

2005

Micheal C. Posner v. Equity Title Insurance Agency, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Appellant,

vs.

EQUITY TITLE INSURANCE
AGENCY, INC., a Utah Corporation.

Appellee.

Appellate Case No. 20050556-CA

Trial Court Case No. 040901853

BRIEF OF APPELLANT

(ORAL ARGUMENT IS REQUESTED)

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Tyrone E. Medley,
Granting a Motion for Summary Judgment

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LIST OF PARTIES

Plaintiff/Appellant: Michael C. Posner

Defendant/Appellee: Equity Title Insurance Agency, Inc.

Defendant: NRT, Inc., a New Jersey corporation doing business as Coldwell Banker Residential Brokerage (not a party to this appeal).

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STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction under U.C.A. §78-2-2(3)(j); the Supreme Court transferred this case to the Utah Court of Appeals pursuant to U.C.A. § 78-2-2(4).

ISSUES PRESENTED FOR REVIEW

The trial court's summary judgment ruling presents the following issues on appeal:

- a. Whether the trial court correctly ruled that the plaintiff's real estate agent acted within her actual/implied or apparent authority when she instructed the defendant Equity Title Insurance Agency, Inc., to close plaintiff's land sale.
- b. Whether the trial court correctly ruled defendant Equity Title Insurance Agency, Inc met its fiduciary duties to plaintiff when its escrow agent, absent written authorization, closed plaintiff's sale without the surety bond required under the terms of the real estate purchase contract.

The standard of review for both issues is correctness: An appellate court reviews a grant of summary judgment without deference to the trial court's legal conclusions, and considers the evidence in the light most favorable to the losing party. The reviewing court affirms only where there is no genuine dispute as to material issues of fact and the moving party is entitled to judgment as a matter of law. *Wycalis v. Guardian Title of Utah*, 780 P. 2d 821, 824 (Utah Ct. App. 1989).

These issues were reserved for appeal because the appellant filed a timely notice of appeal (R. 628-630) following the trial court's entry of a minute order on May 24, 2005 granting summary judgment in favor of Defendant/Appellee Equity Title Insurance Agency, Inc. and defendant Independence Title Insurance Agency.

Addendum 1.

DETERMINATIVE LAW

The following state statute and administrative rule are of central importance in this appeal:

U.C.A. § 25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

U.A.C.A. R162-6-1. Licensee Conduct.

6.1.11.1. A principal broker and licensees acting on his behalf who represent a seller shall have a written agency agreement with the seller defining the scope of the agency.

STATEMENT OF THE CASE

The complaint in this case was filed on January 31, 2004, in Third District Court in Salt Lake City, against Equity Title Insurance Agency, Inc. (Equity) and Independence Title Insurance Agency (Independence). R. 1-23. (Complaint). The complaint alleged breach of fiduciary duty, negligence and breach of contract against the defendants for closing Posner's land sale without the surety bond required by his Real Estate Purchase Contract, thereby effecting a sale to an unqualified buyer. R. 7-10.

On February 9, 2004, Independence filed a Motion and Memorandum to dismiss. R. 24-26, R. 27-32. On February 25, plaintiff filed its Memorandum in Opposition to Independence's Motion to Dismiss (R. 39-44), and Independence filed its Reply on February 27. R. 48-55. The trial court denied Independence's motion to dismiss on May 10, 2004. R. 75.

On March 3, 2004, Equity filed its Answer to plaintiff's complaint. R.56-66. On December 22, 2004, the plaintiff moved to amend its first complaint in order to add a

third defendant, NRT, Inc., a New Jersey corporation doing business in Utah as Coldwell Banker Residential Brokerage (hereinafter Coldwell). R. 119-120. The trial court granted permission to amend on February 7, 2005 (R.165), and on March 28, Posner filed a First Amended Complaint in which he added Coldwell as a third defendant and dropped the breach of contract claims against defendants. R. 323-336.

On March 28 and 29 respectively, Equity and Independence filed Motions and Memoranda in support of summary judgment. R.258-322 (Equity), R. 337-418 (Independence). Posner filed a Memorandum Opposing Summary Judgment on April 14. R. 455-545. Defendants filed Reply Memoranda in Support of Summary Judgment on April 15 (Independence R. 546-566) and April 22 (Equity 594-601). On May 24, 2005 *the Court granted summary judgment to Equity and Independence. Addendum 1.* Posner filed a timely notice of appeal of the trial court's decision to grant summary judgment to Equity on June 20. R. 628-630. Posner did not appeal the Court's dismissal of his claim against Independence. Mr. Posner and Coldwell Banker jointly requested, and were granted, a stay of proceedings pending the outcome of this appeal. R. 635-637.

STATEMENT OF THE FACTS

In the summer of 2002, Michael Posner retained Coldwell Banker Residential Brokerage to list two lots he owned in Deer Valley, and hired Coldwell real estate agent Kandis Christoffersen. R. 274, ¶'s 12, 13 (First Amended Complaint). In July, Posner negotiated a sale of his land for a purchase price of \$450,000 (R.287, Posner's Real Estate Purchase Contract), agreeing to provide \$260,000 in seller financing. Addendum 3. To ensure that he would receive payment in full, Posner inserted a condition in his

Real Estate Purchase Contract (REPC) that required the buyer, Chris Strachan, to supply a surety bond in the same amount as his seller financing. Addendum 4, Addendum 5. Posner retained Equity Title Insurance Agency, Inc. as his title company. R. 16 (Posner's Settlement Statement). The buyer hired Independence Title Insurance Agency of Salt Lake City as his title company. R.79. (Answer of Independence).

On or about August 23, Posner signed closing papers, left them with Equity to complete the closing, and returned to his residence in Florida. R. 362, p. 34, Ins. 1-4 (Posner Deposition). He did not give any written authorization to Kandis Christoffersen or anyone at Equity to make changes on his behalf. R. 481-483, ¶'s 3,11,12. (Posner Affidavit) On or about August 28, Strachan closed with Independence. R. 21 (Buyer's Settlement Statement). At closing Strachan supplied a document entitled "Financial Guarantee" (the Guarantee) for \$260,000 (Addendum 2), and requested that Posner add \$3,900 to the seller financing amount. Posner approved the \$3,900 increase to his seller financing from his residence in Florida by fax and in writing (Addendum 3),¹ but was never informed that the buyer had supplied a so-called "Financial Guarantee" for \$260,000 rather than a surety bond for the full amount of the seller financing (\$263,900). R. 483, ¶ 14 (Posner's Affidavit).

Equity closed Posner's sale when Kandis Christoffersen verbally instructed Equity escrow agent Helen Smith that Posner had seen and approved the Guarantee and said to close. R. 263-264, ¶'s 1-4(Equity's Statement of Undisputed Facts). Equity does not allege that it closed the sale with the signature of Posner or Kandis Christoffersen

¹ See also R. 16, line 206 (Posner's Settlement Statement)

approving the change from a \$263,900 surety bond to a \$260,000 Financial Guarantee. R. 263-264, ¶¶ 1-4 (Equity's Statement of Undisputed Facts). See also Addendum 3.²

Subsequently, Strachan never made a payment on the land. When Posner learned of Strachan's default in November of 2002, he attempted to collect on the Financial Guarantee but it proved worthless. R. 329, ¶ 31 (First Amended Complaint). To mitigate his damages, Posner bought back his land in June of 2003 for approximately \$120,000 more than he had received at the time of closing. R. 334, ¶ 37 (First Amended Complaint).

