

2006

John York and Lisa York v. Tom Heal Commercial Real Estate Inc., and Walker & Company Real Estate : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *York v. Tom Heal Commercial Real Estate*, No. 20060237 (Utah Court of Appeals, 2006).
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IN THE UTAH COURT OF APPEALS

JOHN YORK and LISA YORK:

Defendants/Appellants,

vs.

TOM HEAL COMMERCIAL REAL
ESTATE, INC., and WALKER &
COMPANY REAL ESTATE

Plaintiffs/Appellees.

Case No. 20060237-CA

BRIEF OF APPELLANT

AN APPEAL FROM THE AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT
AND AN APPEAL FROM JUDGMENT IN FAVOR OF THE APPELLEE, IN THE
FOURTH JUDICIAL DISTRICT COURT IN UTAH COUNTY, UTAH, THE
HONORABLE ANTHONY W. SCHOFIELD PRESIDING

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FILED
UTAH APPELLATE COURTS
DEC 22 2006

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ALL PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24 (a)(1) of the Rules of Appellate Procedure, the following are parties to the proceedings:

1. Appellants (Hereinafter “defendants”): John York and Lesa York.
2. Appellees (Hereinafter “plaintiffs”): Tom Heal Commercial Real Estate, Inc., and Walker & Company Real Estate.

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JURISDICTION

Jurisdiction is conferred in the Utah Court of Appeals by §78-2a-3(2)(h) Utah Code.

ISSUES PRESENTED FOR REVIEW, PRESERVATION OF ISSUES, AND STANDARD OF REVIEW

A. Did the Trial Court err in concluding that the subject real property was “sold to a tenant” within the meaning of the parties real estate listing agreement, thus triggering a second commission from defendants to plaintiffs, where defendants did not sell the subject real property to the tenant MATC, but rather sold the subject property to Alpine School District, which had a lease-purchase agreement with the tenant MATC to which defendants were not a party? The issue regarding payment of the second commission was preserved as it was the focus of the entire trial. (R. 506- 1-176). Defendants argued that this action was limited to a breach of contract case. (R 506 p. 163 6-21). Defendants argued regarding construction of the Modified Listing Agreement. (R. 506 172 -21 to R. 173-6). Defendants specifically argued against applying the conduct of MATC, Alpine School District and UVSC to defendants. (R.0506 p.163 15-21, R. 0506 p. 172, 3-8,). See also (R. 506 p. 172 9-20, R. 506 p. 172-21 to 173-12). The standard of review where contract interpretation is a matter of law, is a review for correctness giving the trial court no deference. *Winegar v. Froerer Corp.* 813 P.2d 104, 161 Utah Adv. Rep. 22; 1991 Utah LEXIS 41, *Gillmor v. Macey* 2005 UT App 351, 121 P.3d 57, 533 Utah Adv. Rep. 13; 2005 Utah App. LEXIS 349.

B. Did the trial court err in determining that the subject real property was

“sold to a tenant” within the meaning of the parties real estate listing agreement, thus triggering a second commission from defendants to plaintiffs, where tenant MATC had no statutory authority to purchase the subject real property or enter into a lease-purchase agreement at the time Defendants sold the subject real property to Alpine School District? The evidence at trial was that MATC had no authority from the legislature to purchase property. (R.506 p. 89: 1-10). At trial the evidence was that MATC was not given authority to do capital leases until *after* the time of the lease between MATC and Alpine School District. (R. 506 p. 109:23 to 110:110:14). Defendants argued that at the time of the lease between Alpine School District and MATC, there was no legislative authority for MATC to purchase the property as the amended UCA 53B-2A-113 did not go into effect until 2005. (R. 506 p. 173: 14-24).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, AND RULES**

The following controlling statutes and rules are contained in the Addenda:

Constitutions: None

Statutes: UCA § 53B-2-101

UCA § 53B-2a-113

STATEMENT OF THE CASE

Nature of the Case.

The case at bar is based on the alleged breach of a real estate listing contract between defendants John and Lisa York and plaintiffs Tom Heal Commercial Real Estate, Inc. and Walker & Company Commercial Real Estate, Inc.

Proceedings Below.

A one day bench trial was held by the court. Plaintiffs prevailed at that trial. (R. at 340).

