2018

# Melanie Madsen Thatcher, Plaintiff and Appellee/Cross-Appellant, v. Michael Lang, Defendant and Appellant/Cross-Appellee : Reply Brief

Utah Court of Appeals

Case No. 20180009-CA

IN THE
**UTAH COURT OF APPEALS**

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MELANIE MADSEN THATCHER,

*Plaintiff and Appellee/Cross-Appellant,*

v.

MICHAEL LANG,

*Defendant and Appellant/Cross-Appellee.*

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

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# REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

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## ARGUMENT IN REPLY[1]

### I. To quiet title, Thatcher had the burden to establish Lang's breach and forfeiture and she failed.

Thatcher responds to Lang's quiet title argument by contending that Lang "is not entitled to title in the Property …" (Opp'n Br. Point I.A. at 21-22.) That is not Lang's argument. This case started when Thatcher sued Lang for breach of contract and to quiet title in the Property. (R. 1-3.) "A quiet title action is a 'proceeding to establish a plaintiff's title to land.'" *Collard v. Nagle Constr., Inc*., 2002 UT App 306, ¶ 18, 57 P.3d 603 (quoting Black's Law Dictionary 30 (7th ed. 1999)). "To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own claim to title and not on the weakness of a defendant's title or even its total lack of title." *Id*. (quotation simplified). Thus, in evaluating Thatcher's quiet title claim, the question is—as Lang explained (at Br. 26-30)—whether Thatcher properly terminated the Agreement, not whether Lang was entitled to specific performance.

[1] Thatcher begins both sections of her brief with her view of the facts, including as it relates to the notice provision in the Option Agreement as somehow overriding Section 4.4 in the Agreement and Lang not having the ability to close regardless of her repudiatory conduct. These contentions are arguments, not facts that the trial court ever found. We address them directly in response to the specific argument sections of this brief.

Thatcher is also incorrect in suggesting that Lang "does not have standing to challenge [her] title in the Property." (Opp'n Br. at 22.) The standing question focuses on the standing of the plaintiff who brings the action to quiet title. *See Holladay Towne Ctr., L.L.C. v. Brown Family Holdings, L.L.C.*, 2011 UT 9, ¶ 54, 248 P.3d 452 (discussing standing of parties who "bring a quiet title action to perfect title") (quotation simplified)). Again, that party is Thatcher, not Lang. Lang counterclaimed for an order requiring Thatcher to sell him the Property, not to quiet title in the Property to him. They are not the same thing.

In short, Thatcher sued to quiet title. She failed on her underlying claim. As a result, she was not entitled to an order quieting title. Rather, absent proper termination, the Agreement remains in force. *See* Br. at 28-29; *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 32, 266 P.3d 691.

## II. The trial court abused its discretion in denying Lang specific performance

### A. Lang correctly stated the standard of review and fully preserved his arguments.

Thatcher begins her response to Lang's specific performance arguments with an attempt to water down the applicable standard of review and a cursory argument about preservation. (Opp'n Br. at 23-24.) Both assertions are flawed.

### 1. The trial court abused its discretion in denying specific performance because it misapplied the law.

First, by definition, a trial court abuses its discretion when it misapplies the law. *See Coroles v. State*, 2015 UT 48, ¶ 24, 349 P.3d 739 ("[A]n exercise of discretion guided by an erroneous legal conclusion is reversible."); *Northgate Vill. Dev. LC v. Orem City*, 2018 UT App 89, ¶ 29, 427 P.3d 391 ("Such an error in the application of the law is an abuse of discretion.") *cert. granted sub nom. Northgate Vill. v. Orem City*, 429 P.3d 461 (Utah 2018). Lang explained this in his opening brief (at Br. 3-4), in particular as it applies to specific performance.

Still, Thatcher seeks to cabin that standard to a general statement that "equity and good conscience require that the relief be granted." (Opp'n Br. at 3, 23.) She takes this quote from *Ferris v. Jennings*, 595 P.2d 857, 859 (Utah 1979), suggesting the trial court has untouchable discretion. But like many quotes in Thatcher's brief, it is only a partial quote. The Utah Supreme Court did not stop at "equity and good conscience" in *Ferris*. It went on in the very next sentence to explain that even though "the trial judge has considerable discretion" in determining specific performance, "it is equally true that when the trial court has based his ruling upon a misunderstanding or misapplication of the law" and "a correct one may have produced a different result, the party adversely affected thereby is entitled to have the error rectified and a proper adjudication under correct principles of law." 595 P.2d at 859.

That is the standard Lang put forward. *See* Br. at 3-4. If the trial court's denial of specific performance was based on an erroneous application of law, the trial court abused its discretion and this Court must reverse. *See Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980) ("[W]hen the trial court has based its rulings upon a misunderstanding and misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under correct principles of law.").

**2. Lang preserved his repudiation argument for appeal.**

Next, Thatcher argues that the issue Lang raises is only "partially preserved." (Opp'n Br. at 23-24, 36.) Again, not true.

"An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it." *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (quotation simplified). That standard requires raising the issue so the trial court can consider it; not hammering away at it over and over to the exclusion of any other issue or argument. *See In re Baby Girl T.*, 2012 UT 78, ¶ 34, 298 P.3d 1251 ("For an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it.") (quotation simplified)).

Lang raised Lawsuit-2 as constituting a repudiation several times below, including in his closing argument/post-trial brief, *see* R. 8318-29, 8336-37; [2] in his response to Thatcher's closing argument/post-trial brief, *see* R. 8387-91[3]; and in his motion to correct errors, *see* R. 9510-16.[4] Thatcher's cherry picking other places in the record where Lawsuit-1 was the focus does not change the fact that Lang raised Lawsuit-2 and Thatcher's conduct as a repudiation excusing tender.

