property. Taking that amount at face value suggests that Friedman had approximately \$321,000 invested in the Property. Friedman sold the Property for \$489,000 (minus seller-paid closing costs of \$6,000), for an adjusted sale price of \$483,000. Subtracting \$321,000 from the adjusted sale price yields a rough profit estimate of \$162,000 to Friedman from the sale of the Property.
30. The Court awarded a total of \$31,208.70 in actual damages, and \$15,000 in punitive damages.

SUMMARY OF ARGUMENT

By denying Appellant's Motion to Conform the Pleadings to the Evidence, the Trial Court prevented Appellant from electing his remedy, including: rescission of the sale and attorneys' fees. The Trial Court made no findings with respect to Plaintiff's Motion to Conform the Pleadings to the Evidence at the end of Plaintiff's case-in-chief. In fact, the Trial Court refused to hear argument regarding that issue, and refused to refer to the applicable law on that subject. The Trial Court's denial of Appellant's Motion to Conform the Pleadings to the Evidence pursuant to Utah R. Civ. P. 15(b) and 54(c) was error, and should be reversed.

The Trial Court should have considered a claim for breach of contract based upon Appellant's repudiation of the Second REPC, thereby opening the door for Appellant to

elect his remedy of rescission. That was reversible error by the Trial Court, and should be reversed.

By denying Appellant's request for attorneys' fees, the Trial Court prevented Appellant from collecting attorneys' fees to which he was entitled. Attorney fees should have been awarded on the following grounds: (1) attorneys' fees were available under the Second REPC; (2) the fraud claim was based upon a common core of facts with the breach of contract claims, (3) Defendant engaged in fraud; and (3) the laws of equity demand such an award under the facts of this case. Such ruling was in error, and should be reversed.

Appellant has been saddled with a materially defective home that was fraudulently sold to him and which was not what he bargained for. Allowing Appellees to take advantage of Appellant and walk away with a profit of at least \$162,000.00, was an abuse of discretion under the egregious circumstances of this case. Appellees are in the business of flipping such homes. Such a ruling is inequitable and does not in any way further the goals of deterrence and punishment under the circumstances of this case. Such an award merely amounts to a business expense for Appellees. The Trial Court's award was in error, and should be reversed.

The Trial Court erred in denying Appellant's Rule 59 Motion to Alter or Amend the Judgment. Appellant identified several errors of law that should have been corrected by the Trial Court. The Trial Court's denial of Appellant's Rule 59 Motion to Alter or Amend the Judgment was reversible error, and should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S⁶ MOTION TO CONFORM THE PLEADINGS TO THE EVIDENCE PURSUANT TO UTAH R. CIV. P. 15(B) & 54(C).

The Trial Court erred by denying Clark's Motion to Conform the Pleadings to the Evidence. As a result, Clark was foreclosed electing his remedy, including rescission of the sale for Friedman's repudiation of the Second Real Estate Purchase Contract ("Second REPC"). In addition, Clark was foreclosed from recovering attorneys' fees as provided under the Second REPC, and from recovering attorneys' fees for Friedman's fraud which arose out of a common core of facts with the breach of contract claims.

A district court's determination on a Rule 15(b) Motion is reviewed for correctness. *Fibro Trust*, 1999 UT 13 at ¶8 (citation omitted). In this case, the Trial Court's determination on Clark's Rule 15(b) Motion to Conform the Pleadings to the Evidence was incorrect and should be reversed.

The Trial Court erred by refusing to consider two alternative theories of recovery which would have entitled Clark to rescission of the sale and attorney fees. While Clark did not directly include a claim for anticipatory repudiation in his original Complaint or Amended Complaint,⁷ that was because he was not privy to all of the facts that supported such a theory of recovery at that time. Clark did not include a claim for rescission of the sale on the basis of failure of the contract due to a lack of mutual consent to all material

⁶ Hereinafter, Appellant will be referred to as "Clark," and Appellees will be referred to collectively as "Friedman."

⁷ Though he did allege breach of contract generally, using the language "Defendants breached their contractual duties to plaintiff including, but not limited to:..." (R. 48, at ¶ 33). ¶

terms for the same reasons. However, the unobjected-to evidence ultimately presented at trial established the necessary elements for both of those theories.

The Utah Rules of Civil Procedure provide a mechanism whereby pleadings may be amended at any time, even after trial to conform to the evidence **actually presented at trial**. See Utah R. Civ. P. 15(b) (emphasis added). The specific provision reads as follows:

(b) *Amendments to conform to the evidence.* – When issues not raised by the pleading are tried by express or implied consent of the parties, they **shall** be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. . .

Utah R. Civ. P. 15(b) (emphasis added).

a. The Purpose of Rule 15(b)

The purpose and rationale for this rule is clear. Its purpose is to ensure that the facts which actually emerge at trial are the ones upon which the case is decided, rather than deciding the case on archaic rules of pleading. “The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried.” *General Ins. Co. of America v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976). “Rule 15(b) enables the case to be tried on its merits. . . [I]n effect pleadings are automatically amended to conform to proof on issues tried by express or

implied consent. The sporting element in litigation is eliminated.” *Draper v. Walker*, 244 P.2d 360, 363-364 (Utah 1952) (internal citations omitted).

b. Application of Rule 15(b) is Mandatory.

The Utah Supreme Court has said that application of Rule 15(b) is not permissive; rather, it is mandatory, and the Trial Court has no discretion to deny such an amendment. This is the key to the error committed by the Trial Court. “Significantly the first part of Rule 15(b) is not permissive in terms, for it provides that issues tried by express or implied consent *shall* be treated as if raised in the pleadings. Even failure to amend does not affect the result of these issues.” *General Ins. Co. of America*, 545 P.2d at 506 (emphasis in original); *see also*, *Zions First Nat’l Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 663 (Utah 1990). The Utah Supreme Court has further held that “[o]ur rules of civil procedure *require* that the pleadings be conformed to the evidence presented at trial when no objection is made to the introduction of such evidence.” *General Ins. Co. of America*, 545 P.2d at 506 (emphasis in original).

c. Proper Application of the Rule.

A proper analysis of Rule 15(b) requires a two step approach. The first step is to determine whether the issues were tried by express or implied consent of the parties. “[Rule 15(b)] has two separate parts. The first part provides that if issues are tried with the express or implied consent of the parties” *General Ins. Co. of America*, 545 P.2d at 505. If the issue is found to have been tried by express or implied consent, the court must treat those issues and facts “in all respects as if they had been raised in the pleadings.” Utah R. Civ. P. 15(b).

The second part of Rule 15(b), which gives the court discretion to deny the Rule 15(b) motion only comes into play where the party seeking to exclude the evidence objects at trial. *Id.* If, and only if, a party objects to the introduction of the evidence at trial may the Trial Court exercise discretion to deny the motion. In this case, the evidence in question was not objected to at trial, and was therefore tried by implied consent. Thus, this case falls within the first part of Rule 15(b), and it was mandatory that those issues and facts be considered as if they had originally been raised in the pleadings. The Trial Court's error occurred when the court jumped to the second part of the Rule 15(b) analysis, even though the issues were tried by implied consent. Therefore, the second part of the analysis does not apply, and the Trial Court had no choice but to grant Clark's motion.

d. Implied Consent

Implied consent may be found where . . . evidence is introduced without objection.” *General Ins. Co. of America*, 525 P.2d at 506. In *Fibro Trust*, the Utah Supreme Court held that “[a] party may try an issue by implied consent by failing to object to the introduction of evidence related to the unpleaded issue.” 1999 UT 13 at ¶8.

In this case, the evidence of Friedman's anticipatory repudiation was introduced without objection from Friedman, and was therefore was tried by implied consent. *See Id.* At trial, Clark presented evidence through the testimony of both Friedman and Johnson that established the necessary elements to show a cause of action for breach by repudiation. Friedman did not object to the entry or admissibility of any of the evidence

presented regarding those issues. While Friedman was on the stand testifying during cross-examination at trial, the following exchange took place:

Q. Is it fair to say that you would not have closed without the as-is addendum?

A. I would never have negotiated the home with Mr. Clark in the first place without the as-is addendum.

Q. So...

A. So the answer to that is, would it not have closed? I never would have entered into the agreement-

Q. Well, let me, let me -

A. -in the first place without the addendum.

...

Q. You - isn't it true that you had no intention of going to closing unless Jill Johnson had this signed and returned to you; is that correct? Yes or no.

...

Q. You would not have gone to closing if Jill Johnson had not returned this (referring to as-is addendum); isn't that correct?

A. That's correct.

(R. 2113, Transcript, Previously Recorded Proceedings, Bench Trial, Volume IV of V, 39:21-40:24 (emphasis added)).

Jill Johnson, during her trial testimony, and without eliciting any objection from Friedman's counsel, further confirmed Friedman's intentions of not attending the closing

unless the as-is addendum was signed during her testimony through the following exchange:

THE COURT: I'm sorry, I didn't understand. Is it your testimony that Mr. Friedman told you that, quote, This needs to be signed or I'm not closing today?

THE WITNESS: Yes, uh-huh.

THE COURT: Okay, so that – those words came from him?

THE WITNESS: Yes.

THE COURT. Thank you.

Q (By Mr. Owens): Did he make it very clear to you that he would not close without the as-is clause?

A. Yes.

(R. 2112, Transcript, Previously Recorded Proceedings, Bench Trial, Volume III of V, 198:11-199:4-15 (emphasis added)). Friedman did not object to that line of questioning during Friedman's or Johnson's trial testimony.

If a theory of recovery is fully tried by the parties, the court may base its decision on that theory and deem the pleadings amended, even if the theory was not originally pleaded or set forth in the pleadings or the pretrial order. *Colman v. Colman*, 743 P.2d 782 (Utah App. 1987). At trial, Clark introduced evidence that supports and proves the unpleaded issues of repudiation and failure of the contract due to lack of mutual assent to all material terms. Had Clark been successful on those two theories, he would have been entitled to alternative remedies including rescission of the sale and attorney fees that were

not otherwise made available to him. Therefore, the Trial Court erred in failing to consider those theories when deciding the outcome of the case.

In submitting his motion to conform the pleadings to the evidence, Clark sought to have the Trial Court consider a claim for repudiation which was supported and proven by evidence presented at trial without objection. “It is a basic contract principle that where one party to a contract repudiates it or refuses to perform it, the other party is not obligated to perform his or her promise, and such non-performance does not render the other party liable in damages.” *Scott*, 1999 UT App 139 at ¶ 15, (internal quotation omitted). “Moreover, where a party wrongfully states that he will not perform at all unless the other party consents to a modification of the contract, the statement is a repudiation because the breach that he threatens is a complete refusal of performance.” *Id.* (citation and emphasis omitted).

The unobjected-to evidence presented at trial established the following facts that support a claim for repudiation: On October 24, 2006, Clark and Friedman entered into a Real Estate Purchase Contract (referred to throughout this case as the “Second REPC”). The closing for the Second REPC was set for October 26, 2006. Because Clark was planning to travel to Tennessee to attend a wedding that day, he went to the closing early in the morning on October 26, 2006 and signed all of the documents consummating the sale. That morning, pursuant to the terms of the Second REPC, Clark remitted the remaining balance of the purchase price to Friedman and completed his end of the sale resulting in full performance by Clark. Clark then immediately left for the airport. Both

Friedman and Johnson knew that Clark was leaving town that morning. Friedman was scheduled to close late in the afternoon of October 26, 2006.

After Clark had closed, but before Friedman closed, Friedman communicated with Johnson (Clark's real estate agent) and unequivocally told her he would not close on the sale of the home unless an "as-is" addendum, among other things, was added to the REPC. During the afternoon of October 26, 2006 (after Clark had already closed), Friedman faxed a back-dated⁸ handwritten addendum to Johnson (with the date and time of Clark's signature line already completed) and instructed that it must be signed or he would not close on the transaction. The addendum purported to specify that, among other things, the home was being sold "as-is." Because Clark was on an airplane to Tennessee, he was unreachable. Clark was unaware of any such discussions and never agreed to add the provisions contained in the addendum, and in fact had already closed. Neither Friedman nor Johnson tried to communicate with Clark about Friedman's unwillingness to close on the contract as it stood, which terms had already been negotiated.

Once Johnson received the fax on October 26, 2006 at 2:03 p.m. from Friedman, Johnson followed Friedman's instructions and affixed Clark's initials on the backdated addendum without Clark's knowledge or consent. Johnson faxed the completed document back to Friedman on October 26, 2006 at 3:40 p.m. for inclusion into the Second REPC. Clark did not give Johnson permission to sign the addendum on his behalf and was unaware that she had done so at that time. Friedman closed on the sale

⁸ The addendum was back-dated to October 24, 2006, the date of the Second REPC.

after receipt of the addendum from Johnson, and the transaction was purportedly completed.

Because Friedman did not object to that evidence at trial, the Trial Court should have conformed the pleadings to the evidence, and Clark should have been allowed to recover on an repudiation claim as supported by the facts established at trial.

e. Rule 54(c)

In addition to Rule 15(b) discussed above, Rule 54(c)(1) of the Utah Rules of Civil Procedure provides in part that “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” Utah R. Civ. P. 54(c) (emphasis added). That rule is in harmony with Rule 15(b), and further reinforces the policy that cases must be decided on their merits, and not on archaic rules of pleading. Further, “it could not be made plainer that the underlying purpose of [Rule 54(c)] is that judgment should be granted in accordance with the law and the evidence as the ends of justice require; and that this is true whether the pleadings are amended or not.” *First Sec. Bank of Utah, N.A. v. Colonial Ford, Inc.*, 597 P.2d 859, 861 (Utah 1979). Further, “In pursuing that objective, the proper application of the rules is that amendments should be allowed if necessary to accomplish that objective, where a case has actually been tried on a different issue or a different theory than has been pleaded.” *Id.*

In this case, whether the pleadings contained a claim for anticipatory repudiation/breach is of no significance because those causes of action were tried by the parties without objection. If the facts established throughout discovery and introduced

and admitted without objection at trial support such claims, then Clark should have been awarded the relief to which he was entitled under those claims. The purpose of the pleading rules in Utah is to put the defendant on notice of the nature of the claims the plaintiff is making. “Under our liberal notice pleading standard, all that is required is a ‘short and plain statement’ . . . showing that the pleader is entitled to relief’ and a ‘demand for judgment for the relief.’” *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶34, 233 P.3d 461 (internal citation omitted).