STATEMENT OF FACTS

The facts as decided by the trial court in its ruling are as follows: Plaintiffs are licensed real estate agents.(R. 506 p. 17:1-21) Defendants are former owners of the subject real property, located at 759 East Pacific Drive, American Fork, Utah. (R.506 p. 122:19-24). During the year 2000, Defendants retained Blaine Walker, a principle in Plaintiff Walker and Company Real Estate, and he was hired to list the subject real property. (R. 506 p 21:22-25, See trial exhibit #2). The listing agreement the parties signed spanned a nine-month period. (R.506 p 123:23 to 124:1). Before closing on the lease, Heal informed Defendant John York that the first agreement had expired, and Heal needed to have Defendants sign another listing agreement. (R. 506 p 25:12 to 26:19, Trial Exhibit 3, Addendum 1). Although this listing agreement has different compensation terms than the first listing agreement, not all of those differences were explained to defendants. (R. 506 p 40:10 to 41:11).

Plaintiffs eventually located a tenant for defendants' property. In July, 2001, Defendants signed an eleven year lease. (Trial exhibit 6). The listed parties on the lease are Defendants and UVSC although a signature block was added for MATC. (Trial exhibit 6). The lease was signed by Brad Cook as representative of both institutions. (Trial exhibit 6). UVSC and MATC are each legislatively created institutions of higher

education. At the time the lease was entered into, MATC was an arm of UVSC who administered its finances, payroll, and tuition. (R. 506 p. 85:16-21). Sometime later MATC was made a subsidiary of the Utah Applied Technology College, and was renamed Mountainland Applied Technology College. This action made MATC independent of UVSC. At that time MATC was given its own budget. (R. 506 p. 102:8-10).

After the change in its status, MATC continued to pay rent to Yorks. (R. 506 p. 88:12-14). Approximately two years into the lease MATC began to discuss purchase of the property, although it was unable to do so since it did not have the right, absent legislative action, to purchase real property. (R. 506 p. 87:17-20). At that time, MATC did not have a budget for capital purchase and it required legislative action prior to purchase of property. (R. 506 p. 89:1-10). As part of the discussion of purchase, MATC discussed terminating the lease if Yorks were unwilling to sell. (R. 506 p. 103:1-8).

MATC contacted Alpine School District regarding a purchase in order to avoid seeking legislative approvals. (R. 506 p. 87:17-19, 103:9-20). Alpine School District purchased the property from Yorks, and Alpine School District and MATC entered into a lease purchase agreement. (Trial exhibit 16). MATC is still a tenant of Alpine School District. (R. 506 p. 104:1-6). Based on the sale from Defendants to Alpine School District, plaintiffs have claimed a second real estate commission based on a provision in the Modified Listing Agreement providing for an additional 6% commission in the case of a sale to a tenant. (R. 506 p. 36:1 to 37:4).

SUMMARY OF ARGUMENT

The sole issue before the trial court was whether or not defendants owe plaintiffs a second broker's commission to plaintiffs. The pertinent facts are that in May 2004, defendants sold their property to Alpine School District, who had a lease-purchase agreement with MATC, which was a tenant. In its findings of fact, the trial court found that the sale by defendants to Alpine School District was not a sale to a tenant. (R. at 335). The Trial Court's analysis should have ended there, but instead went on to find that the subject real property was "sold to a tenant" within the meaning of the Modified Listing Agreement because of Alpine School District's lease-purchase agreement with MATC. On the basis of that transaction, defendants were held liable to pay a second commission to plaintiffs. (R. at 340-330).

In reaching this decision, rather than interpreting the contract as a whole, and looking at its intent, the court based its decision on a single phrase within the contract that states: "In the event the property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company a commission equal to six percent (6%) of the sale price." (Trial exhibit 3 at paragraph 2). The court held that because Alpine School District in effect sold the subject real property to MATC via an installment sale, Defendants, despite the fact that they were not parties to that transaction, owe a second commission to plaintiffs. The transactions can therefore be outlined as A to B, then B to C, with the transaction from B to C triggering the second commission by "A".

The complaint in this matter was based on breach of contract, and breach of covenant of good faith and fair dealing. (R. at 25). There is no claim in the complaint, and are no findings of improper acts on the part of the defendants. The trial and subsequent ruling were based on contract.

What the trial court did in this matter was isolate a single term from the Modified Listing Agreement, and use that phrase to determine liability rather than interpreting the contract as a whole. The principles set forth in *Restatement (Second) of Contracts* § 202 (1979), are helpful in interpreting the contract as required by Utah law. The principles from the *Restatement* that are pertinent to analysis of the Modified Listing Agreement can paraphrased as follows: Words are to be given ordinary meaning, and the principal purpose of the parties if ascertainable is given great weight. Writings are to be interpreted as a whole. Language is to be given its generally prevailing meaning. Repeated occasions of performance are to be given great weight in interpretation of the contract. Finally, whenever reasonable, the intentions of the parties are interpreted as consistent with each other, and any course of performance dealing and trade.