SUMMARY OF THE ARGUMENT

Posner alleges negligence and breach of fiduciary duty against Equity for closing his land sale with a "Financial Guarantee" rather than the "surety bond" his REPC required. In granting summary judgment to Equity, the trial court ruled that (1) real estate agent Kandis Christoffersen's instructions to Equity to close fell within the scope of "her actual implied and/or apparent authority" as Posner's real estate agent and (2) that Equity breached no duty to Posner. Addendum 1.

The trial court erred in finding that Christoffersen's verbal instructions provided a basis for Equity to close, as changes to Posner's REPC required his *written* approval.³ In this case, Christoffersen's instruction to close with the \$260,000 Financial Guarantee changed the contract in two respects: (1) it allowed closing to occur without a valid

² Addendum 3 is the page of Posner's REPC on which he crossed out the figure of \$260,000, wrote in \$263,900 and initialed approval of this new amount of seller financing early on the morning of August 30, 2002. This page contains the requirement "surety bond will be issued in the amount above before close"; but no further modifications by Posner appear on this page.

³ Three days prior to the hearing on summary judgment, counsel for Posner informed the trial court via letter and defendants via email and letter, that she intended to rely on the Statute of Frauds and Posner's REPC. This letter does not appear in the official record; however, the transcript from the summary judgment hearing confirms that Judge Medley and Equity received notice: (R. 644, p. 16-20; p. 32-34). At the conclusion of oral argument, the trial court gave the defendants a week to brief this point of law. R. 644, p. 28 and pp. 35-36. Defendants declined to brief this point. R. 644, p. 36.

“surety bond”; and (2) it altered the amount of seller financing from \$263,900 to \$260,000. See Addenda 2-5.

U.C.A. §25-5-3, case law and the terms of Posner’s REPC require changes to a real estate contract to be made in writing by either a party to the contract, or his authorized agent. *Golden Key Realty v. Mantas*, 699 P. 2d 730, 732 (Utah 1985), *Zion’s Properties, Inc. v. Holt*, 538 P. 2d 1319, 1322 (Utah 1975); *Coombs v. Ouzounian*, 465 P. 2d 356, 358 (Utah 1970). When she instructed Equity to close, Christoffersen possessed neither Posner’s written approval of the Guarantee nor written authorization to act in his place. Equity’s summary judgment motion provided no evidence that anyone—Posner or Christoffersen—approved the Financial Guarantee in writing. R.258-322, R. 594-601 (Equity’s Memorandum and Reply in Support of Summary Judgment). Accordingly, the trial court’s ruling that Christoffersen acted within her authority is incorrect as a matter of law.

In addition, the trial court plainly erred in ruling that Equity’s evidence met the threshold requirements for actual, implied or apparent authority. For example, the scope of a real estate agent’s authority must be set forth in writing.⁴ Equity’s evidence that Christoffersen had actual/implied authority, however, consists solely of deposition testimony. As Equity has not offered the agency contract between Posner and Christoffersen into evidence (R. 263-264, Undisputed Facts, Equity’s Summary Judgment Memorandum), and Posner denies that his agency contract contained such authority (R.481, ¶ 12 (Posner Affidavit), there is no proper basis for finding that Christoffersen acted within her actual authority.

⁴ Utah Admin. Code R162-6-1(6.1.11.1.).

Equity's argument in support of apparent authority is also deficient; its evidence fails to establish that Posner's conduct caused Equity's escrow agent to believe that Christoffersen could change Posner's contract without written authorization. In fact, Smith admitted that she knew she needed Posner's, not Christoffersen's, approval to close with the Financial Guarantee. R. 525, Ins. 20-25, R. 526, R. 527, Ins.1-4. (Smith Deposition). See *City Elec. V. Dean Chrysler-Plymouth*, 672 P. 2d 89, 90 (Utah 1983): "...apparent authority vanishes when the third party has actual knowledge of the real scope of the agent's authority."

For these reasons, the trial court's ruling that Christoffersen acted within her authority should be reversed. If the trial court's ruling on Christoffersen's authority is reversed, then the second ruling that Equity breached no duty must also be reversed, as Equity has offered no other undisputed facts or points of law to substantiate this ruling.

ARGUMENT

A. The Trial Court's ruling violates the Utah Statute of Frauds and Posner's REPC.

The trial court's conclusion that Kandis Christoffersen acted within her authority disregards the fundamental requirement that changes to a real estate contract must be in writing. Utah's Statute of Frauds U.C.A. § 25-5-3 states in pertinent part:

Every contract ...for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the sale is to be made, or by his lawful agent thereunto authorized in writing.

When the law requires a contract to be in writing, any changes to the contract must also be made in writing. See *Golden Key Realty v. Mantas*, 699 P. 2d 730, 732 (Utah 1985), *Zion's Properties, Inc. v. Holt*, 538 P. 2d 1319, 1322 (Utah 1975); *Coombs*

v. Ouzounian, 465 P. 2d 356, 358 (Utah 1970). See also § 301 STATUTE OF FRAUDS 72 Am. Jur. 2d: Generally, a contract for the exchange of lands entered into by an agent under verbal authority cannot be enforced where the Statute of Frauds requires the authority of the agent...to be in writing. Consistent with U.C.A. § 25-5-3, Posner's REPC also required that all changes "must be made in writing by the Parties to the contract". Addendum 6

The Statute of Frauds applies to Posner's land sale; therefore, his real estate contract, and any changes to it, had to be in writing. Indeed, since applicable law as well as the REPC required *Posner's* written authorization to change the contract terms, his real estate agent, under any theory of authority, certainly could not make changes verbally. To decide differently not only defeats the purpose of the Statute of Frauds but also gives an agent more legal power than her principal possessed at the outset.

At closing, Posner's REPC was materially changed without his written authorization: Posner authorized \$263,900 in seller financing, and his REPC specifically required "a surety bond in the same amount" as the seller financing. Equity accepted a Financial Guarantee that departed from this REPC requirement in two ways: it was designated "Financial Guarantee", rather than "surety bond"⁵ and it was written for \$3,900 less than the REPC required.⁶ When Equity closed with the Guarantee, it

⁵ Significantly, the trial court considered whether "Financial Guarantee" and "Surety bond" were synonymous terms in Independence's Motion to Dismiss (R 27-32) and its Reply Memorandum. R. 48-55 The Court declined to make a final determination on this point and denied Independence's motion. R. 75.

