IN THE UTAH COURT OF APPEALS

MELANIE A. MADSEN THATCHER, Plaintiff/Appellee/Cross-Appellant, vs. MICHAEL LANG, Defendant/Appellant/Cross-Appellee.	Case No. 20180009-CA

APPEAL FROM THE FIFTH DISTRICT COURT,
WASHINGTON COUNTY, STATE OF UTAH
THE HON. G. MICHAEL WESTFALL, CIVIL NO. 120500520

BRIEF OF APPELLEE / CROSS-APPELLANT

Karra J. Porter, 5223
Kristen C. Kiburtz, 12572
J. D. Lauritzen, 14237
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111-2048
Telephone: (801) 323-5000

Bryan J. Pattison, 8766
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, UT 84770
bpattison@djplaw.com

PARTIES TO THE PROCEEDING

The parties to this appeal are:

Melanie Madsen (aka Melanie Madsen Thatcher), represented by Karra J. Porter, Kristen Kiburtz, and J. D. Lauritzen of Christensen & Jensen, P.C., and by Benjamin S. Reusch of Ruesch & Reeve, PLLC.

Michael Lang, represented by Bryan J. Pattison, Durham Jones & Pinegar, P.C.

There were no other parties in the court below.

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INTRODUCTION

This case involves a real estate dispute between Thatcher (Seller) and Lang (Buyer). Lang failed to make several required interest-only payments. Thereafter, Thatcher sent a notice of termination that the trial court found to be ineffective. The parties continued to operate under the contract, and the trial court found that Thatcher remained willing to honor the agreement.

Lang never cured the overdue interest payments, nor made any other interest-only payments due under the agreement. Thatcher brought suit for breach of contract, citing the unpaid interest payments. Lang counterclaimed, alleging that Thatcher had breached the contract through the earlier ineffective notice of default and by initially believing that Lang owed more principal before later agreeing with Lang's figures. Lang sought specific performance of the contract.

The case was tried to the bench over seven days. The court initially issued findings of fact that were favorable to Lang. Upon reviewing both parties' post-trial motions, however, the court realized that it had overlooked a key exhibit. That exhibit showed that Lang lacked the funding needed to make the payments required under the contract. The court found that Lang not only did not tender, but could not have tendered, his own performance under the agreement. The court also found that Lang had acted unreasonably by failing for months to make required interest payments, which the court found to be an essential obligation. The court denied Lang's equitable claim for specific performance.

The court did grant Lang relief on his "unjust enrichment" claim, essentially allowing Lang to recoup payments of principal that he had made. The court rejected Thatcher's argument that, under the contract, Lang's failure to make interest payments entitled Thatcher to retain principal payments made before the non-payment.

The trial court's denial of specific performance should be affirmed. The law in Utah (and everywhere else) is that a party seeking specific performance must prove that he was ready, willing, and able to tender his own performance under the contract. Lang does not challenge the court's finding that Lang was not ready or able to tender his own performance, either at the time of Thatcher's alleged repudiation or on the last possible closing date under the agreement. Additionally, specific performance is an equitable doctrine that involves fact-intensive weighing of equities. Lang does not meaningfully challenge the court's finding that Lang's actions were unreasonable, or otherwise demonstrate a clear abuse of discretion. The judgment may be affirmed on this alternate ground as well.

On cross-appeal, Thatcher contends that the trial court erred in interpreting Thatcher's contractual remedies when Lang failed to make the required interest payments. Thatcher also contends it was error for the court to award unjust enrichment damages to Lang. The trial court stated that this issue is not settled in Utah, but Thatcher submits that Utah law does not permit such non-contractual relief when a contract exists that addresses the subject matter and where the trial court found that Lang breached the contract.

STATEMENT OF THE ISSUES

I. Issues for Review on Lang's Appeal

ISSUE NO. 1: Did the trial court abuse its discretion in denying specific performance of the Real Estate Purchase Contract?

Standard of review: "Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the court, and accordingly, considerable latitude of discretion is allowed in determination as to whether it shall be granted and what judgment should be entered in respect thereto; and ruling thereon should not be upset on appeal unless it clearly appears that he has abused his discretion." *Carr v. Enoch Smith Co.*, 781 P. 2d 1292, 1294 (Utah Ct. App. 1989).

Preservation: This issue was preserved in the trial court's ruling at R.9414-9421.

II. Issues for Review on Thatcher's Cross-Appeal

ISSUE NO. 1: Did the trial court err in granting Lang relief on "unjust enrichment" grounds?

Standard of Review: The availability of damages is a question of law, which is reviewed for correctness. *Jones v. Mackey Price Thompson & Ostler*, 2015 UT, 60, ¶ 24, 355 P. 3d 1000.

Preservation: This issue was preserved in the trial court's ruling at R. 9419-9420.

STATEMENT OF THE CASE

Facts relating to Buyer's appeal

The Agreement

Plaintiff/Appellee/Cross-Appellant Melanie A. Madsen Thatcher "owns certain real property located in Springdale, Utah consisting of approximately 19 acres" (the "Property" or "Parcel A.") (R.9384.) On or about August 8, 2005, Defendant/Appellant/Cross-Appellee Michael Lang purchased approximately two acres ("Parcel B") located directly across the street from the Property. (*Id*.) "In the fall of 2005, Lang contacted Thatcher, informed her that he owned Parcel B, and made an offer to purchase Parcel A." (*Id*.) Lang represented that he intended to develop the Property for commercial use. Because Thatcher liked Lang's plans for the Property, she entered into an Option Agreement with him to purchase the Property in and around February, 2006. (*Id*.) Among the terms in the Option Agreement was a Liquidated Damages clause, which provided:

> 11. If purchaser [Lang] defaults on any scheduled payment after expiration of a thirty (30) day grace period, all payments previously made shall be forfeited to Seller [Thatcher] as liquidated damages.

(Ex. 3; Add. Exh. 3.)[1]

On or about April 18, 2006, Thatcher entered into a Second Addendum to Option Agreement with Lang, extending the deadlines for the required payment obligations of the first Option Agreement. (Ex. 5; Add. Exh. 4.) The Second Addendum modified only

[1] References to "Ex." are to trial exhibits. Exhibits to the Addendum are referenced as "Add. Exh."

those terms of the Option Agreement that related to the deadlines set forth in paragraphs 2 and 3 of the Option Agreement, leaving all other terms the same. (Ex. 3; Add. Exh. 3.)

On or about May 1, 2006, following his decision to exercise his option to purchase the Property, Lang entered into a Real Estate Purchase Agreement with Thatcher (the "Agreement"). (R.9384-9385; Ex. 8; Add. Exh. 5.) Under the Agreement, Thatcher agreed to sell the Property to Lang for $1.8 million (the "Purchase Price" or "Principal"). (R.9385; Ex. 8; Add. Exh. 5.) The Purchase Price was originally due in four installments, with the final installment of $650,000 due at closing on or before January 5, 2008. (*Id*.) The Agreement also required, among other things, that Lang pay all real property taxes and assessment arising after the effective date of the Agreement. (*Id*.)

The Agreement contained the following provision regarding default:

> 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.

(Ex. 8 §§ 4.3-4.4; R.9385-9386; Add. Exh. 5, §§ 4.3-4.4.)

As noted in the "Buyer Default" provision, the Agreement still included a Liquidated Damages provision. Additionally, the Liquidated Damages provision from the Option Agreement remained in force as the Agreement and Option Agreement merged. (Ex. 8, § 5.2; Add. Exh. 5, § 5.2.) The Option Agreement was also attached as Exhibit C to the Agreement, and as such constituted a part of the Agreement under § 5.2. (*Id*.) The Agreement also contained a time is of the essence clause, which stated:

> 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.

(Ex. 8, § 5.3; Add. Exh. 5, § 5.3.)

The Agreement underwent several amendments, one of which allowed Lang to delay his payments on the balance of the purchase price for five years until January 10, 2013. (R.9388; Ex. 14; Add. Exh. 6.) Under this amendment, Lang agreed to pay $50,000 toward the principal within ten days of signing the amendment. (*Id*.) Lang further agreed to pay an additional $75,000 toward the principal by no later than December 23, 2007, thereby reducing the principal amount to $1 million. (*Id*.) Lang also

agreed that, beginning January 10, 2008, he would make interest-only payments in the amount of $10,000 a month, payable on the tenth day of each month, until and through January 10, 2013 or until the Property was paid for in full. (*Id*.) Included in the aforementioned amendment was a provision regarding "Previous Terms," which stated:

> 8. Previous terms
>
> All other previous terms of the previous contract or amendments thereto not inconsistent with this amendment shall and do remain in full force and effect.

(Ex. 14, § 8; Add. Exh. 6, § 8.)

The other amendments to the Agreement contained a similar "previous terms" provision. (Exs. 13 § 3; Ex. 10 § 3.)

Lang's Inability to Pay his Monthly Payments and Close on the Property

While Lang paid $125,000 toward the principal following the above amendment, over the course of the next two years Lang struggled to make his monthly interest payments. (R.9389-9390.) "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." (*Id*.) The following month he was late again. (*Id*.)

On or about October 15, 2010, Lang took out a loan in the amount of $215,000 from Occum Partners, LLC to help pay for, among other things, the interest-only payments under the Agreement. (R.9390.) The loan was due one year later, along with $35,000 in interest on that loan. (*Id*.) Lang used $40,000 from the proceeds of his loan

to, among other things, pay the interest payments for October, November, and December 2010 on the Property. (*Id*.)

By October 2011, Lang was again behind on his monthly interest payments to Thatcher, and was also struggling to pay back the Occum loan. (*Id*.) Lang requested and received an extension on the Occum loan until April 15, 2012. (*Id*.) In return for this extension, Lang was required to make monthly interest payments to Occum at a 14% annual rate and at a 20% annual rate in the event that a further extension was required. (*Id*.)

By December 5, 2011, Lang was two months behind on his interest-only payments to Thatcher. At that time, Thatcher mailed a letter to Lang stating:

> 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.

(R.9390-9391; Ex. 35.)

"Strapped for cash to cure his default" for failure to make his monthly interest payments, Lang entered into another loan agreement, this one with Mark Machlis. (R.9391.) This loan was structured as a sale of land owned by Lang (Parcel B) to Machlis for $415,000. (*Id*.) Lang received $250,000 in earnest money that he was obligated to repay to Machlis, along with a termination fee of $19,428 prior to April 13, 2012 to avoid the sale. (*Id*.)

On January 5, 2012, Lang brought his interest-only payments current by paying Thatcher $30,000. (R.9391-9392.) On February 10, 2012, however, Lang again missed his interest-only payment on the Property. (R.9393; R.9412.) On February 15, 2012, Lang received a letter from his primary potential lender for the Property, E Meadow Fund, indicating that it was "explor[ing]" a loan transaction, and intended to process the loan "subject to" the terms and conditions set forth, "and completion of due diligence" and if the Fund "considers it a sound and secure loan." (R.9393; Ex. D-1.) Among other conditions, the lender reminded Lang that to provide the requisite funds, it would require a recent appraisal valuing the property at $2,450,000. (*Id.*) The value of the Property, however, was only $1.8 million. (R.9394, n.3.)

Lang had obtained an appraisal valuing the property at $2.45 million on January 10, 2012, but that appraisal was based on the Property being zoned for commercial use. (R.9393.) The commercial designation was overturned by the Springdale Board of Adjustment in February, 2012. (*Id.*) Lang appealed, but the Board of Adjustment's decision was ultimately upheld. (R.9393-9394.) The commercial zoning was important to the value of the property as borne out by the appraisals—the property is worth only $1.8 million with the residential zoning designation. (*Id.*)

On February 21, 2012, Lang (incorrectly) indicated that he "had money together and wanted to close by March 15, 2012 at the latest." (R.9394; R.9396; Ex. 104.) Thatcher had a trip planned for the Philippines and stated that she could accommodate a March closing, but it would have to happen before she left on March 8. (R.9396; Ex. 108.) Contrary to Lang's indication, however, he had not received any definite

communication from his lender stating that his loan was in place, and he did not have the necessary funds to close by that date. (R.9396.)

In preparation for closing, Lang instructed Southern Utah Title Company ("SUTC") to prepare the necessary closing documents, which SUTC attempted to do. However, SUTC never received documents from any lender showing that Lang had funding to close. (R.9397.) On March 8, Thatcher left for the Philippines and told Lang that closing would have to wait until she returned. (R.9396.)

In anticipation of the closing that Lang indicated would occur on Thatcher's return from the Philippines, Thatcher attempted to reconcile the payments that were still owed by Lang under the Agreement. (R.9397-9398.) A series of back and forth email exchanges occurred between Lang and Thatcher's attorney regarding what was still owing on the Property. (R.9397-9409.) Lang believed the balance on the purchase price was $1 million, but Thatcher believed it was more. (R.9398; Ex. 117.) She also believed that Lang had not made his interest payments for January, February, and March, 2012. (*Id*.)

Thatcher asked Lang to provide information regarding the payments made on the purchase price and his interest payments so that she could confirm the amount owing and could move the closing along, which Lang had represented he wanted to do. (R.9399; Exs. 117 and B-69.) Lang, however, refused to provide his payment information. Instead, he claimed "this is [Thatcher's] problem." (R.9398; Ex. 117.) That same day, Lang added that the January interest payment had been wired to her on February 2, 2012,

but he did not provide any information regarding other payments he had made. (R.9398; Ex. 117.)

On March 20, Thatcher returned from the Philippines. (R.9398.) Upon her return, Thatcher continued to try and reconcile the amounts owed by Lang in preparation for an April closing. (R.9398-9399.) This task was made difficult because Lang refused to provide payment information, and because access to Thatcher's online banking records had been restricted because she had triggered her bank's security measures when she tried to access her account from the Philippines. (R.9399; R.9400-9405.) The day after she returned from the Philippines, Thatcher ordered a CD copy of her bank records from Stillman Bank in Illinois, and told Lang that she was waiting for this information from her bank. (R.9399; Exs. 42 & C-17.) Lang responded: "Closing will be 4-10-12. Lots of time for her." (R.9400; Ex. 120.)

On April 4, Thatcher provided Lang a description of the payments that she had received, and stated that if Lang had records of "payments other than as above please let us know as soon as you can." (R.9400; Ex. 122.) Instead of providing Thatcher the requested information, however, Lang balked, and when he finally did so, "his claimed payments were incorrect . . . and completely unrelated to the transaction covered by the Agreement." (R.9401; R.9404.) The parties were unable to resolve the issues regarding the amount still due under the Agreement—and Lang did not have the requisite financing to close in any event—so a new closing was set for April 26, 2012. (R.9402; Ex. 124.)

"[B]etween April 5 and April 25, [Lang] repeatedly presented dates and amounts of purported payments to Thatcher that bore virtually no relation, if any, to the actual

payments made to her." (R.9415.) "[N]ot surprisingly, [Thatcher] did not confirm Lang's incorrect payment history" because "she was unable to match up his claimed payments with her own bank records." (R.9405.)

Even though Lang did not have the money to close by April 26, he threatened to sue Thatcher, accusing her of being negligent in her bookkeeping and of holding up the closing:

> I'm starting every legal procedure possible at 8 am Pacific 4-24 {my birthday} if I haven't heard from [Thatcher] thru [her attorney]. You won't believe the damages. We 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.

(R.9405; Ex. 126 (cleaned up).)

In response, Thatcher filed a lawsuit ("Lawsuit-1") against Lang in Washington County, Utah, asking the court to nullify the agreement and quiet title to the property in her favor. (R.9406.) "The filing of the 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," and was in response to Lang's threat to initiate legal action. (R.9407.) Thatcher never served Lang with Lawsuit 1. (*Id*.)

Closing did not occur on April 26. (R.9408.) For closing to have occurred, Lang needed to have acquired the balance of the purchase price or arranged for financing to pay the same. (*Id*.) "Although the parties did disagree on the amount necessary to close on April 26, 2012, [Lang] 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 Plaintiffs, he had not yet completed due diligence items, such as an appraisal

showing enough value to the Property, and he was involved in litigation with the town of Springdale." (*Id*.) For these reasons, the closing could not have proceeded on April 26. (R.9408-9409.)