The Utah Supreme Court stated that “all that is required is that the pleadings be sufficient to give fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.” *Gudmundson v. Del Ozone*, 2010 UT 33, ¶40, 232 P.3d 1059. In this case, once Friedman was put on notice that Clark was alleging that Friedman breached the Second REPC, that there were construction defects with the house, and that Clark sought to rescind the sale, the notice pleading requirements were met. In fact, Clark clearly notified Friedman in his Amended Complaint that the breach being asserted was not exclusive. Specifically, the Amended Complaint stated that “Defendants breached their contractual duties to plaintiff including, **but not limited to:**” Amended Complaint at ¶ 33 (emphasis added). At that point, the facts controlled, not the pleadings. There were no surprises at trial in this case. All of the facts had been established through discovery. When the facts were established at trial without objection, those facts should have controlled, and Clark should have been granted the relief to which he was entitled, regardless of what was alleged in the Amended Complaint.

B. Conforming the Pleadings to the Evidence Opens the Door to Additional Damages and Remedies to Clark.

Conforming the pleadings to the evidence opens the door to additional damages and remedies to Clark. For example, where there is an anticipatory breach or repudiation, the non-breaching party has three options available to him:

1. Treat the entire contract as broken and sue for damages.
2. Treat the contract as still binding and wait until the time arrived for its performance and at such time bring an action on the contract.
3. Rescind the contract and sue for money paid

Hurwitz v. David K. Richards & Co., 436 P.2d 794, 796 (Utah 1968) (emphasis added); *see also Cobabe v. Stanger*, 844 P.2d 298 (Utah 1992).

It was clear from the outset of this case that Clark sought to rescind the sale of the property and get his money back from Friedman. After discovery of the egregious defects, Clark demanded rescission from Friedman prior to filing suit. Friedman refused. Clark closed on the sale of the property on October 26, 2006. Thus, Clark filed suit on November 30, 2006, only one month later. His Complaint sought an order rescinding the contract of sale (which turned out to be the Second REPC). It is clear that at that point, Clark had elected his remedy of rescission.

Because the facts established at trial clearly support a claim for repudiation of the Second REPC, Clark should have been entitled to elect his remedy from the three choices outlined in the *Hurwitz* case. That is exactly what he did from the very beginning. Therefore, if Clark properly established a claim for repudiation of the Second REPC, the Trial Court erred by failing to grant rescission.

In addition, if the court were to hold that Friedman repudiated the Second REPC, Clark would be entitled to attorney fees pursuant to the attorney fee clause in the Second REPC. Section 17 of the Second REPC contained the following provision: "ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees."

The Trial Court's erroneous denial of Clark's Rule 15(b) motion to conform the pleadings to the evidence severely limited Clark's available remedies, and constitutes reversible error. Therefore, the Trial Court's denial of Clark's Rule 15(b) motion should be reversed.

II. THE TRIAL COURT ERRED BY FAILING TO FIND THAT FRIEDMAN ANTICIPATORILY BREACHED/REPUDIATED THE SECOND REPC WHEN FRIEDMAN REFUSED TO CLOSE WITHOUT CHANGING MATERIAL TERMS OF THE CONTRACT.

The Trial Court erroneously failed to make a finding that Friedman repudiated the Second REPC. By failing to find that Friedman anticipatorily breached/repudiated the Second REPC when Friedman admitted that he would not have closed without material terms, and that was confirmed by Johnson, the Trial Court committed error. In so doing, the Trial Court foreclosed Clark from recovering for repudiation of the Second REPC. Specifically, Clark was foreclosed from electing his remedy, including rescission, and recovering attorneys' fees as provided in the Second REPC. An appellate court "give[s] the trial court's legal conclusions no deference and review[s] them for correctness." *Scott*, 1999 UT App 139 at ¶8.

A. Repudiation Generally

“It is a basic contract principle that where one party to a contract repudiates it or refuses to perform it, the other party is not obligated to perform his or her promise, and such non-performance does not render the other party liable in damages.” *Scott*, 1999 UT App 139 at ¶ 15, (internal quotation omitted). “Moreover, where a party wrongfully states that he will not perform at all unless the other party consents to a modification of the contract, the statement is a repudiation because the breach that he threatens is a complete refusal of performance.” *Id.* (citation and emphasis omitted).

Friedman admitted at trial, without objection, that he repudiated the Second REPC, a fact which was confirmed by Jill Johnson. R. 2113, Transcript, Previously Recorded Proceedings, Bench Trial, Volume IV of V, 39:21-40:24 (Friedman testifying); R. 2112, Transcript, Previously Recorded Proceedings, Bench Trial, Volume III of V, 198:11-199:4-15 (Johnson confirming).

In this case, Friedman repudiated the Second REPC by unequivocally communicating to Johnson that he would not close unless the Second REPC contained an “as-is” addendum. In so communicating with Johnson, he “wrongfully state[d] that he [would] not perform at all unless the other party consent[ed] to a modification of the contract[.]” *Scott*, 1999 UT App 139 at ¶ 15. Therefore, Friedman anticipatorily breached/repudiated the Second REPC, which repudiation should have been considered by the Trial Court.

In *Scott*, the parties entered into a real estate purchase contract for the sale of a condominium in 1994. *Id.* at ¶ 2. The seller refused to perform demanding additional

concessions from the buyer, and the buyer sued for specific performance requiring the seller to convey the condo. The court affirmed the trial court's order awarding specific performance, citing the rule set forth above. *Id.*

B. Remedies for Repudiation

Where there is an anticipatory breach or repudiation, the non-breaching party has three options available to him:

1. Treat the entire contract as broken and sue for damages.
2. Treat the contract as still binding and wait until the time arrived for its performance and at such time bring an action on the contract.
3. Rescind the contract and sue for money paid . . .

Hurwitz, 436 P.2d at 796; *see also Cobabe*, 844 P.2d 298.

It was clear from the outset of this case that Clark sought to rescind the sale of the property and get his money back from Friedman. In fact, prior to filing suit requesting rescission, and after the purported closing, Clark demanded rescission from Friedman immediately after he discovered the egregious defects. Clark closed on the sale of the property on October 26, 2006. He filed suit on November 30, 2006, only one month later. His Complaint sought an order rescinding the contract of sale (which turned out to be the Second REPC). It is clear that at that point, Clark had elected his remedy of rescission.

Because the facts established at trial clearly support and prove a claim for repudiation of the Second REPC, Clark should have been entitled to elect his remedy from the three choices outlined in the *Hurwitz* case. *See also*, Utah R. Civ. P. 15(b).

That is exactly what he did from the very beginning. Therefore, because Clark properly established and proved a claim for repudiation of the Second REPC, the Trial Court erred by failing to grant rescission.

III. THE TRIAL COURT ERRED BY REFUSING TO AWARD ATTORNEYS' FEES TO CLARK.

Attorneys fees should have been awarded to Clark upon three separate bases: (1) attorneys' fees were available to the prevailing party under the Second REPC; (2) the fraudulent nondisclosure claim upon which Clark prevailed was based upon a common core of facts with the breach of contract claims; (3) Friedman's conduct was so egregious that punitive damages were ordered against him and the laws of equity demand such an award under the facts of this case. Such ruling was in error and should be reversed.

The award or denial of attorneys' fees is a question of law which is reviewed for correctness. *See e.g. John Holmes Constr*, 2005 UT 83; *see also Truong*, No. 20080385-CA, 2009 Utah App. LEXIS 215, at *11 (unpublished opinion) (citation omitted) ("The award of attorney fees is a matter of law, which we review for correctness.").

A. Repudiation

As set forth above, the Second REPC in this case contained an attorneys' fee provision. Paragraph 17 of the Second REPC provided that "In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees." (Addendum 2, Second REPC at ¶ 17).

In this case, the evidence of Friedman's repudiation was introduced without objection from Friedman, and was therefore tried by implied consent. At trial, Clark presented

evidence through the testimony of Friedman and Johnson that established and proved the necessary elements to show a cause of action for repudiation. Friedman did not object to the entry or admissibility of any of the evidence presented, and did not rebut the evidence presented. As set forth above, the Trial Court should have conformed the pleadings to the evidence and considered a breach of contract claim based upon Friedman's unequivocal statements that he would not close on the Second REPC without the addition of non-negotiated material terms. That cause of action would have brought the attorney fee provision of the Second REPC directly into play, and would have required an award of attorneys' fees. Therefore, the Trial Court's refusal to grant attorneys' fees and costs to Clark should be reversed, and the matter should be remanded for a determination as to the proper amount of fees and costs to be awarded.

B. Common Core of Facts Doctrine

Generally in Utah, attorneys' fees are recoverable as damages in contract or tort actions where there is a statutory or contractual authority for such fees. *DeBry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc.*, 583 P.2d 1181 (Utah 1978). In this case, the Second REPC contained an attorneys' fee provision which entitled the prevailing party to an award of attorneys' fees and costs in the event of a proceeding to enforce its terms. Because the facts established at trial proved that Friedman anticipatorily breached/repudiated the Second REPC, Clark should be entitled to an award of attorneys' fees as provided in the Second REPC.

Nevertheless, even if the Trial Court had not considered the repudiation claim, Clark should have been awarded his attorneys' fees and costs. "When a plaintiff brings

multiple claims involving a common core of facts and related legal theories, and prevails on at least some of its claims, it is entitled to compensation for all attorney fees reasonably incurred in the litigation.” *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶ 20, 993 P.2d 222) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933 (1983)) (emphasis added); see also *Jane L. v. Bangerter*, 61 F.3d 1505, 1512 (10th Cir. 1996) (“If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on a significant, interrelated claim.”); *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560, 566 (10th Cir. 1993) (stating that because plaintiff’s “claims arose out of a common core of facts and involved related legal theories, the district court may . . . conclude her prevailing status on . . . [one] claim subsumes her failure to succeed [on the other.]”); *Truong*, No. 20080385-CA, 2009 Utah App. LEXIS 215 (unpublished opinion).

This entire case revolves around the purchase and sale of a home pursuant to a Real Estate Purchase Contract, identified throughout this case as the Second REPC. That Real Estate Purchase Contract contains an attorneys’ fee provision, and Clark alleged a cause of action for breaches of that contract. “In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees.” (Addendum 2, Second REPC, at ¶ 17 (emphasis added)). Clark alleged a breach of contract action in his Amended Complaint. Even if Clark was not successful on that claim, he is still entitled to his attorneys’ fees if he is the prevailing party in the overall litigation.

One of the theories behind the breach of contract action, among others, was that Friedman breached the Second REPC by failing to disclose known latent defects in the property. In conjunction therewith, Clark also alleged a cause of action for fraudulent nondisclosure based upon the same facts, i.e., that there were latent defects known to Friedman which Friedman failed to disclose. The Trial Court held that Friedman had not in fact breached the Second REPC by failing to disclose the known latent defects, because he did not have a contractual duty to disclose said defects. Nevertheless, the Trial Court found that Friedman had breached his common law duty to disclose said known latent defects, and that Friedman had fraudulently concealed those defects. Such a situation falls precisely within the common core of facts doctrine outlined by the *Dejavue* Court. Therefore, attorneys' fees should have been awarded.

C. Fraud and Punitive Damages

While there is a contractual basis for awarding attorney fees in this case, the Utah Supreme Court has held that even absent specific contractual or statutory attorney fee provisions, fees may nevertheless be awarded when the court "deems it appropriate in the interests of justice and equity." *Hughes v. Cafferty*, 2004 UT 22, ¶ 21, 89 P.3d 148 (Utah 2004) (quoting *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.3d 759, 782 (Utah 1994)). Such an award is appropriate in cases where exemplary damages are awarded. *See, e.g., DeBry & Hilton Travel Services, Inc.*, 583 P.2d at 1185 ("Counsel fees . . . can be considered as an element of damages . . . in those cases in which exemplary damages are or can be awarded.").

This is a case where the interests of justice and equity demand an award of attorney fees. When Clark purchased the home from Friedman, Clark was a young first-time homebuyer. Friedman was an experienced home flipper. Friedman knew about the very serious defects hidden within the walls and floors of the home. He intentionally hid those defects from Clark, defrauded Clark, and left Clark saddled with a house that was riddled with serious problems. After Friedman refused to rescind the sale, Clark's only option was to sue Friedman. After spending several years and many thousands of dollars on attorney fees and other litigation costs, Clark finally obtained his remedy – at a cost that far exceeded his recovery. Clark had no other option but to attempt to obtain justice through the court system.

The Trial Court viewed Friedman's actions as deplorable enough to award punitive damages. In cases where punitive or exemplary damages are awarded, attorney fees are also appropriate. *See, e.g., DeBry & Hilton Travel Services, Inc.*, 583 P.2d at 1185. The facts and circumstances of this case require an award of attorney fees in the interests of justice and equity. To refuse to award attorney fees and costs in this matter would be a miscarriage of justice. Therefore, the Trial Court's refusal to award attorney fees and costs to Clark should be reversed.

IV. THE TRIAL COURT ERRED BY REFUSING TO GRANT RESCISSION OF THE SALE OF THE HOME.

The Trial Court erred by refusing to grant rescission of the purchase and sale of the home in two respects. First, the Trial Court should have ordered rescission on the basis of Friedman's repudiation of the Second REPC. Second, the Trial Court should

have ordered rescission on the basis of Friedman's fraud. The two together make this an especially appropriate case for rescission.

"The plaintiff in an action for fraud has the option to elect to rescind the transaction and recover damages." *Dugan v. Jones*, 615 P.2d 1239, 1247 (Utah 1980) (*Dugan I*). In addition, a purchaser of real estate has the option to elect to rescind the transaction in the event of a breach of contract by the seller. *See, e.g., Anderson*, 2003 UT App. 241. Rescission is appropriate in cases where the seller repudiates a real estate purchase contract. *Hurwitz*, 436 P.2d at 796.

Despite the fact that Clark had sought the remedy of rescission and rescission is an available remedy for both repudiation and fraud, the Trial Court, without support or evidence, refused to grant rescission because the parties allegedly could not be restored to the status quo. That holding was erroneous, and the Trial Court abused its discretion.

"Rescission is a restitutionary remedy that attempts to return the parties to the status quo." *Anderson*, 2003 UT App 241 at ¶11. The status quo rule "is not a technical rule, but rather it is equitable, and requires practicality in adjusting the rights of the parties." *Dugan v. Jones*, 724 P.2d 955, 957 (Utah 1986) (*Dugan II*); *Ong Int'l, Inc. (U.S.A.) v. 11th Ave. Corp.*, 850 P.2d 447 (Utah 1993).

