

2015

State of Utah, Plaintiff/Appellee, vs. Allen Bruun and James Diderickson, Defendants/Appellants

Utah Court of Appeals

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Case No. 20140295 & 20140296 — CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ALLEN BRUNN & JAMES DIDERICKSON
Defendants/Appellants.

Brief of Appellee

Appeal from convictions for twelve counts of theft (six second degree felonies, five third degree felonies, and one class A misdemeanor), and one count of engaging in a pattern of unlawful activity (a second degree felony), in the Third Judicial District, Salt Lake County, the Honorable Katie Bernards-Goodman presiding

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FILED
UTAH APPELLATE COURTS

SEP 15 2015

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STATE OF UTAH,
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Brief of Appellee

STATEMENT OF JURISDICTION

Defendants Allan Bruun and James Diderickson appeal convictions for twelve counts of theft (six second degree felonies, five third degree felonies, and one class A misdemeanor), and one count of engaging in a pattern of unlawful activity (a second degree felony). This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

Defendants were majority shareholders in Tivoli Properties, an LLC that was formed to develop 29 acres of land in Saratoga Springs. Several months after Tivoli was formed, its other shareholders learned that Defendants had written checks for almost \$200,000 out of Tivoli funds and used those funds to support their other companies and projects. A jury later

convicted Defendants of twelve counts of theft and one count of engaging in a pattern of unlawful activity.

STATEMENT OF THE ISSUES

Issue I: Did the Utah LLC Act allow Defendants to unilaterally disregard limitations on their spending authority that were set forth in Tivoli's Operating Agreement?

Issue II: Did the court err by allowing the jury to determine whether Defendants were authorized to write the checks?

Issue III: Did the court err by refusing to reduce the value of each theft conviction by the amount of Defendants' alleged ownership interest in Tivoli?

Standard of Review for Issues I-III: These statutory interpretation questions are reviewed for correctness. *State v. Binkerd*, 2013 UT App 216, ¶21, 310 P.3d 755.

Issue IV: Did Defendants receive ineffective assistance when their trial counsel withdrew a request for a lesser included offense instruction on wrongful appropriation?

Issue V: Did Defendants receive ineffective assistance when their counsel did not request an additional jury instruction to define one of the elements of a pattern of unlawful conduct?

Standard of Review for Issues IV-V: Ineffective assistance claims raised for the first time on appeal are reviewed for correctness. *State v. Bryant*, 2012 UT App 264, ¶10, 290 P.3d 33.

Issue VI: Did the court err by not reducing the restitution order based on the value the victims received in a prior civil settlement?

Standard of Review: This statutory interpretation question is reviewed for correctness. *Binkerd*, 2013 UT App 216, ¶21.

Issue VII: Should this Court reverse for cumulative error?

Standard of Review: This Court reverses for cumulative error “only if the cumulative effect of the several errors” undermines confidence that a “fair trial was had.” *State v. Santonio*, 2011 UT App 385, ¶30, 265 P.3d 822.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following are reproduced in Addendum A:

- Utah Code Ann. § 76-6-404 (West 2009);
- Utah Code Ann. § 48-2c-803-804 (West 2009);
- Utah Code Ann. § 48-2c-701 (West 2009).

STATEMENT OF THE CASE¹

Tivoli LLC is formed to develop 29 acres in Saratoga Springs

In 1989, Kerry and Bobbie Posey bought 42 acres of land in Saratoga Springs. R1554:114. They sold off 13 acres over the years, but kept the remaining 29 acres, hoping to eventually sell them at a high enough price to fund their retirements. R1521:128-29, 141; 1554:114-15.

In early 2007, the Poseys were introduced to Defendants, who worked together developing real estate projects. R1521:131-32, 136. In August 2007, the Poseys and Defendants worked out a two-step deal by which they would jointly develop the Poseys' 29 acres. First, the Poseys agreed to sell the 29 acres to Equity Partners ("Equity"), an LLC that was owned by Defendants. R1521:139; 1554:128; 1535:213-14; *see also State's Exh. 1* (Real Estate Purchase Contract) ("the REPC") (Addendum B). Second, the Poseys and Defendants formed Tivoli Properties, an LLC that was created to develop the 29 acres. R1521:140; *see also State's Exh. 2* ("the Operating Agreement" or "Op.Agr.") (Addendum C).

¹ The facts are recited in the light most favorable to the jury's verdict. *State v. Bravo*, 2015 UT App 17, ¶2 n.1, 343 P.3d 306.

Defendants were tried together. To avoid duplication, the State will cite to Diderickson's trial record. Also, Defendants filed separate briefs that are paginated slightly differently. But their briefs are substantively identical, raising the same arguments and issues in the same order and relying on the same authority. To avoid duplication, the State will respond to the pagination from Diderickson's brief and cite to it as "Aplt. Br."

Under the Operating Agreement, Equity initially owned 75% of the shares in Tivoli, while the Poseys owned 25%. Op.Agr. at 3.3. The understanding was that the Poseys were putting up the property, while Defendants would use their expertise to develop it. R1521:156.

The initial question was how to fund the development. The answer came in the form of another transaction. In the original REPC, Equity agreed to pay \$3.5 million to the Poseys for the property, including \$750,000 up front. REPC at *1; R1521:141-42. But when Defendants told the Poseys that they couldn't come up with the money, the Poseys agreed that Defendants would put the property up for a collateral loan and allow its proceeds to be used to fund Tivoli's initial development. R1521:142-43.

On November 16, 2007, Defendants secured a short-term, high-interest loan for \$750,000 from K.E. Capital. R1521:143 147, 195; REPC, add. 5 at line 202. That loan was secured using the 29 acres as collateral. R1534:20.

Approximately \$350,000 was used to pay off pre-existing mortgages and taxes; the remaining money was put into Tivoli's bank account. R1520:47; 1534:16; 1554:145; REPC, Add. 5 at lines 506-08. This money was Tivoli's only money. R1534:131, 313-14; 1554:154. It was "exclusively" intended to get Tivoli through the "entitlement" process—the process by

which a municipality approves a future development. R1521:144, 147; 1534:69-70. The idea was that after entitlement was completed, Tivoli would be able to secure a construction loan at better terms allowing it to actually build on the property. R1521:147. Defendants told the Poseys that entitlement would cost “around a hundred thousand dollars.” R1554:139; 1521:153-54.

**Poseys discover that Defendants used
Tivoli’s money for their own purposes**

The Poseys also worked out an arrangement with Defendants in which they received weekly distributions from Tivoli’s funds. R1554:148-49; REPC, Add. 4. In May 2008, however, Diderickson told the Poseys that there was not enough money left in the Tivoli account to pay the distributions. R1554:165-66. When Bobbie asked where the money had gone, Diderickson “evaded” her question. R1554:166; 1521:167-68.

Concerned, the Poseys accessed Tivoli’s bank account and discovered that it was down to just \$1083. R1554:167-68. When they reviewed the check history, they were “floored” to learn that Defendants had spent several hundred thousand dollars on expenses that appeared unrelated to the development of the 29 acres. R1554:169, 171; 1521:168. These included a number of checks that Defendants had written to themselves or their other companies—including one for \$100,000—as well checks that covered

expenses on Defendants' other real estate projects. See R69-78 (listing checks); *State's Exh. 4* (copies of each check) (Addendum D)

Civil settlement

In the meantime, payment on the K.E. Capital loan was coming due, creating the risk that K.E. Capital would foreclose on the property. R1521:249-50. The risk of foreclosure was so imminent that Diderickson asked the Poseys to sign off on another \$100,000 loan that would buy Tivoli an extra two weeks. R1521:181-82. Bobbie refused to sign. R1521:183-87. Instead, she filed a notice of default, intending to get title to the property back from Equity so that the Poseys could negotiate with K.E. Capital directly. R1554:178; 1521:250.

On November 11, 2008, the Poseys entered a settlement agreement with Equity. *Defendants' Exh. 2* ("the civil settlement") (Addendum E). Under its terms, the Poseys paid \$25,000 to Equity in exchange for title to the 29 acres. *Id.* at *1-2. The Poseys also agreed to release Defendants from all claims relating to their management of Tivoli. *Id.* at *2.

Defendants are ordered to pay restitution

On May 9, 2011, Defendants were charged with 29 criminal counts. R1-12; see also R69-78 (amended information).

Theft: Counts 1-28 were theft charges. Under Utah Code Annotated § 76-6-404 (West 2009), a “person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.” Each of the theft counts was tied to a check that the State alleged Defendants wrote from Tivoli’s account for an unauthorized purpose. R69-78.

UPUAA: Count 29 charged Defendants with violating the Utah Pattern of Unlawful Activities Act (UPUAA) by committing at least three thefts. R69-78.

Defendants were tried from November 4-15, 2013. Midway through trial, the State dismissed two of the theft counts. R1536:207-08.

As for the remaining counts, Defendants never disputed that they wrote the checks or that the funds came from Tivoli’s account. Instead, Defendants claimed that they were authorized to write these checks under both the Operating Agreement and the parties’ course of dealings. *See* R1554:92-93, 96-111; 1535:265-71; 1538:36-53, 63-93.

The jury convicted Defendants of twelve theft counts and the UPUAA count, but it acquitted Defendants of the remaining theft counts. R967-70. By virtue of the convictions, the jury found that Defendants committed theft by using Tivoli funds without authorization for:

- Expenses associated with Defendants' other real estate development projects (counts 2, 3, 4, 15, 19, 24); and
- Cash advances to Defendants' other companies (counts 5, 7, 8, 21, 22, and 28).

R69-78; 967-70.

At sentencing, the court ordered Defendants to serve a year in jail and pay restitution. R1099-1102. Defendants subsequently moved to vacate or modify the restitution order, arguing that (1) restitution was foreclosed by the civil settlement, and (2) that if restitution was ordered, it should be reduced to reflect the Poseys' limited ownership interest in Tivoli. R1071-79, 1348-53.

The court rejected these arguments and ordered Defendants to pay \$189,574 in restitution—an amount equal to the face value of the twelve checks for which Defendants were convicted. R1373-75; 1539:22-25.

SUMMARY OF ARGUMENT

Point I: Defendants argue that because they owned 75% of Tivoli, the Utah LLC Act gave them authority to unilaterally disregard any limitations on their spending authority set forth in the Operating Agreement. This claim is unpreserved, so Defendants allege plain error and ineffective assistance of counsel.

Both claims fail for the same reason—namely, the LLC Act did not allow Defendants to disregard Tivoli's Operating Agreement. Instead, the very provisions in the LLC Act that Defendants rely on state that any limitations imposed in an operating agreement control. Here, the Operating Agreement expressly limited Defendants' spending authority. Because of this, the LLC Act provided no basis for relief.

Point II: Defendants argue that the court erred by allowing the jury to determine whether they were authorized to write the checks. According to Defendants, the court should have decided the question as a matter of law.

The court did not err. It is settled that if a contract's terms are ambiguous, its interpretation becomes a question of fact. Here, the Operating Agreement was ambiguous as to (i) Tivoli's business purpose, (ii) whether Defendants were Tivoli's managers, and (iii) whether Defendants had authority to write these checks. Because of the ambiguity, the court properly submitted the case to the jury.

If the court erred, the error was harmless because the jury decided the question correctly. The Operating Agreement contained several limitations that prohibited Defendants from writing these checks for these purposes.

Thus, even if the court should have decided the question as a matter of law, Defendants were not harmed because the jury's decision was correct.

Point III: Defendants argue that the court should have reduced the value of each theft conviction by their ownership interest in Tivoli. Defendants then argue that if this had occurred, all but four of the convictions would have been barred by the statute of limitations.

Contrary to their claim, Defendants had no personal ownership interest in Tivoli's money. Rather, they only had an ownership interest in Tivoli itself. Because of this, they were not authorized to take Tivoli's money for their own use and they were properly convicted of theft for the full value of each check.

Point IV: Defendants argue that their counsel was ineffective for withdrawing a request for a lesser included offense instruction on wrongful appropriation.

Defendants have not proven deficient performance because counsel had a clear strategic reason for withdrawing the request—this advanced an “all or nothing approach” that was designed to maximize their prospects for acquittal.

Defendants also have not proven prejudice. Defendants could only have been convicted of wrongful appropriation if the jury found that they

intended to temporarily steal Tivoli's funds. But Defendants never claimed that they intended to temporarily steal Tivoli's funds; rather, they claimed that they never stole any funds at all. Thus, there is not a reasonable probability that the outcome would have been different if the jury had been given this instruction.

Point V: Defendants argue that their counsel was ineffective for not requesting an additional jury instruction that would have further defined one of the elements of the UPUAA charge.

Counsel did not perform deficiently, however, because there was no settled law that entitled Defendants to the additional instruction. Moreover, counsel could have reasonably determined that requesting this instruction would open the door to potentially incriminatory information.

Defendants also were not prejudiced. If counsel had requested and received this instruction, the instruction could only have impacted one of the two variants by which the State could prove a UPUAA violation. But it would have left the other variant untouched, and the State had strong evidence to support conviction under that variant. Given this, it is not reasonably likely that the outcome would have been more favorable if this instruction were given.

Point VI: Defendants argue that the court erred should have offset the restitution order to reflect the value they gave the Poseys in the civil settlement. Defendants never requested such an offset below, however, so the claim is unpreserved. Because Defendants do not invoke a preservation exception, the issue should not be reached.

Point VII: Defendants ask for reversal for cumulative error. But because there was no prejudicial error, this request should be denied.

ARGUMENT

I.

The Utah LLC Act did not allow Defendants to disregard Tivoli's Operating Agreement.

The question at trial was whether Defendants were authorized to write the disputed checks. As discussed in more detail below, one of the central issues was whether limitations in the Operating Agreement meant that Defendants were not authorized to write these checks.

On appeal, Defendants argue for the first time that they were not bound by the Operating Agreement. According to Defendants, the Utah LLC Act gave them authority to unilaterally authorize these checks, even if the checks were in direct "contravention to the operating agreement." Aplt. Br. 23-25.

This claim is unpreserved, however, and no preservation exception applies because the Utah LLC Act did not grant Defendants this authority.

A. This claim is unpreserved.

“As a general rule, claims not raised before the district court may not be raised on appeal.” *Oseguera v. State*, 2014 UT 31, ¶10, 332 P.3d 963. To preserve a claim for appellate review, a litigant must present it “to the district court in such a way that the court has an opportunity to rule” on it. *Id.* A party does not do this “by merely mentioning an issue without analyzing supporting evidence or relevant legal authority.” *Id.* “Additionally, a party that makes an objection based on one ground does not preserve any alternative grounds for objection for appeal.” *Id.*

Defendants admit that they “did not specifically request the court to interpret the LLC Act,” but contend that this argument was “similar” to the their request for the court to conclude that they had authority under the Operating Agreement to write these checks. Aplt. Br. 2.

But asking the court to interpret their rights under the Operating Agreement is a far cry from asking the Court to determine that, by virtue of an unmentioned statute, Defendants could actually disregard the Operating Agreement entirely. Defendants did the former; they did not do the latter.

This claim is thus unpreserved and Defendants can obtain relief only if they demonstrate that a preservation exception applies. *Oseguera*, 2014 UT 31, ¶15. Here, Defendants argue that (1) the court plainly erred in not sua sponte recognizing their alleged rights under the LLC Act, and (2) trial counsel was ineffective for not invoking that act. Both claims fail.

B. Defendants have not established that the court obviously erred by not ruling that they had authority to disregard the Operating Agreement.

Defendants first assert that the court committed plain error by not sua sponte recognizing their alleged rights under the LLC Act. Aplt. Br. 34-35. To prove plain error, Defendants must prove “that the trial court committed an error, that the error was obvious, and that the error was prejudicial.” *State v. Sessions*, 2014 UT 44, ¶49, 342 P.3d 738.

The problem with Defendants’ argument is that they had no such statutory right. Thus, there was no error, let alone plain error.

Defendants first rely on Utah Code Annotated § 48-2c-804 (West 2009), which governs manager-managed LLC’s like Tivoli. Aplt. Br.23-25; *see also* Op.Agr. at 7.1-7.9 (suggesting that Tivoli was a manager-managed LLC). They specifically rely on § 48-2c-804(6), which states that “unless otherwise provided in the articles of organization or operating agreement of the company,” members and managers who hold “2/3 of the profits

interests in the company” can exercise the powers “described in Subsection 48-2c-803(3).” Those powers include the power to make “a substantial change in the business purpose of the company.” Utah Code Ann. § 48-2c-803(3)(d) (West 2009).

Defendants contend that, because they owned two-thirds of the profits interest in Tivoli, it should have been obvious to the trial court that they had power to unilaterally change Tivoli’s business purpose and unilaterally authorize these checks. Appt. Br. 23-25.

Defendants are misreading the LLC Act. Contrary to their claim, the LLC Act does not allow managers—even those holding two-thirds of the shares in an LLC—to disregard the operating agreement. Instead, the very statute Defendants rely on begins with the qualifier that the statutory authority exists “unless otherwise provided in the articles of organization or operating agreement of the company.” Utah Code Ann. § 48-2c-804(6). This limitation is central to the LLC Act, which contains a legislative directive to “give the maximum effect” “to the enforceability of operating agreements of companies.” Utah Code Ann. § 48-2c-1901 (West 2009); *accord OLP, LLC v. Burningham*, 2008 UT App 173, ¶18, 185 P.3d 1138 (LLC Act controls unless there is “contrary language in [the] operating agreement”).

Here, Defendants initially claim that they could unilaterally change Tivoli's business purpose. But the Operating Agreement defined Tivoli's business purpose. Op.Agr. at 2.4. And, notably, it then expressly required the "consent of One Hundred percent (100%) of all Membership Interests" for "[a]ny amendment or restatement" of "the Operating Agreement" or "[a]ny change in the character of the business and affairs of the Company." Op.Agr. at 7.5.5; 7.5.7. Thus, without the Poseys' consent, Defendants had no authority to change Tivoli's business purpose. Notably, the Poseys testified at trial that they never gave such consent. R1554:142, 144, 163; 1520:33-34; 1521:151, 162.²

Defendants also rely on Utah Code Annotated § 48-2c-803(3)(a)(i), which allows members who hold two-thirds of the profits interest in an LLC to authorize a person "to do any act on behalf of the company that is not in the ordinary course of the company's business, or business of the kind

² As discussed below in Point II(B)(1), if the Operating Agreement is read as a whole, it was arguably ambiguous as to the full scope of Tivoli's business purpose. But this does not change the result with respect to Defendants' claim that they could unilaterally change that purpose. Again, the LLC Act expressly defers to any limitations in an operating agreement, and this Operating Agreement stated that Tivoli's business purpose (whatever, exactly, it was) could not be changed without approval of members holding 100% of the membership interests. As noted, Defendants never received approval, and they accordingly had no such authority under the LLC Act.

carried on by the company.” Aplt. Br. 24. They claim that, because of their ownership interest, this also gave them power to unilaterally authorize these checks. *Id.*

But again, Utah Code Annotated § 48-2c-804(6) states that this power can be limited by an LLC’s operating agreement. And here, the Operating Agreement requires approval of 100% of the membership interests for “[a]ny significant and material purchase” of “any real or personal property or business,” as well as for the “commission of any act which would make it impossible for the Company to carry on its ordinary business and affairs.” Op.Agr. at 7.5.1; 7.5.8.

As discussed, Defendants were convicted of writing twelve unauthorized checks that, together, took \$189,000 out of Tivoli’s account. As also discussed, Tivoli ran out of money before the 29 acres were developed, thus threatening foreclosure of the very property that it was formed to develop. Because of this, it could not have been “obvious” to the trial court that the LLC Act authorized Defendants to write those checks, given that these expenses at least arguably (1) qualified as “significant and material purchases,” and (2) made it impossible for Tivoli to continue functioning.

Finally, Defendants' plain error argument also fails because it would not have been obvious on this record that they even had the necessary profits interest to assert the claimed authority. As noted, Defendants rely on portions of the LLC Act that depend on their ownership interest in Tivoli, and to establish their ownership interest, they point to the shares allocation set forth in the Operating Agreement. Aplt. Br. 24.

But for purposes of the LLC Act, a member's profits interest is determined by his "capital account balances on the date on which compliance is measured." Utah Code Ann. § 48-2c-803.1 (West 2009); *see also* Op.Agr. at 3.7 (directing that capital accounts would be maintained to reflect members' current shares). Thus, although the Operating Agreement set forth the "Membership Interests of the initial members," it stated that "[c]hanges in Membership Interests after the date of this Agreement" would "be reflected in the Company's records," and the "allocation of Membership Interests reflected in the Company's records *from time to time*" would be "presumed to be correct" for purposes of both the agreement and rights under the LLC Act. Op.Agr. at 1.2.12 (emphasis added).

Here, Defendants provided no proof of what the separate capital account balances were on each of the "date[s] on which compliance is measured" (Utah Code Ann. § 78-2c-803.1)-i.e., the separate dates on which

they allegedly authorized each check. Without such specific proof, it could not have been obvious to the court that there was an evidentiary basis to apply these provisions of the LLC Act.³

C. Defendants have not proven that counsel performed deficiently by not making a futile argument based on the LLC Act.

Defendants' ineffective assistance claim fails for similar reasons. To prove ineffective assistance, Defendants must prove that (1) their counsel "rendered a demonstrably deficient performance that fell below an objective standard of reasonable professional judgment" and (2) "that counsel's performance resulted in prejudice." *Sessions*, 2014 UT 44, ¶17. The "failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." *State v. Binkerd*, 2013 UT App 216, ¶29 n.6, 310 P.3d 755.

As discussed, the Operating Agreement required consent from all the members for any change in Tivoli's business purpose, significant material purchases, or any act that would make it impossible for Tivoli to carry out its purposes. There was no proof in this record that Defendants ever obtained such approval from the Poseys. Moreover, the LLC Act also

³ Defendants also assert that this issue should be reviewed for manifest injustice. "Manifest injustice is synonymous" with plain error. *State v. Jimenez*, 2012 UT 41, ¶20, 284 P.3d 640. For the reasons set forth above with respect to plain error, the manifest injustice claim fails.

required proof from Tivoli's capital accounts regarding Defendants' ownership share on each date on which they allegedly authorized each check. There was no such proof. On this record, Defendants accordingly have not proven that counsel performed deficiently by not making what would have been a futile argument.

II.

The court properly submitted the theft counts to the jury.

Defendants next argue that the court erred when it allowed the jury to decide whether they were authorized to write these checks. Aplt. Br. 25-32.

First, a note about what is—and is not—at issue in this claim. The contested element in the theft counts was whether the checks were “unauthorized.” Utah Code Ann. § 76-6-404. There is no dispute that, if Defendants had wanted, they had a right to have the jury decide this element. *See United States v. Gaudin*, 515 U.S. 506, 514 (1995) (a defendant has a constitutional right to have a jury “draw the ultimate conclusion of guilt or innocence”).