⁶ Under Utah law, a "surety bond" must be issued by a licensed insurance company authorized by the state insurance department, see U.C.A. § 31A -22-103, and must comply with minimum capital or surplus requirements set by the state: U.C.A. § 31A-5-211. Posner claims the Financial Guarantee was not a surety bond. R. 39-43. (Posner's Memorandum in Response to 12(b)(6) Motion to Dismiss).

accepted a document that materially departed from the terms of Posner's REPC without his written approval.⁷

Posner's *written* authorization (or *written* approval from an agent authorized by Posner in writing) was a necessary prerequisite to closing with the Guarantee rather than a \$263,900 surety bond. Significantly, even if Posner had approved the Guarantee, his signature was still necessary. Equity has never supplied written authorization approving the Guarantee as grounds for Kandis Christoffersen's authority (R. 263, R. 598), yet this is the only proper basis for finding that Christoffersen had authority to change the contract. The trial court's ruling that Christoffersen acted within her authority is therefore incorrect. This point alone provides the reviewing the Court with sufficient grounds for reversing the trial court's decision on Christoffersen's authority: "Summary judgment is appropriate only when...the moving party is entitled to judgment as a matter of law." *Hill v. Allred*, 28 P.3d 1271, 1275 (Utah 2001); see also Utah R. Civ. P. 56(c).

B. The Trial Court erred in ruling that Kandis Christoffersen acted within the scope of her actual, implied and/or apparent authority.

Even if the Utah Statute of Frauds is not controlling on the issue of Christoffersen's authority, reversal is still warranted because 1) Equity's evidence of Christoffersen's actual or implied authority is legally insufficient, and 2) Equity's evidence does not satisfy threshold requirements for finding apparent authority.

⁷ Given Equity's failure to present either evidence or argument refuting Posner's claim that his REPC was breached, and consistent with the requirement to view the evidence in the light most favorable to the nonmoving party, Posner's claim that a breach occurred must be taken as true for the purposes of this appeal. See *Kouris v. Utah Highway Patrol*, 70 P.3d 72, 75 (Utah 2003): in reviewing a grant of summary judgment, [the reviewing court must] view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

a. Actual Authority

Actual authority encompasses both express and implied authority. *Zion's First National Bank v. Clark Clinic Corp.*, 762 P. 2d 1090, 1994, (Utah 1988). In support of its claim that Christoffersen had express authority, Equity relies (R. 266) on the general rule that "Express authority exists where the principal directly *states* that an agent has the authority to perform a particular act on the principal's behalf." (emphasis added) *Id.* (additional cites omitted). The sole basis of Equity's claim that Christoffersen had express authority is deposition testimony by Posner:

The only reason that Kandis was at my closing was to get her commission. And my contact with her as being I guess my agent was to make sure that it closed. And she was the one negotiating back and forth with the contract [the REPC] as far as making sure that we had surety bond and how much it was and everything else. R. 267

In this quote Posner describes what he thought Christoffersen was doing at his closing.⁸ This statement does not trump other deposition testimony Posner has cited as proof that he *did not* authorize Christoffersen.⁹ R. 467. (Plaintiff's Memorandum in Opposition to Equity's Summary Judgment Motion) Indeed, Posner's explicit denial that he granted Christoffersen express authority in and of itself raises a factual issue mandating rejection of summary judgment. See R. 483, ¶'s 11, 12. (Posner's Affidavit)

Moreover, as a matter of law, Equity's reliance on such verbal evidence is inapposite: in Utah, a real estate agent's express authority must be put in writing. Utah Admin. Code, Rule 162-6-1(6.1.11.1) (1993)¹⁰ requires that the scope of a real estate

⁸ Nor is it clear that the second sentence of this quotation refers to Christoffersen's role at closing, rather than to her role as a conduit for negotiations between Posner and Strachan regarding the original requirement of the surety bond.

⁹ Both quotes are retrospective commentaries uttered more than two years *after* Posner's closing; as such, neither constitutes direct evidence of a statement Posner made, prior to his closing, expressly authorizing Christoffersen to act for him at his closing.

¹⁰ Pursuant to U.C.A. § 61-2-5.5, creating a Real Estate Commission authorized to make administrative rules, Utah Admin. Code Rule 162-6-1(6.1.11.1) (1993) of the Division of Real Estate, Utah Department of

agent's authority be defined in a written agency agreement.¹¹ The written agency agreement between Posner and Coldwell Banker was Posner's listing agreement. R. 301, Ins. 4-9. (Christoffersen Deposition); R. 468. (Posner's Memorandum Opposing Summary Judgment).

A listing agreement does not grant broad or general powers to a real estate agent, but commonly confers to a brokerage the right to find a buyer for the vendor and to receive a commission, §13.02(b)(1), § 13.02(b)(1)(i). Realtor Agreements; Commissions. UTAH REAL PROPERTY LAW, 1999. See also *Pilling v. Eastern and Pacific Enterprises Trust*, 702 P. d 1232, 1237 (Wash. App. 1985): (The scope of the agency between the seller and the broker is defined by the agent's purpose, which is to find a purchaser.); *Painter v. Huke*, 862 P. 2d 566, 568 (Ore. App. 1993): (listing agreement authorizing broker to sell vendor's property "at the selling price and on the terms noted" did not provide express or implied authority to agent to accept a buyer's offer on terms different than those specified in the contract).

In particular, a listing agreement does not authorize real estate agents to transact transfers of real property on behalf of their principals. See *Frandsden v. Gerstner*, 487 P. 2d 697,700 (Utah 1971): (A listing agreement empowering the realtor to find a buyer does not authorize the broker in writing to execute a contract of sale on behalf of his principal: "Thus the authority of a real estate broker with whom lands are listed for sale does not extend to the signing of a contract for sale. The power to execute a contract of

Commerce requires a principal broker and licensees acting on his behalf who represent a seller to "have a written agency agreement with the seller defining the scope of the agency."

¹¹ Cf. *Baumgartner v. Burt*, 365 P. 2d 681, 682(Colo. 1961): The relationship between an agent and his principal is a contractual one and the extent of the rights and duties of each is to be found in the express or implied terms of the agency contract.

sale is an additional authority that must be expressly granted in writing.” citing *Queen City Lumber Co. v. Fisher*, 111 N.W. 2d 714, 716 (N.D. 1961).

Posner claims that he expressly authorized Christoffersen to help find a buyer for his land and nothing more. R.481, ¶’s 3, 11, 12 (Posner Affidavit). Equity has not refuted Posner’s position with proof that Christoffersen’s written contract of agency included the power to negotiate his sales terms and sign in place of him, nor explained how an expressly delegated power to find a buyer for Posner transformed into the far broader authority to act in Posner’s place and approve a Financial Guarantee in place of a “surety bond.” R. 261-322 and R. 594-601. (Equity’s Memorandum and Reply Memorandum in Support of Summary Judgment).

By law, Christoffersen’s express authority must be written, yet Equity’s evidence of her express authority is deposition testimony. The trial court’s finding that express authority existed is incorrect, as it is not based on a written document establishing such authority. At present the record contains nothing more than conflicting testimony on this matter and summary judgment is not appropriate. *Kouris v. Utah Highway Patrol*, 70 P.3d 72,75 (Utah 2003) (Summary judgment only appropriate where there are no disputed issues of material fact).