Thatcher tries to bolster her preservation claim by representing (in her words) that Lang conceded "Lawsuit 2 was not relevant to his claims." (Opp'n Br. at 24). That is false. A review of the record cite she relies on for this representation shows that Lang's trial counsel was seeking to exclude settlement communications occurring after Lawsuit-2 was filed. (R. 6802-04.) Indeed, Lang's trial counsel's relevance statement was that settlement discussions

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[2] Referencing the filing of Lawsuit-2 as violating the Agreement and causing the inability to close and obtain financing and arguing that closing would have occurred "but for Thatcher's termination of the Agreement and filing of Lawsuits-1 and -2." (R. 8318-29, 8336-37.) Also arguing that "[b]ecause Thatcher filed Lawsuit-2 and terminated the Agreement without first serving Lang with a proper notice to cure, she breached the Agreement again." (R. 8326-27.)

[3] Referencing prior arguments in R. 8336-37, including that Thatcher's filing Lawsuit-2 was a repudiation and termination.

[4] Arguing that Lawsuit-2 along with Thatcher's conduct in refusing to close without payment of the new $4.5 million purchase price was a termination and repudiation excusing Lang's tender of performance.

occurring after the fact were not relevant, no matter when those discussions occurred. (R. 6804 Trial Tr. 232:8-10) (arguing "my client continued to try to settle in October of this same year. It continued to try to settle in 2013 and 2014 and 2015, but that's not relevant.").) Thatcher's representation otherwise is false.

In short, Lang adequately preserved below the issue he now raises on appeal.

### B. Thatcher has failed to justify her repudiation as a basis for denying Lang specific performance.

After these preliminary arguments, Thatcher turns to her repudiation, and asserts that even if she repudiated, Lang "must still prove that he could perform at the time his performance was due under the contract." (Opp'n Br. at 24.)[5]

This argument fails on several fronts. First, as Lang has explained (at Br. 35-36), if the seller repudiates, it excuses the buyer's actual tender, which he then need only make through his pleadings. *See Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980); *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 799 (Utah Ct. App.

[5] Thatcher begins this section of her argument by citing *Covey v. Covey*, 2003 UT App 380, ¶ 9, 80 P.3d 553, and *Saunders v. Sharp*, 840 P.2d 796, 808 (Utah Ct. App. 1992). But neither of these cases involved repudiation excusing tender. *Covey* addressed mitigation of damages. *See* 2003 UT App 380, ¶ 9. And *Saunders* involved allowance of damages for lost rents or profits when specific performance is ordered. *See* 840 P.2d at 808.

1997). Indeed, a party need not do a futile or useless thing. *See Carr v. Enoch Smith, Co.*, 781 P.2d 1292, 1295 (Utah Ct. App. 1989).

Rather than confront the futility rule which her repudiatory actions triggered, Thatcher reaches for Williston and case law from other jurisdictions and asserts that repudiation-*plus* is a universally accepted rule that should save her from her conduct. That is not true.

To begin, Thatcher's block quotation from Williston is a partial quote. It does not start with "The party claiming that an anticipatory repudiation has excused the performance must show that but for…" as she quotes it. (Opp'n Br. at 24.) Instead, it begins with "*there is authority holding*" that a buyer must show "it would have been ready, willing, and able to perform its obligations under the contract" when the repudiating seller places that matter at issue.
13 Williston on Contracts § 39:41 (4th ed.) (emphasis added). It also goes on to state, contrary to Thatcher's representations, that the burden belongs to the repudiating party:

> when a seller's repudiation was claimed to have excused the buyer from performing the condition precedent of acquiring agreed upon financing, it [is] not necessary for the buyer to prove, as part of its cause of action for specific performance, that it would have satisfied the condition precedent prior to closing since that proof may not be available, especially if the seller's breach caused the buyer to forgo further efforts to obtain financing or caused the lender to cease its activity; rather, the burden of proof is on the seller to establish that, regardless of the improper repudiation, the condition precedent of providing the required financing would not have been satisfied.

13 Williston on Contracts § 39:41 (4th ed.)

The remaining authority that Thatcher cites for what she calls (at Opp'n Br. 24-25) a "universally recognized" principle shows that the principle is anything but universal. She follows her Williston half-quote by offering up another block quote, this time from the Texas case *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 600 (Tex. 2008). But that portion of her block quote was the 5-4 majority in that case responding to the dissent's view that the majority was turning its back on 100 years of Texas precedent holding "that a non-breaching plaintiff seeking specific performance need only make such a showing by offering to perform in his pleadings." *Id*. at 605 (Green, J., dissenting). Consistent with Utah law, the dissent explained that the purpose of this long-standing rule is that the law has never required "a non-breaching buyer to make the 'useless and idle' showing of proof of ability to complete the transaction when the seller's repudiation of the contract excused the buyer from tendering the purchase price." *Id*.

Thatcher next rattles off a series of perfunctory string cites, beginning with Section 244 of the Restatement (Second) of Contracts. (Opp'n Br. at 25.) But Restatement Section 244 addresses damages generally; not repudiation, tender, and specific performance. *See* Restatement (Second) of Contracts § 244 (1981). The Restatement provision that does address those issues—Section 253—states: "Where performances are to be exchanged under an exchange of promises, one

party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." Restatement (Second) of Contracts § 253 (1981). Again, that supports Lang's position.