The Trial Court addressed Clark's claim for rescission in the following manner:

The Court is not persuaded that the facts of this case warrant rescission of the contract. The Court can take judicial notice of the fact that in the four years since this case was filed the local and national housing markets have been drastically affected by an economy that has suffered a significant downturn. This has, in turn, put downward pressure on home prices generally. Additionally, Clark has not demonstrated he

has maintained the Property in the condition it was in when he received it. Accordingly, it is highly unlikely that the parties could be restored to the condition they were in before the contract was made.

See Findings of Fact, Conclusions of Law, and Order, at ¶ 92. A trial, Friedman did not present any actual evidence of a decline in value of the property. Also, Friedman did not present evidence of how Clark's alleged failure to maintain the property had negatively affected the value of the property, if at all. The Trial Court made assumptions about the value of the property that were not supported by any actual evidence, and therefore abused its discretion. While it may be generally true that property values have declined in the past few years, that is not necessarily true for all properties in all neighborhoods, and is not properly the subject of judicial notice. In any event, even if property values are an appropriate use of judicial notice, it is inequitable to place the risk of declining market conditions upon the innocent party, to the benefit of the party that committed fraud. Clark immediately requested rescission from Friedman less than one month after learning of the egregious defects. Friedman refused and caused any delay.

Any decline in value, or the consequences of the lapse of time should be attributed to Friedman due to his refusal to grant rescission immediately after the defects were discovered. Clark, the innocent party, should not suffer additional damage by being saddled with the Property merely because litigation caused a delay. The loss in market value, if any, is not the result of either party's delays and would have occurred even if Friedman allowed Clark to rescind the sale immediately. Therefore, the status quo would be unaffected by allowing rescission. Because Friedman refused to rescind the sale, any such decline in market value should be borne by Friedman. In addition, any other issues

regarding the status quo can be analyzed and calculated by the Trial Court through the introduction of relevant evidence the Court deems proper. The parties in this case can be restored to the status quo by requiring Friedman to return the purchase price paid, and requiring Clark to execute a quitclaim deed.

By denying Clark's request for rescission of the sale of the home, Clark has been saddled with a materially defective home that was fraudulently sold to him and which was not what he bargained for. Allowing Friedman to take advantage of Clark and walk away with a profit of at least \$162,000.00, was an abuse of discretion. Clark should have been afforded the opportunity to elect his remedy based on Friedman's repudiation of the contract. One of the remedies available to the plaintiff in repudiation cases is rescission. *Hurwitz*, 436 P.2d at 796. In addition, the sale should have been rescinded based on Friedman's fraud. Therefore, the Trial Court abused its discretion, and should be reversed. Clark should be awarded rescission of the Second REPC.

V. THE TRIAL COURT'S AMOUNT OF PUNITIVE DAMAGES WAS ERROR.

The Trial Court's award of only \$15,000.00 in punitive damages was error when Friedman was allowed to retain a profit on the transaction of at least \$162,000.00 on fraudulent sale of the home. Friedman is in the business of flipping such homes, and such a small amount of punitive damages, considering the size of Friedman's profit, amounts to nothing more than a business expense in the event he gets caught. Such a ruling is inequitable and does not further the goals of deterrence and punishment under the circumstances of this case.

Utah appellate courts have “adopted a *de novo* standard for reviewing jury and Trial Court conclusions under the *Crookston* factors.” *Smith*, 2003 UT 41 at ¶31 (citations omitted).

The Utah Supreme Court set forth the standards for an award of punitive damages in *Crookston*, 860 P.2d 937. In so doing, the Court outlined seven factors that should be considered by a court in awarding punitive damages. The seven factors are: (i) the relative wealth of the defendant; (ii) the nature of the alleged conduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. *Id.*

Utah courts have frequently addressed the appropriate amount of punitive damages. *See, e.g., Diversified Holdings, L.C. v. Turner*, 2002 UT 129, 63 P.3d 686 (Utah 2002); *Smith*, 2003 UT 41. The *Diversified Holdings* court held that generally, where actual damages awards do not exceed \$100,000, a ratio of punitive damages to actual damages of 3:1 is generally appropriate. 2002 UT 129. In this case, the Trial Court awarded \$15,000 in punitive damages, where actual damages were \$31,208.70, resulting in a ratio of approximately 0.5:1.

Ignoring the fact that the actual damages in this case should actually be much higher based upon the arguments articulated herein (thereby increasing the punitive damages by proportional amount), the ratio and amount of punitive damages awarded by the Trial Court is much too low given Friedman’s conduct as applied to the *Crookston* factors.

When analyzing the first Crookston factor, courts should tailor the award “to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct.” *Diversified Holdings*, 2002 UT 129 at ¶15. In analyzing that factor, the Trial Court pointed out that Friedman profited from this transaction in the amount of at least \$162,000.00. Given the goal of deterring Friedman from repeating the prohibited conduct, the award of \$15,000 is grossly inadequate. Giving up \$15,000 in punitive damages for an opportunity to gain at least \$162,000 by fraudulent means is simply good business for someone in Friedman’s position. Friedman’s profits should be disgorged, at the very least.

The Wyoming Supreme Court was faced with a very similar situation where fraud was profitable to the defendant in *Alexander v. Meduna*, 47 P.3d 206 (Wyo. 2002). In *Alexander*, the buyers of a home were advised by the seller that there was no groundwater seepage or structural defects. *Id.* The basement flooded shortly after the buyers took possession. *Id.* The Trial Court found that the sellers’ fraudulent representations induced the buyers to contract and awarded punitive damages. *Id.* The court held that “if the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.” *Id.* at 219. The \$15,000 award of punitive damages in this case does little to take away Friedman’s profit on the sale of the home, let alone achieve the goals of deterrence and punishment. Therefore, the Court should disgorge Friedman’s profits and fashion a punitive damages award which makes Friedman recognize a loss on the transaction and achieve the goals of deterrence and punishment.

In considering the second *Crookston* factor, the court should consider the “maliciousness, reprehensibility, and wrongfulness” of the conduct. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 65 P.3d 1134 (Utah 2001). “‘Deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive’ support more substantial awards.” *Smith*, 2003 UT 41 at ¶35 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809 (1996)). In this case, the Trial Court held that “Friedman knowingly and recklessly engaged in conduct that did not comply with his common law duty to disclose known, latent defects in the Property being purchased by Clark. There is furthermore no question that Friedman profited – at Clark’s expense – from that misconduct to the tune of at least \$162,000.00.” Findings of Fact, Conclusions of Law, and Order at ¶ 86. Further, the court held that “Friedman earns his living buying, remodeling, and selling homes. He is an experienced home flipper that knew or should have known that he was undertaking remodeling work that required building permits, yet he failed to arrange for such permits or ensure that others working for him applied for the necessary permits.” *Id.* at ¶ 87. In short, Friedman knew what he was doing, and he took advantage of Clark. In so doing, he made deliberately false statements, and concealed evidence of known latent defects. Therefore, a more substantial award is appropriate.

The third *Crookston* factor “looks to the circumstances surrounding the illegal conduct, particularly with respect to what the defendant knew and what was motivating his or her actions.” *Campbell*, 2001 UT 89 at ¶ 35. It is clear that Friedman’s actions were motivated by profit in this case. In analyzing the third factor, the Trial Court held

that “Friedman earns his living by buying, remodeling, and selling homes. He is an experienced home flipper who presumably aims to maximize his profit in every transaction.” Findings of Fact, Conclusions of Law, and Order at ¶ 87. In fact, Friedman did profit from the transaction, to the tune of more than \$162,000.00. Given that fact, a substantially higher punitive damages award is justified.

The fourth *Crookston* factor requires the court to analyze the actions of Friedman in terms of their impact on Clark and others. Friedman’s misconduct caused Clark to become saddled a home that he did not bargain for, that was worth substantially less than what Clark paid. Clark is unable to refinance the home or sell the home without disclosing its defects. Clark was a first-time homebuyer, and Friedman was an experienced home flipper. Friedman took advantage of that situation to the financial devastation of Clark. Because Friedman refused to rescind the sale, Clark had no other option but to sue Friedman, thereby magnifying his damages. Such circumstances justify a higher punitive damages award.

The fifth *Crookston* factor addresses the probability that the misconduct will occur again in the future. Friedman is and was an experienced home flipper. He makes his living by buying, remodeling, and selling homes. In this particular instance, Friedman realized a profit of at least \$162,000.00 on the sale. A punitive damage award of less than 10% of his profit is not likely to deter Friedman from the same wrongful conduct in the future. \$15,000 is far less than the actual cost of remodeling the home correctly. If \$15,000 is the only penalty, there is a good chance that Friedman will simply take his chances, and if caught, pay much less than what the actual up-front cost would have been

to have done the remodel properly. This is perhaps the most compelling single reason for a substantially higher punitive damages award. Moreover, such a small award in this case sends a message to unscrupulous home flippers and contractors that such conduct is punishable with only a very small penalty if caught.

The sixth *Crookston* factor “analyzes the relationship between the parties, looking particularly at the degree of confidence and trust placed in the defendant.” *Campbell, Co.* 2001 UT 89 at ¶ 44. In analyzing the sixth factor, the Trial Court pointed to the parties’ relative positions in this transaction. Friedman was an experienced home seller, and Clark was a young first time homebuyer. Friedman was clearly in a superior position which allowed Friedman to take advantage of that relationship in perpetuating his fraud. Clark placed his trust in Friedman as the seller and an older, more experienced individual. That relationship between the parties justifies a more substantial award.

The seventh and final *Crookston* factor compares the amount of actual damages awarded with the amount of punitive damages awarded. “The ratio of punitive to compensatory damages does not, by itself determine whether or not an award is excessive; an award that falls outside certain parameters will, however, elicit more searching judicial scrutiny.” *Diversified Holdings, L.C.*, 2002 UT 129 at ¶ 24. “For punitive awards of less than \$100,000 a ratio of three to one will generally be justifiable[.]” *Id.* However, the Utah Supreme Court has not established an absolute ceiling for the ratio of a damages award. *See, e.g., Smith*, 2003 UT 41.

A ratio of 3 to 1 in this case would result in punitive damages of approximately \$93,626.00. However, the circumstances of this case may justify an even higher award.

As set forth above, Friedman profited greatly from the sale of the home. The Trial Court found that Friedman profited to the tune of at least \$162,000.00. The Wyoming Supreme Court has held that where a defendant profits from a fraudulent transaction, the court should take away more than the profit so that the defendant recognizes a net loss, and the goals of deterrence and punishment are achieved. *Alexander*, 47 P.3d 206. This decision was based upon public policy grounds that a fraudulent defendant should not be permitted to profit from his fraudulent conduct. *Id.* Clark urges the Utah courts to adopt a similar rule and, at a minimum, disgorge all of Friedman's profits.

When all of the Crookston factors are applied to the facts of this case, it becomes obvious that the punitive damages awarded by the Trial Court are grossly inadequate. Therefore, the court should reverse the Trial Court, and enter a more appropriate award of punitive damages in order to disgorge Friedman's fraudulently obtained profits, to deter Friedman and others from similar conduct in the future, and to punish Friedman for his egregious conduct.

VI. THE TRIAL COURT'S DENIAL OF CLARK'S RULE 59 MOTION TO ALTER OR AMEND THE JUDGMENT WAS ERROR.

The Trial Court erred in denying Clark's Rule 59 Motion to Alter or Amend the Judgment. Clark identified several errors of law that should have been corrected by the Trial Court as set forth herein.

Utah appellate courts review a denial of a Rule 59 Motion to Alter or Amend under an abuse of discretion standard. However, "if the trial court has made a

determination of law that provides a premise for its denial of a new trial, such a legal decision is reviewed under a correctness standard.” *Crookston*, 860 P.2d at 938.

Rule 59(a)(7) of the Utah Rules of Civil Procedure provides that a judgment can be altered or amended on the grounds that the Court committed an error in law. Prior to taking the instant appeal, Clark moved the Trial Court to alter or amend the judgment pursuant to Rule 59(a)(7), which motion was denied. The grounds for that motion were essentially the same as the grounds for the instant appeal, identifying four errors of law and asking the Trial Court to correct them. First, the Court erred in refusing to consider whether Friedman anticipatorily breached/repudiated the second REPC when he clearly and unequivocally refused to close on the second REPC absent an as-is addendum that was not part of the second REPC. Second, the Court should have allowed Clark to elect the remedy of rescission, because the plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price. *See Dugan I*, 615 P.2d 1239. Third, the Court should have awarded attorney fees to Clark because his fraud claim was based upon a common core of facts with the breach of contract claim. Finally, the Court should have awarded attorney fees to Clark because equity demands it in light of Friedman’s fraud. Those errors are discussed at length herein. For the reasons set forth herein, the Trial Court should have corrected its errors of law. Because it did not do so, the Trial Court erred in denying Clark’s motion, and should be reversed.

CONCLUSION

The Trial Court erred by denying Clark’s Motion to Conform the Pleadings to the Evidence. As a result, Clark was foreclosed from electing his remedy, including

rescission of the sale for Friedman's repudiation/breach of the Second Real Estate Purchase Contract; and from recovering attorneys' fees. The Trial Court's error should be reversed, and Clark should be entitled to rescind the sale and recover his attorneys' fees.

The Trial Court further erred by failing to find that Friedman repudiated the Second REPC when Friedman admitted during trial without objection that he would not have closed without a change in material terms. This prevented Clark from recovering for repudiation of the Second REPC. Specifically, Clark was foreclosed from electing his remedy, including rescission, and recovering attorneys' fees as provided in the Second REPC. The Trial Court's error should be reversed, and Clark should be entitled to rescind the sale and recover his attorneys' fees.

The Trial Court further erred by denying Clark's request for attorneys' fees. Attorneys' fees were available under the Second REPC and because the fraud claim was based upon a common core of facts with the breach of contract claims, and because Friedman engaged in fraud. In fact, Friedman's behavior was so egregious that the Trial Court ordered that he pay punitive damages. The laws of equity demand such an award under the facts of this case. Such a denial was in error, and should be reversed.

The Trial Court further erred by denying Clark's request for rescission of the sale of the home. As a result, Clark has been saddled with a materially defective home that was fraudulently sold to him and which was not what he bargained for. Allowing Friedman to take advantage of Clark and walk away with a profit, of at least \$162,000.00, offends justice, common sense, and was an abuse of discretion under the egregious

circumstances of this case. Clark should have been afforded the opportunity to elect his remedy based on Friedman's repudiation of the contract. In addition, the sale should have been rescinded based on Friedman's fraud.