The closing was once again rescheduled—this time for May 4, 2012. (R.9409.) On April 27, Lang, for the first time, sent records of his payments showing that he had made a $75,000 and $50,000 wire transfer to Thatcher, which demonstrated the balance owed on the Purchase Price was in fact $1 million. (R.9409; Exs. 51, 186 & B-104.) Within a few days of receiving these records, Thatcher confirmed that Lang had been correct about the amount of principal owing. (R.9409; Ex. 53.) Once Thatcher confirmed that Lang had been correct about the amount owing, Thatcher would have closed upon Lang tendering the amount due under the Agreement. (R.9409.)

After April 26, 2012, the parties continued to correspond, and Lang continued efforts to secure financing, but such efforts were unsuccessful and Lang was not able to close. (R.9409.) On July 1, 2012, Lang was now five months behind on his interest payments to Thatcher. (R.9412.) Thatcher would have allowed Lang to have paid his delinquent February, March, and April interest payments at the May closing, but she did not agree to allow Lang to defer his interest payments after that date. (*Id*.) Lang knew that he was delinquent in his payments and that Thatcher was not going to allow Lang to defer those payments until closing. (R.9397; Exs. 123 & 124.)

Lang ignored Thatcher's requests to pay the delinquent interest payments. On July 1, 2012, Thatcher mailed a letter to Lang (dated June 23, 2012) stating:

> 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; Exs. 63 & 64; Add. Exh. 7.)

At this time, Lang knew that he was behind on his interest payments under the Agreement and that Thatcher did not agree to allow him to defer these payments until closing, and it was unreasonable for him not to make these payments. (R.9412; R.9397; Exs. 104, 107, 117, 122, 124, B-47 & 195.) Lang did not make any payments or even respond to the June 23, 2012 notice. (R.9411.)

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

> 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 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 10 days.

(R.9411; Exs. 65 & 66; Add. Exh. 8.)

Facts Relevant to Cross-Appeal

In February 2006, the parties entered into an Option Agreement for the purchase of the property. (R.9384; Ex. 3; Add. Exh. 3.) The Option Agreement contained a liquidated damages clause, which set forth that "[i]f [Lang] defaults on any scheduled

payment after expiration of a thirty (30) day grace period, all payments previously made shall be forfeited to [Thatcher] as liquidated damages." (R. 6867, Ex. 3, § 11; Add. Exh. 3, § 11.)

In April 2006, the parties entered into a Second Addendum to Option Agreement. (Ex. 5; Add. Exh. 4.) That Addendum had no effect on the liquidated damages clause in the Option Agreement. In May 2006, the parties entered into a Real Estate Purchase Agreement. (R.9384-9387; Ex. 8; Add. Exh. 5.) The Agreement included a liquidated damages clause that provided:

> 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.*

(R.9396; Ex. 8, § 4.4; Add. Exh. 5, § 4.4 (emphasis added).)

The Agreement was merged with the Option Agreement to the extent the two were not inconsistent, and the Option Agreement was attached as an exhibit to the Agreement. (Ex. 8, §§ 2 & 5.2; Add. Exh. 5, §§ 2 & 5.2.) The Agreement was amended several times. (R.9387-9389, Exs. 13, 14, 17 & 29; Add. Exh. 6.) None of those amendments modified either the liquidated damages clause in the Agreement or the Option Agreement. They generally stated that all previous terms remained the same, and/or that all previous terms remained in full force and effect to the extent they were not

inconsistent with the amendment. (Exs. 13, § 3, 14, § 8, 17, § 5 & 29, § 6; Add. Exh. 6, § 8.)

At trial, Thatcher read into the record the liquidated damages clauses discussed above, and noted that both the Option Agreement and Agreement contained a liquidated damages clause. (R.6858; R.6867-6868.) She further testified, both on direct and cross-examination, to her understanding of the clauses, including what triggered the grace period and what resulted from Lang's failure to make payment within the grace period. (R.6869; R.7156-7158; R.7237-7238; R.7253.) Lang did not offer a differing interpretation. (Trial transcript, *passim*.)

After his last interest payment on February 2, 2012, Lang sent several communications to Thatcher's counsel admitting that he was aware that he was behind on his interest payments and of the amounts owing. (Exs. 107, 117, 122, 124, B-47 & 195.) Informed by these communications, on July 1, 2012, Thatcher sent Lang a second notice of default (dated June 23, 2012), stating:

> 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; Exs. 63 and 64; Add. Exh. 7.)

Lang did not respond to Thatcher's notice in any way, let alone seek clarification or dispute the nature of his default. (R.9411.) Furthermore, he did not make any

payments toward the interest that he owed. (*Id.*) On August 13, 2012, Thatcher mailed Lang a subsequent letter (dated August 10, 2012), indicating:

> Though not required by the terms of the contract, this is 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 written notice of default.
>
> This letter is also 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 parcels: S-102-B-1, S-102-B-2, S-102-B-6, S-137-A, within ten (10) days.

(R.9411; Exhs. 65 & 66; Add. Exh. 8.)

As with the July notice, Lang did not respond, and did not make any of his outstanding interest payments. (R.8081-8082.) At trial, Lang testified that he did nothing in response to either of Thatcher's notices, and that he never cured his default by tendering any of his missed interest payments to Thatcher. (R.7707-7708; R.8081-8082.) He did not claim to be uncertain as to what Thatcher was demanding of him, or that he was misled by Thatcher.

Course of Proceeding and Disposition in the Court Below

On August 28, 2012, Thatcher filed the present lawsuit ("Lawsuit—2"). (R.9411; R.1-3; R.1779-1806.) She dismissed Lawsuit 1 that same day. (*Id.*) In Lawsuit 2, Thatcher, asserted among other things, that Lang breached the Agreement by failing to pay all amounts due under that Agreement. (R.1780-1796; R.9421-9425.) She also argued that, pursuant to the agreement, she was entitled to retain the payments that Lang had made on the Purchase Price as liquidated damages. (R.1796; R.9424-9425.) Lang, in turn, filed a counterclaim asserting that Thatcher breached the Agreement by filing

Lawsuit 1 and by believing at one point that more than a million dollars was due on the Purchase Price at closing. (R.9414-9415; R.38; R.34-45; R.6276; R.6282-6283.) The Court held a seven-day bench trial where it listened to live testimony and received numerous exhibits related to the parties' claims. (*See* Docket.)

Initially, the trial court ruled that Lang was entitled to specific performance of the contract on the ground that Thatcher unreasonably delayed the April 26 closing date and thereby impeded Lang's performance under the contract. (R.8442-8443.) The parties subsequently filed various motions to amend the court's findings of fact. (*See* docket 9/30/2016-5/1/2017.) In considering these motions, the court reviewed the exhibits and trial testimony, and concluded that some of the findings of fact that were central to his underlying ruling were not correct. (R.9393, n2.) The court therefore amended those findings and issued an Amended Findings of Fact and Conclusion of Law and Ruling on Pending Motions and Objections to Proposed Judgment. (*Id*.; R.9383.)

In relation to Lang's First Cause of Action for Breach of Contract, the court ruled that the filing of Lawsuit 1 was not a material breach of the Agreement because, from the time it was filed through the January 2013 closing deadline, Lang could not have closed. He did not have the requisite financing, and the lack of this financing was due to the change in the Property's zoning designation and not the filing of Lawsuit 1. (R.9414-9418.) The court therefore ruled that 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—were dismissed. (R.9418.)

The Court also ruled that Lang's second cause of action for Breach of Contract was based on the incorrect assertion that Thatcher agreed to pay Lang $5,000, and that despite Lang's alleged performance under the agreement, Thatcher has not done so. (*Id*.) The Court ruled that this agreement was to reduce the final pay out amount by $5,000 at closing. "Because the 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." (R.9418.)

The Court, however, granted Lang relief on his claim for unjust enrichment. The court did so on the ground that Thatcher's right to retain payments as liquidated damages was conditioned upon her strict compliance with the forfeiture provision. (R.9418-9421.) The court ruled that Thatcher did not strictly comply, and therefore it was reading the forfeiture provision out of the contract and allowing Lang to recover the payments made toward the Purchase Price. (R.9419-9420.) The Court denied recoupment of interest payments because those payments were made in exchange for Thatcher agreeing to extend Lang's time to perform. (R.9419-9420.)

The court entered judgment on Lang's unjust enrichment counterclaim in the amount of $800,000. (R.9773.) It ordered that Lang's notice of Interest in the Property be released and quieted title in Thatcher. (R.9776). Lang appeals the court's denial of specific performance. (R.9783.) Thatcher cross-appeals the judgment entered in Lang's favor on the unjust enrichment claim. (R.9843.)

SUMMARY OF ARGUMENT

For several independent reasons, the trial court did not abuse its discretion in rejecting Lang's claim for specific performance. The trial court found that, regardless of any claimed repudiation by Thatcher, Lang did not have the financial ability to perform under the contract. Lang does not challenge that factfinding, which is amply supported in the record. Lang's principal argument is that he was excused from performing because Thatcher repudiated. The trial court correctly concluded, however, that Lang should not receive specific performance from Thatcher when he could not have performed his own obligations under the contract. This principle is universally recognized, including in Utah. Any other result would give non-defaulting parties a windfall, granting them more than they would have been entitled to if the other party had fully performed.

The judgment may alternatively be affirmed on the trial court's finding that, "under the circumstances of this case," Lang needed to tender performance. Without such a tender, and considering the evidence at trial of longstanding financial problems, Lang did not meet his burden of proving that he was able to perform. Additionally, without a tender from Lang, the court could not conclude that Thatcher would have refused performance. When a non-repudiating party takes the position that a contract remains in effect, as Lang does, the other party is entitled to retract the repudiation up to the point when performance is due.

The judgment may also be affirmed on a third independent ground, namely that the court did not abuse its discretion in weighing the equities. Lang appears to suggest that the mere (alleged) repudiation of an executory contract automatically entitles the

non-repudiating party to specific performance. That is flatly contrary to Utah law. Specific performance is an equitable remedy, and trial courts are given wide latitude in determining whether it is appropriate in a particular case. Lang does not challenge the trial court's findings that support its decision, *e.g.,* that Lang acted unreasonably in failing to make interest payments for months, that Lang was uncooperative at times, misrepresented his ability to close, and threatened to sue Thatcher.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LANG'S REQUEST FOR SPECIFIC PERFORMANCE AND QUIETED TITLE IN THATCHER'S FAVOR.

The trial court dismissed Lang's breach of contract and breach of the covenant of good faith and fair dealing claims because "both of which [were] 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." (R.9418.) The trial court therefore denied Lang's request for specific performance and quieted title in the Property in Thatcher's favor. As described below, the trial court did not abuse of discretion in so ruling, and this Court should affirm.

A. Lang is not entitled to title in the Property because he was not awarded specific performance of the Agreement.

Lang spends several pages of his brief arguing that the trial court erred in granting Thatcher quiet title because she did not win her underlying breach of contract claim against Lang. (Aplt. Br., pp. 26-30.) That argument misapprehends Utah law. Thatcher

did not need to succeed on her breach of contract claim to be awarded quiet title in the Property. Thatcher already had (and continues to have) title in the Property. Rather, to impinge on Thatcher's title to the Property, Lang needed to be awarded specific performance, which he was not.

The Court addressed a similar issue in *Collard v. Nagle Const.*, 2002 UT App. 306, 57 P.3d 603. In that case, the plaintiff argued that a court should have quieted title in his favor when he succeeded on his underlying breach of contract claim against the plaintiff and was awarded specific performance by the Court. The Court disagreed: "Although the trial court characterized its decision as an order to quiet title, the trial court's decision is actually a decree for specific performance." *Id.*, ¶ 18. The "buyer's only claim to title of the [property] was through specific performance of the contract, and "[u]nless the trial court ordered seller to perform, buyer had no claim to legal title to the [property]. *Id.*; *see also Holladay Towne Ctr., L.L.C. v. Brown Family Holdings, LLC.*, 2011 UT 9, ¶ 54, 248 P.3d 452 ("Standing to bring a quiet title action to perfect title is limited to parties who could acquire an interest in the property created by the court's judgment or decree.")

Here, there is no dispute that Lang does not have title in the Property, and the trial court found that "Thatcher owns . . . the Property." (R.9384.) Lang does not challenge that finding. Lang's only claim to the Property is through specific performance of the Contract. Absent such an order, Lang is not entitled and does not have standing to challenge Thatcher's title in the Property. *Holladay Towne Ctr.*, 2011 UT 9. Although Lang frames the issue on appeal as (1) whether the trial court erred in quieting title to

Thatcher and (2) whether the court erred in denying specific performance, the arguments are one and the same. The only question before this Court is whether the trial court abused its discretion in denying Lang's request for specific performance.

B. The trial court did not abuse its discretion in finding that Lang was not entitled to Specific Performance.

1. The trial court did not abuse its discretion in denying specific performance because Lang was unable to perform under the contract.

Because "specific performance is an equitable remedy, the trial judge has considerable discretion in determining whether equity and good conscience require that the relief be granted." *Ferris v. Jennings*, 595 P.2d 857, 859 (Utah 1979). As noted above, the trial court found that Lang was not able to perform under the Agreement because he could not establish that he could obtain financing from his lender by the January 10, 2013, closing deadline. The court also found that Lang had acted unreasonably, including failing to make interest payments for months.

Lang argues that the trial court abused its discretion. Lang's principal argument is that his performance was excused because Thatcher allegedly repudiated the Contract by filing either Lawsuit 1 or Lawsuit 2. There are several problems with this argument.

First, it is partially unpreserved. Lang did not claim below that Lawsuit 2 was a repudiation that justified his nonperformance. His counterclaim alleged that Lawsuit 1 constituted a repudiation, which the court rejected.[2] (R.9414-9415; R.35-40; R.6276;

[2] Lang's counterclaim also alleged that Thatcher's initial incorrect belief as to the amount of principal owed was also a repudiation. But the court also rejected that contention,

R.6282-6283.) Indeed, Lang was able to keep evidence out at trial by arguing that Lawsuit 2 was not relevant to his claims. (R.6803-6804.)

Second, Lang's argument ignores settled law. Even when one party (allegedly) repudiates a contract, the non-repudiating party must still prove that he could perform at the time his performance was due under the contract. This universally recognized concept follows from the concept that, in fashioning a remedy for a breach of contract, courts "should place the non breaching party in as good a position as if the contract had been performed." *Covey v. Covey*, 2003 UT App 380, ¶ 29, 80 P.3d 553; *Saunders v. Sharp*, 840 P.2d 796, 808 (UT Ct App. 1992). A court cannot award specific performance, or even damages for that matter, if the plaintiff cannot establish that the defendant's alleged breach or repudiation caused their injuries. *See* discussion *infra*.

In other words, a party is not entitled to specific performance (or damages for that matter) unless he can establish that, at the time performance is due, he himself is ready, willing, and able to perform his duties under the contract. As stated in *Williston on Contracts*:

> The party claiming that an anticipatory repudiation has excused the performance of a condition precedent must show that but for the repudiation, he or she would have been ready, willing, and able to perform his or her obligations under the contract, at least where the defendant that is, the repudiating party-places in issue the ability of the plaintiff to perform.

Richard A. Lord, 13 *Williston on Contracts* § 39.41, at 692-93 (4th ed. 2000).

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noting that Thatcher later agreed with Lang's figures and was willing to complete the deal. (R.9415-9416.)

Williston further explains that, although it may not be necessary for a non-breaching party to tender performance to establish such an ability to perform, he must show that "before the repudiation, he or she was ready, willing and able to perform and would have rendered that performance had the other party not repudiated." *Id*. at 695. The same holds true for bilateral contracts; a "repudiation does not relieve the non-breaching party from showing an ability to perform in order to obtain a remedy." *Id*.

The Texas Supreme Court explained this principle further:

> [O]rdering specific performance without requiring the plaintiff to show that he was capable and willing to perform at the time required by the contract grants the plaintiff more than he is entitled to under the contract. A plaintiff's pleading that he is ready, willing, and able to perform at the time the lawsuit is filed says nothing about whether he was ready, willing, and able to perform at the time required by the contract.
>
> ***
>
> It would, in effect, eliminate the plaintiff's contractual obligation to be capable of performance at the time the contract required, and grant the plaintiff the option to enforce the contract at any time he might become capable of performing before limitations runs. A defendant's breach or repudiation should not alter the contract and give the non-breaching party a contract different from what the plaintiff had. The plaintiff must prove that he was ready, willing, and able to perform his obligations when they came due.