After her Restatement cite, Thatcher grabs *2007 E. Meadows, LP v. RCM Phoenix Partners, LLC*, 45 N.E.3d 1279 (Ind. Ct. App. 2016) (table), which Westlaw has redflagged as an unpublished and non-citable table (memorandum) decision. Even without the redflag, that case is unhelpful as it does not address repudiation as excusing tender. Same thing with her next string cite—*Grunbaum v. Nicole Brittany, Ltd.*, 61 N.Y.S.3d 146 (N.Y. App. Div. 2017). It, too, does not address repudiation as excusing tender. Nor does *3511 13th St., LLC v. Lewis*, 993 A.2d 590, 592 (D.C. 2010) or *Clark v. Scena*, 83 P.3d 1191, 1194 (Colo. App. 2003).

In fact, only two cases she cites—from Hawaii and Connecticut— hold that a buyer seeking specific performance must plead and prove that he could have closed when performance was due. *See PR Pension Fund v. Nakada*, 809 P.2d 1139, 1145 (Haw. App. 1991); *Steiner v. Bran Park Assocs.*, 582 A.2d 173, 176 (Conn. 1990). But two cases hardly support what she calls a universal rule of law. *See Wilkie v. Robbins*, 551 U.S. 537, 565 (2007) ("[T]here is usually a case somewhere that provides comfort for just about any claim."). That is particularly true here, when the treatises on the subject—from Williston to the Restatement—confirm Lang's position. So does Utah law.

This includes the main Utah case which Thatcher relies on, *LHIW, Inc. v. DeLorean*, 753 P.2d 961 (Utah 1988). In *LHIW*, the plaintiff buyer and defendant seller entered into a contract for the buyer to acquire an ownership interest and other assets in a business that the seller owned. *See id*. at 961. The agreed upon closing deadline came and went and neither party tendered performance; in fact the buyer refused to tender because it considered the plaintiff in breach. *See id*. at 961-62. Instead, the buyer sued and obtained an order of specific performance. *See id*. That order included a court-ordered closing date. *See id*. at 962.

But after prevailing, the buyer failed to make its required payment by the court-ordered closing date. *See id*. As a result of the buyer's "failure to perform at the court-ordered closing on December 19, 1983, the trial court dismissed [the buyer's] claim and decreed that all of the court's previous orders were null and void." *Id*. at 963. In other words, it unwound its specific performance order. The Utah Supreme Court affirmed because the buyer did not "tender into court" by the court-ordered deadline and was thus not entitled to specific performance. *Id*. at 963. Thus, the buyer's failure in *LHIW* was not in failing to tender on the contract deadline, it was failing to tender by the court-ordered deadline.

As explained in Lang's opening brief (at Br. 36), the same thing occurred in *PDQ Lube*. There, the seller's repudiation excused the buyer's tender of performance. *See PDQ Lube,* 949 P.2d at 801-02 & n.18. The trial court ordered

specific performance, which required the buyer to tender by a court-ordered closing date. *See id*. The buyer failed to do so. *See id*. at 802 n.18. Lacking a valid excuse for tendering on the court-ordered closing date, the buyer lost its remedy. *See id*.

Here, after the trial court initially found in Lang's favor, he was undisputedly prepared to close upon entry of final judgment. (R. 9485-9489; Br. at 20-21.) He had money in hand and provided Thatcher's counsel with proof of those funds. (*Id*.) And if the trial court had not sua sponte changed its mind, Lang would have tendered and closed upon entry of judgment. (*Id*.) That is not in dispute.

Perhaps knowing this, Thatcher seeks to escape her contract obligations by likening Lang to buyers who could not follow through. But she knows those comparisons are incorrect. She knows he was ready to close on entry of judgment because the trial court threatened her with contempt sanctions if she kept up her repudiatory pattern of conduct. (R. 9487 Hr'g Tr. 48:4-6.) So to avoid the consequences of her own actions, she now asks this Court to adopt a repudiation-*plus* standard.

She would have this Court hold that a buyer must look the other way and tender performance even after a seller has declared a forfeiture and termination; sued the buyer; asserted that the buyer has no rights to the property; claimed an

intent to keep over one million dollars that the buyer paid under the sales contract; listed the property for sale; fielded offers from others; increased the purchase price for the buyer by several million; and never again asked for performance under the existing contract. Thatcher asks this Court to require the buyer to pretend none of this happened and continue on to prove that he could have closed on a hypothetical, one-sided sale for which the seller has expressed no intention of participating.

The better rule is the one that emerges from our current case law: upon repudiation, the buyer must be able to perform when the court orders it. If he cannot at that time, then he loses his right to specific performance and any claim to the property, as occurred in both *LHIW* and *PDQ Lube*. But he must be given that chance. To hold otherwise would reward the bad actor—the repudiating party—to the detriment of the non-repudiating party by forcing them to make an additional showing or risk losing (in this case) millions invested towards a purchase that the seller has unequivocally refused to complete. For these reasons, and as set forth in Lang's opening brief, this Court should reverse.[6]

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[6] Citing *Century 21*, Thatcher also references the "time is of the essence" clause and argues that the Agreement could not extend past the closing. (Opp'n Br. at 37.) That is the same argument the repudiating party made in *PDQ Lube* with little success. There, the repudiating party also cited *Century 21* and argued that "PDQ never tendered performance by the closing date though time was of the essence of the contract." *PDQ Lube Ctr.*, 949 P.2d at 799. This Court still affirmed

### C. The trial court made no finding that Lang could not perform in spite of Thatcher's repudiation.

Thatcher's argument proceeds under the false premise that the trial court made certain findings about Lang's ability to close by January 10, 2013, including a reference to a supposed "unchallenged finding." (Opp'n Br. at 28-31.) Thatcher does not point to any such finding of fact in the record. The best she does is quote from the trial court's analysis. (Opp'n Br. at 28) (quoting from R. 9416).) But this is yet another partial quote stretched too far. As explained in Lang's opening brief, the focus of the trial court's analysis was Lawsuit-1 and the events leading up to April 26, 2012. (R. 9416.) And the full quote from the trial court's analysis in which it referred to "credible evidence" showed just that—it was addressing only Lawsuit-1 and Thatcher's failure to confirm the amount owing by April 26, 2012:

> 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.