In examining the ruling of the court, it is clear that the trial court did not follow the principles set forth in the Restatement in interpreting the agreement between the parties. Examination of the agreement demonstrates that under the agreement, Defendants are defined as “Sellers”, and the basis for the contract is the sale of property owned by “Sellers” located at 759 East Pacific Drive, American Fork, Utah. The problem with the decision by the trial court is that the decision was not based on an analysis of the entire

contract, but instead on a single phrase. Analysis of the contract demonstrates that liability for commissions is based on the premise that the commission is awarded based on a sale of Seller's property to a tenant by the Seller not by another party.

In effect, examination of the four corners of the contract demonstrates that there is an implicit condition present in the agreement, that condition being the requirement that defendants are the party selling the property to a tenant.

The second basis for review by this court focuses on the validity of the lease-purchase agreement between Alpine School District and MATC. The second commission in this case is owed only if the property is "sold" to a tenant, and a transaction is not a "sale" unless it is based upon a valid and enforceable contract. At the time of the transaction, MATC did not have legal authority to purchase or to enter into a lease-purchase agreement. Because MATC is a legislatively created entity, any contract it entered into outside its statutory authority is void as an ultra vires act, and would have been unenforceable by MATC. Therefore, the lease-purchase agreement was neither valid nor enforceable, and the Trial Court erred in holding that the lease-purchase agreement executed by MATC constituted a "sale," triggering a second commission from Defendants to Heal.

A year after the commencement of the present lawsuit, in Chapter 227 of the 2005 legislative session, the legislature amended the statutes that govern MATC to allow MATC to enter into lease-purchase agreements such as the one with Alpine, thus arguably ratifying MATC's ultra vires transaction. This ratification, however, should not

require defendants to pay a second commission, first because the Trial Court made no findings that defendants were aware of the transaction, and second because all parties are charged with knowledge of the law, wherefore defendants and plaintiffs were charged with knowing that such a transaction was impossible. In fact, defendants were aware that MATC had no authority to purchase the property. Further, requiring defendant to be liable for a second commission based on the act of a third party that was legally impossible at the time the act was committed, although ratified later, would upset fundamental notions of justice and fair play and resulting in a miscarriage of justice.

In conclusion, it is the defendants' position that "A court is not at liberty to disregard the language chosen by the parties and broaden the liability in favor of one party at the expense of the other," *Riche v. Jenkins*, 641 P.2d 148, 150; 1982 Utah LEXIS 881. The trial court's ruling effectively broadens defendants' liability under the term of the Modified Listing Agreement providing for a second commission in the event that the subject property is "sold to a tenant" within a specified time period. It does this in two ways: First, since the court interpreted the term "sold to a tenant" to include sales by persons other than the "seller" as defined in the contract, failing to interpret that term in light of the contract as a whole; and second, because it interpreted the term "sold to a tenant" to include a "sale" based upon a lease-purchase agreement that was invalid and unenforceable at the time it was consummated. Both of these interpretations of the term "sold to a tenant" improperly expand defendants' liability under the Modified Listing Agreement and confer upon plaintiffs a benefit for which they did not bargain.

ARGUMENT

The sole issue before the trial court was whether or not defendants owe a second broker's commission to plaintiffs. If a second commission is owed, the basis for that commission is a sentence contained within a listing agreement between the parties. For purposes of this brief, the document titled "Listing Agreement & Agency Disclosure" (Trial exhibit 3, Addendum 1), will be referred to as the "Modified Listing Agreement". The sentence, found in trial exhibit 3 states as follows: "In the event the property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company a commission equal to six percent (6%) of the sale price." (See Modified Listing Agreement, trial exhibit 3, addendum 1).

Defendants do not dispute the trial court's findings of fact and do not dispute the majority of the trial court's conclusions. The trial court correctly concluded that the sale by defendants to Alpine School District standing alone was not a sale to MATC. (R. at 335). Defendants do not dispute the Trial Court's conclusion that the lease-purchase agreement between Alpine School District and MATC was, in form, an installment purchase by MATC from Alpine School District (R. at 337). Defendants do not dispute the finding that Alpine School District purchased the property for \$2,656,000 then entered into a lease purchase agreement with MATC. 1 (R. 338, first paragraph 17).