The Trial Court's award of only \$15,000.00 in punitive damages was error when Friedman was allowed to retain a profit on the transaction of at least \$162,000.00 from Clark through the fraudulent sale of the home. Friedman is in the business of flipping such homes, and will likely engage in the same egregious behavior in the future. Such a ruling is inequitable and does not further the goals of disgorgement, deterrence, and punishment under the circumstances of this case.

Finally, the Trial Court erred in denying Clark's Rule 59 Motion to Alter or Amend the Judgment. Clark identified several errors of law that should have been corrected by the Trial Court, which decisions should be reversed.

ADDENDA

1. Real Estate Purchase Contract ("First REPC") (R. 1615).
2. Real Estate Purchase Contract ("Second REPC") (R. 1631).
3. Findings of Fact, Conclusions of Law, and Order (R. 1795A).

DATED this 20th day of March, 2012.

STRONG & HANNI

By: 

Jeffery J. Owens

Jesse A. Frederick

Attorneys for Aaron Clark

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2012, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was served by the method indicated below, to the following:

Sean A. Monson	(X)	U.S. Mail, Postage Prepaid
BENNETT TUELLER JOHNSON & DEERE	()	Hand Delivered
3165 East Millrock Drive, Suite 500	()	Overnight Mail
Salt Lake City, UT 84121	()	Facsimile

Keith W. Meade	(X)	U.S. Mail, Postage Prepaid
COHNE, RAPPAPORT & SEGAL, P.C.	()	Hand Delivered
257 East 200 South, Suite 700	()	Overnight Mail
Salt Lake City, UT 84111	()	Facsimile



6708.701

ADDENDUM 1



REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.



EARNEST MONEY RECEIPT

Buyer Aaron Clark offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$2,000 in the form of check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [Signature] on 9/19/06 (Date)
(Signature of agent who acknowledges receipt of Earnest Money)

Brokerage: Prudential Utah Real Estate-Parlays Phone Number: 801-428-2800

OFFER TO PURCHASE

1. PROPERTY: 3325 Antler Way also described as:

City of Salt Lake City County of Salt Lake State of Utah, ZIP 84121 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: refrigerator, range, stove, dishwasher

1.2 Excluded Items. The following items are excluded from this sale: _____

1.3 Water Rights. The following water rights are included in this sale: those attached to the property

2. PURCHASE PRICE The purchase price for the Property is \$459,900

2.1 Method of Payment. The purchase price will be paid as follows:

\$2,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$457,900 (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☐ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

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

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) Loan Assumption Addendum (see attached Assumption Addendum, if applicable)

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

\$ _____ (e) Other (specify) _____

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

\$459,900 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

2.3 Application for Loan.

(a) Buyer's duties. No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the

Page 1 of 8 pages Seller's Initials ARC Date 9/19/06 Buyer's Initials TARC Date 9/19/2006

"Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: ☐ _____ hours ☐ _____ days after closing; ☒ Other (specify) upon recording

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract
☐ Seller's Initials: ☐ Buyer's Initials

The Listing Agent, Perter Goodno, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;
The Listing Broker, Utah Select LLC, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

The Selling Agent, Jill Johnson, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;
The Selling Broker, Prudential, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;

6. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

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

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addendum No. 1 ☐ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum ☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law) ☐ Other (specify): _____

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

Page 3 of 6 pages Seller's Initials AFM Date 9/19/08 Buyer's Initials [Signature] Date 9/19/08

08/18/2006 17:13 FAX

001-733-4000
megan

p.10
005/008
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10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

- (a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes):

A one-year Home Warranty Plan ☒ WILL ☐ WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☒ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$ 390 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☒ SHALL

☐ MAY AT THE OPTION OF THE PARTIES

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

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

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

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

referenced in this Contract.

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

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

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

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

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

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

(8) Loan Application & Fee Deadline already completed (Date)

(b) Seller Disclosure Deadline September 26, 2006 (Date)

(c) Evaluations & Inspections Deadline September 26, 2008 (Date)

(d) Loan Denial Deadline September 26, 2006 (Date)

(e) Appraisal Deadline October 10, 2006 (Date)

(f) Settlement Deadline October 23, 2006 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 [] AM [X] PM Mountain Time on September 20, 2006 (Date), this offer shall lapse, and the Brokerage shall return the Earnest Money Deposit to Buyer.

(Buyer's Signature)

(Offer Date)

(Buyer's Signature)

(Offer Date)

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

Aaron Clark
(Buyers' Names) (PLEASE PRINT)

555 Church Street #1512
Nashville, Tn
(Notice Address)

37219
(Zip Code) (Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☒ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. TW (2)

[Signature] ETAL 9/20/08 1:48 PM
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

ANDY FRIEDMAN, ETAL 8418 Supermal Way, Littleton, CO 80121 801.942.4242
(Seller's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

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

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

(Buyer's Signature) (Date) (Buyer's Signature) (Date)

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

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on _____ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.

Sent/Delivered by (specify) _____

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



ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT



Page _____ of _____

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 19, 2006 including all prior addenda and counteroffers, between Aaron Clark as Buyer, and _____ as Seller, regarding the Property located at 3325 Antler Way. The following terms are hereby incorporated as part of the REPC:

1) Seller to contribute 2.5% of acquisition price towards buyers closing costs.

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on September 20, 2006 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Aaron Clark
☒ Buyer ☐ Seller Signature

9/19/2006
(Date) (Time)

☐ Buyer ☐ Seller Signature

(Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

Aaron Clark
(Signature)

9/20/06
(Date)

4:00pm
(Time)

(Signature)

(Date)

(Time)

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

(Signature)

(Date)

(Time)

(Signature)

(Date)

(Time)

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

Sep 25 06:02:31p

A. Friedman Alpine Mktg

801-733-4555

p.6

09/21/2006 08:46 FAX

To: Jill Johnson Page 2 of 2

2006-09-21 01:42:36 (GMT)

@ 003/003
8018097352 From: Peter Gaudre

Sep 20 06 07:10p

A. Friedman Alpine Mktg

801-733-4555

p.1



ADDENDUM NO. Two (2)
TO
REAL ESTATE PURCHASE CONTRACT

Page _____ of _____



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 18, 2006 including all prior addenda and counteroffers, between _____ as Buyer, and Andy Friedman as Seller, regarding the Property located at 3325 ANTLER WAY, Cottonwood Heights, Salt Lake County, UT 84121. The following terms are hereby incorporated as part of the REPC:

1. Purchase price to be \$478,900.
2. Seller to contribute \$4,000 towards buyers closing costs.
3. Appraisal Deadline to be September 29, 2006.
4. Settlement Deadline to be October 19, 2006.
5. Earnest Money to be \$5,000.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☒ ARE CHANGED AS FOLLOWS: SEE ADDENDUM # 2

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain in effect. ☐ Seller ☒ Buyer shall have until 10:00 PM Mountain Time on August 21, 2006 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 9/20/06 9:48 PM
☐ Buyer ☒ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

[Signature] 9/21/2006
(Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 5, 2001. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

09/21/2006 09:45 FAX

002/003



ADDENDUM NO. 3
TO
REAL ESTATE PURCHASE CONTRACT

Page _____ of _____



THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 20, 2006 including all prior addenda and counteroffers, between Aaron Clark as Buyer, and Owner as Seller, regarding the Property located at 3325 Antler Way. The following terms are hereby incorporated as part of the REPC:

- 1) Deadlines in section 24 of the Repc to remain the same (buyer chooses to order their own appraisal)
- 2) Purchase price to be 473,900
- 3) Seller to contribute 12,000 towards buyers closing costs
- 4) Earnest money to be increased to 3,000

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 9/21/2006 9:30AM MST ☐ AM ☒ PM Mountain Time on September 21, 2006 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 25 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 9/21/2006 9:30AM MST
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

[Signature] 9/21/06 3:00PM
(Signature) (Date) (Time) [Signature] (Signature) (Date) (Time)

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

[Signature] [Signature]
(Signature) (Date) (Time) (Signature) (Date) (Time)

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



ADDENDUM NO. 4 TO REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☐ ADDENDUM ☒ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 20, 2006 including all prior addenda and counteroffers, between Aaron Clark as Buyer, and ANITA FRIEDMAN, ET AL as Seller, regarding the Property located at 3325 ANTLER WAY, Cottonwood Heights, Salt Lake County, UT 84121. The following terms are hereby incorporated as part of the REPC:

1. Purchase price to be \$473,900.
2. Seller to contribute \$6,000 towards buyers closing costs.
3. Appraisal Deadline to be September 29, 2006.
4. Earnest Money to be \$5,000.

5. "AS-IS" CONDITION.

Buyer acknowledges and agrees that the warranties contained in Section 10.2 of the REPC are limited as indicated below. If a section is marked "warranted". It is warranted only as described in Section 10.2 of the REPC. If a section is marked "not warranted", then with reference to such section, the Property is being sold in "As-is" condition and: (a) no other provisions, statements or disclosures contained in the REPC, the Seller Property Condition Disclosure form, any marketing materials, or otherwise, shall be treated by Buyer as a warranty by the Seller or the Seller's agents regarding the condition of the Property; and (b) Seller shall not be responsible for any repairs or improvements to the Property either before or after Closing. This provision shall survive Closing.

(check applicable boxes):

<u>[X]</u>	<u>[]</u>
Buyer's	Seller's
Initials	Initials

- | | | |
|----------|---|---|
| 10.2 (a) | <input checked="" type="checkbox"/> warranted | <input checked="" type="checkbox"/> not warranted |
| 10.2 (b) | <input checked="" type="checkbox"/> warranted | <input checked="" type="checkbox"/> not warranted |
| 10.2 (c) | <input checked="" type="checkbox"/> warranted | <input checked="" type="checkbox"/> not warranted |
| 10.2 (d) | <input checked="" type="checkbox"/> warranted | <input checked="" type="checkbox"/> not warranted |
| 10.2 (e) | <input checked="" type="checkbox"/> warranted | <input checked="" type="checkbox"/> not warranted |

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

No. 4

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 10:00 ☒ AM ☐ PM Mountain Time on September 22, 2006 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Amf

ARC

Sep 25 06 02:30p A. Friedman Alpine Mktg

801-733-4555

p.4

09/22/2008 14:25 FAX

ADDENDUM #4 (continued)

003/003

Sep 21 06 08:09p A. Friedman Alpine Mktg

801-733-4555

p.3

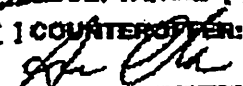
 9/21/06 4:49 PM
[] Buyer [X] Seller Signature (Date) (Time) [] Buyer [] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] ACCEPTANCE: [] Seller [X] Buyer hereby accepts the terms of this ADDENDUM.

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

 9/22/06 8:38 AM
(Signature) (Date) (Time) (Signature) (Date) (Time)

[] REJECTION: [] Seller [] Buyer rejects the foregoing ADDENDUM.

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL,
EFFECTIVE AUGUST 8, 2001. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Sep

to 00 03:14p

A. Friedman Alpine Mktg

801-733-4555

p.2

09/25/2006 17:02 FAX

002/002

Page 1 of 1



ADDENDUM NO. 4
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of Sept 19 2006, including all prior addenda and counteroffers between Clark as Buyer, and Phyllis as Seller, regarding the Property located at 3325 E Antler Way. The following terms are hereby incorporated as part of the REPC:

1) The Buyers inspection deadline to be extended until Thurs Sept. 28th 12:00 am (midnight)

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☒ ARE CHANGED AS FOLLOWS: As in this Addendum #6

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☒ JAM ☐ PM Mountain Time on 9/25/06 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature]
Buyer () Seller Signature

9/25/06 4:50 PM
Date Time

[Signature]
Buyer () Seller Signature

Date Time

PTANCE/COUNTEROFFER/REJECTION

Jill's

Signature

Should be #5

Buyer hereby accepts the terms of this ADDENDUM.

Buyer presents as a counteroffer the terms of attached ADDENDUM NO.

3:00 PM
(Time)

(Signature)

(Date)

(Time)

Buyer rejects the foregoing ADDENDUM.

(Time)

(Signature)

(Date)

(Time)

REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, IS AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM 2

10/24/2008 12:42 FAX

002/008



REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.



EARNEST MONEY RECEIPT

Buyer **AARON CLARK** offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of **\$10,000** in the form of **CHECK** which, upon Acceptance of this offer by all parties (as defined in Section 2.3), shall be deposited in accordance with state law.

Received by: [Signature] on 10/24/08 (Date)

Brokerage: Prudential Utah Real Estate - Parlays Phone Number: 801-428-2800

OFFER TO PURCHASE

1. **PROPERTY:** 3325 ANTLER WAY, Cottonwood Heights, Salt Lake County, UT 84121 also described as:

City of Cottonwood Heights County of Salt Lake State of Utah, ZIP 84121 (the "Property").

1.1 **Included Items.** Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: **REFRIGERATOR RANGE STOVE, DISHWASHER**

1.2 **Excluded Items.** The following items are excluded from this sale: _____

1.3 **Water Rights.** The following water rights are included in this sale: THOSE ATTACHED TO THE PROPERTY

2. **PURCHASE PRICE** The purchase price for the Property is **\$489,000**

2.1 **Method of Payment.** The purchase price will be paid as follows:

\$10,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$479,000 (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☒ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

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

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) Loan Assumption Addendum (see attached Assumption Addendum, if applicable)

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

\$ _____ (e) Other (specify) _____

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

\$489,000 PURCHASE PRICE. Total of lines (a) through (f)

2.2 **Financing Condition.** (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

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003/008

2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: ☐ hours ☐ days after closing; ☒ Other (specify) NEG - Upon Funding and Recording

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

☒ Seller's Initials ☒ Buyer's Initials

The Listing Agent, Peter Goodman, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Listing Broker, Bryce J. Jones, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Agent, Jill Johnson, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Broker, Dougan Jones, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

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10/24/2006 12:43 FAX

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6. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

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

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract (check applicable boxes):

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

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

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

Ans (d) ☒ IS ☒ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;

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

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addendum No. 1 ☐ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum ☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law) ☒ Other (specify):

Earnest Money IS NON-REFUNDABLE

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services.

Page 3 of 6 pages Seller's Initials AMF Date 10/24/06 Buyer's Initials ATC Date 10/24/2006

10/24/2006 12:43 FAX

005/008

provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes):

A one-year Home Warranty Plan ☒ WILL ☐ WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☒ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$ 390 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☒ SHALL

☐ MAY AT THE OPTION OF THE PARTIES

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

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

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

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in mediation under Section 15.