(R. 9416.)

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the district court's grant of specific performance, holding that the repudiating party's conduct excused tender even with such a clause in place. *See id*.

The trial court made no similar finding or analysis that Lang's ability to perform was not impacted by Thatcher's repudiatory conduct in declaring an invalid forfeiture, suing Lang a second time, putting the Property up for sale, jacking up the purchase price, and never asking that he thereafter tender performance. Thatcher cannot declare victory by claiming that a finding that was never made is "unchallenged." Lang need not challenge findings that were never made. *See State v. Greenwood*, 2012 UT 48, ¶ 27, 297 P.3d 556 (explaining that parties need not marshal evidence for factual findings not made).

Still, Thatcher focuses on the trial court's analysis that it "cannot determine that" Lawsuit-1 or Thatcher's conduct in refusing to confirm the amounts due at that time (April 2012) and launches into evidence which supports that reasoning. (Opp'n Br. at 28-30.) But as explained in detail in Lang's opening brief (at Br. 30-47), the focus on Lawsuit-1 and Thatcher's conduct leading up to that lawsuit (through April/May 2012) says nothing about Thatcher's later repudiatory actions.

As also explained in detail in Lang's opening brief (at Br. 45-47), the only finding that touched upon Lang's ability to close on January 10, 2013 was a passing reference in Finding ¶ 95. But the findings lacked any focus on Thatcher's subsequent repudiation as excusing Lang's tender or affecting his ability to tender on that date. *See* Br. at 38-47. It is a bridge too far to ask for

affirmance based on speculation about what findings the trial court might have made if it had viewed the evidence a certain way. *See Francis v. State, Utah Div. of Wildlife Res.*, 2010 UT 62, ¶ 19, 248 P.3d 44 (explaining that "we will not affirm a judgment if the alternate ground or theory is not apparent on the record" particularly if it is based on an assumption about the evidence).

Moreover, and for similar reasons, even if Lang had to make some showing of proof that he could close but for Thatcher's actions, Lang amply marshaled the evidence on that question. (Br. at 38-45.) That evidence demonstrates that Lang sought funding before and continued to seek funding after the January 2013 closing date and Thatcher's lawsuit (Lawsuit-2) was a significant impediment to securing that funding. (Br. at 43-44.) We highlight that evidence here for convenience:

- Lang's testimony that as of June 4, 2012 Meadow Fund was still willing to lend Lang money to buy the Property but "[o]nly if everything could be cleared up legally" with Thatcher. (R. 7725 Trial Tr. 126:11-127:11.)
- Lang received an updated appraisal dated July 2, 2012 which he provided to the Meadow Fund. This appraisal had a higher market value than the initial appraisal and based on that appraisal Meadow would fund "if the litigation was resolved" with Thatcher. (R. 7687-7688 Trial Tr. 88:1-25, 89:1-11.)
- September 24, 2012 letter of intent from Meadow Fund to Lang that it would fund Lang's purchase but including a financing condition of "No litigation or pending litigation." (Trial Ex. D-13; R. 7725 Trial Tr. 126:11-127:11.)

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

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

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

- Brad Seegmiller (president of the title company handling the transaction) testified that in his experience lenders will not close on a loan transaction with a lawsuit pending. (R. 7423 Trial Tr. 60:2-13; R. 9413 ¶ 111.)

On this last point, the trial court expressly found Seegmiller's testimony credible but was ultimately not convinced that Lawsuit-1 affected Lang's ability to close because it could not rule out other factors. (R. 9413 ¶ 111.) It made no similar findings about the markedly different events occurring after Lawsuit-1 and post-April/May 2012.

Moreover, the trial court's reliance on Trial Exhibit D-1, the Meadow Fund's February 15, 2012 letter of intent, on evaluating Lang's ability to close and which served as the apparent catalyst to reverse its original findings and

conclusions[7] is not determinative. That letter of intent was for a $2,900,000 total loan amount—which is $1,790,000 more than Lang needed to close with Thatcher. (Trial Ex. D-1.) This is because that letter of intent covered more than the Property. (Trial Ex. D-1; R. 9504-07.)[8] What's more, that letter of intent was issued in February 2012. (Trial Ex. D-1.) The trial court did not grapple with and thus made no similar findings or analysis related to the evidence of Lang's ability to obtain funding after that time as outlined above or the impact Thatcher's conduct had on those subsequent efforts.

In sum, given the trial court's lack of focus on the repudiatory conduct associated with Lawsuit-2, it is guesswork to suggest that the trial court's conclusory statement about the January 2013 closing in Finding ¶ 95 gave any consideration to Lawsuit-2 and the repudiatory conduct surrounding it.

Without specific findings and faced with relying on such guesswork, Thatcher is again forced to claim that Lang "did not really care about what the

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[7] R. 9393 ¶ 39 n.2.

[8] The combined appraised value of the Property and parcel B under the February 2012 letter of intent was $4,130,000. (Trial Ex. D-1; R. 9504-07.) Thus, broken down, the letter of intent was structured to provide a loan of up to 70% of the entire collateral: A loan for $2,900,000 = 70% of $4,130,000, *i.e.*, a 70% loan-to-value ratio. (Trial Ex. D-1; R. 9504-07.) Also, Lang's uncontroverted trial testimony was that he did not need this loan to close on his purchase of the Property. (R. 7681, 7684-89, 7702, 7731-32, 7742-43; Trial Tr. (Day 5) 82:19-25, 85:19-86:14, 86:18-87:17, 89:17-90:1, 103:20-24, 132:7-15.)

parties did" after Lawsuit-1. (Opp'n Br. at 30.) That remains a false narrative employed to bolster findings that Thatcher knows were never made.