DiGiuseppe v. Lawler, 269 S.W.3d 588, 599 (Tex. 2008).

This principle is universally recognized. *See Restatement (Second) of Contracts* § 244 ("A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise."); *2007 East Meadows, LP v. RCM Phoenix Partners, LLC*, 45 N.E.3d 1279 (Ind. Ct App. 2016) ("Because Meadows was unable to perform the

Agreement as of the January 7, 2008, closing date, it was not entitled to specific performance."); *Grunbaum v Nicole Brittany, Ltd.*, 153 A.D.3d 1384, 61 N.Y.S.3d 146, 147 (NY. App. Div. 2017) ("To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations."); *3511 13th St., LLC v. Lewis*, 993 A.2d 590, 593 (D.C. Cir. 2010) (district court did not err in refusing to grant specific performance where the plaintiff had not demonstrated that he was "ready, willing and able to perform the contract."); *Clark v. Scena*, 83 P.3d 1191, 1194 (Colo. App. 2003) ("We have concluded that, under a purchase and sale contract, a buyer must establish that it was willing and able to close the transaction."); *Pr Pension Fund v. N*, 809 P.2d 1139, 1145 (Haw. Ct App. 1991) (trial court abused its discretion in awarding specific performance when the plaintiff failed to prove that he was ready, willing, and able to timely perform his duties under the contract); *Steiner v. Bran Park Assoc.*, 582 A.2d 173, 179 (Conn. 1990) ("[T]he initial burden in an action for specific performance is on the plaintiff buyer to demonstrate that he was ready, willing and able to perform . . . . Only when the buyer shows that he was ready, willing and able does the seller's breach become relevant.").

Utah case law is in accord, requiring a party seeking specific performance to prove that he is ready, willing, and able to perform his obligations under the contract at the time such performance is due. A party is excused from this requirement only if his inability to perform is caused by the other party's breach. In *PDQ Lube Center v. Hubber*, 949 P.2d 792 (Utah Ct. App. 1997), for example, a trial court ruled that a buyer was entitled to

specific performance despite the fact that he had not timely tendered his performance under the contract. The seller argued that, in order to be granted specific performance, the plaintiff was required to tender his performance by the closing deadline because time was of the essence under the contract. The trial court disagreed, because it was the seller's failure to complete required environmental clean-up that prevented the plaintiff from obtaining a loan and appraisal for the property.

On appeal, this Court focused on the plaintiff's ability to perform, and whether such performance was excused because "[a]ny failure of the [plaintiff] to perform under the contract was directly related or caused by [defendant's] bad faith and failure to perform." *Id*., at 799. The Court held that the trial court had not abused its discretion in awarding specific performance because the defendant's breach "was the sole reason for the plaintiff's failure to perform." *Id*., 803.

In *LHIW, Inc. v. De Lorean*, 753 P.2d 961 (Utah 1988), a buyer argued that the court erred in dismissing his claim for specific performance because he had not demonstrated that he was ready, willing, and able to perform under the contract. In that case, the parties had been ordered to close by a specific date. The buyer failed to do so. He alleged that he could not close because any title he received would have been clouded by the seller's appeal of the specific performance ruling. The Court rejected this excuse as a basis for not performing under the contract. A plaintiff must prove that he is ready, willing, and able to perform in order to obtain specific performance, the Court held. The Court recognized that, in some cases, the remedy has been granted despite the lack of

proven ability to close. In those cases, however, the "defendant's acts had made it impossible for the plaintiff to perform on the contractually specified date." *Id*., 963.

Like the plaintiff in *LHIW* (and unlike the plaintiff in *PDQ Lube*), Lang did not demonstrate that, absent Thatcher's alleged repudiation, he was ready and able to close on the property by the January 10, 2013 deadline. The trial court found that Lang did not prove that he could have closed on the property because "as far, as the credible evidence at trial discloses, [The Property] could not meet Lang's lender's written value requirements as residential property[.]" (R. 9416).

Notably, Lang does not challenge the trial court's finding that he did not have the requisite funding to close on the property. Although Lang suggests in his brief that his lender issued letters of intent demonstrating its willingness to provide funding, (Aplt. Br. 43-44 (citing Exs. D-1, D-12, D-13)), each of these letters conditioned funding on Lang obtaining an appraisal at $2.45 million, far higher than the $1.8 million value found by the court.

Given the unchallenged finding that he was not ready or able to close by the deadline, Lang's only path to specific performance would have been to prove that his inability to obtain financing was caused by Thatcher's alleged repudiation. The trial court concluded otherwise, finding that Lang did not prove that he "would have been able to obtain financing if Thatcher had not filed Lawsuit 1." (R.9416.) Lang does not challenge this finding, which is amply supported by the evidence. Among other things:

- Lang's lender (E. Meadow Funding) conditioned its loan on Lang's ability to obtain a recent appraisal showing that the Property was valued at $2.45 million. *See* e.g., Ex. D-1 (2/15/2012 letter of intent specifying that as a condition of

lending, the property be appraised at $2,450,000); Ex. D-12 (6/4/2012 letter of intent specifying as a condition of lending that property be appraised at $2,450,000; Ex. D-13 (10/24/2012) specifying as a condition of lending that the property be appraised at $3,100,00 for Parcel A & B.)

- Lang could not obtain a recent appraisal showing the value required by his lender. "Although Lang had obtained an appraisal (dated January 10, 2012) showing the requisite value for [the Property], the value for [the Property] was based in part on the [the Property] being zoned for commercial zoning." (R.9393.) In February 2012, the commercial designation was overturned by the Springdale Board of Adjustments" and the Board of Adjustment's decision to uphold the designation was upheld on appeal. (R.9393; Ex. 181.)

- The zoning was important to the value of the Property. In October 2013, an appraisal was done valuing the property at $1.8 million based on the residential zoning that was now in place. (R.9394, n.3.)

Additionally, Lang was also struggling financially and having difficulty just paying the interest-only payments of his contractual obligations. Among other things,

- Lang was late or deficient in making monthly interest payments. "In September 2010, for example he was a week late making his payment. . . .The following month he was late again." (R.9390; Exs. 30, 31, 32-34.)

- Lang took out a loan to pay for, among other things, his interest payments on the Property. Lang used $40,000 from the proceeds of this loan "to pay Thatcher for the October 2010 [interest payment] and apparently in advance for the next three months, but by October 15, 2011, Lang was again behind on his monthly interest-only payments to Thatcher." (R.9390.)

- Lang had to extend the deadline on his loan and was required to repay that loan on April 15, 2012 at a 14% interest rate and at a 20% annual rate in the event of further extensions. (R.9390.)

- "As of December 5, 2011, Lang was two months behind in making his interest-only payments to Thatcher." (R.9390; Ex. 35.)

- "Strapped for cash to cure his default, Lang entered into another loan agreement" to pay for, among other things his interest payments on the Property. (R.9391.)

- Even when both parties appeared to be working toward closing and were in agreement regarding the amounts due in March 2012 and May 2012, Lang did not have the necessary funding to close. (R.9396, ¶ 49; R.9409, ¶¶ 93-95.)

Implicitly conceding the trial court's factfinding as to "Lawsuit 1," Lang argues that the court did not make a similar express finding as to "Lawsuit 2." As noted above, Lang's counterclaim did not contain allegations that Lawsuit 2 was the operative repudiation. Indeed, Lang consistently argued to the trial court that Thatcher repudiated by filing Lawsuit 1, that the contract was terminated when Lawsuit 1 was filed, that Lawsuit 2 was really just a continuation of Lawsuit 1, and that he did not really care about what the parties did to resurrect the situation after the filing of Lawsuit 1:

> **The Court**: And so you don't want me to consider your client's efforts, then, to try and resurrect this situation?
>
> **Mr. Milne**: No, I don't because we're here about breach and we would not have gotten to all of this had that breach not occurred back in the spring [when Lawsuit 1 was filed] whether it was my client that breached or if the plaintiff breached.

(R.6804 ln 2-22; *see also* R.6803 ln 8-25; R.8150 ln 4-5; R.7716 ln 10-13; R.7734 ln. 19-25; .R.6283-6284; R.6615 ln. 6-24.) Under these circumstances, Lang would be unable to complain about the absence of an express reference to Lawsuit 2 in the findings.

But Lang's argument is flawed in any event. It was *Lang's* burden to prove not only a repudiation, but also that the repudiation caused his inability to obtain funding. Absent an affirmative ruling *for* Lang on the latter, his specific performance claim failed. Lang does not cite any such ruling. Instead, he merely argues that the trial court's finding *against* him was too narrow. That is insufficient to obtain a reversal. On appeal, a party must not only show error, but also that it affected his substantial rights "in the context of

the whole proceeding." *Kelson v. Salt Lake County*, 784 P.2d 1152, 1157 (Utah 1989). The appealing party must demonstrate that, "after review of all the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached." *Lawrence v. Mountainstar Healthcare*, 2014 UT App 40, ¶ 16, 320 P.3d 1037.

Lang has not shown that the trial court's overall finding – that Lang was unable to secure funding for reasons that Thatcher did not cause – was clearly erroneous. Nor has he shown any evidence that Lawsuit 2 caused his inability to obtain funding. This ruling by the court is dispositive of Lang's appeal, and requires affirmance of the judgment.

2. Lang's Arguments regarding tender are not on point.

Lang argues that the trial court abused its discretion by also indicating that Lang was required to tender his performance. According to Lang, he was excused from tendering performance because Thatcher sued first and allegedly repudiated the contract before his performance was due. This argument misapprehends the trial court's findings. As explained above, any alleged repudiation did not excuse Lang from proving that, absent Thatcher's alleged repudiation, Lang would still have been ready, willing, and able to close on the property by the January 10, 2013 closing date. The trial court found that he was not.

The trial court's judgment can also be affirmed because, under the facts of this case, a tender was required for the court to determine whether Thatcher would have performed (*i.e.*, whether she had repudiated the contract and would not have withdrawn her repudiation). Whether a party has repudiated a contract is a fact-intensive inquiry.

Adair v. Bracken, 745 P.2d 849, 851 (Utah Ct. App. 1987.) Moreover, even if a repudiation has earlier occurred, a court may conclude that the party would nonetheless have performed had the non-breaching party have tendered his own performance.

A repudiating party may "retract" or "withdraw" the repudiation before the closing date if the other party elects to take the position that the contract remains in effect following the alleged act of repudiation (as Lang does here). *Upland Industries Corpo. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 643 (when an anticipatory breach or repudiation has occurred, non-breaching party may continue to treat the repudiation as ineffective and bring suit "if and when an actual breach occur[s]"); *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 725-726 (Utah Ct. App. 1990) ("The repudiating party has a power of retraction as along as there has been no substantial change of position by the injured party and the nonbreaching party's continuing to urge performance may be properly held to keep this power of retraction alive.").

In this case, absent a tender of his own performance, Lang did not meet his burden of establishing that Thatcher would have refused performance on the due date. Under the "tender" rule, "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 Western Real Estate & Investment Inc. v. Webb*, 645 P.2d 52, 56 (Utah 1982). Although such tender may be excused under certain circumstances, the court found that those circumstances were not present here because Lang did not prove he was financially able to close. Thus, absent tender, the court would have been left to speculate whether Lang could have performed under the contract, and

whether Thatcher would have been in default for not accepting that performance. This is exactly the type of speculation the tender rule was designed to prevent.

In *Carr v. Enoch Smith Co.*, 781 P.2d 1292, 1295 (Utah Ct. App. 1989), the Court analyzed whether a tender was required. In that case, the buyer argued that the seller had repudiated the contract because the seller had committed the property to another entity for use as a model home. The Court noted that, "although there were some fairly significant modifications to the house in order to convert it to a model, there is no evidence in the record to suggest that appropriate corrections could not have been expeditiously made if Smith's performance became necessary." *Id*. at 1295. The Court further noted that tender of the required sum would have placed the seller in the position of choosing to perform or risking a default. Without the formal act of tender, the Court was left to speculate about how the seller might have responded. "Avoidance of such guesswork is one of the primary benefits of actually tendering one's performance and is a sound reason for rather strict adherence by the courts to the tender requirement." *Id*.

Here, as described above, Lang did not prove that he could perform under the contract, even absent Thatcher's alleged repudiation. Indeed, the evidence showed otherwise. The trial court did not abuse its discretion in concluding that, "under the circumstances of this case," a tender was required to avoid speculation as to whether Lang could perform and whether Thatcher would have accepted.

None of the cases that Lang cites involve circumstances similar to those found by the trial court here (*e.g.*, an inability of buyer to perform). *See e.g., Blitz v. Sunset Oaks, Inc.*, 649 P.2d 66, 70 (Utah 1982) (no finding by court that buyer would be unable to

perform contract even absent the breach and undisputed that seller had refused to perform); *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214 (same); *PDQ Lube Ctr., Inc.*, 949 P.2d 799 (not requiring tender because buyer established that its inability to perform was caused by seller's breach).

Lang makes much of the fact that Thatcher sued him first in this case. In essence, Lang asks this Court to overturn the trial court's implicit finding that repudiation had not been established, and instead to make its own finding that Thatcher would not have accepted Lang's performance even if he had tendered it. That argument is implausible in several respects. First, as explained above, Lang had to make a threshold showing that he was ready, able, and willing to perform, which he did not do. Second, it was not Thatcher who "fired the first shot." (Aplt. Br. 33.) The trial court found that Lawsuit 1 was only filed because of *Lang's* threats of litigation, and both parties contended at trial that Lawsuit 2 was merely a continuation of Lawsuit 1.

Third, Lang's argument only presents the facts and inferences that support his position. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." *State v. Nielsen*, 2014 UT 10, ¶ 47, 326 P.3d 645. [A] party challenging a factual finding or sufficiency of the evidence . . . will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal." Id. ¶ 42. Moreover, an appellate court's assessment of a party's claim on appeal is certainly affected ("and greatly undermined") by assertions regarding insufficiency of evidence when the appellant has failed to acknowledge material evidence supporting the finding(s). Id. ¶ 44.

In this case, Lang does not clearly address his marshaling obligation. Instead, he sets forth only those facts and inferences that support his position and ignores those facts and inferences that support the trial court's ruling. For instance, among other things, Lang claims that "Thatcher 'believed that the Agreement terminated' when she filed Lawsuit-1 and that 'Lang thereafter had no right or interest in the Property," thereby inferring that Thatcher would not have accepted Lang's attempts to tender the Purchase Price after Lawsuit 1 and Lawsuit 2. (Aplt. Br. 19.) However, Lang fails to address the fact that, even after filing Lawsuit 1 and after Lang had been delinquent in interest payments for several months, Thatcher was still attempting to work with Lang on closing. He also fails to mention that, although Thatcher was working towards a closing, Lang was unresponsive to her requests.

A reasonable inference from this evidence is that, if a tender was made (even after Lawsuit 2), Thatcher would have accepted it, but as of Lawsuit 1, Lang quit working with Thatcher to close on the Property. Moreover, Lang was continuing to work towards financing up until closing. (Aplt. Br. 43-44.) The reasonable inference from that admission is that he believed Thatcher would have accepted a legitimate tender of the Purchase Price.

Lang also makes much that Thatcher requested that Lang pay $4.5 million on the Property after Lawsuit 2 was filed. But Lang fails to mention that, after filing Lawsuit 1 and Lawsuit 2, his tender of performance included strings attached, such as the waiver of his delinquent interest payments. (R.7194-7195 ln 22-15.) The reasonable inference from this is that the $4.5 million request from Thatcher was merely a settlement

discussion that was in response to Lang's refusal to be bound by the terms of a contract that he concluded was terminated after Lawsuit 1.