Equity also urges that Christoffersen had actual authority under the doctrine of implied authority. When an agent is given express authority, he acquires, by implication, the *implied authority* to do all that is necessary to exercise the authority expressly granted. Thus an agent has implied authority if his conduct fell within the scope of, or was incidental, necessary, usual or proper to, the main authority delegated. *Diston v.*

Enviropak Med. Products, Inc., 893 P. 2d 1071, 1076 (Utah App. 1995). An analysis of actual authority, whether express or implied, focuses on the acts of the principal from the agent's perspective. *Id.*

In support of its claim that Christoffersen had implied authority, Equity states that Ms. Christoffersen was Posner's "listing agent." R. 266, R. 288. As set forth above, however, the only express authority a listing agreement gives is authority to help the seller find a buyer. Moreover, the record demonstrates that Christoffersen *herself* did not believe she had such implied authority at closing, as she took steps to obtain Posner's written authorization of the new amount of seller financing. R. 3045, Ins. 2-18.

In giving verbal instructions to close with a document that materially breached the terms of Posner's REPC without Posner's written authorization, Christoffersen acted without authority. Approving a change in the type of financial security required for seller financing was no more "incidental, necessary or proper" to the authority Posner delegated to assist in finding a buyer than was approving a change in the amount of seller financing, for these unauthorized verbal instructions effectively altered the terms of Posner's agreement and ultimately thwarted the very purpose for which Christoffersen was hired. Christoffersen's conduct violated basic requirements under the Statute of Frauds and Posner's REPC that changes to his contract be made in writing, as well as fiduciary duties that she owed to Posner¹². Therefore, Equity's argument that Christoffersen had implied authority is unfounded in law.

¹² Pursuant to U.C.A. § 61-2-5.5 and 61-2-11, Christoffersen's conduct must conform to professional standards articulated in the Administrative Rules of the Division of Real Estate, Utah Department of Commerce. These standards include the prescription that that principal broker and licensees acting on his behalf owe to their principal fiduciary duties of care including full disclosure Utah Admin. Code R162-6-2(1998) (6.2.15.1.(c)) and reasonable care and diligence 6.2.15.1.(e).

b. Apparent Authority

"Apparent authority exists: 'where a person has created such an appearance of things that it causes a third party *reasonably and prudently* to believe that a second party has the power to act on behalf of the first person" (emphasis added) *Walker Bank & Trust Company v. Jones*, 672 P. 2d 73,75 (Utah 1983). An analysis of apparent authority must focus on the acts of the principal from a third party's perspective. *Diston v. Enviropak Med. Products, Inc.*, 893 P. 2d 1071,1076 (Utah App. 1995). As applied to this case, Christoffersen had apparent authority if the evidence shows that Posner's conduct led Equity reasonably and prudently to believe that Christoffersen could give verbal instructions that substantially changed her principal's REPC without his written authorization. Equity's evidence of Posner's conduct fails to meet this threshold requirement.

Equity urges that Christoffersen had apparent authority because "listing Christoffersen as his agent on the REPC, using her to negotiate the contract, delegating to her the responsibility of 'making sure that we had a surety bond and how much it was and everything else'" created the appearance of apparent authority. R. 267-268 (Equity's Memorandum in Support of Summary Judgment). Merely hiring a real estate agent to sell land and noting this on the REPC is not sufficient conduct on Posner's part to create the appearance that Christoffersen had authority to change Posner's REPC without his written approval. Under general principles of agency law, a real estate agent is deemed to be a special agent acting under a *limited* power, rather than a general agent, and has the power to do *only those acts specifically named in the contract of agency*. (emphasis added) 3 Am. Jur. 2d §122 AGENCY; 12 Am Jur. 2d §88 BROKERS (See also *Martin v.*

Vincent, 593 P. 2d 45, (Mont. 1979) (A real estate broker does not have general authority and is only authorized to do what is specifically assigned in his contract).

The record plainly establishes that Smith understood that Christoffersen's agency was limited rather than general. None of Smith's actions indicate that she believed that Christoffersen possessed authority beyond helping Posner find a buyer and sell his land. On the contrary, Smith stated in her deposition that she did not believe Christoffersen had the authority to replace Posner and stated that she believed she needed Posner's approval to proceed to close. R. 525-527. (Smith Deposition). Smith testified that Posner told her his attorney had approved the Guarantee, again showing lack of reliance on any authority possessed by Christoffersen.¹³ R. 531, Ins. 14-25 (Smith Deposition). Christoffersen had openly told Posner, in Helen Smith's presence, that she had no idea what a surety bond was. R. 544, Ins. 13-18. (Christoffersen Deposition). Smith's decision to accept Christoffersen's verbal representations regarding Posner's wishes, when the documents before her plainly deviated from the express terms of Posner's REPC, signals her own misjudgment, not evidence of her belief in Christoffersen's apparent authority.

Furthermore, apparent authority cannot be invoked by one who knows or has good reason to know the limits and extent of an agent's authority. 3 Am. Jur. 2d § 78. See *Ellis v. Nelson*, 233 P.2d 1072,1075 (Nev.1951):

...there can be reliance only upon what the principal himself has said or done, or at least said or done through some other and authorized agent. The acts of the agent in question can not be relied upon as alone enough to support an estoppel. If his acts are relied upon there must also be evidence of the principal's knowledge and acquiescence in them. Moreover, in any case, *the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances.* (emphasis added).

¹³ Posner's attorney supplied an affidavit stating he never saw the Financial Guarantee prior to closing. R. 587, ¶11. (Affidavit of Scott Poston).

Utah cases uphold this limitation: See *Bodell Construction Company v. Stewart Title Guaranty Company*, 945 P. 2d 119, 124 (Utah App. 1997); *City Elec. V. Dean Chrysler-Plymouth*, 672 P. 2d 89,90 (Utah 1983); *Bradshaw v. McBride*, 649 P. 2d 74, 78 (Utah 1982), citing *Dohrmann Hotel Supply Co. v. Beau Brummel, Inc.*, 103 P. 2d 650, 651 (Utah 1940): one who deals with an agent has the responsibility to ascertain the agent's authority despite the agent's representations. Reliance on apparent authority is also not justified where it is inconsistent with the circumstances of the transaction. 3 Am. Jur. 2d § 78 AGENCY *Simpson v. Compagnie Nationale Air France*, 248 N.E. 2d 117, 120 (Ill. 1969). The mere fact that Smith chose to rely on Christoffersen is not itself evidence of Christoffersen's authority.¹⁴

On the facts of this case, Helen Smith knew or had good reason to know Kandis Christoffersen did not have the authority to change Posner's REPC without written approval. Helen Smith was not an uninformed third party in this transaction but an escrow agent. R. 519, Ins. 5-21 (Smith Deposition) with a fiduciary duty¹⁵ to Posner. The record plainly establishes that Ms. Smith understood that Posner's REPC functioned as her escrow instructions (R. 519, Ins. 7-12, Smith Deposition) and that she knew Posner's closing documents needed to meet the terms of his REPC. R. 520, lines 15-20. (Smith Deposition). As an escrow agent bound to follow the terms of the REPC, Smith knew or should have known that Posner's signature was required to approve a change in his REPC. Addendum 6. Thus it was neither prudent nor reasonable for Smith to rely on verbal instructions from Christoffersen. Equity's assertion of apparent authority is an attempt to escape liability for its agent's failure to act to protect Posner's interests simply

¹⁴ "Authority is not 'apparent' simply because the party claiming has acted upon his conclusions." *Tsouras v. Southwest Plumbing and Heating*, 587 P. 2d 1321, 1323 (Nev. 1978).

