2018

Melanie Madsen Thatcher, Plaintiff and Appellee, v. Michael Lang, Defendant and Appellant : Brief of Appellant

Utah Court of Appeals

Case No. 20180009-CA

IN THE
UTAH COURT OF APPEALS

MELANIE MADSEN THATCHER,

Plaintiff and Appellee,

v.

MICHAEL LANG,

Defendant and Appellant.

On appeal from a judgment of the Fifth District Court for Washington County,
The Honorable G. Michael Westfall

BRIEF FOR APPELLANT

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There are no parties to the district court proceedings who are not parties on appeal.

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INTRODUCTION

This case involves performance of a real estate purchase contract. Under the contract, Plaintiff Thatcher agreed to sell her property to Defendant Lang for $1.8 million. During the course of his performance, Lang paid Thatcher over $1.2 million. After a series of disagreements, Thatcher sent a notice of default. The notice of default failed to comply with the contract's notice requirements. Still, Thatcher followed that notice with a letter declaring a forfeiture. She followed that with a lawsuit to terminate Lang's interest in the property and quiet title in her favor. And she did all of it before the contractually agreed upon deadline for closing. Lang counterclaimed for specific performance.

The trial court agreed with Lang that Thatcher's notice of default was insufficient and her forfeiture was invalid. It thus dismissed Thatcher's claim for breach against Lang. But it still granted her quiet title claim and denied Lang's claim for specific performance because Lang did not tender his performance by the contract's closing deadline. That was error.

First, Thatcher's failure to comply with the contract's strict notice requirement rendered the forfeiture invalid. Without proper notice and an opportunity to cure as required by the contract, the contract remains in force and Lang retains his interests and rights—including the right to cure any alleged defaults and to close on the property. Second, the trial court erred in finding that

Lang was not entitled to specific performance. A buyer need not tender performance if a seller repudiates the contract. Here, Thatcher unequivocally repudiated the contract in declaring a forfeiture and suing Lang—all before the agreed upon closing date. Thatcher's conduct excused Lang's tender.

For these reasons, this Court should reverse and remand with instructions to order specific performance and allow Lang to complete his purchase of the property.

STATEMENT OF THE ISSUES

I.

A seller seeking forfeiture of a buyer's interest in a real estate contract must strictly comply with the contract's notice and cure requirements. If it fails to do so, the contract remains in force. Here, the trial court found that the seller, Plaintiff Thatcher, declared a forfeiture of her contract with the buyer, Defendant Lang, but did not strictly comply with the contract's notice requirements. Thus, the trial court dismissed her breach of contract claim. Still, the trial court terminated Lang's rights and quieted title in the property to Thatcher. Did the trial court err in quieting title to Thatcher?

Standard of Review. This issue presents a legal question, reviewed for correctness. *In re Adoption of Baby B.*, 2012 UT 35, ¶ 41, 308 P.3d 382.

Preservation. This issue was preserved at R. 8324-29, 8387, 8389-91, 9507-09.

II.

A buyer seeking specific performance of a real estate contract must first tender his own performance unless the seller's conduct excuses that tender. Here, Plaintiff Thatcher, as seller, sent Defendant Lang, as buyer, a notice of default declaring a forfeiture of the contract, sued to terminate his interest in the property, listed the property for sale, offered to sell it to Lang for millions over what he owed, and unequivocally testified that she considered the contract terminated and of no force or effect. And she did all of this before Lang's performance was due. The trial court found Thatcher's notice of default insufficient, her forfeiture attempt invalid, and that Lang did not breach. Still, it ruled that Lang was not entitled to specific performance because he did not tender his funds by the contract deadline. Did the trial court err in failing to grant Lang specific performance?

Standard of Review. A trial court's denial of equitable relief is reviewed under an abuse of discretion standard, but the underlying legal questions are reviewed for correctness. *See SMS Fin., LLC v. CBC Fin. Corp.*, 2017 UT 90, ¶ 6, 417 P.3d 70. Whether the facts amount to a repudiation excusing tender is a legal question. *See Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980) ("[W]hen the trial

court has based its rulings upon a misunderstanding and misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under correct principles of law"). *See also Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 89 (Utah 1992) (explaining that the effects of a notice "which presumably led the trial court to find an anticipatory repudiation, is a question of law which we review for correctness"); *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 680 P.2d 1235, 1240–41 (Ariz. Ct. App. 1984) (whether the facts amounted to a repudiation of an agreement "is a question of law to be determined by this court"); *Nuco Plastics, Inc. v. Universal Plastics, Inc.*, 601 N.E.2d 152, 154–55 (Ohio App. 1991) ("[W]hether the actions of appellant, which are facts to be found by the trial court, constitute a repudiation of the contract is a question of law. Therefore, no deference needs to be given to the trial court's determination that the contract was repudiated.").

Preservation. This issue was preserved at R. 8326-29, 8336-37, 8387-91, 9510-16.

STATEMENT OF THE CASE[1]

A. The Agreement

Plaintiff/Appellee Melanie Madsen Thatcher, an experienced attorney, owns about 19 acres of real property in Springdale, Utah (the "Property"). (R. 9384 ¶¶ 1-2.) Defendant/Appellant Michael Lang acquired around two acres of property located directly across the street from the Property. (R. 9384 ¶ 3.) After he acquired his property, Lang contacted Thatcher about buying hers with the intent of developing the two together as an integrated project. (R. 9384 ¶¶ 4, 6.) Thatcher liked Lang's development vision and thus entered into a written option agreement with Lang, granting him "the exclusive right and option to purchase" the Property. (R. 9384 ¶ 5.)[2]

Lang exercised his option in May 2006, and he and Thatcher entered into a Real Estate Purchase Agreement (the "Agreement") for Lang to buy the Property for $1.8 million. (R. 9384-85 ¶ 7; Trial Ex. 8 – Agreement, attached at **Addendum 2**.)[3]

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[1] The trial court's Amended Findings of Fact and Conclusions of Law are in the record at R. 9383-9431 and attached at **Addendum 1**. References to "Trial Ex. ___" are to the trial exhibits which are in tabbed binders in the record.

[2] The trial court's findings and conclusions refer to the Property as "Parcel A" and to Lang's property as "Parcel B." The distinction is irrelevant to this appeal so for simplicity this brief does not use the same terminology.

[3] We did not include the Agreement's exhibits with the addendum, such as the legal description and title report as they are not relevant to this appeal.

Under the Agreement, the purchase price was due and payable in four installments plus a $50,000 option payment. (R. 9385 ¶ 8; Agreement § 1.2.) Thatcher agreed to pay all taxes, penalties, and interest on the Property due and unpaid as of the Agreement's effective date. (R. 9385 ¶ 9; Agreement § 3.4.)[4] Lang was responsible for "all real property taxes and assessments arising after" the effective date. (R. 9385 ¶ 9; Agreement § 3.4.) Closing was originally to "take place on or before January 5, 2008." (R. 9385 ¶ 10; Agreement § 3.1.)

The Agreement contained specific provisions governing default, including notice requirements. (R. 9385-86 ¶ 11; Agreement §§ 4.3, 4.4.) If Thatcher claimed a default, she had to give Lang written notice "specifying such default" and then allow a 30-day period for Lang to cure:

> § 4.4. Buyer Default. Seller may terminate this Agreement by giving written notice to Buyer if Buyer materially breaches any covenant or other obligation of Buyer under this Agreement and fails to cure such breach within thirty (30) days after written notice from Seller is received by Buyer specifying such breach. If Buyer fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to Seller as liquidated damages.

(R. 9386 ¶ 11; Agreement § 4.4.) Any notices were to be "served personally" or "by registered or certified mail, postage prepaid, to the addresses specified" in the Agreement, with copies to counsel. (R. 9386 ¶ 12; Agreement § 5.5.)

[4] The Agreement defined the effective date as the date on which the last party signed—May 5, 2016. (Agreement § 5.9.)

The Agreement authorized Lang to record a memorandum of it against the Property. (R. 9386-87 ¶ 13; Agreement § 5.12.) Lang did so by recording a notice of interest (the "NOI") a few months later. (R. 9386-87 ¶ 13.)

B. The parties serially amend the Agreement and extend the closing date.

Lang paid the option payment plus the first two installments ($550,000 in total) to Thatcher but deducted $12,500 from the first installment believing the parties had agreed to that reduction. (R. 9387 ¶ 14.) Thatcher ultimately refused to sign a proposed addendum for the reduction. (R. 9387 ¶ 14.) Thus began a series of amendments and changes in payment terms and dates. (R. 9384-89.)

1. Amendment changing payment terms and extending closing.

In part to resolve the disagreement over the outstanding $12,500, the parties amended Section 1.2 to address future payments. (R. 9387 ¶ 15; Trial Ex. 13.) With this amendment—called the "Second Amendment"[5]—they agreed that Lang would pay the missing $12,500 in exchange for Thatcher's commitment to meet him at the Property for an onsite visit, two additional principal payments totaling $125,000, an interest-only payment of $101,250, and a final payment of $1,125,000 by January 7, 2008, the new closing date. (R. 9387 ¶ 15; Second Amendment § 1.2.) All other terms of the Agreement "remain[ed] the same." (R.

[5] What would have been the "first" amendment is the proposed addendum that Thatcher refused to sign. (R. 9387 ¶ 15.)

9387 ¶ 15; Second Amendment § 3.) After entering into the Second Amendment, Lang made these payments leaving a principal balance of $1,125,000. (R. 9387-88 ¶ 16.)

2. Amendment extending the closing to January 10, 2013.

In September 2007, the parties again amended the Agreement's payment terms. (R. 9388 ¶ 17; Trial Ex. 14 – attached as **Addendum 3**.) This amendment—the "Third Amendment"—extended the closing date to January 10, 2013. (Third Amendment § 1) ("Parties agree that the payment due January, 2008, may be delayed for up to five years and will be payable no later than January 10, 2013.").)

It also required Lang to make another $125,000 in additional principal payments, thus leaving a principal balance of $1,000,000. (*Id*. § 2.) Lang also agreed to make interest-only payments of $10,000 per month beginning January 10, 2008 and then due on the tenth day of each month "until January of 2013 or until the [P]roperty is paid in full." (*Id*. § 3.) Once again, all other terms of the Agreement and Second Amendment remained "in full force and effect." (R. 9388 ¶ 17; Third Amendment § 8.)

After entering into the Third Amendment, Lang made the two principal payments, leaving a $1 million principal balance. (R. 9388-89 ¶ 18.) He also began making the monthly interest-only payments. (R. 9388-89 ¶ 18.)

3. The final amendments.

The Agreement was amended two more times in May 2008 and March 2009, respectively. (R. 9389 ¶¶ 19-20; Trial Exs. 17 & 29.) With the final amendment in 2009, Thatcher agreed to reduce the final payment amount by $5,000 to resolve a dispute over whether she advised Lang of circumstances which "may or may not have resulted in an increase of real estate taxes, now or until final payout." (R. 9389 ¶ 20; Trial Ex. 29, § 2.)

Neither of these last two amendments changed the agreed upon January 10, 2013 closing date. (R. 9389 ¶¶ 19-20; Trial Ex. 17, § 5, Trial Ex. 29 § 1.)

C. Disputes arise, Thatcher declares a default, Lang cures, Thatcher sues.

1. Thatcher's first notice of default.

From January 10, 2008 on, Lang generally made his monthly interest-only payments. (R. 9390 ¶ 21.) But by December 5, 2011, he was two months behind on these interest-only payments. (R. 9390 ¶ 23.) Thatcher mailed a letter to Lang declaring him in default ("Notice-1") because, she claimed, his monthly payment was late and he had not paid taxes and other assessments for the Property. (R. 9390-91 ¶ 23; Trial Ex. 35.) In that letter, Thatcher promised to provide Lang with "an invoice of payments and dates" for the assessments she claimed were owed. (R. 9390-91 ¶ 23.) She never did. (R. 9391 ¶ 26.)

When he got Notice-1, Lang offered to waive his $5,000 discount at closing in exchange for, among other things, an extension of his interest-only payment deadlines. (R. 9391 ¶ 24.) Thatcher would not agree. (R. 9391 ¶ 24.) So Lang quickly obtained a loan and paid all amounts necessary to cure the default. (R. 9391-92 ¶¶ 25-28.)

On January 5, 2012, Lang's attorney, Troy Blanchard, faxed a letter to Thatcher's attorney, Fred Morelli, informing him that Lang had paid the property taxes and made a $30,000 payment to Thatcher thus curing the alleged defaults. (R. 9391-92 ¶ 28.) Neither Thatcher nor Morelli disputed that Lang had cured the alleged defaults (R. 9392 ¶ 29), and the trial court specifically found that "Lang timely cured the defaults mentioned in Notice-1." (R. 9392 ¶ 30.)

2. The run up to litigation.

As it stood on February 2, 2012, Lang had paid Thatcher $1,391,250, including interest payments. (R. 9586 ¶ 35.)[6] He was also current on all interest and principal payments and was planning to secure funding that would enable

[6] The trial court's amended finding at R. 9392 ¶ 35 put this number at $1,271,250. However, it granted a portion of Lang's motion to correct errors, and changed the amount to $1,391,250. (R. 9586 ¶ 35.)

him to close with Thatcher and pay off his other loans by April 2012. (R. 9392-93 ¶ 36.)[7]

On February 9, Blanchard faxed Morelli asking Thatcher to prepare for a March 10, 2012 closing. (R. 9393 ¶ 37.) To that end, Lang had a letter of intent from his primary potential lender for acquiring the Property, the E Meadow Fund Inc. (R. 9393 ¶ 38.) The Meadow Fund loan was subject to various terms and conditions, including obtaining an appraisal for the Property. (R. 9393 ¶ 39.) Lang had an appraisal for the required amount but it was based on a commercial zoning for the Property which Lang had obtained from the Town of Springdale. (R. 9393 ¶ 39.) That re-zoning designation was later overturned by the Town's appeal authority, a decision a district court upheld in other proceedings. (R. 9393 ¶ 39.)

Still, on February 21, Lang left a voicemail with Morelli stating that he had "[m]oney together" and wanted to "close by March 15th at the latest." (R. 9394 ¶ 42.) To confirm, Lang also stated that he owed $1 million and "$10,000.00 worth of interest" and that Thatcher "owes $5000.00 for property taxes." (R. 9394 ¶ 42.) This triggered a series of ongoing communications between the parties and their counsel about what was owed. (R. 9394-9406 ¶¶ 42-82.) And for the

[7] Lang had obtained another loan with which he made his October 2010 payment. (R. 9390 ¶ 22.)

next month, they went back and forth on the question, first grappling over what was owed in interest and whether Lang had somehow waived the $5,000 principal reduction that Thatcher had agreed to. (R. 9394-9406 ¶¶ 42-82.) Then, in late March, Thatcher notified Lang for the first time that she disputed the $1 million principal balance. (R. 9398 ¶ 57.) In her view, he owed $1,250,000. (R. 9400 ¶ 67.)

This continued into late April 2012. (R. 9398-9406 ¶¶ 53-83.) With both sides entrenched in their positions, they set to asking the other to verify payment history and records. (R. 9398-9406 ¶¶ 53-83.) Thatcher failed to provide information to Lang. (R. 9398-9406 ¶¶ 53-83.) Lang provided payment history and other information to Thatcher, which she could not verify. (R. 9398-9406 ¶¶ 53-83.) In the middle of it all, Lang was asking to close on April 26 and was growing increasingly frustrated by Thatcher's lack of responsiveness. (R. 9405-06 ¶ 80-82.) As the trial court described it, there was a rising level of "animus and mistrust" between Thatcher and Lang that would eventually result in this litigation. (R. 9410 ¶ 96.)

On April 24, Thatcher sued Lang in Fifth District Court ("Lawsuit-1"), alleging—"incorrectly" the trial court would later find—that Lang had "not been current since October 10, 2011." (R. 9406 ¶ 83.) In her complaint, she requested that the trial court nullify Lang's NOI and quiet title to the Property in her favor.

(R. 9406 ¶ 83.) The trial court found that though Lang had been late on some payments, his intent was to pay amounts due at closing, including interest and assessments. (R. 9407 ¶ 88.) Also, Thatcher had never served him with a new notice of default. (R. 9407 ¶ 88.) Nor did she ever serve Lang with Lawsuit-1. (R. 9407 ¶ 89.)

Needless to say, closing did not occur as scheduled on April 26, as the parties could not agree on the amounts owed. (R. 9408 ¶ 92.) For example, Thatcher failed to provide information to Lang about what assessments he owed, leaving him in the dark and unable to pay them. (R. 9407 ¶ 87.) If she had advised him of the amounts, the trial court found that "Lang could and would have paid it." (R. 9407 ¶ 87.)

In addition, as the trial court later viewed it, Lang had still to complete "due diligence items" such as an appraisal, was in zoning litigation with the Town of Springdale, was behind in monthly-interest payments to Thatcher, and otherwise did not tender the amount he claimed he owed under the Agreement by the scheduled April 26 closing date. (R. 9408 ¶ 92.) As a result of these and other factors, the April 26 closing "could not and did not proceed." (R. 9408-09 ¶ 92.)

No matter. Closing was not required until January 10, 2013—over eight months away. (R. 9409 ¶ 95; Third Amendment § 1.) And "like they had done

on prior occasions," the parties simply rescheduled the closing, this time for May 4, 2012. (R. 9409 ¶ 93.) In anticipation of the new closing date, Blanchard emailed Lang's wire transfer records to Thatcher which showed his payment history and asked her to review her bank records to confirm the amounts owing. (R. 9409 ¶¶ 93-94.)[8] To this point, Thatcher had never agreed that the balance of the purchase price was $1,000,000, instead insisting that it was $1,250,000. (R. 9410 ¶ 97.) But after reviewing her own accounting, she finally agreed with Lang's number. (R. 9409 ¶ 94; Trial Ex. 53; R. 9410 ¶ 97.)

At that time, around May 3, 2012, she was willing to close at the principal amount claimed by Lang. (R. 9410 ¶ 97.) And she would have closed if Lang tendered the amounts due under the Agreement. (R. 9409 ¶ 94.) Lang testified that he did not close at this point because Lawsuit-1 was pending and "[n]o lender is going to lend into a legal mess." (R. 7733-34 Trial Tr. 134:12-25, 135:1-18.)

In any event, under the Agreement, Lang still had nearly nine months to tender his funds and close. (R. 9409 ¶ 15; Third Amendment § 3.) But would never get that chance.

[8] When Lawsuit-1 was filed, Morelli stopped representing Thatcher, thus Blanchard began to communicate with her directly. (R. 9406 ¶ 85.)

D. Thatcher sends a second default notice, declares a forfeiture, and sues Lang again.

1. The second default notice and forfeiture.

About two months later, on July 1, 2012,[9] Thatcher mailed Lang a second notice of default, dubbed "Notice-2," the entirety of which read:

> As you are aware, you are now, and have been for many months, in default and breach of the contract for purchase of land in Springdale, Utah.
>
> This is not your first notice, and you have previously received written notice pursuant to the contract.
>
> Although you have defaulted, I expected to hear from you concerning my willingness to allow you to cure the default, but I have not.

(R. 9411 ¶ 100; Trial Exs. 63 & 64 – attached as **Addendum 4**.)

Lang did not respond to Notice-2. (R. 9411 ¶ 102.) And he made no additional payments. (R. 9411 ¶ 102.) So on August 13, Thatcher mailed another letter to him declaring a forfeiture. (R. 9411 ¶ 103; Trial Exhs. 65 & 66.)[10] She wrote:

> Though not required by the terms of the contract, this is a formal notice of forfeiture which is the only remedy contemplated by, and pursuant to, the contract between us for your failure to cure within 30 days of receiving a written notice of default.
>
> This letter is also a formal request to remove your Notice of Interest, any Liens or Lis Pendens from the Washington County records on all properties belonging to me including [the Property], within ten (10) days.

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[9] The letter was dated June 23, 2012.

[10] This letter was dated August 10, 2012.

(R. 9411 ¶ 103; Trial Exs. 65 & 66.)

2. The second lawsuit.

Fifteen days after sending the forfeiture letter, Thatcher filed this action ("Lawsuit-2") against Lang, seeking removal of the NOI and an order quieting title in the Property to her. (R. 1-3, filed August 28, 2012.) She also sought damages claiming the NOI was a wrongful lien. (R. 1-3.) Nothing in her original complaint suggested that she believed the Agreement still effective. (R. 1-3.) Rather, she alleged—and verified under oath—that Lang "failed to make all payments as agreed" and that she had terminated the Agreement with her forfeiture letter when Lang did not cure. (R. 1-3.)[11]

Lang answered and counterclaimed for specific performance. (R. 26, 34, counterclaim filed October 8, 2012.) In his counterclaim, and as relevant to this appeal, Lang sued for an order of specific performance requiring Thatcher to close on the sale. (R. 39-40.) He also sued for breach of the covenant of good faith and fair dealing and unjust enrichment. (R. 34-40.)

[11] She amended her complaint in April 3, 2014. (R. 1779.) After filing this lawsuit, Thatcher voluntarily dismissed Lawsuit-1 without ever serving it on Lang. (R. 9412 ¶ 105, 9407 ¶89.) Though calling it "groundless," the trial court gave her a free pass, concluding that Thatcher filed it under the erroneous belief that it would "preserve her jurisdictional position." (R. 8442, 9412 ¶ 105.)

3. Thatcher calls the deal dead, moves on, lists the Property for sale, and tells Lang it will cost him $4.5 million to purchase it.

As set out above and in the trial court's findings, when Thatcher filed Lawsuit-1 in April 2012, nothing changed: the parties continued to communicate both before and after, trying to reconcile numbers and close under the Agreement. (R. 9406-9410 ¶¶ 82-98.) But once Thatcher served Notice-2 on July 1, they communicated only a handful of times. (R. 9411-9414, ¶¶ 100, 102-104, 109.) Evidence of these communications was largely excluded at trial as Rule 408 settlement discussion. (R. 7200-7205 Trial Tr. 90:4-25, 91-94, 95:1-22; R. 7216-17 Trial Tr. 106:22-25, 107:1-21.) But what is known of the communications is that they were limited.

Hearing nothing from Lang in response to Notice-2 (R. 9411 ¶ 102), she served the forfeiture letter on August 13 and that same day listed the Property for sale with a real estate brokerage for $4.3 million. (Trial Ex. G-4.)[12]

She emailed Lang directly on October 4, 2012, that she would entertain an offer from him if he "still" wanted to buy the Property and told him the list price was $4.5 million:

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[12] Thatcher testified at trial that she did not list the Property until 2013. (R. 7208-07 Trial Tr. 98:4-25, 99:1-21.) That is false. The listing plainly states August 13, 2012. (Trial Ex. G-4.) And consistent with that date, she testified that she received an offer on the Property a few months later, in October 2012. (R. 6864 Trial Tr. 11:11-20.) Perhaps she was confused as she listed the Property with a different brokerage in 2013. (Trial Ex. G-7.)

> [I]f you still want to purchase the property I'm willing to offset the settlement price of the property to you by what you paid in principle [sic] under the terms of the now defaulted purchase contract. The listing price is $4.5 million for the total acreage. However, I am hoping to be selling the property in separate parcels. I'm willing to entertain reasonable offers as to price.

(R. 7211-12 Trial Tr. 101:19-25, 102:1-12.)[13]

Shortly after (in October), Lang met with Thatcher to discuss resolving the suit. (R. 8015-8019.) Lang testified that during this discussion, Thatcher made two things clear: she told him the contract "was over" (R. 8018 Trial Tr. 22:17-25), and that if he wanted the Property, he could buy it for $4.5 million. (R. 8019-20 Trial Tr. 23, 24:1-19.) In fact, she had fielded an offer from at least one interested buyer in this same October timeframe. (R. 6864 Trial Tr. 11:11-20.) Consistent with her position from her October email, Thatcher's trial testimony did not contradict Lang's on these matters. Instead, she was adamant and steadfast that she considered the Agreement over and terminated. (R. 6870 Trial Tr. 17:5-6; R. 6871 Trial Tr. 18:5-9; R. 7184 Trial Tr. 74:11-18; R. 7188 Trial Tr. 78:3-13; R. 7189-90 Trial Tr. 79:1-25, 80:1-5.)

The trial court also found that Thatcher "believed that the Agreement terminated" when she filed Lawsuit-1 and that "Lang thereafter had no right or

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[13] These portions of the email, marked for identification as Defendant's Exhibit B-116, were read and received into evidence. (R. 7211-7212 Trial Tr. 101:12-15, 102:1-25.) The court did not receive the actual exhibit because it excluded other portions of it under Utah R. Evid. 408. (R. 7216-17 Trial Tr. 106:22-25, 107:1-21.)

interest in the Property." (R. 9406 ¶ 84.) And, consistent with her position that the Agreement was terminated, the trial court also found that "Thatcher never asked Lang to put any money in escrow." (R. 9413 ¶ 109.)

E. Lang prevails: The trial court's original findings and conclusions.

In November and December 2015, the case was tried in a seven-day bench trial, after which the trial court issued its original findings of fact and conclusions of law. (R. 8413 – attached as **Addendum 5**.) It found for Lang and ordered Thatcher to sell him the Property. (R. 8444.) This was based on its finding that Thatcher committed the first material breach which excused Lang's performance. (R. 8443.)

Thatcher's actions, the trial court found—her refusal to review her records to confirm what Lang owed, her failure to communicate with Lang, and her filing "a groundless lawsuit" against Lang—"unreasonably delayed the agreed-upon closing date and impeded Lang's performance, thereby violating her duty of good faith and fair dealing and breaching the parties' contract." (R. 8441-43.) Thus, it concluded that Lang "was excused from having to tender his own performance." (R. 8443.) And that "absent Thatcher's breach, Lang would have fully performed his payment obligations under the parties' agreement at the April 26 closing date." (R. 8443.) It called Lang's testimony about his lender's readiness to fund "uncontroverted," and that he had "completed his required

due diligence and was not required to present any additional appraisals." (R. 8443-44.)