¹ In part of its ruling the court states that "Alpine's role in the transaction is only that of a financier." (R. 331). Presumably in this conclusion the court is speaking from an accounting rather than a legal perspective. Otherwise, this conclusion would be inconsistent with other portions of the court's ruling. For example, the first paragraph 17 (R. 338), acknowledges that Alpine School District was the purchaser. The evidence on this issue was from Senator

Defendants do dispute, however, the trial court's final conclusions with respect to interpretation of the term "sold to a tenant" in the Modified Listing Agreement. It is defendants' position that the trial court committed error by concluding that the property was "sold to a tenant" within the meaning of the Modified Listing Agreement, when defendants did not sell the subject property to the tenant MATC, but rather sold the property to Alpine School District, which had a lease-purchase agreement with MATC that did not involve defendants. It is also defendants' position that the trial court committed error by interpreting the term "sold to a tenant" to include a lease-purchase agreement between MATC and Alpine School District at a time when MATC had no statutory authority to enter into such an agreement.

POINT I. THE TRIAL COURT ERRED BY DETERMINING THAT THE SUBJECT PROPERTY WAS "SOLD TO A TENANT" WITHIN THE MEANING OF THE MODIFIED LISTING AGREEMENT WHERE THE DEFENDANTS DID NOT SELL THE SUBJECT PROPERTY TO A TENANT.

The trial court correctly concluded that Defendants sold the property to Alpine School District, but did not sell the property to MATC, the tenant. Specifically, the court's heading states: "Despite their cooperation, the purchase by Alpine alone is not a purchase by MATC." (R. at 335). At trial, plaintiffs proceeded on the theory that because they had similar goals in educating a portion of the population in Utah County, Alpine School District and MATC were de facto the same entity, and the sale to Alpine School District was a sale to MATC. (R. 506 p.150-162). Defendants opposed this

Kurt Bramble who was testifying from an accounting rather than legal perspective. Senator Bramble testified: "... from a CPA's perspective, Alpine functioned essentially as the financing a, institution, the bank if you will, and the property the, the, the effective ownership went from whoever was leasing it to mountainland they were the lessor." they became the seller, Mountainland became the purchaser with Alpine being the a, financier if you will." (R. 506 p.120:21 to 121:3).

notion arguing that each of the entities involved has a completely separate statutory identity and that they have no ability to control one another's actions. (R. 506 p. 162:25 to 174:10). In considering whether Alpine School District and MATC were in effect the same entity, the court found:

The evidence produced at trial established that Alpine bought the Property for the benefit of MATC and in cooperation with MATC. Nevertheless, I am persuaded that this cooperation does not make Alpine and MATC partners nor joint venturers in the legal sense that makes one liable for the actions of the other. Although Alpine was acting on behalf of MATC, the Modified Listing Agreement provides for a commission only where the tenant itself, not someone acting on the tenant's behalf, purchases the property. (R. at 335).

From the standpoint of the defendants, where there were no findings of subterfuge, fraud, or deceit, this finding by the court should have been the end of the dispute. The property was purchased by Alpine School District, not MATC, (R. 338:17), and no second commission is owing.

Although it is the defendants' position that the trial court's analysis should have ended when it determined that the defendants did not sell the subject property to the tenant MATC, the defendants nevertheless do not dispute the Trial Court's conclusion that "the lease-purchase agreement between Alpine and MATC purports to be a lease, but is in fact an installment purchase by MATC," (R. at 336), assuming for the purposes of this section that the agreement was valid and enforceable. Because "[i]t is the duty of the court to look to substance rather than form," *MacKay v. Hardy*, 973 P.2d 941, 358 Utah Adv. Rep. 20; 1998 Utah LEXIS 93, (R. at 331), the trial court concluded that MATC did not lease the property from Alpine School District, but purchased the property from

Alpine School District, (R. at 331). Defendants contest the conclusion that Alpine School District was a financier and not the seller in this transaction.

Defendants also dispute the Trial Court's conclusion that the defendants are liable for a second commission under the Modified Listing Agreement because the defendants sold the property to Alpine School District and Alpine School District made an installment sale to the tenant MATC. (R. at 331). In reaching this conclusion, the trial court should have interpreted the term "sold to a tenant" in light of the purpose and terms of the contract as a whole to mean that the defendants must be party to any sale that results in liability for a commission. But instead the court isolated the term "sold to a tenant" to include a transaction between unrelated entities which neither involved nor conferred any benefit upon the defendants. This misinterpretation ultimately resulted in giving the plaintiffs a benefit greater than that which the parties bargained for, because the terms of the contract interpreted as a whole show that defendants must be party to any sale that results in liability for a commission.

A. DEFENDANTS DID NOT SELL THE PROPERTY TO MATC.

Upon determining that the sale to Alpine School District was not a sale to a tenant, the inquiry by the trial court should have ended as the only contractual basis for liability by defendants was a sale of the property to a tenant. (See addendum 1 paragraph 2). Instead, the trial court chose to examine the relationship between Alpine School District and MATC. The court found that the lease agreement between Alpine School District and

MATC was an installment sale, and therefore a commission was owing by defendants. (R. at 333).