¹⁵ *Freegard v. First Western National Bank*, 738 P. 2d 614, 616 (Utah 1987)

by contacting him directly. None of the evidence supplied in Equity's motion for summary judgment can correctly be construed as sufficient in law to support a finding of apparent authority.

C. The Trial Court's conclusion that Equity breached no duty to Posner should be reversed

In Utah, escrow agents owe a fiduciary duty of care to the parties to an escrow. In *Freegard v. First Western National Bank*, 738 P. 2d 614, 616 (Utah 1987), the Utah Supreme Court noted "it is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and as such, a fiduciary is held to a high standard of care in dealing with its principals." See also *New West Federal Savings and Loan Assoc. v. Guardian Title Company of Utah*, 818 P. 2d 585, 589 (1991 Utah App.); *Hertz v. Nordic Limited, Inc.*, 761 P. 2d 959, 962 (Utah App. 1988).¹⁶

Although an escrow agent's fiduciary duty may vary somewhat according to jurisdiction, courts agree that the core of the escrow agent's fiduciary duty is to follow the escrow instructions. See, e.g., *Schoepe v. Zion's First National Bank*, 750 F. Supp. 1084, 1088, (D. Utah 1990), (noting Utah courts have endorsed the principle that "the scope of the escrow agent's duty is governed by the escrow agreement, and includes, at minimum, an obligation to exercise reasonable skill and ordinary diligence in following the escrow instructions." (Additional cites omitted)

In the instant case, Posner's escrow agent, Helen Smith, closed his sale with a document that, in both name and amount, did not match the specific requirements of the

¹⁶ This principle is recognized in other jurisdictions as well: The escrow agent must strictly comply with the instructions of the principals. See, e.g., *Manley v. Ticor*, 798 P. 2d 1327, 1331 (Az. Ct. App 1989): "[H]e must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence." *National Bank of Washington v. Equity Investors*, 506 P. 2d 20, 35 (Wash. 1973).

REPC terms. Despite the notable discrepancies between the REPC terms and the Guarantee, and despite the fact that Smith was an agent who owed a fiduciary duty of care to Posner, Equity's phone records show no fax to Posner's residence in Florida prior to his closing. R. 461; R. 504-515. As alleged in the Equity's summary judgment motion, the sole foundation upon which Ms. Smith based her decision to close was that Posner's real estate agent told her that Posner had approved the Guarantee and said that closing could occur. Ms. Smith closed without requesting or receiving written authorization of the Guarantee from Mr. Posner.

Ms. Christoffersen's verbal instructions in closing Posner's sale were not a legally sufficient basis for Ms. Smith to close Posner's sale. As set forth previously, to verify that she had Mr. Posner's *actual* knowledge and approval of the Guarantee, as well as comply with her professional obligations to disclose relevant information in a diligent manner, Ms. Christoffersen was required to obtain Posner's signature approving the Guarantee. Measured by either the law governing real estate transactions or the professional standards of the real estate business, nothing short of a signature was a sufficient basis for Ms. Christoffersen, in Utah, to conclude that Posner, in Florida, had seen and approved the Guarantee.

As set forth previously, the evidence plainly establishes that Smith knew she was obliged to follow the terms of Posner's REPC, and therefore should have known that Posner's signature was required to approve a change in his REPC. Addendum 6. To verify that Christoffersen's instructions were proper and accurate, Smith should have either insisted that Christoffersen supply Posner's written approval of the Financial

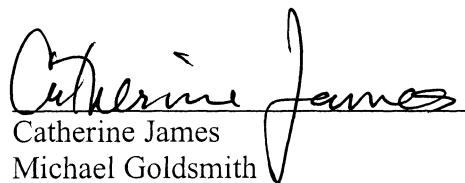
Guarantee, or else obtained it herself. There is thus no proper basis for concluding that Smith was entitled to rely on Christoffersen's verbal instructions.

Appellee's motion for summary judgment depends, in its entirety, on the assertion that it was justified in relying on Christoffersen's authority, whether actual/implicit or apparent. R. 263, 268. If Equity's argument regarding Christoffersen's authority is incorrect, then there is no basis in fact or law to refute Posner's claims of fiduciary breach. Therefore, if the trial court's ruling on Christoffersen's authority is reversed, its finding of no fiduciary breach must also be reversed.

CONCLUSION

For the reasons put forth above, Appellant respectfully requests this Court to confirm that Posner's written approval of the Guarantee was required by law and to reverse the trial court's grant of summary judgment on this basis, remanding for further proceedings consistent with this ruling. In addition or in the alternative, Appellant requests the Court to find Equity's evidence of Christoffersen's authority insufficient as a matter of law, reversing the trial court's grant of summary judgment on this basis and remanding for proceedings consistent with this ruling.

Dated this 24 day of November, 2005.


Catherine James
Michael Goldsmith

Attorneys for Plaintiff/Appellant Michael C. Posner

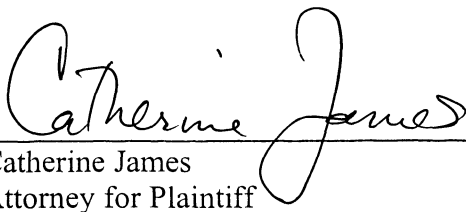
CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of November 2005, I delivered two true and correct copies of the foregoing **BRIEF OF APPELLANT** (Appellate Case No. 20050556-CA) to:

David Bennion
Parsons Behle & Latimer
One Utah Center
201 S. Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145
Attorneys for Appellee

I certify that on this 28 day of November 2005, I sent two true and correct copies of the foregoing **BRIEF OF APPELLANT** (Appellate Case No. 20050556-CA) via U.S. first class pre-paid mail to the following:

Dave Overholt
Robert Ponte
RICHER & OVERHOLT
901 West Baxter Drive
South Jordan, Utah 84095
Attorneys for Defendant NRT, Inc.