It ordered Thatcher to "convey [the Property] to Lang for $1,037,149.76," and broke down the calculation of principal, interest, and assessments for that amount. (R. 8445.)[14] It instructed Lang to prepare the proposed judgment. (R. 8445.)

After the findings were entered, Lang moved for an award of his attorney fees and filed several Rule 52(b) motions all directed to discrete and separate issues on different categories of claimed damages. (R. 8451-8516.)[15]

In March 2017, the parties were in front of the trial court again for a hearing on those post-judgment motions and the final form of the judgment. (R. 9440.) During that hearing, the parties discussed the procedure for the final closing. (R. 9480-9490.) Lang's counsel explained to the trial court that he delivered proof of availability of funds to Thatcher and that Lang could deposit those funds that day, once the court entered judgment. (R. 9485 Hr'g Tr. 46:2-6; 9489 Hr'g Tr. 50:20-24.) Thatcher did not contest the availability of funds. (R. 9485 Hr'g Tr. 46:1-17.) The trial court also made it clear that it intended to sign

[14] The trial court made numerous other rulings on other claims and procedural matters as well. Those are not at issue in this appeal.

[15] The trial court's amended findings at R. 9425-9430 summarize each of Lang's motions.

the judgment and expected Thatcher to deliver the deed to the title company for recording before Lang would be required to deposit his funds. (R. 9484-9489; Hr'g Tr. 45:4-25, 46-49, 50:1-11.) It even admonished Thatcher that if she failed to sign and deliver the deed, she was "looking at contempt sanctions …" (R. 9487 Hr'g Tr. 48:4-6.)

F. The trial court changes its mind: The amended findings and conclusions.

With the parties on the verge of finally completing the sale, the trial court unexpectedly entered amended findings of fact and conclusions of law and effectively reversed itself. (R. 9383 – Addendum 1.) These were entered on May 3, 2017—one year and four-and-a-half months after trial ended. (R. 9383.) Neither party asked the trial court to revisit the entirety of its original findings or its conclusions. (R. 8491-8516 (Lang's motions); R. 8273 (Thatcher's motion).)[16]

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[16] In some effort to explain its about-face, the trial court included a footnote that "in the process of considering Lang's posttrial motions, the court was led to review the evidence presented at trial, including this exhibit." (R. 9393 n.1.) The exhibit was Trial Exhibit D-1, which was a letter of intent from Lang's lender which included an appraisal requirement. The trial court said that it had previously "overlooked" this exhibit. (R. 9393 n.1.)

We do not suggest that a trial court has no authority to revisit its decisions at any time before the entry of final judgment. It does. *See* Utah R. Civ. P. 54(b). But the trial court's amendment here was unusual. Not only did neither side request these amendments, but those amendments departed significantly from the original findings. Trial courts are given deference to make fact findings because they view the evidence and see the witnesses testify live. *See id*. R. 52(a)(4). Here, the trial court changed its findings over a year after trial, and

Indeed, the trial court denied all of Lang's post-judgment motions as moot because of the amended findings. (R. 9425-9430.) And though Thatcher also filed a post-judgment motion to amend some findings, that motion was in the briefing stages and had not been submitted for decision when the amended findings were entered. (R. 8723, 9583.) Thatcher's motion was denied as moot nearly six months later. (R. 9706.)

With its amended findings, the trial court took an entirely different approach. It denied all of Thatcher's contract-based causes of action. (R. 9424-9425.) On her first claim for breach seeking termination and forfeiture of the Agreement, it found the forfeiture invalid because Notice-2 did not comply with Section 4.4 of the Agreement. (R. 9411 ¶ 101, 9421-22.) Instead of "specifying the breach," the trial court explained, Notice-2 "speaks of default and breach in the most general of terms, only referencing a failure of which [Lang] is supposed to be 'aware.'" (R. 9411 ¶ 101.)[17]

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seemed to rely more on the paper record (trial exhibits) than the live testimony that drove its original findings. That is troubling.

[17] The trial court also turned away Thatcher's claim that Lang agreed to waive the $5,000 credit and rejected her breach of good faith and fair dealing claim because, it found, Lang did not "intentionally or purposely [do] anything to destroy or injure Thatcher's right to receive the fruits of the contract." (R. 9424) (cleaned up).)

Although Thatcher failed to give proper notice and her claimed forfeiture was invalid, the trial court reversed course on its original decision to order specific performance for Lang. (R. 9416-18.) It concluded that Lang was not entitled to specific performance because he did not tender his funds by January 10, 2013. (R. 9416-18.)

Having concluded that Thatcher failed in her bid to invalidate the Agreement and establish that Lang was in breach, but also that Lang was not entitled to specific performance, the trial court quieted title in the Property to Thatcher because "[u]nder these circumstances, it only seems reasonable to recognize that fact by quieting title in Thatcher." (R. 9422-23.)

At the same time, however, it allowed Lang's fourth cause of action for unjust enrichment. (R. 9419.) It reasoned that because "Thatcher's contractual right to retain payments as liquidated damages is conditioned on her strict compliance with the forfeiture provisions," her failure to follow those provisions defeats any contractual right to retain funds that Lang had paid. (R. 9419.) Accordingly, "[s]ince the conditions necessary for the enforcement of the forfeiture provision are not met here, the court concludes that the Agreement should be treated as one lacking such a provision, and that the unjust enrichment claim is viable." (R. 9419.) Finding all elements of unjust enrichment present, the

trial court awarded Lang his principal payments of $800,000 as damages. (R. 9420-21.)

Lang moved to correct errors in the amended findings and conclusions and sought a new trial. (R. 9502.) That motion was denied. (R. 9585.)[18] Final judgment was entered on January 1, 2018. (R. 9773.) Lang appeals. (R. 9783.)

SUMMARY OF ARGUMENT

Section 4.4 of the Agreement required Thatcher to provide Lang with written notice "specifying the breach" and allow a 30-day cure period before should could declare a forfeiture, terminate the Agreement, and retain Lang's payments as liquidated damages. Because forfeiture is a harsh remedy, Utah law requires strict compliance with a contract's notice and cure provisions. And failure to comply strictly with the notice and cure provisions invalidates the claimed forfeiture because forfeiture provisions are not self-executing.

Thatcher's notice did not comply strictly with the requirements of Section 4.4. Thus, the trial court found her forfeiture was invalid and dismissed her breach of contract claims against Lang. That should have resulted in dismissal of Thatcher's quiet title claim as well because a plaintiff is not entitled to have title quieted in its favor unless it prevails on its underlying claim. But instead of

[18] The trial court did agree with Lang that there were mathematical errors in its findings that it corrected. (R. 9586.)

ruling that the Agreement remained in force absent proper notice and a cure period, the trial court still quieted title to the Property in Thatcher.

The trial court based its decision to quiet title in Thatcher's favor on its denial of Lang's claim for specific performance. It reasoned that because Lang did not tender his own performance by the January 10, 2013 closing deadline, he was not entitled to specific performance. That ruling was also in error.

A party is excused from tendering his own performance if the seller through its actions repudiates the agreement. Not only did Thatcher declare an invalid forfeiture of the Agreement prior to the closing date, she sued Lang claiming the Agreement was terminated and that Lang was in breach. And her actions from that point forward confirmed her repudiation. The trial court did not find to the contrary.

The reason for the tender rule is to remove any speculation about a seller's intentions to perform. A buyer's tender before filing suit extinguishes any speculation about the seller's intentions. But here we are not left to speculate about Thatcher's intentions: She made them clear by declaring a forfeiture and then suing Lang claiming that the Agreement was terminated, that he had no rights to the Property, and that she was keeping over $1 million dollars that he had paid to her. And she took this action nearly five months before the closing date in the Agreement. By any measure, she repudiated the Agreement thereby

excusing Lang's tender. Therefore, the trial court's decision to deny Lang's specific performance based upon his failure to tender was in error.

This Court should reverse and remand.

ARGUMENT

I. The Agreement Remains in Force Because Thatcher's Notice was Insufficient and Her Forfeiture Invalid.

A. The trial court found that Lang did not breach.

If Thatcher believed Lang breached the Agreement, Section 4.4 required her to provide him with a written notice "specifying [the] breach" and a 30-day period within which to cure it. Agreement § 4.4. And if Lang failed to timely cure, then Thatcher could declare a forfeiture, terminate the Agreement, and retain any amounts paid as liquidated damages. *Id*. (providing that if Lang fails to cure, "all payment previously made shall be forfeited to [Thatcher] as liquidated damages").

In that event, Lang could not complain because parties are free to contract for this type of forfeiture provision. *See Adair v. Bracken*, 745 P.2d 849, 852 (Utah Ct. App. 1987). But given the harsh result a forfeiture inflicts on the buyer, Utah law requires the seller to "comply strictly with the notice provisions of the contract." *Id*. (quotation simplified); *Johnson v. Austin*, 748 P.2d 1084, 1087 (Utah 1988) (recognizing that because forfeiture is a "harsh remedy," a proper notice and cure period are required). This includes notifying "the buyer of what

specific provision in the contract the seller is proceeding under and stat[ing] what the buyer must do to bring the contract current." *Adair*, 745 P.2d at 852 (quotation simplified).

Here, Thatcher's Notice-2 did not strictly comply with these requirements. As the trial court found, instead of "specifying such breach," as Section 4.4 required, Thatcher's notice "speaks of default and breach in the most general of terms, only referencing a failure of which [Lang] is supposed to be 'aware.'" (R. 9411 ¶ 101.) By any measure, that is not sufficient. *See Adair*, 745 P.2d at 852 (holding default notice insufficient because "it fatally omitted the amount the sellers were demanding, including principal, accrued interest and back taxes"); *Butler v. Wilkinson*, 740 P.2d 1244, 1257 (Utah 1987) ("[Seller] did not give the kind of notice necessary to forfeit [buyer's] interest [because seller] … failed to notify [buyer] of the exact amount by which he was in default and what he had to do to bring the contract current."); *First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983) ("[F]orfeiture should be refused when the notice given to the delinquent buyer is indefinite or uncertain as to the amount he is to pay or the performance demanded of him.").

As a result, and as the trial court found, Thatcher did not give proper notice, her forfeiture was invalid, and her breach of contract claims against Lang failed and were dismissed:

> Based on the foregoing, the court concludes that Thatcher may not prevail under her first cause of action for Breach of Contract, which in substance is an effort to either validate her invalid pre-suit attempted termination of the Agreement and forfeiture of Lang's rights thereunder or a request to obtain a termination and forfeiture by means other than those she contracted for.

(R. 9424.)

B. Thatcher was not entitled to an order quieting title because she failed on her underlying claims.

The trial court's finding that Thatcher did not give proper notice of default, that her forfeiture was invalid, and that Lang did not breach means that Lang's interests in the Agreement did not automatically terminate. They continue to exist absent proper notice and a cure a period. *See Adair*, 745 P.2d at 853. As a result, he still has the right to complete his purchase of the Property.

The trial court did not see it that way, concluding that Lang should have closed by January 10, 2013, and because he did not, Thatcher takes title. (R. 9422-24.) That was an incorrect application of Utah law.

"In order to terminate a real estate purchase contract and work forfeiture on the buyer, the seller must notify the buyer of the default and provide an opportunity to cure." *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 32, 266 P.3d 691. And this is so, the Utah Supreme Court tells us, even if the buyer fails to meet the closing deadline. *See id*. Indeed, in *Selvig*, the seller argued that the purchase contract was terminated when the buyer failed to perform by the

agreed upon closing deadline. *See* 2011 UT 39, ¶ 31. The Court disagreed mainly because the seller did not first provide a notice of default. *See id*. ¶ 32. Thus, the Court upheld dismissal of an unjust enrichment claim because the underlying contract remained in force even past the performance deadline. *See id*.

The same principle applies here. Lang's failure to close by the deadline did not terminate the Agreement absent a proper notice and cure period. *See Selvig*, 2011 UT 39, ¶ 32. *See also First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983) (reasoning that forfeiture provisions are not self-executing and require "some affirmative act on the part of the seller … notify[ing] the buyer what he must do to bring the contract current") (quotation simplified). That is something that undisputedly has not occurred in accordance with Section 4.4. As a result, the Agreement remains in force and Lang retains his rights thereunder. *See Selvig*, 2011 UT 39, ¶ 32.

To hold otherwise, as the trial court did, would undermine Utah's strict compliance mandate for declaring forfeitures. A seller who is not entitled to prevail because it failed to comply strictly with a contract's notice provisions, could achieve the same end by filing a meritless suit before the closing date. No proper notice or cure period required. It would make forfeiture provisions self-executing through litigation. That cannot stand. *See Selvig*, 2011 UT 39, ¶ 32; *First Sec. Bank*, 659 P.2d at 1081.

Yet even as it found for Lang on Thatcher's claims, the trial court still quieted title in Thatcher. That was error. If a plaintiff's "success on its quiet title action depends on the validity" of its underlying claim, "it is not entitled to have title quieted in its favor" unless it prevails on that claim. *Powder Run at Deer Valley Owner Ass'n v. Black Diamond Lodge at Deer Valley Ass'n of Unit Owners*, 2014 UT App 43, ¶ 23, 320 P.3d 1076. Thatcher's quiet title claim to remove Lang's NOI was premised on the validity of her forfeiture and corresponding claim for breach. (R. 1804-05) (alleging quiet title based on Lang's "defaulting on his contractual obligations"). The trial court found against her on those claims. As a result, it was error to issue an order quieting title in her favor. *See In re Hoopiiaina Tr.*, 2006 UT 53, ¶ 27, 144 P.3d 1129 ("[A] party is entitled to have title quieted only if the court first finds in his or her favor on another legal issue ….").

This Court should reverse and remand with instructions to reinstate Lang's rights under the Agreement and to require Thatcher to provide adequate notice and a cure period for Lang to perform.

II. Lang Was Entitled to an Order of Specific Performance because Thatcher's Actions Excused His Tender.

To be sure, the trial court's decision to quiet title in Thatcher was based on its determination that Lang was not entitled to specific performance. (R. 9422-23.) According to the trial court, Lang was not entitled to specific performance because he did not tender his own performance by the January 10, 2013 closing

date. (R. 9416-18, 9422-23.) That was an erroneous application of the tender rule.[19]

A. Thatcher sued Lang and repudiated before Lang's performance was due.

The tender rule requires that "the party who desires to use legal process to exercise his legal remedies under such a contract must make a tender of his own agreed performance in order to put the other party in default." *Century 21 All W. Real Estate & Inv., Inc. v. Webb*, 645 P.2d 52, 56 (Utah 1982). But like other rules, it has exceptions. *See PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 799 (Utah Ct. App. 1997). A party need not tender if he has a valid excuse. *See id*.

As relevant here, a seller's own actions and conduct may excuse formal tender—including if the seller is unwilling to perform, repudiates the agreement, or engages in other actions that show any tender would be futile. *See* 15 Williston on Contracts § 47:4 (4th ed. 2018). *See also, e.g., PDQ Lube Ctr., Inc.*, 949

[19] The trial court relied on *Commercial Investment Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct. App. 1997). In *Siggard*, this Court affirmed a jury verdict that a plaintiff-buyer was not entitled to specific performance even though the defendant-seller declared a premature forfeiture. *See id*. at 1110. This Court's affirmance was procedural—based solely on the fact that the buyer did not appeal from the jury's verdict that it was not entitled to specific performance. *See id*. Because reversal to allow the buyer to perform was effectively a request for specific performance, the Court held that the buyer's failure to appeal the adverse verdict on that question was fatal to allowing it time to perform within the remaining two days of its unexpired cure period. *See id*. at 1110. Lang does not so concede.

P.2d at 799 (excusing tender where buyer's failure to perform was caused by seller's conduct); *Reed v. Alvey*, 610 P.2d 1374, 1379-80 (Utah 1980) (excusing buyer's tender where seller encumbered property excusing buyer's tender under contract requiring removal of prior encumbrances).

Lang is the defendant in this action. Thatcher sued him. And she did so well before his performance was due. In *Century 21*, the Utah Supreme Court affirmed dismissal of a buyer's suit for specific performance "on the basis that the buyers failed to tender their own performance before or *at the time of bringing suit*." 645 P.2d at 55 (emphasis added). The reason for the tender rule is that a buyer should first make the tender so the court is not left wondering whether the seller would have performed. *See Carr v. Enoch Smith Co.*, 781 P.2d 1292, 1295 (Utah Ct. App. 1989). Tender before suit extinguishes any speculation of the seller's intentions. *See id*.

In *Carr*, for example, the buyer sued the seller for specific performance without first tendering his own performance. *See id*. at 1293-95. The buyer claimed that tender would have been futile because the seller had "committed" the property to another for use as a model home. *Id*. at 1294-95. This Court found that this excuse was insufficient to establish that "tender would have been a futile act." *Id*. at 1295. It pointed out that the purpose of tender is to put the seller "in the position of choosing to perform or risking a default." *Id*. Without

evidence of that choice, "we are left having to speculate about how [the seller] might have responded." *Id*.[20]

This case is different. Lang did not fire the first shot. Thatcher did. She declared a forfeiture and sued him. Having taken that step, we are not left to speculate about her intentions. Indeed, it is one thing for a seller to question its obligation to perform, or to suggest to the buyer that it might take some action inconsistent with the buyer's rights, or for the buyer to have suspicions about whether the seller will perform. In those situations, forcing the seller to show its hand through tender would remove the guesswork and clarify the seller's intentions.

But it is quite another for the seller to declare a forfeiture and then sue the buyer claiming that the agreement is terminated, that the buyer has no rights to the property, and that the seller is keeping over one million dollars that the buyer paid under the agreement—and to do so before the agreed upon date on which the buyer must close. Yet that is exactly what Thatcher did here.

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[20] Our research of Utah case law revealed no case like this one in which the seller sued the buyer before the closing date and in which the buyer sought specific performance. See, e.g., *Century 21*, 645 P.2d 52 (buyer suing seller); *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, (Utah Ct. App. 1997) (buyer suing seller); *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct. App. 1997) (buyer suing seller); *Reed v. Alvey*, 610 P.2d 1374 (Utah 1980) (buyer suing seller); *Kelley v. Leucadia Finc. Corp*., 846 P.2d 1238 (Utah 1992) (buyer suing seller).

And if that were not enough, she unequivocally testified that she considered the Agreement terminated, told Lang the Agreement was terminated, told him that if he still wanted the Property he could buy it for $4.5 million, listed the Property for sale the same day she declared a forfeiture, and (as the trial court found, ¶ 109) never asked him to tender performance after she sued him. If the facts here do not establish a repudiation sufficient to excuse Lang's tender, then it is difficult to imagine what would.

Indeed, the Utah Supreme Court has held that if the seller creates a situation in which the buyer is "entitled to doubt the intent of the [seller] to proceed with the contract," the buyer need not make futile attempts to perform. *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 70 (Utah 1982). Doubt, coupled with a refusal to provide any assurance of performance, is enough to establish repudiation. *See id.*

Similarly, this Court has explained that a party is excused from performance if the other party has engaged in conduct that is "'sufficiently positive to be reasonably interpreted to mean that the party will not perform.'" *Scott v. Majors*, 1999 UT App 139, ¶ 15, 980 P.2d 214 (quoting Restatement (Second) of Contracts § 250 cmt. b (1981) (cleaned up)). This conduct includes adding new conditions to an agreement, or refusing to perform without acceptance of modifications. *See id.*

Thatcher's conduct moves beyond these examples of repudiation sufficient to excuse tender. When a seller declares a forfeiture and sues the buyer, as Thatcher did here, there is no reason to doubt the seller's intent not to perform. *See Bitzes*, 649 P.2d at 70. That action is "sufficiently positive to be reasonably interpreted to mean that the [seller] will not perform." *Scott*, 1999 UT App 139, ¶ 15. That is particularly true when the lawsuit is followed by the imposition of new terms on an old contract—such as a new $4.5 million price tag.

By any definition, Thatcher's conduct was a repudiation and breach of the Agreement and excused Lang's tender. *See OLP, LLC v. Burningham*, 2008 UT App 173, ¶ 43, 185 P.3d 1138 (affirming jury instruction: "A party repudiates a contract when that party does or says anything indicating that he does not intend to perform the contract"); 13 Williston on Contracts § 39:37 (4th ed. West 2018) (explaining that when one party to a contract communicates "by word or conduct, unequivocally, unconditionally, and positively, its intention not to perform" it constitutes a repudiation and "allows the other party to treat the repudiation as an immediate breach of contract").[21]

[21] The trial court found that Thatcher's filing Lawsuit-1 and her non-communication with Lang leading up to the failed April 26 closing was not a material breach. (R. 9414-9416.) But it undertook no similar analysis regarding the events occurring after forfeiture—the second default notice (Notice-2), Lawsuit-2, and her conduct in repudiation.

B. If a buyer's tender is excused, the buyer need not tender in strict conformance with an agreed upon closing date.

The trial court made no contrary finding on repudiation. It discussed whether Thatcher's unserved Lawsuit-1 was a material breach and concluded it was not. (R. 9416.) But it performed no similar analysis on this lawsuit—Lawsuit-2—and Thatcher's default notice (Notice-2) and forfeiture. Instead, the unexpired closing date drove the trial court's analysis. (R. 9416-17, 9422-23.) In the trial court's view, no matter what Thatcher had done, Lang still had to tender by that date or lose his rights. *Id*. Not so.

If a seller's actions excuse the buyer's tender, the buyer need not tender in strict conformance with an agreed upon closing date. *See PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 799 (Utah Ct. App. 1997); *Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980). In *PDQ Lube*, this Court affirmed an order of specific performance, rejecting the seller's argument that the buyer did not tender by the closing date. *See* 949 P.2d at 799. It held that once a seller engages in the actions constituting the excuse, it is enough for the buyer to express the tender in the underlying complaint for specific performance. *See id*. *See also Reed v. Alvey*, 610 P.2d at 1377.

Surely, the same rationale applies with equal—if not more force—when the seller sues the buyer before the buyer's performance is due. That is what happened here. And it was error for the trial court to ignore that critical

distinction. *See Reed*, 610 P.2d at 1377 ("[W]hen the trial court has based its rulings upon a misunderstanding and misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under correct principles of law.")

* * *

In sum, this Court should reverse and remand with instructions to do what the trial court originally did: order specific performance and allow Lang to complete the transaction that he was on the verge of completing—with money in hand—before the trial court changed its mind. And if Lang cannot perform, for whatever reason, the trial court may terminate the Agreement. *See PDQ Lube,* 949 P.2d at 801-02 & n.18 (affirming termination of contract after awarding buyer specific performance because buyer failed to tender performance by deadline in the trial court's order). But as a starting point, Lang must be given the opportunity to do what Thatcher deprived him from doing when she declared an invalid forfeiture with no cure opportunity and sued him. To hold otherwise would render the exceptions to the tender rule incapable of anything but erratic application.

III. The Trial Court's Findings Do Not Insulate Its Ruling on Tender.

As set forth above, Thatcher's repudiation excused Lang's tender. Still, we next address the trial court's findings related to tender and the January 10, 2013 closing date to show that they do not permit an inference that Thatcher did not repudiate. There are only a handful of findings that touch on these issues: ¶¶ 95, 107, and 108.

A. The trial court improperly placed its entire focus on Lang's conduct, without regard to Thatcher's repudiation.

We start with what the trial court did not find (because it could not). It made no findings that Thatcher would perform *after* August 2012 when she declared a forfeiture and filed this suit—Lawsuit-2. Rather, its findings on her willingness to close point only to the failed closings in April/May 2012, *before* she declared the forfeiture in August. (Finding ¶¶ 94, 106.) It also made no findings that Thatcher did not repudiate the Agreement. That is fatal and renders its other findings irrelevant.[22]

The same is true of the trial court's analysis. It gave no consideration to what occurred after Thatcher declared a forfeiture and filed Lawsuit-2. Indeed,

[22] It is no answer to say that the trial court reversed its original decision that Thatcher repudiated the Agreement. Those original findings were based solely on events leading up to the failed April 26, 2012 closing and whether Lawsuit-1 was a repudiation. (R. 8441-43.) Nothing after the August forfeiture. Nor could there be since there is no evidence on which such a conclusion could be made.

its entire focus is on the effects of Lawsuit-1 and the efforts and conduct of the parties up to May 3, 2012. (R. 9414-18.) From there, it simply went on to conclude that Lang should have tendered on the January 10, 2013 closing deadline without accounting for what happened in the six months between.

As explained above in Point II, the common thread running through our case law on whether tender is excused is a focus on the seller's actions and conduct. *Supra* at 30-37. Thus, a trial court cannot properly determine whether a buyer's tender was excused without examining the seller's conduct. The trial court did not do so here for the critical timeframe after Thatcher declared a forfeiture.