Here, however, Defendants claim that they had authority under the Operating Agreement to write these checks, and that because the interpretation of a contract is a question of law, they had a right to have the judge decide this question before trial. Aplt. Br. 25-32. Thus, in contrast to

the more usual scenario, Defendants here are claiming that they had a right to have the jury *not* decide this element.

But Defendants' rights were not violated. It is settled that when a contract is ambiguous, its interpretation presents a question of fact that may be submitted to the jury. Because this Operating Agreement was ambiguous as to Defendants' authority, the court did not err by submitting the case to the jury.

A. The interpretation of an unambiguous contract is a question of law for the judge, while the interpretation of an ambiguous contract is a question of fact for the jury.

In "a jury trial, questions of law are to be determined by the court," while "questions of fact" are determined "by the jury." Utah Code Ann. § 77-17-10(1) (West 2009). Thus, "juries serve only as fact-finders, not law-makers or interpreters," and a court may determine "'pure questions of law'" itself. *State v. Palmer*, 2009 UT 55, ¶¶10, 14, 220 P.3d 1198.

Defendants were charged with theft, which occurs when a person "exercises unauthorized control" over another's property. Utah Code Ann. § 76-6-404 (West 2009). Defendants argued below that they had authority under the Operating Agreement to write these checks. R1554:96; 1538:31-62, 63-93. Thus, the question of whether Defendants committed theft initially turned on interpreting their authority under the Operating Agreement.

"A contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent." *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶14, 48 P.3d 918. The difference turns on whether the contract is ambiguous.

"If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶19, 54 P.3d 1139. "However, if the language of the contract is ambiguous such that the intentions of the parties cannot be determined by the plain language of the agreement, extrinsic evidence must be looked to in order to determine the intentions of the parties," and its interpretation becomes a question of fact. *Id.*; accord *R&R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1074 (Utah 1997).⁴

Thus, if the Operating Agreement was unambiguous, its interpretation became a question of law; but if it was ambiguous, then the question of whether Defendants had authority to write these checks became

⁴ Defendants point out that this Operating Agreement contained an integration clause. Aplt. Br. 26-27. Even on an integrated contract, extrinsic evidence may be admitted to prove the parties' intent as a factual matter if the "language of the agreement is ambiguous." *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶¶11, 18, 182 P.3d 326; accord *WebBank*, 2002 UT 88, ¶22.

a question of fact that was properly submitted to the jury for consideration alongside extrinsic evidence about the parties' intent. *See also State v. Larsen*, 834 P.2d 586, 591 (Utah App. 1992) (because defendant did not have clear authority under partnership agreement to take partnership funds, "there was a legal basis for finding 'unauthorized control,' and it was for the jury to decide whether a theft was committed").⁵

B. Because the Operating Agreement was ambiguous, the court properly submitted the question of Defendants' authority to the jury.

"An ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *WebBank*, 2002 UT 88, ¶20. Thus, a contract is ambiguous "when it is reasonably capable of being understood in more than one sense" and the "contrary positions of the parties" are each "tenable." *R&R Energies*, 936 P.2d at 1074.

⁵ The State accordingly notes one other question that is not at issue. If the Operating Agreement unambiguously stated that these checks were not authorized, that determination may also have presented a question of law under the above authority. But because a defendant has a right to a jury trial on all elements, the "judge may not direct a verdict of guilty, in whole or in part, no matter how conclusive the evidence." Charles Alan Wright, et al., 2 Fed. Prac. & Proc. Crim § 371 (4th ed.). This Court need not resolve the implications of such a scenario, however, because the State has never claimed that the judge should have resolved this as a question of law in its favor.

As noted, the jury found that Defendants were not authorized to use Tivoli funds for expenses associated with their other real estate projects or companies. Thus, the question is whether reasonable minds could differ as to whether the Agreement authorized such expenses. Reasonable minds could differ on three levels.

1. The agreement was ambiguous as to Tivoli's business purpose.

The Operating Agreement stated that Tivoli was formed "for the sole purpose of investing in, purchasing, selling, granting, or taking an option on lands for investment purposes and/or development." Op.Agr. at Recitals, #1.⁶ That same provision directed that Tivoli "*shall not conduct any other business unless related to the business*, unless approved by unanimous consent of all Members." *Id.* (emphasis added).

At trial, Defendants argued that this provision gave them authority to use Tivoli funds for any real estate project, regardless of whether it was tied to the 29 acres. R226; 1554:96; 1520:32-34; 1535:129-30, 265, 268.

But the Operating Agreement also contained language restricting Tivoli's business purpose to those 29 acres. The "Purposes of the

⁶ A recitals provision is the "preliminary statement in a contract . . . explaining the reasons for entering into it." Black's Law Dictionary, *Recital* (10th ed. 2014). This agreement does not contain a provision entitled "Recitals." Instead, that introductory section is captioned "Witnesseth." For clarity, the State refers to it as the Recitals section.

Company” subsection stated that Tivoli “is organized for the purpose of” developing “the Property or any other enterprise that members may mutually agree upon.” Op.Agr. at 2.4. In the Definitions section, the term “Property” was defined as “approximately 29 acres of real property located in Utah County, Utah” that was “the subject of the Purchase Agreement,” and “Purchase Agreement” was defined to refer to the REPC under which the Poseys sold the 29 acres to Equity. Op.Agr. at 1.2.16, 1.2.19. Given these provisions, the State contended that the only authorized business purpose was the development of the 29 acres. R1554:79-81.

Again, language is ambiguous if reasonable minds could differ about its interpretation. Here, Defendants’ appellate approach at least implicitly acknowledges that the State’s interpretation of the business purpose clauses was reasonable. Otherwise, there would be no need to open the brief by arguing that the LLC Act gave Defendants authority to change Tivoli’s business purpose. Given this ambiguity, this question was properly submitted to the jury.

2. The agreement was ambiguous as to whether Defendants had been appointed as Tivoli’s managers.

Defendants claimed that they were Tivoli’s managers and had authority as managers to write these checks. R1554:96; 1520:35-36; 1521:210-

11; 1535:126, 263; 1538:52-53. But reasonable minds could differ as to whether they were managers under the Operating Agreement.

The recitals section stated that Tivoli's members "intend to" appoint a manager. Op.Agr. at Recitals, #3. The Definitions section defined the term "manager" as meaning "a Person, Persons or Committee, whether or not consisting of a Member, Members or not, who is vested with authority to manage the Company in accordance with Article VII." Op.Agr. at 1.2.10. By stating that Tivoli "intend[ed] to" appoint a manager, but not then identifying Equity or Defendants as managers in the Definitions section, the Operating Agreement at least implied that Defendants had not formally been appointed as managers.

By contrast, Defendants relied on a provision stating that Equity had authority to "manage and control the affairs of the Company." Op.Agr. at 7.1(a). While this language gave Equity (and, by extension, Defendants) management authority, it did not clearly appoint Equity or Defendants as official managers. Instead, given the above, one reasonable interpretation would be that this was interim authority that would exist until managers were formally appointed.

Again, a contract's language is ambiguous if reasonable minds could differ about its interpretation. Notably, the trial judge and the State's

forensic accounting expert both stated at trial that they thought it unclear whether Defendants were managers under the agreement, as did Bobbie Posey, who testified that Defendants were not formally appointed as managers. R1534:302; 1535:60; 1521:35; 1554:146; 1520:18.

3. The agreement was ambiguous as to limitations on managers' authority.

The Operating Agreement contained a section that imposed limitations on managers' authority. Op.Agr. at 7.5. If Defendants were managers, two of these limitations that would have been at issue contained facially ambiguous terms.

First, as noted, a manager could not make "any significant material purchase" of property without approval of 100% of the members. Op.Agr. at 7.5.1. At trial, the State contended that several of the checks qualified as "significant purchases." R1535:121-22. But the term "significant" was not defined in the Operating Agreement, thus creating an ambiguity as to whether these checks were prohibited.

Second, managers could not commit "any act which would make it impossible" for Tivoli to carry on its business. Op.Agr. at 7.5.8. The State contended at trial that the loss of these funds made it "impossible" for Tivoli to carry on its ordinary business. R1535:121-22. But the term

"impossible" was not defined in this Operating Agreement, thus creating another ambiguity.

In short, Defendants can only show that the jury could not determine this question if they demonstrate that the Operating Agreement unambiguously authorized these expenses. They have not. Because there was a "legal basis" for the jury to determine that they did not have such authority under the Operating Agreement, "it was for the jury to decide whether a theft was committed." *Larsen*, 834 P.2d at 591.⁷

C. If the court erred by submitting the question to the jury, the error was harmless.

1. The improper submission of a legal question to a jury can be harmless.

In *Baird v. Denver R.G.R. Co.*, 162 P. 79, 81 (Utah 1916), the Utah Supreme Court held that although a trial court had improperly submitted a question of contract interpretation to the jury, the error was harmless

⁷ Defendants do not appear to separately argue that, even if the question was properly submitted to the jury, there was insufficient evidence to support the jury's finding that these checks were unauthorized.

In any event, such an argument would plainly fail. The Poseys both unequivocally testified that Defendants were not authorized to write these checks for these purposes. See R1554:138, 142-43, 147-48, 160-63, 170-72 (Bobbie); R1521:140-41, 147, 151-53, 171-77 (Kerry). This was supported by an Equity board member who sat in on Tivoli's board meetings. R1534:77-78, 80-92. And it was also supported by testimony from the State's investigator, who testified that in an initial interview, Defendants both admitted that they knew they were not authorized to use Tivoli funds for anything other than the development of the 29 acres. R1534:192-93, 276.

because “the jury found in accordance with what the court should have declared as a matter of law.”

This kind of situation does not appear to have since been addressed by a Utah appellate court. But *Baird*’s approach comports with the general rule, which is that the “[s]ubmission of a question of law to the jury” is harmless if the jury “answered as the trial court should have answered” it. 5 Am.Jur.2d, *Appellate Review* § 694; see also *Sabatini v. Its Amore Corp.*, 455 Fed. Appx. 251 at *7 (3d Cir. 2011); *Reed & Martin, Inc. v. Honolulu*, 440 P.2d 526, 528 (Haw. 1968); *Schneider v. Girard Trust Bank*, 218 A.2d 259, 260 (Pa. 1966); *Bank of America v. Jeff Taylor LLC*, 358 S.W.3d 848, 865 (Tex. App. 2012).

2. Any error was harmless.

If the court should have interpreted the Operating Agreement itself, rather than submitting it to the jury, the error was harmless because the jury got it right. Indeed, if anything, the agreement unambiguously *prohibited* Defendants from writing these checks.

First, the Operating Agreement stated that Tivoli was organized for the purpose of developing and selling “the Property,” and it defined “the Property” to refer to the 29 acres. Op.Agr. at 1.2.16, 1.2.19, 2.4. The

agreement then limited Defendants' management authority to that purpose. Op.Agr. at 7.1.

As noted, the recitals section also contained some language arguably suggesting that the business purpose extended to any real estate development. Op.Agr., Recitals, #1. But if this was indeed an unambiguous contract as Defendants must claim, then the more specific language described above controls. *See* Restatement (Second) of Contracts § 203 (1981) ("In the interpretation of a promise or agreement or a term thereof, . . . (c) specific terms and exact terms are given greater weight than general language."); accord *Wood v. Utah Farm Bureau Ins. Co.*, 2001 UT App 35, ¶7, 19 P.3d 392.

Second, the Operating Agreement prohibited a manager from doing anything that "would make it impossible" for Tivoli "to carry on its ordinary business and affairs." Op.Agr. at 7.5.8. To the extent that this was an unambiguous legal provision, the jury was entitled to determine as a factual matter that these expenses deprived Tivoli of funds it needed to bring the 29 acres to entitlement, thus making it impossible to carry on its purpose.

Third, the Operating Agreement prevented a manager from making "any significant material" purchase without approval of 100% of the

members. Op.Agr. at 7.5.1. To the extent that this was an unambiguous legal provision, the jury was entitled to determine as a factual matter that these expenses were “significant” – and that Defendants’ use of the funds was therefore unauthorized.

III.

Defendants were not entitled to a reduction of their convictions based on their ownership interest in Tivoli.

In Point II of their brief, Defendants make a two-part argument that they claim should have resulted in the dismissal of all but four of the theft counts.

First, the degree of offense for a theft depends on the value of the stolen property. Utah Code Ann. § 76-6-412(1) (West 2009). Defendants argue that because they owned 75% of Tivoli, they owned 75% of its funds. Aplt. Br. 35-42. Defendants then reason that because a “person cannot be charged with stealing his own property,” they could only be convicted for stealing 25% of the value of each check. *Id.* According to Defendants, this would have reduced all but four of the thefts to misdemeanors. Aplt. Br. 19, 41-42.

Second, felony theft has a four-year statute of limitations, but misdemeanor theft has a two-year statute of limitations. Utah Code Ann. § 76-1-302(1) (West 2009). These charges were filed more than two years after

the thefts, so Defendants argue that each theft that should have been reduced to a misdemeanor should have been dismissed as untimely. Aplt. Br. 41-42.

Defendants' arguments fail for two reasons. First, Defendants' claimed ownership interest provided no defense to theft. Second, even if the ownership interest could matter, it didn't here because Defendants' ownership was in Tivoli, not its money.

A. Defendants' ownership interest provided no defense to theft.

Under Utah law, it "is no defense" to theft if "the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled" to infringe. Utah Code Ann. § 76-6-402(2) (West 2009).

Defendants assert that they owned 75% of Tivoli and that the Poseys owned 25%. Aplt. Br. 18-19, 41. Defendants thus admit that the Poseys "also ha[d] an interest" in Tivoli. Utah Code Ann. § 76-6-402(2). Because of this, Defendants' interest—even their controlling interest—did not provide them with a "fractional" or "proportional" defense to the theft charges. Rather, under Utah law, their interest provided "no defense" at all. *Id.* Defendants' claim fails for this reason alone.

B. Even if Defendants' ownership interest in Tivoli could provide a defense, it did not here because the interest was in Tivoli, not its money.

A Utah LLC "is a legal entity distinct from its members." Utah Code Ann. § 48-2c-104 (West 2009). While a member of an LLC has "an ownership interest in [the] company," Utah Code Ann. § 48-2c-102(14) (West 2009), the member "has no interest in specific property of a company." Utah Code Ann. § 48-2c-701(1)-(2) (West 2009); accord *In re McCauley*, 520 B.R. 874, 882 (Bankr., D. Utah 2014).

An LLC's members "generally have been found to have no interest in the LLC's assets," including "members who own all the interests in single member LLCs." J. William Callison and Maureen A. Sullivan, *Limited Liability Companies: A State-by-State Guide to Law and Practice*, § 4:1 (2015). What a member instead owns is a "share of the LLC's profits and losses" and the "right to receive distributions of LLC assets." *Id.*

This construct is set forth in Tivoli's Operating Agreement, which defines a "membership interest" as a "Member's percentage interest in the Company, consisting of the Member's right to share in Profits, receive distributions, participate in the Company's governance, approve the Company's acts, participate in the designation and removal of a Manager, and receive information pertaining to the Company's affairs." Op.Agr. at

1.2.12. Nowhere does the Operating Agreement separately grant members an interest in Tivoli's actual funds.

Though subtle, this distinction makes sense, and it is integral to the proper functioning of the corporate system. If a person owns stock in Apple, for example, he owns a portion of the company. But that does not mean that he also owns a portion of its money. For example, an Apple shareholder could not walk into an Apple store, reach into the cash register, and take out money equal to the value of his stock.

But that is essentially what Defendants are claiming that they could do here. Defendants are claiming that because they owned portions of Tivoli, they owned an equivalent portion of its money and could use it however they wanted. This argument has been rejected, however, by a wide array of cases from both Utah and other jurisdictions that have affirmed theft or theft-related convictions in similar circumstances.

In *State v. Stites*, 297 P.2d 227, 229 (Utah 1956), for example, the Utah Supreme Court upheld a shareholder's conviction for misapplication of corporate funds, even though the shareholder "owned all but four shares of the stock" and was "practically its only shareholder." The court reasoned that "[s]o long as the corporation is an entity and owns the money, and that money is withheld or taken and used for non-corporate purposes, . . . there

is no escape from the conclusion that there has been a wrongful and intentional" misapplication of corporate funds. *Id.*

In *State v. Radzvilowicz*, 703 A.2d 767, 777 (Conn. 1997), the court similarly stressed that it is "an elementary principle of corporate law that a corporation and its stockholders are separate entities and that the title to the corporate property is vested in the corporation and not in the owner of the corporate stock." Thus, "even the controlling stockholder cannot transfer or assign the corporation's properties" or "apply corporate funds to personal debts or objects." *Id.* Other courts have agreed, allowing convictions for theft-related offenses where a shareholder misused or took corporate funds without proper authorization. See, e.g., *United States v. Falcone*, 934 F.2d 1528, 1547 (11th Cir. 1991); *LaParle v. State*, 957 P.2d 330, 333-35 (Alaska Ct. App. 1998); *State v. Hill*, 296 P.3d 412, 418-19 (Idaho App. 2012); *State v. Sylvester*, 516 N.W.2d 845, 849 (Iowa 1994); *State v. Gagne*, 79 A.3d 448, 455 (N.H. 2013); *State v. Gard*, 742 N.W.2d 257, 262-63 (S.D. 2007).

The North Carolina Supreme Court has even applied this rule to a case in which the defendant owned *all* of a company's shares. In *State v. Kornegay*, 326 S.E.2d 881, 889 (N.C. 1985), the court reasoned that once money becomes the corporation's money, the defendant's ownership of the company—even his sole ownership—becomes irrelevant. "Having

organized a corporation and conducted his business through it in order to obtain the benefits and protections of the corporate form, defendant may not now ignore the corporate entity and treat corporate funds as his own.” *Id.* If it were otherwise—i.e., if stockholders could “legally convert all of a corporation’s assets to their own use” — “those dealing with the corporation on the faith of its property might be irretrievably injured.” *Id.*

Thus, contrary to Defendants’ position, they did not own Tivoli’s funds. Rather, they owned portions of Tivoli itself. Because of this, they could properly be convicted of theft for the full value of each check, and their reduction-of-offense and statute of limitations arguments both fail.⁸

⁸ The State recognizes that the prosecutor below suggested that the Poseys also had an ownership interest in the funds. *See, e.g.*, R1447; 1535:39, 156; 1538:19-20. Under the above authority, the Poseys were in the same position as Defendants and did not.

But this Court may affirm on any ground apparent from the record. *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158. Here, Defendants themselves repeatedly claimed that this was Tivoli’s money. *See, e.g.*, R1513:6-7 (Bruun’s counsel arguing that the “money alleged to have been stolen in each of the counts charged was never the property of the Poseys. It was in each case an asset of Tivoli Properties, LLC.”); R1514:6 (Diderickson’s counsel arguing that “this wasn’t the Poseys’ money. The money was an asset of Tivoli.”); R1535:68 (Diderickson’s counsel asserting to jury that if Defendants “stole anything,” they “really committed a theft against Tivoli, not against the Poseys, because it became Tivoli’s money”).

C. *State v. Parker* does not compel a different result.

Despite the above authority, Defendants argue that *State v. Parker*, 137 P.2d 626 (Utah 1943), compels a different result. Aplt. Br. 36-37.

In *Parker*, the court held that a car owner could be convicted of theft for taking his car back from a mechanic before satisfying the mechanic's lien. 137 P.2d at 626-34. Although the majority agreed on the result, the case produced an unusually fractured lineup—four opinions came from the five justices.

Defendants rely on a concurring opinion from Chief Justice Wolf. After agreeing that this could be theft, the Chief Justice opined that under common law rules regarding bailors and bailees, the amount of the theft would be limited to the amount of money the owner owed the mechanic, rather than the value of the car. *Id.* at 631 (Wolfe, C.J., concurring). Two other justices expressed the same view. *Id.* at 632-33 (McDonough, J., concurring); *id.* at 634 (Wade, J., concurring).

Moreover, theft requires proof that the person exercised "unauthorized control over the property of another," but it does not require the jury to determine who the other owner was. Utah Code Ann. § 76-6-404; *accord Larsen*, 834 P.2d at 591 (Utah App. 1992) (to "obtain conviction for theft, the State does not have to prove who owned the property"). By convicting Defendants, the jury found that the money was not theirs. Legally, this was enough, and affirming on this ground is warranted.

Defendants analogize this to this situation, claiming that their thefts should be limited by the amount of their interest in Tivoli. Aplt. Br. 36-37.

But the discussion at issue from the *Parker* opinions centered on the “special property” interest that a bailor has in the property under his control. *Parker*, 137 P.2d at 631 (Wolfe, C.J., concurring). As discussed above, however, Defendants did not own Tivoli’s funds; rather, they owned a share in Tivoli itself. Thus, the unique “shared ownership” concepts inherent in *Parker* are not present here and the rule is inapplicable.

Moreover, the question in *Parker* was whether a bailee could be charged with theft of his own property. Because the court held that a bailee could, the discussion in the separate opinions about the *amount* of theft was dicta. *See id.* at 626-34.

But *Parker*’s underlying holding has since been legislatively abrogated. As noted, the current theft statute states that it “is no defense” to theft if another person has an interest in the property. That provision then goes on to state that this limitation does not apply when the other’s interest is “a security interest for the repayment of a debt or obligation.” Utah Code Ann. § 76-6-402(2). In other words, the current law has removed the State’s ability to charge a bailee with theft for taking his own property, thus overruling the common law doctrine at issue in *Parker*.

Because of this, Defendants are ultimately relying on a dicta-derived valuation rule that was applicable to a type of theft that no longer exists. This is not good authority and should not be followed, particularly where it conflicts with current rules prohibiting corporate theft detailed above.

IV.

Defendants did not receive ineffective assistance when their counsel withdrew a request for a wrongful appropriation instruction.

“Wrongful appropriation is a lesser included offense” of theft. Utah Code Ann. § 76-6-404.5(4) (West 2009). Like theft, wrongful appropriation requires proof that the defendant obtained or exercised “unauthorized control over the property of another.” *Id.* § 76-6-404.5(1). The difference is that in wrongful appropriation, the person acts “with intent to *temporarily* appropriate, possess, or use” the property. *Id.* (emphasis added).

At trial, defense counsel specifically withdrew a request for a wrongful appropriation instruction. R1537:214. Defendants now argue that their counsel was ineffective for doing so. Aplt. Br. 42-47.

A. Defendants have not proven deficient performance.

1. Counsel had a legitimate reason to not request the instruction.

Defendants must first prove deficient performance. “An attorney’s performance is deficient under *Strickland* if it can be shown to have fallen

below an objective standard of reasonableness.” *Sessions*, 2014 UT 44, ¶18. Defendants must overcome a strong presumption that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013). To overcome this strong presumption, Defendants must demonstrate that “there was *no conceivable tactical basis* for counsel’s actions.” *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original).