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

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

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

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

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

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

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

(a) Loan Application & Fee Deadline already completed (Date)

(b) Seller Disclosure Deadline n/a (Date)

(c) Evaluations & Inspections Deadline n/a (Date)

(d) Loan Denial Deadline October 27, 2006 (Date)

(e) Appraisal Deadline October 27, 2006 (Date)

(f) Settlement Deadline October 27, 2006 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 [] AM [X] PM Mountain Time on October 24, 2006 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

X Aaron Clark 10/24/2006
(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

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

AARON CLARK

(Buyers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

10/24/2006 12:44 FAX

007/008

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

[Signature] 10/24/06 1:10 PM
 (Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

ALPINE MARKETING, INC. 8418 Supernova Way, Cottonwood Heights, UT 84121
 (Seller's Name) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

801-942-4242

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

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

[Signature] 10/24/06
 (Buyer's Signature) (Date) (Buyer's Signature) (Date)

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

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on _____ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.

Sent/Delivered by (specify) _____

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



ADDENDUM NO. ONE
TO
REAL ESTATE PURCHASE CONTRACT

Page ____ of ____



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of October 24, 2006 including all prior addenda and counteroffers, between AARON CLARK as Buyer, and ALPINE MARKETING, LLC as Seller, regarding the Property located at 3325 ANTLER WAY. The following terms are hereby incorporated as part of the REPC:

1) SELLER TO CONTRIBUTE 6,000 TOWARDS BUYERS CLOSING COSTS.

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 10/28/06 ☒ 1 AM ☐ 4 PM Mountain Time on 5:00 PM (Date); to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Aaron Clark 10/24/2006
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

Aaron Clark ETAL 10/24/06 1:00 PM
(Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

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



ADDENDUM NO. 2
TO

Page ____ of ____



REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 10/24/06 including all prior addenda and counteroffers, between Aaron Clark as Buyer, and Alpine Marketing, Inc. as Seller, regarding the Property located at 3325 E. Antler Way, Cottonwood Heights, UT. The following terms are hereby incorporated as part of the REPC:

- 1) Buyer is purchasing the property AS-IS
- 2) Seller makes no warranties as to the condition of the property. Seller will not be held responsible for the property condition either before or after closing.
- 3) Section 10.2 a-c of the REPC do not apply.
- 4) Seller has never occupied the property.

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

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☒ Buyer shall have until 10/24/06 ☐ AM ☒ PM Mountain Time on 5:00 PM (Date). In accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] ETAL 10/24/06 1:00 PM
☐ Buyer ☒ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

[Signature] 10/24/06 1:50 PM
(Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

ADDENDUM 3

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

SALT LAKE COUNTY

Deputy Clerk **KE**

AARON CLARK,

Plaintiff,

vs.

ALPINE MARKETING, INC., a Utah
corporation, ANDREW M. FRIEDMAN, an
individual, JILL JOHNSON, an individual, and
EXTREME HOLDING, LLC, a Utah limited
liability company dba
PRUDENTIAL UTAH REAL ESTATE

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, and ORDER

Case No. 060919234

Judge Denise P. Lindberg

Date: November 18, 2010

A bench trial was held on this matter August 30, 2010 through September 2, 2010 and September 7, 2010. Jeffery J. Owens and Jesse A. Frederick represented Aaron Clark ("Clark"). Sean A. Monson represented Alpine Marketing ("Alpine") and Andrew M. Friedman ("Friedman"). Keith W. Meade represented Jill Johnson ("Johnson") and Extreme Holding dba Prudential Utah Real Estate ("Prudential").

BACKGROUND

Friedman sold a house to Clark on October 24, 2006. In December of 2006 Clark filed a complaint with this Court. Clark asserts that in the course of the sale Prudential and its agent Johnson breached their fiduciary duties and committed negligent misrepresentation. Further, Clark seeks relief against Friedman and Alpine on the basis of unjust enrichment, breach of contract, and fraud. Finally, Clark asks this Court to pierce Alpine's corporate veil. The Court

heard testimony and admitted both Plaintiff's and Defendants' Trial Exhibits into evidence. The Court, being fully informed, now enters the following Findings of Fact:

FINDINGS OF FACT

The parties.

1. Aaron Clark moved to Salt Lake City, Utah from Nashville, Tennessee in September of 2006. He worked as a sales representative for Dell. During his first three months in Salt Lake City, Clark resided in a Marriot hotel. At the time, Clark was 27 years old and had never owned or purchased real estate. Because Clark was new to the area and unfamiliar with home purchasing, he hired Jill Johnson of Prudential to act as a buyer's agent.

2. On or about September 19, 2006, Clark entered into an Exclusive Buyer-Broker Agreement and Agency Disclosure ("Broker Agreement") with Prudential and Johnson. Johnson signed the agreement on behalf of Prudential. The Broker Agreement provided that agents for the buyer "have fiduciary duties to the Buyer that include loyalty, full disclosure, confidentiality, and reasonable care." The Broker Agreement also provided that "[n]either the Company, nor the buyer's agent are trained to provide the Buyer with . . . technical advice regarding the physical condition of the Property. Accordingly, neither the Company nor the Buyer's Agent will make any representations or warranties regarding the physical or legal condition of any Property selected by the Buyer, including, but not limited to: past or present compliance with zoning and building code requirements."

3. Although Clark and Johnson signed the Broker Agreement on September 19, 2006, the two of them had been working together for several weeks to find a suitable property for Clark. Clark told Johnson that he was looking to buy his first home and that he did not want a

"fixer-upper." He wanted a home that was "good to go," one that he could immediately move into. Johnson showed him 12 to 15 homes and Clark became most interested in a property located in Cottonwood Heights at 3325 Antler Way ("Property").

4. During Clark's first visit to the Property he met Defendant Friedman. Friedman was in the business of purchasing, cosmetically updating, and selling homes ("flipping").¹ Friedman represented to Clark that he had done a lot of work on the Property and had "spent almost \$100,000 or more" on the remodel. According to Clark, Friedman appeared to be "very proud" of the work done on the Property.

5. Friedman is the sole shareholder, director, and officer of Alpine Marketing, Inc., ("Alpine"), a Sub S Corporation that was the record owner of the Property.² Friedman maintains the corporate books for Alpine, and "if there is a profit" he receives a salary from Alpine.³ When questioned whether Alpine holds regular Board meetings Friedman scoffed and said "yes, to the extent you can hold a Board meeting with yourself." Friedman maintains a separate checking account in Alpine's name, and payments for the remodeling work were made

¹ Although there was conflicting testimony as to how many properties Friedman had flipped, at trial Friedman testified he had done six other such transactions. However, neighbor Brent Barber testified Friedman had told him that he (Friedman) had "flipped 200 homes" over a twenty-year period, and that he did this as his business. Johnson also testified that Friedman "did this [flipping homes] for a living."

² Notably, however, throughout his testimony regarding the Property Friedman stated that "*I'm the home owner and I hire contractors to do the work for me.*" (emphasis added). Friedman testified that at the beginning of the remodel he would be at the Property about once a day or once every other day for "about 10 to 20 minutes." Towards the end of the remodel he would go over "every day for a couple of hours" to handle the many details that needed his attention.

³ At trial Friedman testified that he receives a W-2 from Alpine for his services, but during his deposition Friedman's response to the same question was that he "didn't recall" whether or not he did. No evidence was presented at trial showing W-2s issued to Friedman.

from Alpine's bank account. Friedman denied paying for his personal expenses from the Alpine account.

6. Although Alpine was the title owner of record on the Property, Friedman testified that he took out personal mortgage(s) to acquire the Property. He also admitted using the proceeds from the sale of the Property [presumably the property of Alpine] to retire his personal obligations on the mortgage.

7. Friedman testified that Alpine had previously owned other properties throughout Salt Lake valley. In particular, in 2006 Alpine owned three other properties (besides the Property in question here)—one at 8331 Valiant Drive in Midvale, another at 6807 Normandy Place in Midvale, and a third one at 4574 Park Manor Drive, in Cottonwood. Sometime on or after 2006, however, Friedman created three limited liability companies (8331 LLC; Normandy LLC, and Park Manor LLC) and transferred title from Alpine to those properties to the correspondingly-named LLCs. Under questioning Friedman admitted that none of the new LLCs paid any money to Alpine for the transfer of the various properties. However, according to Friedman, the LLCs entered into "management agreements" with Alpine.⁴ Friedman is the sole shareholder of each of the three new LLCs.

The Property.

8. From 2002 to 2005 Hallston Davis and his family occupied the Property. After the Davis family moved out, an intermediary buyer bought the Property with the intent to "flip" it.

⁴ It is unclear exactly what services, if any, Alpine renders to the LLCs, although Friedman testified that each of those properties is currently a "rental." Friedman further testified that the Valiant property has an annual rental value of \$8.40/sq. ft; the Normandy Place property has an annual rental of \$9.20/sq. ft.; and the Park Manor property has an annual rental of \$10/sq. ft. There was no evidence, however, as to the actual square footage of each of those rental properties.

The buyer did no work on the Property and it sat vacant for almost a year. Friedman then purchased the Property and began work on it. The Court credits the testimony of the neighbors who saw the Property during the time it sat vacant. They testified that there was a substantial, visible mold infestation in the two basement bathrooms⁵ and in a laundry room, all of which shared a wall. There was also water damage to the ceilings of the upstairs master bedroom and the kitchen. Further, there was a non-functioning indoor swimming pool; at least one witness testified that there was a crack in the pool's foundation.

9. Friedman began to "pretty up" the Property without applying for the required building permits. Friedman testified that he hired Donato DeGregio to act as a general contractor.⁶ Friedman stated that he relied on DeGregio's expertise and that DeGregio was responsible for pulling the permits. The evidence presented at trial contradicted this testimony. The neighbors testified that Friedman was highly involved with the remodel and was clearly the "man in charge" directing what needed to be done.⁷ Also, according to the trial exhibits and other testimony Friedman was the person who arranged for, and paid, all the various subcontractors and suppliers. In all, Friedman (and not DeGregio) arranged for the building

⁵There was testimony offered that in one bathroom there was mold on the back of the toilet, in the sink, in the vanities, and in the tile surround.

⁶ DeGregio, in turn, worked with one or two unnamed Hispanic laborers who apparently did the bulk of the physical labor on the remodel. DeGregio did not testify at trial.

⁷ According to the testimony of one neighbor, Friedman was at the house everyday and would stay for four to five hours at a time directing the "Italian man" (DeGregio) and the unnamed "Hispanics." Another neighbor testified to interacting with Friedman on a regular basis regarding the house remodel. A third neighbor testified to visiting the home "about 50 times" during the course of the remodel and seeing Friedman there 80% of the time. The witnesses also testified to seeing Friedman do some minor work himself.

materials, the painting, the stucco, the floor coverings, the carpet installation, the cabinetry, the countertops, and the air-conditioning/heating systems used in the remodel.

10. The Court finds that Friedman was clearly acting as the general contractor and would have been the person responsible for securing the required permits and for overseeing the quality of the work.

11. During the course of the remodel a furnace, new air conditioning, and new water heaters were installed in the Property. Friedman's crew removed and replaced the moldy bathroom vanities and shower surrounds and did some electrical work. They applied stucco to the exterior of the home. A "great room" was constructed over the existing indoor swimming pool. When the remodel was complete there was no evidence that the pool had ever existed. The only access to the pool was through a two-foot hole that was located in the office closet underneath carpet.⁸

12. Despite the cosmetic changes and upgrades, the neighbors testified that they were concerned that Friedman had "cut corners." For example, one neighbor testified to seeing stones being applied to the pillars of the front of the house by means of liquid nails instead of mortar. Several neighbors were concerned that the roof was not replaced and that Friedman was not building the floor over the indoor swimming pool in a safe manner. These neighbors testified that they voiced their concerns to Friedman; Friedman denied ever having the conversations.

⁸ During discovery Friedman's expert came to Clark's home to inspect the floor. Clark testified that this was when he first learned how to access the swimming pool. Apparently Friedman's expert had pulled back the carpet in the office closet to access the pool and did not put it back in place. Clark alleged that the hole had been cut during this visit.

13. Friedman's "cosmetic facelift" was completed by July 1, 2006. Shortly after completion Friedman had an open house. All of the neighbors agreed that the remodel of the Property was beautiful. Friedman listed the Property for sale on the Multiple Listing Service ("MLS").⁹ Johnson contacted Friedman regarding the Property. At no time throughout the negotiations and the transaction did Friedman disclose on MLS or to Johnson or Clark that the floor of the great room had been placed over an indoor swimming pool.

The purchase.

14. As a novice home purchaser Clark had been advised to inquire whether building permits had been secured. Clark asked Johnson whether building permits were required for the repairs and remodeling that had been done on the Property. Johnson told Clark that building permits were not required in Utah. At trial Johnson admitted that she did not know about, and did not check on, the need for such permits.

15. Having determined to purchase the property, Clark hired Kyle Oler ("Oler"), a home inspector, to inspect the Property. Oler inspected the property on September 28, 2006. In his report Oler noted that certain windows needed to be replaced with tempered glass, that there was a problem with the main electrical service panel, that there was a missing wood railing in the stairway over the living room, and that the down spouts of the rain-gutter needed to be improved to maintain a flow of water away from the home. Oler also noted that the grading of the landscape around the basement and window wells was sloped toward the house, that the grading needed to be improved, and that there was evidence of past penetration of water at some of the basement windows. The Oler report stated that the asphalt shingles on the roof were well

⁹ The MLS listing stated that the house was "Completely Redesigned, Remodeled & Updated." However, the listing did specify that the roof "is approximately 7 years old."

within their typical life expectancy. The Oler report made no mention of the condition of the "tar and gravel" portion of the roof.

16. On or about September 19, 2006, Johnson prepared and submitted a Real Estate Purchase Contract ("the first REPC") to Friedman on Clark's behalf. The first REPC contained a number of addenda, including Addendum No. 4, which stipulated that the Property was to be sold "as-is," without warranty, and Addendum No. 5, which stated that the seller would not provide seller disclosures. The settlement deadline for the REPC was October 19, 2006. Clark was unable to get financing prior to the closing date so the sale fell through. Despite this setback Clark was still interested in purchasing the Property and Friedman was still interested in selling it to Clark.¹⁰

17. A few days later, on or about October 23, 2006, Clark, Johnson, and Friedman met at Einstein Bagels on Fort Union to renegotiate the purchase of the Property. At the meeting the parties agreed that Johnson would draft a new REPC ("the second REPC"). The second REPC was signed and fully executed by both Clark and Friedman on October 24, 2006.