To be sure, one could point to Finding ¶ 95—that "[a]fter April 26, 2012, the parties continued to correspond and Lang continued efforts to secure financing" up to the closing date—and argue for an inference that the continued communication was much like the continued communication after Thatcher filed Lawsuit-1. That is, after she filed Lawsuit-1 claiming a termination of the Agreement, she still was at the closing table willing to perform. One might argue that Thatcher does not mean what she says or intend what she does. But while

the finding (¶ 95) is accurate—the parties did continue to correspond—the evidence does not permit that inference. [23]

Unlike the trial court's excruciatingly long recitation of the facts and evidence leading up to the failed April/May 2012 closing in which it detailed the dates and substance of each discussion and communication during that time period, Finding ¶ 95 tells us nothing. It gives us no information about the substance of communications from August 2012 to the January 10, 2013 closing date—the critical time period after Thatcher declared a forfeiture and filed Lawsuit-2. The evidence of what happened during that period is not conflicting, and it all points to her unequivocal repudiation:

- Thatcher declared forfeiture by letter on August 13. (R. 9411 ¶ 103, Trial Exs. 65 & 66.)
- Thatcher sued Lang (Lawsuit-2) alleging that Agreement was terminated Lang had no interest the Property and seeking removal of his NOI (August 28) (R. 1);
- Thatcher's testimony that Notice-2 was her "notice of complete forfeiture, but basically I was terminating the contract." (R. 7188 Trial Tr. 78:3-13.) And that regardless of the cure period in the Agreement, she considered

[23] Although this portion of fact finding (¶ 95) is not clearly erroneous, because the Court views the evidence in a light most favorable to the decision, *see Kunz & Co. v. State Dep't of Transp.*, 949 P.2d 763, 765 (Utah Ct. App. 1997), we marshal the evidence in support of the finding but do so to show that this evidence does not permit the inference: That is, the evidence supporting the finding is insufficient to support an inference in a light most favorable to the trial court's decision.

the Agreement "was in total, complete default at this point." (R. 7189 Trial Tr. 79:1-6.)

- Thatcher's testimony that Notice-2 indicated no specific default but was "letting [Lang] know that [she] felt the contract was over and to please remove the notice of interest." And that Lang has no 'rights or interest in the [P]roperty." (R. 7189-90 Trial Tr. 79:16-25, 80:1-5.)

- Thatcher's testimony that "When [Lang] failed to cure the defaults after 30 days' notice, I was entitled to terminate the contract." (R. 6870 Trial Tr. 17:5-6.)

- Thatcher's testimony that in August 2012, when she filed Lawsuit-2 she believed Lang had no interest in the Property and thus had to remove his NOI. (R. 7184 Trial Tr. 74:11-18.)

- Thatcher's testimony responding to the trial court's question "what do you want" question, that she wanted the court to "uphold my right to the contract, Judge, and to uphold that I terminated the contract after 30 days' notice and failure to cure." (R. 6871 Trial Tr. 18:5-9.)

- Thatcher's amended petition asking the Court to find she "was justified and correct" in terminating the Agreement "pursuant to her remedies as seller for a material breach on the part of the Buyer." (R. 1796 ¶ 102.b.)

- Thatcher's listing the Property for sale on August 13, the same day she declared a forfeiture. (Trial Ex. G-4.)

- Lang's uncontradicted testimony that Thatcher told him in October that the Agreement "was over" (R. 8018 Trial Tr. 22:17-25), and that if he wanted the Property, he could buy it for $4.5 million. (R. 8019-20 Trial Tr. 23, 24:1-19.)

- Thatcher's testimony that she had fielded an offer from at least one interested buyer in this same October timeframe. (R. 6864 Trial Tr. 11:11-20.)

- Thatcher never asked Lang to perform after she declared a forfeiture and sued him. (R. 9413 ¶ 109.)

Unlike the communications shortly before and after Thatcher filed Lawsuit-1, after she declared a forfeiture in August, Lang and Thatcher were no longer discussing what was owed, trying to schedule closings, and blaming each other for the delays. And unlike Lawsuit-1, which Thatcher dismissed without serving, and which the trial court found was just "a misguided effort to secure jurisdiction as a result of Lang's own threat to initiate legal action" (¶ 89), Lawsuit-2 was followed by protracted litigation. In fact, the trial court's view of these communications was the same, that after the April 2012 time frame the parties were in litigation and therefore their communications were largely settlement discussions revolving around the litigation. (R. 7205 Trial Tr. 95:10-16.) Thatcher's position was there was no Agreement, Lang had forfeited, and if he wanted the Property, it would cost him $4.5 million. It was an unequivocal repudiation.

The same could be said of the other portion of Finding ¶ 95, that Lang continued to seek financing after April 2012. That portion of the finding is also accurate. The evidence shows that Lang did continue to seek financing after the failed April/May closings, after Thatcher declared a forfeiture, after she filed Lawsuit-2, through the January 10, 2013 closing, and thereafter. Why wouldn't he. His view has always been that he had an enforceable Agreement. And he counterclaimed for specific performance. If he prevailed, he would have to

close. The evidence on his "continued efforts" which spans a time period just from Thatcher's claimed forfeiture and into 2014:

- Lang's testimony that as of June 4, 2012 Meadow Fund was still willing to lend Lang money to buy the Property but "[o]nly if everything could be cleared up legally" with Thatcher. (R. 7725 Trial Tr. 126:11-127:11)

- Lang received an updated appraisal dated July 2, 2012 which he provided to the Meadow Fund. This appraisal had a higher market value than the initial appraisal and based on that appraisal Meadow would fund "if the litigation was resolved" with Thatcher. (R. 7687-7688 Trial Tr. 88:1-25, 89:1-11.)

- September 24, 2012 letter of intent from Meadow Fund to Lang stating: "We … appreciate the opportunity to explore a loan transaction with you…. [W]e are happy to inform you that it is our intent to process this loan subject to but not limited to the terms and conditions as presented below…. Funding date has been set for November 9, 2012. ¶ Funding Terms[:] … Satisfactory to [Meadow] clean title…. No negative events occur prior to closing…. No litigation or pending litigation.") (Trial Ex. D-13; R. 7725 Trial Tr. 126:11-127:11.)

- March 15, 2013 correspondence from the Meadow Fund to Lang "following up on [Lang's] request concerning the [Property]," and explaining that Meadow "would be happy to revisit the project if there are no more legal concerns, and the values and security for the loan meet our requirements. Good luck in your court case [referring to Lawsuit-2]."). (Trial Ex. 168.)

- Lang's testimony (about Trial Ex. 168 – March 15, 2013) that Meadow was going to fund, the only concern he had was being able to provide a clean title as a result of Lawsuit-2. (R. 8161 Trial Tr. 165:10-25.)

- Lang's testimony that he had a third appraisal done for the property in October 2013 in response to "Thatcher's contention that the property was worth $4.5 million and I wanted to try to resolve this and point to the fact that we're closed to that and we need to get back in the dialogue and work this out." (R. 8162 Trial Tr. 166:4-11. See also R. 8037 Trial Tr. 41:1-14)

- Lang's testimony that he was still seeking funding from lenders in 2013 "[b]ecause I still wanted to build this project and it was still a viable project if the funding came in and the lawsuit went away." (R. 7714 Trial Tr. 115:16-20.)

- Lang's testimony that in the time period 2008 to about June 2014 it was difficult for anyone to get money and for that reason he favored lender was the Meadow Fund because its rates were better than those of other lenders. (R. 7534-35 Trial Tr. 171:20-172:4)

- Lang's testimony about his debts/loans on his property that from October 2012 to December 2013, he was having trouble with his lenders for which he was using his property as collateral, and that he walked away from that property because he did not want to fight the lender anymore and his father was terminally ill. (R. 7630-7641 Trial Tr. 31-42.)

- Lang's testimony that after April 24, 2012 he continued to seek funding from the Meadow Fund but Lawsuit-1 "kind of brought me to a screeching halt." And that he was going to get an updated appraisal and continue to work with Meadow. (R. 7686-7687 Trial Tr. 87-88.)

- Trial Exhibits D-1, D-12, and D-13, which are letters of intent from the Meadow Fund February 2012, June 2012, and September 2012. (Trial Exs. D-1, D-12, D-13.)[24]

So again, while one could argue for an inference that Lang's pursuit of financing somehow undercuts Thatcher's repudiation, this evidence taken together with the evidence of Thatcher's repudiation, shows that Lang was

[24] Brad Seegmiller, a title company president handling the closing, testified that in his experience lenders will not close on a loan transaction with a lawsuit pending. (R. 7423 Trial Tr. 60:2-13; R. 9413 ¶ 111.) While the trial court was not convinced that Lawsuit-1 affected Lang's ability to close (finding that it could not rule out other factors) id., it made no similar finding on the events arising thereafter. Instead, the letter of intent from Lang's lender in September 2012 was clear that there could be no litigation or pending litigation. (Trial Ex. D-13.)

preparing to close on resolution of the dispute. That is consistent with what the law allows. *See PDQ Lube*, 949 P.2d at 799. And, of course, we know that he was successful in those efforts because he had funds on hand after he originally prevailed and was preparing to close. (R. 9485-9489.)

B. The trial court's findings on what actions were necessary to preserve Lang's rights are based on an erroneous view of the law.

Thatcher's repudiation renders the trial court's remaining findings, which touch on tender (¶¶ 95, 107, and 108), irrelevant as a matter of law. We take them in turn.

The last portion of Finding ¶ 95 suggests that Lang did not tender and could not close by January 10, 2013, because he did not have financing. But again, if his tender was excused (and it was), whether he had financing to close on January 10, 2013 is beside the point. See *supra* at 30-37. It was enough for him to allege a willingness to close and tender on the date of any court-ordered closing if he prevailed. *See PDQ Lube*, 949 P.2d at 799. Following Thatcher's repudiation, his failure to close on January 10, 2013—whatever the reason—is irrelevant to the ultimate legal question of whether his tender was excused. Thus, this portion of Finding ¶ 95 falls away.

For the same reasons that Lang's tender on January 10, 2013 is irrelevant, so too is Finding ¶ 107—that he failed to tender monthly interest payments after February 10, 2012. If Lang was in default, he was entitled to

notice and a cure period—something the trial court agrees he never received. See *supra* at 26-28. And if Thatcher repudiated, Lang's performance was excused and he could tender through his pleadings and thereafter when specific performance is ordered if he prevailed. See *supra* at 36-37.

In Finding ¶ 108, the trial court states that Lang had to tender payments after February 2, 2012, to "preserve his claims." It states that his failure to do so "was not reasonable." But what action was essential to preserve his claims against Thatcher is a legal question. *See In re Adoption of Baby B.*, 2012 UT 35, ¶¶ 40-41, 308 P.3d 382. Whether he took that action is a question of fact. *See id.* As set forth above, once Thatcher repudiated, the required action was a complaint for specific performance. Lang did that through his counterclaim.

For the same reasons, whether his conduct was "reasonable" depends on what action he had to take to preserve his claims. Under the trial court's analysis, its conclusion that Lang's conduct was not reasonable is based on its view that tender was required by the closing deadline to obtain specific performance. (R. 9416-18, 9422-23.) But as explained above, that is not the law. *See PDQ Lube*, 949 P.2d at 799. If Thatcher repudiated (and she did), it was reasonable for Lang not to close on the deadline, because he discharged his obligation through his counterclaim for specific performance. *See id.*

Finally, with this finding, the trial court again condensed a nearly one-year time period—February 2012 to January 2013—into a single statement, failing to account for all the events during that period. In particular, the uncontradicted evidence of what occurred after Thatcher's August forfeiture.

Trial courts cannot insulate their decisions with broad, conclusory statements in fact findings. It must support those statements with subsidiary facts bearing on the issue or at least give insight into the evidentiary basis on which they were made. *Cf. Woodward v. Fazzio*, 823 P.2d 474, 478 (Utah Ct. App. 1991) (explaining that findings should provide "insight into the evidentiary basis for the trial court's decision" and "set forth specific facts—subsidiary facts—bearing on that issue"); *Parduhn v. Bennett*, 2005 UT 22, ¶ 24, 112 P.3d 495 (explaining that "findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached") (quotation simplified)). The trial court did not do so here because it could not.

* * *

In short, the trial court's findings are tainted by its misapplication of the appropriate legal standard. *Cf. Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶ 16, 379 P.3d 1218 (explaining that appellate courts owe no deference to fact findings tainted by misperceptions

of applicable law). Its entire focus is on the events leading up to the failed April/May 2012 closing and then on whether Lang tendered on January 10, 2013. Its findings and analysis reflect this. But the critical events related to repudiation and tender occurred in between. The evidence of those events is not conflicting. And there is no evidence through which one could reasonably infer that Thatcher did not repudiate the Agreement after declaring a forfeiture in August 2012. As a result, and as set forth in detail above, this Court should reverse.

CONCLUSION

This Court should reverse and remand with instructions to enter a judgment and decree ordering Thatcher to specifically perform and conclude the sale of the Property to Lang at the unpaid amounts owed under the Agreement.

DATED: June 20, 2018.

DURHAM JONES & PINEGAR, P.C.

BRYAN J. PATTISON
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because according to the word processing program used to prepare this brief (Word 2013), this brief contains 10,678 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) governing the filing of public and private records.

3. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in a 13-point Book Antiqua font.

Dated: June 20, 2018.

BRYAN J. PATTISON
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I served two copies of the **Brief for Appellant**, along with a CD containing a searchable PDF copy of the Brief, on the following by U.S. mail, postage prepaid, addressed to the following:

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Addenda 1

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MELANIE A. MADSEN THATCHER, Plaintiff, vs. MICHAEL LANG, Defendant.	**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RULING ON PENDING MOTIONS AND OBJECTION TO PROPOSED JUDGMENT** Case No. 120500520 Judge G. Michael Westfall

On September 30, 2016, the court issued its Findings of Fact and Conclusions of Law ("Findings and Conclusions" or "F & C"), which are amended as set forth below.[1] On March 3, 2017, the court heard oral argument on eight matters, including seven motions filed by Defendant Michael Lang – 1) Motion for Attorney Fees ("Fees Motion"); 2) Motion to Amend Findings Regarding Property Value ("Property Value Motion"); 3) Motion to Amend Findings and Conclusions Regarding Interest ("Interest Motion"); 4) Motion to Amend Findings and Conclusions Regarding Rents ("Rents Motion"); 5) Motion to Amend Findings and Conclusions Regarding Revenue ("Revenue Motion"); 6) Motion to Amend Findings and Conclusions Regarding Impairment of Value of Work ("Work Value Motion"); and 7) Motion to Make

[1] The procedural history of this case was set forth at length in slightly more than the first 10 pages of the Findings and Conclusions that were entered on September 30, 2016. No amendment is made to such history.

Additional Findings Regarding Property Taxes ("Taxes Motion") – as well as 8) Plaintiff's objections to Defendant's Proposed Judgment. At the conclusion of the hearing, the court took these matters under advisement and now rules as explained below.

FINDINGS OF FACT

The previously entered Findings of Fact are hereby amended to read as follows:

1. Thatcher is a law school graduate and an experienced attorney, licensed to practice in at least two states.

2. Thatcher owns certain real property located in Springdale, Utah, consisting of approximately 19 acres (the "Property" or "Parcel A").

3. On or about August 8, 2005, Lang purchased certain real property, consisting of approximately two acres ("Parcel B"), located directly across the street from the Property.

4. In the fall of 2005, Lang contacted Thatcher, informed her that he owned Parcel B, and made an offer to purchase Parcel A. Lang also explained to Thatcher what his plans and intentions were with respect to the development of both Parcels A and B.

5. Because Thatcher liked Lang's vision and plans for the Property, she entered into a written Option Agreement with Lang on February 13, 2006, granting Lang "the exclusive right and option to purchase" the Property.

6. Both before and after entering into the Option Agreement, Lang told Thatcher's then-attorney, Fred Morelli, on numerous occasions what his plans and intentions were with respect to the development of Parcels A and B as an integrated project.

7. On May 5, 2006, Lang exercised his option to purchase the Property by entering

into a written Real Estate Purchase Agreement (the "Agreement") with Thatcher, pursuant to which Lang agreed to purchase and Thatcher agreed to sell the Property for $1,800,000 (the "Purchase Price" or "Principal"). Exh. 8.

8. The Purchase Price was originally due and payable as follows:

> (a) *Option Money*. The initial, non-refundable option money of [$50,000] has been paid by [Lang] to [Thatcher] in accordance with the Option Agreement and deposited into [Thatcher's] account, and shall be applied to the Purchase Price;
> (b) *First Payment*. The first payment of [$100,000] shall be due and payable on or before May 1, 2006 or on such other date not to exceed seven (7) days as the parties shall agree;
> (c) *Second Payment*. The second payment of [$400,000] shall be due and payable on or before July 5, 2006;
> (d) *Third Payment*. The third payment of [$600,000] shall be due and payable on or before January 5, 2007;
> (e) *Final Payment*. The final payment of [$650,000] shall be due and payable at Closing, set forth below.

Exh. 8 § 1.2.

9. The Agreement also required Thatcher to pay all outstanding taxes, penalties, and interest on the Property that were due and unpaid as of the effective date of the Agreement with Lang to pay "all real property taxes and assessments arising after the Effective Date of [the] Agreement." Exh. 8 § 3.4.

10. Closing was originally to "take place on or before January 5, 2008." Exh. 8 §3.1.

11. Regarding the possibility of default, the Agreement states:

> 4.3. Seller Default. Upon thirty (30) days prior notification in writing by [Lang] to [Thatcher] of any material breach of the representations, warranties and covenants of [Thatcher] set forth in this Section 4 or elsewhere in this Agreement, [Thatcher], at [Thatcher's] own expense, shall cure or remedy any such breach of such representations, warranties and covenants. If [Thatcher] fails within thirty (30) days following [Lang's] notice thereof to cure or otherwise remedy the breach, [Lang] may terminate this Agreement upon notice to [Thatcher]. With

respect to any cloud on title that may be cured by payment of cash at Closing, [Thatcher] shall have until Closing to cure such cloud. In such event, any sums paid by [Lang] to [Thatcher] shall be returned to [Lang] except for the initial $50,000 payment referenced in Section 1.2(a). Nothing contained in this Section shall be construed to require [Lang] to postpone the Closing, or to limit or preclude the recovery by [Lang] against Seller of any sums for damages to which [Lang] may lawfully be entitled, or the exercise by [Lang] of any equitable rights or remedies, including, without limitation, the remedy of specific performance, to which [Lang] may lawfully be entitled by reason of any material breach of any of the representations, warranties or covenants of [Thatcher] set forth in this Agreement.

4.4. Buyer Default. [Thatcher] may terminate this Agreement by giving written notice to [Lang] if [Lang] materially breaches any covenant or other obligation of [Lang] under this Agreement and fails to cure such breach within thirty (30) days after written notice from [Thatcher] is received by [Lang] specifying such breach. If [Lang] fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to [Thatcher] as liquidated damages.

Exh. 8 §§ 4.3-4.4.

12. The Agreement states that any notice required to be given thereunder "shall be served personally or shall be mailed by registered or certified mail, postage prepaid, to the addresses specified" in the Agreement. Exh. 8 §5.5. Those addresses were, for buyer, "Michael Lang, PMB 263, 9805 NE 116th Street, Kirkland, WA 98034, with a copy to Bryan J. Pattison, Durham Jones & Pinegar, 192 East 200 North, 3rd Floor, St. George, UT 84770, Facsimile: (435) 628-1610, and, for seller, Melanie A. Madsen, P.O. Box 145, Oregon, Illinois 61061, Facsimile: (815) 732-2139, with a copy to Fred Morelli, Jr., Morelli & Cook, 403 W. Galena Blvd., P.O. Box 1416, Aurora, IL 60407-1416, Facsimile: (630) 892-0479. Exh. 8 §5.5.

13. The Agreement expressly authorizes Lang to "execute and record a Memorandum of Agreement covering the Property." Exh. 8 §5.12 Pursuant to this provision, Lang caused a

Notice of Interest (the "NOI") to be recorded against the Property on December 13, 2006. Exh. G-2.

14. Lang paid the first $550,000 as required, except that he deducted $12,500 from the first $100,000 payment pursuant to his understanding of an agreement the parties had reached (through counsel) that was the subject of a draft addendum to the Agreement. Exhs. 9 & 10. However, Plaintiff ultimately refused to sign such addendum.

15. On or about December 11, 2006, partly to resolve the parties' disagreement over the outstanding $12,500, the parties amended Section 1.2 of the Agreement, regarding payment of the Purchase Price, as follows:

> Section 1.2(d)-(e) of the Agreement is amended as follows, and subsections (f)-(h) are hereby added:
> (d) [Lang] shall pay to [Thatcher] the sum of [$12,500] upon (i) [Lang's] receipt of [Thatcher's] signature to this Second Addendum and (ii) [Thatcher's] commitment to an on-site visit to the Property with [Lang], which shall occur in December 2006 or January 2007 (excepting December 21, 2006 to January 1, 2007) at a time mutually convenient to the parties. Funds for this payment will be made by wire transfer to [Thatcher]. The sum paid under this Section 1.2(d) represents return of the amount withheld by [Lang] as set forth in the First Addendum and shall be applied to the Purchase Price.
> (e) [Lang] shall pay to [Thatcher] the sum of [$25,000] on or before December 23, 2006. This sum shall be applied to the Purchase Price for the Property.
> (f) [Lang] shall pay to [Thatcher] the sum of [$100,000] on or before January 5, 2006 [sic]. This sum shall be applied to the Purchase Price for the Property.
> (g) [Lang] shall pay to [Thatcher] the sum of [$101,250], which sum represents an interest payment of 9% on the $1,125,000.00 million outstanding on the Purchase Price for the Property and shall not be applied to the Purchase Price.
> (h) The final payment of [$1,125,000] shall be due and payable at Closing, on or before January 7, 2008.

Exh. 13 (designated Second Addendum because of the prior draft addendum discussed above).

16. Lang paid the $12,500 and $125,000 amounts of principal specified and the $101,250

amount for interest as required, leaving the principal balance due at $1,125,000.

17. On September 13, 2007, the parties amended the Agreement again as follows:

> 1. Delay of Full Payment:
> Parties agree that the payment due January, 2008, may be delayed for up to five years and will be payable no later than January 10, 2013.
> 2. Principle [sic] Payment:
> A payment on the Principle [sic] in the amount of $50,000.00 will be made within ten (10) days of the signing of this amendment[;] a second payment on principle [sic] in the amount of $75,000.00 will be made no later than December 23, 2007, leaving the principle [sic] balance due at $1,000,000.00.
> 3. Interest Only Payments on the Balance:
> Interest only payments of $10,000.00 per month shall begin and be payable on January 10, 2008, with subsequent payments due by the 10th (10th) day of each month thereafter until and through January of 2013 or until the property is paid in full. Such payments to be made by electronic money transfer to the account of [Thatcher].
> (Routing number to be supplied).
> ....
> 5. Notification of Any Change, Improvement or Building on the Property:
> ... If any ... lien arises against the property [from any change, improvement, construction or building on the Property by Lang], [Lang] shall notify [Thatcher] within 14 days of any such lien and [Lang] shall have ninety days to cure the lien or be in default of the contract and its amendments. This described default will be treated as any other default event as described in the original contract and/or amendments and the penalty for such default shall arise automatically within thirty days of written notice by the seller to the buyer of any such, or any other, default as described herein or in the original contract and/or other amendments unless the default is cured within that 30 day period.

Exh. 14. Morelli, Thatcher's attorney, drafted this amendment to the Agreement. The monthly payments referred to in Paragraph 3 of this amendment, which were due on the 10th day of each month, were for interest that began to accrue on January 10. Except as stated in the December 11, 2006 addendum, the Agreement does not provide for the accrual of interest prior to January 10, 2008.

18. Lang paid the $50,000 and $75,000 amounts of principal (leaving the balance of

principal owing at $1 million) and began making the monthly interest-only payments as required.

19. On May 5, 2008, the parties amended the Agreement again as follows:

> 1) Jonathan Zambella will be permitted to build a parking lot on the property....
> ....
> 3) Mike Lang and Jonathan Zambella jointly and severally agree to indemnify and hold [Thatcher] harmless for any and all expenses of any kind or nature in any way associated with the construction, maintenance or operation of the parking lot. This includes but is not limited to attorney's fees, court costs, judgments, building expenses, the cost of removal, insurance and any expenses whatsoever in any was associated with the parking lot. This paragraph is not intended to include expenses which are in no way associated with the parking lot.
> ....
> 5) This agreement shall be considered an addendum to all previous written agreements between [Thatcher] and Mike Lang. All terms in existence between them which are not inconsistent with this agreement shall remain in full force and effect.

Exh. 17.

20. On March 11, 2009, the parties amended the Agreement again as follows:

> 1. The terms of this agreement shall be binding on all parties. All other terms of all previous agreements shall remain in full force and effect to the extent they are not inconsistent to this agreement.
> 2. [Thatcher] agrees to reduce the final pay out amount by the sum of $5,000.00.
> ....
> 5. These additional terms shall be in full force and effect unless changed later in writing and signed by both parties.

Exh. 29. Morelli drafted this amendment to the Agreement. Its purpose was in part to resolve any dispute between the parties regarding Lang's claim that Thatcher had not advised him of circumstances which "may or may not have resulted in an increase of real estate taxes, now or until final payout." Exh. 29, ¶ 3.

21. On and after January 10, 2008, Lang generally made his monthly interest-only

payments as required. However, over the next two years, he was sometimes late making such payments. In September 2010, for example, he was a week late making his payment. Rather than acknowledge his responsibility for the overdue payment, Lang said he was withholding it due to Thatcher's failure to get him certain tax information. Exhs. 30 & 31.

22. The following month, he was late again. Exhs. 32-34. On October 15, 2010, Lang borrowed $215,000 from Occum Partners, LLC ("Occum"), that was due (along with $35,000 interest) one year later ("Occum Loan"). Exhs. 166 & 173. Lang pledged Parcel B as part of the collateral for this loan. Exh. 166, ¶ 17; Exh. 173, ¶ 11. $40,000 from the proceeds of this loan were used to pay Thatcher for the October 2010 payment and apparently in advance for the next three months (Exhs. 32-34 & 139), but by October 15, 2011, Lang was again behind on his monthly interest-only payment to Thatcher. At about this time, he arranged to extend the deadline for the Occum Loan to April 15, 2012. Under the new terms for the Occum Loan, Lang was required to make monthly interest payments at a 14% annual rate and at a 20 % annual rate in the event of a further extension. Exh. 179.