Thus, the “threshold question under *Strickland* is not whether some strategy other than the one that counsel employed looks superior given the actual results of trial. It is whether a reasonable, competent lawyer could have chosen the strategy that was employed in the real-time context of trial.” *State v. Barela*, 2015 UT 22, ¶21, 349 P.3d 676; accord *State v. Nelson*, 2015 UT 62, ¶16, 792 Utah Adv. Rep. 67.

Here, Defendants seem to suggest that because they were entitled to the instruction, counsel was required to request it. Aplt. Br. 43-44. But the Sixth Amendment “does not require counsel to argue *every* reasonable theory” in a case. *State v. Lucero*, 2014 UT 15, ¶54 (emphasis in original). To the contrary, “counsel’s decision to choose one of two alternative, reasonable trial strategies is not grounds for an ineffective assistance of counsel ruling.” *Id.* at ¶53. This extends to lesser included offense

instructions, where this Court “generally affords deference to defense counsel’s decision to request or not request a lesser-included-offense” instruction. *Jackson v. State*, 2015 UT App 217, ¶18 n.7, -- Utah Adv. Rep. --.

Here, Defendants’ counsel could have reasonably decided to not request the wrongful appropriation instruction for two reasons.

First, counsel could reasonably decide to not request this instruction as part of an “‘all or nothing’ strategy”—i.e., a strategy designed to maximize a defendant’s chance for acquittal, rather than risking the chance that the jury would convict on a lesser included offense as a compromise. *State v. Feldmiller*, 2013 UT App 275, ¶3, 316 P.3d 991; accord *State v. Dyer*, 671 P.2d 142, 145 (Utah 1983); *State v. Valdez*, 432 P.2d 53, 54 (Utah 1967).

There was a particular reason why such an approach would make sense in this case. Defendants were businessmen with no prior criminal records who were charged with non-violent offenses. R1149-50, 1169-70 (PSI’s). During a discussion midway through trial, the judge openly stated that it was “outrageous” for defense counsel to have suggested in front of the jury that the defendants might serve a lengthy prison term. R1536:62. The judge then explained to the parties: “I doubt that the State is even seeking prison in this case, let alone a consecutive sentence. I have no intention of putting these men in prison.” *Id.*

At that point, Defendants knew that they faced no risk of long-term incarceration. Because of this, their remaining risk was the possibility of conviction itself. But given their backgrounds, many of the consequences that would come with a conviction for theft would also come with a conviction for wrongful appropriation. After all, Defendants were self-employed real estate developers. Even if they were convicted of wrongful appropriation, rather than theft, they still could have lost their professional licenses. *See* Utah Code Ann. § 58-1-401(2)(a) (West 2009) (DOPL “may refuse to issue a license” if an applicant “has engaged in unprofessional conduct, as defined by state or rule”); Utah Code Ann. § 61-2f-401 (West 2009) (real estate licenses may be revoked if a person is “convicted of a criminal offense involving moral turpitude” within five years); Utah Admin. Code R. 162-2f-201(1)(ii) (certain real estate licenses “shall be denied” if the applicant was convicted of “a misdemeanor involving fraud, misrepresentation, theft, or dishonesty” within three years); Utah Admin. Code R. 156-1-302 (allowing suspension of license if an applicant “has failed to demonstrate good moral character” or “has been involved in unlawful conduct”).

Moreover, wrongful appropriation convictions could also have dramatically impaired their future business prospects. As noted, a

wrongful appropriation conviction would represent a finding that Defendants had temporarily exercised “unauthorized control” over another’s property. Utah Code Ann. § 76-6-404.5(1). The fact that a wrongful appropriation conviction would have only signaled a temporary, as opposed to permanent, theft would likely have been of little reassurance to prospective future investors, banks, or clients.

Counsel could have therefore reasonably decided to forego requesting the instruction in the hopes that Defendants might be acquitted outright. Given the complexities of this case, they were not without reason to have such hope, as evidenced by Defendants’ acquittal on the majority of the theft charges.

Second, as a separate matter, counsel could also have reasonably believed that an alternative defense of wrongful appropriation would have hurt Defendants because it was “inconsistent” their Defendants’ claim of outright innocence. *Feldmiller*, 2013 UT App 275, ¶4. Counsel could have surmised that they could not credibly argue to the jury that Defendants never intended to unlawfully deprive Tivoli of its funds at all . . . but that if they did, they only intended to *temporarily* deprive Tivoli of its funds. Pushing such an approach could have jeopardized the possibility of any

acquittal, and counsel could therefore have reasonably decided to withdraw the request for the instruction.

2. The record does not support Defendants' claim that the decision to withdraw the instruction was unreasonably based on an agreement with the prosecutor.

Defendants alternatively claim that counsel's decision to withdraw the request for a wrongful appropriation instruction was unreasonably based on an unfulfilled "stipulation" from the State. Aplt. Br. 44-46.

As an initial matter, it does not matter whether this was counsel's actual motivation. The question under *Strickland*'s first element is whether counsel's performance fell below "an *objective* standard of reasonable professional judgment." *Sessions*, 2014 UT 44, ¶17 (emphasis added). Thus, this Court's "consideration of counsel's performance does not depend on 'counsel's subjective state of mind'; instead, what matters is "the objective reasonableness of counsel's performance." *Jackson*, 2015 UT App 217, ¶19.

As discussed above, reasonably competent counsel could have decided to not request the instruction here. This, alone, defeats this claim.

Second, the record also does not support Defendants' claim that counsel withdrew the request based on a stipulation with the prosecutor. Aplt. Br. 44-46.

After conviction, Defendants filed a new trial motion in which they argued that the question of who owned what percentage of Tivoli's money was a legal question that should have been decided by the court. R1380-91. Explaining the procedural history, defense counsel represented that they had an agreement with the prosecutor in which they could wait to raise this issue until after trial if they were convicted. R1385. Counsel further represented that they had decided to not request a lesser included offense instruction on wrongful appropriation "*in anticipation* of obtaining a considered ruling" on the ownership issue after trial if it proved necessary. R1383. Defendants then contended that, "[i]n hindsight" and with "more mature consideration," they believed that they should have pushed for a ruling on ownership before the case was submitted to the jury. R1383-84.

Thus, the record does not support Defendants' claim on appeal that their decision to withdraw the wrongful appropriation request was part of a stipulation with the State. Rather, the record shows that they made the decision themselves, based on their belief that they would either (1) be acquitted by the jury, or (2) obtain legal relief after trial through a new trial motion.

The fact that counsel later regretted this approach is of no import. When reviewing an ineffective assistance claim, "every effort" must be

made to “eliminate the distorting effects of hindsight” and “not question” counsel’s decisions “unless there is no reasonable basis supporting them.” *Nelson*, 2015 UT 62, ¶16; *accord Barela*, 2015 UT 22, ¶21.

As discussed, there was a reasonable basis for withdrawing the request for a wrongful appropriation instruction: it put the State to a higher burden of proof and made acquittal more likely. Regardless of whether defense counsel later regretted that decision, it was still reasonable at the time, and Defendants’ claim thus fails.

B. Defendants were not prejudiced because it is not probable that the jury would have convicted them of wrongful appropriation.

Defendants must also prove that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Here, there is not a reasonable probability that the jury would have convicted Defendants of wrongful appropriation if the instruction had been given.

As noted, the difference between theft and wrongful appropriation is that in theft, the defendant has a “purpose to deprive” the owner of his property, while in wrongful appropriation, he intends to “temporarily deprive the owner” of his property. *Compare* Utah Code Ann. § 76-6-404 *with* Utah Code Ann. § 76-6-404.5.

Bruun testified at trial. In his testimony, he never claimed that he and Diderickson intended to temporarily steal Tivoli's funds. Instead, he insisted that they had authority to use these funds for these purposes. *See* R1535:265-71.

Given that Defendants steadfastly justified these checks, there was no reason for the jury to believe that they intended to give the money back after a temporary period. Because of this, there is no probability that the outcome would have changed if the instruction had been given.⁹

V.

Defendants have not proven that counsel was ineffective for not requesting an additional UPUAA instruction.

Defendants were also convicted of one count of engaging in a pattern of unlawful activity (UPUAA). R967-70. Under the UPUAA statute, it is a crime for a person who is "associated with any enterprise" to "participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity." Utah Code Ann. § 76-10-1603(3) (West 2009). A "pattern of unlawful activity" includes "the commission of

⁹ Defendants also claim that this is reviewable for manifest injustice. Aplt. Br. 47. Under invited error, however, "a party on appeal cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Alfatlawi*, 2006 UT App 511, ¶26, 153 P.3d 804. As noted, counsel affirmatively withdrew a request for a wrongful appropriation instruction. R1537:214. Invited error thus bars this claim.

at least three episodes of unlawful activity, which episodes are not isolated,” and which “demonstrate continuing unlawful conduct.” Utah Code Ann. § 76-10-1602(2) (West 2009).

The jury was instructed about all of the above elements and definitions. R952-54. Defendants nevertheless argue that the instructions were incomplete—but not because they omitted any statutory language. Rather, Defendants argue that the court should also have instructed the jury that to qualify as “continuing unlawful conduct,” the thefts must have “occurred over a substantial period of time.” Apl’t. Br. 48.

Here, Defendants were convicted for writing checks over a nine-month period—specifically, check 1007 (the basis for count 2) was written in December 2007, while check 1070 (the basis for count 28) was written in September 2008. R69-78, 971-73; Addendum D. Defendants thus argue that, if the jury had been instructed that the thefts must have occurred over a “substantial period of time,” it would have concluded that nine months did not suffice and therefore acquitted them of UPUAA charge. Apl’t. Br. 47-53.

Defendants admit that they never requested such an instruction below, but argue that this should be reviewed for plain error or ineffective assistance. Apl’t. Br. 52-53.

A. This Court cannot review this issue for plain error.

Under the invited error doctrine, “a party on appeal cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *Alfatlawi*, 2006 UT App 511, ¶26. Where a party “confirm[s] on the record that the defense had no objection to the instructions given by the trial court,” the invited error doctrine forecloses plain error review. *State v. Geukgeuzian*, 2004 UT 16, ¶10, 86 P.3d 742.

During a break at trial, Bruun’s counsel informed the court that the parties had “agreed on all but one instruction.” R1537:213. The parties then discussed the one remaining dispute with the court—a dispute that centered on one of the theft instructions. R1537:213-20. At the close of that discussion, defense counsel affirmatively approved the remaining instructions. R1537:220. Defense counsel never separately pointed to any deficiency in the UPUAA instructions.

Defendants accordingly cannot obtain relief for plain error. Instead, they can obtain relief only if they demonstrate that counsel was ineffective. *State v. Sellers*, 2011 UT App 38, ¶13, 248 P.3d 70.¹⁰

¹⁰ Defendants also suggest that this is reviewable for a “manifest injustice.” Again, “manifest injustice” is “synonymous with the plain error standard.” *Pullman*, 2013 UT App 168, ¶5. Defendants’ “manifest injustice” claim is accordingly likewise barred by invited error.

B. Defendants have not proven deficient performance.

Defendants must first prove that counsel's performance fell "below an objective standard of reasonableness." *Sessions*, 2014 UT 44, ¶18. Defendants must prove that counsel's "representation amounted to incompetence under prevailing professional norms," not just that it "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 88 (2011).

Defendants' deficient performance claim fails for two reasons. First, counsel did not perform deficiently because there was no controlling law that entitled Defendants to such an instruction. And second, trial counsel had several reasonable bases for choosing not to request the additional instruction here.

1. No controlling law entitled Defendants to an additional instruction.

Defense counsel's decisions must be evaluated "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Thus, to prove the first *Strickland* element, Defendants must demonstrate that, "on the basis of the law in effect at the time of trial, [their] trial counsel's performance was deficient." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993); *see also Menzies v. State*, 2014 UT 40, ¶76, 344 P.3d 581.

Defendants accordingly cannot prevail by simply showing that counsel did not advance “a novel legal theory which has never been accepted by the pertinent courts.” *State v. Love*, 2014 UT App 175, ¶7, 332 P.3d 383. Instead, to show deficient performance, Defendants must show that counsel disregarded “controlling appellate law” that existed at the time of trial. *State v. Kerr*, 2010 UT App 50, ¶9, 228 P.3d 1255; *see also In re N.A.D.*, 2014 UT App 249, ¶6, 338 P.3d 226.

As noted, UPUAA requires proof of a “pattern of unlawful activity,” and a “pattern of unlawful activity” is defined as “continuing unlawful conduct.” Utah Code Ann. §§ 76-10-1602(2), -1603(3). According to Defendants, what was missing here was an additional definitions instruction that would define the phrase “continuing unlawful conduct” as conduct that occurred over a “substantial period of time.” Apl't. Br. 47-52. Thus, to be clear, what Defendants are faulting their counsel for is not requesting an additional definitions instruction for one of the definitions of one of the elements of the UPUAA count.

The problem is that no case entitled them to this instruction. Defendants draw their proposed “substantial period of time” instruction from *Hill v. Estate of Allred*, 2009 UT 28, ¶¶38-41, 216 P.3d 929. There, the supreme court did suggest that the “continuing conduct” element of a

UPUAA claim is satisfied if the conduct “extend[ed] over a substantial period of time.” *Id.*

But the question in *Hill* was not about the adequacy of jury instructions. Rather, the question was about whether the evidence in that case was sufficient to support the UPUAA conviction. *See id.* Although the court used the “substantial period of time” language as part of its analysis, the court did not say that trial courts must always give an instruction including that definition in every UPUAA prosecution.

Defendants point to no Utah case, and the State is aware of none, in which any Utah court has held that a “substantial period of time” instruction must be included in a UPUAA case. This defeats their claim, because, again, counsel does not violate the Sixth Amendment for not advancing “a novel legal theory which has never been accepted by the pertinent courts.” *Love*, 2014 UT App 175, ¶7.

This is particularly so here given that it remains an open question as to whether such an instruction is required. While a “party is entitled to have the jury instructed on its theory of the case” if evidence supports it, a “party is not entitled to have the jury instructed with any particular wording.” *State v. Marchet*, 2012 UT App 197, ¶17, 284 P.3d 668. Thus, if

“the jury instructions as a whole fairly instructed the jury on the applicable law,” “it is not error to refuse a particular instruction.” *Id.*

As Defendants note, the UPUAA statute is patterned after the federal RICO statute; it is for this reason that Defendants largely rely on federal RICO cases to support this claim. *Aplt. Br.* 50-51. But many federal courts have held that a court is not required to include the “substantial period of time” “clarification” in RICO jury instructions. Indeed, federal decisions sometimes go beyond that, holding that jury instructions are not even required to include the “continuous conduct” definition for the “pattern of unlawful activity” element.

In *United States v. Boylan*, 898 F.2d 230, 250 (1st Cir. 1990), for example, the court held that the element in a RICO prosecution is the “pattern of unlawful activity.” By contrast, “continuity is not an element of a RICO offense,” but is instead a “necessary characteristic of the evidence used to prove the existence of a pattern.” 898 F.2d at 250. Thus, while the concept of “continuity” helps define the “pattern” element, the “word itself should not be accorded talismanic significance,” and its absence from the jury instructions does not constitute plain error. *Id.*

Many other federal courts have followed this approach. *See, e.g., United States v. Celestine*, 43 Fed. Appx. 586, 591 (4th Cir. 2002) (jury

instructions must “incorporate the concept of continuity,” but it is enough if the instructions “requir[e] the jury to find a pattern of activity, and not just isolated acts”); *United States v. Kotvas*, 941 F.2d 1141, 1144 (11th Cir. 1991) (no error where instructions did not include “continuity” requirement, because instructions required proof of a “pattern”); cf. *United States v. Dote*, 150 F.Supp.2d 935, 940 (N.D. Ill. 2001) (“‘Continuity’ is not an element of a RICO violation, and need not be plead with particularity to survive a motion to dismiss”); *United States v. Mavroules*, 819 F.Supp. 1109, 1117-18 (D. Mass. 1993) (“continuity” “need not be alleged” in a RICO indictment because “continuity is not an element of a RICO offense”).

Thus, at the time of this trial, federal cases suggested that instructions are sufficient if they instructed the jury on the pattern of activity element, as well as the concept of continuity. No Utah case required more. Because of this, Defendants cannot show that their counsel performed deficiently by not requesting an additional instruction.

2. There was a tactical reason for not requesting this instruction.

A deficient performance claim also fails if there was any “conceivable tactical basis for counsel’s actions.” *Clark*, 2004 UT 25, ¶6. Here, even if Defendants were entitled to an additional instruction, counsel could reasonably have decided to not request it.

As noted, UPUAA requires proof that the person engaged in “a pattern of unlawful activity,” and it defines a “pattern of unlawful activity” as “continuing unlawful conduct.” Utah Code Ann. § 76-10-1602(2), -1603(3).

Hill addressed the question of what it means to be “continuing.” 2009 UT 28, ¶¶33-42. Interpreting that term, the court relied on heavily on *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), a decision that interpreted a similar element in the RICO statute. *Hill*, 2009 UT 28, ¶¶33-42. *Hill* concluded that there can be two kinds of “continuous” criminal conduct. First, there may be a “closed” period of continuity, wherein the conduct “extend[ed] over a substantial period of time.” *Id.* at ¶39. Second, there may be an “open” period of continuous conduct. *Id.* This occurs when the pattern of unlawful activity was “interrupted” before it covered a substantial period of time, but there was proof that it likely would have continued without the interruption. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1529-30 (9th Cir. 1995). Thus, if a UPUAA action is prosecuted as an open continuity case, proof that there was a “threat of continuity” without the interruption is enough. *Hill*, 2009 UT 28, ¶39.

Against this backdrop, defense counsel here could have reasonably decided to not request a “substantial period of time” instruction. The

current instructions did not draw attention to the open/closed continuity distinction. But if counsel had requested an instruction on the “substantial period of time” definition, this would have drawn attention to this distinction because, again, the substantial period of time definition only applies to closed continuity cases. *Hill*, 2009 UT 28, ¶39; *H.J. Inc.*, 492 U.S. at 242.

But if this distinction became a focus, the State could have avoided any “substantial period of time” limitation altogether by now pushing this as open-continuity prosecution. Indeed, such an approach would have been consistent with prior Utah cases, which have held that open continuity can be established through short periods of time that resemble the period of time at issue here. *See, e.g., State v. McGrath*, 749 P.2d 631, 635 (Utah 1988) (open-continuity pattern spanned five months); *State v. Nichols*, 2003 UT App 287, ¶¶15-22, 76 P.3d 1173 (open-continuity pattern spanned approximately six months). Indeed, federal courts have held that open continuity can occur in as little as two months. *See, e.g., Sun Savings and Loan Ass’n v. Dierdoff*, 825 F.2d 187, 194 (9th Cir. 1987); *United States v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991). Thus, any tactical gains that Defendants achieved through this instruction could have been short-lived if the State simply shifted focus.

Moreover, if the State had been prompted to pursue this as an open-continuity case, this could have further backfired because of the particular kind of proof at issue in such prosecutions. Again, the question in an open-continuity case is whether there was a “threat of continuity” before the pattern was disrupted. *Hill*, 2009 UT 28, ¶39; *H.J. Inc.*, 492 U.S. at 242. One way to prove this is by showing that the criminal conduct was the defendant’s “regular way of conducting” business. *H.J. Inc.*, 492 U.S. at 243.

When assessing an ineffective assistance claim, courts give deference to the choices of trial counsel, in part, because, “unlike a later reviewing court,” the attorney “knew of material outside the record and interacted with the client.” *Harrington*, 562 U.S. at 105. On this record, it is conceivable that the reason counsel avoided this issue was a worry the State would have responded by pursuing this as an open-continuity case – which would have then caused the State to inquire further as to whether Defendants’ conduct was indicative of their regular business practice.

Indeed, the record already provides a basis for such a worry. Defendants had worked together on real estate projects for years. R1535:208-09. When Bruun testified at trial, he was decidedly unrepentant, repeatedly insisting that what he and Diderickson did with Tivoli’s money was justified because they were Tivoli’s managers. R1535:265-71. Notably,

Bobbie Posey testified that when the Poseys met with Defendants to form Tivoli, they signed forms that *Defendants* had drafted. R1554:121. One reasonable inference from this is that this was the way that Defendants did business.

Again, Defendants must show that there was no *conceivable* basis for this decision. Here, counsel could reasonably have believed that requesting an instruction that was only applicable to a closed-continuity UPUAA claim (1) would not help, because the prosecutor could avoid any limitations by pressing this as an open-continuity claim, and (2) it could have backfired by prompting the prosecutor to now ask questions about Defendants' business practices. This was reason to leave the jury instructions alone, and the deficient performance claim fails.

C. Defendants were not prejudiced because it is not probable that the jury would have acquitted them on the UPUAA count if given the additional instruction.

Defendants must also prove prejudice. They have not.

First, if Defendants had pushed for a substantial period of time instruction, the State could have simply avoided any limitation imposed by this by now pressing this as an open-continuity prosecution. As noted, the time period at issue here — nine months — is well within the range of periods approved in such cases. *See, e.g., McGrath*, 749 P.2d at 635; *Nichols*, 2003 UT

App 287, ¶¶15-22. Because of this, it is not reasonably likely that Defendants would have been acquitted if this issue had been raised.

Second, even if the instruction had been given and the case was confined to a closed-continuity construct, it is not reasonably likely that Defendants would have been acquitted.

The term “substantial” commonly refers to something that is “important” or “considerable.” *Merriam-Webster Dictionary*, Substantial (2), (5) (2005 ed.). Because this concept is relative, the question of whether this period of time was substantial was a jury question, and the jury could have readily resolved it against Defendants.

As noted, Tivoli was formed in August 2007, and the checks for which they were convicted were written over nine months. R69-78, 971-73; Addendum D (checks 1007 & 1070). It is not reasonably likely that the jury would have found that a nine-month period of thefts was not “substantial.”

True, the Supreme Court in *H.J. Inc.* suggested that in a closed-continuity case, “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct” would not “satisfy this requirement,” 492 U.S. at 242, and the Utah Supreme Court later adopted this language in *Hill*, 2009 UT 28, ¶¶38, 41.

But *H.J. Inc.* did not establish this as an inviolable rule. To the contrary, the Court stressed that it would still employ a “flexible approach” and that it was “difficult to formulate in the abstract any general test for continuity.” 492 U.S. at 241. Thus, even after the Court suggested that conduct occurring over “a few weeks or months” would not suffice, the Court stressed that the “limits of the relationship and continuity concepts that combine to define a RICO pattern” “cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a pattern of racketeering activity exists.” *Id.* at 243.