Here, as she did earlier in her brief, she provides only a partial quote. The portion she leaves out (italicized below) makes it plain that the colloquy between Lang's trial counsel and the trial court was about the admissibility of settlement negotiations occurring after Lawsuit-2 was filed, nothing more:

> THE COURT: And so you don't want me to consider your client's efforts, then, to try to 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 whether it was my client that breached or if the plaintiff breached. *We're here for breach, not to talk about—I mean my client continued to try to settle in October of this same year. It continued to try to settle in 2013 and 2014 and 2015, but that's not relevant.*

(R. 6804 Trial Tr. 232:2-10) (Emphasis added).)

Setting aside these record-misrepresentations, what we do know is that the first time Thatcher declared a default and threatened to terminate the Agreement, Lang undisputedly did what was necessary to cure it. (R. 9392 ¶ 30.) Similarly, as explained, he undisputedly was ready to close immediately upon entry of judgment—had the trial court not changed its mind. (R. 9480-90.) Rather than acknowledge these facts, Thatcher gratuitously (at Opp'n Br. 8, 29) quotes the trial court's "strapped for cash" comment, failing to acknowledge that it was a narrow reference to the early 2012-time frame. (R. 9391 ¶ 25.) It was also

followed by a finding that Lang cured the default. (*Id.* ¶ 30.) When given the chance, Lang always came through.[9]

As a result of these undisputed facts, it is conjecture for Thatcher to argue what Lang could or could not have done where the trial court did not directly confront the issue. Instead, she wants this Court to infer meaning out of findings never made, under legal standards never applied, and to pick a winner (her), thereby excusing her from her repudiatory conduct. That is not a legitimate basis to affirm.

### D. Thatcher's claim that she would have accepted had Lang tendered in January 2013 is without support in the findings, contrary to the evidence, and speculative.

Thatcher goes even further. She next labors to convince the Court that she really would have accepted had Lang tendered on January 10, 2013. (Opp'n Br. at 31-39.) With this argument, she wants this Court to find in the first instance

[9] As of February 2, 2012, Lang had already paid Thatcher $1,391,250 in principal and interest and $52,000 in property taxes—$1,443,250 in total—all of which Thatcher seeks to retain *in addition* to keeping the Property. To suggest that Lang could not or would not have tendered the additional amount necessary to close regardless of Thatcher's conduct—that he would walk away from nearly $1.5 million and receive nothing in return is belied by the evidence. Significantly, this includes the fact that when the trial court initially ruled in his favor he deposited $1,037,149.76 in an account and was ready to close as soon as Thatcher signed the warranty deed. (R. 9485-9489; Br. at 20-21.)

that regardless of her repudiatory conduct, Lang's tender would not have been futile. That eleventh-hour argument suffers from several fatal defects.

First, there is no finding to support it. In fact, the findings and evidence that Lang has marshaled show that the opposite is true. Unlike the events Thatcher stitches together as "evidence" for this Court to find that she would have closed, her conduct tells another story. (Br. at 40-42.) This includes, as explained, declaring a forfeiture and termination; suing Lang and actively litigating her forfeiture and termination claims; unequivocally asserting that Lang has no rights to the Property; unequivocally declaring her intent to keep over one million dollars that Lang had paid her; listing the Property for sale; fielding offers from others; and telling Lang if he wanted the Property it would cost him millions more.

Thatcher's trial testimony confirmed her actions: she considered the deal dead and the Agreement terminated. (R. 6870 Trial Tr. 17:5-6; R. 6871 Trial Tr. 18:5-9; R. 7184 Trial Tr. 74:11-18; R. 7188 Trial Tr. 78:3-13; R. 7189-90 Trial Tr. 79:1-25, 80:1-5.) Yet on appeal, she says we must ignore all of that—her conduct, her actions, her testimony. Trust me, she now says, if Lang had tendered, she would have closed. But the law does not require Lang to play the part of Charlie Brown to Thatcher's Lucy, hoping she won't pull the ball from under him when he

approaches in full stride to kick it. We don't need to watch it to know how it ends.

On that score, Thatcher's argument (at Opp'n Br. 33) that it is speculative to determine what she would have done without Lang's actual tender is only an invitation to give seller's license to engage in this type of unequivocal, repudiatory conduct and still force buyers through the process of tendering money to the seller in the hopes that the seller is only kidding. This repudiation-*plus* standard would sanction and approve of conduct such as hers in every instance. It would breed bad faith tactics by remorseful sellers to escape contracts willingly entered into. Yet that is the unworkable and destabilizing rule Thatcher proposes as the legal standard.

Finally, in asking this Court to so hold, Thatcher is requesting this Court resolve what are at best for Thatcher disputed factual issues. That is not something appellate courts are in the business of doing. *See Richardson v. Hart*, 2009 UT App 387, ¶ 19, 223 P.3d 484 (remanding for additional findings of fact where factually disputed issues were presented on appeal and no findings on the issues were made below). Once again, appellate courts do not affirm on grounds that are not apparent in the record based on evidentiary assumptions and findings never made. *See Francis*, 2010 UT 62, ¶ 19. Rather, if there is even a question, the proper course of action is a remand with instructions to the trial

court to address the issue. *See Richardson*, 2009 UT App 387, ¶ 19. Indeed, that is the course of action this Court has adopted before where the trial court did not make specific findings on the futility of tender. *See id*. ¶¶ 19, 21. Thus, if the Court is persuaded at all by Thatcher's arguments, it should still reverse with instructions for the trial court to address the issue in the first instance.