Moreover, there was ample evidence supporting a conclusion that Thatcher would have allowed Lang to perform had he been able to do so. Among other things, Thatcher, through her attorney, was still communicating and attempting to reach out to Lang in an attempt to close even after Lawsuit 1 was filed. The parties were still communicating regarding the possibility of Lang purchasing the Property after Lawsuit 2. (R.7195 ln 2-15; R.7212 ln 2-12; R.8019 ln 15-20.) Lang was still in use of the Property as of March 2013, and it was not until March 25, 2013, that Thatcher sent Lang and his lessee (Zambella) a notice to vacate the Property. (R.9414.) And, as Lang himself admits, he was still attempting to obtain funding for the Property up until closing. (Aplt. Br.42-44.)[3]

Lang also suggests that the trial court abused its discretion in refusing to grant specific performance because the Agreement is allegedly still on-going and has not been terminated. Therefore, Lang suggests, the trial court was required to order specific performance. That argument lacks persuasive force. First, Lang did not preserve this argument below. Indeed, Lang specifically represented to the trial court that the Contract terminated on April 24, when Thatcher filed Lawsuit 1, and ended again when she filed Lawsuit 2. (R.8316, ¶ 46; R.6803-6804; R.8326-R.8327.) Indeed, based on this

[3] Although Lang claims that Thatcher was requesting more money after Lawsuit 2, these requests were made in relation to settlement discussions, and were in response to Lang's assertion that he would not pay his six months of outstanding interest payments. R.7194-7195 ln 22-15.

position, Lang successfully moved to exclude certain evidence as being irrelevant. (R.6803-6804 ln 12-22.)

Second, rights under a contract do not extend beyond the closing date if the contract says time is of the essence. Here, the closing date came and went without Lang ever having the financial ability to close. The contract thereby terminated by its own terms. *Century 21*, *supra*, 645 P.2d at 55 n.1 ("Where the contract states that time is of the essence, cases hold that both parties are discharged from their contract obligations if neither makes tender by the agreed closing date.").

Third, even assuming the contract continued to exist after the January 2013 closing date, that would not compel specific performance. The existence of an enforceable contract is a *prerequisite* to, but not sufficient *in itself*, to entitle a party to specific performance. "Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the trial court, and, accordingly, considerable latitude of discretion is allowed in the determination as to whether it shall be granted…." *Covey v. Covey*, 2003 UT App 380, ¶ 32, 80 P.3d 553, quoting *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981).

Lang makes little effort to show an abuse of discretion in the trial court's weighing of equities here. It is not an abuse of discretion to deny specific performance if a court believes it would be inequitable under the circumstances. *Carr*, *supra*. In *Carr*, for example, this Court upheld the denial of specific performance where the buyer did not take his obligations under the contract seriously. Among other things, the buyer never obtained the loan that he needed to purchase the property, and did not communicate with

the seller during the course of the contract regarding ongoing construction that was occurring on the property.

The trial court likewise did not abuse its discretion here in ruling that the equities did not favor specific performance. Among other things, the court found it unreasonable for Lang to refuse to tender any of his past-due monthly interest payments even though this was an "essential" obligation, and Lang knew that Thatcher did not agree to accept those payments at closing. *Supra*, 14; R.9412-9413. Lang criticizes this finding, but does not show it to be clearly erroneous. Indeed, it is hard to imagine how such a showing could be made. Lang had stopped making his interest payments in February 2012 – *months* before any alleged repudiation by Thatcher. Moreover, the claimed repudiation was a technical deficiency in the notice of default. Thatcher was right that a default had occurred, and Lang never attempted to cure it.

Lang does not challenge the other trial court's findings that bear on the equities. For example, Lang dragged his feet in providing documents to help the parties resolve disputes regarding the amounts owed. *Supra* 10-12. He threatened to sue Thatcher. *Supra* 12. He also repeatedly misrepresented that he had "money in hand" to close, when he did not. *Supra* 10-12.

Additionally, the parties agreed that January 10, 2013 would be the last day Lang could perform on the contract, and that time was of the essence. (Exs. 8 & 13; Add. Exh. 5.) If the Contract was allegedly not terminated when Lang claimed it was (upon the Filing of Lawsuit 1 and 2), Lang should have tendered his performance on or before the deadline or, at least, proved his ability to do so. The Court found that Lang did not have

(and could not have obtained) the funding to purchase the Property by that date. The equities do not favor giving Lang more than he bargained for under the Contract by extending his ability to perform by more than five years, and the trial court did not abuse its discretion.

CROSS-APPEAL

SUMMARY OF CROSS-APPEAL ARGUMENT

The judgment on Lang's counterclaim for unjust enrichment should be reversed. As an initial observation, the trial court applied the incorrect standard to the liquidated damages clauses. While historically forfeiture or liquidated damages clauses have been subjected to "heightened judicial scrutiny," that practice is no longer permitted under Utah law. Such provisions are interpreted, and enforced, like any other contract provision to which parties have voluntarily agreed.

The court first erred in failing to recognize that the liquidated damages clause in the Option Agreement was self-executing. By its terms, the clause did not require notice. It afforded Lang an automatic 30 day grace period and, if Lang failed to pay by the end of that period, it allowed Thatcher to automatically retain any payments previously made toward the purchase price. The same is true of the relevant portion of § 4.4 of the Agreement itself.

Even if notice had been required, Thatcher's communications met that obligation. First, the trial court erred in requiring Thatcher to establish strict compliance. The burden of proof was on Lang to prove that Thatcher repudiated, not the other way around. Additionally, a "strict compliance" standard is not supported by current Utah law, under

which liquidated damages and other clauses are subject to normal principles of interpretation. In any event, the requirement of strict compliance was to protect defaulting parties from confusion about their obligations or being misled, neither of which was claimed to be the case here.

Finally, the trial court's judgment should be reversed because unjust enrichment is not available when a contract exists regarding the subject matter of the dispute. Thatcher and Lang undisputedly entered into a contract that explicitly addresses the consequences of nonpayment. Believing this issue to be unsettled under Utah law, the trial court adopted the minority rule allowing such recovery. Thatcher submits that this was incorrect under the law of Utah and the majority of jurisdictions nationwide.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THATCHER NEEDED TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS IN ORDER TO RETAIN LANG'S PAYMENTS AS LIQUIDATED DAMAGES.

Before analyzing the language of the parties' contract, the applicable standard should first be addressed. The trial court appears to have believed it was required to apply a heightened level of judicial scrutiny to the liquidated damages provision. *See* R. 9422, citing *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105, 1109 (Utah Ct. App. 1997), *Adair v. Bracken*, 745 P.2d 849, 852 (Utah Ct. App. 1987), and *Madsen v. Anderson*, 667 P.2d 44, 48 (Utah 1983).

That is no longer the law in Utah. Liquidated damages provisions are to be reviewed like any other contractual provision. *See Commercial Real Estate Inv., L.C. v.*

Comcast of Utah, Inc., 2012 UT 49, ¶¶ 38, 40, 285 P.3d 1193. As the Supreme Court explained:

> We now hold that liquidated damages clauses should be reviewed in the same manner as other contractual provisions. Persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain. It is not our prerogative to step in and renegotiate the contract of the parties. Instead, unless enforcement of a liquidated damages clause would be unconscionable, we should recognize and honor the right of persons to contract freely and to make real and genuine mistakes when the dealings are at arms' length. Courts ... should not interfere except when sharp practice or most unconscionable result[s] are to be prevented. Courts should invalidate liquidated damages clauses only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract.

Id. (internal citations and quotations omitted).

The party challenging the enforceability of a liquidated damages clause bears the burden of proof. *Id.*, ¶ 41. "[T]he burden properly rests on the party challenging the clause's enforceability because the purpose of a liquidated damages provision is to obviate the need for the nonbreaching party to prove actual damages." *Id.* (citation omitted).

The trial court's ruling here did not apply the correct standard. (R.9418-9421.) The court improperly placed the burden of proof on Thatcher to prove strict compliance with her alleged notice obligation under the terms of the Agreement, ruling that even a "technical" violation precluded enforcement of the clause. (R.9421-9422.) This was error in two different ways.

A. No notice was required of an intent to retain principal payments in the event of payments beyond a 30-day grace period.

The trial court ruled on only one of Thatcher's two arguments in support of liquidated damages. Throughout the case, including at trial, Thatcher pointed out that there were two distinct contractual provisions addressing liquidated damages. One provided Lang an automatic 30-day grace period for overdue payments, after which Thatcher was automatically entitled to retain other payments to date as liquidated damages. This provision did not require a notice to trigger either the grace period or the retention of payments.

In Utah, "parties are free to contractually provide for … an enforceable forfeiture provision." *Adair*, 745 P.2d 849 at 852. *See also*, *Park Valley Corp. v. Bagley*, 635 P.2d 65, 67 (Utah 1981); *Biesenger v. Behunim*, 584 P.2d 801, 803 (Utah 1978); *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105, 1109 (Utah Ct. App. 1997). Utah courts have long-recognized a distinction between forfeiture provisions that are self-executing and those that require notice. *See, e.g.*, *Papodopulos v. Defabrizio*, 125 P.2d 416, 418 (Utah 1942); *Fed. Land Bank of Berkeley v. Sorenson*, 121 P.2d 398, 399-400 (Utah 1942); *Leone v. Zuniga*, 34 P.2d 699 (Utah 1934); *Howorth v. Mills*, 221 P. 165 (Utah 1923).

A forfeiture provision that is self-executing is one that works a forfeiture without notice to the defaulting party. *See*, *Papodopulos*, 125 P.2d at 418. By contrast, a forfeiture provision that is not self-executing requires "some affirmative act on the part of the seller to notify the buyer of what specific provision in the contract the seller is

proceeding under and state what the buyer must do to bring the contract current." *Grow v. Marwick Development, Inc.*, 621 P.2d 1249, 1251-52 (Utah 1980).

In February 2006, the parties entered into an Option Agreement for the purchase of the property (hereinafter "Option Agreement"). (R. 9384, ¶ 5; Ex. 3; Add. Exh. 3.) The Option Agreement contained a liquidated damages clause which stated that, "[i]f [Lang] defaults on any scheduled payment after expiration of a thirty (30) day grace period, all payments previously made shall be forfeited to [Thatcher] as liquidated damages." (R. 6867 ln. 8-10; Ex. 3, § 11; Add. Exh. 3, § 11.)

In April 2006, the parties entered into a Second Addendum to Option Agreement. (R.6644-6645; Ex. 5; Add. Exh. 4.) By its terms, that Addendum had no effect on the Agreement's liquidated damages clause. (Ex. 5; Add. Exh. 4.) In May 2006, the parties entered into a Real Estate Purchase Agreement. (R.9384-9387; Ex. 8; Add. Exh. 5.) The Agreement included a liquidated damages clause that provided:

> 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.*

(R.9396; Ex. 8, § 4.4; Add. Exh. 5, § 4.4 (emphasis added).)

The Agreement was merged with the Option Agreement to the extent the two were not inconsistent, and the Option Agreement was included as an exhibit to the Agreement. (Ex. 8, §§ 2 & 5.2; Add. Exh. 5, §§ 2 & 5.2.) The Agreement was amended several

times. (R.9387-9389, Exs. 13, 14, 17, 29; Add. Exh. 6.) The amendments generally stated that all previous terms remained the same, or that all previous terms remained in full force and effect to the extent they were not inconsistent with the amendment. (Exs. 13, § 3, 14, § 8, 17, § 5, 29, § 6; Add. Exh. 6, § 8.) None of those amendments modified either of the liquidated damages clauses in the Agreement or the Option Agreement.

The liquidated damages clause in the Option Agreement is not inconsistent with that of the Agreement. To the contrary, the concepts of automatic 30-day grace periods and automatic payment forfeitures are in both agreements. Under the language of either the Option Agreement or the Agreement, Lang automatically forfeits prior payments if two conditions occur. First, if Lang fails to make any payment by the deadline in the Agreement, he is given a 30-day grace period within which to make that payment. (Exs. 3, § 11, 8, § 4.4; Add. Exh. 3, § 11; Add. Exh. 5, § 4.4.) Second, if the grace period expires without payment, he forfeits his previous payments as liquidated damages for that nonpayment. *Id.* This liquidated damages provision is devoid of any notice requirement. *Id.*

At trial, Thatcher read into the record the clauses discussed above, noting that both the Option Agreement and Agreement contained a liquidated damages clause. (R.6858, 6867-68.) She further testified to her understanding of those clauses, including what triggered the grace period and what resulted from Lang's failure to make payment within the grace period. (R.6869 ln. 10-17; R.7156-7158; R.7237-7238; R.7253 ln. 17-22.) Lang never testified to a different interpretation. (Trial transcript, *passim*.)

In response to Thatcher's closing argument, Lang urged that the grace period in the liquidated damages clause was "described in the preceding paragraph of Section 4.4 in connection with the service of written notice to cure." (R.9390-91.) Lang further insisted that, under "Paragraph 5 of the parties' September 13, 2007 amendment," Thatcher had to provide notice and an opportunity to cure before she could declare a forfeiture. (R.8391.)

Paragraph 5 of the September 2007 amendment provides in its entirety:

> 5. Notification of Any Change, Improvement or Building on the Property:
>
> The buyer shall notify the seller of any planned or intended charge, 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 [Thatcher] to [Lang] 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.

(Ex. 14, § 5; Add. Exh. 6, § 5.)

Section 5 details the rights and obligations of the parties in the event that a lien arose against the property from any change, improvement, construction or building. It does nothing to override the explicit language of the liquidated damages language in the Option Agreement, or in the latter half of § 4.4.

The trial court did not address the liquidated damages clause in the Option Agreement at all. By its terms, that clause contains no notice requirement. In exchange for an automatic grace period on every payment due, Lang agreed that Thatcher could automatically retain prior payments if he failed to take advantage of that benefit. It is undisputed – and the trial court found – that the last interest payment by Lang was on February 2, 2012 (for the payment due January 10, 2012). (R. 9392, ¶ 34.)

The February interest payment was due February 10, 2012. (R. 9388; Ex. 14, § 3; Add. Exh. 6, § 3.) The automatic grace period began on February 11 and (2012 being a leap year) ended on March 11, 2012. No payment was made at that time (or in April, May, etc.). (R.8081-8082.) By the express terms of the Option Agreement, Thatcher was entitled to keep payments made by Lang prior to that failure.

The same would be true with respect to the liquidated damages provision in § 4.4 of the principal Agreement. As shown above, § 4.4 addresses two distinct concepts, termination of the contract (requiring a notice), and retention of payments made prior to expiration of a grace period. *See*, p. 39, *supra*, quoting § 4.4 ("…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.").

In short, the plain language of the Option Agreement and, independently, § 4.4 of the Agreement, permit Thatcher to retain payments made before expiration of a grace period. This right vested in March 2012, and is distinct from Thatcher's other rights under § 4.4 (*e.g.*, termination). The trial court erred in concluding that Thatcher was

required to provide Lang with notice of default and an opportunity to cure and the judgment in favor of Lang should be reversed.

B. Even if required to provide notice, Thatcher met her obligation.

Based upon its application of an incorrect standard, the trial court ruled that Thatcher "fail[ed] to comply with the notice provision in the Agreement." (R.9411.) The court reasoned that, "[a]lthough 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 terms, only referencing a failure of which Defendant is supposed to be 'aware.'" (*Id.*) The court's reasoning is flawed. Lang admitted that he was well aware of his failure to make required interest payments, which were a flat $10,000 per month. Because Lang was not uncertain of the performance Thatcher demanded in her notice to him, and because Thatcher's notice was not otherwise misleading, her notice was sufficient.

1. Thatcher's notice was sufficient where Lang admitted he was previously aware of his default.

As the Supreme Court has noted, "[b]ecause forfeitures are usually harsh, we have disfavored them in cases where the notice to the buyer of the impending forfeiture is uncertain as to the performance demanded, or misleads the buyer into thinking that the forfeiture provision will not be strictly enforced." *Madsen v. Anderson*, 667 P.2d 44, 47 (Utah 1983).

In *First Sec. Bank of Utah v. Maxwell*, 659 P.2d 1078, 1081-82 (Utah 1983), the court found the sellers' notice was deficient where it "did not contain the amount

demanded by the sellers," and that "[h]ad [the] buyer been told that the amount was insufficient he presumably could have raised the remaining small amount within the 28 days remaining before he became in default." In *Madsen*, the court declined to enforce a forfeiture provision where it found that the seller's actions were misleading because "[i]t left some doubt in the [buyers'] minds as to what was expected, … and led them to believe that the sellers might be willing to forward all of the tax notices before reimbursement was due." *Madsen*, 667 P.2d at 48 (internal quotations and citations omitted).

Similarly, in *Grow v. Marwick Development, Inc.*, 621 P.2d 1249, 1252 (Utah 1980), the court found that "the giving of notice of default twice and then a notice of forfeiture followed by another notice of default to bring the contract current within 15 days or forfeiture would result would be misleading" because it "would leave some doubt in the respondents' minds as to what the appellant expected and leave the respondent to believe that strict compliance with the contract was not required and that he would have additional time granted him by the appellant's letter."