Defendants nevertheless rely on a series of cases suggesting that a period does not qualify as substantial unless it extends for multiple years. *Aplt. Br.* at 50. But these decisions run contrary to *H.J. Inc.*, which, again, endorsed a “flexible” approach to the question. 492 U.S. at 241. Moreover, some federal courts have specifically rejected efforts to impose a set requirement. *See, e.g., Allwaste, Inc.*, 65 F.3d at 1528 (rejecting “a hard and fast, bright line, one-year rule,” because “such a rigid requirement” “would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J. Inc.*”); *California Pharmacy Mgmt., LLC v. Zenith Ins. Co.*, 669 F.Supp.2d 1152, 1162-63 (C.D. Cal. 2009) (same).

In short, neither the United States Supreme Court nor the Utah Supreme Court have imposed an inflexible rule of the sort pushed by Defendants. Given this, it would have been up to this jury to determine whether Defendants' nine-month pattern of thefts sufficed, and on these facts, it is not reasonably probable that the jury would have held that it did not. This claim accordingly fails.

VI.

Defendants' restitution claim is unpreserved and should not be reached.

Defendants argue that the court erred by not taking the terms of the civil settlement into account when ordering restitution. Aplt. Br. 53. But this issue is unpreserved.

Before sentencing, Defendants argued that the civil settlement "preclude[d]" any restitution. R1077, 135; 1539:6-8. Defendants' claim was essentially one of estoppel—that because the Poseys agreed to the settlement, they were foreclosed from receiving any restitution in the criminal case. *See id.*

Defendants were wrong. In *State v. Laycock*, 2009 UT 53, ¶15, 214 P.3d 104, the supreme court expressly recognized that the State's ability to request restitution as part of a criminal sentence is separate from the

victims' actions in a separate civil proceeding. Because of this, the court correctly ordered restitution. R1539:22-25.

On appeal, Defendants do not renew the argument that they made below, which, again, was that the civil settlement foreclosed any restitution. Aplt. Br. 53-55. Instead, Defendants' argument now is that the restitution order should have included an offset for the value that the Poseys received in the civil settlement. *See id.*

But arguing that the civil settlement prevented the court from ordering any restitution is fundamentally different from arguing that the civil settlement should have been valued and then included in it. Again, Defendants did the former, but did not do the latter. This is accordingly an unpreserved claim and can be reached only if Defendants demonstrated that a preservation exception applies "in [their] opening brief." *Oseguera*, 2014 UT 31, ¶15. Defendants did not. Aplt. Br. 54-55. This Court accordingly should not reach the issue.

In any event, if this issue is considered, Defendants are wrong when they suggest that the court should have accounted for the settlement in either its complete or court-ordered restitution orders. Aplt. Br. 54. A complete restitution order accounts for "all losses caused by the defendant," while a court-ordered restitution order reflects the portion that the court

orders the defendant to pay as part of the criminal sentence. Utah Code Ann. § 77-38a-302(2)(a), (2)(b). If Defendants have indeed already paid some amount to the Poseys, this would not change either aspect of this—i.e., it would not change the overall amount of the Poseys' losses, nor would it change the amount that the court believed should be attached to the sentence.

Instead, if the settlement is to now be considered, the place to do so would be as a credit in the court's ongoing accounting of how much restitution Defendants have actually paid. If this is to be done, however, the readjustment must include more than Defendants let on.

Defendants did not give the Poseys their property back as a unilateral, one-way bequest that was intended to compensate the Poseys for their losses. Rather, this came as part of negotiated, two-way transaction in which Defendants gave the Poseys their property back *in exchange for* \$25,000. Addendum D at 1-2.

If Defendants' end of that transaction is to be counted as restitution—i.e., as compensation for the harm the Poseys suffered from Defendants' crimes—then Defendants cannot be allowed to keep the \$25,000. Otherwise, Defendants would essentially be in the position of charging their victims a \$25,000 restitution fee.

Convicted criminals do not get to charge their victims for the right to receive restitution. So if this civil settlement is to counted as restitution, the first thing that must happen is that the \$25,000 must be taken back from Defendants.

And the adjustment should not stop there. The State asserted below that although the Poseys received title to their property back in the settlement, their property interests had been damaged in the interim by the thefts, and that to stave off foreclosure, the Poseys were forced to negotiate a settlement with the hard money lenders that ultimately caused them to lose half of their property. R1064-67.

Defendants want restitution to be offset by the value of the property the Poseys received in the civil settlement. But that begs the question of how, exactly, to value it. If it is true that the title the Poseys received was now compromised by a loan that ultimately forced them to lose half their property, then that loss must be accounted for when determining how much credit to give Defendants. Otherwise, Defendants would be receiving credit for giving the Poseys property value that the Poseys never actually received.

Restitution is intended to compensate the victims for "all losses" caused by the crimes. Utah Code Ann. § 77-38a-302(2)(a). If Defendants

want the civil settlement to be accounted for, both sides of it must be included—including the full amount that Poseys lost through that settlement.

But again, Defendants did not raise this argument below. Because they did not brief a preservation exception, this issue need not be considered.¹¹

VII.

This Court should not reverse for cumulative error

Finally, Defendants ask for relief for cumulative error. Apl't. Br. 55. This Court reverses for cumulative error only if the cumulative effect of multiple errors undermines its confidence that the defendant received a fair trial. *State v. Kohl*, 2000 UT 35, ¶25, 999 P.2d 7. Here, there was no prejudicial error—either individually or cumulatively.

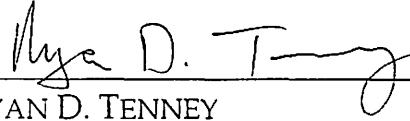
CONCLUSION

For the foregoing reasons, the Court should affirm.

¹¹ In Point V(b), Defendants argue that if any of their convictions are reversed, “the portion of the restitution award associated with those counts must also be reversed.” Apl't. Br. 55. The State agrees. See *State v. Larsen*, 2009 UT App 293, ¶6, 221 P.3d 277 (restitution must be based on valid conviction or agreement); see also *United States v. Camick*, 2015 WL 4597562 (10th Cir., July 31, 2015) (setting aside portion of restitution based on overturned convictions).

Respectfully submitted on September 14, 2015.

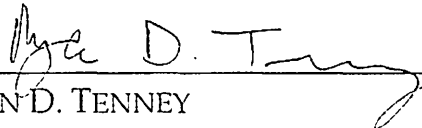
SEAN D. REYES
Utah Attorney General



RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13.992 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



RYAN D. TENNEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on September 14, 2015, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

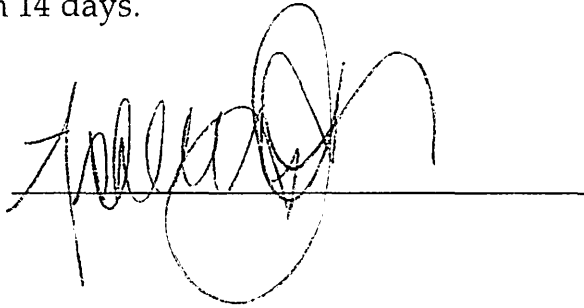
Karra J. Porter
Christensen & Jensen
257 East 200 South
Salt Lake City, UT 84111-2048

Clifton W. Thompson
562 S. Main Street, Lower Level East
Bountiful, UT 84010

Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

A handwritten signature in black ink, appearing to read 'Karra J. Porter', is written over a horizontal line.

Addenda

Addendum A

§ 76-6-404. Theft — Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

§ 48-2c-803. Management by members

In a member-managed company, each member shall be subject to the duties described in Section 48-2c-807 and, unless otherwise provided in this chapter, in the articles of organization, or an operating agreement:

(1) the affirmative vote, approval, or consent of members holding a majority of profits interests in the company shall be required to decide any matter connected with the business of the company;

(2) the affirmative vote, approval, or consent of all members shall be required to:

(a) amend the articles of organization, except to make ministerial amendments including:

(i) amendments made only to reflect actions previously taken with the requisite approval, such as a change in managers; or

(ii) to change an address;

(b) amend the operating agreement, except to make ministerial amendments, including:

(i) amendments made only to reflect actions previously taken with the requisite approval, such as a change in managers; or

(ii) to change an address; or

(c)(i) authorize a member or any other person to do any act on behalf of the company that contravenes the articles of organization or operating agreement; and

(ii) after authorizing an act under Subsection (2)(c)(i) to terminate the authority so granted; and

(3) the affirmative vote, approval, or consent of members holding 2/3 of the profits interests in the company shall be required to bind the company to any of the following actions:

(a)(i) authorizing a member or any other person to do any act on behalf of the company that is not in the ordinary course of the company's business, or business of the kind carried on by the company; and

(ii) after authorizing an act under Subsection (3)(a)(i) to terminate the authority so granted;

(b) making a current distribution to members;

(c) resolving any dispute connected with the usual and regular course of the company's business;

- (d) making a substantial change in the business purpose of the company;
- (e) a conversion of the company to another entity;
- (f) a merger in which the company is a party to the merger;
- (g) any sale, lease, exchange, or other disposition of all or substantially all of the company's property other than in the usual and regular course of the company's business;
- (h) any mortgage, pledge, dedication to the repayment of indebtedness, whether with or without recourse, or other encumbering of all or substantially all of the company's property other than in the usual and regular course of the company's business; or
- (i) any waiver of a liability of a member under Section 48-2c-603.

§ 48-2c-804. Management by managers

In a manager-managed company, each manager and each member shall be subject to Section 48-2c-807 and:

(1)(a) the initial managers shall be designated in the articles of organization; and

(b) after the initial managers, the managers shall be those persons identified in documents filed with the division including:

(i) amendments to the articles of organization;

(ii) the annual reports required under Section 48-2c-203; and

(iii) the statements required or permitted under Section 48-2c-122;

(2) when there is a change in the management structure from a member-managed company to a manager-managed company, the managers shall be those persons identified in the certificate of amendment to the articles of organization that makes the change;

(3) each manager who is a natural person must have attained the age of majority under the laws of this state;

(4) no manager shall have authority to do any act in contravention of the articles of organization or the operating agreement, except as provided in Subsection (6)(g);

(5) a manager who is also a member shall have all of the rights of a member;

(6) unless otherwise provided in the articles of organization or operating agreement of the company:

(a) except for the initial managers, each manager shall be elected at any time by the members holding at least a majority of the profits interests in the company, and any vacancy occurring in the position of manager shall be filled in the same manner;

(b) the number of managers:

(i) shall be fixed by the members in the operating agreement; or

(ii) shall be the number designated by members holding at least a majority of the profits interests in the company if the operating agreement fails to designate the number of managers;

(c) each manager shall serve until the earliest to occur of:

(i) the manager's death, withdrawal, or removal;

(ii) an event described in Subsection 48-2c-708(1)(f); or

- (iii) if membership in the company is a condition to being a manager, an event described in Subsection 48-2c-708(1)(d) or (e);
- (d) a manager need not be a member of the company or a resident of this state;
- (e) any manager may be removed with or without cause by the members, at any time, by the decision of members owning a majority of the profits interests in the company;
- (f) there shall be only one class of managers; and
- (g) approval by:
 - (i) all of the members and all of the managers shall be required for matters described in Subsection 48-2c-803(2); and
 - (ii) members holding 2/3 of the profits interests in the company, and 2/3 of the managers shall be required for all matters described in Subsection 48-2c-803(3).

§ 48-2c-701. Nature of member interest

- (1) A member's interest in a company is personal property regardless of the nature of the property owned by the company.
- (2) A member has no interest in specific property of a company.

Addendum B



Utah Association
of REALTORS®

REAL ESTATE PURCHASE CONTRACT FOR LAND

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

EARNEST MONEY RECEIPT

Buyer Equity Partners LLC offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$500 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: TRAVIS TUeller controller on 8-10-07 (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: N/A Phone Number: N/A

OFFER TO PURCHASE

1. PROPERTY: Address 7916N 10800 W SARATOGA SPRINGS
Acre: also described as: Tax ID #
Tax ID # City of Saratoga Springs County of Utah State of Utah, ZIP 84045 (the "Property").

1.1 Included Items. (specify) _____

1.2 Water Rights/Water Shares. The following water rights and/or water shares are included in the Purchase Price.

☐ 1.5 Shares of Stock in the EXISTING Well (Name of Water Company)
☐ Other (specify) _____

2. PURCHASE PRICE The purchase price for the Property is \$3,500,000

The purchase price will be paid as follows:

\$500 (a) Earnest Money Deposit. Under certain conditions described in this Contract, DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$3,499,500 (b) New Loan. Buyer agrees to apply for one or more of the following loans:

☐ CONVENTIONAL ☐ OTHER (specify) _____

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

☐ SPECIFIC LOAN TERMS _____

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

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

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

\$3,500,000 PURCHASE PRICE. Total of lines (a) through (e)

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (½) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(c), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: ☐ Upon Closing ☒ Other (specify) At Reacording

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

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

Selling Agent N/A, represents [] Seller [] Buyer [] both Buyer and Seller as a Limited Agent;
Selling Broker for N/A, represents [] Seller [] Buyer [] both Buyer and Seller as a Limited Agent;
(Company Name)

Buyer's Agent N/A, represents [] Seller [] Buyer [] both Buyer and Seller as a Limited Agent;

Buyer's Broker for N/A, represents [] Seller [] Buyer [] both Buyer and Seller as a Limited Agent;
(Company Name)

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

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

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems;
- (e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and
- (f) Other (specify) _____

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

- (a) ☒ IS [] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS [] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS [] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;
- (d) ☒ IS [] IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;
- (e) ☒ IS [] IS NOT conditioned upon the Property appraising for not less than the Purchase Price;
- (f) ☒ IS [] IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;
- (g) [] IS [] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

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

8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

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

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

10. **SELLER WARRANTIES AND REPRESENTATIONS.**

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

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

☒ **SELLER** ☐ **BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.**

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

- (a) the Property shall be free of debris and personal property;
- (b) the Property will be in the same general condition as it was on the date of Acceptance.

11. **FINAL PRE-CLOSING INSPECTION.** Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine **only** that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property, and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the Property as represented.

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

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

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

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

☐ **SHALL**

☒ **MAY AT THE OPTION OF THE PARTIES**

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

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

17. **ATTORNEY FEES AND COSTS.** In the event of litigation or binding arbitration to enforce this Contract, the prevailing

party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

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

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

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

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

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

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

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

(a) Seller Disclosure Deadline 8-15-07 (Date)

(b) Due Diligence Deadline 8-20-07 (Date)

(c) Settlement Deadline 8-30-07 (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: _____ [] AM [] PM Mountain Time on _____ (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

AMC PRCA MANAGER

(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"

Equity Partners LLC

(Buyers' Names) (PLEASE PRINT)

605 N 1250 W CENTERVILLE UT 84014

(Notice Address)

(Zip Code)

(Phone)

801-298-4611

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. _____

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

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

☐ **REJECTION:** Seller rejects the foregoing offer.

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

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UAR FORM 19

8-10-7



ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 8-10-07 including all prior addenda and counteroffers, between EQUITY PARTNERS LLC as Buyer, and BOBBIE POSEY AND KERRY POSEY as Seller, regarding the Property located at _____ The following terms are hereby incorporated as part of the REPC:

- 1- Purchase price of property is based on city approval of conceptual plan for Rezoning to R-3 with 20% density bounus.
- 2- Purchase price of property is based on city approval of conceptual plan for rezoning 4-5 acres of property along Redwood Road to commercial/mixed use.
- 3- Subject to legal review.

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 _____ ☐ AM ☐ PM Mountain Time on _____ (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.

Bobbie Posey
Kerry Posey

ALAN BRUN *8-10-07* *Bobbie H. Posey* *8-10-07*
Kerry R. Posey *8-10-07*

☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☒ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

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

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

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

8-28-07



ADDENDUM NO. 2
TO
REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of _____ including all prior addenda and counteroffers, between Equity Partners, LLC as Buyer, and _____ as Seller, regarding the Property located at 7916 NO. 10800 W., Saratoga Springs, UT 84045. The following terms are hereby incorporated as part of the REPC:

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

1. Buyer proposes to plat and subdivide the property which is the subject of this Agreement according to Utah COUNTY Codes and requirements. Buyer will seek ANNEXATION approval of a SUBDIVISION for the entire parcel.
 2. Fulfillment of this offer to purchase is contingent on Buyer determining to his sole satisfaction that the project is economically feasible.
 3. In the event Buyer determines the project is not feasible for any reason then the Earnest Money accompanying this Agreement Will revert to Buyer unless other arrangements are agreed between the Buyer and Seller. Buyer will also provide all the product of his work on the site to date but at no cost to the Seller and this Agreement will be deemed null and void.
 4. In the event governmental approvals are still pending and imminent upon expiration of the time period noted in the Purchase and Sale Agreement, then closing for the Agreement will be automatically extended for a period of 120 days.
 5. Seller agrees to join with Buyer in the proceedings and in the execution of any petitions, plats or dedications which may be required for development of the realty but at no expense to the Seller.
 6. Seller grants permission for the Buyer or his representative to enter onto the property for the purpose of soil tests, surveying, and all those studies necessary to prepare the realty for development.
 7. Buyer hereby indemnifies and saves Seller harmless from any liens or accidents that may arise because of Buyer's activity on the land.
 8. Seller warrants the property which is the subject of this Agreement is free of hazardous wastes and has never been used as a toxic waste dump of any kind. In the event hazardous wastes are discovered on the site Buyer may abandon the project and all Earnest Money will be returned to Buyer.
 9. In the event unusable wetlands are found to exist on the site, those identified wetlands plus buffer areas will be deducted from the purchase price on a per square foot basis.
- ALL THE OTHER TERMS AND CONDITIONS of the Agreement remain unchanged.

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 _____ ☐ AM ☐ PM Mountain Time on _____ (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.

[Handwritten signatures]

8-28-07

[] Buyer [] Seller Signature (Date) (Time) [] Buyer [] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

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

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

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

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



SELLER FINANCING ADDENDUM TO REAL ESTATE PURCHASE CONTRACT

11-12-07



THIS SELLER FINANCING ADDENDUM is made a part of that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 10, 2007, between Equity Partners, LLC as Buyer, and Kerry and Bobbie Posey as Seller, regarding the Property located at 7916 N 10800 N saratoga Springs 84045. The terms of this ADDENDUM are hereby incorporated as part of the REPC.

1. **CREDIT DOCUMENTS.** Seller's extension of credit to Buyer shall be evidenced by: ☒ **Note and Deed of Trust** ☐ **Note and All-Inclusive Deed of Trust** ☐ **Other:** _____

2. **CREDIT TERMS.** The terms of the credit documents referred to in Section 1 above are as follows:
\$2,750,000 principal amount of the note (the "Note"); interest at 0% per annum; payable at approximately \$0 per 0. The entire unpaid balance of principal plus accrued interest is due in 12 months from date of the Note. First payment due 12 months. Additional principal payments, balloon payments or other terms as follows:

The credit documents referenced in Section 1 of this ADDENDUM will contain a due-on-sale clause in favor of Seller. Seller agrees to provide to Buyer at Settlement: (a) an amortization schedule based on the above terms; (b) a written disclosure of the total interest Buyer will pay to maturity of the Note; and (c) the annual percentage rate on the Note based on loan closing costs.

3. **TAXES AND ASSESSMENTS.** In addition to the payments referenced in Section 2 above, Buyer shall also be responsible for: (a) property taxes; (b) homeowners association dues; (c) special assessments; and (d) hazard insurance premiums on the Property. These obligations will be paid: ☐ **directly to Seller/Escrow Agent on a monthly basis** ☒ **directly to the applicable county treasurer, association, and insurance company as required by those entities.**

4. **PAYMENT.** Buyer's payments under Sections 2 and 3 above will be made to: ☒ **Seller** ☐ **an Escrow Agent**. If an Escrow Agent, _____ will act as Escrow Agent and will be responsible for disbursing payments on any underlying mortgage or deed of trust (the "underlying mortgage") and to the Seller. Cost of setting up the escrow account shall be paid by: ☐ **Buyer** ☐ **Seller** ☒ **split evenly between the parties.**

5. **LATE PAYMENT/PREPAYMENT.** Any payment not made within 0 days after it is due is subject to a late charge of \$0 or 0% of the installment due, whichever is greater. Amounts in default shall bear interest at a rate of 0% per annum. All or part of the principal balance on the Note may be paid prior to maturity without penalty.

6. **DUE-ON-SALE.** As part of the Seller Disclosures referenced in Section 7 of the REPC, Seller shall provide to Buyer a copy of the underlying mortgage, the note secured thereby, and the amortization schedule. Buyer's obligation to purchase under this Contract is conditioned upon Buyer's approval of the content of those documents, in accordance with Section 8 of the REPC. If the holder of the underlying mortgage calls the loan due as a result of this transaction, Buyer agrees to discharge the underlying loan as required by the mortgage lender. In such event, Seller's remaining equity shall be paid as provided in the credit documents.

7. **BUYER DISCLOSURES.** Buyer has provided to Seller, as a **required** part of this ADDENDUM, the attached Buyer Financial Information Sheet. Buyer may use the Buyer Financial Information Sheet approved by the Real Estate Commission and the Attorney General's Office, or may provide comparable written information in a different format, together with such additional information as Seller may reasonably require. Buyer ☒ **WILL** ☐ **WILL NOT** provide Seller with copies of IRS returns for the two preceding tax years. Buyer acknowledges that Seller may contact Buyer's current employer for verification of employment as represented by Buyer in the Buyer Financial Information Sheet.

8. **SELLER APPROVAL.** By the Seller Disclosure Deadline referenced in Section 24(b) of the REPC, Buyer shall provide to Seller, at Buyer's expense, a current credit report on Buyer from a consumer credit reporting agency. Seller may use the credit report and the information referenced in Section 7 of this Addendum ("Buyer Disclosures") to evaluate the credit worthiness of Buyer.

8.1 **Seller Review.** By the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, Seller shall review the credit report and the Buyer Disclosures to determine if the content of the credit report and the Buyer Disclosures is acceptable. If the content of the credit report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to either: (a) provide written objections to Buyer as provided in Section 8.2 of this ADDENDUM; or (b) immediately cancel the REPC by providing written notice to Buyer by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return

Page 1 of 2 pages Seller's Initials RRP Date _____ Buyer's Initials AB Date _____

Bobbie P.

to Buyer the Earnest Money Deposit.

8.2 Seller Objections. If Seller does not immediately cancel the REPC as provided above, Seller may, by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, provide Buyer with written objections. Buyer and Seller shall have seven calendar days after Buyer's receipt of the objections (the "Response Period") in which to agree in writing upon the manner of resolving Seller's objections. Buyer may, but shall not be required to, resolve Seller's objections. If Seller and Buyer have not agreed in writing upon the manner of resolving Seller's objections, Seller may cancel the REPC by providing written notice to Buyer no later than three calendar days after expiration of the Response Period. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.3 Failure to Object. If Seller does not deliver a written objection to Buyer regarding the credit report or a Buyer Disclosure by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC or cancel the REPC as provided in Sections 8.1 or 8.2 of this ADDENDUM, the credit report and Buyer Disclosures will be deemed approved by Seller.