* * *

For these reasons and those in Lang's opening brief, this Court should reverse.

## RESPONSE TO CROSS-APPEAL

### I. The trial court correctly applied Utah law requiring strict compliance with forfeiture provisions.

#### A. The trial court applied the correct standard to Thatcher's claimed forfeiture.

In her cross-appeal, Thatcher's main argument is that Utah law no longer requires strict compliance with mandatory notice provisions in contracts to declare forfeitures. (Opp'n Br. at 40-41.) This is based on her reading of *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, ¶ 38, 285 P.3d 1193. But that case did not address notice requirements. It addressed the enforceability of liquidated damages provisions generally, and the proper test for determining the validity of the same. *See id.* ¶ 33 ("We now clarify the standard that Utah courts should use in evaluating the enforceability of liquidated

damages provisions."). It said nothing about the procedure for invoking forfeiture provisions.

For that reason, even as it was surveying Utah case law on liquidated damages, the Utah Supreme Court did not mention the body of case law governing notice, including *Johnson v. Austin*, 748 P.2d 1084, 1087 (Utah 1988), *Butler v. Wilkinson*, 740 P.2d 1244, 1257 (Utah 1987), *First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983), or *Adair v. Bracken*, 745 P.2d 849, 852 (Utah Ct. App. 1987).

Lower courts should not assume overruling of precedent absent express indication to the contrary from the Utah Supreme Court. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Hale v. Beckstead*, 2003 UT App 240, ¶ 27, 74 P.3d 628, *rev'd*, 2005 UT 24, ¶ 27, 116 P.3d 263 (explaining that the Utah Court of Appeals is bound to follow its decisions until the Utah Supreme Court expressly overrules them) (Thorne, J., dissenting). Nothing in *Commercial Real Estate* suggests—let alone expressly holds—that the Court was overruling these precedents.

In short, the issue here is not whether the liquidated damages provision was enforceable; it is whether Thatcher properly triggered that provision by complying with the Agreement's notice requirements. As a result, Thatcher's reliance on *Commercial Real Estate* is misplaced and the Court should reject her effort to peddle it off as changing long-standing Utah law. It simply does not provide her with a new, more forgiving standard to justify her invalid and failed notice.[10]

### B. Thatcher misplaces her reliance on conflicting and invalid provisions in the Option Agreement.

After advancing an incorrect standard, Thatcher's first substantive argument in her effort to justify her failure to comply with Section 4.4 is to ignore it. (Opp'n Br. at 43-47.) She now points to the notice provision in the parties' Option Agreement and argues that it survived, applies, and saves her from her failure to comply with Section 4.4.[11] This argument does not withstand scrutiny.

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[10] Not only that, but we cannot locate anywhere in the record to show that Thatcher raised *Commercial Real Estate*, 2012 UT 49 to the trial court as creating a new standard that it must apply. Given that, Thatcher cannot now ask this Court to reverse. To hold otherwise would allow Thatcher to exploit her failure to raise the issue below and impermissibly benefit from an error she invited. *See Cea v. Hoffman*, 2012 UT App 101, ¶ 13, 276 P.3d 1178 ("Under the invited error doctrine, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.") (quotation simplified)).

[11] Her argument is belied by her faulty notice (Trial Ex. P-63), which states, "This is not your first notice, and you have previously received written notice

Section 2 of the Agreement merged the Option Agreement into the Agreement and rendered ineffective any inconsistent or conflicting provision of the Option Agreement. *See* Agreement § 2. Still, Thatcher contends that the default provision in the Option Agreement survived because it is not "inconsistent" with Section 4.4. (Opp'n Br. at 43.) That is not true and, consistent with her argument pattern, refuses to consider or fully acknowledge the language at issue.

The broadly worded merger clause in the Agreement addresses not only inconsistencies, but also conflicts. It states: "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." Agreement § 2.

The default provision in the Agreement—Section 4.4—requires Thatcher to provide notice "specifying the breach" and a 30-day cure period before Thatcher may declare a forfeiture and retain the payments as liquidated damages. *Id.* § 4.4.[12] To remove any doubt about what Section 4.4 applies to, the parties made

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pursuant to *the contract*." She plainly understood that the notice provision in the contract—the Agreement—required a written notice. And she failed to comply.

[12] Section 4.4 of the Agreement states:

it clear that it applies to all material breaches. *See id*. It carves out none. Section 11 of the Option Agreement, on the other hand, provides what is in effect an automatic default after a 30 day "grace period" — no notice requirement, no cure period after notice, nothing. *See* Option Agreement § 11.[13]

For Thatcher to suggest that these two provisions are not inconsistent or in conflict ignores what they say. They both address default and forfeiture. One says nothing about notice, the other mandates notice, specification of the breach, and a cure period. That is conflict. And that conflict results in inconsistent application. Thatcher's effort to reach back to the Option Agreement to justify her failure to comply with Section 4.4 only highlights the inconsistency and conflict.

To conclude otherwise would ignore the plain language of the Agreement and allow Thatcher to pick and choose which default provision she wants to

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> 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.

[13] Section 11 of the Option Agreement states: "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."

comply with, rendering Section 4.4 meaningless. That reading is not permissible. *See Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134 (explaining that under our rules of contract interpretation courts must "consider each contract provision … in relation to all of the others, with a view toward giving effect to all and ignoring none") (citation omitted)).