The circumstances in this case are far different. There is no question here that Lang was aware of his default prior to receiving any notice. He had no doubt as to what Thatcher expected through her notice. (R. 9395-9396; R.9398; R.9400; R.9402; Exs. 107, 117, 122, 124, 195 & B-47.) Thatcher had first put Lang on notice of his failure to make the monthly interest payments in December 2011. (R.6718-6723; Exs. 35-37.) Lang cured that default (R.6723 ln. 5-8; R.9392, ¶ 30; Ex. 38), but within two months

had again fallen behind on those same payments. (R. 9395-9396; R.9398; R.9400; R.9402; Exs. 107, 117, 122, 124, 195 & B-47.)

After making his last interest payment in February 2012, he sent several communications to Thatcher's counsel acknowledging that he was behind on his interest payments and of the amounts owing. (Exs. 107, 117, 122, 124, 195 & B-47.) Informed by those communications, Thatcher, on July 1, 2012 sent Lang a second notice of default (dated June 23, 2012) stating:

> 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; Exs. 63 & 64; Add. Exh. 7.)

The default for which Lang was "aware" was the failure to make his monthly interest payments that he had already admitted in writing. Thatcher's notice should have been read in the context of the communications between Lang and Thatcher's counsel, in which make clear Lang's knowledge of his default and the amounts owing. Lang should not be able to escape his default simply because Thatcher's notice did not reiterate the information he had previously reported to her counsel. These facts were simply not disputed.

Thatcher's July 2012 notice reflects that fact in the sense that it explains Lang "has been for many months, in default and breach of the contract for purchase of land in

Springdale, Utah," and that "[t]his [was] not [Lang's] first notice, and [he had] previously received written notice pursuant to the contract. (Ex. 63; Add. Exh. 7.) The only possible breach to which Thatcher could have been referring was Lang's failure to make his monthly interest payments.

Lang did not respond to Thatcher's notice in any way. He did not seek clarification, or dispute the nature of his default. (R.9411.) And he made no payments. (*Id.*) On August 13, 2012, Thatcher mailed Lang a letter (dated August 10, 2012), indicating:

> Though not required by the terms of the contract, this is 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 written notice of default.
>
> This letter is also 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 parcels: S-102-B-1, S-102-B-2, S-102-B-6, S-137-A, within ten (10) days.

(*Id.*; Exs. 65 & 66; Add. Exh. 8.)

As with the July notice, Lang never responded to Thatcher's August letter, and he never made any of his outstanding interest payments. (R.8081-8082.) At trial, Lang acknowledged that he did nothing in response to either of Thatcher's notices, and never cured his default by tendering any of the missed interest payments. (R.7707-7708, 8081-8082.) He did not claim to be uncertain of what Thatcher was demanding of him, or that he was misled by the Thatcher. Under these undisputed facts and applying the correct standard, Thatcher's notice was sufficient to inform Lang of his default.

III. THE TRIAL COURT INCORRECTLY RULED IN FAVOR OF LANG'S UNJUST ENRICHMENT CLAIM WHERE THE AGREEMENT COVERED THE SUBJECT MATTER OF THE LITIGATION AND THE COURT OTHERWISE DETERMINED THAT LANG BREACHED THE AGREEMENT.

The trial court made two additional errors in allowing Lang's unjust enrichment claim to proceed. First, the court erroneously determined that, "[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.9418.) Second, the court erred in granting Lang unjust enrichment even though it found that Lang breached the Agreement. (R.9418-9421.)

A. Unjust enrichment is unavailable where an enforceable contract exists.

Under Utah law, unjust enrichment is unavailable where an enforceable contract exists with respect to the same subject matter. "Because '[unjust enrichment] is designed to provide an equitable remedy where one does not exist at law,' the doctrine may be invoked 'only when no express contract is present' that governs the remedies available to an injured party." *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 30, 266 P.3d 691 (alteration in original) (internal quotation marks omitted). "[W]here an express contract covering the subject matter of the litigation exists, recovery for unjust enrichment is not available." *Selvig*, 2011 UT 39, ¶ 30 (internal quotation marks omitted). *See also TruGreen Cos., LLC, v. Mower Bros., Inc.*, 2008 UT 81, ¶ 18, 199 P.3d 929; *Helf v. Chevron U.S.A. Inc*, 2015 UT 81, ¶ 69, 361 P.3d 63; *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246; *Mann v. Am. W. Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978); *E&M Sales*

West, Inc. v. Diversified Metal Products, Inc., 2009 UT App 299, ¶ 8, 221 P.3d 838; *Davies v. Olson*, 746 P.2d 264, 268 (Utah Ct. App. 1987).

Stated differently, "[r]ecovery under [unjust enrichment] presupposes that no enforceable written or oral contract exists." *Davies*, 746 P.2d at 268. "To allow such a cause of action in the face of an enforceable contract governing the parties' rights would effectively add or modify terms for which they had not bargained." *U.S. Fid. v. U.S. Sports Specialty*, 2012 UT 3, ¶ 13, 270 P.3d 464, 468-69.

1. The Agreement covered the subject matter of the dispute.

The substance of Lang's unjust enrichment claim is governed by the terms of the Agreement. Any claim he had to the payments he made under the Agreement were specifically dealt with in the retained payments provision of the Option Agreement and the "Buyer Default" provision of the Agreement. *See, e.g.*, *Cardon v. Jean Brown Research*, 2014 UT App 35, ¶¶ 13-14, 327 P.3d 22 (finding that "express contract exist[ed] covering the subject matter of the litigation—Cardon's job performance, his compensation, and his termination"); *Nickerson Co. v. Energy West Mining Co.*, 2009 UT App 366, ¶ , 2009 Utah App. LEXIS 384 (determining that "Nickerson's express contract with Weyher Construction Co. (Weyher) covering the subject matter of the litigation, i.e., the cost and installation of the pumps, barred any claim for recovery against Energy West on a theory of unjust enrichment"); *Truong v. Holmes*, 2009 UT App 212, ¶ , 2009 Utah App. LEXIS 215 (concluding that, "[b]ecause the Agreement addressed renovations and improvements to the property in the event Truong failed to exercise the option, the trial court did not err in dismissing Truong's unjust enrichment claim as legally unavailable").

Like the contracts at issue in the cited cases, the Agreement here addressed the disposition of payments previously made by Lang in the event of his failure to make later payments. Any remedy available to Lang for his failure to pay is controlled by the Agreement.

2. The trial court was not allowed to read the liquidated damages clause out of the Agreement.

As argued above, Thatcher's right to liquidated damages was self-executing, *i.e.*, she was automatically entitled to retain Lang's prior payments in the event he failed to make a payment within the 30-day grace period. However, to the extent Thatcher was required to provide notice in order to trigger the liquidated damages clause, Thatcher, for the reasons stated previously, complied with that obligation. For those reasons, the trial court erred in reading the liquidated damages clause out of the Agreement.

B. Lang was not entitled to a judgment on his unjust enrichment claim where he breached the Agreement.

The trial court's determination that Lang's unjust enrichment claim could proceed despite its finding that Lang breached the Agreement was in error. Citing an *A.L.R.* article and the *Restatement (Third) of Restitution and Unjust Enrichment*, the court adopted the minority position that a defaulting party may recover payments made under the contract. (R.9420.) Utah does not, and should not, follow that rule.

In *Foxley v. Rich*, 99 P. 666, 669-672 (Utah 1909), the Supreme Court rejected a contention that a vendee could recoup his proper payments. "To permit him to recover back his payments under the facts and circumstances of this case would, in effect, offer a premium to purchasers of real estate to refuse to comply with their contracts," the court

wrote. "If the bargain suited them, they would insist on the completion of the purchase; but if it did not, they would refuse to complete it, and sue to recover back the money paid by them." *See also Weyher v. Peterson*, 399 P.2d 438, 439 (Utah 1965) (denying a vendee's claim to prior payments made where the payments did not exceed the damages to the vendor); *Young ., Hansen*, 218 P.2d 666, (Utah 1950) (Pratt, J, dissenting) (noting that the prevailing rule is that a defaulting party may not recover prior payments).

The reasoning in *Foxley* has long been recognized by courts around the country. *See, e.g., Johnson v. Wortzel*, 517 So. 2d 42, 43 (Fla. Ct. App. 1987); *Pruett v. La Salceda*, 359 N.E.2d 776, 779-80 (Ill. Ct. App. 1977); *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. Ct. App. 1961); *Quillen v. Kelly*, 140 A.2d 517, 520-23 (Md. Ct. App. 1958); *Vanlandingham v. Jenkins*, 43 So. 2d 578, 581-82 (Miss. 1949); *Hayes v. Hartelius*, 697 P.2d 1349, 1354 (Mont. 1985); *Ryan v. Kolterman*, 338 N.W.2d 747, 749 (Neb. 1983); *Rudy v. Newman*, 220 P.2d 489, 491 (N.M. 1950); *Evans v Norris*, 415 N.Y.S.2d 92 (N.Y. Ct. App. 1979); *Walker v. Weaver*, 209 S.E.2d 537, 538 (N.C. Ct. App. 1974); *Diehl v Welsh*, 393 P.2d 834, 837-38 (Okla. 1964); *Kaufman Hotel & Restaurant Co. v Thomas*, 190 A.2d 434 (Pa. 1963); *Barragan v. Mosler*, 872 S.W.2d 20, 22 (Tex. Ct. App. 1994).

The upshot of these cases is that a buyer in default may not recover his or her payments where the seller stands ready and able to comply with the terms of the contract. As the court in *Linster v. Regan*, 248 N.E.2d 751, 752-53 (Ill. Ct. App. 1969), reasoned, "[recognizing the purchaser's right to recover payments] would be to permit a party to

sustain an action based on his own breach of the contract where the other party stands ready and willing to perform."

As noted above, the trial court also relied on the *Restatement (Third) of Restitution and Unjust Enrichment (Rest.)* § 36(1) (2011), which states: "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."

Regardless of whether Utah would adopt this general contention, it would not apply in this case. Under § 36(3), "[a] claim under this section may be displaced by a valid agreement of the parties establishing the rights and remedies in the event of default." *Id.*, § 36(2). Additionally, the *Restatement* recognizes that "[i]f the claimant's default involves fraud or other inequitable conduct, restitution may on that account be denied." *Id.*, § 36(4) and cmt. b (discussing that "willful or deliberate default" conduct makes restitution unavailable). For the reasons discussed above, Lang's conduct was inequitable. He repeatedly failed to make interest payments, threatened to sue [Madsen], refused to respond to Thatcher's attempts to obtain compliance, made misrepresentations about his ability to close, and otherwise engaged in conduct the trial court found to be unreasonable.

CONCLUSION

For the reasons set forth above, the judgment should be affirmed on Lang's claim for specific performance, and the judgment should be reversed on Lang's unjust

enrichment claim.

DATED this 10th day of September, 2018.

CHRISTENSEN & JENSEN, P.C.

Karra J. Porter
Kristen C. Kiburtz
J. D. Lauritzen
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2018, I caused to be sent via email a true and correct copy of the foregoing, **BRIEF OF APPELLEE/CROSS-APPELLANT** to the following:

Bryan J. Pattison
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, UT 84770
bpattison@djplaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 13-point typeface and contains 15,689 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

Karra J. Porter
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 21(g), counsel for Appellees/Cross-Appellant certifies that the foregoing brief contains no non-public information.

Karra J. Porter
JD Lauritzen
Kristen C. Kiburtz
Attorneys for Appellee/Cross-Appellant

Addendum 1

Amended Findings of Fact

Filed May 3, 2017

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 28 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

Addendum 2

Judgment

signed January 1, 2018

The Order of the Court is stated below:
Dated: January 01, 2018 02:40:37 PM
/s/ G MICHAEL WESTFALL
District Court Judge

Benjamin S. Ruesch (12646) **Ruesch & Reeve, PLLC** 55 S 300 West, Ste 1 Hurricane, UT 84737 (435) 635-7130 tel (435) 635-7100 fax Attorneys for Plaintiff/Counterclaim Defendant	
IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH	
MELANIE MADSEN THATCHER, Plaintiff, vs. MICHAEL LANG, Defendant.	**Judgment** Case No. 120500520 Judge G. Michael Westfall

Having previously entered findings of fact and conclusions of law, the Court hereby enters JUDGMENT as follows:

1. Judgment is entered in favor of Plaintiff Melanie Madsen Thatcher on the Sixth Cause of Action of her Amended Petition against Defendant Michael Lang to quiet title. All of Thatcher's remaining claims and causes of action in this case are hereby dismissed with prejudice and on the merits, including but not limited to her First (for breach of contract), Second (for breach of contract), Third (for breach of the implied covenant of good faith and fair dealing), and Fifth (for promissory estoppel) Causes of Action. (This Court previously entered orders dismissing Thatcher's Fourth and Seventh Causes of Action).

2. Judgment is entered in favor of Defendant Michael Lang on the Fourth Cause of Action of his Counterclaim against Plaintiff Melanie Madsen Thatcher for unjust enrichment. All of Lang's remaining claims and causes of action in this case are hereby dismissed with prejudice and on the merits, including but not limited to his First (for breach of contract), Second (for breach of contract), Third (for breach of the implied covenant of good faith and fair dealing), and Fifth (for promissory estoppel) Causes of Action. Pursuant to the stipulation of the parties at trial, Lang's Seventh Cause of Action (for tortious interference with contract) is also dismissed with prejudice. (This Court previously entered an order dismissing Lang's Sixth Cause of Action).

The Court hereby further ORDERS, DECLARES, and ADJUDICATES as follows:

3. Plaintiff is the owner in fee simple absolute of the following described property located in Washington County, State of Utah (the "Subject Property"), which has Tax Parcel Numbers S-102-B-1, S-102-B-2, S-102-B-6 and S-137-A:

> Parcel 1: Beginning at a point North 0°08' East, 550.00 feet along the Section Line and South 65°45' East, 536.25 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 65°45' West, 536.25 feet; thence North 0°08' East, 770.97 feet to the Southwest Corner of Balanced Rock Hills Subdivision, a subdivision according to the Official Plat thereof, on file in the Office of the County Recorder of Washington County, State of Utah; thence North 89°57'22" East along the East-West 1/16 line and the South Line of said Balanced Rock Hills Subdivision 1077.0 feet, more or less, to the Westerly Line of Balanced Rock Road; thence along the Westerly Line of said road as follows: South 20°44' West 301.7 feet; Southerly along the arc of a 119.4 foot radius curve to the left 68.1 feet; South 11°57' East, 124.2 feet; Southerly along the arc of a 92.5 foot radius curve to the right 59.4 feet; South 24°53' West, 87.2 feet; Southerly along the arc of a 57.3 foot radius curve to the left 58.3 feet to the North Line of Sunwest Resort Condominiums, as recorded in the Office of the County Recorder of Washington County, State of Utah; thence North 65°45' along the North Line of said Sunwest Resort Condominiums, to the most Easterly Corner of Sunwest Resort Condominiums Phase Two; thence around said Sunwest Resort Condominiums

Phase Two as follows; Westerly 24.28 feet along the arc of a 112.50 foot radius curve to the left; North 51°10'04" West, 94.87 feet; Westerly 26.85 feet along the arc of a 162.50 foot radius curve to the left; North 20°00' East, 27.17 feet; North 70°00' West, 70.00 feet; South 20°00' West, 25.00 feet; North 70°00' West, 128.00 feet; North 74°00' West, 127.00 feet; South 16°00' West, 50.00 feet; South 16°42'56" East, 194.48 feet; South 76°00' East, 253.00 feet; thence leaving said Sunwest Resort Condominiums Phase Two boundary and running thence South 09°53' West, 307.83 feet to the point of beginning.

Excepting therefrom that portion described as follows: Beginning at a point North 933.24 feet and East 239.05 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 203.63 feet; thence South 74°00' East, 404.19 feet; thence South 25°00' West, 210.30 feet; thence North 70°00' West, 171.56 feet; thence North 74°00' West, 144.02 feet to the point of beginning.

Parcel 2: Beginning at the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North along the Section Line 550.00 feet; thence South 65°53' East, 974.8 feet; thence South 37°50' East, 192.0 feet; thence West 1007.5 feet, more or less, to the point of beginning.