9. TITLE INSURANCE. Buyer ☐ **SHALL** ☒ **SHALL NOT** provide to Seller a lender's policy of title insurance in the amount of the indebtedness to the Seller, and shall pay for such policy at Settlement.

10. DISCLOSURE OF TAX IDENTIFICATION NUMBERS. By no later than Settlement, Buyer and Seller shall disclose to each other their respective Social Security Numbers or other applicable tax identification numbers so that they may comply with federal laws on reporting mortgage interest in filings with the Internal Revenue Service.

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 November 12, 2007 (Date), to accept the terms of this SELLER FINANCING ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this SELLER FINANCING ADDENDUM shall lapse.

Handwritten: ITS MANAGER EQUITY PARTNERS

☒ Buyer ☐ Seller Signature (Date) (Time) Social Security Number

☐ Buyer ☐ Seller Signature (Date) (Time) Social Security Number

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. _____

Handwritten: Terrell R. Paray Robert H. Paray
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing SELLER FINANCING 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 17, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

11-12-7
11-16-7 ?

ADDENDUM NO. 3
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 8-10-07, including all prior addenda and counteroffers, between Equity Partners, LLC as Buyer, and Kerry and Bobbie Posey as Seller, regarding the Property located at 7916 N 10800 W, Saratoga Springs UT 84045. The following terms are hereby incorporated as part of the REPC:

Seller agrees to receive \$750,000 now. Also, agree to take \$750,000 when the long term financing is arranged. The remaining balance of \$2,000,000 will be subordinated to Fivoli Properties, LLC.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☒ ARE CHANGED AS FOLLOWS: 24.C = 11/16/07

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 11/12/07 (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] [Signature]
☒ 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] [Signature]
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.
(Signature) (Date) (Time) (Signature) (Date) (Time)

ADDENDUM NO. 4
TO REAL ESTATE PURCHASE CONTRACT

ADDENDUM () to reference date of 8-10-07 between Equity Partners, LLC (names) ALLAN BRUN, James Didricksen
Guy Anderson, Vladimir Canro,

_____ as buyers. Kerry R and Bobbie M Posey as SELLERS. The following terms are hereby incorporated as part of the REPC:

1. Addendum # 3 is solely for obtaining a loan from money people. (*Lenders*)
2. Purchase price remains at \$3,500,000 for 29 plus acres and buildings. Payoff is to be distributed as follows.....

Kerry to receive \$1000 weekly, Bobbie to receive \$1500 weekly.
Commencing one week after closing.

\$ 750,000 to be received at Hard Money after entitlement.

House and barn to be vacated by 15 days after entitlement.

Poseys get salvage rights as to buildings being torn down.

Buyers

[Signature]

11-14-2007

Time _____

Sellers

Kerry R Posey, Bobbie M. Posey

11-14-2007

Time _____

L. Settlement Charges

700. Total Sales/Broker's Commission based on price		\$3,500,000.00	@ % = \$0.00	Paid From	Paid From
Division of Commission (line 700) as follows:				Borrower's	Seller's
701.	to			Funds at	Funds at
702.	to			Settlement	Settlement
703. Commission Paid at Settlement				\$0.00	\$0.00
800. Items Payable in Connection with Loan					
801. Loan Origination Fee	% to				
802. Loan Discount	% to				
803. Appraisal Fee	to	JOE DUNLOP		\$500.00	
804. Credit Report	to				
805. Lender's Inspection Fee	to				
806. Mortgage Insurance Application	to				
807. Assumption Fee	to				
808. PROCESSING FEE	to	K E Capital Services		\$500.00	
809. INTEREST AND POINTS	to	K E Capital Services		\$61,489.73	
1003. County Property Taxes	months @	\$147.58	per month		
1004. Assessment Taxes	months @		per month		
1005. HOA Dues	months @		per month		
1006.	months @		per month		
1007.	months @		per month		
1008.	months @		per month		
1011. Aggregate Adjustment					
1100. Title Charges					
1101. Settlement or closing fee	to	Premier Title Insurance Agency Inc.		\$100.00	\$100.00
1102. Abstract or title search	to	Premier Title Insurance Agency Inc.			
1103. Title examination	to	Premier Title Insurance Agency Inc.			
1104. Title insurance binder	to	Premier Title Insurance Agency Inc.			
1105. Document preparation	to	Premier Title Insurance Agency Inc.		\$25.00	\$25.00
1106. Notary fees	to	Premier Title Insurance Agency Inc.			
1107. Attorney's fees	to				
(includes above items numbers:)					
1108. Title insurance	to	Premier Title Insurance Agency Inc.		\$1,737.00	\$7,548.00
(includes above items numbers:)					
1109. Lender's coverage		\$750,000.00/\$1,737.00			
1110. Owner's coverage		\$3,500,000.00/\$7,548.00			
1111. Escrow fee	to				
1112. ENDORSEMENTS 100,116,8.1	to	Premier Title Insurance Agency Inc.		\$55.00	
1205. Courier/Messenger Fee	to	Premier Title Insurance Agency Inc.		\$50.00	\$50.00
1206. RECONVEYANCE	to	Premier Title Insurance Agency Inc.			\$150.00
1207. RECORDING	to	Premier Title Insurance Agency Inc.		\$100.00	
1300. Additional Settlement Charges					
1301. Survey	to				
1302. Pest Inspection	to				
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)				\$64,556.73	\$7,873.00

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a completed copy of pages 1, 2 and 3 of this HUD-1 Settlement Statement.

Equity Partners LLC

Kerry R Posey
Kerry Roger Posey

Bobbie Marie Posey
Bobbie Marie Posey

By

SETTLEMENT AGENT CERTIFICATION

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

Settlement Agent

Date

Warning: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For more information, see HUD-1 Settlement Statement, 1001 and Section 1010.

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Machine-generated OCR, may contain errors.

Addendum C

Operating Agreement
for
Tivoli Properties, LLC
A Utah Limited Liability Company

THIS OPERATING AGREEMENT is made and entered into as of August 15, 2007 by and among Equity Partners, LLC and Kerry R. and Bobbie M. Posey, ie; Tivoli Properties LLC, a Utah LLC (the "Company") and the persons executing this Operating Agreement as Members of the Company and all of those who shall hereafter be admitted as Members (individually, a "Member" and collectively, the "Members") whose names and signatures shall appear on "MEMBER LISTING; CAPITAL CONTRIBUTIONS," below, hereby agree as follows:

WITNESSETH:

1. Whereas, the Members desire to enter into this agreement ("Operating Agreement") or ("Agreement") for the purposes of governing the Company, to and for the sole purpose of investing in, purchasing, selling, granting, or taking an option on lands for investment purposes and/or development. The Company shall not conduct any other business unless related to the business, unless approved by unanimous consent of all Members.

2. Whereas, a limited liability company was formed in accordance with the provisions of the Utah Limited Liability Company Act (the "Act") under the name of Tivoli Properties, LLC (the "Company") pursuant to a Certificate of Formation filed November 11, 2007, with the Utah Division of Corporation. This Operating Agreement of the Company was entered into as of that same date.

3. Whereas, the Members intend to operate the Company, appoint a person or persons to assume responsibility for certain management matters (the "Manager") and provide for the restriction on the transfers of ownership interests in the Company ("Interests").

NOW, THEREFORE, in consideration of the mutual premises below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

I. DEFINITIONS

1.1 Scope. For purposes of this Agreement, unless the language or context clearly indicates that a different meaning is intended, the following capitalized terms shall have the meanings specified in this Article.

1.2. Defined Terms.

1.2.1. "Act" means the Utah Revised Limited Liability Company Act and any successor statute, as amended from time to time.

1.2.2. "Agreement" means this Operating Agreement, including any amendments, supplements, or modifications thereto.

1.2.3. "Articles" means the articles of organization filed with the Utah Department of Commerce, Division of Corporations and Commercial Code, to organize the Company as a limited liability company, including any amendments.

1.2.4 "Available Funds" means the Company's gross cash receipts from operations, less the sum of: (a) payments of principal, interest, charges, and fees pertaining to the Company's indebtedness; (b) expenditures incurred incident to the usual conduct of the Company's business, including with out limitation the Manager compensation payments made pursuant to Article 7.9; and (c) amounts reserved to meet the reasonable needs of the Company's business in the future as determined by the Manager in its sole discretion.

1.2.5 "Capital Account" of a Member means the capital account maintained for the Member in accordance with Article II, paragraph 5.

1.2.6 "Code" means the Internal Revenue Code of 1986, as amended.

1.2.7 "Company" means Tivoli Properties, LLC, a Utah Limited Liability Company.

1.2.8. "Loan" means the acquisition and development loan obtained by Equity Partners, LLC from a third party lending institution to finance the acquisition and development of the Property.

1.2.9 "Loss" means, for any given tax year, the Company's loss for such tax year, as determined in accordance with accounting principles appropriate to the Company's method of accounting and consistently applied.

1.2.10. "Manager" means a Person, Persons or Committee, whether or not consisting of a Member, Members or not, who is vested with authority to manage the Company in accordance with Article VII.

1.2.11. "Member" means an initial member of the Company and any Person who is subsequently admitted as an additional or substitute member of the Company pursuant to the terms of this Agreement.

1.2.12 "Membership Interest" or "Interest" means a Member's percentage interest in the Company, consisting of the Member's right to share in Profits, receive distributions, participate in the Company's governance, approve the Company's acts, participate in the designation and removal of a Manager, and receive information pertaining to the Company's affairs. The Membership Interests of the initial Members are set forth in Article 3.3. Changes in Membership Interests after the date of this Agreement, including those necessitated by the admission and dissociation of Members, will be reflected in the Company's records. The allocation of Membership Interests reflected in the Company's records from time to time is presumed to be correct for all purposes of this Agreement and the Act. Except as expressly provided otherwise herein, with respect to the interest of a Transferee, "Interest" or "Membership Interest" means a Transferee's percentage interest in distributions from the Company; provided that nothing in this sentence shall be interpreted to grant to a Transferee the right to vote on or otherwise participate in any matter as a Member hereunder other than the right to receive distributions as set forth in Article 6.1.5.

1.2.13. "Net Investment" means, with respect to each Member and as of any given date of determination, the aggregate amount of cash capital contributions actually paid to and received by the Company from such Member less all amounts of Available Funds distributed to such Member by the Company with respect to such Member's Membership Interest.

1.2.14. "Person" means any individual, association, cooperative, corporation, trust, partnership, joint venture, limited liability company, or other legal entity.

1.2.15. "Profit" means, with respect to any given tax year, the Company's income for such tax year, as determined in accordance with accounting principles appropriate to the Company's method of accounting and consistently applied.

1.2.16. "Purchase Agreement" means that certain Real Estate Purchase Contract, entered into by and among Equity Partners, LLC, as buyer, and Poseys as Seller, pursuant to which Seller has agreed to sell and Equity Partners, LLC has agreed to purchase, the Property, as such contract is amended from time to time.

1.2.17 "Regulations" means proposed, temporary, or final regulations promulgated under the Code by the Department of the Treasury, as amended.

1.2.18 "Seller" means, collectively, Kerry R. Posey, both individually and as a trustee of the Kerry R. Posey Charitable Remainder Unitrust, and Bobbie M. Posey, both individually and as trustee of the Bobbie M. Posey Charitable Remainder Unitrust, in each case in such individual's or trustee's capacity as a seller under the Purchase Agreement.

1.2.19. "Property" means approximately 29 acres of real property located in Utah County, Utah, held by Seller, Assessor Parcel Numbers 58-035-0029 and 58-035-0030, which real property is the subject of the Purchase Agreement.

1.2.20 "Developer" means, Tivoli Properties, LLC, a Utah Limited Liability Company, established to manage, improve, subdivide, develop, lease, and sell the Property and to perform all other activities reasonably related thereto.

1.2.21 "Transfer" means, with respect to an Interest, a sale, pledge, encumbrance, lien, assignment, subordinate, gift or any other disposition, direct or indirect, by Member, whether voluntary, involuntary, or by operation of law; *provided, however*, that the term "Transfer" shall not include a redemption of all or part of a member's Membership Interest by the Company.

1.2.22. "Transferee" means a Person who acquires a Membership Interest by Transfer from a Member or another Transferee and is not admitted as a Member in accordance with the Agreement. Notwithstanding anything herein to the contrary, a Transferee shall not have the rights of a Member set forth in Article 1.2.11, other than the right to receive distributions as set forth herein.

1.2.23. "Sharing Ratio" shall mean the percentage representing the ratio that the number of Units owned by a Member bears to the aggregate number of Units owned by all of the Members. Upon the issuance of additional Units or the transfer, repurchase or cancellation of any outstanding Units, the Sharing Ratios of the Members shall be recalculated as of the date of such issuance,

transfer, repurchase or cancellation. The recalculated Sharing Ratio of each Member shall be the percentage representing the ratio that the number of Units owned by the Member bears to the aggregate number of Units owned by all of the Members after giving effect to the issuance, transfer, repurchase or cancellation.

1.2.24. "Unit" shall mean an equity interest in the Company. The Company shall have two classes of Units: Class A and Class B. The two classes of Units shall be identical in all respects except for their respective Voting Interests. The number of Units owned by each Member shall be determined in connection with the issuance of a membership interest in the Company in exchange for the capital contribution made by such Member. Initially the Units shall not be represented by certificates. If the Management Committee determines that it is in the interest of the Company to issue certificates representing the Units, certificates shall be issued and the Units shall be represented by such certificates. The Company is authorized to issue 1,000,000,000 Class A Units and 200,000,000 Class B Units.

1.2.25 "Voting Interest" (a) With respect to the Class A Units, "Voting Interest" shall mean that number of Class A Units held by a Member, and (b) with respect to the Class B Units, "Voting Interest" shall mean that number of Class B Units held by a Member divided by 10.

II. ORGANIZATION

2.1. Formation of the Company. The Company has been organized as a Utah Limited Liability Company pursuant to the Act. The rights and obligations of the Members shall be as set forth in the Act unless the Articles or this Agreement expressly provide otherwise, in which case the provisions of the Articles or this Agreement shall control.

2.2. Name of the Company. The name of the Company shall be: **TIVOLI PROPERTIES, L.L.C.** and all Company business shall be conducted in that name or such other name the Members may select from time to time and which is in compliance with applicable laws.

2.3. Registered Agent and Location of Records. The registered agent and registered office of the Company in the State of Utah shall be the initial registered agent and registered office set forth in the Articles or such other Person or location, as the case may be, as the Manager may designate from time to time. The records of the Company required to be maintained by the Act shall be kept at the designated office identified in the Articles, or at such other designated office as the Manager may designate from time to time, consistent with the Act.

2.4. Purposes of the Company. The Company is organized for the purpose of carrying on the business of acquiring, managing, improving, subdividing, developing, leasing and selling the Property or any other enterprise that members may mutually agree upon.

2.5. Fiscal year, accounting. The Company's fiscal year shall be the calendar year. the particular accounting methods and principals to be followed by the Company shall be selected by the accountant for the Company ("Accountant") who is hereby designated as Dallas Cooke, CPA as the independent CPA firm. The CPA Accountant may be changed by written Notice of the then serving Manager, consented to in writing by at least Two (2) Members.

2.6. Reports. The Managers shall provide reports concerning the financial condition and results of operation of the Company and the Capital Accounts of the Members to the Members in the time, manner, and form as the Manager determines. Such reports shall be provided at least annually as soon as practicable after the end of each calendar year and shall include a statement of each Member's share of profits and other items of income, gain, loss, deduction and credit.

2.7. Term of Existence. The company shall begin on 15th day of August, 2007, and shall continue until dissolved by mutual consent or by a 30 day notice in writing on the part of the person or persons desiring to withdraw to the other member or members of the company, and the member or members desiring to withdraw shall first offer all his right, title and interest in the company and assets thereof to the other member or members at a valuation to be determined by three disinterested persons, one of whom shall be named by the member or members desiring to withdraw, one by the remaining member or members and the third by the two so chosen.

III. CAPITAL CONTRIBUTIONS

3.1 Initial Capital Contributions. The Members shall make the following initial capital contributions to the Company, in cash, services, or property, in the following amounts:

3.1.1. Contributions from Equity Partners. Equity Partners shall contribute and assign to the Company all of Equity Partners' right, title, and interest as buyer in, to, and under the Purchase Agreement and the Company shall assume and shall perform all of Equity Partners obligations as buyer thereunder. Furthermore, Equity Partners will arrange for, sign and guarantee an interim loan in the amount of Seven Hundred-Fifty Thousand Dollars (\$750,000.00) which will be used as operating capital for the Company. Additionally, all amounts paid by Equity Partners pursuant to the entitlement process, Purchase Agreement or otherwise related to the acquisition and development of the Property, whether paid prior to or after the execution of this Agreement, shall be deemed to be capital contributions made to the Company by Equity Partners. As of the date of this Agreement, the aggregate amount of such deemed capital contribution made by Equity Partners to the Company \$800,000.00. Once the Loan is obtained, Equity Partners shall set aside and pay \$10,000.00 per month to the Sellers from the operating capital of the Company. As a result of such contribution, Equity Partners has been credited with a capital account equal to \$800,000.00, and has received 800,000 Class A Units.

3.1.2 Contribution from Kerry R. Posey. Kerry R. Posey shall contribute the carrying costs of his subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Kerry R. Posey. As a result of such contribution, Kerry R. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units.

3.1.3 Contribution from Bobbie M. Posey. Bobbie M. Posey shall contribute the carrying costs of her subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Bobbie M. Posey. As a result of such contribution, Bobbie M. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units

3.2 Initial Commitments and Contributions. By the execution of this Operating Agreement, the initial Members hereby agree to make the capital contributions set forth herein. The interests of the

respective Members in the total capital of the Company (their respective "Sharing Ratios", as adjusted from time to time to reflect changes in the Capital Accounts of the Members and the total capital in the Company). Any additional Member (other than an assignee of a Membership Interest who has been admitted as a Member) on any capital contribution except as provided in this Operating Agreement.

3.3 Allocation of Membership Interest. As a result of the transactions described above, the Members own the number and classes of Units and have capital account balances attributable to the Units as set forth below:

Member	Class "A" Units	Class "B" Units	Capital Account Balance
Equity Partners	750,000	-0-	\$750,000
Kerry R. Posey	100,000	25,000	\$125,000
Bobbie M. Posey	100,000	25,000	\$125,000

Based on the above, the initial Sharing Ratio of Equity Partners is 75%, and the initial Sharing Ratio of Kerry R. and Bobbie M. Posey is 12.5% each.

3.4 Subsequent Capital Contributions No Member shall be obligated to make any capital contributions to the Company other than those set forth herein, except as the Company and such Member may agree in writing.

3.5 Failure to Contribute. If any member fails to make a capital contribution when required, the Company may, in addition to the other rights and remedies the Company may have under the Act or applicable law, take such enforcement action (including, the commencement and prosecution of court proceedings) against such Member as the Managers consider appropriate. Moreover, the remaining Members may elect to contribute the amount of such required capital themselves according to their respective Sharing Ratios. In such an event, the remaining Members shall be entitled to treat such amounts as an extension of credit to such defaulting Member, payable upon demand, with interest accruing thereon at the federal midterm rate provided for under Code Sec. 1274(d), plus Two Percent (2%) until paid, all of which shall be secured by such defaulting Member's interest in the Company, each Member who may hereafter default, hereby granting to each Member who may hereafter grant such an extension of credit, a security interest in such defaulting Member's interest in the Company.

3.6 Return of Capital Contributions. Except as expressly provided herein, each Member agrees not to withdraw as a Member of the Company and no Member shall be entitled to the return of an part of his or her capital contributions or to be paid interest in respect to either his or her Capital Account or his or her capital contributions.

3.7 Capital Accounts of the Members. Separate Capital Accounts for each Member shall be maintained by the Company. Each Member's Capital Account shall reflect the Member's capital contributions and increases for the Member's share of any net income or gain of the Company. Each Member's Capital Account shall also reflect decreases for distributions made to the Member and the Member's share of any losses and deductions of the Company.

3.7.1. Each Member's Capital Account may be increased by:

- (i) The amount of money contributed by the Member to the Company.
- (ii) The fair market value of property contributed by the Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Code Sec... If any property, other than cash, is contributed to or distributed by the Company, the adjustments to Capital accounts required by Treasury Regulation Sec... shall be made.
- (iii) The Member's share of the increase in the tax basis of Company property, if any, arising out of the recapture of any tax credit.

V. MEMBERS

5.1 Initial Members. The initial Members of the Company are the Persons executing this Agreement as Members as of the date first set forth above, each of which is admitted to the Company as a Member effective contemporaneously with the execution of this Agreement by such person.

5.2 Member Compensation. The members shall be paid such salaries as may be agreed upon which will be charged as an expense of the business.

5.2.1 The salaries so paid, as provided hereof, shall not be considered as part of the profits to which said parties shall be entitled.

5.3 Rights and duties of the Members.

5.3.1 Allocation. Each of the members shall be entitled to the net profits of the business, as well as the losses happening in the course of the business which shall be borne by each member. Such shall be borne in the same proportions as their respective company ownership, unless the same shall happen through the wilful neglect or default and not the mistake or error) of either of the members. In which case the loss so incurred shall be made good by the member through whose neglect or default such losses shall arise.

5.3.2. Distributions. The Managers may make distributions to the Members from time to time. Distributions may be made only after the Managers determine in their reasonable judgement, that the Company has sufficient cash on hand which exceeds the current and the anticipated needs of the Company to fulfill its business purposes (including needs for operating expenses, debt service, acquisitions, reserves, and mandatory distributions, if any). All distributions shall be made to the Members in accordance with their Sharing Ratios. Distributions shall be in cash or property or particularly in both, as determined by the Managers. No distribution shall be declared or made if, after giving it effect, the Company would not be able to pay its debts as they become due in the usual course of business or the Company's total assets would be less than the sum of its total liabilities plus, the amount that would be needed if the Company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other Members upon dissolution that are superior to the rights of the Members receiving the distribution.

5.3.3. Family Partnership Savings Provision. Notwithstanding anything in this Operating Agreement to the contrary, should any provision of this Operating Agreement, or any act of the parties, result in violation of the family partnership provisions of Code Sec. 704(e) or the regulations and cases thereunder, the Managers may amend this Agreement, or take any other actions reasonably necessary to prevent such violation, or to correct such violation.

5.3.4. Other business In view of the fact that all the Members are engaged in other business ventures, no member shall be bound to devote all of his time to the affairs of the company but he shall devote at least a part of his working time to the affairs of the company business and when the demands of the business shall warrant, he agrees to give his entire working time to the business.

5.3.5 Conduct of the Company Any questions regarding the conduct of the Company business shall be determined by a vote of 100% of the Managing Members of the Company.