Here, the parties expressly agreed, through the merger clause in Section 2, that any conflicting or inconsistent provisions in the option—such as Section 11—would not apply. The merger provision of the Agreement abrogates and nullifies Section 11. *Cf. Embassy Grp., Inc. v. Hatch*, 865 P.2d 1366, 1371 (Utah Ct. App. 1993) ("The merger doctrine has been routinely applied when an antecedent agreement contains an abrogation clause."). It is not plausible to suggest a contrary interpretation. *See Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 17, 133 P.3d 428 (explaining that contrary contract interpretations must be plausible given the language used).

In short, as the trial court determined, Section 4.4 governs Thatcher's notice.

**C. Thatcher's notice was insufficient.**

Thatcher next argues that even if Section 4.4 applies (and it does), her notice of default sufficiently complied. (Opp'n Br. at 47-50.) She contends that

Lang was generally aware of the default, and so no harm, no foul. There are several problems with this contention.

First, it requires the Court to accept her position that strict compliance does not mean strict compliance. In fact, she seeks to carve out an exception to the strict compliance rule by comparing these facts with other cases in which notice was insufficient—trying to tease out various nuances to save her insufficiencies. But she ignores *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct. App. 1997), in which this Court stated the matter bluntly: "[the] Buyer's knowledge of its default and its failure to tender performance in those last two remaining days does not validate Sellers' otherwise defective forfeiture." *Id*. at 1110. There is no awareness safe harbor for a fatally deficient notice.

Second, not only does it not matter what Lang knew or did not know, the trial court never made a finding about what Lang knew or did not know. Instead, it held that Thatcher did not provide Lang with adequate notice, finding that the "letter notably fails to comply with the notice provision of the Agreement" and only "in the most general of terms" did it reference "a failure of which [Lang] is *supposed* to be 'aware.'" (R. 9411 ¶ 101) (Emphasis added).) What Lang was "supposed to be aware" is far different from what Lang was actually aware, as Thatcher seeks to infer.

Given the long and documented history of the parties' dealings in which Thatcher claimed various defaults, failed to provide timely or complete information, provided inaccurate information, and refused to communicate for long periods of time (R. 9384-9413) there is ample support justifying the trial court's conclusion that her notice was not sufficient.[14]

Moreover, what someone knew, didn't know, or should have been aware are fact intensive questions reserved for the trial court. *See McTee v. Weber Ctr. Condo. Ass'n*, 2016 UT App 134, ¶ 11, 379 P.3d 41 (determining what someone "knew or with the exercise of reasonable diligence should have known … depends on the facts and circumstances of the particular case" and is committed to the trial court's discretion) (citations omitted)). Here, the trial court resolved that question against Thatcher, and she has not confronted that fact, let alone marshaled the evidence to demonstrate it was in error. *See State v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645 ("[W]e reiterate that a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal.").

[14] It also undercuts Thatcher's argument (at Opp'n Br. 48-49) that there was no "misleading" conduct on her part. The record and findings are riddled with such conduct. (R. 9384-9413.)

In short, the trial court did not err in finding Thatcher's notice deficient and ineffective. This Court should affirm that ruling.

## II. The trial court's judgment of unjust enrichment was in all respects correct and justified.

Thatcher's final argument in her cross-appeal is her assertion that the trial court erred in its unjust enrichment award to Lang. As set forth below, she has failed to establish any error in the trial court's findings and reasoned analysis.

### A. The unjust enrichment award is moot if Lang prevails on appeal.

As a threshold matter, if this Court agrees with Lang, reverses the trial court's denial of specific performance, and remands with instructions that the parties close, it moots the unjust enrichment award. In that event, Thatcher would retain the funds awarded to Lang in unjust enrichment and apply them to Lang's purchase of the Property. Thus, if Lang prevails on his appeal, it moots the unjust enrichment issue.

### B. The trial court did not err in awarding Lang damages for unjust enrichment.

If this Court does not reverse on the specific performance issue as Lang requests, it should affirm the unjust enrichment award because the trial court did not err in finding that allowing Thatcher to keep all of Lang's payments would unjustly reward her for her failure to comply with the forfeiture provision in the Agreement.

Thatcher claims that the trial court's award of unjust enrichment was improper because it addressed a subject matter covered by the Agreement. (Opp'n Br. at 51-53.) At first glance, the argument seems obvious as that is the general rule. *See Selvig v. Blockbuster Enterprises, LC*, 2011 UT 39, ¶ 30, 266 P.3d 691. But as the trial court recognized, unjust enrichment has exceptions. *See, e.g.*, *E & M Sales W., Inc. v. Diversified Metal Prod., Inc.*, 2009 UT App 299, ¶ 8, 221 P.3d 838 ("Our case law, however, supports the proposition that even where there is an express contract, an equitable claim may be viable, under specific factual circumstances, if the equitable claim is based on a separate representation or misleading act arising independently of the express contract."). And here, through careful analysis and application of its findings, the trial court found such an exception.[15]

To begin with, the Agreement did not address what would happen to payments if proper notice of default was not given. *See* Agreement § 4.4. Rather, the forfeiture provision to which the parties agreed was premised on Thatcher giving proper notice and a cure period. That did not happen. Thus, if the Court

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[15] The trial court found that all elements of unjust enrichment were met. (R. 9420) (citing *Desert Miriah, Inc. v. B & L Auto, Inc.*, 2000 UT 83, ¶ 13, 12 P.3d 580)). Thatcher does not challenge that conclusion and so has waived any challenge that the elements of unjust enrichment were not established. *See Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App. 1991) ("Generally, where an appellant fails to brief an issue on appeal, the point is waived.").

turns away Lang's appeal, we have a situation not addressed in the Agreement: What happens to the payments if the transaction never closes. As a result, it was appropriate for the trial court to address this issue through principles of equity since no contractual provisions governed the remedies available to Lang. *See U.S. Fid. v. U.S. Sports Specialty*, 2012 UT 3, ¶ 13, 270 P.3d 464 (explaining that unjust enrichment may be invoked "when no express contract is present that governs the remedies available to an injured party") (quotation simplified)).