23. As of December 5, 2011, Lang was two months behind in making his interest-only payments to Thatcher. On December 5, 2011, Thatcher mailed a letter (dated November 19, 2011) to Lang ("Notice-1"), in which Thatcher wrote:

> This is a notice of breach and request to cure all breaches of the Agreement dated May 5, 2006, within thirty (30) days including in full of all Washington County taxes and other assessments past due and owing on the [Property]. Public information on the taxes due and owing for these parcels is attached herewith. You are currently, once again, late on your monthly payment. In addition, at clause 13 of the Option Agreement, (now merged with the Purchase Agreement) you agreed that during the term of the contract, "Buyer shall be responsible for taxes and assessments." This includes city and county assessments.

....

In addition, [Thatcher] requests reimbursement for water, sewer and other city assessments she paid during 2006-2008 which were [Lang's] responsibility to pay. An invoice of payments and dates will follow.

Exh. 35. This Notice-1 was mailed to Lang at the address specified in the Agreement, with a copy to Bryan Pattison. Lang received Notice-1 on December 9, 2011. Exh. 36.

24. Upon receiving Notice-1, Lang offered to waive his entitlement to a $5,000 discount at closing (per Exh. 29) in exchange for, among other things, an extension of his interest-only payment deadlines, but Thatcher would not agree. B-49 & B-50.

25. Strapped for cash to cure his default, Lang entered into another loan agreement, this one with Mark Machlis ("Machlis Loan"). The Machlis Loan was structured as a sale of Parcel B from Lang to Machlis for $415,000. Lang received $250,000 in "earnest money" that he was obligated to repay to Machlis, along with a "termination fee" of $19,438, prior to April 13, 2012, to avoid the sale. Exh. 177. Pursuant to the terms of the Machlis Loan, Lang was also permitted to extend the closing deadline for 45 days by, among other things, paying $19,438 before April 5, 2012. Exh. 177.

26. After Lang received Notice-1, Thatcher never provided him with "[a]n invoice of payments and dates" for reimbursement of water, sewer, and other assessments.

27. As of January 4, 2012, all property taxes that were due on the Property had been paid.

28. On January 5, 2012, Lang's attorney, Troy Blanchard, faxed a letter to Morelli stating: "Mike Lang indicated that he paid the property taxes yesterday on the property and brought his payments current with [Thatcher] by paying $30,000. We believe this cures your

client's alleged defaults." Exh. 38.

29. After receiving this letter from Blanchard, neither Thatcher nor Morelli ever disputed that Lang had cured the alleged defaults at issue in Notice-1.

30. The court finds that Lang timely cured the defaults mentioned in Notice-1.

31. Prior to receiving Notice-1, Lang paid a total of $800,000 to Thatcher under the Agreement toward the Purchase Price. Thatcher received and accepted all of these payments from Lang and never returned any payment to Lang.

32. Prior to receiving Notice-1, Lang paid $101,250 to Thatcher under the Agreement as a one-time-only (9%) interest payment. Thatcher received and accepted this payment from Lang.

33. Prior to receiving Notice-1, Lang paid a total of $330,000 to Thatcher under the Agreement for monthly (12%) interest payments. Thatcher received and accepted all of these payments from Lang.

34. After receiving Notice-1, Lang paid an additional $40,000 to Thatcher under the Agreement for monthly (12%) interest payments. The last such monthly interest payment that Lang made to Thatcher was on February 2, 2012 (for the payment due January 10, 2012). Thatcher received and accepted all of these payments from Lang.

35. As of February 2, 2012, Lang had paid Thatcher $1,271,250 under the Agreement, including interest payments.

36. As of February 2, 2012, Lang was current on all interest and principal payments due under the Agreement, and was planning to secure funding that would enable him to close

with Thatcher and pay off the Occum and Machlis Loans in March 2012 or, if needed, by mid-April 2012.

37. On February 9, 2012, Blanchard faxed a letter to Morelli asking "that [Thatcher] be prepared to close the sale of the property by March 10, 2012." Exh. 103. Lang did not pay the interest that was due on February 10, 2012.

38. On February 15, 2012, Lang received a letter of intent from his primary potential lender, E Meadow Fund, Inc. ("EMF"), stating in part as follows:

> We . . . appreciate the opportunity to explore a loan transaction with you. Based upon our preliminary review of your documents and request for funding of up to $2,900,000 U.S. (TWO MILLION NINE HUNDRED THOUSAND), we are happy to inform you that it is our intent to process this loan subject to but not limited to the terms and conditions as presented below and completion of due diligence and that EMF considers it a sound and secure loan.

Exh. D-1.

39. Among the terms identified in this letter of intent is the requirement for a "[r]ecent appraisal showing $2,450,000 on parcel A (20 acres) . . . ." Exh. D-1.[2] Although Lang had obtained an appraisal (dated January 10, 2012) showing the requisite value for Parcel A, the value shown on the First Appraisal was based in part on Parcel A being zoned for commercial use. Lang had been successful in achieving a rezoning of the Parcel A property from residential to commercial, but by February 2012, the commercial designation had been overturned on appeal by the Springdale Board of Adjustment. On February 29, 2012, Lang appealed the Board of Adjustment's decision to the district court, but the district court ultimately upheld the decision on

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[2] In reaching its previous Findings and Conclusions, the court overlooked this exhibit. However, in the process of considering Lang's posttrial motions, the court was led to review the evidence presented at trial, including this exhibit.

July 9, 2012. Exh. 181.

41. At trial, Lang testified that the zoning designation that was the subject of ongoing litigation with Springdale was of no concern to his lender, but he presented no evidence to substantiate this testimony, which seems dubious in light of the undisputed importance of zoning to the value of the property (as borne out by the three different appraisals done here).[3]

42. On February 21, 2012, Lang left a voicemail with Morelli stating that he had "[m]oney together" and wanted to "close by March 15th at the latest." Exh. 104. He stated that he owed "1 million dollars" and "$10,000.00 worth of interest" and that Thatcher "owes $5000.00 for property taxes." Exh. 104. In a letter to Blanchard the same day, Morelli recited the voicemail and responded:

> I expect but am not sure his numbers are accurate. I distinctly remember discussing and agreeing with you that he would waive that $5000.00 she had agreed to pay. If that is not the case please let me know as soon as possible. It appears Mike believes he is $10,000.00 in arrears when in reality he has missed the January and February and by the time he pays on March 15th, it will be $30,000.00 in arrears. Please confirm these numbers.

Exh. 104.

43. On March 1, 2012, Morelli sent an email to Lang and Blanchard stating in part as follows:

> Good Morning Mike,
>
> Per your request, this e-mail is to confirm that the balance due [Thatcher] on principal is $1,000,000 .00. There will also be interest due to the date of payment.

---

[3] On July 3, 2012, a second appraisal was done valuing Parcel A at $2,650,000, again based in part on the property being zoned for commercial use. In October 2013, a third appraisal was done valuing the property at $1,800,000 based in part on the property being zoned for residential use.

> I have not confirmed that amount with [Thatcher] as I am not totally clear on your position. . . . Please e-mail details of you [sic] understanding of amounts due over and above the principal. I will the [sic] contact [Thatcher] and confirm.
>
> . . .
>
> This is also to confirm that [Thatcher] will be out of the country from March 8, 2012 until March 17, 2012.
>
> I hope this transaction is concluded before [Thatcher] leaves. . . .

Exh. 106.

44. Lang responded as follows: "My position is that I owe $1M plus 10k for interest accrued thru 3-10-12 less $5k for overpayment of property taxes due to [Thatcher] neglect" as "previously negotiated". Exh. B-47.

45. The parties went back and forth on March 1, 2012, regarding the $5,000 issue, with Morelli asserting that it had been waived and Lang and Blanchard insisting to the contrary. Exhs. B-48, B-49, B-50.

46. Days later the matter was still unresolved. On March 5, 2012, Morelli sent an email to Lang and Blanchard stating as follows:

> My understanding of the posture of the sale is that Mike will wait until March 20, 2012 to close. This is to accommodate [Thatcher's] previously scheduled trip abroad.
>
> I further understand I will be receiving a written breakdown of what Mike believes is owed.
>
> The $5,000.00 remains an open but solvable issue.

Exh. 107.

47. On March 6, 2012, Lang responded:

> My lender wants to close on the 15th [–] [Thatcher] is just one of three notes to be paid [–] I will talk with Brad @ southern utah title to explore options [–] Will

advise late today[.]

What is owed: 1M note plus interest 10k {Feb 10-Mar 10} less 5k {tax mishap} plus $1665 interest {$333 @ Day} TOTAL $1,006,665.

Exh. 107.

48. Also on March 6, 2012, Morelli replied:

I have spoken to [Thatcher]. She would like to close before she leaves on the 8th.

She has also pointed out that neither the January or February payment have been made and the March payment will be due on the 10th.

Please get your official numbers to me as soon as you can. Please advise if you will be able to close before the 8th.

Exh. 108.

49. Responding to a request by Blanchard for him to call to discuss Morelli's email, also on March 6, 2012, Lang wrote: "I will call bank about January payment[.] This was when we were asking [Thatcher] to send the history on property which she continues to ignore [–] maybe I didn't pay because [. . . .]" Exh. 108. However, Lang could not have closed before March 8, 2012. In an email to Brad Seegmiller of Southern Utah Title Company ("SUTC"), also on March 6, 2012, Lang wrote in part: "It looks like I got my money. Will know for sure by 3-10-12." Exh. 141. No evidence was presented to indicate that, as of March 10, 2012, Lang had been given any definite communication from his lender stating that his loan was in place. Thus, even at a time when everyone appears to have agreed that Lang owed $1 million in principal (and possibly $5,000 less) to Thatcher, he did not have the necessary funding to close.

50. On March 8, 2012, Thatcher left to the Philippines. The parties agreed to close at some point after her return.

51. In preparation for closing, Lang instructed SUTC to prepare all of the necessary closing documents, which SUTC attempted to do. However, SUTC never received documents from any lender for Lang showing that he had funding to close.

52. Contrary to Lang's position herein, the parties never understood and agreed that all of Lang's monthly interest payments after the January 2012 payment would be paid at the closing. Rather, Thatcher (through Morelli) consistently reminded Lang that he needed to pay such (e.g., Exhs. 123, 124).

53. In a letter dated March 14, 2012, Morelli wrote to Blanchard in part as follows:

> I still await a written confirmation of what Mike believes the numbers are. . . .
> The exact amount Mike owes is easily determined. [Thatcher] believes he was current as of September 2011. All we need do is see how much he paid[,] compare that to how many months have elapsed[,] and we have the number.
> The five thousand dollars remains an issue but I do not believe it is anything that cannot be overcome. . . .

Exh. 111.

54. In an email to Morelli on March 15, 2012, Thatcher wrote in part as follows: "I could only find three payments from Mike Lang other than the monthly ones. These do not total 800,000. I am happy to have my memory refreshed if there is something I am missing." Exh. B-61. Morelli responded in part by asking Thatcher to "scan and e-mail" him her records upon her return, and by noting his "recollection that at one time everyone agreed that the balance was $1,000,000.00." Exh. B-61.

55. On March 16, 2012, Morelli sent an email to Seegmiller asking him to "ask Mike to assemble a record of all payments made." Exh. 114. Later that same day, Seegmiller sent an email to Blanchard, Morelli, and Lang, and included Morelli's email as part of the email string

beneath his own email. Exh. 114.

56. On March 19, 2012, Morelli sent an email to Lang asking him to "[p]lease get me the financial information I have requested." Exh. 117. That same day, Lang wrote back as follows: "Fred what are you asking for? Everything is current except for interest payment 2-10 thru 3-10-12 thru closing. I am not [Thatcher's] bookeeper [sic]." Exh. 117.

57. Also on March 19, 2012, Morelli wrote again:

> I'm sorry Mike she does not agree. She thinks you did not pay January or February or March of this year, nor does she agree that the amount owed is $1,000,000.00 she thinks it is more.
>
> I am not asking you to be her bookeeper [sic], I'm asking you to share YOUR bookeeping [sic] with us. I do not think that is too much to ask to move this deal along without it becoming a contested real estate closing.

Exh. 117. This was the first notice that Lang received indicating that Thatcher disputed his claim that the balance owed on the Purchase Price was $1,000,000.

58. Also that day, Lang replied:

> Review the contracts and addendums[.] The reason I pay $10k a month is that is 12% of $1M. Everything was paid up through year end on 1-6-12[.] $30k to her and 42k in taxes.
>
> I didn't pay January till 2-2-12. $10k. I owe her 10k for February and $333 @Day from March 10th till closing. What else can I do? I'm not going to give you my private info ie Banking Statements and Tax Returns. This is [Thatcher's] problem [–] in her head. In addition she just ignores our requests.

Exh. 117.

59. A little later that same day, Lang added: "The 1-10-12 thru 2-10-12 payment was wired to her on 2-2-12. Tell her to look[.]" Exh. 117.

60. On March 20, 2012, Thatcher returned from the Philippines. Also that day,

Blanchard sent an email to Morelli stating as follows:

> I think we're all a bit frustrated with your clients [sic] continued blanket statements that she disagrees with our calculations but refusing to give us her own. A good example is your statement that she doesn't agree that the amount owed is $1,000,000, "she thinks it is more." If so, please ask her to provide her calculations. Otherwise, we are preparing to close based on the settlement statement prepared by the title company.

Exh. 117.

61. That same day, Morelli responded as follows:

> I have not heard from [Thatcher] since her return. I have forwarded your request to her and will phone her when I get the chance.
>
> I hope to be back to you soon but I expect (hope) it will be easier for Mike to assemble his figures than for [Thatcher] to put her figures together when she banks in Illinois.
>
> I will ask her to get her numbers together but also ask Mike to do the same. If Mike will do so I expect this will move forward much more quickly.

Exh. 117. The parties had a similar exchange later the same day. Exh. B-69.

62. On March 21, 2012, Thatcher ordered a CD copy of her bank records from Stillman Bank in Illinois. Exhs. 42; C-17. She was unable to access such records online at that time because, while in the Philippines, she had attempted to do so and had unintentionally triggered bank security measures denying her further online access to her account until roughly a month after her return to the United States.

63. Also on March 21, 2012, Thatcher emailed Morelli, informing him that she had ordered her bank records and was also attempting to obtain from Springdale information regarding the water, sewer, and fire assessments she had paid in order to calculate Lang's share of such obligations. She also confirmed that Lang had made January's interest payment but that

"February and March remain unpaid." Exhs. 41; B-71.

64. On March 22, 2012, Lang sent an email to Blanchard, Morelli, and Seegmiller, stating as follows: "I'm through dealing with [Thatcher's] xyz[.] I'm having to communicate with 2 other note holders and the new lender. Tell her to get all info together. Closing will be 4-10-12[.] Lots of time for her[.]" Exh. 120. Morelli responded that "that should be enough time." Exh. 120.

65. Lang also sent an email to Rob Albright at Occum that same day, stating as follows: "Lender is trying to syncronize [sic] his notes[.] I have a verbal commitment for 4-10-12 close[.] I am to receive written by 3-23-12[.]" Exh. 182.

66. On March 24, 2012, Morelli emailed Thatcher, saying in part as follows: "April 10th for closing. That should give you enough time to analyze your bank records and hopefully enough time for all of us to resolve any differences. You also get another full month of interest." Exh. B-74.

67. On April 4, 2012—fifteen days after Thatcher's return from the Philippines—Morelli sent an e-mail to Blanchard and Lang stating as follows:

> [Thatcher] confirms that Mike made the January 2012 payment in February 2012. There have been no interest payments since then.
>
> [Thatcher] confirms payment of $50,000.00 in February of 2006, $100,000.00 in May of 2006 and $400,000.00 in July of 2006. The purchase price was $1,800,000.00. If [Thatcher's] numbers are accurate that leaves a balance of $1,250,000.00.
>
> I personally have no records. If Mike has records of payment other than as above please let us know as soon as you can.

Exh. 122.

68. On April 5, 2012, Lang sent the following response to Morelli:

> As usual she is wrong[.] Fred[,] read the contract[.] I am paying $10k a month[;] that equals $120k a year[;] that equals 12%[.] Do you think [Thatcher] would have let this go for 3 years? . . . Been waiting 2 weeks [since Thatcher's return from the Philippines] and she still gets it wrong[.] To allow last addendum[,] I had to pay down the contract[.] Why would she allow this as well interest rate if she didn't get something for it?

Exh. 122.

69. That same day, Morelli wrote back to Lang, stating in part as follows: "Just make my life easier and tell me of the additional payment you made. We could spend weeks arguing about this but why when all you need do is tell me when and how much you paid in addition to what she shows." Exh. 122.

70. Lang responded the same day, stating as follows: "Obviously I paid 250k when we executed the last addendum[.] [S]he should look to her bank statements at this time . . . ." Exh. 122. In fact, at no point at or about the time when any of the addenda to the Agreement were signed, or at any other point, did Lang make a lump-sum payment, or any combination of payments, amounting to $250,000.

71. On April 6, 2012, Lang sent another email to Morelli, stating in part as follows: "Fred[,] sorry to be so short with you but the contracts tell the story [–] along with the change in interest rates {dates and amounts} . . . ." Exh. 122. This was a correct generalization, but Morelli was left with the mistaken impression, which he relayed to Thatcher, that she should be looking for a $250,000 payment, even telling her on April 8, 2012, that he (Morelli) had "some recollection of that payment," and that he thought that, if needed, Lang "will be able to come up with a canceled check." Exh. B-83.

72. The following day, on April 9, 2012, Morelli wrote to Lang again, apologetically asking "for a copy of the [$]250,000.00 check," or "some confirmation" of a wire transfer. Exh. 123. Lang responded, again incorrectly reinforcing the notion that he had made one $250,000 payment:

> In other words[,] [s]he hasn't a clue. I was hoping to close on the 10th[.] Now I have to involve a bank that I no longer do business with[.] Why can't she involve her bank[?] $250k would be easy to spot[.] I'm on road till 4-15-12[.] Can't dig into 2008 tax box till then[.] She needs to advise about water rights issue[.] Yes[,] I owe for feb and march[.] [W]hen she does what she should have done a month ago [–] she would have been paid off[.]

Exh. 123.

73. On April 10, 2012, Morelli reiterated that Thatcher "has no record of or recollection of the $250,000.00 payment," and repeated his request for Lang to "send a copy of the front and back of the check or confirmation of wire transfer," stating that it could not "be that much of a problem to get the proof of the $250,000.00 payment . . . ." He also repeated that Lang "owes February, March and now April" interest payments. Exh. 124.

74. The next day, Lang responded, again turning attention to "the contracts," and asking, "Why did I start paying her only $10,000 in January 2008?" Regarding his past due payments, he said, "I'm not paying her monthly because we should have closed and [. . .] New closing is set for 4-26-12[.] This should be ample time to resolve." Exh. 124.

75. On April 20, 2012, Morelli sent an email to Blanchard and Lang stating that he had not received any information from Thatcher since his April 4, 2012 email claiming that the balance owed on the Purchase Price was $1,250,000. Later that same day, Morelli also sent an email to Thatcher, stating:

> [Lang] called[.] [H]e asked if you had actually looked at your bank statements. I told him I thought you had but I do not know. He reminded me that the monthly payment went from $12,000.00 per month to $10,000.00 per month when he made the last payment on principal. He said the interest rate remained the same (12%). That makes sense to me but I have no records and little recollection.
>
> Miks' [sic] lawyer also e-mailed me and said Mike was sending $20,000.00 on the interest.
>
> I have not heard from you for a while[.] I hope all is OK. . . .

Exh. B-90. Assuming this communication from Lang was accurately relayed by Morelli (Lang has made no argument to the contrary), it is difficult to see how it would have shed light on the problem the parties were discussing. No evidence has been presented that Lang was ever required under any of the various versions of the Agreement to make payments of $12,000 per month.

76. Also on April 20, 2012, Lang emailed Morelli, Blanchard, and Steve Vicory stating as follows:

> If [Thatcher] reviews the timeline on the contracts and compare [sic] to wire transfers[,] She [sic] might agree with the numbers. She's a lawyer[.] [W]hy did she sign [a] contract that spelled out the amount of $1.125M if she wasn't in agreement[?] The other $125k will show up in her bank statements from Sept 2007 thru Jan 10, 2008 when she finally does what I've been asking for – for over a month[.]

Exh. 50. This email explained one method by which Thatcher could have reliably confirmed the principal amount owing under the Agreement.

77. However, almost immediately, Lang sent another email to the same people almost completely obscuring his payment history as follows:

> I pulled the following dates and amounts from my SCHWAB statements of 2006[.] [Thatcher] needs to talk with her bank NOW[.] There is more than just me who is getting her by her negligence.

2-3-06 $50,000
2-21 $50,000
4-3 $25,000
4-18 $75,000
5-1 $100,000
5-31 $30,000
6-13 $150,000
7-3 $410,000
TOTAL $890,000

Original contract was for $1.8M[.] The balance owing before September 2008 was $1,125,000[.] I paid this down to $1M by 1-10-2008 and interest rate increased from 9% to 12% [–] $10,000@month. Included in the 890k above is a one time interest payment of $101,250.

She needs to get her bank to look at all incoming wire transfers to agree to the above AND she needs to get September 2007 thru Jan 10, 2008 statements AND/OR incoming wire transfers to account for the balance and the signed contract a balance of $1M[.] The damages are real[.] Let's get this done NOW[.]

Exh. 125.

78. Almost all, if not all, of these individual claimed payments were incorrect. The only three that were even close were those of February 21, 2006, May 1, 2006, and July 3, 2006.[4] All of the rest were, so far as the evidence presented at trial here indicates, completely unrelated to the transaction covered by the Agreement. Although Lang's accompanying summary of the contractual history was generally correct, his reference to September 2008 should have been to September 2007, and he incorrectly assigned a relationship between the $101,250 interest

[4] However, even as to these, the date appears to be wrong as to the first, see Exh. 4 ($50,000 cashier's check having an issue date of February 13, 2006 and a transaction date of February 16, 2006), and the dates and amounts appear to be wrong as to the latter two. See Exh. 9 at 3 (faxed letter dated May 5, 2006, from Lang's then-counsel to Morelli stating, in part, "we are overnighting a check in the amount of $87,500.00") and at 6 (faxed copy of $87,500 check dated May 5, 2006, from Lang to Thatcher); Exh. 12 (letter dated July 6, 2006 from Morelli to Lang's then-attorney acknowledging "receipt of Mr. Lang's personal check in the amount of Four Hundred Thousand Dollars ($400,000.00)").

payment and the $890,000 figure previously set forth. Manifestly, the $101,250 interest payment was not made by July 3, 2006 (the date of the last purported payment on the principal in Lang's itemization), since it was not even called for until the December 11, 2006 addendum (Exh. 13).

79. Morelli forwarded Lang's email to Thatcher (Exh. 49), but, not surprisingly, she did not confirm Lang's incorrect payment history. Aside from having technical problems with the CD sent by the bank, she was unable to match up his claimed payments with her own bank records.

80. On April 22, 2012, Lang sent the following email message to Morelli:

> Fred[,] did [you] find [Thatcher][?] Is she contacting bank NOW[?]—If not I am forced to do any and everything possible at 1pm on 4-23-12 {Pacific daylight time}[.] I have architects, engineers, contractoer [sic] [,] etc[.] working and counting on me. I already have unnecessary attorney fees[.] I gave [you] the wire transfer dates and amounts for 2006 [p]roving her $1.25m was incorrect AND she signed a contract Sept[.] 7, 2007[,] stating the amount owed was $1.125m and that [L]ang had to pay $125,000 and the interest rate would increase to 12% from 9% by 1-10-08—which it did. I've done everything I can[.] Damages will be substantial on all sides[.] She has 1 bank to talk to and get answers for herself—maybe an hour of work—instead we get zip[.]

Exh. 126.

81. On April 23, 2012, Morelli responded that he had forwarded Lang's message to Thatcher, who had "said she would get back to me today. I will be in contact with you." Exh. 126. Later that same day, Lang sent the following email to Morelli:

> It's 4 pm and I have nothing[.] I'm starting every legal procedure possible at 8 am Pacific 4-24 {my birthday} if I haven't heard from her thru you[.] [Y]ou won't believe the damages[.] [W]e were to close on 4-10-12—her negligence is incomprehensible. Hopefully something is being done today because I stop tomorrow if 8am comes and goes.

Exh. 126. Also that day, Morelli replied, again saying he had forwarded Lang's email and was

trying to reach Thatcher. Exh. 126.

82. On April 24, 2012, Lang emailed Morelli asking what was happening and saying, "I will slide my timeline to noon today from 8am [–] I need her position/I need to know what she is doing to resolve and I need timeline [–] NOW[.]" Exh. 126. Later that day, he sent the following email to Morelli:

> I've called a half dozen times today—no response from you[.] Sent emails—no response from you[.] I've tried to get where [Thatcher's] head is—no response from you. We wanted to close on 4-10[.] She left country without helping[.] We advised we wanted to close on 4-26—leaving plenty of time for [Thatcher] to respond and contribute—nothing[.]
>
> I have people working—their livelyhoods [sic] depending on me—And we have someone willfully hindering this closing.
>
> Please advise today even if it's she hasn't called—I must move forward[.]

Exh. B-97.