Catherine James
Attorney for Plaintiff

ADDENDUM 1

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

MICHAEL C. POSNER, an	:	MINUTE ENTRY
individual,	:	CASE NO. 040901853
Plaintiff,	:	
vs.	:	
EQUITY TITLE INSURANCE AGENCY,	:	
INC., a Utah Corporation;	:	
INDEPENDENCE TITLE INSURANCE	:	
AGENCY, a Utah Corporation; and	:	
NRT Inc., a New Jersey	:	
Corporation doing business in	:	
Utah as COLDWELL BANKER	:	
RESIDENTIAL BROKERAGE,	:	
Defendants.	:	

Defendant Equity Title Insurance Agency and defendant Independence Title's Motions for Summary Judgment were taken under advisement by the Court after the submission of Memoranda and oral argument by counsel. After further consideration and review of all Memoranda in support, opposition and reply, the Court rules as follows.

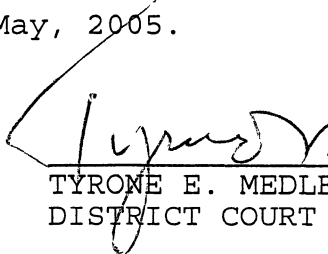
1. Both defendants' Motions for Summary Judgment are granted in full as prayed for. Based upon all of the undisputed material facts, legal authorities and legal analyses set forth in both defendants' Memoranda in support and reply incorporated herein by this reference, the Court finds that plaintiffs' agent,

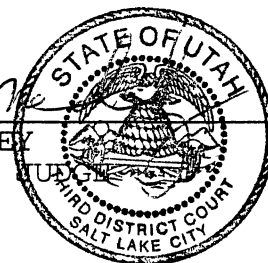
Christoffersen, was acting within the scope of her actual implied and/or apparent authority when she communicated plaintiff's approval of the Financial Guarantee. Consequently, neither defendant breached any duty owed to plaintiff by following directions given by plaintiff's agent. Additionally, defendant Independence owed plaintiff no duty, its duty is owed to the buyer as the buyer's escrow agent.

2. Plaintiff's pending Motion to Compel is now moot.

3. Counsel for defendants are instructed to submit a joint Order consistent with this Minute Entry and Rule 7(f), Utah Rules of Civil Procedure.

Dated this 23 day of May, 2005.


TYRONE E. MEDLEY
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 24 day of May, 2005:

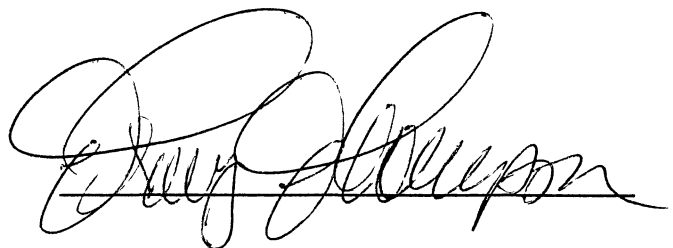
Catherine James
Attorney for Plaintiff
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Mountain Green, Utah 84050

Michael Goldsmith
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David M. Bennion
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George W. Burbidge II
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50 S. Main Street, Suite 1500
Salt Lake City, Utah 84144

David W. Overholt
Robert A. Ponte
Attorneys for Defendant NRT
901 W. Baxter Drive
South Jordan, Utah 84095

A handwritten signature in black ink, appearing to read "David M. Bennion", written over a horizontal line.

ADDENDUM 2

FINANCIAL GUARANTEE

THIS GUARANTEE is made and entered into, by and between AMERICAN NATURAL RESOURCES CORPORATION, hereinafter called GUARANTOR; and STRACHAN & ASSOCITES, LLC, hereinafter called BORROWER, for the benefit of MICHAEL C. POSNER, hereinafter called LENDER.

WITNESSETH

WHEREAS, LENDER expects to loan to BORROWER certain assets, namely \$260,000 (two hundred and sixty thousand dollars), balance of purchase price of a certain property located at 350 Deer Valley Drive, Park City, Utah., in terms of an agreement entered into between Borrower and Lender, dated August 2nd, 2002, hereinafter referred to as the loan, and
WHEREAS, BORROWER desires GUARANTOR to act as GUARANTOR, at BORROWER'S request, to LENDER, for the amount on the Loan described below; and
WHEREAS, GUARANTOR is willing to act as GUARANTOR subject to the provisions hereof;
NOW THEREFORE, FOR VALUE RECEIVED, including the promises and mutual covenants herein set forth, BORROWER, LENDER and GUARANTOR do hereby mutually agree as follows:

TERMS AND CONDITIONS

1. DEFINITIONS

For the purposes of this Guarantee, the terms and phrases listed below shall have only the meaning shown when used herein;

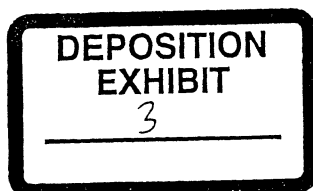
(a) The "GUARANTOR" means the GUARANTOR whose name appears on the face of the Guarantee.

(b) The "LENDER" means the LENDER to whom the GUARANTOR is obligated and whose name appears in this Guarantee, and who makes a loan of securities to the BORROWER and whose interest in the Loan Instrument is an equitable interest under a contract or promissory note.

(c) The "BORROWER" means the one stated as BORROWER on the Loan instrument, whether single or multiple individuals, partnership, corporation or other legal entity.

(d) The "Loan Instrument" means any written evidence of obligation, including a promissory note, loan agreement, Asset Holder Agreement, or other debt instrument, obtained from the BORROWER by the LENDER which bears a genuine signature of the BORROWER and all other parties to the instrument, is complete on its face, and is valid and enforceable against the BORROWER.

(e) A "Loss" means the aggregate amount of an unpaid principal and lease fees not to exceed \$260,000 (two hundred and sixty thousand dollars) on the loan instrument plus interest payments, evidencing an Eligible Loan which is in default notwithstanding anything to the contrary herein, loss shall exclude penalties of any nature and expenses of collection, and shall be reduced by any payments made by the GUARANTOR. The aggregate of all losses under the Guarantee shall in no event exceed the Limit of Liability stated in the Guarantee.



(f) A "Loan" means an advance of funds or securities evidenced by a loan instrument, the proceeds of which have been or are to be used solely for the project as declared to the LENDER and the GUARANTOR as set forth above.

(g) The "Eligible Loan" means the total amount due inclusive of finance charges, if any. The loan shall be evidenced by a written instrument which bears a genuine signature of the BORROWER as well as all other parties. The Loan shall comply with all Federal, State, Province, and local rules, statutes and ordinances.

(h) An "Extension" means the permission granted to the LENDER to allow a payment to be deferred. These deferred payments must be paid before a loan is satisfied.

(i) The "Limit of Liability" means: the principal amount of two hundred and twenty five thousand dollars (\$260,000), plus interest payments, the aggregate amount as stated shall be the GUARANTOR's maximum liability under this Guarantee.

(j) The "Application" means any statement and/or presentation, either orally or in writing, made by the BORROWER, LENDER or their agents, servants or employees, in order to induce the GUARANTOR to issue this Guarantee.

(k) The "Payment" means a deposit by the BORROWER with the LENDER of funds or the return of securities which represents the full or partial payment on the Loan Instrument evidencing an eligible loan.

(l) The "Date of Default" means the earliest date upon which an installment payment was due which was not paid by the BORROWER according to the terms of the Loan Instrument.