Excepting therefrom that portion described as follows: Beginning at the West Quarter Corner of said Section 28, and running thence North 190.34 feet along the Section Line; thence South 66°30' East, 48.40 feet to the point of a 400.00 foot radius curve to the right; thence Southeasterly 91.92 feet along the arc of said curve; thence South 53°20' East, 109.02 feet to a point on a 460.00 foot radius curve to the left; thence Southeasterly 126.33 feet along the arc of said curve to a point on the South Line of the Northwest Quarter of said Section 28; thence North 89°52'30" West, 321.55 feet to the point of beginning.

Also excepting therefrom that portion dedicated to the Town of Springdale for Amphitheater Road, by Instrument recorded in Book 364, at Page 533 of the Official Records of Washington County, Utah.

Also less and excepting therefrom any portion of the above described Parcels 1 and 2 lying within Sunwest Resort Amended, and Sunwest Resort, Phase 2, according to the Official Plats thereof, recorded in the Office of the County Recorder of said County.

4. Plaintiff owns the Subject Property in fee simple and is entitled to the lawful, peaceful and continuous possession thereof.

5. Plaintiff's title to the Subject Property is forever quieted against any and all claims or demands of Defendant or any persons claiming by, through or under said defendants and the defendants, and all persons claiming by, through or under them shall be and they hereby are

forever barred from any estate, right, title, lien, claim, interest and/or equity of redemption in and to the subject property or any part thereof and the title of plaintiff is hereby adjudged and decreed quieted against all claims or demands of the defendants and the defendants, and all persons claiming by, through or under them, are hereby perpetually estopped and enjoined from asserting any claim thereto.

6. Lang's notice of interest, recorded on 12/13/2006, as entry 20060057874 with the Washington County Recorder's Office, is hereby RELEASED.

7. Lang is awarded judgment in the amount of $800,000.00 against Thatcher regarding his fourth cause of action (for unjust enrichment).

8. Pursuant to Utah R. Civ. P. 54(d), Thatcher is awarded costs in the amount of $5,914.74 as of November 8, 2017.

9. This order shall constitute the final order of the Court in this case, and no additional order is necessary.

IT IS SO ORDERED.

[The Court's signature appears at the top of the first page of this Judgment.]

END OF ORDER

Approved as to form: _____ Eli Milne Durham Jones & Pinegar Attorneys for Defendant

Addendum 3

Option Agreement

EXHIBIT P
3
Stip

OPTION AGREEMENT

THIS AGREEMENT dated this ____ day of _____, 2006, by an between Melanie Madsen (herein after "owner" of the City o f Oregon, Ogle County, IL; and Mike Lang (herein after "buyer")

Witnesseth:

1. For and in consideration of the payment to her of Fifty Thousand Dollars ($50,000.00), to be paid by certified funds, on or before February 9, 2006, owner does hereby grant to Mike Lang, the exclusive right and option to purchase the real estate shown and described on Exhibit "A" hereto.

(Legal to be inserted) consisting of approximately 19 acres located in Springdale, Washington County, Utah.

2. The right to purchase said real property shall be for a period of (56) days commencing with date hereof and expiring on the 2nd day of April, 2006, on which date, unless exercised prior to that date in the manner hereinafter specified, any and all rights granted hereunder by owner shall terminate without any further action on her part.

3. The purchase price to be paid for said property shall be One Million Eight Hundred Thousand Dollars, ($1,800.000.00), which sum shall be paid as follows: the first of which shall be One Hundred Thousand Dollars ($100,000.00), non refundable, payable on signing of final contract of sale on or before April 2, 2006.
A second payment of Four Hundred Thousand Dollars ($400,000.00) to be paid on or before June 6, 2006.
A third payment of Six Hundred Thousand Dollars ($600,000.00), to be paid on or before January 5, 2007.
A Final payment of Six Hundred Fifty Thousand Dollars ($650,000.00), to be paid on or before January 5, 2008.

4. The parties agree that, in the event of the exercise of this option, they will execute a written contract of sale in form of that generally in use for the installment sale of commercial real property in Ogle County, Illinois, or such other form as the parties may agree.

5. In addition to such other provisions that said contract of sale may contain, it shall provide for the payment of the purchase price as provided above, and that upon payment thereof owner shall execute and deliver to Mike Lang, her warranty deed to said property in the form of that in general use in the State of Utah.

6. The rights granted hereunder may not be assigned without the prior written consent of owner who agrees that such consent will not be unreasonably withheld.

MM

7. The parties agree that this agreement shall be governed by the laws of the State of Illinois and that Circuit Court of Kane County, Illinois shall have exclusive jurisdiction to hear and adjudicate any disputes that may arise between the parties hereto.

8. Any and all notices that are required to be sent hereunder shall be sent by registered or certified mail, return receipt requested, to the parties hereto addressed as follows:

To Owner: Melanie Madsen, C/O Fred Morelli, Jr. 403 W. Galena Blvd. Aurora, IL 60506 or Melanie Madsen P.O. Box 145 Oregon, IL 61061

To: Mike Lang

9. In the event that parties fail to agree on the form of the contract hereinabove referred to, the initial Fifty Thousand Dollar ($50,000.00) payment remains non refundable, except in the event Seller can not provide insurable title.

10. In the event that this option is exercised, no interest shall be due on the unpaid balance of the purchase price, from time to time owed.

11. If purchaser defaults on any scheduled payment after expiration of a thirty (30) day grace period, all payments previously made shall be forfeited to Seller as liquidated damages.

12. Title to the property shall not pass from Seller to Buyer until all payments required by this contract are made.

13. During the term of this contract, Buyer shall be responsible for taxes and assessments, but not responsible for prior taxes or assessments.

14. Seller shall cooperate with Buyer in providing information as to water rights and other local matters.

15. The Buyer accepts the property as presently zoned.

16. This agreement does not become effective until either Buyer's Fifty Thousand Dollars ($50,000.00) check clears Seller's bank or Buyer has wired Fifty Thousand Dollars ($50,000.00) to Seller's account and the funds have been deposited.

17. Seller to provide history of property and zoning to Buyer before February 15, 2006.

Dated the year and date first above written.

Melanie Madsen

Mike Lang

1417

Addendum 4

Second Addendum to

Option Agreement

SECOND ADDENDUM TO OPTION AGREEMENT

This is a Second Addendum to the Option Agreement dated (by Owner) February 13, 2006, by and between MELANIE MADSEN as "Owner" and MIKE LANG as "Buyer" for the option to purchase certain real property consisting of approximately 19 acres located in the Town of Springdale, Washington County, Utah.

Owner and Buyer agree to modify the Option Agreement as follows. This Second Addendum replaces and supersedes the first Addendum to the Option Agreement.

ADDENDUM

1. **Grant of Extension.** The parties hereby agree to extend the deadlines referenced in paragraphs 2 and 3 of the Option Agreement as follows:

   (a) Buyer's right to exercise the option granted in the Option Agreement to purchase the real property shall expire on May 1, 2006;
   (b) The first payment of $100,000.00 shall be due and payable on or before May 1, 2006;
   (c) The second payment of $400,000.00 shall be due and payable on or before July 5, 2006.

2. **Counterparts.** This Addendum may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement. Transmittal and receipt of a facsimile copy of this Addendum with facsimile signatures shall be binding on the parties hereto.

3. **No Modifications of Other Terms.** Except as expressly set forth herein, all other terms of the Option Agreement shall remain the same.

4. **Full Agreement.** This written document contains the entire understanding and agreement of the parties on the subject matter set forth herein, and supercedes any prior agreement relating to these matters. No promises or inducements have been made other than those reflected herein, and no party is relying on any statement or representation by an person except those set forth herein, including without limitation oral or written summaries of this Addendum.

Melanie Madsen

Melanie Madsen

Date: April 15, 2006

Mike Lang

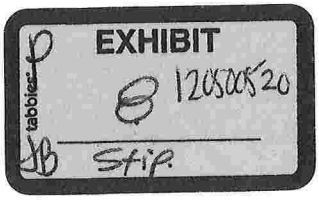
Date: _____

MAL

Addendum 5

Real Estate

Purchase Agreement



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:

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

If to 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

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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EXHIBIT A

File No. 133475

EXHIBIT "A" - LEGAL DESCRIPTION

PRELIMINARY LEGAL DESCRIPTION ONLY

PARCEL 1:

PROOFREAD ☐

Beginning at a point North 0°08' East, 550.00 feet along the Section Line and South 65°45' East, 536.25 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 65°45' West, 536.25 feet; thence North 0°08' East, 770.97 feet to the Southwest Corner of BALANCED ROCK HILLS SUBDIVISION, a subdivision according to the Official Plat thereof, on file in the Office of the County Recorder of Washington County, State of Utah; thence North 89°57'22" East along the East-West 1/16 Line and the South Line of said BALANCED ROCK HILLS SUBDIVISION 1077.0 feet, more or less, to the Westerly Line of Balanced Rock Road; thence along the Westerly Line of said road as follows: South 20°44' West 301.7 feet; Southerly along the arc of a 119.4 foot radius curve to the left 68.1 feet; South 11°57' East, 124.2 feet; Southerly along the arc of a 92.5 foot radius curve to the right 59.4 feet; South 24°53' West, 87.2 feet; Southerly along the arc of a 57.3 foot radius curve to the left 38.3 feet to the North Line of SUNWEST RESORT CONDOMINIUMS, as recorded in the Office of the County Recorder of Washington County, State of Utah; thence North 65°45' West along the North Line of said SUNWEST RESORT CONDOMINIUMS, to the most Easterly Corner of SUNWEST RESORT CONDOMINIUMS PHASE TWO; thence around said SUNWEST RESORT CONDOMINIUMS PHASE TWO as follows; Westerly 24.28 feet along the arc of a 112.50 foot radius curve to the left; North 51°10'04" West, 94.87 feet; Westerly 26.85 feet along the arc of a 162.50 foot radius curve to the left; North 20°00' East, 27.17 feet; North 70°00' West, 70.00 feet; South 20°00' West, 25.00 feet; North 70°00' West, 128.00 feet; North 74°00' West, 127.00 feet; South 16°00' West, 50.00 feet; South 16°42'56" East, 194.48 feet; South 76°00' East, 253.00 feet; thence leaving said SUNWEST RESORT CONDOMINIUMS PHASE TWO boundary and running thence South 09°53' West, 307.83 feet to the point of beginning.

EXCEPTING THEREFROM that portion described as follows:

Beginning at a point North 933.24 feet and East 239.05 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 203.63 feet; thence South 74°00' East, 404.19 feet; thence South 25°00' West, 210.30 feet; thence North 70°00' West, 171.56 feet; thence North 74°00' West, 144.02 feet to the point of beginning.

(CONTINUED)

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File No. 133475

EXHIBIT "A" - LEGAL DESCRIPTION - CONTINUED

PARCEL 2:

Beginning at the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North along the Section Line 550.00 feet; thence South 65°53' East, 974.8 feet; thence South 37°50' East, 192.0 feet; thence West 1007.5 feet, more or less, to the point of beginning.

EXCEPTING THEREFROM that portion described as follows:

Beginning at the West Quarter Corner of said Section 28, and running thence North 190.34 feet along the Section Line; thence South 66°30' East, 48.40 feet to the point of a 400.00 foot radius curve to the right; thence Southeasterly 91.92 feet along the arc of said curve; thence South 53°20' East, 109.02 feet to a point on a 460.00 foot radius curve to the left; thence Southeasterly 126.33 feet along the arc of said curve to a point on the South Line of the Northwest Quarter of said Section 28; thence North 89°52'30" West, 321.55 feet to the point of beginning.

ALSO EXCEPTING THEREFROM that portion dedicated to the Town of Springdale for Amphitheater Road, by Instrument recorded in Book 364, at Page 533 of the Official Records of Washington County, Utah.

ALSO LESS AND EXCEPTING THEREFROM any portion of the above described Parcels 1 and 2 lying within SUNWEST RESORT AMENDED, and SUNWEST RESORT, PHASE 2, according to the Official Plats thereof, recorded in the Office of the County Recorder of said County.

* * *

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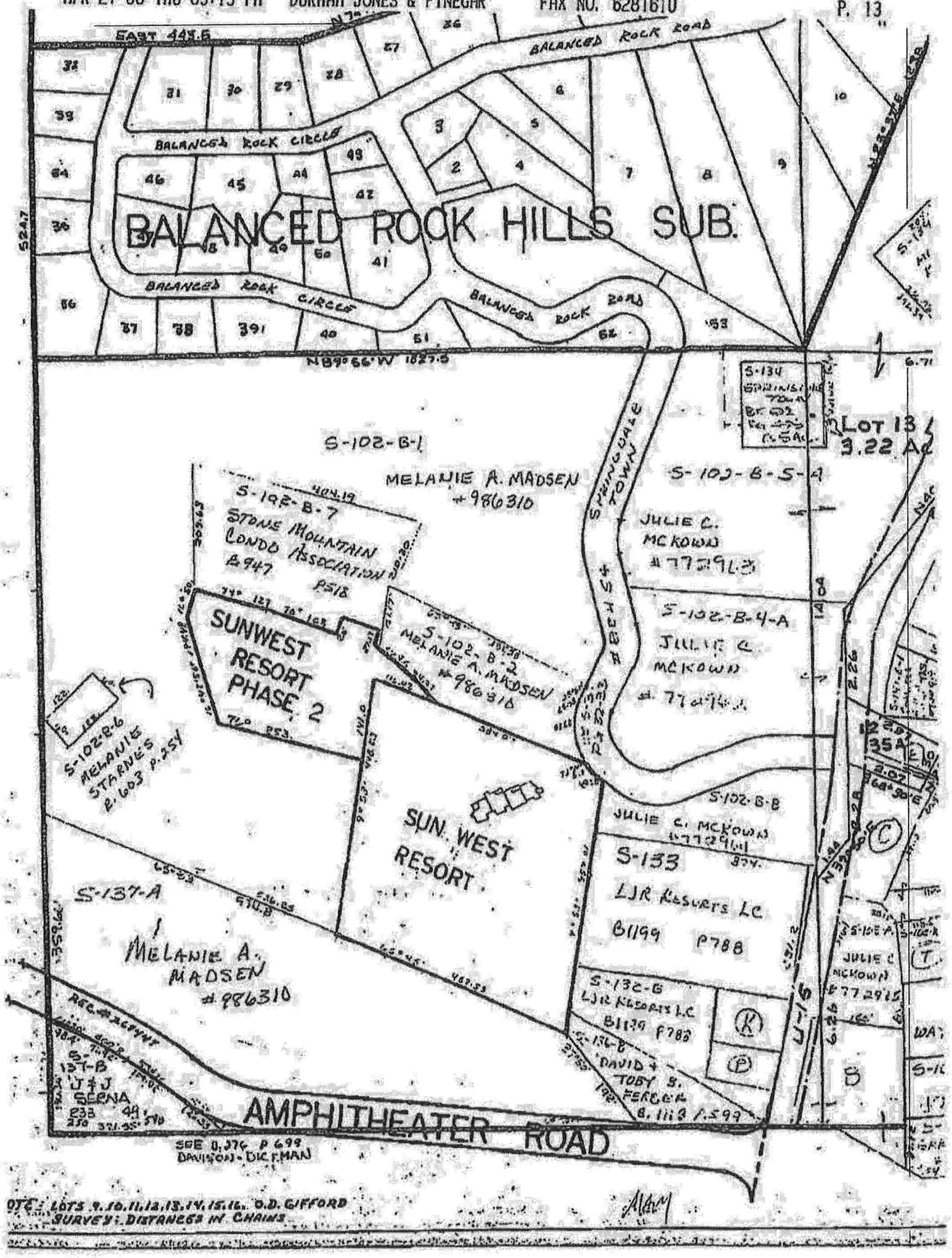
BALANCED ROCK HILLS SUB.
BALANCED ROCK ROAD
BALANCED ROCK CIRCLE
BALANCED ROCK CIRCLE
BALANCED ROCK ROAD
EAST 445.5
N89°66'W 1827.5
S-102-B-1
MELANIE A. MADSEN
#986310
S-102-B-7
STONE MOUNTAIN CONDO ASSOCIATION
B947 P518
SUNWEST RESORT PHASE 2
S-102-B-2
MELANIE A. MADSEN
#986310
S-102-B-6
MELANIE STARNES
B.603 P.251
SUN WEST RESORT
S-137-A
MELANIE A. MADSEN
#986310
S-102-B-5-A
JULIE C. MCKOWN
#772915
S-102-B-4-A
JULIE C. MCKOWN
#772915
S-102-B-8
JULIE C. MCKOWN
#772915
S-133
LJR RESORTS LC
B1199 P788
S-132-B
LJR RESORTS LC
B1199 P788
DAVID & TOBY S. FERRER
B.1113 P.599
S-134
LOT 13
3.22 AC
SPRINGDALE TOWN
AMPHITHEATER ROAD
SEE B.376 P.699
DAVISON - DICKMAN
DTC: LOTS 9,10,11,12,13,14,15,16, O.D. GIFFORD SURVEY; DISTANCES IN CHAINS

EXHIBIT B

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COMMITMENT FOR TITLE INSURANCE

Fidelity National Title Insurance Company

SCHEDULE A

File No. 133475

*** OWNER PREMIUM:** [redacted]

Closing Officer: DENISE
157 E Riverside Dr., Ste 1B/652-4827
Fax/656-9832

1. Effective Date: 30TH day of NOVEMBER, 2005, at 7:00 A.M.

2. Policy or Policies to be Issued: Amount

(a) [] ALTA Owner Policy: 10-17-92 [redacted]

Proposed Insured: [redacted]

(b) [] ALTA Loan Policy: 10-17-92 $

[] Conv [] FHA [] VA

Proposed Insured:

3. The estate or interest in the land described or referred to in the Commitment and covered herein is FEE SIMPLE and is at the effective date hereof vested in
MELAINE STARNES, as to a 60.00 foot by 100.00 foot Parcel lying within Parcel 1 and to MELANIE A. MADSEN, as to the remainder

4. The land referred to in this Commitment is situated in the County of WASHINGTON, State of UTAH, and described as follows:

SEE ATTACHED EXHIBIT "A" - LEGAL DESCRIPTION

* * *

NOTE: The names above have been checked for Judgments and any matters thereon are shown on Schedule "B" of this Commitment.