18. The second REPC included only one addendum, which specified that Friedman was to contribute \$6,000 towards Clark's closing costs. At the time Clark and Friedman signed the second REPC, it did not contain an "as-is" addendum. Consistent with their earlier agreement, however, sections 7 and 24 of the second REPC did not require Friedman to make seller disclosures, and section 8 stated that Clark's obligation to purchases was not conditioned upon his approval of the content of seller disclosures or his approval of the physical condition

¹⁰ Friedman testified he had another offer pending that would have yielded greater financial benefit to him. If that had been so, it is unclear why Friedman would have chosen to continue pursuing negotiations with Clark.

inspection of the Property. In other words, under the terms of the second REPC, Clark was irrevocably committed to purchasing the property notwithstanding the lack of seller disclosures. The second REPC required Clark to close by October 27, 2006.¹¹

19. Friedman contends that the parties intended the second REPC to be "identical" to the first, except for (a) a \$15,000 increase in the purchase price, from \$473,900 to \$489,000, (b) a doubling of the earnest money, from \$5,000 to \$10,000, and (c) making the earnest money nonrefundable. Clark contends that he was giving Friedman a lot more money and expected something in return, primarily that the house not be sold "as-is." There is no evidence, however, that if Clark held such a subjective expectation, that he communicated it to Johnson or anyone else.

20. The Court finds that the above-stated changes were substantive and involved material changes (in Friedman's benefit) to the REPC. They made the second REPC a very different contract than the first REPC. Additionally, there were a couple of other smaller changes that also belie Friedman's contention that all the parties intended the terms of the two REPCs to be identical.

21. Clark was able to finalize the financing, so early in the morning of October 26, 2006, Clark and Johnson went to the First American Title Insurance office at 6955 South Union Park Center in Midvale. Clark signed all the necessary documents to close the buyer's portion of the transaction. Immediately upon signing the settlement documents at the title company, Clark left for the airport to travel from Salt Lake City to Nashville to attend a wedding. Prior to his

¹¹The second REPC, like the first, also contained an integration clause.

departure Clark told Johnson that "the moving vans were on their way" and to "make sure the deal went through."¹²

22. Early in the afternoon of October 26, 2006, while Clark was airborne and unreachable, Friedman contacted Johnson demanding that an "as is" addendum be included as part of the second REPC or he would not close on the Property. Friedman then prepared an "as-is" addendum, backdated it to the day of the signing of the second REPC, and sent it to Johnson. Johnson, without Clark's knowledge, signed the "as-is" addendum in Clark's name. Johnson testified that she did so because she thought that signing it was consistent with a similar addendum that Clark had approved in the first REPC. She also believed that doing so was consistent with Clark's expressed direction that she ensure the deal "go through."

The aftermath.

23. Within weeks of Clark moving into the Property, he and his father installed new downspouts for the rain gutters¹³ because the house was missing them.

24. Shortly thereafter, Clark learned about the existence of the indoor swimming pool from a neighbor. Clark immediately called Johnson and asked her about it, but Johnson knew nothing about a pool on the Property.¹⁴ It was during this call that Johnson informed Clark that

¹² At trial, Clark did not deny making these statements.

¹³ However, it appears that Clark and his father did not install the downspouts properly; as a result, the evidence at trial was that during rainstorms the water comes off of the downspouts, which are too-short, then it drains back towards the foundation and basement window wells.

¹⁴ Friedman insisted at trial that Johnson was, or should have been, aware of the pool for two reasons. First, Friedman contended that when the parties were meeting at Einstein's Bagels to discuss the second REPC, a Friedman acquaintance came by the table and discussed the pool with him while Clark and Johnson were present. Clark and Johnson both denied that anyone had come by the table or that any such discussion took place. Second, Friedman contended that early

she had signed his name to the backdated "as-is" addendum prepared by Friedman. Clark testified that he was disappointed with Johnson's actions; he stated, however, that he did not think Johnson signed his name with malice or intent to deceive.

25. Clark then went to the City of Cottonwood Heights (the "City") Building Inspector's office and requested an official inspection of the remodeling work. Jody Hilton ("Hilton"), the City's contracted building inspector, informed Clark that no building permits had been issued and that no official inspections had been done. Hilton inspected the Property and concluded that the work performed violated various provisions of the building code. Following his inspection Hilton prepared a report that, among other things, noted the following problems:

- a. The house had undergone major remodeling and additions built without permits and inspections;¹⁵
- b. The house was landscaped with a reverse slope that allowed water to drain towards the window wells;
- c. The rain gutters were not functioning properly;

in the negotiations he had gone to the house and had found Johnson there looking at the listing history of the Property on her laptop. Johnson denied this ever took place and evidence was presented that Johnson did not own a laptop at the time in question—her only computer was a desktop model she had at her office. Both of these instances alleged by Friedman add further support to the Court's conclusion that Friedman's testimony was, overall, of questionable credibility. Accordingly, absent corroborating evidence supporting Friedman's contentions, the Court gives little weight to Friedman's testimony.

¹⁵ At trial Friedman presented evidence that the pool and family room additions to the Property had indeed been made pursuant to building permits issued by Salt Lake County in 1973, 1976, and 1981-82. It appears that for some of the earlier work no final inspections were requested. Hilton testified that these records were old enough that they would not have been in the City's possession, since they predated the City's incorporation. Accordingly, Hilton testified that if Clark had gone to the City to search for building permits on the property, he would not have found those records.

- d. There were roof leaks above the rear (master) bedroom;
- e. The stucco lacked flashing and weep holes; and
- f. New windows had been installed but it was unknown if they were properly flashed and caulked.

26. Clark has lived at the property for four years. In that time, other than installing some downspouts early after he moved in, and arranging for mold remediation (towards the end of 2009),¹⁶ Clark has not taken any further corrective action to address the problems noted by Hilton or Oler. In particular, by the time of trial Clark still had not arranged for a landscaper to change the slope of the landscaping, nor had he undertaken repairs (or even routine maintenance) of the tar and gravel roof.

27. A few months after Clark moved into the Property a neighbor, Brent Barber, noticed that Clark had not turned off his sprinklers notwithstanding the approaching winter season. Barber suggested to Clark that he should do so but Clark did not know how to do it, so Barber went over and showed Clark what it involved. In the process, Barber noticed that the stop and waste valve appeared broken, and the area around it was full of water. Barber told Clark he should have that looked at and fixed, but Clark took no action to fix it until June 2010. The location of the broken stop and waste valve is near the window to the basement's center bedroom, where mold was later found.

28. According to Clark, he began noticing problems with mold in the basement sometime during spring, 2007, about 6 or 7 months after moving in. He also began to see

¹⁶ The mold remediation cost Clark approximately \$1,800.

evidence of roof leaks, primarily in one window and on the ceiling of the master bedroom that Clark occupies.

Damages.

29. At trial Clark's counsel focused their presentation of the Property's problems in four specific areas: (1) the pool area/great room floor (including the HVAC system under the great room floor), (2) the stucco application to the outside of the Property, (3) the roof and problems related to roof leaks, and (4) the mold in the basement. The Court heard testimony from Plaintiff's experts, Eldon Peterson ("Peterson") and Hilton, and from Defendant's experts, Christopher Nielson ("Nielson") and David Alter ("Alter") regarding damage to the property alleged to have resulted from Friedman's remodel. The Court found all the experts to be credible, but the Court found Alter's testimony to be particularly compelling and gives it greater weight.

A. Pool area/great room floor.

30. Clark's experts decried the construction of the great room floor over the swimming pool as "tinker toy construction" and "an abomination." Defendants' experts charitably described the construction as "unconventional" but not "unsafe," and emphasized the great room floor had not "failed." The Court agrees with Clark's experts on this point.¹⁷ The construction of the great room floor supports clearly violates building code requirements; while they may not have yet "failed," the use of untreated wood in the supporting structures, if left un-remedied, will eventually cause significant problems for Clark.

¹⁷ The pictures of the floor's construction taken from the space underneath the great room are the poorest example of construction this Court has observed in 12 years of trying cases.

31. The supports for the great room floor are provided by joists that run across the pool's span. The joists were constructed out of untreated wood and were placed directly on the concrete decking surrounding the pool area itself. Some of the 2x4s were attached to the vertical cement walls of the pool and held in place by nothing more than gobs of glue, liberally applied. To provide vertical support across the pool span itself, Friedman's workers used additional untreated 2x4's and randomly placed them directly on the pool's concrete floor. Then they either nailed or glued other 2x4's on the diagonal between the joists and the vertical supports. Many of the nails used to hold the 2x4's in place were the wrong size. At least one photograph shows what appears to be a diagonal 2x4 that is nowhere anchored to either the vertical support or to the floor. All the experts, including the defense experts, agreed that the framing of the structure supporting the floor of the great room was not in line with general construction standards and violated many provisions of the building code. Upon questioning by the Court, the experts uniformly stated that they would not accept such construction in their own homes nor consider it acceptable in the discharge of their professional responsibilities.

32. The experts testified that untreated wood should never be placed directly on concrete because it is subject to rotting, and that joist splices need to be level and regular or else there may be unevenness in a floor's surface. They differed, however, on their proposed solutions to fix the framing problems in the pool area. After considering all the testimony of the various experts the Court finds that Alter's proposed fixes are the most practical way of bringing the great room floor up to code without a wholesale "tear down" of the prior construction.

33. Although Alter did not do a structural testing of the pool floor, he testified that he was "pretty sure" there were no cracks in the pool because he did not see any, and he testified such cracks would have manifested by now. Alter testified he would not recommend removing the pool, nor would he recommend filling it in because of problems with settling that would occur. Instead, Alter proposed putting in two bearing walls per span, together with "proper blocking" (which is presently missing) to fix the problems noted. Alter stated he was "very confident" that workers could insert thin metal sheeting and metal studs to create a barrier between the concrete and the wood supports. Alter would also correct the present "deflection" of the great room floor (*i.e.*, would level the floor as part of the remedial work that needs to be undertaken).

34. Alter estimated that the fix of the great room floor would cost approximately \$2,500 in engineering work and \$15,000 to accomplish the fix.¹⁸ However, Alter acknowledged that these amounts were just "guesses," not a detailed cost analysis. Moreover, Alter acknowledged that in giving his estimated costs, he had not taken into account the costs of electrical or plumbing work that might need to be done. He also did not include in his calculations the cost of replacing any damage to the hardwood floors of the great room, or the costs of removing and resetting kitchen cabinets, appliances, countertops.

¹⁸ Peterson (Clark's expert) provided a detailed cost breakdown for the costs he projected would need to be incurred in fixing the great room floor problems. Peterson's estimate, which the Court rejects as unreasonably high and based on the unwarranted assumption that the whole thing has to be ripped out and replaced, is \$80,700.

Similarly, Alter did not take into account possible costs associated with replacing wallboard, baseboards, carpets, etc., over other areas affected beyond the great room itself.¹⁹

35. After considering some of the costs identified by the various experts, the Court finds that in the worst case scenario, the cost of fixing all the issues identified in relation to the great room floor/pool would add another \$10,000 to Alter's estimation, for a total of \$28,500 in damages to remedy the problems associated with the great room floor/pool area.²⁰

36. Based on the expert testimony at trial the Court finds that the portion of the HVAC system that runs underneath the great room floor was improperly installed. Specifically, all the experts agreed that the HVAC tubing was not adequately supported; some of the tubing was held in place by nylon fasteners (acceptable) and duct tape (not acceptable). In various places the HVAC tubing under the great room floor showed kinks and bends that impact the flow of air and decrease the HVAC system's efficiency. Alter testified that removing and replacing the HVAC tubing under the great room floor would be expensive, but opined that the problems with the HVAC system could be fixed by properly suspending the tubing that is already in place. Alter testified that he spoke with Hilton regarding the issue of under floor ventilation; Alter testified that he would insulate the north wall to provide the necessary vapor barrier and avoid the need to vent the space to the outside. However, Alter did not provide an estimate for what it would cost to fix the

¹⁹ Alter indicated that there would have to be proper support provided for water and gas lines under the great room floor, but indicated that this would also not be a difficult or expensive proposition. He did not provide an estimate for these necessary fixes.

²⁰ In arriving at this amount the Court has considered the various estimates offered by Alter, Nielson, and the specific breakdown of various costs provided by Peterson.

ventilation and HVAC problems he noted. Peterson estimated the cost of removing and replacing the HVAC ductwork under the pool at \$3,000. Although Alter testified that the problems with the HVAC under the pool could likely be corrected for less cost, he did not provide an estimate of those costs, so the Court accepts the Peterson estimate of \$3,000 as the damages resulting to Clark as a result of the faulty installation of HVAC under the great room floor.

B. Stucco.

37. Clark's expert, Peterson, suggested that Friedman's workers employed the EFIS system to re-stucco the Property. Because it was put up without the benefit of building inspections, Peterson further opined it would all have to be removed and redone in order to ensure it had been done right. Peterson estimated the cost of fixing the stucco at approximately \$9,705.00. Peterson testified that failure to properly install an EFIS system could lead to water infiltration and development of mold that would not be easily detectable until considerable damage had already occurred.

38. While the Court does not disagree with Peterson's assessment of potential problems with an improperly installed EFIS system, the evidence before the Court persuades it to find that it is more likely than not that the Property's prior exterior finish was made of brick, and that the stucco installation that was done to update it was a "hard coat" stucco application rather than an EFIS system. For this finding, the Court relies on exhibits showing that the additions made to the Property in the 1970s and early 1980s were made pursuant to building permits, and those permits show that a brick exterior was planned. The Court further relies on the testimony of Hilton, who when presented with evidence of those

earlier building permits testified that typically brick is placed on an addition to make it tie in to the balance of the house. Accordingly, Hilton testified he was "more reassured" that the stucco had been applied over brick.

39. Nevertheless, all the experts who testified concluded that the hard coat stucco application was deficient and did not comport with building code requirements because no weep holes were preserved for the underlying brick.

40. Alter testified that "the important thing with stucco is to prevent build up of moisture without a means to escape." Alter testified that had there been a stucco failure, it would have already manifested itself, and he found no evidence of a problem when he inspected the property. Nevertheless, Alter recommended that weep holes be installed. He estimated that making weep holes in the stucco would "take less than 3 to 4 hours" and would be relatively inexpensive. All it entails is hiring a knowledgeable handyman with a drill and a masonry bit to make new holes. Alter estimated the cost of correcting the absence of stucco weep holes to be approximately \$600-\$700. The Court accepts this estimate as an appropriate estimate of damages resulting from the failure to preserve weep holes to allow moisture to escape.