5.3.6 Business Continuation. The expulsion of any Member shall not dissolve the Company as to other Members, and the remaining Members shall have right to continue the Company business by themselves or in conjunction with any other person or persons they might select.

5.3.7 Withdrawal The Members shall have the right to retire or withdraw from the Company, and this Agreement may be terminated as to one or more Members and new members may be admitted under the provisions hereinafter set forth, but neither such retirement, withdrawal, termination, death of any Member, or admission of any new Member shall dissolve this Company.

5.3.8 Selling of Members Interest Should one or more of the members desire to sell his or their interest in the company or to withdraw from the company he or they shall do so upon the following terms:

- (i) He or they shall give to the remaining member or members 30 days' written notice of such intention and shall, if the other member or members indicates willingness to buy within such 30 days, sell to the remaining member or members his or their interest in the company for an amount equal to the value of the interest or interests according to standard accounting procedure. In the valuation of the interest, market value, not book value, is to be considered; nor is goodwill to be considered as an asset.
- (ii) The selling member or members shall accept payment for his or their interest in cash to be paid within 45 days from the giving of a notice of acceptance by the remaining member or members.
- (iii) The option to purchase may be exercised by the remaining members, if more than one, in equal proportion, or, if one of them fails to exercise his option and the others do not fail to do so, the latter shall have the right to purchase the whole

of the selling member's or members' interest. The selling member or members shall not be required to sell unless their entire interest is purchased.

(iv) Should there be any disagreement by the members as to the value of the interest of the selling member or members, the selling member or members shall appoint an arbitrator and the buying member or members shall appoint another and if these two arbitrators are unable to agree, the two shall appoint a third arbitrator, and the value of selling member's or members' interest fixed by said arbitrators or any two of them shall determine the purchase price. All parties agree to be bound by such decision of the arbitrators.

5.4. Manner of Acting Among Members

5.4.1. No Member shall, without consent in writing of the other Members, do any of the following:

- (i). Assign his share or interest in the Company.
- (ii) Except by will, no Member shall sell, pledge or in any way encumber his or her interest in the Company without written consent of all other Members.
- (iii) Without the consent of all the other Members or Member, draw, accept, or sign any bill of exchange or promissory note, or contract any debt on account of the Company, or employ any of the money or effects thereof, or in any manner pledge the credit thereof, except in the usual and regular course of business. Any infraction of this provision shall be a ground for an immediate dissolution of the Company as regards that Member so offending, and the other Members may forthwith declare the same dissolved by a written notice to the offending Member, or left for him at the office of the Company.
- (iv) Without the consent of all the other Members or Member, compound, release, or discharge any debt which shall be due or owing to the Company, without receiving the full amount thereof. Any infraction of this provision shall be a ground for an immediate dissolution of the Company as regards that Member so offending, and the other Members may forthwith declare the same dissolved by a written notice to the offending Member, or left for him at the office of the Company.
- (v) Lend any money, or give credit to, or have dealings on behalf of the Company, with any person, company, or corporation whom the other Members or Member shall have forbidden him to trust or deal with; and if he shall act contrary to this provision he shall repay to the Company any loss which may have been incurred thereby.
- (vi) Hire or dismiss, except in case of gross misconduct, any clerk or other person in the employment of the Company, without the consent of all the other Members.
- (vii) Give their signature separately or collectively on behalf of the company or any Member thereof, except for legitimate business purposes and with the consent of 100% of the other Members of the Company.

(viii) Without the previous consent in writing of all the other Members, enter into any bond, or become bail, surety, or security, for any person.

(ix) Buy, order, or contract for any article exceeding the value of \$500.00 dollars, without the previous consent in writing of all the other Members; and in case he or she does so, the other Members shall have the option to take the goods or articles so bought, ordered, or contracted for, on behalf of the Company, or to leave the same for the separate use of the Member so buying, ordering, or contracting, to be paid for out of his or her own money.

(x) Have the right to embark in any speculative transactions involving the Company without the consent of all the other Members.

(xi) Divulge to any person not a Member of the Company any trade secret connected with the Company business that shall come to his or her knowledge by reason of his or her being a Member, during the continuance of this Company and for five (5) years after its termination.

(xii) With the approval of all the other Members and consent of the all Members, any Member shall be entitled to purchase any goods carried by the Company at actual invoice price, plus the freight.

5.4.2 Meetings. An annual meeting of Members for the transaction of such business as may properly come before the Meeting, shall be held at such place, on such date and at such time as the Managers shall determine. Special meetings of Members for any proper purpose or purposes may be called at any time by the Managers or the holders of at least Ten Percent(10%) of the Sharing Ratios of all Members. The Company shall deliver or mail written Notice stating the date, time, place, and purposes of any meeting to each Member entitled to vote at the meeting. Such Notice shall be given not less than Ten(10) and no more than Sixty(60) days before the date of the meeting. All meetings of Members shall be presided over by a Chairperson who shall be a Manager. A Member may participate and vote at such meeting via phone conference call.

5.4.3. Consent. Any action required or permitted to be taken at an annual or special meeting of the Members may be taken without a meeting, without prior Notice, and without a vote, if consents in writing, setting forth the action so taken, are signed by the Members having not less than the minimum number of votes that would be necessary to authorize or take action were present and voted. Every written consent shall bear the date and signature of each Member who signs the consent. Prompt Notice of the taking of action without a meeting by less than unanimous written consent shall be given to all Members who have not consented in writing to such action.

5.4.4 Voting Rights. Each member shall have a number of votes equal to such Member's Membership Interest in the Company.

5.4.4.1 Required Vote. Except with respect to matters for which a greater minimum vote is required by the Act or this Agreement, the vote of Members

whose aggregate Membership Interest exceeds 50% of the aggregate Membership Interest of all Members present binds the Company.

VI. TERMINATION OR DISSOLUTION

6.1 Accounting. Upon the dissolution of the Company a full and general account of the assets, liabilities, and transactions of the Company shall be taken, and the assets and property thereof shall, as soon as practicable, be sold, the debts due the Company collected, the proceeds applied, first, in discharge of the liabilities of the company and the expenses of liquidating the same; and next in payment to each Member or his or her representatives of any unpaid interest or profits belonging to him or her, and of his or her share of the capital; and the surplus, if any, shall be divided between the Members or their representatives in equal shares; and the Members or their representatives shall execute all such instruments for facilitating the collection and division of the Company, and for their mutual indemnity and release, as may be requisite or proper.

6.2 Distribution. The Members agree that the determination of the amount to be paid to either Member shall be determined by the auditor or certified public accountant then employed by the company, and such computation shall be final and conclusive upon them.

6.3. Goodwill On the termination or dissolution of the Company or the death or retirement therefrom of a Member, neither the goodwill of the Company nor the right to the use of the firm name shall be considered as an asset of the Company, nor shall any value be placed thereon for the purpose of accounting or distribution.

6.4 Death of Member Upon the death of any Member, the Company shall immediately cease as to him or her, but shall continue as to the survivors in accordance with the terms and conditions hereinafter set forth.

(i). Upon the death of any Member, the surviving Members shall have the right to purchase the interest of the deceased Member at the appraised value reached by appraisers selected as herein stated.

(ii) If the surviving Members do not desire to purchase the interest of the deceased Member, they shall have the right to continue to operate the Company business so long as it shows a profit; and accurate records shall be kept and frequent audits made to ascertain whether a profit is being made for a term of one year. In this event the profits of the deceased Member shall be paid to his or her legal representative or representatives in semiannual installments.

(iii) After the term of one year without the surviving Members purchase of the interest of the deceased Member, an account and statement shall be taken and made out of his or her share of the capital and effects of the Company, and of all unpaid interest and profits belonging to him or her up to the time of his decease plus the year extension, for which purpose a valuation shall be made of any assets or effects requiring valuation, and the amount so ascertained to be due and owing to the deceased Member shall be paid by the surviving Members to his or her representatives within three (3) calendar months from the date of the one year extension from his or her decease, with interest thereon until payment

at the rate of 10 percent per annum (10%); and on such payment the share of the deceased Member in the Company property and effects shall go and belong to the surviving Members in the proportions in which they shall have contributed to the purchase thereof.

(iv) In case of the death of a Member and of the purchase of his or her interest by the remaining Members as herein provided, the right to use the name of the Company and to carry on the business under such name shall, so far as the deceased Member is concerned, be the property of the remaining Members.

(v) In the event the remaining Members do not perform under the terms set forth above in respect to the purchase of the deceased portion of the Company, the Company's business shall be wound up and liquidated in 30 days from the fore-named time limit and divided as herein provided.

6.5 Bankruptcy or insolvency of a Member. If any member shall be adjudicated bankrupt, or insolvent, or take proceedings for liquidation by arrangement or composition with it, his or her creditors, the Company shall thereupon terminate as to it, him, or her and it, he, she, or its, his or her executors, administrators or assigns, as the case may be, shall have no interest in common with the surviving or other Members or Member in the property of the Company, but shall be considered in equity as a vendor to the surviving Members or Member for the share in the company of the bankrupt or liquidating or compounding Member as and from the date of its, his or her bankruptcy, or insolvency, or of its, his or her having compounded as aforesaid, for the price and on the terms to be arrived at under the provisions hereinbefore contained.

6.5.1 This Agreement is expressly not intended for the benefit of any creditor of the Company, the Manager, the Members, or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under this Agreement. No third person shall under any circumstances have any right to compel any actions or payments by the Company, any Manager, or any Member.

VII. BUSINESS OF THE COMPANY

7.1 Business of the Company. (a) Equity Partners, LLC ("EP") shall have full, exclusive and complete authority and discretion in the management and control of the business of the Company for the purposes herein stated and shall make all decisions affecting the business of the Company. At such, any action taken shall constitute the act of, and serve to bind, the Company. EP shall manage and control the affairs of the Company to the best of its ability and shall use its best efforts to carry out the business of the Company and will be compensated for providing various services.

(b) The expenses so paid, as provided hereof, shall not be considered as part of the profits to which any of the parties shall be entitled.

(c) All the members of the company shall fix the wages or salaries to be paid to any of the members of the company, and shall be binding upon all.

(d) The Company has retained Four Winds Development Group, LLC ("Four Winds") as their representative to obtain all necessary governmental permits, approvals and entitlements which are required to allow the improvement, development, construction and

sale of the real estate property. Such expenses are considered expenses of the Company and shall be paid by Four Winds and shall be reimbursed by the Company.

- (e) The Company shall indemnify, save harmless, and pay all expenses, costs, or liabilities of any Member who for the benefit of the Company makes any deposit, acquires any option, or makes any other similar payment or assumes any obligation in connection with any property proposed to be acquired by the Company, which action shall have been consented to by the Company, and who suffers any financial loss as the result of such action.

7.2 Change of Managers The Members from time to time may change the number of Managers upon the affirmative vote or written consent of Members holding an aggregate of not less than 100% of the outstanding Membership Interest.

7.3 Election of Managers Managers shall be elected at a meeting of the Members in the case of a Manager vacancy. If more than one Manager is to be elected, all management positions shall be filled in the same election, i.e.; the candidate with the highest vote total will fill the first available position, the candidate with the next highest vote total will fill the next available position, and so forth. In voting for Managers, each Member shall have the number of votes equal to his, her or its Membership Interest. Members may cast all of their votes for one candidate, or divide their votes among multiple candidates.

7.4. General Powers of Managers. Except as may otherwise be provided in this Operating Agreement, the ordinary and usual decisions concerning the business and affairs of the Company, shall be made by the Managers. The managers have the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company, including, the power to:

- 7.4.1 Purchase, lease, or otherwise acquire any real or personal property; Sell, convey, mortgage, grant a security interest in, pledge, lease, exchange, or otherwise dispose or encumber any real or personal property;
- 7.4.2 Open one or more depository accounts and make deposits into, and write checks and withdrawals against such accounts;
- 7.4.3 Borrow money, incur liabilities, and other obligations;
- 7.4.4 Enter into any and all agreements and execute any and all contracts, documents, and instruments relating to the Business;
- 7.4.5 Engage consultants and agents, define their respective duties and establish their compensation or remuneration;
- 7.4.6 Obtain insurance covering the Business and affairs of the Company's name;
- 7.4.7 Participate with others in partnerships, joint ventures, and other associations and strategic alliances only where same are directly in pursuit of the Business, as defined above.

7.4.7.1 There is an express limitation on the nature of the Business and the powers granted the Managers herein, the Company is intended to purchase and develop, hold and sale real estate for investment purposes only, and no activities inconsistent with such limited purposes shall be undertaken.

7.5. Limitations. Notwithstanding the foregoing and any other provision contained in this Operating Agreement to the contrary, no act shall be taken, sum expended, decision made, obligation incurred or power exercised by any Manager on behalf of the Company except by the consent of One Hundred percent (100%) of all Membership Interests with respect to:

7.5.1 Any significant and material purchase, receipt, lease, exchange, or other acquisition of any real or personal property or business;

7.5.2 The sale of all or substantially all of the assets and property of the Company;

7.5.3 Any mortgage, grant of security interest, pledge, or encumbrance upon all or substantially all of the assets and property of the Company;

7.5.4 Any merger;

7.5.5 Any amendment or restatement of the Articles or of this Operating Agreement;

7.5.6 Any matter which could result in a change in the amount or character of the Company's capital;

7.5.7 Any change in the character of the business and affairs of the Company;

7.5.8 The commission of any act which would make it impossible for the Company to carry on its ordinary business and affairs;

7.5.9 Any act that would contravene any provision of the Articles or of this Operating agreement or the Act.

7.6. Standard of Care. Every Manager shall discharge his or her duties as a Manager in good faith, with care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the Company. A manager shall not be liable for any monetary damages to the Company for any breach of such duties except for a receipt of a financial benefit to which the Manager is not entitled; voting for or assenting to a distribution to Members in violation of this Operating Agreement.

7.7 Tenure of Managers. Each Manager shall serve for an indefinite period, except that: (a) a Manager may resign at any time by giving written notice to the Members at least 30 days prior to the effective date of the resignation; (b) a Manager who is a natural personal shall cease to be a Manager upon his or her death or at such time as he or she is adjudicated incompetent; (c) a Manager who is a legal entity other than a natural person shall cease to be a Manager upon its dissolution or upon a change in the controlling ownership of such Person; (d) a Manager shall cease to be a Manager at such time as he or she files , or fails to successfully contest, a petition seeking liquidation, reorganization, arrangement,

readjustment, protection, relief, or composition in any state or federal bankruptcy, insolvency, reorganization, or receivership proceeding; and (e) if a court of competent jurisdiction removes a Manager for cause, such Manager shall cease to be a Manager upon the date of such order.

7.8. Managers Need Not be Members. A Manager need not also be a Member.

7.9. Informal Action. Any action required or permitted to be taken by the Manager may be taken without a meeting if the action is evidenced by a written record describing the action taken, signed by the Manager.

VIII. EXCULPATION OF LIABILITY: INDEMNIFICATION

8.1. Exculpation of Liability. Unless otherwise provide by law or expressly assumed, a person who is a Member or Manager, or both, shall not be liable for the acts, debts or liabilities of the Company.

8.2. Indemnification. Except as otherwise provided in this Article, the Company shall indemnify any Manager and may indemnify any employee or agent of the Company who was or is a party or is threatened to be made a party to a threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal, other than an action by or in the right of the Company, by reason of the fact that such person is or was a Manager, employee or agent of the Company against expenses, including attorney's fees, judgements, penalties, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with the action, suit or proceeding, if the person acted in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner that such person reasonably believed to be in the best interests of the Company and with respect to a criminal action or proceeding, if such person had no reasonable cause to believe such person's conduct was unlawful.

8.2.1. To the extent that a Member, employee, or agent of the Company has been successful on the merits or otherwise in defense of an action, suit, or proceeding or in the defense of any claim, issue, or other matter in the action, suit, or proceeding, such person shall be indemnified against actual and reasonable expenses, including attorney's fees, incurred by such person in connection with the action, suit, or proceeding and any action, suit or proceeding brought to enforce the mandatory indemnification provided herein. Any indemnification permitted under this Article, unless ordered by a court, shall be made by the Company only as authorized in the specific case upon a determination that the indemnification is proper under the circumstances because the person to be indemnified has met the applicable standard of conduct and upon an evaluation shall be made by a majority vote of the Members who are not parties or threatened to be made parties to the action, suit, or proceeding. Notwithstanding the foregoing to the contrary, no indemnification shall be provided to any Manager, employee, agent of the Company for or in connection with the receipt of a financial benefit to which such person is not entitled, voting for or assenting to a distribution to Members in violation of this Operating Agreement or the Act, or a knowing violation of law.

8.3 Insurance. The Company shall maintain for the protection of the Company and all of its

Members such insurance as the Management Committee, in its sole discretion, deems necessary for the operations being conducted.

IX. AGREEMENTS WITH THIRD PARTIES AND WITH AFFILIATES OF THE COMPANY

9.1. Validity of Transactions. Affiliates of the parties to this Agreement may be engaged to perform services for the Company. The validity of any transaction, agreement or payment involving the Company and any Affiliates of the parties to this Agreement otherwise permitted by the terms of this Agreement shall not be affected by reason of the relationship between them and such Affiliates or the approval of said transactions, agreement or payment.

9.2. Other Activities Any Member and the Managers may engage in other business ventures of every nature, including, without limitation by specification, the ownership of another business similar to that operated by the Company. Neither the Company nor any of the other Members shall have any right or interest in any such independent venture or to the income and profits derived therefrom.

X. BOOKS, RECORDS, REPORTS, AND BANK ACCOUNTS.

10.1 There shall be kept at all times, during the continuance of the company, full and correct books of account wherein each of the members shall enter all moneys by them or either of them received, paid, laid out, or expended in and about the business, as well as all goods, wares, commodities, and merchandise by them or either of them bought or sold, by reason or on account of the business and the management thereof in any wise belonging. The books shall be used in common among the members, so that any of them may have access thereto without an interruption or hindrance of the others.

10.1.1 The company shall operate on the basis of a calendar year. On the last day of each year, a general account shall be taken of the assets and liabilities of the company and of all dealings and transactions of the same during the then preceding calendar year or portion thereof.

10.1.2 The bankers of the firm shall be Zion's 1st National Bank or such other bankers as shall from time to time be agreed upon by the members, and all money and credits not required for current expenses shall be deposited with the bank, and all checks, drafts, bills of exchange, promissory notes or the like drawn thereon shall be signed one member and countersigned by another, and shall be of no effect unless so signed and countersigned. All indorsement of commercial paper by the company shall be by the company stamp or name affixed by any member, and the same shall be signed by two members; and shall be of no effect unless so made. If any member shall give such obligation, except in the case aforesaid, the same shall be deemed to be given on his separate account and shall be payable out of his separate estate, and he shall indemnify the other member or members against the payment thereof.

10.2 Schedule K-1. On or before the 90th day following the end of each fiscal year of the Company's existence, the Company shall cause each Member to be furnished with a federal (and where applicable state) income tax reporting Schedule K-1 or its equivalent.

10.3 "Tax Matters Partner." The Members shall designate a Member to the "Tax Matters Partner" of the Company pursuant to Section 6231 (a)(7) of the Code. The Member so designated is authorized to take such actions as are permitted by Sections 6221 through 6233 of the Code. The initial Tax Matters Partner shall be James Didericksen, in his capacity as a Member of Equity Partners. The Tax Matters Partner may be removed by the Members at any time with or without cause. The Tax Matters Partner will inform the Members of all administrative and judicial proceedings pertaining to the determination of the Company's tax items and will provide the Members with copies of all notices received from the Internal Revenue Service regarding the commencement of a Company-level audit or a proposed adjustment of any of the Company's tax items. The Company will reimburse the Tax Matters Partner for reasonable expenses properly incurred while acting within the scope of the Tax Matters Partner's authority, including, but not limited to, legal and accounting fees, claims, liabilities, losses, and damages. The payment of such expenses shall be made as an expense of the Company and before any distributions are made to Members. The provisions related to limitation of liability and indemnification of the Managers set forth in this Agreement shall be fully applicable to the Member acting as the Tax Matters Partner for the Company.

XI. DISSOLUTION AND WINDING UP

11.1. Dissolution. The Company shall dissolve and its affairs shall be wound up on the first to occur of the following events:

- (i) At any time specified in the Articles or this Operating Agreement;
- (ii) Upon the happening of any event specified in the Articles or this Operating Agreement;
- (iii) By the unanimous consent of all Members;
- (iv) Upon the death, withdrawal, expulsion, bankruptcy, or dissolution of a Member or the occurrence of any other event that terminates the continued memberships of a Member in the Company unless within Ninety (90) days after the disassociation of membership, a majority in interest of the remaining Members consent to continue the business of the Company and to the admission of one or more Members as necessary.

11.2. Winding Up. Upon dissolution, the Company shall cease carrying on its business and affairs and shall commence the winding up of the Company's business and affairs and complete the winding up as soon as practical. Upon the winding up of the Company, the assets of the Company shall be distributed first to creditors to the extent permitted by law, in satisfaction of Company debts, liabilities, obligations and then to Members and former Members first, in satisfaction of liabilities for distributions and then, in accordance with their Sharing Ratios. Such proceeds shall be paid to such Members within One Hundred Twenty(120) days after the date of winding up.

XII. GENERAL PROVISIONS

12.1 Formation of Company The Company was formed as a new venture for the purpose of acquiring real property for development. There can be no assurance that the real property acquired by the Company will be able to be developed and sold at a profit. Furthermore, there can be no assurance that the application of the capital contributions required hereunder and the proceeds of the Loan (if obtained

by Equity Partners) will be sufficient to cover the acquisition, development, and carry costs of the real property acquired and held by the Company.

12.2. Disposition of Membership Interests Every sale, assignment, transfer, exchange, mortgage, pledge, grant, hypothecation or other disposition of any Membership Interest shall be made only upon compliance with this Article. No Membership Interest shall be disposed of if the disposition would cause a termination of the Company under Sec 708 of the Internal Revenue Code of 1986, as amended; without compliance with any and all state and federal securities laws and regulations; and unless the assignee of the Membership Interests provides the Company with the information and agreements that the Managers may require in connection with such disposition, including but not limited to an executed counterpart of this Agreement.

12.2.1 No Member shall be entitled to assign, convey, sell, encumber, or in any way alienate all or any part of its Membership Interest in the Company and as a Member except with the prior written consent of a majority in the interest of the non-transferring Members, which consent may be given or withheld, conditioned, or delayed (as allowed by this Agreement or the Act), as the non-transferring Members may determine in their sole discretion. Transfers in violation of this provision shall only be effective to the extent of an assignment of such interest with only rights set forth in the following provision "Permitted Dispositions".