* * *

Countersigned: _____
Authorized Officer or Agent

SOUTHERN UTAH TITLE COMPANY
ST. GEORGE, UTAH

PA J
ALTA Commitment-Schedule A
Form 1004-223

ORIGINAL

Valid Only If Schedule B and Cover Are Attached

11417

File No. 133475

EXHIBIT "A" - LEGAL DESCRIPTION

PRELIMINARY LEGAL DESCRIPTION ONLY

PARCEL 1:

PROOFREAD ☐

Beginning at a point North 0°08' East, 550.00 feet along the Section Line and South 65°45' East, 536.25 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 65°45' West, 536.25 feet; thence North 0°08' East, 770.97 feet to the Southwest Corner of BALANCED ROCK HILLS SUBDIVISION, a subdivision according to the Official Plat thereof, on file in the Office of the County Recorder of Washington County, State of Utah; thence North 89°57'22" East along the East-West 1/16 Line and the South Line of said BALANCED ROCK HILLS SUBDIVISION 1077.0 feet, more or less, to the Westerly Line of Balanced Rock Road; thence along the Westerly Line of said road as follows: South 20°44' West 301.7 feet; Southerly along the arc of a 119.4 foot radius curve to the left 68.1 feet; South 11°57' East, 124.2 feet; Southerly along the arc of a 92.5 foot radius curve to the right 59.4 feet; South 24°53' West, 87.2 feet; Southerly along the arc of a 57.3 foot radius curve to the left 58.3 feet to the North Line of SUNWEST RESORT CONDOMINIUMS, as recorded in the Office of the County Recorder of Washington County, State of Utah; thence North 65°45' West along the North Line of said SUNWEST RESORT CONDOMINIUMS, to the most Easterly Corner of SUNWEST RESORT CONDOMINIUMS PHASE TWO; thence around said SUNWEST RESORT CONDOMINIUMS PHASE TWO as follows; Westerly 24.28 feet along the arc of a 112.50 foot radius curve to the left; North 51°10'04" West, 94.87 feet; Westerly 26.85 feet along the arc of a 162.50 foot radius curve to the left; North 20°00' East, 27.17 feet; North 70°00' West, 70.00 feet; South 20°00' West, 25.00 feet; North 70°00' West, 128.00 feet; North 74°00' West, 127.00 feet; South 16°00' West, 50.00 feet; South 16°42'56" East, 194.48 feet; South 76°00' East, 253.00 feet; thence leaving said SUNWEST RESORT CONDOMINIUMS PHASE TWO boundary and running thence South 09°53' West, 307.83 feet to the point of beginning.

EXCEPTING THEREFROM that portion described as follows:

Beginning at a point North 933.24 feet and East 239.05 feet from the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North 203.63 feet; thence South 74°00' East, 404.19 feet; thence South 25°00' West, 210.30 feet; thence North 70°00' West, 171.56 feet; thence North 74°00' West, 144.02 feet to the point of beginning.

(CONTINUED)

File No. 133475

EXHIBIT "A" - LEGAL DESCRIPTION - CONTINUED

PARCEL 2:

Beginning at the West Quarter Corner of Section 28, Township 41 South, Range 10 West, Salt Lake Base and Meridian; and running thence North along the Section Line 550.00 feet; thence South 65°53' East, 974.8 feet; thence South 37°50' East, 192.0 feet; thence West 1007.5 feet, more or less, to the point of beginning.

EXCEPTING THEREFROM that portion described as follows:

Beginning at the West Quarter Corner of said Section 28, and running thence North 190.34 feet along the Section Line; thence South 66°30' East, 48.40 feet to the point of a 400.00 foot radius curve to the right; thence Southeasterly 91.92 feet along the arc of said curve; thence South 53°20' East, 109.02 feet to a point on a 460.00 foot radius curve to the left; thence Southeasterly 126.33 feet along the arc of said curve to a point on the South Line of the Northwest Quarter of said Section 28; thence North 89°52'30" West, 321.55 feet to the point of beginning.

ALSO EXCEPTING THEREFROM that portion dedicated to the Town of Springdale for Amphitheater Road, by Instrument recorded in Book 364, at Page 533 of the Official Records of Washington County, Utah.

ALSO LESS AND EXCEPTING THEREFROM any portion of the above described Parcels 1 and 2 lying within SUNWEST RESORT AMENDED, and SUNWEST RESORT, PHASE 2, according to the Official Plats thereof, recorded in the Office of the County Recorder of said County.

* * *

Schedule B - Section 2

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession, or claiming to be in possession, thereof.
2. Easements, liens, encumbrances, or claims thereof, which are not shown by the public records.
3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey of the land would disclose, and which are not shown by the public records.
4. Any lien, or right to a lien, imposed by law for services, labor, or material heretofore or hereafter furnished, which lien, or right to a lien, is not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) Indian treaty or aboriginal rights, including, but not limited to, easements or equitable servitudes; or, (d) water rights, claims or title to water, whether or not the matters excepted under (a), (b), (c) or (d) are shown by the public records.
6. Taxes or assessments which are not now payable or which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
7. Any service, installation, connection, maintenance or construction charges for sewer, water, electricity, or garbage collection or disposal or other utilities unless shown as an existing lien by the public records.
8. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this Commitment.
9. Any right, title, or interest in any minerals, mineral rights, or related matters, including but not limited to oil, gas, coal & other hydrocarbons.
10. Taxes for the year 2005, in the amount of $137.61, $12.81, $27.46 and $1,074.10, which are liens, now due and payable, but will not become delinquent until December 1, 2005. Tax Serial No. S-102-B-1, S-102-B-2, S-102-B-6 and S-137-A.
11. Taxes for the year 2004, in the amount of $147.58, $13.74, $29.44 and $1,151.87, plus penalties, interest and costs, which are liens, now delinquent, due and payable. Tax Serial No. S-102-B-1, S-102-B-2, S-102-B-6 and S-137-A.
12. Taxes for the year 2003, in the amount of $147.52, $13.73, $29.43 and $1,151.41, plus penalties, interest and costs, which are liens, now delinquent, due and payable. Tax Serial No. S-102-B-1, S-102-B-2, S-102-B-6 and S-137-A.

(CONTINUED)

NOTE: EXCEPTIONS # 8; WILL NOT APPEAR IN THE MORTGAGE POLICY TO BE ISSUED HEREUNDER.

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Fidelity National Title Insurance Company

FILE NO. 133475
Page No. 3

SCHEDULE "B" CONTINUED

13. Taxes for the year 2002, in the amount of $8.40 and $62.67, plus penalties, interest and costs, which are liens, now delinquent, due and payable. Tax Serial No. S-102-B-1 and S-137-A.

14. Taxes or Assessments which are not shown as existing liens by the Official Washington County Records. This Policy does not include a search of the Special Assessment Records of Springdale Town, and Ownership of said property is subject to any Assessment by said Municipality for Curb and Gutter, Street Improvement, Sewer, Sidewalk, Water, etc.,

15. Rights of way for any roads, ditches, canals, or transmission lines now existing over, under, or across said property.

16. An Easement for Utilities and incidental purposes, and rights thereto, as conveyed to Los Angeles and Salt Lake Railroad Company, by Instrument recorded February 11, 1927, as Entry No. 29912, in Book U-6, at Pages 460-461, Official Washington County Records. (General Easement - no specific location set forth)

17. An Easement for Utilities and incidental purposes, and rights thereto, as conveyed to Los Angeles and Salt Lake Railroad Company, by Instrument recorded July 23, 1928, as Entry No. 30149, in Book U-7, at Page 115, Official Washington County Records. (General Easement - no specific location set forth)

18. Excepting and Reserving all the Oil and Gas and the right to prospect for, mine, and remove such deposits upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509), as Reserved by the U.S.A. by Patent recorded July 7, 1929, as Entry No. 30754, in Book U-7, at Pages 185-186, Official Washington County Records. (Affects this and other property)

19. Subject to a Right of Way along the South line of said Land for Roadway to the Springdale Garbage Disposal Pit and the Springdale Pipeline Company Head House. (Affects Parcel 2)

20. Right of Way Easement in favor of California-Pacific Utilities Company, 5 feet in width, for a right of way and easement, and rights incidental thereto, recorded December 6, 1966, as Entry No. 128988, in Book S-64, at Page 331, Official Washington County Records. (Affects the West 5.0 feet of Parcel 1 and also affects other property)

21. Rights of way for utility and incidental purposes, and rights thereto, as conveyed to California-Pacific Utilities Company by instrument recorded December 19, 1966, as Entry No. 129083, in Book S-64, at Pages 457, Official Washington County Records. (Affects the West 5.0 feet of Parcel 1 and also affects other property)

(CONTINUED)

1417

Fidelity National Title Insurance Company

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Page No. 4

SCHEDULE "B" CONTINUED

22. Subject to a Right of Way Easement in favor of The Town of Springdale, for Water Line Easement 10 feet in width, and rights thereto, as recorded December 1, 1970, as Entry No. 142807, in Book 99, at Page 454, Official Washington County Records. (Affects Parcel 2) (Exact location to be determined by survey)

23. A right of way for pipelines and incidental purposes, and rights thereto, as conveyed to the Town of Springdale by instrument recorded December 8, 1970, as Entry No. 142911, in Book 100, at Pages 89-91, Official Washington County Records. (Affects Parcel 1) (Exact location to be determined by Survey)

24. Liability to Assessments levied by Washington County for Rockville/Springdale Fire Protection District, as disclosed by Resolution recorded January 30, 1985, as Entry No. 271357, in Book 368, at Pages 161-163, Official Washington County Records.

25. Deed of Trust, dated NOVEMBER 16, 2005, executed by MELANIE A. MADSEN, as TRUSTOR, in favor of ZIONS FIRST NATIONAL BANK, as TRUSTEE and BENEFICIARY, to secure the payment of $117,000.00 and interest, recorded NOVEMBER 21, 2005, as Entry No. 986311, in Book 1816, at Pages 187-197, Official Washington County Records.

26. Any discrepancies, conflicts in boundary lines, shortage in area, encroachments, and any facts which a correct Survey would disclose. (Prior to the issuance of a Policy of Title Insurance, a Certified Survey must be submitted to this Office for review and said Policy will be subjected to the same)

27. Require underwriter approval before the issuance of the Policy of Title Insurance herein referred to.

* * *

NOTICE: Any matter in dispute between you and The Company may be subject to arbitration as an alternative to court action pursuant to the title insurance arbitration rules of the American Arbitration Association, a copy of which is available on request from The Company. Any decision reached by arbitration shall be binding upon both you and The Company. The arbitration award may include attorney's fees if allowed by state law and may be entered as a judgment in any court of proper jurisdiction.

* A search and examination fee of not less than $120.00 and not more than 50% of the proposed premium will be charged. This amount will be wholly credited against title insurance fees should Southern Utah Title Company issue a policy.

MM

Chicago Title Insurance Company

Fidelity National Financial Group of Companies' Privacy Statement
July 1,2001

We recognize and respect the privacy expectations of today's consumers and the requirements of applicable federal and state privacy laws. We believe that making you aware of how we use your non-public personal information ("Personal Information"), and to whom it is disclosed, will form the basis for a relationship of trust between us and the public that we serve. This Privacy Statement provides that explanation. We reserve the right to change this Privacy Statement from time to time consistent with applicable privacy laws.

In the course of our business, we may collect Personal Information about you from the following sources:

- From applications or other forms we receive from you or your authorized representative;
- From your transactions with, or from the services being performed by, us, our affiliates, or others;
- From our Internet web sites;
- From the public records maintained by governmental entities that we either obtain directly from those entities, or from our affiliates or others; and
- From consumer or other reporting agencies.

Our Policies Regarding the Protection of the Confidentiality and Security of Your Personal Information

We maintain physical, electronic and procedural safeguards to protect your Personal Information from unauthorized access or intrusion. We limit access to the Personal Information only to those employees who need such access in connection with providing products or services to you or for other legitimate business purposes.

Our Policies and Practices Regarding the Sharing of Your Personal Information

We may share your Personal Information with our affiliates, such as insurance companies, agents, and other real estate settlement service providers. We also may disclose your Personal Information:

- to agents, brokers or representatives to provide you with services you have requested;
- to third-party contractors or service providers who provide services or perform marketing or other functions on our behalf; and
- to others with whom we enter into joint marketing agreements for products or services that we believe you may find of interest.

In addition, we will disclose your Personal Information when you direct or give us permission, when we are required by law to do so, or when we suspect fraudulent or criminal activities. We also may disclose your Personal Information when otherwise permitted by applicable privacy laws such as, for example, when disclosure is needed to enforce our rights arising out of any agreement, transaction or relationship with you.

One of the important responsibilities of some of our affiliated companies is to record documents in the public domain. Such documents may contain your Personal Information.

Right to Access Your Personal Information and Ability To Correct Errors Or Request Changes Or Deletion

Certain states afford you the right to access your Personal Information and, under certain circumstances, to find out to whom your Personal Information has been disclosed. Also, certain states afford you the right to request correction, amendment or deletion of your Personal Information. We reserve the right, where permitted by law, to charge a reasonable fee to cover the costs incurred in responding to such requests.

All requests must be made in writing to the following address:

Privacy Compliance Officer
Fidelity National Financial, Inc. 4050 Calle Real, Suite 220
Santa Barbara, CA 93110

Multiple Products or Services

If we provide you with more than one financial product or service, you may receive more than one privacy notice from us. We apologize for any inconvenience this may cause you.