In reaching its decision in this matter, the court relied entirely on a transaction between Alpine School District and MATC that was signed two weeks before the sale to Alpine School District. (Trial exhibit 16, addendum 2). Close examination of the Alpine School District/MATC lease agreement, the findings of fact and conclusions of law of the court, (R. 416 – 406), and the ruling, demonstrate that Yorks were not a party to the lease agreement. (R. at 340-330, addendum 3, “Ruling”).

B. PLAINTIFF’S COMPLAINT IS BASED ONLY ON CONTRACT AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING.

In considering whether the second commission is owing to plaintiffs, it is important to look at the causes of action set forth in plaintiffs’ complaint. (R. at 25). Examination of the complaint demonstrates that the causes of action are limited to breach of contract, and breach of covenant of good faith and fair dealing. Examination of the causes of action is important as much for what was not pled as for what was before the trial court. There were no claims for conspiracy or fraud, or any other doctrine that would give the trial court the opportunity to go outside the contract. The trial in this case was limited to considering interpretation and enforcement of a contract, and is nothing more or less than that. The pleadings are important because despite the lack of any wrongdoing or attempt at deceit, the court has lumped parties and non-parties together and has seemingly construed relationships between them that are outside the contract, and outside any findings or conclusions.

There are a number of facts that are not contested by the defendants. There is no conflict between the parties on the fact that plaintiffs and defendants executed a listing agreement. (Trial exhibit 3, addendum 1). There is no dispute that while the listing agreement was in place, plaintiffs obtained a lease between defendants and UVSC, and were paid a commission. (R. 506 p. 12-14). Where the dispute begins is over the conclusion that defendants owe a second commission to plaintiffs based on the eventual sale of the property to Alpine School District, and the school district lease to MATC.

The trial court announced its decision that a second commission was owing by using the following language in its ruling: “Although the Property was sold to Alpine before Alpine sold it to MATC, the intermittent sale in my view does not alter the fact that the tenant purchased the Property.” (R. at 331). This brings the first question for consideration by this court to the forefront. Does an installment sale between Alpine School District and MATC somehow trigger payment of a second commission by Defendants?

The court reached the conclusion that a commission was owing on the basis that: “Since the tenant’s purchase occurred during the term of the lease, the provision of the Modified Listing Agreement regarding the sale to a tenant is triggered by the purchase.” There are at least two basic problems with this conclusion. The first problem is that the isolated statement from the agreement relied on by the court does not reflect the intent of the parties, nor the plain language of the Modified Listing Agreement. The second

problem with this conclusion is that it utterly ignores the fact that defendants were not parties to, and had no control of the sale between Alpine School District and MATC.

C. THE TRIAL COURT REACHED AN INCORRECT LEGAL CONCLUSION ABOUT THE MEANING OF THE TERM “SOLD TO A TENANT” BY IGNORING THE PURPOSE OF THE CONTRACT AND ITS TERMS AS A WHOLE.

As indicated above, in determining that Yorks owed a second commission, the court relied on a single sentence from the Modified Listing Agreement. The sentence states that: “Since the tenant’s purchase occurred during the term of the lease, the provision of the Modified Listing Agreement regarding the sale to a tenant is triggered by the purchase.” (R. at 331). Based on this statement, it appears that the court took a very narrow look at a single sentence from the Modified Listing Agreement and applied that sentence without harmonizing the sentence with the rest of the listing agreement. The trial court’s failing to harmonize the agreement constitutes error. *Wagner v. Clifton* 2002 UT 109, 62 P.3d 440, 460 Utah Adv. Rep. 42; 2002 Utah LEXIS 172. “It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so.” *L.D.S. Hospital v. Capitol Life Ins. Co.* 765 P.2d 857, 858; 94 Utah Adv. Rep. 16; 1988 Utah LEXIS 108. Analysis of the listing agreement demonstrates that the purpose of the agreement is not to simply provide a commission to plaintiffs under any and all circumstances, but to provide a commission if and when defendants sell the property to a “tenant” during the term of the lease. It is appropriate for this court to review this interpretation of the contract since when contract interpretation is a matter of law, appellate courts review for correctness

giving no deference to the trial court. *Winegar v. Froerer Corp.* 813 P.2d 104, 161 Utah Adv. Rep. 22; 1991 Utah LEXIS 41. See also *Gillmor v. Macey* 2005 UT App 351, 121 P.3d 57, 533 Utah Adv. Rep. 13; 2005 Utah App. LEXIS 349.