83. That same day, April 24, 2012, Thatcher filed a lawsuit ("Lawsuit-1") against Lang in Washington County, Utah, alleging (incorrectly) that Lang had "not been current since October 10, 2011," and requesting the Court to nullify the NOI and to quiet title to the Property in her favor.

84. According to Thatcher's testimony at trial, she believed that the Agreement terminated on or prior to the date that she filed Lawsuit-1 and Lang thereafter had no right or interest in the Property.

85. Because Morelli is not licensed to practice law in Utah, he could not represent Thatcher in Lawsuit-1. As a result, when Thatcher filed Lawsuit-1, Morelli immediately ceased representing Thatcher and communicated with Lang and Blanchard only to give them Thatcher's

contact information and to tell them about Lawsuit-1. Exhs. 128 & 129.

86. Prior to the filing of Lawsuit-1, almost all communications from Thatcher to Lang had come through Morelli because Thatcher did not want to communicate directly with Lang.

87. Prior to the filing of Lawsuit-1, Lang did not know what amount was owed for assessments because Thatcher did not provide that information to him. Thatcher did not know what amount was owed for assessments prior to the filing of Lawsuit-1. Had Thatcher told Lang what amount was owed for assessments (which, according to her recollection at trial, "was around [$]1,300 or $1,400") before filing Lawsuit-1, Lang could and would have paid it. However, he did not tender payment of any amount at the scheduled closing.

88. Prior to the filing of Lawsuit-1, Lang had been late on some payments but had indicated an intent to pay amounts due at closing,[5] including interest and assessments, and had not been served with a notice of default that had remained uncured, as required by the Agreement (for the termination of his interest in the Property).

89. The April 24, 2012 lawsuit had questionable merit at the time it was filed, as evidenced by Thatcher's dismissal of the same prior to having served Lang with process. The filing of that lawsuit was not a repudiation of the contract or a breach of the same but was, instead, a misguided effort to secure jurisdiction in Utah as a result of Lang's own threat to initiate legal action.[6]

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[5] Some of Lang's written communications indicate that he was deliberately withholding payments as leverage to get Thatcher to give him certain information regarding property taxes or water rights. See, e.g., Exhs. 30 & 129.

[6] On April 23, 2012, one day prior to Thatcher filing the first lawsuit, Lang let her know that he would take every legal procedure possible and that she would not believe the damages if

90. On April 25, 2012, Lang sent an email to Blanchard and Vicory, setting forth "the amounts and dates for 2007 which ties to last addendum of signed contract." Exh. 49. This email correctly identified the dates on which principal payments were made on September 20, 2007, and December 20, 2007. Exh. 59. The email also purported to set forth "the 2006 wire transfers which include interest paid," but again, many if not all of the individual dates and payments set forth for 2006 were incorrect. Exh. 49. Blanchard forwarded this email to Thatcher the same day. Exhs. 49 & 57.

91. Also that day, Lang emailed Morelli, saying, "I just wanted [you] to know that I got my proof from my bank today." Exh. 131. That day, Blanchard sent Thatcher an email with "Lang's 2006 wire transfer records." Exh. 51. It is not clear that the records referenced accurately reflected payments Lang had made to Thatcher.

92. In any event, closing did not occur as scheduled on April 26, 2012. For closing to occur, Lang needed to have acquired the balance of the purchase price or arranged for financing to pay the same. Although the parties did disagree on the amount necessary to close on April 26, 2012, Defendant never tendered payment of the amount he claimed was due and made no interest payments after February 2, 2012. He was behind in his monthly payments to Plaintiff, he had not yet completed due diligence items, such as an appraisal showing enough value to Parcel A (given that the zoning assumption underlying the appraisal he had was by that time incorrect), and he was involved in litigation with the Town of Springdale. As a result of these and other factors, the

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she did not comply with his demands regarding the closing. She reasonably interpreted that to mean that he would initiate legal proceedings. Her filing on April 24, 2012, was in response to that threat and in an effort to secure jurisdiction in Utah, although this court agrees with Lang's arguments that jurisdiction would have been in Utah regardless of who filed first.

closing projected for April 26, 2012, could not and did not proceed.

93. When the April 26, 2012 closing did not occur, the parties – like they had done on prior occasions – once again rescheduled it, this time for May 4. On April 27, 2012, Blanchard sent Thatcher an email with "the 2007 Charles Schwab wire transfer records showing the $75,000 and the $50,000 wire transfers." Exhs. 51, 59, 186 & B-104. The email went on, "As I mentioned to you on the phone, the closing is currently scheduled for May 4, with the hope to move that up to May 2. Please review your bank records to confirm the amount owing. . . ." Exhs. 51, 186 & B-104.

94. Within a few days of receiving Lang's 2007 records showing the principal payments he made following the September 13, 2007 addendum,, Thatcher confirmed that Lang had been correct about the amount of principal owing. Exh. 53. Once Thatcher's misunderstanding regarding the principal amount due under the Agreement had been corrected, on or about May 3, 2012, Thatcher would have closed upon Lang tendering the amounts due per the Agreement.

95. The parties' Agreement, with its several addenda, did not require a closing on April 26, 2012. However, closing was required to have occurred by January 10, 2013, upon Lang having paid the full amount due under the Agreement. After April 26, 2012, the parties continued to correspond and Lang continued efforts to secure financing, but such efforts were unsuccessful and he was not able to close by January 10, 2013.

96. The Agreement does require that "Each party shall . . . deliver such other documents . . . and take such other action as the other party . . . may reasonably require in order

to document and carry out the transaction contemplated in this Agreement." Prior to April 26, 2012, Lang had not produced his own history of accounting records to verify amounts due at that time, despite Thatcher's request that he do so. However, Lang's failure to produce documentation to confirm payments made, in order to resolve the dispute regarding the amount due at closing, is not a material breach of the Agreement since Thatcher could have, and eventually did, confirm that his claims regarding the principal amount due were correct. His refusal to provide her the verification requested is just one more of several examples of the animus and mistrust that existed between these parties which eventually resulted in this lawsuit.

97. Prior to filing Lawsuit-1, Thatcher never agreed that the balance of the Purchase Price owed was $1,000,000. Instead, she continued to insist that the principal balance owed was $1,250,000 until she completed her own accounting and ultimately agreed with Lang's position regarding the principal amount due. At that time, in early May 2012, she was willing to close at the principal amount claimed by Lang.

98. Prior to filing Lawsuit-1, the only notice to cure that Thatcher ever sent to Lang, and that Lang ever received from Thatcher, was Notice-1. Although Lang cured Notice-1, he made no further payments of interest or anything else to Thatcher after February 2, 2012.

99. Although Lang claimed that there had been requests to dismiss Lawsuit-1, after he had become aware of the same, the court finds that a request to dismiss the same was never communicated to Thatcher, except in connection with an effort to resolve other issues that interfered with closing. Further, the court finds that if such a request had been made and if a closing had occurred, she would have dismissed Lawsuit-1.

100. On July 1, 2012, Thatcher mailed a letter (dated June 23, 2012) to Lang, stating as follows:

> As you are aware, you are now, and have been for many months, in default and breach of the contract for purchase of land in Springdale, Utah.
>
> This is not your first notice, and you have previously received written notice pursuant to the contract.
>
> Although you have defaulted, I expected to hear from you concerning my willingness to allow you to cure the default, but I have not.

Exhs. 63 & 64.

101. This letter notably fails to comply with the notice provision of the Agreement. Although the Agreement requires "written notice … specifying [the] breach" alleged to have occurred (emphasis added), the June 23, 2012 letter instead speaks of default and breach in the most general of terms, only referencing a failure of which Defendant is supposed to be "aware."

102. Lang did not make any payments or even respond to the June 23, 2012 notice.

103. On August 13, 2012, Thatcher mailed a letter (dated August 10, 2012) to Lang, stating as follows:

> Though not required by the terms of the contract, this is a formal notice of forfeiture which is the only remedy contemplated by, and pursuant to, the contract between us for your failure to cure within 30 days of receiving a written notice of default.
>
> This letter is also a formal request to remove your Notice of Interest, any Liens or Lis Pendens from the Washington County records on all properties belonging to me including [the Property], within ten (10) days.

Exhs. 65 & 66.

104. On August 28, 2012, Thatcher filed the present lawsuit ("Lawsuit-2") against

Lang alleging that he had "failed to make all payments as agreed," and requesting the Court to remove the NOI from the Property and award her damages associated with the operation of a portion of the Property as a parking lot by Zion Adventure Co.

105. After filing Lawsuit-2, Thatcher immediately filed a notice, voluntarily dismissing Lawsuit-1 without prejudice. Although in error, she still believed that the pendency of that lawsuit preserved her jurisdictional position.

106. Had he been able to obtain the funds to close on April 26, 2012, Lang would have paid any interest that became due on and after February 10, 2012, at the closing. Although Thatcher would have been willing to accept payment of overdue interest at the closing contemplated for April 26, 2012, and had even agreed to waive the interest due in May if closing occurred during that month, she was not willing and did not agree to defer interest payments thereafter.

107. Lang claims that he could have and would have continued making monthly interest payments to Thatcher until January 10, 2013, but failed to do so because of the pending lawsuits. However, the court has not been presented with any evidence to substantiate that testimony and finds to the contrary. Prior to January 10, 2013, Lang never tendered any payments of interest accruing on and after February 10, 2012, or of the principal that would be due at a closing.

108. Lang's failure to tender any further payments to Thatcher after February 2, 2012, in order to preserve his claims against Thatcher was not reasonable. The deadline for performance was January 10, 2013. In order to preserve his claims, tender of accruing interest

payments was essential.

109. Thatcher never asked Lang to put any money in escrow. However, he never offered or attempted to do so either.

110. Prior to the filing of Lawsuit-1, Lang claimed to have secured favorable financing from E Meadow Fund to pay all amounts owed to purchase Parcel A and all debts secured by Parcel B in connection with the development of both parcels.

111. Lang testified at trial that, because the filing and pendency of Lawsuit-1 clouded title to Parcel A, his lender was not able to transfer funds to close on Parcel A before the filing of Lawsuit-2. Additionally, Brad Seegmiller, president of SUTC, testified as follows:

> Q. … [I]n your experience[,] do lenders like loaning money when the property at issue is involved in a lawsuit?
> A. No.
> Q. Why wouldn't a lender want to loan money to someone if the property that's to be the security is in a lawsuit?
> A. It would have the potential to be subject to the lawsuit[,] and you're asking me to assume something, I guess, what would be the intent of the lender, but they wouldn't want property that would be tied up in a legal proceeding.
> Q. And, so, in your experience generally lenders are leery of loaning money secured by disputed property?
> A. Yes.

Day-4 Transcript 60:2-13. However, while not questioning the accuracy of Seegmiller's testimony, the court is not persuaded that Lawsuit-1 interfered with Lang's ability to close any more than did the loss of the commercial rezoning for Parcel A and the pending Springdale lawsuit.

112. Lang testified that the Springdale lawsuit was an issue he resolved with his lender, who was willing to overlook that lawsuit because, unlike Lawsuit-1, it did not cloud title to the

Property. However, no evidence was presented to substantiate this testimony, which is highly questionable given the requirement in the February 15, 2012 letter of intent that Parcel A have an appraised value of $2,450,000, and the undisputed fact that the January 10, 2012 appraisal assigning such value to Parcel A was based in part on the commercial zoning then attached to the property. Since the first two appraisals assign dramatically different values to Parcel A compared to the third appraisal, apparently based on whether it is zoned commercial or residential, they cast further doubt on this aspect of Lang's testimony.

113. On March 25, 2013, Thatcher served Lang and Zambella with a notice to vacate certain property on Parcel A which Lang was then leasing to Zambella as a commercial parking lot for $500 per month. At some point thereafter, though it is not clear when, she directed Zambella to begin making such payments to her rather than Lang, which he did.

114. Thatcher currently operates a parking lot ("Zion Park!") on a separate portion of Parcel A, consisting of 100 parking spaces. She charges $10/day for cars, $15/day for RVs, and $30/day for motor homes. She has projected 90-200 vehicles using her parking lot per day.

CONCLUSIONS OF LAW

The previously entered Conclusions of Law are hereby amended to read as follows:

Lang's Claims

Thatcher's filing of Lawsuit-1, while providing no benefit to Lang and possibly contributing to Lang's difficulty in obtaining financing to purchase the property, does not constitute a breach of the parties' agreement for which relief is awardable. Filing the lawsuit without complying with the notice provisions in the Agreement does violate the Agreement.

However, Lang was never served with Lawsuit-1 and the same was voluntarily dismissed by Thatcher without Lang ever responding to the same. Moreover, Lang did not demand or even request dismissal of the lawsuit. Had the pendency of the lawsuit been such a critical factor in Lang's obtaining financing, a reasonable person would have taken the initial step of demanding that the lawsuit be dismissed. With the exception of including dismissal of the lawsuit as part of an effort to resolve other issues that interfered with closing, dismissal of Lawsuit-1 was not demanded nor discussed with Thatcher and, had the request been made, she would have dismissed it, provided a closing would take place.

Thatcher's belief that a different amount would be due at closing also does not constitute a breach of the Agreement. Cf. First Sec. Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1082 (Utah 1983) (where "[t]he monthly payments had on occasions been prepaid and at other times were in arrears," court said that it was "understandable that neither buyer nor sellers would know the exact status of the payments at any time"). Even if, due to the clarity of the September 13, 2007 addendum, it was at first unreasonable for Thatcher to overstate the amount due in principal on March 19, 2012, Lang significantly clouded the issue when, at least between April 5 and April 25, he repeatedly presented dates and amounts of purported payments to Thatcher that bore virtually no relation, if any, to the actual payments made to her. Upon examining her records in connection with Lang's 2007 records, which he did not provide until after April 26, 2012, she agreed with Lang and was willing to close upon payment of amounts due, including $1,000,000 principal. As of May 3, 2012, Thatcher was willing to close at that amount.

Further, even if Thatcher breached the Agreement by filing Lawsuit-1 and/or by failing to

confirm the principal amount owing under the Agreement prior to the April 26, 2012 closing date, the court cannot say that such breach was material. At that time, Lang had already lost the favorable commercial rezoning for Parcel A and was engaged in a related lawsuit with Springdale. Given that, as far as the credible evidence at trial discloses, Parcel A could not meet Lang's lender's written value requirement as residential property, this court cannot determine that Thatcher's failure to confirm the principal amount owing under the Agreement by April 26, 2012, and/or her filing of Lawsuit-1, made financing more difficult to obtain, or that Lang would have been able to obtain financing had Thatcher more promptly confirmed the amount owing and not filed Lawsuit-1.

Lang never tendered the $1,000,000 principal amount outstanding prior to January 10, 2013. Neither did he tender the ongoing monthly interest payments after February 2, 2012, as required by the Agreement and its September 13, 2007 addendum. He stopped paying Plaintiff the $10,000 monthly amounts after making the January 2012 payment in February and never paid anything to Plaintiff again. Because Defendant failed to tender any past-due monthly interest payments into escrow, he failed to mitigate his damages and has no remedy for damages against Plaintiff. The burden is on Defendant to tender performance and he failed to do so.

The Utah Supreme Court denied the buyer/defendant's request for specific performance where the buyer "failed to tender their own performance before or at the time of bringing the suit." Century 21 All W. Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 55 (Utah 1982). In Century 21, there was a disagreement between the buyer and seller about whether a $5,000 lien had to be paid prior to closing. Id. In upholding the district court's decision, the Court stated:

> The parties were deadlocked in the week preceding the agreed closing date, both having taken a position of doubtful validity on the law or the facts. Both parties insisted that the Citicorp encumbrance be cleared by the other in advance of the closing, buyers because they thought this was their legal right, and seller because the buyers were insisting upon clearance and because she had made this an oral addition to the contract. This is precisely the sort of deadlock meant to be resolved by the requirement of tender.

Id.

Accordingly, in ruling against the buyer's request for specific performance in Century 21, the Court reaffirmed the following rules:

> During the executory [] period of a contract whose time of performance is uncertain but which contemplates simultaneous performance by both parties, such as the Earnest Money agreement involved in this case, neither party can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance. 6 Corbin on Contracts s 1258 (1962). In other words, the party who desires to use legal process to exercise his legal remedies under such a contract must make a tender of his own agreed performance in order to put the other party in default. Huck v. Hayes, supra ; 15 Williston on Contracts s 1809 (3d ed. W. Jaeger 1972).
>
> To qualify under this rule, a tender, such as an offer to pay money, must be complete and unconditional. Timpanogos Highlands, Inc. v. Harper, Utah, 544 P.2d 481 (1975); Zion's Properties, Inc. v. Holt, Utah, 538 P.2d 1319 (1975).

Id. at 55-56.

Lang not only failed to tender the principal amount which he knew was due, he failed to tender any interest payments that he knew were due until the deadline for his performance in January 2013. His failure to tender anything, under the circumstances of this case, precludes his recovery against Thatcher. Although Lang has argued that Thatcher's actions prevented and excused his tender, cf. PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792, 799 (Utah Ct. App. 1997) (where "trial court concluded that [plaintiff] 'made all reasonable efforts to comply in good faith

with its obligations under the contract,' and that '[a]ny failure of [plaintiff] to perform under the contract was directly related to or caused by [defendant's] bad faith and failure to perform[,]'" and where "there was testimony during the course of the trial that [plaintiff] was still ready, willing, and able to buy the property," "the trial court was correct in concluding that, although [plaintiff] had not tendered its performance, an award of specific performance in [plaintiff's] favor could be granted") (citation omitted), the court cannot agree, as previously explained.

For the foregoing reasons, Lang's first cause of action for Breach of Contract and third cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing – both of which are premised on the unproven proposition that Lang lost his funding due to Thatcher's failure to confirm the correct amount of principal owing under the Agreement prior to April 26, 2012, and having filed Lawsuit-1 – are dismissed.

Lang's second cause of action for Breach of Contract is based on the incorrect assertion that Thatcher entered into an agreement in which she promised to pay Lang $5,000 and that, despite Lang performing under such agreement, Thatcher has not done so. This agreement was part of an addendum to the Agreement and, by its terms, merely required Thatcher "to reduce the final pay out amount by the sum of $5,000.00." Exh. 29. In other words, this promise was to affect the final closing amount. Because that closing never happened (as a result of Lang's failure to secure funding), he is not entitled to $5,000 or any other amount pursuant to this agreement. Lang's second cause of action is therefore likewise dismissed.

Lang's fourth cause of action for Unjust Enrichment and fifth cause of action for Promissory Estoppel must overcome the fact that the parties here entered into an enforceable

contract. See E & H Land, Ltd. v. Farmington City, 2014 UT App 237, ¶¶ 29-31, 336 P.3d 1077 ("Like unjust enrichment and other equitable remedies, promissory estoppel is available only to a party who has no right to relief under an enforceable contract. . . . Once a court determines 'that an enforceable contract exists and governs the subject matter of the dispute,' the plaintiff is no longer free to maintain inconsistent legal claims for breach of contract and equitable claims for promissory estoppel or unjust enrichment.") (citations omitted). Thus, the parties' rights are generally governed by that contract, not by the equitable doctrines of unjust enrichment and promissory estoppel. As a result, Lang's fifth cause of action is also dismissed.

However, the court determines that the fourth cause of action for unjust enrichment should be allowed. Although a contractual liquidated damages provision is presumptively enforceable, see Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc., 2012 UT 49, ¶ 40, 285 P.3d 1193 (holding that "courts should begin with the longstanding presumption that liquidated damages clauses are enforceable" and may be challenged "only by pursuing one of the general contractual remedies, such as mistake, fraud, duress, or unconscionability"), Thatcher's contractual right to retain payments as liquidated damages is conditioned on her strict compliance with the forfeiture provisions. See Commercial Inv. Corp. v. Siggard, 936 P.2d 1105, 1109 (Utah Ct. App. 1997) (recognizing that, to enforce a contractual forfeiture provision, "'the seller must comply strictly with the notice provisions of the contract[]'") (quoting Grow v. Marwick Dev., Inc., 621 P.2d 1249, 1251 (Utah 1980)) (emphasis added in Siggard; other citations omitted). Because, as explained below, she has not done so, she has no contractual right to retain them.

Since the conditions necessary for the enforcement of the forfeiture provision are not met

here, the court concludes that the Agreement should be treated as one lacking such a provision, and that the unjust enrichment claim is viable. See James O. Pearson, Jr., Annotation, Modern Status of Defaulting Vendee's Right to Recover Contractual Payments Withheld by Vendor As Forfeited, 4 A.L.R.4th 993 § 2 (Originally published in 1981) (noting that, while there are many cases to the contrary, "in some of the cases not involving contracts containing forfeiture provisions, the courts have considered [application of the general rule that a vendee in default cannot recover back the money he has paid on an executory contract to his vendor who is not himself in default] to be an inequitable result and have thus allowed a defaulting vendee to recover some or all of his payments if it was equitable to do so, it typically being held that the vendee was entitled to recover the amount in excess of the damages suffered by the vendor"); Restatement (Third) of Restitution and Unjust Enrichment ("Rest.") § 36(1) (2011) ("A performing party whose material breach prevents a recovery on the contract has a claim in restitution against the recipient of performance, as necessary to prevent unjust enrichment."); id. cmt. d ("The classic illustration of restitution in this setting is the claim by a defaulting purchaser of real property.").

> In order to prevail on a claim for unjust enrichment, three elements must be met. First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. The plaintiff must prove all three elements to sustain a claim of unjust enrichment.

Desert Miriah, Inc. v. B & L Auto, Inc., 2000 UT 83, ¶ 13, 12 P.3d 580 (citations and internal quotation marks omitted).

It is undisputed that Lang has paid Thatcher $800,000 in principal under the Agreement,

and $671,250 in interest. The interest was a negotiated amount, apparently intended to extend Lang's time to perform by keeping the property unavailable for sale to other potential buyers. Once that payment is established, the court considers it appropriate that the burden of establishing damages caused by Lang's breach would shift to Thatcher and that she be entitled to offset against any unjust enrichment award any damages she has suffered.. Although she presented no specific evidence of any such damages, the court finds that the parties agreement regarding interest payments is an appropriate measure of any damages Thatcher suffered as a result of the property being unavailable for sale to another buyer. Even acknowledging that Thatcher should be entitled to retain the interest payments, the existing evidence shows that Lang has conferred a net benefit upon Thatcher, and that the circumstances are such as to make it unjust for her to retain the amount paid toward the purchase price, $800,000.00. Lang is entitled to a judgment against Thatcher on his fourth cause of action for unjust enrichment in that amount.

Thatcher's Claims

Section 4.4 of the Agreement allows for Thatcher to terminate the Agreement and to retain Lang's payments as liquidated damages as follows:

> 4.4. Buyer Default. [Thatcher] may terminate this Agreement by giving written notice to [Lang] if [Lang] materially breaches any covenant or other obligation of [Lang] under this Agreement and fails to cure such breach within thirty (30) days after written notice from [Thatcher] is received by [Lang] specifying such breach. If [Lang] fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to [Thatcher] as liquidated damages.

Exh. 8 §4.4 (emphasis added).

Thus, under the plain language of Section 4.4, Thatcher is required to give two written

notices to Lang in order to terminate the Agreement and to retain Lang's payments as liquidated damages. First, to effect this outcome, Thatcher was required to notify Lang in writing of any material breach and give him thirty days to cure. Only if, after sending such notice, the specified breach was uncured after 30 days, could Thatcher give written notice of intent to terminate the Agreement. See Commercial Inv. Corp. v. Siggard, 936 P.2d 1105, 1109 (Utah Ct. App. 1997) (similarly explaining parallel forfeiture provision). The second sentence of Section 4.4 addresses the monetary consequence to Lang (i.e., forfeiture) of his failure to pay money during the "thirty (30) day grace period," which the court interprets to be the 30 day cure period established by the first sentence. The first notice, sent in late 2011, was cured. The June 23, 2012 notice of default fails to specify the alleged breach as required by Section 4.4 and is therefore invalid under the strict compliance standard. See, e.g., Adair v. Bracken, 745 P.2d 849, 852 (Utah Ct. App. 1987) (notice of default letter "fatally omitted the amount the sellers were demanding, including principal, accrued interest and back taxes") (citations omitted). Because the notice of default was invalid, Thatcher had no right under the terms of Section 4.4 to terminate the contract and declare a forfeiture. It follows that "[Lang] did not forfeit [his] rights under the contract" by his failure to respond to Thatcher's notice of default or cure such within 30 days thereof. See Madsen v. Anderson, 667 P.2d 44, 48 (Utah 1983); see also Siggard, 936 P.2d at 1110 (declining to excuse as a mere "technical violation" sellers' admittedly defective notice of forfeiture, which was sent 28 rather than 30 days after the notice of default, notwithstanding "[b]uyer's knowledge of its default and its failure to tender performance in those last two remaining days," which the court explained "does not validate [s]ellers' otherwise defective forfeiture").