This tracks long-standing Utah law which allows equity to intervene to avoid penalizing a party under inequitable circumstances. *See Carlson v. Hamilton*, 332 P.2d 989, 991 (Utah 1958) ("It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.").

Here, the result the trial court avoided was one that would have allowed Thatcher to retain nearly $2 million along with the Property as a reward for declaring an invalid forfeiture and engaging in a series of repudiatory actions. As the trial court saw it, Thatcher's recovery far exceeded the amount of any damages she could justly claim—particularly having failed to abide the Agreement's express terms. (R. 9420-21.)

To that end, contrary to Thatcher's arguments, the trial court did not ignore the existence of the Agreement. It confronted it. The trial court began its analysis, "Lang's fourth cause of action for Unjust Enrichment … must overcome the fact that the parties here entered into an enforceable contract." (R. 9418-19.) It reasoned that because Thatcher's only right to retain liquidated damages arose from a provision that she flouted, "the court concludes that the Agreement should be treated as one lacking such a provision, and that the unjust enrichment claim is viable." (R. 9419-20.)

This conclusion was based on the trial court's survey of applicable law. (*See id*.) As one authority explained, without a valid forfeiture clause, courts may use equity to allow a buyer to recover some or all payments made to a seller in excess of the amount of the seller's damages. *See* 4 A.L.R.4th 993, Part I § 2 (Westlaw 1981, original publication) ("[I]n some of the cases not involving contracts containing forfeiture provisions, the courts have considered this 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"). That is the result the trial court reached here, and it is the just one.

As explained in the Restatement (Third) of Restitution and Unjust Enrichment, also cited by the trial court, "[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." Restatement (Third) of Restitution & Unjust Enrichment § 36(1) (2011). "The classic illustration of restitution in this setting is the claim by a defaulting purchaser of real property." *Id*. cmt. d.

Using its equitable discretion as applied to the facts, the trial court fashioned an equitable remedy that allowed Thatcher to retain $671,250 in interest payments. (R. 9420-21.) But the trial court continued, "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." (R. 9420-21.) Indeed, using Thatcher's preferred standard of review as the guide on equitable remedies, the trial court had the discretion to grant this relief in "equity and good conscience." *Ferris*, 595 P.2d at 859. Thatcher has failed to explain how the trial court exceeded the bounds of equity and good conscience in refusing to let her to retain millions of dollars for Property she never conveyed to Lang based on a forfeiture provision that she did not comply with.

Thatcher also argues that the trial court erred in granting Lang equitable relief because, she claims, Lang breached the Agreement and engaged in inequitable conduct. (Opp'n Br. at 53-55.) That is not true. The trial court

expressly dismissed Thatcher's claim for breach. (R. 9421-22.) She cannot claim refuge in a failed cause of action. Rather, Thatcher never validly put Lang in default. That's the point of the trial court's unjust enrichment ruling.

Moreover, her arguments (at Opp'n Br. 55) aimed at claiming Lang was the instigator of inequitable conduct contradict the trial court's findings that allowing Thatcher to retain all payments would be inequitable. She does not properly challenge those findings.

Finally, Thatcher cites the nearly 100-year old case *Foxley v. Rich*, 99 P. 666, 672 (Utah 1909) and follows it with yet another long list of string cites from other jurisdictions. In doing so she fails to acknowledge that the reasoning in *Foxley* was dependent solely on its facts. That is, *Foxley* instructs that the appropriateness of returning payments to a buyer is decided on a case-by-case basis. *See id.* at 672 ("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 facts in *Foxley* demonstrated that the sellers "were not only able, but they were willing, to convey the legal title to respondent." *Id*. at 672. Those are not the facts here.

Here, Thatcher sent a termination notice. Here, Thatcher sued Lang. Here, Thatcher listed the Property for sale to third parties. Here, Thatcher told Lang the deal was dead. Here, Thatcher told Lang if he wanted the Property, the new

price was $4.5 million. Here, Thatcher repudiated. Under the facts here, the seller was not willing to convey to title Lang.

Thatcher simply refuses to confront these facts, including the trial court's ultimate conclusion that "the circumstances are such as to make it unjust for her to retain the amount paid toward the purchase price, $800,000." That failure cannot overcome the considerable discretion afforded the trial court and should result in summary affirmance. *See State v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645 ("[W]e reiterate that a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal.").

## CONCLUSION

As to Lang's appeal, for the reasons set forth above and in Lang's opening brief, this Court should reverse and remand with instructions to enter a judgment and decree ordering Thatcher to perform.

As to Thatcher's cross-appeal, this Court should affirm the trial court's findings that Thatcher failed to provide proper notice and forfeiture. A decision affirming the trial court on that issue and reversing the trial court on Lang's appeal for specific performance would moot the remainder of Thatcher's cross-

appeal. If the Court does not so conclude, however, it should affirm the trial court's unjust enrichment award to Lang.

DATED: November 29, 2018.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24A(g)(1) because according to the word processing program used to prepare this brief (Word 2013), this brief contains 9,009 words, excluding the parts of the brief exempted by Utah R. App. P. 24A(g)(2).

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

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

Dated: November 29, 2018.

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*Cross-Appellee*

## CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, I served two copies of the **Reply Brief of Appellant and Brief of Cross-Appellee**, along with a CD containing a searchable PDF copy of the Brief, on the following by U.S. mail, postage prepaid, addressed to the following:

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