41. Without conceding that there were problems with the stucco application, Friedman argued that any problems with the stucco would have been open and readily discernable by Clark or Oler, Clark's home inspector. Therefore, Friedman argued, he had no obligation to disclose and should not be liable for the costs of correcting the problem. The Court disagrees. On this point, the Court gives credence to Peterson's opinion that "run of the mill home inspectors would not likely have picked up on the stucco problem." Thus,

the Court finds that any issues with the stucco application would not have been readily apparent to Clark as a reasonably prudent buyer, or to Oler. On the other hand, Friedman, as the acting general contractor, was the person who contracted for the stucco application and was therefore ultimately responsible for ensuring its proper installation.

C. Roof.

42. There is clear evidence that part of the roof²¹ over the rear (master) bedroom has leaked and resulted in damage to the ceiling and window casings.

43. As noted earlier, neighbors testified that they had seen evidence of roof leaks in the back bedroom area when the Davis family was living at the Property. In rebuttal to the neighbor's testimony Friedman called Hallston Davis, who testified there had been a leak in a corner of a front bedroom, which had been repaired. However, Davis denied being aware of roof leaks in the back bedroom presently used by Clark as the master bedroom.

44. Although at trial Friedman denied having personally seen any roof leaks, in his deposition Friedman apparently stated that as part of the remodel some effort had been made to do "sealing with roofing tar."²² He also acknowledged that there had been "several" areas in the ceiling showing water stains.

²¹ The roof of the Property is divided into two sections--asphalt shingles cover the majority of the roof, but a portion of it (over the addition that forms the great room, the back bedroom, office, etc.,) is a tar and gravel roof.

²² No depositions were introduced into evidence, but Friedman's testimony was challenged by Clark's attorney through Friedman's deposition testimony. The Court is relying on its notes and memory for this reference.

45. At least one neighbor testified that she had directly spoken with Friedman about the roof leaks. According to the neighbor's testimony, Friedman denied that there were any leaks, saying it was just a disconnected water line to the swamp cooler.

46. The Court finds that, at a minimum, Friedman had knowledge of past water damage from roof leaks. The Court is troubled by Friedman's alleged summary dismissal of roof leaks as a disconnected swamp cooler water line. The Court also finds it is more likely than not that in the course of the remodeling any evidence of roof leakage inside the house was cosmetically covered over, thereby masking any potential problem from Clark or his inspector.²³ Based on the totality of the evidence (and after assessing the credibility of the various witnesses), the Court finds that Friedman would have had knowledge that any evidence of ceiling water damage had been covered up in the remodeling process.

47. However, the Court further finds that a majority of the problems with the roof are primarily attributable to Clark's lack of regular maintenance of the tar and gravel portion of the roof over the four years he has owned the Property. According to one of the experts (Nielson), the gravel and tar section of the roof must be regularly maintained "at least every couple of years." In the four years Clark has owned the Property he has done nothing to maintain the roof, even when the damage to the rear bedroom window casing became

²³ While the general condition of the tar and gravel roof surface should have been open and obvious to Oler, due to the cosmetic cover-up of past water damage the Court cannot find that Oler would have seen interior indications that should have put him on notice that the roof would leak.

obvious.²⁴ It was not reasonable for Clark to have taken no action for at least three and one-half years (since April 2007) on an obvious leak and still expect to place the blame for all the resulting damage upon Friedman or Alpine.

48. Clark's expert, Peterson, estimated the cost to repair the roof over the bedroom at approximately \$2,778.00,²⁵ but with one exception (an additional estimate of \$122.65 to fix ceiling damage over a doorway), Peterson did not specifically break down that amount into its component parts as he did with respect to the great room/pool area.

D. Mold.

49. Mold was found in the basement center bedroom wall, the furnace room and the basement bathrooms. The Court finds that there were two different sources for the mold. The Court finds it more likely than not that the mold found along the exterior wall of the basement center bedroom was caused by the reverse sloping of the landscaping coupled with the improper grading of the window wells and the improperly installed downspouts.

50. When Friedman sold the Property there were no downspouts installed on the Property. Typically, downspouts are necessary to channel rainwater away from a home. This problem was noted in Oler's report. This problem was open and obvious, and Clark was clearly aware of it. Indeed, Clark and his father installed downspouts shortly after Clark moved in; however, it appears that at least some of the downspouts were improperly

²⁴In an April 2007 video shown at trial, there was already evidence of water damage to the window casing/wallboard in the back master bedroom.

²⁵At least one other estimate provided in the exhibits to the Court put the cost of repairing the tar and gravel portion of the roof at over \$8,900. That estimate did not breakdown what would be done for that price. The Court has therefore rejected this estimate and has used the figures provided by Peterson.

installed and, therefore, the installation of down spouts did not succeed in channeling water away from the foundation.²⁶

51. Compounding the mold problem in the basement center bedroom wall was the fact that shortly after Clark acquired the property (in late October or early November 2006) he learned that the stop and waste valve located just outside the window well of that bedroom was apparently broken and full of water. Clark's neighbor Barber brought the stop and waste valve problem to Clark's attention the day he assisted Clark in turning off the Property's sprinklers. Barber told Clark that he needed to get the valve fixed, but Clark took no action to remedy that problem until June 2010.

52. The Court finds that Clark knew or should have known that there was a reasonable likelihood of water-related problems that could affect the foundation (and therefore, the interior basement wall). Not only did Oler's report note evidence of prior infiltration, the report made specific suggestions to prevent future problems (recontouring the landscape, adding drain spouts, etc). Clark did not implement most of the report's suggestions in a timely manner. Moreover, the one suggestion that Clark did act on (installing the drain spouts) he did not do properly, as shown by the videos presented at trial. Further, there has been evident bowing and warping of the rain gutters around the Property, but no apparent maintenance has taken place. As a result, water penetrated the foundation and mold resulted in the center bedroom wall.

²⁶Video tapes of the Property taken September and December 2009 show water pouring down a partial downspout into the window well and dripping from the roof, again into the window well. There is no evidence that Clark has fixed these problems.

53. On the other hand, the Court finds that the mold located in the basement bathrooms and furnace room existed at the time Friedman remodeled the Property and Friedman was or should be imputed knowledge of its existence. In fact, Friedman's own home inspector noted it as "surface mold" in the downstairs bathrooms. Moreover, as testified to by the neighbors, the presence of mold in the bathrooms was open and obvious during the time the house sat vacant. There is no reasonable way that Friedman would not have seen what was easily observed by the neighbors in their visits to the Property. Therefore, the Court finds that during the course of the remodel the mold in the basement bathrooms and furnace room was known to Friedman. Although Friedman's painter testified he did not see mold when he was painting the house, the Court credits Peterson's testimony that putting bleach on the mold could have hidden it without actually killing the mold. While Friedman's workers removed and replaced cabinets and fixtures in the bathroom, it is more likely than not that some portion of the pre-existing mold remained but was covered up with paint, rendering it impossible for Clark or Oler to become aware of it. Because the mold was not properly remediated the mold spores likely went dormant and re-grew into mold when an errant baseboard nail punctured a water pipe behind the toilet and introduced additional moisture into the environment.²⁷

²⁷ On or about May 2007 (about six months after moving in), Clark noticed a problem in one of the basement bathrooms and called Roto-Rooter Plumbers. The Roto-Rooter technician who responded to the service call prepared a report wherein he noted that a baseboard nail had punctured the water line, leading to a slow leak behind the wall. The technician's report also noted the presence of mold (which was attributed to the leak) and recommended that proper mold remediation be undertaken. One of the defense experts (Nielson) questioned the technician's statement that a baseboard nail had punctured the water pipe. Nielson opined that the location of the baseboard was below where the water pipe would have been and, as a result, he thought it "unlikely" that a nail from the baseboard would hit the water line. Nielson's

54. Exhibits introduced into evidence show that Clark paid Roto-Rooter \$281.70 to address the initial problem in the bathroom wall attributable to the baseboard nail puncturing the water line. Clark paid an additional \$282 to Rainbow International restoration on or about the time the water line problem and attendant mold was found in the basement bathrooms and furnace room.

55. Clark also testified he paid approximately \$1,800 to remediate the mold in the basement bathrooms, furnace room, and center bedroom. Unfortunately, no breakdown was provided to separate the costs associated with the bedroom mold remediation (for which the Court finds Clark responsible) and the bathrooms/furnace room mold remediation (for which the Court finds Friedman responsible). Based on the testimony received and the Court's review of the photographs received as evidence, The Court finds that the incidence of mold (based on testimony and photographs in evidence), was somewhat greater in the basement center bedroom than in the bathrooms/furnace room—something in the order of 60% of the mold problem being found in the basement center bedroom and 40% in the bathrooms/furnace room.

56. Based on the above Findings, the Court now enters its

CONCLUSIONS OF LAW

57. As a preliminary matter the Court notes that pursuant to the parties' stipulation, the second REPC signed on October 24, 2006 is the operable document governing the

opinion is based on his after-the-fact attempt to reconstruct what occurred. He did not see the punctured pipe. On the other hand, the Roto-rooter technician who uncovered the wall to inspect the problem reported that the nail had punctured the pipe. The Court therefore gives greater weight to the contemporaneous Roto-Rooter report. Additionally, given the sub-par workmanship evident in other aspects of the hidden remodeling work, the Court finds it more likely than not that it was, in fact, an ill-placed nail during the remodel that punctured the pipe.

Property sale in this case. The Court expressly rejects Plaintiff's unjust enrichment claim because the second REPC governed the transaction. "A claim for unjust enrichment is an action brought in restitution, and a prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue." *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246 (footnote omitted). In this case there was an actual written and binding contract between the parties, therefore, the unjust enrichment claim fails as a matter of law.

Prudential.

58. At the conclusion of the Plaintiff's case the Court granted a Rule 41 dismissal of the sole claim against Prudential—that Prudential had violated its fiduciary duties to Clark by failing to supervise Johnson and by failing to "insure that the Property was safe, and that repairs had been made with the proper permits and in a professional and workmanlike manner." At trial Plaintiff provided no expert testimony as to what the applicable standard of care in the industry is regarding (1) a broker's responsibility to ensure a listed property's safety, or (2) a broker's responsibility to train or provide oversight of its real estate agents. Further, the Broker Agreement governing the relationship between Clark, Johnson, and Prudential made it clear that neither Prudential nor its Agent would "make any representations or warranties regarding the physical or legal condition of any Property." The Court therefore dismissed the claim against Prudential.

Johnson.

59. The Court also dismisses Clark's negligent misrepresentation claim against Johnson. A party who is injured due to "reasonable reliance upon a second party's careless

or negligent misrepresentation of a material fact may recover damages resulting from that injury when the second party had a pecuniary interest in the transaction, was in a superior position to know the material facts, and should have reasonably foreseen that the injured party was likely to rely upon the fact.” *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 59 (Utah 1986). Plaintiff’s amended Complaint alleged that Johnson violated her fiduciary duties and negligently misrepresented Clark by failing “to insure that the Property was safe, and that repairs had been made with the proper permits and in a professional and workmanlike manner.” At trial Johnson admitted she owed a fiduciary duty to Clark. However, there is no evidence that Johnson had any knowledge of the various problems with the Property. Additionally, as was the case with respect to Prudential, Plaintiff failed to provide expert testimony at trial regarding the standard of care applicable to real estate agents. Without such testimony the Court cannot conclude that Johnson breached her duties to Clark. Moreover, since the Broker Agreement explicitly stated that neither Prudential nor its Agent were prepared to make any representations or warranties regarding the physical condition of any property, including zoning and building code issues, the Court concludes that Clark’s reliance on Johnson’s statement that Utah did not require permits for the remodel work done at the Property was unreasonable.

60. The Court also holds that Johnson did not negligently misrepresent Clark by signing the backdated “as-is” addendum and failing to disclose that fact immediately to Clark. Based on the totality of the evidence at trial the Court concludes that Johnson reasonably believed that she was acting in accordance with Clark’s desires and intent when she signed the “as-is” addendum. At a minimum, the Court concludes that Johnson had

apparent authority to sign for Clark, thereby binding him to the "as-is" addendum. While it is a closer question whether Johnson received Clark's express authority to sign, the Court concludes that based on (a) Clark's statements to Johnson that the moving van was "on its way" and to "make sure the deal" went through, and (b) the fact that Clark himself had accepted an "as-is" addendum in the first REPC, Johnson had a reasonable bases for her action.

Friedman.

61. The Court rejects Plaintiff's allegation that Friedman breached the second REPC by "failing to make the seller's disclosures." Section 8 of the second REPC makes clear that Clark's obligation to purchase was not conditional upon seller disclosures, and section 24 indicates that there was no deadline for seller disclosures. The Court concludes that Clark understood no seller disclosures would be made and that the failure to make seller disclosures cannot be grounds for a breach of contract claim.

62. The Court is also not persuaded that Friedman's statements to Clark about the expenditures in the house amounted to a contractual representation that the remodeling work had been done in a "professional and workmanlike manner." The only evidence before the Court on this issue was Clark's testimony that Friedman appeared to be "very proud" of the outcome of the remodel and that he'd spent close to or over "\$100,000."

63. Although the Complaint alleges fraud, the parties actually tried the case as one of fraudulent nondisclosure. To prevail on a claim of fraudulent nondisclosure, the Plaintiff must show (1) that there is a legal duty to communicate, (2) that the nondisclosed information is material, and (3) that the nondisclosed information is known to the party

failing to disclose. *Mitchell v. Christensen*, 2001 UT 80, ¶ 9, 31 P.3d 572. While caveat emptor operates in the sale of existing or used residences, a seller does have an independent common law duty to disclose known latent defects that are not discoverable by reasonable care.²⁸ *Id.* at ¶ 11; (see also *Davencourt HOA v. Davencourt*, 2009 UT 65, ¶ 62, 221 P.3d 234).

64. The Court concludes that Friedman violated his duty to disclose known latent defects of the Property.

A. Great room floor/pool.

65. Friedman of course knew about the pool and determined to install a floor over it as a way of increasing the value of the Property. When the construction was done, there was no way for any reasonable observer to have known that there was a pool underneath the great room. Nor could a reasonable purchaser or home inspector been in a position to verify the extent and quality (or lack thereof) of the construction. Indeed, even after Clark learned about the pool from the concerned neighbors, he did not even know that there was a way for him, or anyone, to inspect the construction. The only access to the pool area was through a two-foot hole cut in the floor of the office closet, but that access way was hidden from view by carpeting. Clark did not learn of the access opening until after this litigation was instituted when Friedman and his attorney visited the Property while Clark was away. Upon his return to the Property Clark found the uncovered hole in the closet floor.