Nevertheless, given the court's determination, as previously explained, that Lang is not

entitled to an award of specific performance due to his unexcused failure to tender his own performance at any time prior to the January 10, 2013 deadline, he lacks any enforceable right to Parcel A under the Agreement. Cf. Siggard, 936 P.2d at 1110 (ultimately holding that despite seller's ineffective forfeiture notice, buyer was not entitled to two additional days in which to cure default because he failed to appeal jury determination that he was not entitled to specific performance, which was essentially relief he was seeking). Under these circumstances, it only seems reasonable to recognize that fact by quieting title in Thatcher. See Siggard, 936 P.2d at 1112 (Orme, J., concurring) ("Being in material breach of its [payment] obligations under the contract, without excuse and without having tendered its performance, Buyer was simply not entitled to specific performance of the contract. In turn, Sellers were entitled to have their title quieted against Buyer, which had lost its rights under the contract by its long-standing material breach and its failure to tender its performance."); see also W. W. Allen, Annotation, Right of vendor in contract for sale or exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 A.L.R. 1239, §§ I & IV (Originally published in 1935) (recognizing that, generally, "it is of course clear that, in strictness, a suit to obtain a cancelation, forfeiture, or foreclosure cannot be maintained where, by reason of statute or the terms of the contract, such termination of the contract is to be effected extrajudicially upon the giving of a particular notice," and further recognizing that "[u]pon strict theory, and according to the rule supported by at least a half of the cases, the contract relation between the parties to a contract for the sale or exchange of land must be terminated by notice, if not otherwise terminated, before a suit to quiet title to the premises will lie," but noting that "since the mere giving of such notice and compliance

therewith, as by surrender of possession by the party receiving the notice, would not necessarily dispense with the bringing of a suit to quiet title, the insistence upon a preliminary notice is not in all cases founded upon the practical considerations of justice that apply to a mere suit to recover possession,—which circumstance may, in some measure, account for the conflict in authority as to the necessity of notice in mere quiet-title suits").

Based on the foregoing, the court concludes that Thatcher may not prevail under her first cause of action for Breach of Contract, which in substance is an effort to either validate her invalid pre-suit attempted termination of the Agreement and forfeiture of Lang's rights thereunder or a request to obtain a termination and forfeiture by means other than those she contracted for. Accordingly, that claim is dismissed, but her sixth cause of action to Quiet Title is granted, although she is awarded no "damages based on any loss relative to the continued encumbrance on the property and/or litigation proceeding," Amended Petition, ¶ 141, as none were proven, except as an offset to Lang's unjust enrichment claim, as discussed hereinabove.

Thatcher's second cause of action for Breach of Contract involves Lang's alleged violation of a purported agreement to waive the $5,000 credit to which he was entitled pursuant to the March 11, 2009 addendum to the Agreement. The court does not find that any such agreement existed between the parties, so this claim is likewise dismissed. Finally, her third cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing fails because, although Lang has failed to perform his obligations under the contract, he has not "intentionally or purposely do[ne] anything" to "destroy or injure [Thatcher's] right to receive the fruits of the contract." Mitchell v. ReconTrust Co. NA, 2016 UT App 88, ¶ 58, 373 P.3d 189 (citation omitted), reh'g denied (June 29, 2016), cert. denied, 387 P.3d 508 (Utah 2016). Rather, although

he has at times exaggerated his ability to perform and perhaps even unfairly blamed Thatcher for his own nonperformance, he has clearly been engaged for several years in a genuine attempt to perform his contractual obligations. This claim is also dismissed.

RULING ON PENDING MOTIONS

I. Fees Motion

A. Contractual Indemnity Provision and Reciprocal Attorney Fee Statute

Lang requests attorney fees on two grounds. First, he argues that such an award is proper pursuant to the May 5, 2008 amendment to the Agreement, which provides, in pertinent part:

> 1) Jonathan Zambella will be permitted to build a parking lot on the property . . . . In no instance is [Thatcher] to be charged with any expense whatsoever [in] any way associated with any aspect of said parking lot.
> . . .
> 3) Mike Lang and Jonathan Zambella jointly and severally agree to indemnify and hold [Thatcher] harmless for any and all expenses of any kind or nature in any way associated with the construction, maintenance or operation of the parking lot. This includes but is not limited to attorney's fees, court costs, judgments, building expenses, the cost of removal, insurance and any expenses whatsoever in any way associated with the parking lot. This paragraph is not intended to include expenses which are in no way associated with the parking lot.
> . . .
> 5) This agreement shall be considered an addendum to all previous written agreements between [Thatcher] and Mike Lang. All terms in existence between them which are not inconsistent with this agreement shall remain in full force and effect.

Exh. 17 (emphasis added).

Lang argues that he should be awarded attorney fees under paragraph 3 quoted above and the reciprocal attorney fee statute, see Utah Code Ann. § 78B-5-826 ("A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the

promissory note, written contract, or other writing allow at least one party to recover attorney fees."), "[b]ecause Thatcher's claims in this case are and have always been in some way associated with the Parking lot." See Fees Motion at 8. As of October 14, 2016, the attorney fees requested "total no less than $278,021.07." Id. As Lang is no longer the prevailing party, on any contract claim, the court concludes that this aspect of the Fees Motion is moot.

B. Meritless Claims Brought in Bad Faith Statute

Lang next argues that he is entitled to attorney fees under Utah Code section 78B-5-825(1), which provides, in pertinent part: "In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith . . . ."

Regarding the "without merit" requirement, Lang notes the court's previous characterization of Thatcher's Lawsuit-1 as "groundless" and "without basis in law or fact," given that "Lang had cured every default for which he had been given a proper 30-day notice and the parties had agreed and understood that all further amounts owing would be paid at closing on April 26, 2012." F & C, ¶ 52, at 23-24. He argues that the instant action "is likewise groundless and without basis in law or fact, as the Court has similarly found that Lang was never given a proper 30-day notice and opportunity to cure before this lawsuit was filed either." Fees Motion at 8. Additionally, he points to the court's holding that "Thatcher committed the first substantial breach," F & C at 31, and that all of her claims "have failed as a matter of law." Fees Motion at 9 (citing different court rulings dismissing Thatcher's claims). Clearly, the factual underpinnings for this aspect of the Fees Motion are likewise now missing based on the amended Findings and Conclusions. The Fees Motion is denied.

II. Motions to Amend

A. Standard for Rule 52(b) Motion

A recurring issue in the various motions to amend is the applicable standard to be applied. These motions are brought under rule 52(b), Utah R. Civ. P., which provides, in pertinent part: "Upon motion of a party filed no later than 28 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Utah R. Civ. P. 52(b).[7] The parties agree that, because there is little Utah law treating this provision, the court should look to the federal case law for the applicable standard regarding motions brought thereunder.

Thatcher argues for a highly restrictive construction that would allow for amendments under this provision only "in very narrow circumstances," such as 1) "to correct manifest errors of law or fact," 2) to consider "new evidence not available at trial," or 3) "where there has been a change in the controlling law." Opp. Property Value Motion at 3-4 (citations omitted). She stresses that "a motion under Rule 52(b) is not to allow [1] the re-litigation of old issues, [2] a rehearing on the merits, or [3] the presentation of new theories of the case," and that such a motion "is properly denied [4] where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions." Opp. Property Value Motion at 4 (citations omitted).

Lang, on the other hand, while not challenging the grounds identified by Thatcher for

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[7] Notably, "[t]he motion to amend or make additional findings of fact under Rule 52(b) need not . . . await the entry of judgment, but may be made prior thereto." Zions First Nat. Bank v. C'Est Bon Venture, 613 P.2d 515, 517 (Utah 1980) (footnote omitted).

granting (or denying) a rule 52(b) motion to amend, emphasizes that a trial court's amendment of its own findings and conclusions is a matter within the trial court's discretion, and compares his motions to one brought under rule 54(b). See Utah R. Civ. P. 54(b) (providing, in part, that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties") (emphasis added).

The court agrees with Lang's position that the matter is discretionary, and that the court is not rigidly bound from reconsidering its own nonfinal decisions. See Express Recovery Servs. Inc. v. Reuling, 2015 UT App 299, ¶ 22, 364 P.3d 766 (reviewing denial of motion to amend judgment for abuse of discretion); DeBry v. Fid. Nat. Title Ins. Co., 828 P.2d 520, 523 (Utah Ct. App. 1992) (noting that "the very purpose of such a motion [i.e., one brought under Utah R. Civ. P. 50(b), 52(b), or 59] is to allow a trial court to correct its own errors, thus avoiding needless appeals") (emphasis added and citations omitted). Accord Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 125 (1st Cir. 1990).

B. Property Value Motion

Lang asks the court to correct paragraph 73 of its former Findings of Fact, which states: "The value of the Property increased significantly after the parties entered into the Agreement, and is currently at least $2,450,000." Based on the court's review of the evidence presented at trial, this fact has been removed from the court's amended findings. Accordingly, although Lang has effectively been granted the relief he requested via the Property Value Motion, this motion is denied as moot.

C. Interest Motion

Lang asks the court to correct certain findings and conclusions regarding interest, beginning with paragraph 33 of the court's Findings of Fact, which states:

> In preparation for closing, Lang instructed Morelli on February 21, 2012, that $1,000,000 was owed toward the Purchase Price and that $10,000 interest would be due on the then-scheduled date of closing. This was incorrect as to the amount of interest that would be due. At that point, he had only made the interest payments due through January 10, 2012, so he would have owed $20,000 in interest by March 10, 2012.

F & C, ¶ 33 (emphasis added).

Again, based on the court's review of the evidence presented at trial, this fact paragraph has been corrected, and the amended conclusions no longer include the provisions Lang sought to amend via this motion, which is therefore likewise denied as moot.

D. Rents Motion

Lang asks the court to credit him for $20,000 in lost rent that occurred between July 2013 and October 2016, inclusive, after Thatcher had served him (on March 25, 2013) with a notice to vacate the parking lot on the Property, which he had been renting to Zion Adventure Co. ("ZAC") for $500 per month. He notes that Thatcher has taken over the parking lot and continues to collect rent from ZAC, and that the lost rent constitutes "damages that were the reasonably foreseeable result of [Thatcher's] failure to close the deal," which the court has held Lang entitled to recover. F & C at 32. Again, the court's amended conclusions undermine the basis for the motion. Because the court now holds that Lang is not entitled to recover damages against Thatcher, the Rents Motion is also denied as moot.

E. Revenue Motion

In this motion, Lang asks the court to credit him with "(1) the lost rental value of the Property; or (2) the lost projected revenue from two acres of the Property; or (3) the lost collateral value of the Property." Again, he characterizes these amounts as reasonably foreseeable damages he incurred as a result of Thatcher's breach of contract. For the reasons just stated regarding the Rents Motion, the Revenue Motion is also denied as moot.

F. Work Value Motion

Lang argues that the evidence is undisputed that he spent $97,539.38 on architectural services to develop Parcel A and that all such work will need to be redone because it was done with Parcel B in mind, which is no longer there. He therefore asks the court to reduce the balance owed for the Property by that amount. Again, the court's amended conclusions render this motion moot and as such it is denied.

G. Taxes Motion

Lang asks that, if the court denies the Revenue Motion (which it does, as indicated above), he at least be given a reduction of the balance owing for the Property by the amount of unpaid property taxes that have accrued while Thatcher has had exclusive possession and control of the Property, and the associated penalties and interest. Like the other motions, this one is denied as moot based on the court's amended conclusions.

VIII. Proposed Judgment

Based on the amended findings and conclusions, the parties' disputes regarding Lang's proposed Judgment are also moot and the court declines to reach them.

Thatcher's counsel is to prepare an Order, consistent with this decision.

DATED this 24 day of May, 2017.

BY THE COURT:

G. MICHAEL WESTFALL
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120500520 by the method and on the date specified.

MAIL: ELI L MILNE 192 E 200 N 3RD FL ST GEORGE, UT 84770
MAIL: BRYAN J PATTISON 192 E 200 N STE 300 ST GEORGE UT 84770
MAIL: BENJAMIN S RUESCH 55 S 300 W STE 1 HURRICANE UT 84737

Date: 05/03/2017 /s/ JUDY BRADER

Deputy Court Clerk

Addenda 2

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT is made and entered into by and between Melanie A. Madsen, of Ogle, Illinois (the "*Seller*"), and Michael P. Lang, of Kirkland, Washington (the "*Buyer*").

RECITALS

A. The Seller owns certain real property located in the Town of Springdale, Washington County, Utah.

B. On February 13, 2006, Seller entered into an option agreement ("*Option Agreement*") with Buyer, granting Buyer the option to purchase the property from Seller in accordance with the terms and conditions of the Option Agreement. A true and correct copy of the Option Agreement, and the addendum thereto, are attached hereto as Exhibit C.

C. Pursuant to the terms of the Option Agreement, upon Buyer's exercise of the option, the parties have agreed to execute a written contract for Buyer's purchase of the real property.

D. Wherefore, Buyer has exercised his option to purchase the real property in accordance with the terms of the Option Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, the Seller and the Buyer hereby agree as follows:

AGREEMENT

1. Purchase.

1.1 Agreement to Purchase Property. The Seller hereby agrees to sell and the Buyer agrees to purchase that certain real property situated in the Town of Springdale, Washington County, Utah, which consists of approximately 19 acres and is more particularly described in Exhibit A and has the Tax I.D. # S-102-B-1, S-102-B-2, S-102-B-6, and S-137-A (hereafter the "*Property*"). The parties agree and acknowledge that Buyer will obtain a survey of the Property and that the legal description from such survey will replace and supersede the legal description attached as Exhibit A to the extent there are any discrepancies.

1.2 Purchase Price. The purchase price which the Buyer shall pay for the Property (the "*Purchase Price*") shall be One Million Eight Hundred Thousand Dollars ($1,800,000.00). The Purchase Price shall be due and payable to the Seller as follows:

(a) *Option Money.* The initial, non-refundable option money of Fifty Thousand Dollars ($50,000.00) has been paid by Buyer to Seller in accordance with the Option Agreement and deposited into Seller's account, and shall be applied to the Purchase Price;

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(b) *First Payment*. The first payment of One Hundred Thousand Dollars ($100,000.00) shall be due and payable on or before May 1, 2006 or on such other date not to exceed seven (7) days as the parties shall agree;

(c) *Second Payment*. The second payment of Four Hundred Thousand Dollars ($400,000.00) shall be due and payable on or before July 5, 2006;

(d) *Third Payment*. The third payment of Six Hundred Thousand Dollars ($600,000.00) shall be due and payable on or before January 5, 2007;

(e) *Final Payment*. The final payment of Six Hundred Fifty Thousand Dollars ($650,000.00) shall be due and payable at Closing, set forth below.

Notwithstanding the above schedule of payments, Buyer may, at any time, pay of such sums without incurring any pre-payment penalty. All funds tendered by Buyer to Seller pursuant to this Section shall be payable in cash, by cashier's check, certified check, wire transfer or other acceptable forms of funds.

2. Terms of Agreement. The terms of the Option Agreement have been merged herein and to the extent any terms or conditions of the Option Agreement conflict or are otherwise inconsistent with this Agreement, the terms of this Agreement shall control.

3. Closing.

3.1 Closing Transactions. The closing of the transactions contemplated herein (the "*Closing*") shall take place on or before January 5, 2008. The place of the Closing shall be at the office of the Southern Utah Title Company in St. George, Utah ("*Escrow Office*"). At the Closing the following shall occur:

(a) The Seller shall execute, acknowledge, and deliver to the Buyer a general warranty deed conveying and warranting to the Buyer title to the Property, subject only to the title exceptions shown on Exhibit B attached (collectively, the "*Permitted Exceptions*").

(b) The Buyer shall deliver to the Seller the final payment in the form required above.

(c) Prorations shall be made as of the Closing Date and appropriate credits shall be given for real property taxes.

(d) The Seller shall pay the premium for the title insurance referred to in Section 3.2.

(e) The Buyer and the Seller shall each pay one-half (1/2) of the costs of the escrow agent service fee charged by the Title Company. The Seller shall pay recording fees and similar charges and expenses.

(f) The Seller and the Buyer shall execute and deliver to each other closing statements reflecting the adjustments, payments, and credits described in this Section 3.1.

(g) Each party shall execute, acknowledge, and deliver such other documents and instruments and take such other action as the other party or its legal counsel may reasonably require in order to document and carry out the transaction contemplated in this Agreement.

(h) Seller agrees to provide to the Internal Revenue Service the Sale of Real Estate 1099 form as required by law.

(i) Existing mortgage and lien indebtedness may be paid out of sale proceeds.

3.2 Title Insurance. In conjunction with the Closing, the Seller shall arrange for the issuance and delivery to the Buyer of a standard form ALTA owners policy of title insurance from the Escrow Office, in an amount equal to the Purchase Price, naming the Buyer as the insured and insuring that title to the Property is vested in the Seller, subject only to the Permitted Exceptions.

3.3 Possession; License to Enter Property. Upon the Effective Date, Buyer and Buyer's employees and agents shall have a limited license to enter upon the Property to fully investigate the Property, including conducting engineering studies and soils and compaction tests, so long as the activities do not materially damage the Property. Buyer shall indemnify Seller from and against any liability and damage arising from Buyer's entry; provided, however, that Buyer shall make no alterations or changes to the Property until Closing. Possession of the Property shall be delivered to the Buyer at the Closing, in the same condition as it now is, free and clear of the rights or claims of any other party. All warranties and representations of the Seller and the Buyer, and any covenants and obligations of the parties hereunder which remain unperformed upon Closing, shall survive the Closing.

3.4. Taxes and Assessments.

(a) Seller Responsibility. As indicated on Exhibit B, at item no. 13, there are presently delinquent taxes, penalties, interest, and costs which constitute liens on the Property, which are presently due and payable by Seller. Notwithstanding anything herein to the contrary, item no. 13 on Exhibit B and any other delinquent taxes, penalties, interests, and costs through the Effective Date of this Agreement shall not be considered Permitted Exceptions and shall be cured by Seller as follows. Upon Buyer's payment of the first payment to Seller (see Section 1.2(b)), Seller pay all outstanding taxes, penalties, and interest on the Property. Upon such payment, Seller shall certify to Buyer that the outstanding amounts have been paid in full. If Seller fails to make such payment, Buyer may cure the delinquent taxes by paying the same directly, and shall receive a reduction on the Purchase Price in the amount paid by Buyer.

(b) Buyer Responsibility. Buyer shall be responsible for the payment of all real property taxes and assessments arising after the Effective Date of this Agreement.

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4. Representations, Warranties and Covenants.

4.1 Seller. The Seller represents, warrants and covenants to the Buyer, as of the date hereof and as of the Closing Date, as follows:

(a) Authority. The Seller has all requisite power and authority to enter into and to perform the terms of this Agreement.

(b) Binding Obligations. This Agreement and all other documents delivered by the Seller to the Buyer, now or at the Closing, which are necessary to complete the transaction contemplated by this Agreement, have been and will be duly authorized, executed, and delivered by the Seller and constitute legal, valid, and binding obligations of the Seller (assuming the same constitute legal, valid, binding obligations of the Buyer), and do not violate the provisions of the agreements which formed the Seller or any applicable laws, ordinances, rules, or regulations.

(c) Title. The Seller's title to the Property is, and the Seller's title to the Property at the Closing shall be, good, merchantable, and marketable fee simple title, free and clear of any liens, encumbrances, highways, rights-of-way, easements, licenses, restrictions, leases, tenancies, mineral leases, reservations or severances, agreements, covenants, conditions, and limitations, except for the Permitted Exceptions. No person (other than the Seller) has any right to possession of the Property, including without limitation lessees for agricultural, billboard/signage or other purposes, and no person has any right or option to lease or purchase the Property.

(d) Environmental. Seller represents that, to the best of Seller's knowledge, there are not now, nor have there been, any underground storage tanks located on the Property and no chemicals or toxic waste have been stored or disposed of on the property and that the Property has not been cited for any violation of any Federal, State, County or local environmental law, ordinance or regulation and the Property is not located within any designated legislative "superfund" area.

(e) Encumbrances. Seller will not enter into or extend any leases with respect to the subject property from and after the date Seller signs this contract without the express prior written consent of Buyer. Seller also agrees to do nothing which would encumber the property until time of closing.

(f) No Prior Assessments. There are no existing prior assessments of any kind or nature due or payable on or prior to the date hereof which are unpaid.

(g) Survey. Prior to Closing, Buyer will obtain a survey of the Property by a licensed land surveyor showing the property lines and fences, if any. The cost of any survey obtained by Buyer shall be paid for by Buyer; provided, however, if the survey obtained by Buyer is the first survey provided to the parties then Seller shall be responsible for payment of half of the cost of the survey.

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4.2 Buyer. The Buyer represents, warrants and covenants to the Seller, as of the date hereof and as of the Closing Date, as follows:

(a) Authority. The Buyer has all requisite power and authority to enter into and to perform the terms of this Agreement.

(b) Binding Obligations. This Agreement and all other documents delivered by the Buyer to the Seller, now or at the Closing, have been and will be duly authorized, executed, and delivered by the Buyer and constitute legal, valid, and binding obligations of the Buyer (assuming the same constitute legal, valid, binding obligations of the Seller), and do not violate the provisions of the agreement which formed the Buyer or any applicable laws, ordinances, rules, or regulations.

(c) Buyer acknowledges for the benefit of Seller and for the benefit of third parties that Buyer has had complete access to the real estate as well as the public records related to the Property, and is satisfied as to the physical and other condition of the Property.

4.3. Seller Default. Upon thirty (30) days prior notification in writing by Buyer to Seller of any material breach of the representations, warranties and covenants of Seller set forth in this Section 4 or elsewhere in this Agreement, Seller, at Seller's own expense, shall cure or remedy any such breach of such representations, warranties and covenants. If Seller fails within thirty (30) days following Buyer's notice thereof to cure or otherwise remedy the breach, Buyer may terminate this Agreement upon notice to Seller. With respect to any cloud on title that may be cured by payment of cash at Closing, Seller shall have until Closing to cure such cloud. In such event, any sums paid by Buyer to Seller shall be returned to Buyer except for the initial $50,000 payment referenced in Section 1.2(a). Nothing contained in this Section shall be construed to require Buyer to postpone the Closing, or to limit or preclude the recovery by Buyer against Seller of any sums for damages to which Buyer may lawfully be entitled, or the exercise by Buyer of any equitable rights or remedies, including, without limitation, the remedy of specific performance, to which Buyer may lawfully be entitled by reason of any material breach of any of the representations, warranties or covenants of Seller set forth in this Agreement.

4.4. Buyer Default. Seller may terminate this Agreement by giving written notice to Buyer if Buyer materially breaches any covenant or other obligation of Buyer under this Agreement and fails to cure such breach within thirty (30) days after written notice from Seller is received by Buyer specifying such breach. If Buyer fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to Seller as liquidated damages.

5. General Provisions.

5.1 Assignment. Buyer shall have the right, upon notice to Seller, to assign all his rights and interest in this Agreement to one or more entities in which Buyer holds a controlling interest.

5.2 Entire Agreement and Amendment. This Agreement, including the exhibits, constitutes the entire agreement between the parties hereto relative to the subject matter

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hereof. Any prior negotiations, correspondence, or understandings relative to the subject matter hereof shall be deemed to be merged in this Agreement and shall be of no force or effect. This Agreement may not be amended or modified except in writing executed by both of the parties hereto.

5.3 Time of the Essence. Time is of the essence in all provisions of this Agreement; provided however that Seller and Buyer may change any date or time limit set forth herein by a written agreement executed by Seller and Buyer or their authorized agents.

5.4 Interpretation. The section headings contained in this Agreement are for purposes of reference only and shall not limit, expand, or otherwise affect the construction of any provisions of this Agreement.

5.5 Notices. Any notice required to be given under this Agreement shall be served personally or shall be mailed by registered or certified mail, postage prepaid, to the addresses specified below unless either party, by written notice, provides a different address for delivery of notices, in which case such notice shall be addressed to such different address:.

If to Buyer:	If to Seller:
Michael Lang PMB 263 9805 NE 116th Street Kirkland, WA 98034	Melanie A. Madsen, P.O. Box 145, Oregon, Illinois 61061 Facsimile: (815) 732-2139
With a copy to:	**With a copy to:**
Bryan J. Pattison Durham Jones & Pinegar 192 East 200 North, 3rd Floor St. George, UT 84770 Facsimile: (435) 628-1610	Fred Morelli, Jr. Morelli & Cook 403 W. Galena Blvd. P.O. Box 1416 Aurora, IL 60407-1416 Facsimile: (630) 892-0479

5.6. Facsimiles. Any facsimile transmission of any documents relating to this contact shall be considered to have the same legal effect as the original document and shall be treated in all manner and respects as the original document.

5.7. 1031 Exchange. The Seller or the Buyer may assign its rights in this Agreement to Southern Utah Title Company, as a qualified intermediary under a §1031 like-kind exchange.

5.8. Successors and Assigns. This Agreement shall bind and inure to the benefit to the parties hereto and their respective successors and assigns.

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5.9. Effective Date. The Effective Date of this Agreement shall be the date on which the last party to sign the Agreement has signed and dated the Agreement. The party last signing the Agreement shall do so within ten days after signature by the party to first sign.

5.10. Dates and Times. In computing any period of time prescribed or allowed by this Agreement, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday (either federal or Utah or Illinois state), in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. The deadline of the last day of the period so computed shall be 5:00 P.M., Mountain Time.

5.11. Governing Law, Jurisdiction, and Choice of Forum. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah. Any action brought to enforce or interpret any provision of this Agreement or that otherwise arises under this Agreement shall be brought in the United States District Court for the District of Utah or in the Fifth Judicial District Court for Washington County, State of Utah. Both parties hereby expressly consent to the personal jurisdiction of said courts and waives any objection they may now or hereafter have to the laying of venue of any action brought in such courts arising from or related to this Agreement.

5.12. Memorandum of Agreement. Upon execution of this Agreement, Buyer may execute and record a Memorandum of Agreement covering the Property.

IN WITNESS WHEREOF, the Seller and the Buyer have executed duplicate originals of this Agreement as of the day and year first above written.

Seller:

Melanie A. Madsen 05/01/06

Buyer:

Michael Lang 5-05-06

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Addenda 3

AMENDMENT TO CONTRACT FOR PURCHASE

THIS DOCUMENT IS AN AMENDMENT to that contract to purchase dated _____, ____, _____ and any subsequent amendments thereto between Mike Lang and Melanie A Madsen. All terms of that contract and amendments remain in full force and effect except for those incompatible with this amendment.