These principles of contract interpretation are set forth explicitly in *Restatement (Second) of Contracts* § 202 (1979), titled “Rules in Aid of Interpretation” which states:

- (1) Words and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
- (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
- (3) Unless a different intention is manifested, (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning; (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
- (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
- (5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

Examination of the contract using the applicable principles set forth in *Restatement (Second) of Contracts* § 202 (1979) demonstrates that the court did not properly interpret the contract in finding that an installment sale agreement between Alpine School District and MATC entitled plaintiffs to a second commission.

The first principle set forth in section 202 above involves ascertaining the principal purpose of the parties. The first line of the text indicates who those parties were. The agreement states that: “This agreement is entered into by and between Tom Heal Commercial Real Estate, Inc., (the “Company”) and John York (the “Seller”). (See trial

exhibit #3, addendum 1). Here the purpose of the agreement is to provide a mechanism whereby defendants (Sellers), retain plaintiffs, (Company) to “Sell, Lease, or Exchange certain real property owned by Seller, described as: Commercial Building at 759 East Pacific Drive, American Fork, Utah (the “Property), at the price and terms stated on the attached property data information form, or at such other price and terms to which the Seller may agree in writing.” (Trial exhibit 3 at paragraph 1). According to the agreement Seller was to pay Company a 6% commission for success in selling or leasing the property. Accordingly, when the property was leased to UVSC, the plaintiffs were paid a 6% commission. (R. 506 p. 32:12-14).

In considering the meaning of the language in the contract, one of the key phrases to be considered in determining the intent of the parties is “real property owned by Seller”. (Trial exhibit 3 at paragraph 1). Considering this language in light of the decision of the trial court, it appears that instead of interpreting the agreement “in light of all the circumstances”, and giving great weight to the “purpose of the parties”, the trial court isolated the language contained in paragraph 2 of the Listing Agreement and Agency Disclosure. The court read the provision as providing a second commission where there was a sale to a tenant “during the term of the lease or within 180 days of expiration of the lease,” without considering whether based on the intent of the agreement the sale to a tenant had to be a sale by the “Seller.”

That triggering of a second commission is based on the premise that “Seller” be involved in the sales transaction can be seen in several places in the agreement. As

indicated above, the “Company” is being given the right to Sell, Lease or Exchange property “owned by Seller.” (Trial Exhibit 3 paragraph 1, addendum 1). In the second paragraph, Company is to find a party willing to “acquire” the property. The sale must be “at the listing price, and at terms to which the Seller has agreed in writing.” Later in the second paragraph it indicates that the brokerage fee is due on the “date of closing of the acquisition of the property.”

The fourth paragraph of the agreement also contains language tending to demonstrate that the circumstance contemplated by the agreement is a sale by the Seller. The paragraph covers seller warranties and disclosures. In the paragraph, “Seller” warrants that the party listed in the agreement as Seller represents “all of the record owners of the property.” (Trial Exhibit 3 at paragraph 4, addendum 1). The seller warrants that it has “marketable title and established right to sell, lease, or exchange the Property.” Seller agrees to “execute the necessary documents of conveyance and to prorate general taxes, insurance, rents, interest and other expenses affecting the Property to the agreed date of possession.” Further, in paragraph 4 the Seller agrees to “execute the necessary documents of conveyance and to prorate general taxes, insurance, rents, interest and other expenses affecting the Property to the agreed date of possession.” The seller also promises to “furnish the buyer at closing good and marketable title with a policy of title insurance in the amount of the purchase price.” (Trial exhibit 3 at paragraph 4). Finally, as Sellers, the Yorks promised to “fully inform the Seller’s Agent regarding the Seller’s knowledge of the condition of the Property.” (Trial exhibit 3 at

paragraph 4, addendum 1). With respect to the installment sale that the court found to have occurred between Alpine School District and MATC, there is no evidence in the record that defendants performed any of the above obligations, as they sold the property to Alpine School District, not to MATC.

The above language is important in interpreting the purpose of the listing agreement because it demonstrates the basis and intent of the parties respecting the Modified Listing Agreement. The promises made by Sellers in the above paragraphs of the Modified Listing Agreement are exactly the kind of promises made when a seller transfers property it owns to a buyer. They are not promises a seller would, or could make with respect to a sale by the buyer to another party.