²⁸ Friedman's reliance on the "as-is" addendum and on the absence of seller disclosures is not persuasive. See *Moore v. Smith*, 2007 UT App 101, ¶ 32, 36, 158 P.3d 562 (affirming trial court's refusal to dismiss Plaintiff's fraudulent nondisclosure claims despite presence of "as-is" clause).

66. The Court has found that notwithstanding his disavowal, Friedman was the person responsible for the remodeling done at the Property, yet he decided not to secure the required building permits. As a result, the construction of the floor over the pool was horrendous and indisputably not up to Code. Whether or not Friedman actually knew about the sub-par construction of the great room floor is immaterial; he is charged with the knowledge of his workers and with his own failure to supervise their work appropriately. The foregoing triggered a legal duty on Friedman's part to disclose the information known to him—something he chose not to do.

67. The Court concludes that all the problems related to the building of the great room floor (*e.g.*, the improper supports for the joists, the water/gas pipes, the HVAC system runs under the floor, and any ventilation issues) were latent defects known to Friedman and not discoverable by a reasonably prudent buyer (or his home inspector) through the exercise of reasonable care. Moreover, the Court holds that the nondisclosed information was material. Clark wanted a house he could move into; he did not want a "fixer-upper." Knowledge of that defect alone would have affected Clark's decision whether or not to buy the property or, in the alternative, would have affected Clark's decision as to how much to offer for the Property.

68. As a result of Friedman's intentional non-disclosure, Clark was damaged. The Court determines the amount of damages to Clark to be approximately \$28,500 to correct all the problems associated with the creation of the great room over the pool area, including the HVAC.

B. Roof.

69. Because the remodeling and “prettying up” process covered up evidence of roof problems and the damage to the window casing in the back (master) bedroom became obvious so soon after Clark’s purchase of the Property (by no later than April 2007), the Court finds that Friedman should be held responsible for at least a portion of the cost of repairing the ceiling over that bedroom. Although admittedly an ad hoc allocation, after weighing all the evidence the Court concludes Friedman should be held responsible for 25% of the cost of fixing the roof over the bedroom. Using Peterson’s figures, Friedman should be held responsible for \$725.00 of the cost of repairing the roof.

C. Mold.

70. Based on its earlier stated findings, the Court allocates the cost of the mold remediation on a 60/40 basis, with 60 percent of the cost (or \$1,080.00) attributable to Clark because of his failure to take action to correct the problems noted in Oler’s report (proper down spouts, landscape correction) or by Barber (the stop and waste valve) which the Court has found caused the mold in the basement center bedroom wall. Forty (40) percent (or \$720) of the mold remediation costs should be chargeable to Friedman because the mold problems in the basement bathrooms and furnace room are attributable to him.

71. Additionally, Friedman bears responsibility for the expenses incurred by Clark with Roto-rooter and with Rainbow International (totaling \$563.70) as a result of the damage caused by the baseboard nail’s puncture of the water line in the course of the remodel.

D. Stucco.

72. The Court concludes that Friedman is responsible for the improper installation of the hard coat stucco because weep holes were not preserved. This was a latent defect not reasonably detectable by Clark or his home inspector. As the acting general contractor on the remodel, Friedman knew or should have known of the improper installation. Friedman is responsible for the cost of correcting this problem. Accordingly, damages in the amount of \$700 for this problem are chargeable to Friedman.

Alpine.

73. The Court further concludes that Alpine is the alter ego of Friedman and that observing the corporate form in this case would be inequitable. To pierce the corporate veil a Plaintiff must show "(1) such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity." *Colman v. Colman*, 743 P.2d 782, 786 (Utah App. 1987).

74. Friedman testified that he never used corporation money to pay his personal expenses. The Court finds that testimony not consistent with the evidence. Friedman testified that Alpine owned the Property. However, the Property was not acquired with a mortgage based on Alpine's assets. Rather, in acquiring the Property Friedman testified he negotiated the loan/mortgage in his own name. When the Property was sold to Clark, the proceeds of the sale—which ostensibly belonged to Alpine—were used to retire Friedman's personal obligation on the mortgage.

75. Friedman is the sole shareholder, director, and officer of Alpine. Friedman's scoffing response to the question whether he had observed corporate formalities, such as holding board of director meetings, leads the Court to conclude it is more likely than not that such formalities were not observed.

76. Based on the various invoices, etc., presented at trial, the Court also concludes that the majority of purchases of goods or services employed in the remodel were negotiated by Friedman in his individual capacity, rather than on Alpine's behalf.

77. The Court also finds that Friedman has diverted assets from Alpine. The Court finds it striking and highly probative of Friedman's intent that the same year that this Property was sold to Clark and this law suit was initiated, Friedman created three new LLCs and transferred to those new entities three properties that had been previously held in Alpine's name. Those actions strongly suggest that Friedman intended to make Alpine judgment-proof in the event this law suit resulted in a judgment against Alpine.

78. Based on the foregoing, the Court concludes that Alpine is Friedman's alter ego and it would not be fair to observe the corporate form in this case.

Punitive Damages.

79. Clark seeks a punitive damages award on the basis that Friedman "manifested intentional fraudulent conduct." Under Utah law, a Court *may* award punitive damages only where it is established by clear and convincing evidence that "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. § 78B-8-201 (West 2010).

80. Here, Friedman knowingly failed to disclose material latent defects even though he had a duty to do so. Moreover, while there may be disagreement as to whether Friedman's actions constituted "intentionally fraudulent conduct," there is clear and convincing evidence that, at a minimum, Friedman manifested a knowing and reckless indifference toward, and disregard of, Clark's right to be informed regarding latent material defects of the Property. *See O'Brien v. Rush*, 744 P.2d 306, 309 (Utah App. 1987) (holding that mechanic's taking advantage of plaintiff's lack of knowledge and charging premium prices for used parts warranted punitive damages).

81. Once a court determines that a punitive damages award may be appropriate, it must then determine whether Plaintiff has presented adequate evidence to allow a proper determination of the amount of punitive damages that should be assessed.

82. The Utah Supreme Court set forth seven factors that must be considered when evaluating the amount of punitive damages awarded:

(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 808 (Utah 1991); *see also Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 12, 63 P.3d 686.

83. Plaintiff presented no evidence from which the Court can determine Friedman's (or Alpine's) relative wealth. However, although relative wealth is a factor to be considered, the Utah appellate courts have recognized that "the introduction of evidence as to the relative wealth of the defendant is not a technical prerequisite to an award of punitive damages."

Bennett v. Huish, 2007 UT App 19, ¶ 38, 155 P.3d 917. Moreover, “the defendant who appears to have wealth but in fact does not, should not expect the plaintiff to point this out to [the trier of fact] for him. He himself must present to [the trier of fact] evidence of his inability to pay a large award of punitive damages.” *Id.* (alterations in original) (quoting *Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 (Utah 1998)).

84. Based on Ex. 86, the Court is aware that the Antler Way property was purchased for \$221,000. The testimony at trial was that Friedman had spent approximately “\$100,000” to upgrade the property, taking that amount at face value suggests that Friedman had approximately \$321,000 invested in the property. Friedman sold the Property for \$489,000 (minus seller-paid closing costs of \$6,000), for an adjusted sale price of \$483,000. Subtracting \$321,000 from the adjusted sale price yields a rough profit estimate of \$162,000 to Friedman/Alpine from the sale of the Property.

85. The only other evidence from which some income could potentially be attributed to Friedman or Alpine was Friedman’s testimony as to the per square foot annual rental value of three residential properties previously owned by Alpine, and now owned by the three LLCs for which Friedman is the sole shareholder and director. However, although Friedman identified the per square foot annual rental value for the three properties, he was not asked about the actual square footage of each of those properties. Accordingly, the Court cannot compute annual rental income attributable to Friedman’s other LLCs. Furthermore, there is no evidence from which the Court could determine (a) offsetting expenses incurred by the three LLCs, or (b) whether the three LLCs can be deemed to be Friedman’s alter egos so that the net revenues of the LLCs could be imputed to Friedman.

86. In evaluating the second *Crookston* factor, the nature of Friedman's misconduct, the Court has found that Friedman knowingly and recklessly engaged in conduct that did not comply with his common law duty to disclose known, latent defects in the Property being purchased by Clark. There is furthermore no question that Friedman profited—at Clark's expense—from that misconduct to the tune of approximately \$162,000.

87. The third *Crookston* factor “looks to the circumstances surrounding the [misconduct], particularly with respect to what the defendant knew and what was motivating his or her actions.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 38, 82 P.3d 1064 (internal quotation marks omitted). As discussed at length in the Court's findings of fact, Friedman earns his living buying, remodeling and selling homes. He is an experienced home flipper who presumably aims to maximize his profit in every transaction. Friedman knew or should have known that he was undertaking remodeling work that required building permits, yet he failed to arrange for such permits or ensure that others working for him applied for the necessary permits. Friedman's claimed reliance on DeGregio as his general contractor is belied by his exclusive involvement in the purchase of goods and services, including subcontractor services, involved in the Property's remodel. Friedman was present at the house every other day at the beginning, and then daily—for extended periods of time—once the remodeling work progressed. According to all the neighbor's testimony, Friedman was clearly the person “in charge” of overseeing the entire remodeling project. Once the remodel was complete it was Friedman again who marketed the Property. Finally, it was he that negotiated the purchase and sale agreement with Clark and Clark's agent. As Johnson testified regarding the negotiations with Friedman, he was “one tough cookie.” In short, it

strains credulity to believe that Friedman was not fully aware of the Property's actual condition or of what his workers were doing. Moreover, based on Friedman's own testimony the Court concludes that Friedman did not maintain the necessary corporate formalities and that he misused Alpine assets to retire his obligation on mortgages he took out in his own name. Furthermore, the Court concludes that it was no coincidence that at or about the time Clark became aware of the problems with the Property, all assets held in Alpine's books were transferred to other LLCs controlled by Friedman, without consideration being paid for such transfers.

88. The fifth *Crookston* factor addresses the probability that the misconduct will occur again in the future. "A high probability of recidivism justifies a higher than normal punitive damage award." *Id.* at ¶ 42. With respect to the impact on Plaintiff (and others) of Friedman's actions, it is indisputable that Clark paid a lot of money for what has turned out to be a "fixer-upper," exactly what Clark was trying to avoid. Moreover, because Friedman earns his living flipping houses, there is a substantial probability that unless deterred through an appropriate punitive damages amount Friedman will take similar action in the future to the detriment of other naïve potential purchasers.

89. The sixth *Crookston* factor concerns the relationship between the parties. Here Friedman was an experienced home flipper; Clark was an inexperienced, first-time buyer who never had been involved in real estate purchases. Although it is unlikely that these parties will have future interactions, Friedman's failure to disclose material latent defects known to him violated his additional duty of good faith and fair dealing implied by law in most contractual relationships.

90. The seventh *Crookston* factor compares the amount of actual damages awarded with the amount of punitive damages awarded. "The ratio of punitive to compensatory damages does not, by itself, determine whether or not an award is excessive; an award that falls outside certain parameters will, however, elicit more searching judicial scrutiny." *Diversified Holdings, LC v. Turner*, 2002 UT 129, ¶ 24, 63 P.3d 686. "For punitive awards of less than \$100,000 a ratio of three to one will generally be justifiable, but for awards greater than \$100,000, a somewhat lower ratio is usually appropriate." *Id.* After considering the facts of this case and weighing the *Crookston* factors, the Court concludes that an award of \$15,000 in punitive damages is merited. The amount is certainly well within the likely profit Friedman received from the sale, and it is less than one half of the amount of compensatory damages awarded by the Court (\$31,208.70). Thus, it is well below the ratios of punitive vs. compensatory damages that Utah appellate courts have upheld. Although it is barely nine percent of the presumptive profit earned by Friedman in this transaction, the Court believes it is sufficient to cause Friedman to pause and reconsider his actions in the future.

Attorneys' fees.

91. In Utah, each party is typically responsible for its own attorneys' fees, *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998), but attorney fees may be awarded where they are provided for by statute or contract. *Id.* Attorney's fees that are "provided for by contract . . . are allowed only in strict accordance with the terms of the contract." *Id.* Section 17 of the second REPC provided for an award of attorney's fees and costs in the event of "litigation or binding arbitration to enforce" the contract. Clark claims that an award of attorney's fees

is warranted because Friedman breached the second REPC by failing to make seller disclosures. However, the Court has already concluded that seller disclosures were not required under the second REPC. Accordingly, it cannot be the basis for recovery of attorney fees in this case and Plaintiff has identified no other basis for its fee request. Plaintiff's request is denied.

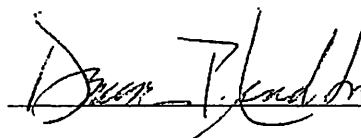
Rescission.

92. "It is a general rule that a party to a contract is not entitled to have it rescinded, unless both parties can be restored to the condition in which they were before the contract was made." *Kelly v. Kershaw*, 14 P. 804, 805 (Utah 1887); *see also Coalville City v. Lundgren*, 930 P.2d 1206, 1210 (Utah App. 1997). Further, "a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a material breach of the contract by the other party." *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979). The Court is not persuaded that the facts of this case warrant rescission of the contract. The Court can take judicial notice of the fact that in the four years since this case was filed the local and national housing markets have been drastically affected by an economy that has suffered a significant downturn. This has, in turn, put downward pressure on home prices generally. Additionally, Clark has not demonstrated he has maintained the Property in the condition it was in when he received it. Accordingly, it is highly unlikely that the parties could be restored to the condition they were before the contract was made. The Court concludes that an award of damages is a more appropriate remedy.

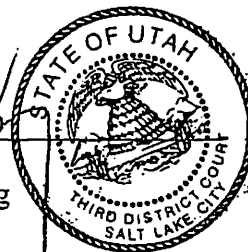
ORDER

93. Plaintiff's counsel is directed to prepare and submit an Order and Judgment consistent with these Findings of Fact and Conclusions of Law.

So Ordered this 18 day of November, 2010. By the Court:



Judge Denise Posse Lindberg



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060919234 by the method and on the date specified.

MAIL: JESSE A FREDERICK 3 TRIAD CENTER SUITE 500 SALT LAKE CITY, UT 84180

MAIL: GRADEN P JACKSON 3 TRIAD CENTER STE 500 SALT LAKE CITY UT 84180

MAIL: SEAN A MONSON 3165 E MILLROCK DR STE 500 SALT LAKE CITY UT 84121-5039

MAIL: JEFFERY OWENS 3 TRIAD CENTER STE 500 SALT LAKE CITY UT 84180

Date: 11/19/10

K Ferguson
Deputy Court Clerk