(m) The "Guarantee Period" means from August 28, 2002 to August 28, 2003, and renewable annually thereafter for a period not to exceed ten years. In no event shall this Guarantee be called or loss claimed earlier than September 28, 2002.

2. CONDITIONS PRECEDENT TO RECOVERY

Each of the following is a condition precedent to the obligation of the GUARANTOR to indemnify against a loss hereunder, and each condition must occur prior to any liability or obligation of the GUARANTOR to cover such loss.

(a) Prior to making a loan of the securities, the LENDER shall obtain financial information and representations from the BORROWER. The Lender will do such due diligence as it, in its sole discretion, deems necessary, which information will be made available to the Guarantor at the Guarantor's request. The Lender will consider such credit factors as a prudent person but one who does not routinely enter such transactions.

(b) If, after the loan is made the LENDER discovers any material misstatements in the information given by the BORROWER, or misuse of the proceeds of the loan by the BORROWER, the LENDER shall promptly report such discovery to the GUARANTOR.

(c) All payments received on account of the Loan Instrument, must be applied to the principal and interest payment due in their order, in the absence of specific written instructions from the GUARANTOR to do otherwise.



(d) The LENDER shall give written notice of default within thirty (30) days after the event and submit a claim, if the default is not rectified by the sixtieth (60th) day of default.

3. EXCLUSIONS

This Guarantee shall not indemnify the LENDER for any reasons other than for the default of the BORROWER, including but not limited to any loss:

(a) Resulting from the successful assertion of a defense against the LENDER releasing the BORROWER from the obligation to pay the Eligible Loan, or any judicial order, government statute, rule or regulation which otherwise extends, modifies or releases the BORROWER from obligation.

(b) Resulting directly or indirectly from any dishonest, fraudulent or criminal act of any officer or employee of the LENDER its successor, assigns or predecessors in interest, or any other person or business entity acting alone or in collusion with the BORROWER who is a party to the obligation covered by the GUARANTOR hereunder.

(c) Resulting from forgery.

(d) Resulting from any failure to comply with Federal, State, Province and local rules, statutes and regulations.

4. CANCELLATION OF THE GUARANTEE

Cancellation by the LENDER: This Guarantee may be canceled by the LENDER by returning it to the GUARANTOR or by mailing to the GUARANTOR a written notice of cancellation stating when, thereafter such cancellation shall be effective. Such cancellation shall not alter or affect the GUARANTOR's obligation with respect to any Claims Notice which was received by it prior to the cancellation effective date.

5. NOTICE OF DEFAULT

The LENDER shall as soon as possible, and in no event later than thirty (30) days after the event, notify the GUARANTOR in writing that payments or interest under the Loan Instrument are in default. The LENDER shall also send a Notice of Default to the BORROWER and provide a copy of such notice to the GUARANTOR. Monthly reports indicating the status of the Loan is in default shall be given to the GUARANTOR thereafter until such Default is secured, an extension approved, or transfer of equity has been effected.

6. SUBMISSION OF A CLAIM

In the event that the Loan Instrument is in default for thirty (30) days and the BORROWER, after notice from the LENDER as required herein, has not made payment to rectify the default, by the sixtieth (60th) day of default, the LENDER shall, within ten (10) days thereafter, send a notice of claim to the GUARANTOR. Upon receipt of a Notice of Claim, the GUARANTOR shall take one of the following actions:

(a) Pay installments due thereon;

(b) Pay the aggregate amount, less all prior payments by the BORROWER.



7. **CONVEYANCE OF SECURITY OR COLLATERAL**

As an express condition to the settlement of any claim hereunder, the LENDER shall tender to the GUARANTOR an assignment of the lien, or collateral, within a reasonable period of time after settlement is made in accordance with the rights of subrogation herein (paragraph 10).

8. **AMOUNT OF LOSS**

(a) Within sixty (60) days of a submission of claim, and subject to the provisions of paragraphs 12 and 13, the GUARANTOR shall pay such claim by paying LENDER directly.

(b) In any event, the GUARANTOR may elect either to make installment payments in accordance with the Loan Instrument which is in default (in which case the GUARANTOR will, at the time of its first installment payment, make all payments in default) or unless other agreements are agreed to, or replacement instrument is provided for with the concurrence to the LENDER, or pay the LENDER the full amount of loss calculated in accordance with paragraph, 1 (e)

(c) In any event, there shall be no acceleration of the subject Loan Instrument or the Eligible Loan, if either is subject to acceleration by the terms hereof.

9. **WHERE NOTICE IS GIVEN**

All notices, pleadings, claims, tenders and reports and other data required to be given by the LENDER to the GUARANTOR shall be sent by courier service or registered mail (return receipt requested) and directed to the GUARANTOR in care of its Agent of Record as listed.

10. **SUBROGATION**

Upon payment of any claim under this Guarantee, the GUARANTOR shall be subrogated to the LENDER's rights under the terms of the Loan Instrument and against the BORROWER and any other party, business entity or organizations liable under the terms of the Defaulted LENDER's instrument and against any reserves or holdbacks in the LENDER's possession. The LENDER shall execute and deliver at the request of the GUARANTOR all instruments and papers and do whatever else is necessary to transfer, assign and secure such rights, the execution by the LENDER of a release or waiver of the right to collect the unpaid amount due on any Loan Instrument shall equally release the GUARANTOR from any further obligation under this Guarantee as to the Loan Instrument. In the event the Loan Instrument is paid in full, the GUARANTOR shall be subrogated to the rights of the LENDER under the security and/or collateral lien on said security and/or collateral to the extent of claim payments made directly by the GUARANTOR to the LENDER pursuant to this Guarantee.

11. **MISCELLANEOUS PROVISIONS**

(a) Transfer of Interest: Transfer of the BORROWER's obligations under the Loan Instrument and of the BORROWER's interest in any collateral securing such Loan Instrument shall not be permitted by the LENDER.

(b) Reports and Examinations of Records: The GUARANTOR may at any time call upon the LENDER for such reports as it may deem necessary and may inspect any accounts or records of the LENDER which are applicable to the Loan Instrument. Such examinations shall be made during the normal business hours of the LENDER.