1. Delay of Full Payment:

Parties agree that the payment due January, 2008, may be delayed for up to five years and will be payable no later than January 10, 2013.

2. Principle Payment:

A payment on the Principle in the amount of $50,000.00 will be made within ten (10) days of the signing of this amendment a second payment on principle in the amount of $75,000.00 will be made no later than December 23, 2007, leaving the principle balance due at $1,000,000.00.

3. Interest Only Payments on the Balance:

Interest only payments of $10,000.00 per month shall begin and be payable on January 10, 2008, with subsequent payments due by the 10th (10th) day of each month thereafter until and through January of 2013 or until the property is paid in full. Such payments to be made by electronic money transfer to the account of Melanie A. Madsen. (Routing number to be supplied).

4. No prepayment penalty:

If the full balance due, owing and payable on January 10, 2013, is paid in full anytime prior to January 10, 2013, there will be no prepayment penalty. However, the month's interest on any such payment will be due and owing and is non-refundable if already paid.

5. Notification of Any Change, Improvement or Building on the Property:

The buyer shall notify the seller of any planned or intended change, improvement or construction or building which may affect the property and shall indemnify the seller for the cost of any lien on the property arising from any such change, improvement, construction or building on the property. If any such lien arises against the property, Buyer shall notify Seller within 14 days of any such lien and the Buyer shall have ninety days to cure the lien or be in default of the contract and its amendments. This described default will be treated as any other default event as described in the original contract and/or amendments and the penalty for such default shall arise automatically within thirty days of written notice by the seller to the buyer of any such, or any other, default as described herein or in the original contract and/or other amendments unless the default is cured within that 30 day period.

6. Taxes Insurance and other expenses

Taxes (including fire taxes), assessments, all water and sewer, insurance as required and all other expenses incidental to ownership of the property shall be the responsibility of the buyer and he shall indemnify and hold the seller harmless for such expenses. ~~Buyer shall show proof of payment of taxes and other expenses to the seller within 14 days of the date payment is due.~~ Buyer shall obtain a policy of liability insurance in the amount of AT least $1M ~~within 30 days~~ of the date of this amendment with seller as a named beneficiary. Seller shall be presented with a copy of such policy.

By 1-10-08 FW

Seller will go online to verify taxes

FW

7. Extension or modification of Agreement

This Arrangement may be extended or modified by the parties with terms as agreed upon by the parties in writing at the time of the extension or modification. All extensions or modifications must be in writing signed by both parties.

8. Previous terms

All other terms of the previous contract or amendments thereto not inconsistent with this amendment shall and do remain in full force and effect.

9. Headings

The headings set forth in this amendment are for informational purposes and do not modify the terms of this amendment or previous amendments or the original contract.

10. Signatures

Faxed signatures shall be as effective as hard copy signatures. The parties shall provide each other hard copy signatures as soon after faxed signatures as possible by U.S. mail return receipt requested and within 10 days of faxed signatures.

Signed: _____ Dated: Sept 11, 2007
SELLER

Signed: _____ Dated: 9-13-07
BUYER

Addenda 4

Melanie A Madsen Thatcher
863 Royal Sceptor Way
Washington, UT 84780

E. Troy Blanchard
Durham, Jones, & Pinegar P.C.
192 East 200 North , Third Floor
St George, Utah 84770-2879

Michael Lang
PMB 263
9805 NE 116th Street
Kirkland, WA 98034

June 23, 2012

Dear Mr. Lang,

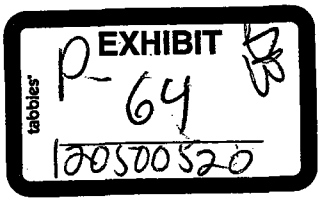
As you are aware, you are now, and have been for many months, in default and breach of the contract for purchase of land in Springdale Utah.

This is not your first notice, and you have previously received written notice pursuant to the contract.

Although you have defaulted, I expected to hear from you concerning my willingness to allow you to cure the default, but I have not.

Best regards,

Melanie Madsen Thatcher
863 Royal Sceptor Way
Washington, UT 84780



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

E. Troy Blanchard
Durham, Jones & Pinegar PC
192 E 200 North, 3rd Floor
St. George UT 84770-2879

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Chris Karr ☒ Agent ☐ Addressee

B. Received by (Printed Name) Chris Karr C. Date of Delivery 7/3/12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7010 1870 0001 2816 8754

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Michael Lang
PMB 263
9805 NE 116th St
Kirkland WA 98034

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X ☒ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery 7/2/12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7010 1870 0001 2816 8747

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

Addenda 5

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

MELANIE A. MADSEN THATCHER, Plaintiff, vs. MICHAEL LANG, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 120500520 Judge G. Michael Westfall

This matter was commenced with the filing of Plaintiff's[1] *pro se* Petition for Removal of Wrongful Lien, Assignment of Rents or Lease and to Quiet Title on August 28, 2012, based on her claims that Defendant had breached the terms of a contract for the purchase of real property owned by Plaintiff and then had filed a Notice of Interest regarding the property, claiming that he had the "right to purchase the Property." Plaintiff asked that the Notice of Interest be treated as a wrongful lien and be removed, requested statutory damages for the wrongful lien and rents received by Defendant from a third party, and sought an order quieting title to the subject property.

Defendant answered on September 18, 2012, denying many of the facts alleged in the

[1] The parties refer to each other at times as either Petitioner or Plaintiff and either Respondent or Defendant. The court will refer to Ms. Thatcher as Plaintiff or Thatcher and Mr. Lang as Defendant or Lang throughout this document.

Petition, and asserted several affirmative defenses. On October 8, 2012, Defendant filed a Counterclaim. In that Counterclaim he alleged that Plaintiff had breached their agreement by, among other things, refusing to close on the appointed date, and requested an order of the court that Plaintiff perform her obligations under the parties' Agreement or, in the alternative, for a judgment against Plaintiff for damages in the amount of "not less than $4,500,000" plus interest and attorney fees in the First Cause of Action and "not less than $5,000" plus interest and attorney fees in the Second Cause of Action. Defendant also asserted causes of action for Breach of Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment, Promissory Estoppel, Interference with Economic Relations, and Interference with Contract, seeking an award for "damages in an amount to be proven at trial."

Plaintiff filed a Motion to Dismiss, for a More Definite Statement or for Summary Judgment on October 22, 2012 seeking dismissal of Defendant's Counterclaim "for failure to state a claim upon which relief may be granted, and for a more definite statement of any claims and defenses surviving [that] motion." In the alternative, Plaintiff sought summary judgment against Defendant on all or part of Defendant's claims.

On November 5, 2012, Defendant filed a Motion to Strike Affidavit of Plaintiff, claiming that designated paragraphs should not be considered by the court, and a Memorandum Opposing Petitioner's Motion to Dismiss, for a More Definite Statement, or for Summary Judgment. Plaintiff responded to the Motion to Strike and replied to the Motion to Dismiss on November

16, 2012. She also filed a Second Affidavit of Plaintiff on that same date. Defendant replied to the Motion to Strike and filed a Motion to Strike Second Affidavit of Plaintiff on November 29, 2012. There followed additional affidavits, motions to strike affidavits, motions to strike filings, requests to submit and objections to requests to submit. At a hearing on March 19, 2013, Judge Wilcox, who was assigned to the case at that time, denied the Motion to Dismiss, except as to the 6th cause of action for Interference with Economic Relations, and declined to consider the Motion for Summary Judgment at that time. An Order was entered by the court on April 2, 2013, consistent with that decision.

On March 26, 2013, Plaintiff filed her Answer to Counterclaim and Affirmative Defenses and requested a hearing on her wrongful lien claim. Following a flurry of filings, including objections to just about every action taken by either party and discovery motions, Judge Wilcox entered several orders on July 11, 2013, including an Order Granting Motion to Strike Petitioner's Response [regarding the Defendant's objection to Plaintiff's request for a hearing on the wrongful lien claim], an Order Granting [Defendant's] Motion to Strike Petitioner's Surreply [regarding Defendant's objection to Plaintiff's proposed order regarding the wrongful lien claim], an Order Granting [Defendant's] Motion to Strike Petitioner's Reply to Lang's Objection [regarding the wrongful lien claim], and an Order Granting [Defendant's] Motion to Strike Petitioner's Reply re Motion to Compel. On July 15, 2013, the court also entered an Order Granting [Defendant's] Motion to Strike Affidavit of Petitioner re: 7th Cause of Action. For

reasons not entirely clear from the record, that last Order was entered again on August 5, 2013.

On August 27, 2013, the court held a hearing on all pending motions. The court denied Plaintiff's request for relief based on the wrongful lien claim, quashed subpoenas Plaintiff had issued, denied the Motion to Compel, and declined to consider the pending Rule 56(f) Motion. The court allowed Plaintiff to request additional discovery, if needed. The orders prepared by Defendant, and approved as to form by Plaintiff, address the relief granted except the Order Granting Respondent's Rule 56(f) Motion, instead of deferring further consideration of the Motion, grants the Motion, extending the fact discovery deadline to November 15, 2013, and declined to consider the Plaintiff's Motion for Summary Judgment on Respondent's Seventh Cause of Action (Interference with Contract) until after Defendant had taken Plaintiff's deposition. That Order also adopts the default dates and deadlines "provided for in rule 26(a) of the Utah Rules of Civil Procedure" using the new fact discovery deadline. That Order did not include a provision allowing Plaintiff to seek additional discovery, despite the court's having announced that decision at the hearing.

On October 11, 2013, Plaintiff filed a Request for Leave to Amend, seeking leave of the court to amend her pleadings to add claims and join additional parties. There followed additional discovery motions and objections to just about every action taken by the opposing party. At a hearing on January 24, 2014, the court granted the Motion for Leave to Amend, except as to the unlawful detainer action, and declined to extend fact discovery. Plaintiff was to

prepare an order for the court's signature. That Order was entered on February 12, 2014. On January 24, 2014, the court also signed and entered an Order striking portions of Plaintiff's pleadings regarding a pending Motion to Compel. The Amended Petition was filed by Plaintiff on April 30, 2014.

On January 28, 2014, Defendant had filed a Motion for Partial Summary Judgment re Wrongful Lien in light of the court's earlier determination that the Notice of Interest filed by Defendant is not a wrongful lien, and requested an award of attorney fees on that claim. Plaintiff responded to that Motion on February 24, 2014, a Reply was filed on February 27, 2014, and the court held a hearing on May 6, 2014. The court denied the Motion for Partial Summary Judgment because Plaintiff had not asserted a wrongful lien claim in her Amended Complaint and the issue of a wrongful lien claim was, therefore, moot. However, the court granted attorney fees to the Defendant on his successful challenge to the wrongful lien claim, heard and decided on August 27, 2013. At a hearing on October 30, 2014, the court granted attorney fees only until the time Plaintiff had abandoned her wrongful lien claim. On January 12, 2015, the court heard the dispute regarding the attorney fees and awarded attorney fees to Defendant in the amount of $4,981.00. The court's Order Granting and Denying in Part Defendant's Motion for Partial Summary Judgment re Wrongful Lien was signed and entered on May 7, 2015.

On February 6, 2014, Plaintiff wrote a multi page letter to Judge Wilcox, asking him to review a document and determine whether he should recuse because of a prior representation of

Defendant's business by Judge Wilcox's former law firm. Judge Wilcox signed and entered an Order of Recusal on February 12, 2012, and the matter was assigned to Judge Eric A. Ludlow on February 20, 2014. On February 28, 2014, Judge Ludlow voluntarily recused from the matter and the case was assigned to Judge James L. Shumate on February 28, 2014. After Judge Shumate's retirement, on March 31, 2014, the matter was assigned to Judge G. Michael Westfall, who has presided over the matter since that time.

On May 19, 2014, Defendant filed a Motion to Dismiss Amended Petition, claiming that the "fourth (fraud), fifth (promissory estoppel), and seventh (defamation) causes of action . . . should be dismissed . . . for failure to state a claim upon which relief can be granted." Defendant answered the Amended Petition on that same date. Plaintiff filed a Memorandum in Opposition to Respondent's Motion to Dismiss on May 29, 2014, and Defendant replied on June 9, 2014. At a hearing on January 12, 2015, the court denied the motion to dismiss the fourth cause of action but granted the motion as it related to the fifth and seventh causes of action. That Order was entered by the court on February 5, 2015.

After several objections to subpoenas regarding discovery were filed, a hearing was held on August 26, 2014, to consider those motions and the same were resolved at that time.

Prior to the hearing on the Defendant's Motion to Dismiss the fourth, fifth, and seventh causes of action of the Amended Petition, Plaintiff filed a Motion for Judgment on the Pleadings, or for Summary Judgment, Against Defendant's Second Cause of Action for Breach of Contract.

This Motion was filed August 22, 2014 and Defendant responded on September 8, 2014, with a Memorandum in Opposition and a Motion to Strike Affidavit of Petitioner re: Petitioner's Motion to Dismiss Respondent's 2nd Cause of Action. Plaintiff withdrew her August 22, 2014 Motion in a Notice, filed on September 17, 2014, but then filed a Motion for Summary Judgment against Defendant's Second Cause of Action for Breach of Contract on September 19, 2014. Defendant filed an Opposition to that Motion on October 17, 2014, and a Motion to Strike Petitioner's Second Affidavit on October 11, 2014. Plaintiff replied to the Opposition regarding Summary Judgment on October 15, 2014, and responded to the Motion to Strike her Affidavit on October 17, 2014. On November 7, 2014, Defendant objected to additional facts alleged by Plaintiff in her Reply. Plaintiff filed her Withdrawal of Motion for Summary Judgment against R. Second Cause of Action Breach of Contract on November 14, 2014, and withdrew her Motion for Judgment on the Pleadings for a second time on that same date. On November 21, 2014, Plaintiff filed her third request for summary judgment on Defendant's second cause of action for breach of contract. Defendant filed his Memorandum in Opposition to Petitioner's Second Revised Motion for Summary Judgment re Breach of Contract on December 8, 2014. Plaintiff replied on December 15, 2014, which was followed by Defendant's Motion to Strike Portions of Plaintiff's Reply Brief, filed on January 6, 2015. At a hearing on January 12, 2015, the court denied the Motion to dismiss Defendant's second cause of action for breach of contract and an Order was entered on February 5, 2015. An Order striking portions of Plaintiff's Reply Brief

was entered on January 26, 2015, as well as an Order Regarding Motion to Strike Additional Statement of Facts in Reply Brief and an Order Granting Motion to Strike Affidavit of Petitioner re: Petitioner's Motion to Dismiss Respondent's 2nd Cause of Action.

On October 23, 2014, Plaintiff had asked the court to take judicial notice of several alleged facts. Defendant objected on November 7, 2014, and Plaintiff filed her Reply on November 13, 2014. At a hearing on January 12, 2015, the court agreed to take judicial notice of the date pleadings were filed but would not take judicial notice of their content for the purpose of establishing any facts. An Order was entered on February 5, 2015.

On October 15, 2014, Plaintiff filed a Jury Demand. This is the first time the issue of a jury trial was brought to the court's attention. Defendant objected on November 7, 2014, and Plaintiff filed her Memorandum in Support of Petitioner's Motion to Reserve Jury Demand or, Alternatively, for Trial by Jury Pursuant to Rule 39(b) on November 12, 2014. Defendant replied to Plaintiff's November 12, 2014, filing on November 24, 2014, and Plaintiff replied to that pleading on December 8, 2014. At a hearing on January 12, 2015, the court sustained Defendant's objection and denied the request for jury trial. An Order Sustaining Objection and Granting Motion to Strike Petitioner's Jury Demand was entered on January 26, 2015, and an Order Denying Plaintiff's Motion to Reserve Jury Demand of for Trial by Jury was entered on February 5, 2015.

At the hearing on January 12, 2015, the court ruled on outstanding motions and

objections. However, Plaintiff claimed there were still issues that needed to be resolved prior to trial. The court allowed her 30 days to file any pretrial motions and to submit outstanding motions for decision.

Defendant filed his Certificate of Readiness for Trial on April 29, 2015.

On June 8, 2015, Plaintiff filed her Motion to Reopen Discovery and Objection to Defendant's Certificate of Readiness for Trial. After the Motion was briefed and argued the court denied the same at a hearing on October 27, 2015, and set the matter for a final pretrial conference on November 10, 2015, with a four day trial to be held on November 30, 2015, December 1, 2015, December 3, 2015, and December 4, 2015. Orders relating to those Motions were signed and entered on December 18, 2015. Both parties filed pretrial disclosures and both parties objected to the other's pretrial disclosures. The pretrial conference was continued to November 17, 2015, and a Stipulated Pretrial Order was entered on November 18, 2015. On November 20, 2015, Plaintiff filed a Motion in Limine to Exclude Evidence Disclosed after Fact Discovery Deadline of November 15, 2013, and a Motion in Limine to Exclude Evidence Regarding Parol Evidence Relating to the Real Estate Purchase Agreement and its Exhibits, Addendums and Amendments. On that same date, Defendant filed a Motion in Limine to Exclude Witnesses, a Motion in Limine re: Appraisals, and a Motion in Limine to Exclude Plaintiff's Post-Discovery Disclosures. Oppositions to the various Motions in Limine were filed on November 25, 2015, and each party filed his or her Trial Brief on that same date.

Trial was held on November 30, 2015, and December 1, 3, 4, 10, 21, and 22, 2015. Prior to beginning trial, the court heard and resolved the pending Motions in Limine. Defendant's Motion to Exclude Witnesses was granted. The court took under submission the Motion to Exclude Expert Testimony, Motion to Exclude Post-Discovery Disclosures, and Motion in Limine to Exclude Evidence Regarding Parol Evidence. The court also took under submission the Defendant's objection to Plaintiff's pretrial disclosures. The parties and witnesses were sworn and testified and numerous documents were marked, offered and received into evidence. Plaintiff's fourth cause of action was dismissed during trial and an Order was entered on March 19, 2016, after the court considered objections to the proposed Order prepared by Defendant. Following the presentation of evidence, the court permitted the parties to submit legal memoranda. Defendant filed a Motion to Strike Undisclosed Trial Exhibits and Associated Testimony, renewing his Objection to Plaintiff's pretrial disclosures. After that issue had been fully briefed, the court denied the same in an Order entered on February 18, 2016. The parties filed their Trial Briefs, containing each party's closing arguments, on April 8, 2016, and each filed a Response to the other party's closing arguments on April 27, 2016. A Request to Submit Case for Decision was filed on April 28, 2016, and the matter was under submission since that time. However, as the court was preparing its decision in the matter it came to the court's attention that there were some issues regarding which exhibits had been received and the status of the exhibits. Those issues were resolved with the court clerk on July 7, 2016, and the matter

has been considered submitted for decision as of that date.

From the evidence presented, the court hereby makes and enters the following:

FINDINGS OF FACT

1. Thatcher is a law school graduate and an experienced attorney, licensed to practice in at least two states.

2. Thatcher owns certain real property located in Springdale, Utah, consisting of approximately 19 acres (the "Property" or "Parcel A").

3. On or about August 8, 2005, Lang purchased certain real property, consisting of approximately two acres ("Parcel B"), located directly across the street from the Property.

4. In the fall of 2005, Lang contacted Thatcher, informed her that he owned Parcel B, and made an offer to purchase Parcel A. Lang also explained to Thatcher what his plans and intentions were with respect to the development of both Parcels A and B.

5. Because Thatcher liked Lang's vision and plans for the Property, she entered into a written Option Agreement with Lang on February 13, 2006, granting Lang "the exclusive right and option to purchase" the Property.

6. Both before and after entering into the Option Agreement, Lang told Thatcher's then-attorney, Fred Morelli, on numerous occasions what his plans and intentions were with respect to the development of Parcels A and B as an integrated project.

7. On May 5, 2006, Lang exercised his option to purchase the Property by entering

into a written Real Estate Purchase Agreement (the "Agreement") with Thatcher, pursuant to which Lang agreed to purchase and Thatcher agreed to sell the Property for $1,800,000 (the "Purchase Price" or "Principal").

8. The Purchase Price was originally due and payable as follows:

> (a) Option Money. The initial, non-refundable option money of [$50,000] has been paid by [Lang] to [Thatcher] in accordance with the Option Agreement and deposited into [Thatcher's] account, and shall be applied to the Purchase Price;
> (b) First Payment. The first payment of [$100,000] shall be due and payable on or before May 1, 2006 or on such other date not to exceed seven (7) days as the parties shall agree;
> (c) Second Payment. The second payment of [$400,000] shall be due and payable on or before July 5, 2006;
> (d) Third Payment. The third payment of [$600,000] shall be due and payable on or before January 5, 2007;
> (e) Final Payment. The final payment of [$650,000] shall be due and payable at Closing, set forth below.

9. The Agreement also required Thatcher to pay all outstanding taxes, penalties, and interest on the Property that were due and unpaid as of the effective date of the Agreement with Lang to pay "all real property taxes and assessments arising after the Effective Date of [the] Agreement."

10. Closing was originally to "take place on or before January 5, 2008."

11. Regarding the possibility of default, the Agreement states:

> 4.3. Seller Default. Upon thirty (30) days prior notification in writing by . [Lang] to [Thatcher] of any material breach of the representations, warranties and covenants of [Thatcher] set forth in this Section 4 or elsewhere in this Agreement,

[Thatcher], at [Thatcher's] own expense, shall cure or remedy any such breach of such representations, warranties and covenants. If [Thatcher] fails within thirty (30) days following [Lang's] notice thereof to cure or otherwise remedy the breach, [Lang] may terminate this Agreement upon notice to [Thatcher]. With respect to any cloud on title that may be cured by payment of cash at Closing, [Thatcher] shall have until Closing to cure such cloud. In such event, any sums paid by [Lang] to [Thatcher] shall be returned to [Lang] except for the initial $50,000 payment referenced in Section 1.2(a). Nothing contained in this Section shall be construed to require [Lang] to postpone the Closing, or to limit or preclude the recovery by [Lang] against Seller of any sums for damages to which [Lang] may lawfully be entitled, or the exercise by [Lang] of any equitable rights or remedies, including, without limitation, the remedy of specific performance, to which [Lang] may lawfully be entitled by reason of any material breach of any of the representations, warranties or covenants of [Thatcher] set forth in this Agreement.

4.4. Buyer Default. [Thatcher] may terminate this Agreement by giving written notice to [Lang] if [Lang] materially breaches any covenant or other obligation of [Lang] under this Agreement and fails to cure such breach within thirty (30) days after written notice from [Thatcher] is received by [Lang] specifying such breach. If [Lang] fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to [Thatcher] as liquidated damages.

12. The Agreement states that any notice required to be given thereunder "shall be served personally or shall be mailed by registered or certified mail, postage prepaid, to the addresses specified" in the Agreement. Those addresses were, for buyer, "Michael Lang, PMB 263, 9805 NE 116th Street, Kirkland, WA 98034, with a copy to Bryan J. Pattison, Durham Jones & Pinegar, 192 East 200 North, 3rd Floor, St. George, UT 84770, Facsimile: (435) 628-1610, and, for seller, Melanie A. Madsen, P.O. Box 145, Oregon, Illinois 61061, Facsimile: (815) 732-2139, with a copy to Fred Morelli, Jr., Morelli & Cook, 403 W. Galena Blvd., P.O. Box 1416, Aurora,

IL 60407-1416, Facsimile: (630) 892-0479.

13. The Agreement expressly authorizes Lang to "execute and record a Memorandum of Agreement covering the Property." Pursuant to this provision, Lang caused a Notice of Interest (the "NOI") to be recorded against the Property on December 13, 2006.

14. On or about December 11, 2006, the parties amended Section 1.2 of the Agreement, regarding payment of the Purchase Price, as follows:

> Section 1.2(d)-(e) of the Agreement is amended as follows, and subsections (f)-(h) are hereby added:
> (d) [Lang] shall pay to [Thatcher] the sum of [$12,500] upon (i) [Lang's] receipt of [Thatcher's] signature to this Second Addendum and (ii) [Thatcher's] commitment to an on-site visit to the Property with [Lang], which shall occur in December 2006 or January 2007 (excepting December 21, 2006 to January 1, 2007) at a time mutually convenient to the parties. Funds for this payment will be made by wire transfer to [Thatcher]. The sum paid under this Section 1.2(d) represents return of the amount withheld by [Lang] as set forth in the First Addendum and shall be applied to the Purchase Price.
> (e) [Lang] shall pay to [Thatcher] the sum of [$25,000] on or before December 23, 2006. This sum shall be applied to the Purchase Price for the Property.
> (f) [Lang] shall pay to [Thatcher] the sum of [$100,000] on or before January 5, 2006. This sum shall be applied to the Purchase Price for the Property.
> (g) [Lang] shall pay to [Thatcher] the sum of [$101,250], which sum represents an interest payment of 9% on the $1,125,000.00 million outstanding on the Purchase Price for the Property and shall not be applied to the Purchase Price.
> (h) The final payment of [$1,125,000] shall be due and payable at Closing, on or before January 7, 2008.

15. On September 13, 2007, the parties amended the Agreement again as follows:

> 1. Delay of Full Payment:

Parties agree that the payment due January, 2008, may be delayed for up to five years and will be payable no later than January 10, 2013.

2. Principle Payment:

A payment on the Principle in the amount of $50,000.00 will be made within ten (10) days of the signing of this amendment[;] a second payment on principle in the amount of $75,000.00 will be made no later than December 23, 2007, leaving the principle balance due at $1,000,000.00.