12.3 Permitted Dispositions. Subject to the provisions of this Article, a Member may assign such Member's Membership Interest in the Company in whole or part. The assignment of a Membership Interest does not in itself entitle the assignee to participate in the management and affairs of the Company or to become a Member. Such assignee is only entitled to receive, to the extent assigned, the distributions the assigning Member would otherwise be entitled to, and such assignee shall only become an assignee of a Membership Interest and not a substitute Member.

12.4 Acknowledgment of Access to Records. Each Member acknowledges that such Member has been furnished and has reviewed the Articles of Organization and Operating Agreement of the Company and all amendments, if any, to those documents. Each Member further acknowledges that all instruments, documents, records, books, and financial information pertaining to this investment have been made available for inspection by such Member and its professional advisors and that the books and records of the Company will be available upon reasonable notice for inspection by such Member during reasonable business hours at the Company's principal place of business.

12.5 Required Amendments. The Members and Managers will execute and file any amendments to the Articles required by the Act. If any such amendments results in inconsistencies between the Articles and this Agreement, this Agreement will be considered to have been amended in the manner necessary to eliminate the inconsistencies.

12.6 Policies. In every instance where agreement between the members does not exist with reference to the policies to be followed by the company; the managing members shall have the right to decide what policy or policies shall be followed and the other member or members shall consider the decision as final.

12.7 Additional Instruments. Each Member will execute and deliver any document or statement necessary to give effect to the terms of this Agreement or to comply with any law, rule, or regulation governing the Company's formation and activities.

12.8 Power of Attorney. Each Member appoints each Member, with full power of substitution, as the Member's attorney-in-fact, to act in the Member's name and to execute and file (a) all certificates, applications, reports, and other instruments necessary to qualify or maintain the Company as a limited liability company in the states and foreign countries where the Company conducts its activities, (b) all instruments that effect or confirm changes or modifications of the Company or its status, including, without limitation, amendments to the Articles, and (c) all instruments of transfer necessary to effect the Company's dissolution and termination. The power of attorney granted by this article is irrevocable, coupled with an interest, will survive any incapacity of the Member, and shall be binding upon the Member's successors and assigns.

12.9 Disputes. In the event that any dispute should arise concerning any of the terms, covenants or conditions of this agreement, or with respect to the enforcement thereof, or with respect to any dissolution or liquidation of the Company, or with respect to any matter affecting the operation and conduct of the business of the Company, such dispute shall be disposed of by arbitration by submitting the same to two indifferent, competent persons in or well acquainted with the trade or business of the company, one to be chosen by either party, or by an umpire to be chosen by the referees in the usual course in such or similar cases; and their or his decision shall, in all respects, be final and conclusive on both parties, and shall be given, in writing, within 10 days next after such submission, or within such further time, not exceeding 30 days, as they or he shall require.

12.10 Entire Agreement. This Agreement embodies the entire understanding and agreement among the parties concerning the Company and supersedes any and all prior negotiations, understandings or agreements in regard thereto.

12.11. Amendment. This Agreement may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by Members having a Sharing Ratio of more than 50% in the aggregate.

12.12 Pronouns. References to a Member, including by use of a pronoun, shall be deemed to include masculine, feminine, singular, plural, individuals, partnerships, corporations or other legal entities where applicable.

12.13 Severability. If any provision of this Agreement or the application of such provision to any Person or circumstance shall be held invalid, the remainder of the Agreement, or the application of such provision to Persons or circumstances other than those as to which it is held invalid, shall not be affected.

12.14 Applicable Law. The laws of the State of Utah shall govern this Agreement, excluding any conflict of laws rules.

12.15 Counterparts. This instrument may be executed in any number of counterparts each of which shall be considered an original.

12.14 Applicable Law. The laws of the State of Utah shall govern this Agreement, excluding any conflict of laws rules.

12.15 Counterparts. This instrument may be executed in any number of counterparts each of which shall be considered an original.

12.16. Parties and Successors Bound. This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto and constitutes the entire agreement of the parties hereto, and may not be amended by the parties except in writing signed by the majority of the parties.

12.17. Article Headings. The Article headings and numbers contained in this Operating Agreement have been inserted only as a matter of convenience and for reference, and in no way shall be construed to define, limit, or describe the scope or intent of any provision of this Operating Agreement.

12.18. Amendment. This Operating Agreement may be amended or revoked at any time by a written agreement executed by all of the parties to this Operating Agreement, except where a lesser percentage of Membership Interests is permitted elsewhere in this Operating Agreement. No change or modification to this Operating Agreement shall be valid unless in writing and signed by all of the parties to this Operating Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the date and year first above written.

EQUITY PARTNERS, LLC

By: [Signature] 8-10-07
Its: Managing Member

Kerry R Posey 8-10-07
KERRY R. POSEY

Bobbie M. Posey
BOBBIE M. POSEY

Addendum D

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1006

31-5/1240
23

12/10/07

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

PAY TO THE ORDER OF Jim Diducksew \$ 2000.00

Two thousand & no/100 DOLLARS

TWO SIGNATURES REQUIRED

MEMO Mgt. fee

⑈001006⑈ ⑆124000054⑆ 023 11716 ⑈ ⑆0000200000⑈

DEC 12 07

KEY BANK

0011 95795

⑈124000054⑆ 12/13/07
ZIONS BANK S.L.C. UT
801-974-0000

⑈1250000574⑆
KEYBANK N.A. 3015 005
12122

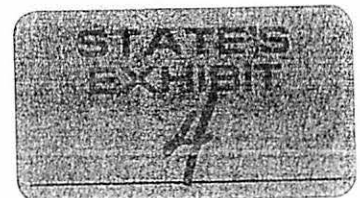
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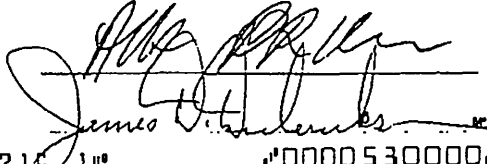
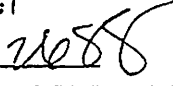
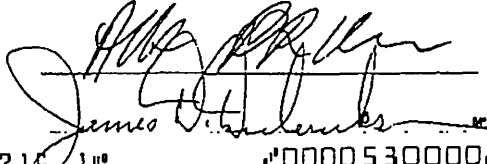
⑈760076277⑈

394339

Jim Diducksew


Date:12/13/07 Sequence Num:50134349 Account:23117161 Serial:1006 Amount:\$2,000.00 Dep Seq#:-



ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parrish Lane Centerville, Utah 84014		1012 31-5/1240 23
TIVOLI PROPERTIES, LLC 11-07 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		
PAY TO THE ORDER OF	KOMATSU Equipment	\$ 5300.00
FIVE THOUSAND THREE HUNDRED & 00/100		DOLLARS
TWO SIGNATURES REQUIRED		
Down Pmt PC35 S/N 10529 Geosystems CK 30 S/N A30561		
MEMO <u>Advance</u>		
001012 1240000541 023 117161		*0000530000*

1240000541 01/07/08 ZIONS BANK S.L.C. UT 801-974-0974 60660178739	WEB, MA SLC, UT 01042003 TRACER 2381 012 1221-0527-84 2148718440	PAY TO THE ORDER OF FIRST SECURITY BANK OF UTAH, N.A. SALT LAKE CITY, UTAH FOR DEPOSIT ONLY KOMATSU EQUIPMENT COMPANY ACCOUNT # 51-00073-13
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Date:01/07/08 Sequence Num:60178739 Account:23117161 Serial:1012 Amount:\$5,300.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parnish Lane Centerville, Utah 84014		1015 31-5/1240 23
TIVOLI PROPERTIES, LLC 11-07 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		
PAY TO THE ORDER OF	<i>Mouldings & Sons</i> <i>Four thousand eighty dollars ⁰⁰/₁₀₀</i>	<i>\$4080 ⁰⁰/₁₀₀</i> DOLLARS
TWO SIGNATURES REQUIRED		
MEMO <i>Dump Fees lot #16</i>		
⑈001015⑈ ⑈124000054⑈ 023 11716 ⑈0000408000⑈		

124000054 01/15/08 ZIONS BANK S.L.C. UT 801-974-0800 0660148495	0540	PAY TO THE ORDER OF WELLS FARGO BANK NORTHWEST NA BOX 0, AM 84007 124000054 FOR DEPOSIT ONLY MOULDING & SONS SAND AND GRAVEL 1014684003
1221-0527-84 2541673661		

Date:01/15/08 Sequence Num:60148495 Account:23117161 Serial:1015 Amount:\$4,080.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1016

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

PAY TO THE
ORDER OF

Geo Systems

\$4500.00

Four thousand & no/100

DOLLARS

TWO SIGNATURES REQUIRED

MEMO

Temp. Adv.

⑈001016⑈ ⑈124000054⑈ 023 11716 1⑈

⑈0000450000⑈

⑈124000054⑈ 01/04/08
ZIONS BANK S.L.C. UT
801-974-0900

⑈0660161958⑈

⑈1250000574⑈
ZIONS BANK S.L.C. UT
801-974-0900

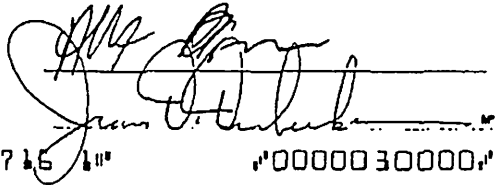
⑈7800896983⑈

JAN - 3 08

KEY BANK
002

032 26489

Date:01/04/08 Sequence Num:60161958 Account:23117161 Serial:1016 Amount:\$4,500.00 Dep Seq#:-

TIVOLI PROPERTIES, LLC 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		11-07	ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parrish Lane Centerville, Utah 84014	1017 31-5/1240 23
PAY TO THE ORDER OF	<i>Key Bank</i> <i>Three Hundred & no/100</i>	<i>\$ 300.00</i>	DOLLARS	
MEMO <i>Establish Checking Account</i>		TWO SIGNATURES REQUIRED 		
⑈001017⑈ ⑈124000054⑈ 023 11716 1⑈		⑈0000030000⑈		

⑈124000054⑈ 01/04/08 ZIONS BANK S.L.C. UT 801-974-8888 -0660161952	⑈1250000574⑈ KEY BANK S.L.C. UT 801-974-8888 7800896931	JUN - 3 2008 KEY BANK 002	032 20437
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Date:01/04/08 Sequence Num:60161952 Account:23117161 Serial:1017 Amount:\$300.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W Parrish Lane
Centerville, Utah 84014

1019

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

PAY TO THE ORDER OF

US General

One hundred thousand. & no/100

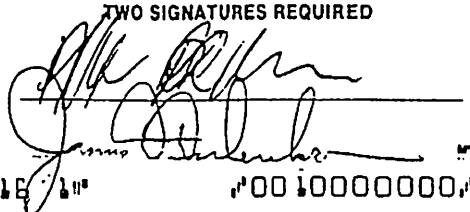
\$100,000.00

DOLLARS

MEMO

Const. deposit

TWO SIGNATURES REQUIRED



001019 1240000541 023 11716 11

0010000000

01112008
111941331
4240036532


IMMEDIATE CHASE BANK, N.A.
> 111941331 < POSITION
01/10/2008 924053523 6235
0000002737368320 650134
0660186073

01/11/08
ZIONS BANK S.C. UT
801-974-0800

for deposit only

2137368320

Date:01/11/08 Sequence Num:60186073 Account:23117161 Serial:1019 Amount:\$100,000.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parrish Lane Centerville, Utah 84014		1027 31-5/1240 23
TIVOLI PROPERTIES, LLC 11-07 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		1/23/2008
PAY TO THE ORDER OF Four Winds Development Group, LLC		\$ **4,000.00
Four Winds Development Group, LLC		DOLLARS
TWO SIGNATURES REQUIRED 		
MEMO _____		
⑈001027⑈ ⑆124000054⑆ 023 11716 1⑈		⑈0000400000⑈

124000054 01/25/08 ZIONS BANK S.L.C. UT 801-974-6861 0660139090	⑈001027⑈ ⑆124000054⑆ 023 11716 1⑈	PAY TO THE ORDER OF WELLS FARGO BANK, NA FOR DEPOSIT ONLY FOUR WINDS DEVELOPMENT GROUP LLC 140601008
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Date:01/25/08 Sequence Num:60139090 Account:23117161 Serial:1027 Amount:\$4,000.00 Dep Seq#:-

101000048
01/23/2008
6110029065

This is a LEGAL COPY of
your check. You can use it
the same way you would
use the original check.

8002/22/2008 01/22/2008
000010003001677
[ET9202642]

TIVOLI PROPERTIES, LLC 605 N 1250 W SUITE 25 80112-2040 CENTERTVILLE, UT 84014		1023 1/18/2008
PAY TO THE ORDER OF Granite Builders, LLC		\$ 1,700.00
One Thousand Seven Hundred and 00/100		DOLLARS
Granite Builders, LLC 605 North 1250 West, Suite #25 Centerville, Utah 84014		TWO SIGNATURES REQUIRED <i>[Signature]</i> <i>[Signature]</i>
memo To Reimburse GB for paying Saratoga City Applicant		0000170000
001023 1124000054 023 11716 1		

001023 1124000054 023 11716 1 0000170000

01230002
1020-00199
EXT: 1606 TRF: 1606 PK: 05
0626/47091

1240000500 01/23/08
ZIONS BANK S.L.C. UT
801-974-9200

0550131398

>124302613< 01/22/2008
000010003001677

01/23/08

1023 627

1023 627

PAY TO THE ORDER OF
FIRST UNION BANK
FORT DOUGLASS
GRANITE BUILDERS, LLC
8011420

Do not endorse or write below this line.

101000048 01/23/2008
6110029065

Date:01/23/08 Sequence Num:50131398 Account:23117161 Serial:1023 Amount:\$1,700.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W Parrish Lane
Centerville, Utah 84014

1024

31-5/1240
23

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

PAY TO THE ORDER OF DOPL

\$ 405.⁰⁰

Four Hundred five + no/100 DOLLARS

TWO SIGNATURES REQUIRED

MEMO License Application

001024 124000054 023 11716 0000040500

Pay to the order of
UTAH STATE TREASURER
DEPT. OF COMMERCE
FOR DEPOSIT ONLY

01/22/2008
0510 801129
Wells Fargo Bank
2386573

JUN 25 02 1

0550277749

124000054 01/25/08
ZIONS BANK S.L.C. UT
801-974-8889

WEB.NA SLC.UT 01252003
TRANSFER 1328 012
1221-0527-84
2141454616

98689

Date:01/25/08 Sequence Num:50277749 Account:23117161 Serial:1024 Amount:\$405.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1025

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

PAY TO THE
ORDER OF

DOPPL
Two Hundred ten + $\frac{20}{100}$

\$ 210.⁰⁰

DOLLARS

TWO SIGNATURES REQUIRED

MEMO

License Application

[Signature]
[Signature]

⑆001025⑆ ⑆124000054⑆ 023 11716 1⑆

⑆0000021000⑆

Pay to the order of
UTAH STATE TREASURER
DEPT. OF COMMERCE
FOR DEPOSIT ONLY
01/22/2008

0510 601129
Wells Fargo Bank
2326577

JAN 25 02 1

⑆124000054⑆ 01/25/08
ZIONS BANK S.L.C. UT
801-974-6669

0550277750

WFB,NA SLC,UT 01250000
TRACE# 1229
⑆1221052784

2141454617

98690

Date:01/25/08 Sequence Num:50277750 Account:23117161 Serial:1025 Amount:\$210.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1029

31-5/1240
23

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

PAY TO THE
ORDER OF

\$ 3,475.00

Geosystems, L.C.

DOLLARS

Three Thousand Four Hundred Seventy-Five and no/100-----

TWO SIGNATURES REQUIRED

[Signature]
[Signature]

MEMO GWT, Inc. - Landscaping

⑈001029⑈ ⑆124000054⑆ 023 11716 1⑈ ⑆0000347500⑆

⑆124000054⑆ 01/25/08
ZIONS BANK S.L.C. UT
801-974-0000

⑆0660360889⑆

⑆1250005744⑆
KEYSAFE, N.A. 4364 695
01/25/08

7800892631

JUN 25 08

KEYSAFE
01/25/08

2032 27191

Date:01/25/08 Sequence Num:60360889 Account:23117161 Serial:1029 Amount:\$3,475.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1034

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

12/28/2007

PAY TO THE ORDER OF

Four Winds Development Group, LLC

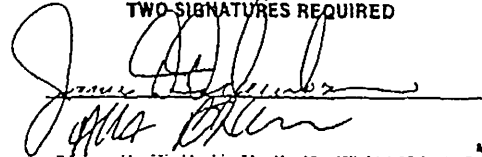
\$ **2,000.00

and 00/100

DOLLARS

Four Winds Development Group, LLC

TWO-SIGNATURES REQUIRED



MEMO February Management Fee

⑈001034⑈ ⑆124000054⑆ 023 11716 1⑈

⑈0000200000⑈

PAY TO THE ORDER OF
WELLS FARGO BANK, NA
FOR DEPOSIT ONLY
FOUR WINDS DEVELOPMENT GROUP, LLC
146873078

⑆124000054⑆ 02/12/08
ZIONS BANK S.L.C. UT
801-974-0000

WFB, NA SLC, UT 02112008
TR#3342FRT #612
>1221-0527-8<
7445920659

⑆0550150419⑆

Date:02/12/08 Sequence Num:50150419 Account:23117161 Serial:1034 Amount:\$2,000.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1035

31-5/1240
23

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

12/28/2007

PAY TO THE
ORDER OF Jim Didericksen

\$ 5,151.50

Five Thousand One Hundred Fifty-One and 50/100 DOLLARS

Jim Didericksen

TWO SIGNATURES REQUIRED

MEMO _____

⑈001035⑈ ⑆124000054⑆ 023 11718 1⑈ ⑆0000515150⑆

⑆124000054⑆ 02/11/08
ZIONS BANK S.L.C. UT
801-974-8888

0440111059

⑆125000574⑆
KEYBANK N.A. 4627 005
02112008

7600741485

391039
David Didericksen

Date:02/11/08 Sequence Num:40111059 Account:23117161 Serial:1035 Amount:\$5,151.50 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1041

31-5/1240
23

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

PAY TO THE ORDER OF *Wasatch Trailers*

Five Thousand & 52/100

\$ 4,015.52

DOLLARS

TWO SIGNATURES REQUIRED

[Signature]

[Signature]

MEMO *Tealce*

⑈001041⑈ ⑆124000054⑆ 023 11716 1⑈ ⑆0000401552⑆

82152888
P0815376498 12

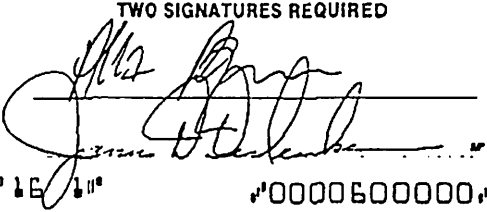
>124389741<
Barnes Banking Company
Kaysville, UT

⑆124389741⑆ 02/15/08
ZIONS BANK S.L.C. UT
801-974-6939

0550430619

PAY TO THE ORDER OF
 BARNES BANKING COMPANY
 KAYSVILLE, UTAH 84037
 FOR DEPOSIT ONLY
 WASATCH TRAILER SALES, INC.
 01 - 0230811

Date:02/15/08 Sequence Num:50430619 Account:23117161 Serial:1041 Amount:\$4,015.52 Dep Seq#:50430172

ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parrish Lane Centerville, Utah 84014		1042
TIVOLI PROPERTIES, LLC 11-07 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		31-5/1240 23
2/1/2008		
Pay to the order of Four Winds Development Group, LLC		\$ **6,000.00
Six thousand and 00/100		DOLLARS
Four Winds Development Group, LLC		
TWO SIGNATURES REQUIRED		
		
MEMO		
#001042# 1240000541 023 117161		#0000600000#

PAY TO THE ORDER OF WELLS FARGO BANK, NA FOR DEPOSIT ONLY FOUR WINDS DEVELOPMENT GROUP LLC 14000000	WFB, NA SLC, UT 02292003 TR#3414PKT #012 >1221-0527-0< 7749232766	03/03/08 2100000000 001-974-0000 0660179522
---	--	--

Date:03/03/08 Sequence Num:60179522 Account:23117161 Serial:1042 Amount:\$6,000.00 Dep Seq#:-

101000046
03/31/2008
6618357336

This is a LEGAL COPY of
your check. You can use it
the same way you would
use the original check.

8002/28/03 03/28/2008
000010701000051
000010701000051

[Signature]

TIVOLI PROPERTIES, LLC 11-07
805 N 1250 W SUITE 8 801-228-4055
CENTERTVILLE, UT 84014

DOHS FIRST NATIONAL BANK
Center and Lines, 140 N. Fourth Lane
Centerville, Utah 84014

1047

31-4/114

3/27/2008

PAY TO THE
ORDER OF Granite Builders, LLC

\$ 5,000.00

Five Thousand and 00/100

DOLLARS

Granite Builders, LLC
805 North 1250 West, Suite #5
Centerville, Utah 84014

TWO SIGNATURES REQUIRED

[Signature]
[Signature]

MEMO

⑈001047⑈ ⑈124000054⑈ 023 11716 1⑈

⑈001047⑈

⑈124000054⑈

023 11716 1⑈

⑈0000500000⑈

>124302613<
000010701000051
03/28/2008

PAY TO THE ORDER OF
FIRST UNION BANK
FOR DEPOSIT ONLY
GRANITE BUILDERS, LLC
8101420

101000046 03/31/2008
6618357336

124302613 03/31/08
ZIONS BANK S.L.C. (UT
801-974-0300)

Do not endorse or write below this line.