The second paragraph of *Restatement (Second) of Contracts* § 202 (1979) also bears consideration in light of the language extracted from the Modified Listing Agreement set forth above. That paragraph provides that: “A writing is to be interpreted as a whole, and all writings that are part of the same transaction are to be interpreted together.” Clearly the trial court did not follow this principle of contract interpretation in concluding that the sale from Alpine School District to MATC was a sale to a tenant triggering a second commission. In examining the language from the Modified Listing Agreement, it is clear that the entire document is based on the premise that “Seller” is the party who holds and then sells the property. There is no reference to actions by third parties.

The third paragraph from *Restatement (Second) of Contracts* § 202 (1979) set forth above is also helpful in the case at bar. The paragraph provides that words are interpreted using their generally prevailing meaning. Further, technical words are given their technical meaning. Here it seems that the first critical word needing interpretation is “Seller”. In examining the term in the context of the Modified Listing Agreement, it is clear that the word in effect has two meanings. On one level, according to a sentence preceding paragraph 1 of the agreement John York is the “Seller.” On a second level, the term “Seller” has its ordinary meaning which according to *Websters* is “one that offers for sale”. Here, the defendants offered nothing for sale, nor sold anything to MATC.

The second word that seems to need some further interpretation is the word “sale”. The word comes up implicitly through the use of the word “sell” in the first paragraph of the Modified Listing Agreement, (Trial Exhibit 3, Addendum 1), and directly in the second paragraph where plaintiffs are given a second commission for a “sale” to a tenant. The Supreme Court of Utah stated in 1945 that “the word ‘sale’ in the context of a real estate broker’s listing contract, which sometimes renders the owner liable for payment of a commission, means “the conveyance of title to the purchaser for a valuable consideration consisting of the purchase price, or the execution and delivery of a valid and enforceable contract of sale whereby some estate in the land, legal or equitable, passes to the purchaser.” *Lewis v. Dahl* 108 Utah 48, 161 P.2d 362, 1945 Utah LEXIS 143, 160 A.L.R. 1040. In *Lewis*, there was a valid listing contract, and owners had allegedly made an *oral* agreement to sell their property to certain buyers during the listing

term, but not a *written* one. The written agreement was completed after the term of the listing agreement had expired. The broker won in the trial court, but the appeals court reversed, because an *oral* agreement was not a “sale” within the terms of the listing agreement.

In the case at bar, the contract states that York would be liable for a commission in the event that the “property” is “sold to a tenant” during a certain term. Much like the owners in *Lewis*, York did *not* make a written sale contract with MATC or UVSC. Unlike the owners in *Lewis*, York did not even make an *oral* sale contract with MATC or UVSC. York did not make a sale contract at all with MATC or UVSC, but with a separate entity, Alpine School District, which the Trial Court concluded subsequently sold the property to MATC. Clearly, if the Utah Supreme Court concluded that an *oral* contract between owner and buyer during the term of a listing agreement is not a “sale,” then *no contract at all* between owner and buyer during the term of a listing agreement is not a “sale.”

Because there was no series of transactions between the parties, the fourth paragraph of *Restatement (Second) of Contracts* § 202 (1979) appears to have no application. The final paragraph, paragraph 5 does have application. Section 5 indicates that in interpreting contracts, the manifestations of intention of the parties to an agreement are interpreted as consistent with each other and with any course of any performance, course of dealing or usage of trade. Here, the listing agreement when considered in its entirety demonstrates that its purpose is to assist defendants in selling

their property, and that the provision regarding payment of the second commission is to be harmonized with that purpose. Examining the document as a whole, it is evident that commission payments are premised on the sale by the “Seller” of property he owns. The provision regarding a second commission for sale to a tenant is consistent with the rest of the agreement when interpreted in a way that requires that sale to have been made by “Seller”, not by some third party. The interpretation adopted by the trial court is at odds with the balance of the agreement and is not consistent with the requirements of section 202.

In examining the purpose of the agreement, it is necessary to look at the words used. The first line of the text sets forth the parties to the agreement. The agreement states that: “*This agreement is entered into by and between Tom Heal Commercial Real Estate, Inc., (the “Company”) and John York (the “Seller”).* (See trial exhibit #3, addendum 1). Giving the ordinary meaning to those words, the term “Seller” means John York.

D. SALE TO A TENANT BY YORKS IS A CONDITION PRECEDENT TO PAYMENT OF A SECOND COMMISSION.

In examining the Modified Listing Agreement in its entirety, it is clear that the sale to a tenant that triggers a second commission, must be a sale by the defendants. In effect, this requirement constitutes a condition precedent. *Restatement (Second) of Contracts* § 224 (1979) defines conditions, and states: “A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.”