- (c) Conformity of Statutes: The terms and conditions of the Guarantee, if any, that are in conflict with the statutes or laws of the jurisdiction where the Guarantee is performed are hereby amended to conform with the minimum requirements of the State of Utah and Federal statutes of law.
- (d) All instruments evidencing or securing or otherwise relating to the Loan must be satisfactory to the GUARANTOR.
- (e) Failure by the BORROWER or the LENDER to satisfy any conditions as set forth above or elsewhere within this Guarantee, shall relieve the GUARANTOR of any obligations to perform under this instrument, but in such event, all premiums paid shall be regarded as earned and shall be retained by GUARANTOR.
- (f) GUARANTOR shall be liable to LENDER in accordance with this Guarantee, and LENDER shall not be required to first exhaust its remedies against BORROWER.
- (g) Applicability: The terms and conditions of this Guarantee are to the benefit of and be binding upon the GUARANTOR and the LENDER, their successors and assigns.
- (h) Assignment of This Agreement: In order to assign the Guarantee the LENDER shall complete a Certificate of Assignment and the GUARANTOR shall consent to assignment in writing by a duly authorized officer of the GUARANTOR. Consent of assignment shall not be unreasonably withheld by the GUARANTOR; however, the LENDER may not assign the Guarantee without the prior written consent of the GUARANTOR and this Guarantee shall be deemed null and void if assigned or transferred without the written consent of the GUARANTOR, whether such transfer be voluntary or involuntary.
- (i) Waiver Provision: No Waiver of any condition or covenant of this Guarantee shall be effective unless in writing and signed by the party against whom said waiver is asserted and no failure to exercise and any right or remedy by either the LENDER or the GUARANTOR shall be considered to imply or constitute a further waiver by such party by name or any other condition, covenant, right remedy, except as provided herein.
- (j) Amendments: Notice to any agent or knowledge possessed by any agency or by any other person shall not effect a waiver or change any part of this Guarantee or stop the GUARANTOR or the LENDER from asserting any right under the terms of the Guarantee. The terms of this Guarantee may be waived, amended, or changed only after written approval of the GUARANTOR by its President, or authorized representative, agent and/or assigns.
- (k) Conflict: It is understood and agreed that in the event of a conflict between provisions of this form and any expression of intent to cover or any other paper, the provisions of this form shall apply.

12. EXPENSES, COMMISSIONS, ETC

BORROWER shall be solely and exclusively responsible for, and shall promptly pay, all fees, costs and expenses due any agent, broker, attorney, forwarders, finders, or any other party entitled to receive funds or which may be payable as a result of BORROWER entering into this Guarantee Agreement.



13. CONSIDERATION TO GUARANTOR

BORROWER shall pay to GUARANTOR the sum of three thousand nine hundred dollars (\$3,900) upon the execution of this FINANCIAL GUARANTEE BOND and shall be fully earned and shall be non refundable for any reason including cancellation. Further, as a condition to GUARANTOR's continuing obligation hereunder, BORROWER shall pay to GUARANTOR an additional one and one half percent (1½ %) each year for a period not to exceed a total of ten (10) years of the unpaid principal balance, or only so long as this Guarantee is required by the LENDER on or before the fifteenth day prior to the anniversary of the effective date of this Guarantee. This Guarantee is null and void ab initio in the event of non payment of any amount due, when due.

14. BORROWER'S WARRANTY AS TO AUTHORIZATION TO ACT

If BORROWER is a corporation, trust or partnership, association or other legal entity, the individual or individuals signing the Guarantee Agreement on BORROWER's behalf hereby expressly warrant: (a) that each such person has the full and complete authority, pursuant to appropriate resolution, or other direction in writing of BORROWER's Board of Directors, Trustees, General Manager or Managing Board of Directors who have been fully informed, concerning this transaction, understand and have approved the provisions of this Guarantee; and (b) that BORROWER is both in fact and in law, effectively bounded by the provisions of this Guarantee.

All notices required to be given herein and all correspondence must be sent certified mail, return receipt requested or by Federal Express to:

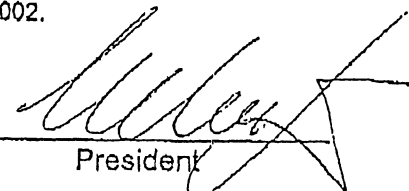
LENDER: Michael C. Posner, c/o The Manager, Caldwell Banker Residential Brokerage, 1750 Park Avenue, Park City, Utah, 84060

BORROWER: Christopher Strachan: c/o Stephanie Gyllenskog, Allpro, 144 West 100 South, Brigham City, Utah, 84302

GUARANTOR: Robert V. Murton, President, American Natural Resources Corporation, 10151 Thyme Circle, South Jordan, Utah. 84095.

IN WITNESS WHEREOF, THE GUARANTOR has duly executed this Guarantee and endorsement attached and has caused these presents to be signed by its duly authorized officer on this 3rd day of August 2002.

(Signed)


President

ADDENDUM 3

ADDENDUM NO. 9
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT (REPC) with an Offer Reference Date of July 23, 2002 including all prior addenda and counteroffers between Strachan & Associates LLC as Buyer and Michael Posner as Seller regarding the Property located at 350 Deer Valley Dr. hereby incorporated as part of the REPC.

1. Buyer shall have until Thursday, August 29th at 6:00pm to close.

2. Seller carry back to be in the amount of \$250,000.00 secured in second position.

3. Surety bond will be issued in the amount above before close.

4. All other terms on contract and previous addendums to remain the same.

In the event the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, those terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Buyer shall have until 6:00 ☐ AM ☒ PM Mountain Time on August 29, 2002 to accept the terms of this ADDENDUM in accordance with the provisions of Section 1 of the REPC. Unless so accepted, the offer is void and this ADDENDUM shall be void.

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

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

☐ COUNTEROFFER: ☐ Seller ☐ Buyer proposes a counteroffer to the terms of the above ADDENDUM as follows:

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL.
EFFECTIVE AUGUST 17, 1990. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM 4



ADDENDUM NO. 4
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 7-23-02 including all prior addenda and counteroffers, between Scrachan & Associates LLC as Buyer, and Posner as Seller, regarding the Property located at 350 Deer Valley Drive. The following terms are hereby incorporated as part of the REPC:

Buyer to provide to Seller a Surety Bond for the Sellers Financing; as

per Real Estate Purchase Contract and all Seller financing addendums

and all other addendums to the contract on 350 Deer Valley Drive.

to be provided before closing of the property. The closing shall be on or before
August 7, 2002. 5:00 PM Mountain Time. All prorations shall stay the same

August 2 2002. Buyer to pay off Seller financing in full before starting
any construction on property.

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

mdk 8/2/02
☐ Buyer ☐ Seller Signature Date Time

☐ Buyer ☐ Seller Signature Date Time

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

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

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ITI-0042

ADDENDUM 5

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ADDENDUM NO. 8
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of July 23, 2002, including all prior addenda and counteroffers, between Strachan & Associates LLC as Buyer, and Michael Posner as Seller, regarding the Property located at 350 Dear Valley Dr.. The following terms are hereby incorporated as part of the REPC:

1. Buyer will increase Surety Bond to cover new amount Seller will carry.

2. Rate is increased to 10%.

3. Buyer will give Seller a check in the amount of \$1,100.00, to cover costs of testing fees for land being purchased.

4. All other items on contract to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on 8/22/02 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 8-22-02 7:00 pm
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

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

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

[Signature] 8/22/02
 (Signature) (Date) (Time) (Signature) (Date) (Time)

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

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

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1992. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ITI-0043

ADDENDUM 6

for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

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

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

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

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

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

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

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract ~~SHALL~~ ☒ **SHALL** ☐ **MAY** (upon mutual agreement of the parties) first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

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

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



Seller's Initials



Date

7/23/02



Buyer's Initials



Date 7/23/02