1/11/1

SOUTHERN UTAH TITLE COMPANY
July 1,2001

e recognize and respect the privacy expectations of today's consumers and the requirements of applicable federal and state privacy laws. We believe at making you aware of how we use your non-public personal information ("Personal Information"), and to whom it is disclosed, will form the basis r a relationship of trust between us and the public that we serve. This Privacy Statement provides that explanation. We reserve the right to change this ivacy Statement from time to time consistent with applicable privacy laws.

the course of our business, we may collect Personal Information about you from the following sources:

- From applications or other forms we receive from you or your authorized representative;
- From your transactions with, or from the services being performed by, us, our affiliates, or others;
- From our Internet web sites;
- From the public records maintained by governmental entities that we either obtain directly from those entities, or from our affiliates or others; and
- From consumer or other reporting agencies.

ur Policies Regarding the Protection of the Confidentiality and Security of Your Personal Information

'e maintain physical, electronic and procedural safeguards to protect your Personal Information from unauthorized access or intrusion. We limit ccess to the Personal Information only to those employees who need such access in connection with providing products or services to you or r other legitimate business purposes.

ur Policies and Practices Regarding the Sharing of Your Personal Information

'e may share your Personal Information with our affiliates, such as insurance companies, agents, and other real estate settlement service rovidors. We also may disclose your Personal Information:

- to agents, title companies, exchange companies, appraisers, brokers or representatives to provide you with services you have requested;
- to third-party contractors or service providers who provide services or perform marketing or other functions on our behalf; and
- to others with whom we enter into joint marketing agreements for products or services that we believe you may find of interest.

n addition, we will disclose your Personal Information when you direct or give us permission, when we are required by law to do so, or when e suspect fraudulent or criminal activities. We also may disclose your Personal Information when otherwise permitted by applicable privacy ws such as, for example, when disclosure is needed to enforce our rights arising out of any agreement, transaction or relationship with you.

ne of the important responsibilities is to record documents in the public domain. Such documents may contain your Personal Information.

Jght to Access Your Personal Information and Ability To Correct Errors Or Request Changes Or Deletion

'ertain states afford you the right to access your Personal Information and, under certain circumstances, to find out to whom your Personal nformation has been disclosed. Also, certain states afford you the right to request correction, amendment or deletion of your Personal Information. 'e reserve the right, where permitted by law, to charge a reasonable fee to cover the costs incurred in responding to such requests.

ll requests must be made in writing to the following address:

Privacy Compliance Officer
Southern Utah Title Company
40 South 100 East, St. George, Utah 84770

ultiple Products or Services

f we provide you with more than one financial product or service, you may receive more than one privacy notice from us. We apologize for any inconvenience ch may cause you.

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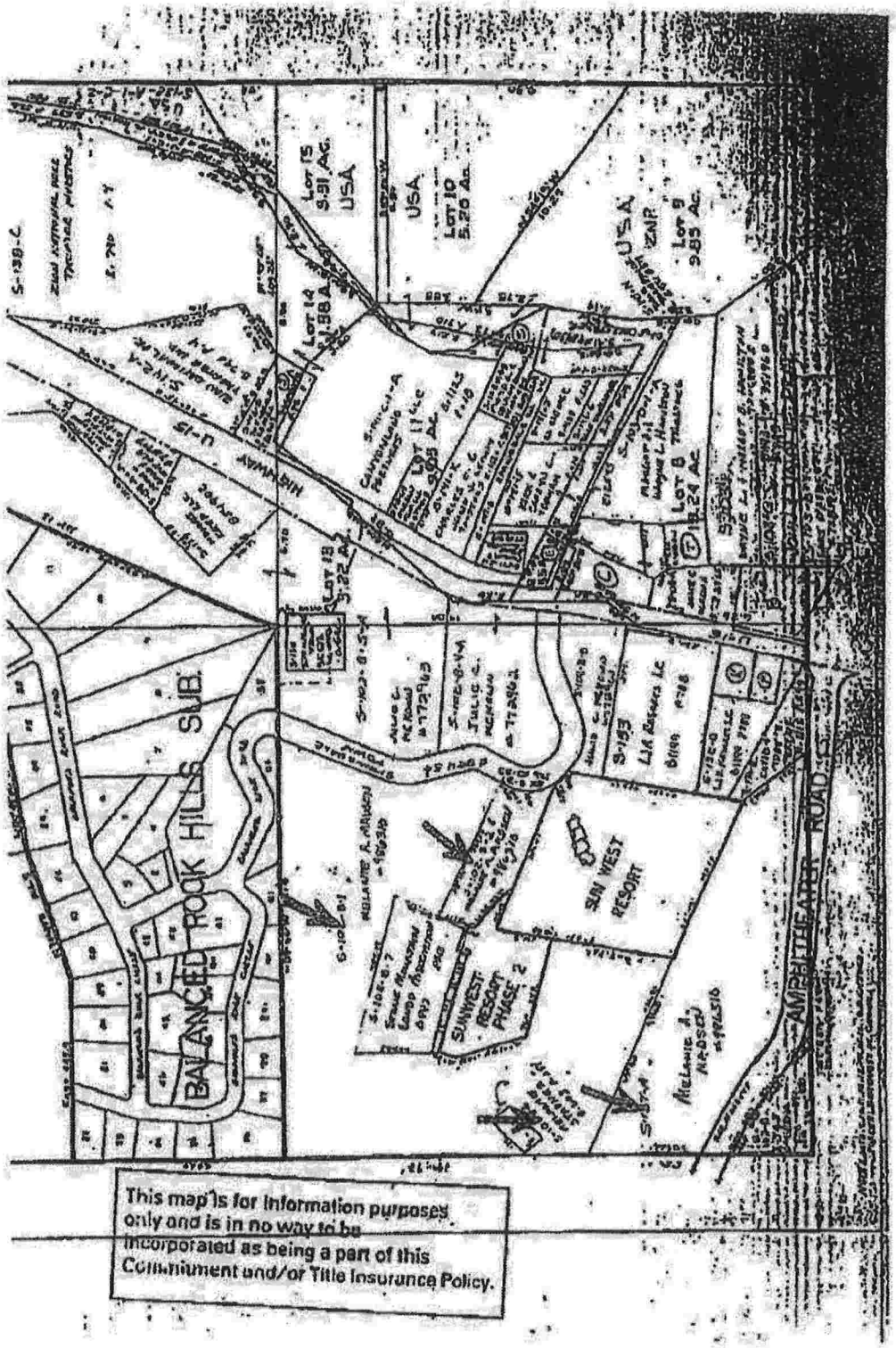
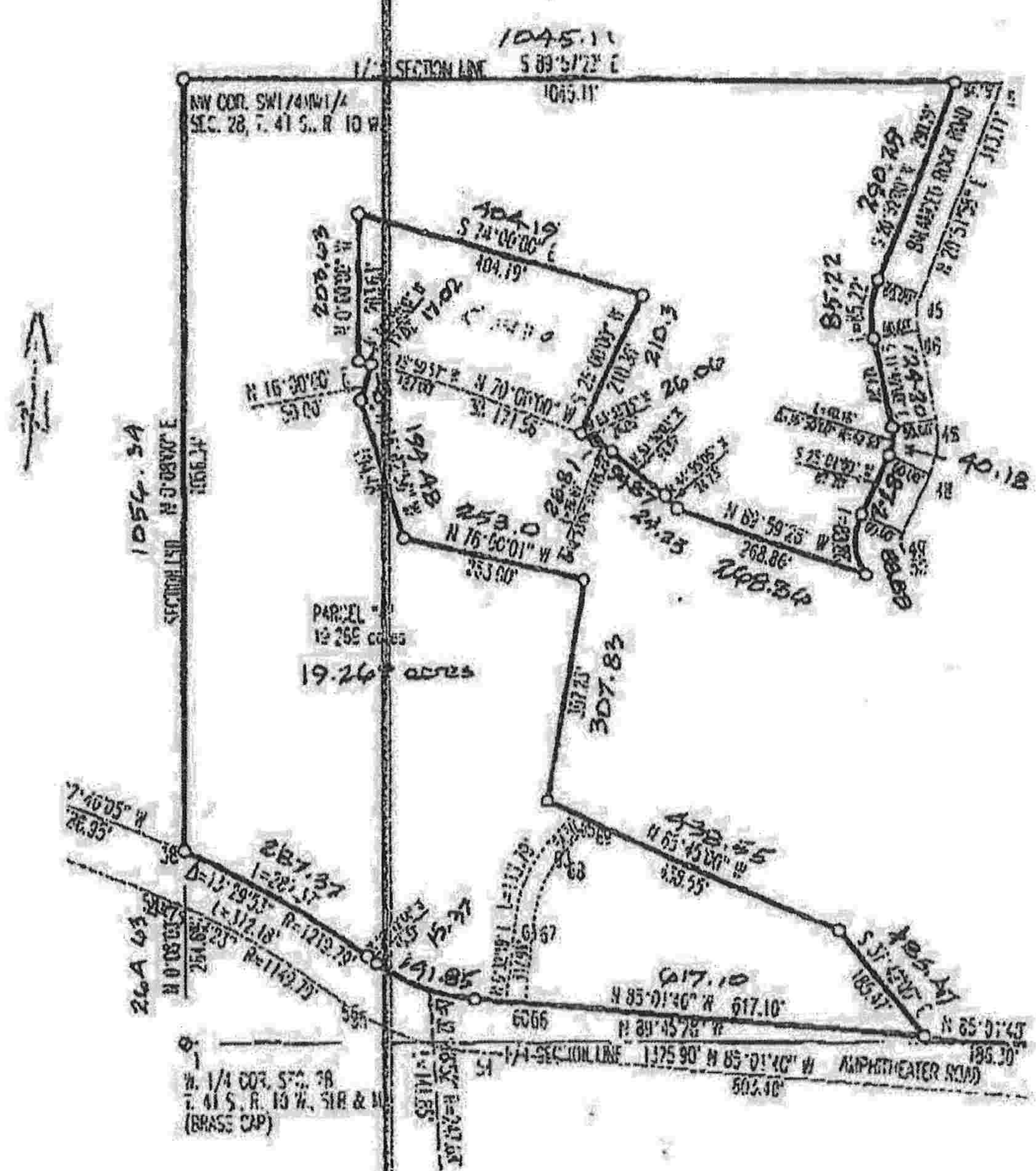

BALANCED ROCK HILLS SUB.
SUN WEST RESORT
SUNWEST RESORT PHASE 2
AMPHITHEATER ROAD
Lot 15 9.91 Ac.
USA
Lot 10 5.20 Ac.
Lot 9 9.85 Ac.
Lot 14 11.58 Ac.
Lot 11 9.05 Ac.
Lot 8 18.24 Ac.
Lot 18 3.22 Ac.
S-193
This map is for information purposes only and is in no way to be incorporated as being a part of this Commitment and/or Title Insurance Policy.

11477


1/4 SECTION LINE S 89°57'22" E
1045.11'
NW COR. SW1/4NW1/4
SEC. 28, T. 41 S., R. 10 W.
S 74°00'00" E
404.19'
PARCEL
19.26 acres
N 76°00'01" W
353.00'
N 85°01'40" W 617.10'
1/4 SECTION LINE 1325.90' N 85°01'40" W
AMPHITHEATER ROAD
W. 1/4 COR. SEC. 28
T. 41 S., R. 10 W., SLB & M
(BRASS CAP)

3AC5

NAM

EXHIBIT C

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OPTION AGREEMENT

THIS AGREEMENT dated this ____ day of _____, 2006, by an between Melanie Madsen (herein after "owner" of the City o f Oregon, Ogle County, IL; and Mike Lang (herein after "buyer")

Witnesseth:

1. For and in consideration of the payment to her of Fifty Thousand Dollars ($50,000.00), to be paid by certified funds, on or before February 9, 2006, owner does hereby grant to Mike Lang, the exclusive right and option to purchase the real estate shown and described on Exhibit "A" hereto.

(Legal to be inserted) consisting of approximately 19 acres located in Springdale, Washington County, Utah.

2. The right to purchase said real property shall be for a period of (56) days commencing with date hereof and expiring on the 2nd day of April, 2006, on which date, unless exercised prior to that date in the manner hereinafter specified, any and all rights granted hereunder by owner shall terminate without any further action on her part.

3. The purchase price to be paid for said property shall be One Million Eight Hundred Thousand Dollars, ($1,800.000.00), which sum shall be paid as follows: the first of which shall be One Hundred Thousand Dollars ($100,000.00), non refundable, payable on signing of final contract of sale on or before April 2, 2006.
A second payment of Four Hundred Thousand Dollars ($400,000.00) to be paid on or before June 6, 2006.
A third payment of Six Hundred Thousand Dollars ($600,000.00), to be paid on or before January 5, 2007.
A Final payment of Six Hundred Fifty Thousand Dollars ($650,000.00), to be paid on or before January 5, 2008.

4. The parties agree that, in the event of the exercise of this option, they will execute a written contract of sale in form of that generally in use for the installment sale of commercial real property in Ogle County, Illinois, or such other form as the parties may agree.

5. In addition to such other provisions that said contract of sale may contain, it shall provide for the payment of the purchase price as provided above, and that upon payment thereof owner shall execute and deliver to Mike Lang, her warranty deed to said property in the form of that in general use in the State of Utah.

6. The rights granted hereunder may not be assigned without the prior written consent of owner who agrees that such consent will not be unreasonably withheld.

MLL

7. The parties agree that this agreement shall be governed by the laws of the State of Illinois and that Circuit Court of Kane County, Illinois shall have exclusive jurisdiction to hear and adjudicate any disputes that may arise between the parties hereto.

8. Any and all notices that are required to be sent hereunder shall be sent by registered or certified mail, return receipt requested, to the parties hereto addressed as follows:

To Owner: Melanie Madsen, C/O Fred Morelli, Jr. 403 W. Galena Blvd. Aurora, IL 60506 or Melanie Madsen P.O. Box 145 Oregon, IL 61061

To: Mike Lang

9. In the event that parties fail to agree on the form of the contract hereinabove refered to, the initial Fifty Thousand Dollar ($50,000.00) payment remains non refundable, except in the event Seller can not provide insurable title.

10. In the event that this option is exercised, no interest shall be due on the unpaid balance of the purchase price, from time to time owed.

11. If purchaser defaults on any scheduled payment after expiration of a thirty (30) day grace period, all payments previously made shall be forfeited to Seller as liquidated damages.

12. Title to the property shall not pass from Seller to Buyer until all payments required by this contract are made.

13. During the term of this contract, Buyer shall be responsible for taxes and assessments, but not responsible for prior taxes or assessments .

14. Seller shall cooperate with Buyer in providing information as to water rights and other local matters.

15. The Buyer accepts the property as presently zoned.

16. This agreement does not become effective until either Buyer's Fifty Thousand Dollars ($50,000.00) check clears Seller's bank or Buyer has wired Fifty Thousand Dollars ($50,000.00) to Seller's account and the funds have been deposited.

17. Seller to provide history of property and zoning to Buyer before February 15, 2006.

Dated the year and date first above written.

Melanie Madsen

Mike Lang

1417

SECOND ADDENDUM TO OPTION AGREEMENT

This is a Second Addendum to the Option Agreement dated (by Owner) February 13, 2006, by and between MELANIE MADSEN as "Owner" and MIKE LANG as "Buyer" for the option to purchase certain real property consisting of approximately 19 acres located in the Town of Springdale, Washington County, Utah.

Owner and Buyer agree to modify the Option Agreement as follows. This Second Addendum replaces and supersedes the first Addendum to the Option Agreement.

ADDENDUM

1. **Grant of Extension.** The parties hereby agree to extend the deadlines referenced in paragraphs 2 and 3 of the Option Agreement as follows:

(a) Buyer's right to exercise the option granted in the Option Agreement to purchase the real property shall expire on May 1, 2006;
(b) The first payment of $100,000.00 shall be due and payable on or before May 1, 2006;
(c) The second payment of $400,000.00 shall be due and payable on or before July 5, 2006.

2. **Counterparts.** This Addendum may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement. Transmittal and receipt of a facsimile copy of this Addendum with facsimile signatures shall be binding on the parties hereto.

3. **No Modification of Other Terms.** Except as expressly set forth herein, all other terms of the Option Agreement shall remain the same.

4. **Full Agreement.** This written document contains the entire understanding and agreement of the parties on the subject matter set forth herein, and supercedes any prior agreement relating to these matters. No promises or inducements have been made other than those reflected herein, and no party is relying on any statement or representation by an person except those set forth herein, including without limitation oral or written summaries of this Addendum.

Melanie Madsen
Date: April 15, 2006

Mike Lang
Date: ________

[illegible]

MAM

Addendum 6

Amendment to Contract

for Purchase

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.

Seller will be online to verify taxes paid

By 1-10-08 FW

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

Addendum 7

Notice

dated June 23, 2012

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

Addendum 8

Notice

Dated August 10, 2012

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

August 10, 2012

Dear Mr. Lang,

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 parcels: S-102-B-1, S-102-B-2, S-102-B-6, and S-137-A, within ten (10) days.

Sincerely,

Melanie Madsen Thatcher
863 Royal Sceptor Way
Washington, UT 84780

By Regular Mail + Return Receipt Requested