3. Interest Only Payments on the Balance:

Interest only payments of $10,000.00 per month shall begin and be payable on January 10, 2008, with subsequent payments due by the 10th (10th) day of each month thereafter until and through January of 2013 or until the property is paid in full. Such payments to be made by electronic money transfer to the account of [Thatcher].

(Routing number to be supplied).

....

5. Notification of Any Change, Improvement or Building on the Property:

... If any ... lien arises against the property [from any change, improvement, construction or building on the Property by Lang], [Lang] shall notify [Thatcher] within 14 days of any such lien and [Lang] shall have ninety days to cure the lien or be in default of the contract and its amendments. This described default will be treated as any other default event as described in the original contract and/or amendments and the penalty for such default shall arise automatically within thirty days of written notice by the seller to the buyer of any such, or any other, default as described herein or in the original contract and/or other amendments unless the default is cured within that 30 day period.

Morelli, Thatcher's attorney, drafted this amendment to the Agreement. The monthly payments referred to in Paragraph 3 of this amendment, which were due on the 10th day of each month, were for interest that began to accrue on January 10. Except as stated in the December 11, 2006 Second Addendum, the Agreement does not provide for the accrual of interest prior to January 10, 2008.

16. On May 5, 2008, the parties amended the Agreement again as follows:

> 1) Jonathan Zambella will be permitted to build a parking lot on the property....
> ....
> 3) Mike Lang and Jonathan Zambella jointly and severally agree to indemnify and hold [Thatcher] harmless for any and all expenses of any kind or nature in any way associated with the construction, maintenance or operation of the parking lot. This includes but is not limited to attorney's fees, court costs, judgments, building expenses, the cost of removal, insurance and any expenses whatsoever in any was associated with the parking lot. This paragraph is not intended to include expenses which are in no way associated with the parking lot.
> ....
> 5) This agreement shall be considered an addendum to all previous written agreements between [Thatcher] and Mike Lang. All terms in existence between them which are not inconsistent with this agreement shall remain in full force and effect.

17. On March 11, 2009, the parties amended the Agreement again as follows:

> 1. The terms of this agreement shall be binding on all parties. All other terms of all previous agreements shall remain in full force and effect to the extent they are not inconsistent to this agreement.
> 2. [Thatcher] agrees to reduce the final pay out amount by the sum of $5,000.00.
> ....
> 5. These additional terms shall be in full force and effect unless changed later in writing and signed by both parties.

Morelli drafted this amendment to the Agreement. Its purpose was in part to resolve any dispute between the parties regarding Lang's claim that Thatcher had not advised him of circumstances which "may or may not have resulted in an increase of real estate taxes, now or until final payout."

18. Although he had made substantial interest only payments after January 10, 2008, as of December 5, 2011, Lang had not made all of the interest only payments due at that time. On December 5, 2011, Thatcher mailed a letter (dated November 19, 2011) to Lang ("Notice-1"), in which Thatcher wrote:

> This is a notice of breach and request to cure all breaches of the Agreement dated May 5, 2006, within thirty (30) days including in full of all Washington County taxes and other assessments past due and owing on the [Property]. Public information on the taxes due and owing for these parcels is attached herewith. You are currently, once again, late on your monthly payment. In addition, at clause 13 of the Option Agreement, (now merged with the Purchase Agreement) you agreed that during the term of the contract, "Buyer shall be responsible for taxes and assessments." This includes city and county assessments.
>
> ....
>
> In addition, [Thatcher] requests reimbursement for water, sewer and other city assessments she paid during 2006-2008 which were [Lang's] responsibility to pay. An invoice of payments and dates will follow.

This Notice-1 was mailed to Lang at the address specified in the Agreement, with a copy to Bryan Pattison. Lang received Notice-1 on December 9, 2011.

19. After Lang received Notice-1, Thatcher never provided him with "[a]n invoice of payments and dates" for reimbursement of water, sewer, and other assessments.

20. As of January 4, 2012, all property taxes that were due on the Property had been paid.

21. On January 5, 2012, Lang's attorney, Troy Blanchard, faxed a letter to Morelli stating: "Mike Lang indicated that he paid the property taxes yesterday on the property and

brought his payments current with [Thatcher] by paying $30,000. We believe this cures your client's alleged defaults."

22. After receiving this letter from Blanchard, neither Thatcher nor Morelli ever disputed that Lang had cured the alleged defaults at issue in Notice-1.

23. The court finds that Lang timely cured the defaults mentioned in Notice-1.

24. Prior to receiving Notice-1, Lang paid a total of $800,000 to Thatcher under the Agreement toward the Purchase Price. Thatcher received and accepted all of these payments from Lang and never returned any payment to Lang.

25. Prior to receiving Notice-1, Lang paid $101,250 to Thatcher under the Agreement as a one-time-only (9%) interest payment. Thatcher received and accepted this payment from Lang.

26. Prior to receiving Notice-1, Lang paid a total of $330,000 to Thatcher under the Agreement for monthly (12%) interest payments. Thatcher received and accepted all of these payments from Lang.

27. After receiving Notice-1, Lang paid an additional $40,000 to Thatcher under the Agreement for monthly (12%) interest payments. The last such monthly interest payment that Lang made to Thatcher was on February 2, 2012 (for the payment due January 10, 2012). Thatcher received and accepted all of these payments from Lang.

28. As of February 2, 2012, Lang had paid $1,271,250 to Thatcher under the

Agreement, including interest payments.

29. As of February 2, 2012, Lang was current on all interest and principal payments due under the Agreement.

30. On February 9, 2012, Blanchard faxed a letter to Morelli asking "that [Thatcher] be prepared to close the sale of the property by March 10, 2012." The date of closing was later moved to March 15, 2012.

31. In preparation for closing, Lang instructed Southern Utah Title Co. to prepare all of the necessary closing documents, which Southern Utah Title Co. then did.

32. In preparation for closing, the parties understood and agreed that all amounts due under the Agreement, including any accrued interest and assessments, would be paid at the closing which was contemplated would take place in March, and later April, 2012.

33. In preparation for closing, Lang informed Morelli on February 21, 2012, that $1,000,000 was owed toward the Purchase Price and that $10,000 interest would be due on the then-scheduled date of closing. This was incorrect as to the amount of interest that would be due. At that point, he had only made the interest payments due through January 10, 2012, so he would have owed $20,000 in interest by March 10, 2012.

34. On March 1, 2012, Morelli sent an e-mail to Lang and Blanchard "confirm[ing] that the balance due [Thatcher] on principal is $1,000,000.00"; explaining that he still needed to confirm with Thatcher the amount of interest owed; and asking Lang to "prepare the paperwork"

for closing. Eighteen days later, however, Morelli informed Lang that Thatcher believed the balance of the Purchase Price owed was for more than $1,000,000.

35. On March 8, 2012, Thatcher left to the Philippines without confirming the amount of interest owed at closing or having reached a determination regarding what amounts may be due at closing. As a result, closing was moved to April 10, 2012.

36. On March 14, 2012, Morelli faxed a letter to Blanchard claiming that Lang had not paid interest for the last three months of 2011 or for the first three months of 2012.

37. On March 19, 2012, Morelli sent an e-mail to Lang stating that Thatcher "thinks you did not pay [interest for] January or February or March of this year," and that she "does [not] agree that the amount owed [in principal] is $1,000,000[;] she thinks it is more." This was the first notice that Lang received indicating that Thatcher disputed his claim that the balance owed on the Purchase Price was $1,000,000.

38. On March 20, 2012, Thatcher returned from the Philippines.

39. On April 4, 2012—fifteen days after Thatcher's return from the Philippines—Morelli sent an e-mail to Blanchard and Lang claiming that the balance owed on the Purchase Price was$1,250,000. In correspondence dated April 10, 2012, Morelli acknowledged that Lang had made the January 2012 interest payment.

40. On April 5, 2012, Lang sent the following response to Morelli:

> As usual she is wrong[.] Fred[,] read the contract[.] I am paying $10k a month[;]

> that equals $120k a year[;] that equals 12%[.] Do you think [Thatcher] would have let this go for 3 years? . . . Been waiting 2 weeks [since Thatcher's return from the Philippines] and she still gets it wrong[.] To allow last addendum[,] I had to pay down the contract[.] Why would she allow this as well interest rate if she didn't get something for it?

41. On April 9, 2012—the day before closing—Morelli told Lang that more time was needed to close because Thatcher had not yet confirmed the amounts due at closing. As a result, closing was moved to April 26, 2012.

42. On April 20, 2012, Morelli sent an e-mail to Blanchard and Lang stating that he had not received any information from Thatcher since his April 4, 2012 e-mail claiming that the balance owed on the Purchase Price was $1,250,000. Later that same day, Morelli also sent an e-mail to Thatcher, stating:

> [Lang] called[.] [H]e asked if you had actually looked at your bank statements. I told him I thought you had but I do not know. He reminded me that the monthly payment went from $12,000.00 per month to $10,000.00 per month when he made the last payment on principal. He said the interest rate remained the same (12%). That makes sense to me but I have no records and little recollection… I have not heard from you for a while[.] I hope all is OK.

43. On April 22, 2012, Lang sent the following e-mail message to Morelli:

> Fred[,] did you find [Thatcher][?]—Is she contacting bank now[?]—If not I am forced to do any and everything possible at 1pm on 4-23-12 {Pacific daylight time}[.] I have architects, engineers, contractors[,] etc[.] working and counting on me. I already have unnecessary attorney fees[.] I gave [you] the wire transfer dates and amounts for 2006 [p]roving her $1.25m was incorrect AND she signed a contract Sept[.] 7, 2007[,] stating the amount owed was $1.125m and that [L]ang had to pay $125,000 and the interest rate would increase to 12% from 9% by 1-10-

08—which it did. I've done everything I can[.] Damages will be substantial on all sides[.] She has 1 bank to talk to and get answers for herself—maybe an hour of work—instead we get zip[.]

44. On April 23, 2012, Lang sent the following e-mail message to Morelli:

It's 4 pm and I have nothing[.] I'm starting every legal procedure possible at 8 am Pacific 4-24 {my birthday} if I haven't heard from her thru you[.] [Y]ou won't believe the damages[.] [W]e were to close on 4-10-12—her negligence is incomprehensible. Hopefully something is being done today because I stop tomorrow if 8am comes and goes.

45. On April 24, 2012, Lang sent the following e-mail message to Morelli:

I've called a half dozen times today—no response from you[.] Sent emails—no response from you[.] I've tried to get where [Thatcher's] head is—no response from you. We wanted to close on 4-10[.] She left country without helping[.] We advised we wanted to close on 4-26—leaving plenty of time for [Thatcher] to respond and contribute—nothing[.]

I have people working—their livelihoods depending on me—And we have someone willfully hindering this closing.

Please advise today even if it's she hasn't called—I must move forward[.]

46. That same day, April 24, 2012, Thatcher filed a lawsuit ("Lawsuit-1") against Lang in Washington County, Utah, alleging (incorrectly) that Lang had "not been current since October 10, 2011," and requesting the Court to nullify the NOI and to quiet title to the Property in her favor.

47. According to Thatcher's testimony at trial, she believed that the Agreement terminated on or prior to the date that she filed Lawsuit-1 and Lang thereafter had no right or interest in the Property.

48. Because Morelli is not licensed to practice law in Utah, he could not represent Thatcher in Lawsuit-1. As a result, when Thatcher filed Lawsuit-1, Morelli immediately ceased representing Thatcher and had no further communications with Lang or Blanchard.

49. Prior to the filing of Lawsuit-1, almost all communications from Thatcher to Lang had come through Morelli because Thatcher did not want to communicate directly with Lang.

50. Prior to the filing of Lawsuit-1, Lang did not know what amount was owed for assessments because Thatcher did not provide that information to him. Thatcher did not know what amount was owed for assessments prior to the filing of Lawsuit-1. Had Thatcher told Lang what amount was owed for assessments (which, according to her recollection at trial, "was around [$]1,300 or $1,400") before filing Lawsuit-1, Lang could and would have paid it. However, he did not tender payment of any amount at the scheduled closing.

51. Prior to the filing of Lawsuit-1, Lang had been late on some payments but had not refused to pay any amounts owed under the Agreement, had indicated an intent to pay amounts due at closing, including interest and assessments, and had not been served with a notice of default that had remained uncured, as required by the Agreement (for the termination of his interest in the Property).

52. The April 24, 2012 lawsuit was groundless. At that point in time, Lang had cured every default for which he had been given a proper 30-day notice and the parties had agreed and understood that all further amounts owing would be paid at closing on April 26, 2012. Although

the lawsuit was no doubt prompted by Lang's own threat to initiate legal action,[2] and although it was filed merely in a misguided effort to secure jurisdiction in Utah, the claims asserted therein were without basis in law or fact.

53. Prior to Thatcher's filing of the lawsuit on April 24, 2012, Lang had prepared to close as scheduled on April 26, 2012, by arranging for financing to pay the balance of the purchase price, needing only Thatcher's confirmation of the $1 million owing in principal. He had also completed his due diligence items, such as an appraisal showing enough value to Parcel A and Parcel B. Although he was involved in litigation with the Town of Springdale, his lender was aware of such and was not concerned about it as it did not cloud title to the Property.

54. The Agreement does require that "Each party shall . . . deliver such other documents . . . and take such other action as the other party . . . may reasonably require in order to document and carry out the transaction contemplated in this Agreement." Lang had not produced his own history of accounting records to verify amounts due at that time, despite Thatcher's request that he do so. However, Lang's failure to produce documentation to confirm payments made, in order to resolve the dispute regarding the amount due at closing, is not a

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[2] On April 23, 2012, one day prior to Thatcher filing the first lawsuit, Lang let her know that he would take every legal procedure possible and that she would not believe the damages if she did not comply with his demands regarding the closing. She reasonably interpreted that to mean that he would initiate legal proceedings. Her filing on April 24, 2012, was in response to that threat and in an effort to secure jurisdiction in Utah, although this court agrees with Lang's arguments that jurisdiction would have been in Utah regardless of who filed first.

material breach of the Agreement since Thatcher could have, and eventually did, confirm that his claims regarding the principal amount due were correct. His refusal to provide her the verification requested is just one more of several examples of the animus and mistrust that existed between these parties which eventually resulted in this lawsuit.

55. Prior to filing Lawsuit-1, Thatcher never agreed that the balance of the Purchase Price owed was $1,000,000. Instead, she continued to insist that the principal balance owed was $1,250,000 until she completed her own accounting and ultimately agreed with Lang's position regarding the principal amount due. At that time, in early May 2012, she was willing to close at the principal amount claimed by Lang.

56. Although the parties did disagree on the amount necessary to close on April 26, 2012, Defendant never tendered payment of the amount he claimed was due and made no interest payments after February 2, 2012.

57. The parties' written Agreement, with its several addenda, did not require a closing on April 26, 2012. However, the parties had verbally agreed to the April 26, 2012 closing date and Lang would have closed on that date had Thatcher simply reviewed her own records, including the September 13, 2007 amendment, and confirmed the $1 million in principal owing.

58. After April 26, 2012, the parties made no other arrangements to close the transaction prior to January 10, 2013, although they continued to correspond and Lang continued efforts to secure financing, which were unsuccessful due to Thatcher's filing of Lawsuit-1, which

clouded title to the Property.

59. Prior to filing Lawsuit-1, the only notice to cure that Thatcher ever sent to Lang, and that Lang ever received from Thatcher, was Notice-1.

60. After April 27, 2012, Lang made no further payments of interest or anything else to Thatcher.

61. Although he claimed that there had been requests to dismiss Lawsuit-1, after Lang had become aware of the same, the court finds that a request to dismiss the same was never communicated to Thatcher. Lang, on several occasions, testified at trial that Thatcher would not dismiss that lawsuit. However, his only evidence to support that claim was his testimony that "I'm sure my attorney communicated that . . ." without any direct evidence that the request was ever made. Thatcher testified that "if someone had asked me to dismiss it, which they never did, and paid the amounts owed or closed, I would have been happy to dismiss it at a closing or before based on closing or the payment of the amounts owed me."

62. On July 1, 2012, Thatcher mailed a letter (dated June 23, 2012) to Lang ("Notice-2"), in which Thatcher wrote:

> As you are aware, you are now, and have been for many months, in default and breach of the contract for purchase of land in Springdale, Utah.
>
> This is not your first notice, and you have previously received written notice pursuant to the contract.
>
> Although you have defaulted, I expected to hear from you concerning my willingness to allow you to cure the default, but I have not.

63. This letter notably fails to comply with the notice provision of the Agreement. Although the Agreement requires "written notice … *specifying* [the] breach" alleged to have occurred (emphasis added), the June 23, 2012 letter instead speaks of default and breach in the most general of terms, only referencing a failure of which Defendant is supposed to be "aware."

64. On August 13, 2012, Thatcher mailed a letter (dated August 10, 2012) to Lang ("Notice-3"), in which Thatcher wrote:

> Though not required by the terms of the contract, this is a formal notice of forfeiture which is the only remedy contemplated by, and pursuant to, the contract between us for your failure to cure within 30 days of receiving a written notice of default.
>
> This letter is also a formal request to remove your Notice of Interest, any Liens or Lis Pendens from the Washington County records on all properties belonging to me including [the Property], within ten (10) days.

65. Again, this letter, which fails to detail the particular acts claimed to amount to default, is deficient under the "Buyer Default" portion of the Agreement.

66. On August 28, 2012, Thatcher filed the present lawsuit ("Lawsuit-2") against Lang alleging that he had "failed to make all payments as agreed," and requesting the Court to remove the NOI from the Property and award her damages associated with the operation of a portion of the Property as a parking lot by Zion Adventure Co.

67. After filing Lawsuit-2, Thatcher immediately filed a notice, voluntarily dismissing Lawsuit-1 without prejudice. Although in error, she still believed that the pendency of that lawsuit preserved her jurisdictional position.

68. Prior to the filing of Lawsuit-1, Lang secured favorable financing from E Meadow Fund to pay all amounts owed to purchase Parcel A and all debts secured by Parcel B in connection with the development of both Parcels.

69. Prior to the filing of Lawsuit-1, Lang told Morelli on numerous occasions that a lender would be providing financing to pay all amounts owed to purchase Parcel A and all debts secured by Parcel B in connection with the development of both Parcels. However, Thatcher was not aware that a delay in financing to purchase Parcel A would adversely affect Lang's effort to finance or develop parcel B.

70. Because the filing and pendency of Lawsuit-1 clouded title to Parcel A, Lang's lender was not able to transfer funds to close on Parcel A before the filing of Lawsuit-2. Concerning this, Brad Seegmiller, president of Southern Utah Title Co., testified as follows:

> Q. … [I]n your experience[,] do lenders like loaning money when the property at issue is involved in a lawsuit?
> A. No.
> Q. Why wouldn't a lender want to loan money to someone if the property that's to be the security is in a lawsuit?
> A. It would have the potential to be subject to the lawsuit[,] and you're asking me to assume something, I guess, what would be the intent of the lender, but they wouldn't want property that would be tied up in a legal proceeding.
> Q. And, so, in your experience generally lenders are leery of loaning money secured by disputed property?
> A. Yes.

71. The lawsuit with Springdale was an issue Lang resolved with his lender, who was willing to overlook that lawsuit because, unlike Lawsuit-1, it did not cloud title to the Property.

72. Thatcher currently operates a parking lot ("Zion Park!") on a portion of Parcel A, consisting of 100 parking spaces. She charges $10/day for cars, $15/day for RVs, and $30/day for motor homes. She has projected 90-200 vehicles using her parking lot per day.

73. The value of the Property increased significantly after the parties entered into the Agreement, and is currently at least $2,450,000.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following legal conclusions:

By agreeing, on September 13, 2007, that the January 2008 payment could "be delayed for up to five years" and would "be payable no later than January 10, 2013," the parties did not intend to make closing subject to the unilateral caprice of either side prior to that ultimate date. Rather, while they left the actual closing date uncertain, they intended to fix such at a mutually satisfactory time at some point on or before January 10, 2013.

On February 9, 2012, Lang proposed a closing date of March 10, 2012, which the parties then agreed to move to March 15, 2012, then to April 10, 2012, and finally to April 26, 2012. The delays from March 15 to April 10, and then to April 26, were intended to allow Thatcher sufficient time to review her records to determine whether Lang was correct as to the amount of principal and interest then owing. By April 10, the parties were in agreement about the amount of interest owing but Thatcher had still failed to review her records and confirm the amount of principal owing.

However, in the days leading up to April 26, Thatcher abruptly stopped communicating even with her own attorney. By this point in time, Lang had clearly and repeatedly (and correctly) explained his own position as to the amount of principal then owing ($1 million) and had made arrangements to secure funding in such amount, but needed confirmation from Thatcher regarding such.

Understandably, by April 23, having still received no confirmation, or any other communication during the previous two weeks to indicate Plaintiff was even still preparing for the scheduled closing, Lang was very anxious, and threatened to "start[] every legal procedure possible at 8 am Pacific 4-24" if Thatcher had not yet gotten back to him. Rather than simply reviewing her records to confirm the amount owing, or otherwise responding and requesting additional time to prepare for closing, Thatcher filed a groundless lawsuit against Lang, declaring his interest in Parcel A to be terminated. At the time such lawsuit was filed, no uncured notice of default had been given to Lang, and the parties had agreed that the accumulated interest payments (amounting to $34,666.67 from January 11 through April 24, 2012) would be paid at closing.

In failing, despite ample opportunity, to review her records and determine the correct amount of principal owing, which Lang had clearly and repeatedly explained to her, and in failing even to communicate with Lang, and finally, in filing a groundless lawsuit declaring Lang's interest in Parcel A terminated (without a prior 30-day notice of default and opportunity to cure), Thatcher unreasonably delayed the agreed-upon closing date and impeded Lang's

performance, thereby violating her duty of good faith and fair dealing and breaching the parties' contract. See Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975) ("[T]here is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the other's performance of his obligations thereunder; and that one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused.") (footnotes omitted).[3]

Because Thatcher committed the first substantial breach, Lang was excused from having to tender his own performance. See Cross v. Olsen, 2013 UT App 135, ¶ 25, 303 P.3d 1030, 1035 ("[U]nder the first breach rule a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.") (citation and internal quotation marks omitted).

Further, absent Thatcher's breach, Lang would have fully performed his payment obligations under the parties' agreement at the April 26 closing date. By Lang's uncontroverted testimony, his lender was prepared to fund the project once Thatcher confirmed the $1 million principal owing. Lang's uncontroverted testimony also establishes that the Springdale lawsuit

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[3] Under the parties' contract, Lang was not obligated to give Thatcher a 30-day notice and opportunity to cure this particular breach. Section 4.3 of the Agreement provides, in pertinent part, that "[n]othing contained in this Section shall be construed to require [Lang] to postpone the Closing . . . ."

was qualitatively distinct from the lawsuit Thatcher filed, and was of no concern to his lender. Finally, Lang's uncontroverted testimony is that he had completed his required due diligence and was not required to present any additional appraisals.

Thatcher has attempted to blame Lang for her mistake about the amount owing prior to and at the time she filed her lawsuit on April 24, suggesting that he should have provided a more complete accounting or presented his own records to support his computation. However, the September 13, 2007 amendment states on its face that $1 million in principal was owed and Thatcher has given no reasonable explanation for her extended confusion as to such amount.

Under these circumstances, the court concludes that Lang is entitled to specific performance and to damages that were the reasonably foreseeable result of her failure to close the deal. See Wagner v. Anderson, 122 Utah 403, 407-08, 250 P.2d 577, 580 (1952) ("Assuming that the respondent's refusal to perform on time was wrongful, there arose in favor of the appellants a cause of action for specific performance and also any special damages occasioned by the delay which the appellants can prove. . . . [W]hen decreeing specific performance, a court of equity may award damages also to the plaintiff if the decree of specific performance will not give complete relief.") (also recognizing court authority to award reasonable attorney fees for enforcement of contract where parties had so agreed) (citations omitted).

However, contrary to Lang's position, Thatcher was not aware that her failure to close on Parcel A would affect Parcel B or result in its loss through foreclosure, so Lang cannot recover

the damages claimed for Parcel B. The court is also not persuaded that the value of the work done on Parcel A has been greatly impaired, or that any impairment is not more than covered by the significant appreciation in value of Parcel A. Additionally, Lang's claim for lost profits are, as Thatcher has explained, too speculative for the court to accept. Accordingly, the court concludes that granting specific performance will afford Lang complete relief. For these reasons, Thatcher is required to convey Parcel A to Lang for $1,037,149.76 (consisting of $1 million for principal; $34,666.67 for interest ($10,000 for 1/11/12 through 2/10/12; $10,000 for 2/11/12 through 3/10/12; $10,000 for 3/11/12 through 4/10/12; $4,666.67 for 4/11/12 through 4/24/12); $2,225.62 for utilities; and $257.47 for fire protection District assessments).

For the same reasons, Thatcher may not prevail on her claims in this lawsuit and her claims for relief are denied.

Defendant's counsel is to prepare an Order, consistent with this decision.

DATED this 29th day of September, 2016.

BY THE COURT

G. MICHAEL WESTFALL
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120500520 by the method and on the date specified.

MAIL: JOHN R BERGER 192 E 200 N 3RD FL ST GEORGE, UT 84770
MAIL: ELI L MILNE 192 E 200 N 3RD FL ST GEORGE UT 84770
MAIL: BRYAN J PATTISON 192 E 200 N STE 300 ST GEORGE UT 84770
MAIL: BENJAMIN S RUESCH 55 S 300 W STE 1 HURRICANE UT 84737
MAIL: ROGER J SANDERS 55 S 300 W STE 1 HURRICANE UT 84737-0386

09/30/2016 /s/ JUDY BRADER

Date: _____ _____

Deputy Court Clerk