0660173196

Date:03/31/08 Sequence Num:60173196 Account:23117161 Serial:1047 Amount:\$5,000.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1098

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

PAY TO THE
ORDER OF

Q.W.F., Inc

\$ 4,000 ⁰⁰/₁₀₀

Four Thousand & no/100 176843619 02-29-08 3591 07

DOLLARS

TWO SIGNATURES REQUIRED

MEMO

Advance/Dier

"001098" 1124000054 023 11716 1"

"0000400000"

WAMU BK OR
PROC. CTR - PORTLAND OR 325070760<
176843619 3600 3591 00 02-29-08
176843619

[Signature]

WFS, W. S.C. UT 43/43/44
1221-0527-8
2548702732

03/03/08 11:21:11
012
001-974-0543

Date:03/03/08 Sequence Num:60289711 Account:23117161 Serial:1098 Amount:\$4,000.00 Dep Seq#:-

FROM MEMBER OF THE
FEDERAL RESERVE
SYSTEM BY
EVALUATION OF

PAY TO THE ORDER OF

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1049

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

4/1/2008

\$ **6,000.00

DOLLARS

Four Winds Development Group, LLC

Four Winds Development Group, LLC

MEMO April 2008

TWO SIGNATURES REQUIRED

⑈001049⑈ ⑆124000054⑆ 023 11716 ⑈

⑈0000600000⑈

1124000054 04/03/08
ZIONS BANK S.L.C. UT
801-974-0933

0660127500

UPB NA SLC-UT 04020003
TR#00000001 #012
>1221-0527-8<
7446526011

PAY TO THE ORDER OF
WELLS FARGO BANK, N.A.
FOR DEPOSIT ONLY
FOUR WINDS DEVELOPMENT GROUP LLC
1486073078

Date:04/03/08 Sequence Num:60127500 Account:23117161 Serial:1049 Amount:\$6,000.00 Dep Seq#:-

29-04-08-01

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1051

TIVOLI PROPERTIES, LLC 11-07
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

31-5/1240
23

4/11/2008

PAY TO THE
ORDER OF Centruy 21 Elite

\$ **7,500.00

Seven Thousand Five Hundred and 00/100***** DOLLARS

Centruy 21 Elite

TWO SIGNATURES REQUIRED

MEMO Uinta Shadows, Roosevelt, UT Earnest Monies

⑈001051⑈ ⑈124000054⑈ 023 11718 ⑈ ⑈0000750000⑈

0021 98755

APR 17 08

KEY BANK
C21

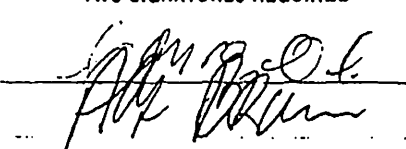
124000054 04/17/08
ZIONS BANK S.L.C. UT
801-974-0800

0660400870

125000574
125000574
7800637175

PAY TO THE ORDER OF
KEYBANK
SALT LAKE CITY, UT 84121
124000737
FOR DEPOSIT ONLY
WANT INC.
DBA CENTURY 21 ELITE
440570021558

Date:04/17/08 Sequence Num:60400870 Account:23117161 Serial:1051 Amount:\$7,500.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK Centerville Office 440 W. Parrish Lane Centerville, Utah 84014		1055
TIVOLI PROPERTIES, LLC 11-07 605 N 1250 W SUITE 5 801-298-4055 CENTERVILLE, UT 84014		31-5/1240 23
5/2/2008		
Four Winds Development Group, LLC		\$ **6,000.00
..... thousand and 00/100		DOLLARS
Four Winds Development Group, LLC		
TWO SIGNATURES REQUIRED		
		
MEMO		
⑈001055⑈ ⑆124000054⑆ 023 11716 1⑈		⑈0000600000⑈

⑆124000054⑆ 05/05/08 ZIONS BANK S.L.C. UT 801-974-0000	⑆001055⑆ ⑆124000054⑆ 023 11716 1⑈	PAY TO THE ORDER OF WELLS FARGO BANK, N.A. FOR DEPOSIT ONLY FOUR WINDS DEVELOPMENT GROUP, LLC 14000000
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Date:05/05/08 Sequence Num:60160220 Account:23117161 Serial:1055 Amount:\$6,000.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1062

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

5/23/2008

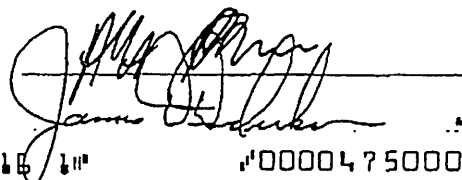
PAY TO THE
ORDER OF Construction Advisors

\$ 4,750.00

Four Thousand Seven Hundred Fifty and 00/100 DOLLARS

Construction Advisors

TWO SIGNATURES REQUIRED



MEMO _____

⑈001062⑈ ⑆124000054⑆ 023 11716 ⑈ ⑆0000475000⑈

PAY TO THE ORDER OF
KEYBANK
BOUNTIFUL, UT 84010
124000737
FOR DEPOSIT ONLY
CONSTRUCTION ADVISORS, LLC
440610014258

6021 5077

KEY BANK
CL

MAY 23 08

⑈124000737⑈ 05/27/08
ZIONS BANK S.L.C. UT
801-974-0044

0660174187

⑈1250005744⑈
⑈0522040⑈

7800375592

Date:05/27/08 Sequence Num:60174187 Account:23117161 Serial:1062 Amount:\$4,750.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1066

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

6/5/2008

PAY TO THE
ORDER OF Construction Advisors

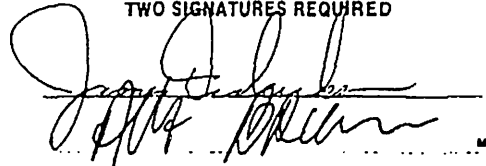
\$ **1,250.00

One Thousand Two Hundred Fifty and 00/100..... DOLLARS

Construction Advisors

TWO SIGNATURES REQUIRED

MEMO Remainder of June



⑈001066⑈ ⑆124000054⑆ 023 11716 1⑈

⑈0000125000⑈

PAY TO THE ORDER OF
KEYBANK
BOUNTIFUL, UT 84010
124000737
FOR DEPOSIT ONLY
CONSTRUCTION ADVISORS, LLC
440610014258

0021 87731

KEY BANK
C21

JUN-5-08

⑈124000054⑆ 06/06/08
ZIONS BANK S.L.C. UT
801-974-0300

0660175286

⑈1250000574⑆
⑈0000125000⑆
7800838649

Date:06/06/08 Sequence Num:60175286 Account:23117161 Serial:1066 Amount:\$1,250.00 Dep Seq#:-

ZIONS FIRST NATIONAL BANK
Centerville Office 440 W. Parrish Lane
Centerville, Utah 84014

1070

31-5/1240
23

TIVOLI PROPERTIES, LLC
605 N 1250 W SUITE 5 801-298-4055
CENTERVILLE, UT 84014

11-07

9/4/2008

PAY TO THE
ORDER OF

Construction Advisors

\$ **983.81

Nine Hundred Eighty-Three and 81/100*****

DOLLARS

Construction Advisors

TWO SIGNATURES REQUIRED

[Signature]
[Signature]

MEMO _____

⑈001070⑈ ⑆124000054⑆ 023 11716 ⑈

⑈0000098381⑈

PAY TO THE ORDER OF
CHASE
CENTERVILLE UT 84014
⑈124001545⑈
⑆OR DEPOSIT ONLY⑆
US GENERAL CONST GROUP LLC
72603773

⑈124001545⑈ 09/08/08
ZIONS BANK S.L.C. UT
801-974-8000

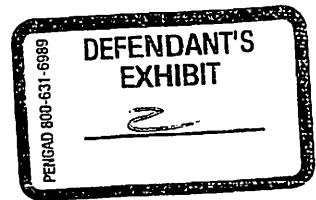
0660157607

⑈12500005744⑈
REVENUE N.A. 7221 805
09/02/08

7800341360

Date:09/08/08 Sequence Num:60157607 Account:23117161 Serial:1070 Amount:\$983.81 Dep Seq#:-

Addendum E



SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Settlement Agreement") is made and entered into by and among Kerry Posey and Bobbie Posey, individuals (the "Poseys"); Equity Partners, LLC, a Utah limited liability company, and Four Winds Development Group, LLC, a Utah limited liability company, as the sole member and manager of Equity Partners, LLC (collectively referred to as "Equity Partners"); Four Winds Development Group, LLC, a Utah limited liability company, James Didericksen, as an individual and as a member and manager of Four Winds Development Group, LLC, Allan Bruun, as an individual and as a member and manager of Four Winds Development Group, LLC, and Guy Anderson, as an individual and as a member and manager of Four Winds Development Group, LLC (collectively referred to as "Four Winds"); and Tivoli Properties, LLC, a Utah limited liability company, Equity Partners, LLC, as a member of Tivoli Properties, LLC, Kerry Posey, as a member of Tivoli Properties, LLC, Bobbie Posey as a member of Tivoli Properties, LLC, and Vladamir Canro, as an individual and as the manager of Tivoli Properties, LLC (collectively referred to as "Tivoli"); and collectively referred to as the "Parties."

RECITALS

WHEREAS, up to the fall of 2007, the Poseys owned approximately thirty acres of real property located at 7916 North 10800 West, Saratoga Springs, Utah, 84045, and more particularly described in the legal descriptions attached hereto as Exhibit A (the "Property"); and

WHEREAS, as members of a newly created Utah limited liability company (Tivoli Properties, LLC), the Poseys and Equity Partners entered into an agreement to develop the Property for the anticipated mutual benefit of the Poseys and Equity Partners; and

WHEREAS, at a real estate closing held on or about November 16, 2007, in exchange for a cash payment and the agreement of Equity Partners to provide the Poseys with a third lien position in the Property, the Poseys conveyed title to the Property to Equity Partners, LLC; and

WHEREAS, due to declining real estate and financial markets, and also due to growing distrust, dissatisfaction and disappointment between the Parties, the Parties have chosen now to part ways, and by this Settlement Agreement have arrived at what each believes to be an agreeable resolution and settlement of all claims, disputes and defenses the Parties have or may have with respect to each other.

NOW THEREFORE, in order to memorialize their resolution and settlement, the Parties hereby enter into this following Settlement Agreement upon the following terms:

TERMS

1. Settlement Payment: Equity Partners shall receive a lump sum Settlement Payment in the amount of Twenty Five Thousand dollars (\$25,000.00). The Settlement Payment shall be made as a transfer from Premier Title Company's escrow account to an account, or accounts, designated by Equity Partners within forty-eight hours after the execution of this Settlement Agreement.

2. Transfer of Property: Equity Partners shall execute a Quit Claim Deed in favor of the Poseys, as Grantees, for the Property. The Quit Claim Deed described in this paragraph has been approved by the Poseys, and is currently being held by Premier Title Company. The Quit Claim Deed will be recorded by Premier Title Company within forty eight-hours after the execution of this Settlement Agreement.

3. Release of Claims and Liability: The Parties mutually release, cancel, forgive and forever discharge each other, and each of their predecessors, parents, subsidiaries, affiliates and divisions, and all of their officers, members, directors and employees from all actions, claims, demands, damages, obligations, liabilities, controversies and executions, of any kind or nature whatsoever, whether known or unknown, which have arisen, or which may have arisen, or which may arise by reason of money received, management of funds, management actions or payments made, as designated and described in the Tivoli Properties, LLC, Operating Agreement and the Real Estate Purchase Agreement associated with the Property, as managers, buyers, sellers, consultants, agents, employees, representatives, owners, members, affiliates, contractors, associates, or any other affiliated operative from the first day of the world, including this day and each day hereafter. This release of claims includes, but is not limited to, the payments to and receipts by the persons and entities identified on the schedule of Questioned Payments attached hereto as Exhibit B.

4. Global /Comprehensive Release: The Parties specifically waive any claim or right to assert any cause of action or alleged case of action which has, through oversight or error, intentionally or unintentionally, and whether by mutual or unilateral mistake, been omitted from this Settlement Agreement.

5. Agreement to Execute Additional Documents to Carry Out Settlement: The Parties will execute any and all other documents as reasonably necessary to implement the terms and effecting the purposes of this Settlement Agreement.

6. Payment of Attorneys' Fees and Costs: Each Party is responsible for his/her/its own attorneys' fees and costs associated with resolution of the issues and transactions to which this Settlement Agreement pertains, including but not limited to negotiating, drafting and entering into this Settlement Agreement, and for any subsequent documents and actions necessary and appropriate for implementing the terms and effecting the purposes of this Settlement Agreement.

7. Confidentiality: Except as necessary to the conduct or protection of their legitimate business interests or as may be required by operation of law or order of court, the Parties covenant to hold the terms, conditions and performance of this Settlement Agreement in confidence and to refrain from discussing their dispute or its resolution with other persons not a party to this Settlement Agreement, except as necessary or appropriate with their legal and financial professionals.

8. No Actual or Implied Admission: This Settlement Agreement is not to be construed as an admission or acknowledgment of any wrongdoing, fault or liability by any Party to any other Party, or to any third person or entity not party to this Settlement Agreement; and each Party hereby expressly denies any such wrongdoing, fault or liability.

9. Severability: If any provision of this Settlement Agreement or the application thereof to any person, entity, or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, neither the remainder of this Settlement Agreement nor the application of such provision to any other person, entity, or circumstance shall be affected thereby, but rather shall be enforced to the greatest extent possible.

10. Default and Attorneys' Fees and Costs: In the event of breach or default hereunder, the prevailing party shall be entitled to recover from the other party all expenses, costs, and attorneys' fees incurred in connection with determining, protecting or enforcing their rights, including lay and expert witness fees, whether such expenses would be recoverable as costs and attorneys' fees in the original action or not.

11. Jurisdiction, Venue, and Governing Law: Jurisdiction and Venue shall exist only in the Fourth District Court, Utah County, State of Utah for any action in regard to this Settlement Agreement. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

12. Entire Agreement: This Settlement Agreement sets forth the entire Settlement Agreement of the Parties in the settlement of their respective differences. No provision of this Settlement Agreement may be amended or any right hereto modified or waived except by a written agreement executed by the Parties.

13. Cooperation in Drafting the Settlement Agreement: Each Party hereto has cooperated in establishing the terms of this Settlement Agreement as well as drafting the recitals and terms of this Settlement Agreement. Therefore, if any construction or interpretation is to be made regarding this Settlement Agreement or any of its Recitals or Terms, the same shall not be presumptively construed against any Party.

14. Counterparts: This Settlement Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and all of which when taken together shall constitute one and the same document.

15. Successors and Assigns: This Settlement Agreement is binding upon the Parties, their heirs, executors, administrators, successors, and assigns, and will inure to the benefit of the Parties, their heirs, executors, administrators, successors, and assigns.


16. Authority to Execute This Agreement: Each Party to this Settlement Agreement hereby represents and warrants to each other Party that he/she/it has the authority and/or has been duly authorized to execute, be bound to, and deliver this Settlement Agreement.

17. Acknowledgement: The Parties declare that each has read and understands this Settlement Agreement. The Parties have executed this Settlement Agreement voluntarily and without being unduly pressured, under duress or influenced by any statement or representation made by any other Party or by any person acting on behalf of any other Party, including their counsel. In negotiating, drafting and

entering into this Agreement, the Parties also acknowledge that they have either been represented, or have had an opportunity to be represented, by and/or consult with independent counsel of their own choosing.

Dated: 11/11/08

EQUITY PARTNERS, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
(Name) JAMES D. DIDERICKSEN
Managing Member of Four Winds
Development Group, LLC, its sole member
and manager


Dated: 11/11/08

FOUR WINDS DEVELOPMENT GROUP, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
Guy Anderson
Its: Managing Member


Dated: 11-11-08

FOUR WINDS DEVELOPMENT GROUP, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
Allan Bruun
Its: Managing Member

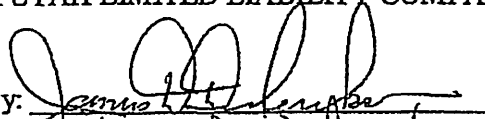
Dated: 11/11/08

FOUR WINDS DEVELOPMENT GROUP, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
James Didericksen
Its: Managing Member

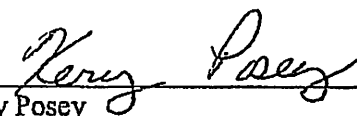
Dated: 11/11/08

TIVOLI PROPERTIES, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
(Name) JAMES D. DIDERICKSEN
Managing Member of Four Winds
Development Group, LLC, the sole member
and manager of Equity Partners, LLC, its
member

Dated: 11/12/08

TIVOLI PROPERTIES, LLC
A UTAH LIMITED LIABILITY COMPANY

By: 
Kerry Posey
Its: Member

Second Signature Page of Settlement Agreement on Following Page

Second Signature Page of Settlement Agreement

Dated: 11-12-08

TIVOLI PROPERTIES, LLC
A UTAH LIMITED LIABILITY COMPANY

By: Bobbie Posey
Bobbie Posey
Its: Member

Dated: 11-12-08

TIVOLI PROPERTIES, LLC
A UTAH LIMITED LIABILITY COMPANY

By: Vladimir Canro
Vladimir Canro
Its: Manager

Dated: 11-12-08

By: Kerry Posey
Kerry Posey
As an individual

Dated: 11-12-08

By: Bobbie Posey
Bobbie Posey
As an individual

Dated: 11/11/08

By: James Didericksen
James Didericksen
As an individual

Dated: 11-11-08

By: Allan Bruun
Allan Bruun
As an individual

Dated: 11/11/08

By: Guy Anderson
Guy Anderson
As an individual

Dated: 11-12-08

By: Vladimir Canro
Vladimir Canro
As an individual

When Recorded Mail to:
GRANTEE
7916 North 10800 West
Saratoga Springs, UT 84045

ENT 122137:2008 PG 1 of 2
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
2008 Nov 14 12:59 pm FEE 14.00 BY TO
RECORDED FOR PREMIER TITLE INSURANCE AGE
ELECTRONICALLY RECORDED

PREMIER TITLE INSURANCE AGENCY INC.
7240 S Highland Dr Ste 200
Salt Lake City, UT 84121

QUIT CLAIM DEED

Equity Partners LLC

grantor(s) of Utah, State of UTAH, hereby QUIT CLAIM to

Kerry R. Posey and Bobbie M. Posey, Tenants in Common , grantees(s)

of Utah for the sum of TEN DOLLARS AND OTHER VALUABLE
CONSIDERATIONS***** the following described tract(s) of land in County,
State of Utah, to-wit:

Parcel 1:

Commencing at a point located South 867.08 feet and East 56.12 feet from the North quarter corner of Section 23, Township 8 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 892.28 feet; South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East right of way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0029

Parcel 2:

Commencing East along Section line 60.63 feet and South 867.68 feet from the North quarter corner of Section 23, Township 8 South, Range 1 West, Salt Lake Base and Meridian; thence East 2853.03 feet; thence South 42 degrees 41' West 667.20 feet to a fence; thence North 89 degrees 47' West along said fence line 2404.35 feet to a fence intersection; thence North 26' East along fence line 481.46 feet to the beginning.

and including the following described tract of land in Utah County, State of Utah:

Commencing at a point located South 867.08 feet East 56.12 feet from the North quarter corner of Section 23, Township 8 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 892.28 feet; thence South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East Right of Way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0030

Tax ID No.: 58-035-0029, 58-035-0030

WITNESS the hand(s) of said grantor(s), November 11, 2008.

Signed in the Presence of

When Recorded Mail to:

GRANTEE

7916 North 10800 West
Saratoga Springs, UT 84045

Date: 11/14/08 Entry: 122137:2008

Submitted by: jessie

PREMIER TITLE INSURANCE AGENCY INC.
7240 S Highland Dr Ste 200
Salt Lake City, UT 84121

QUIT CLAIM DEED

Equity Partners LLC

grantor(s) of Utah, State of UTAH, hereby QUIT CLAIM to

Kerry R. Posey and Bobbie M. Posey, Tenants in Common , grantee(s)

of Utah for the sum of TEN DOLLARS AND OTHER VALUABLE
CONSIDERATIONS***** the following described tract(s) of land in County,
State of Utah, to-wit:

Parcel 1:

Commencing at a point located South 867.08 feet and East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 392.28 feet; South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East right of way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0029

Parcel 2:

Commencing East along Section line 60.69 feet and South 867.58 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence East 2853.03 feet; thence South 42 degrees 41' West 667.20 feet to a fence; thence North 89 degrees 47' West along said fence line 2404.35 feet to a fence intersection; thence North 26' East along fence line 481.46 feet to the beginning.

and including the following described tract of land in Utah County, State of Utah:


Commencing at a point located South 867.08 feet East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 392.28 feet; thence South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East Right of Way line of Redwood Road 201.24 feet to point of beginning.

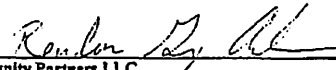
Tax Serial No.: 58-035-0030

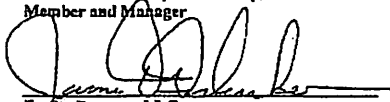
Tax ID No.: 58-035-0029, 58-035-0030

WITNESS the hand(s) of said grantor(s), November 11, 2008.

Signed in the Presence of


Equity Partners LLC
By: Allan Bruun, Managing Member of Four
Winds Development Group, Its Sole Member and
Manager


Equity Partners LLC
By: Reula Guy Anderson, Managing Member of
Four Winds Development Group, Its Sole
Member and Manager


Equity Partners LLC
By: James Darrell Didericksen, Managing
Member of Four Winds Development Group, Its
Sole Member and Manager

STATE OF UTAH,)
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County of SALT LAKE)

On November 11, 2008, personally appeared before me, Allan Bruun,
Reula Guy Anderson, James Darrell Didericksen, Managing Member of Four
Winds Development Group, Its Sole Member and Manager, Equity Partners LLC
the signer(s) of the above instrument, who duly acknowledged to me that they
executed the same.

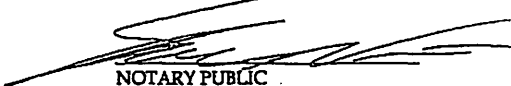

NOTARY PUBLIC

EXHIBIT "A"

EXHIBIT "A"
(Legal Description)

Parcel 1:

Commencing at a point located South 867.08 feet and East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 392.28 feet; South 89 degrees 57'57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49'19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05'14" East along East right of way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0029

Parcel 2:

Commencing East along Section line 60.69 feet and South 867.58 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian, thence East 2853.03 feet; thence South 42 degrees 41' West 667.20 feet to a fence; thence North 89 degrees 47' West along said fence line 2404.35 feet to a fence intersection; thence North 26' East along fence line 481.46 feet to the beginning,

and excluding the following described tract of land in Utah County, State of Utah:

Commencing at a point located South 867.08 feet East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56'32" East along an existing fence line 392.28 feet; thence South 89 degrees 57'57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49'19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05'14" East along East Right of Way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0030

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EXHIBIT "B"

Unexplained Payments

Related Entities	Check Number(s)	Amount
Four Winds Development	1004, 1008, 1021, 1024, 1027, 1034, 1042, 1049, 1055	\$47,500.00
Granite Builders	1007, 1018, 1023, 1028, 1047,	\$58,240.00
Geosystems	1016, 1029	\$7,975.00
U.S. General Construction	1019	\$100,000.00
Construction Advisors	1062, 1066	\$6,000.00
TOTAL:		\$219,715.00

Related Persons	Check Number(s)	Amount
Guy Anderson	1001	\$1,014.38
Jim Didericksen	1006, 1035	\$7,151.50
Dustin Didericksen	1030	\$500.00
TOTAL:		\$8,665.88

Other	Check Number(s)	Amount
Cash	Counter Check	\$100.00
Kamatsu Equipment	1012	\$5,300.00
Moulding & Sons	1015	\$4,080.00
Key Bank	1017	\$300.00
DOPL	1024, 1024	\$615.00
GWF Inc.	1098	\$4,000.00
Century 21 Elite	1051	\$7,500.00
Wasatch Trailers	1041	\$4,015.52
TOTAL:		\$25,910.52
GRAND TOTAL		\$254,291.40

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