In this case, the condition precedent is that the defendants are the party who sells the property to the tenant. That this is the intent of the contract can be determined by examination of the contract. As discussed above, the “Seller” under the contract is John York. In the case at bar, the buyer from John York was the Alpine School District. According to the court’s findings the “tenant” was MATC. (R. 339 at paragraph 6). Where the sale by the Yorks was to Alpine School District, and where it was Alpine School District that was involved in the installment sale with the “tenant”, there is a failure of the condition precedent, which was that Yorks were the sellers.

In effect, the Trial Court was too narrow in its decision. In considering the sale of the real property to Alpine School District, and the installment sale to MATC as a sale to a tenant, the court has failed to consider the effect the sale to Alpine School District has had on any relationship that may have existed between Defendants and MATC. Query for example whether in the event of a breach of the agreement between Alpine School District and MATC, Defendants could be sued for that breach also? Clearly as they are not parties to the agreement, they could not be held liable for a breach of the contract between Alpine and the MATC.

POINT II. THE TRIAL COURT ERRED IN HOLDING THAT THE SUBJECT REAL PROPERTY WAS “SOLD TO A TENANT” BECAUSE THE SO-CALLED “SALE” TO TENANT MATC WAS BASED UPON AN INVALID AND UNENFORCEABLE CONTRACT.

The Trial Court’s ruling in this case is predicated on the notion that MATC purchased the subject property from Alpine School District in May 2004, thus triggering payment of a second commission to Plaintiffs. Paradoxically, the Trial Court also ruled

that “MATC was unable to purchase the Property at the time because it did not have the right, independent of legislative action, to acquire real property,” (R. 506 p. 87:14) which suggests that any “purchase” by MATC at the time would have been invalid. It is Defendant’s position that the statutes governing MATC in May 2004 did not confer upon MATC the right to enter into a lease-purchase agreement, thus making the lease-purchase agreement void and unenforceable against defendants. The proper standard of review for considering interpretation of a statute is set forth in *Toone v. Weber County*, 2002 UT 103, 57 P.3d 1079, 459 Utah Adv. Rep. 19; 2002 Utah LEXIS 165. “The proper interpretation of a statute is . . . a question of law, which appellate courts review for correctness.” *Toone v. Weber County*, 2002 UT 103, 57 P.3d 1079, 459 Utah Adv. Rep. 19; 2002 Utah LEXIS 165.

A. MATC LACKED STATUTORY AUTHORITY TO ENTER INTO THE LEASE-PURCHASE AGREEMENT WITH ALPINE SCHOOL DISTRICT IN MAY 2004, AND THIS LACK OF AUTHORITY MADE THE LEASE-PURCHASE AGREEMENT INVALID AND UNENFORCEABLE AGAINST YORKS.

The validity of the lease-purchase agreement between Alpine School District and MATC is central to the question of whether the lease-purchase agreement between Alpine and MATC made in May 2004 was or was not a “sale” to MATC. Although discussed in other contexts above, “The word ‘sale’ in a real estate broker’s listing contract” can mean one of two things, namely (1) “the conveyance of title to the purchaser for a valuable consideration consisting of the purchase price” or (2) “the execution and delivery of a *valid and enforceable* contract of sale whereby some estate in

land, legal or equitable, passes to the buyer.” *Lewis v. Dahl* 108 Utah 486, 161 P.2d 362, 1945 Utah LEXIS 143, 160 A.L.R. 1040 (emphasis added). Here, if MATC’s lease-purchase agreement was a “sale,” it could not qualify under the first prong, which requires a “conveyance of title,” because legal title remains in Alpine under the lease-purchase agreement. (MATC is still a tenant of Alpine School District, R. 506 p. 104:1-6). Rather, it must qualify, if at all, under the second prong, which requires (a) “a *valid and enforceable* contract” (b) that passes “some estate in land, legal or equitable.” Because MATC is an entity created by statute, the interpretation of the statutes that govern MATC is crucial to the question of whether the contract is “valid and enforceable.”

MATC, like other statutorily created entities, may only do those things authorized by the statutes that created it. In *Weese v. Davis County*, 834 P.2d 1, 188 Utah Adv. Rep.3; 1992 Utah LEXIS 46, the Utah Supreme Court held that a contract entered into by a statutorily created entity (in this case a county) in excess of that entity’s authority was void. Specifically, it stated:

Any contract, express or implied, between plaintiffs and the county is subject to the statutory and constitutional limitations on the county as a governing body. The county only has those rights and powers granted it by the Utah Constitution and statutes or those implied as a necessary means to accomplish them. [citation]. Any act by the county in excess of this authority or forbidden by the Utah Constitution is null and void as an ultra vires act.

Thus, where MATC lacked authority to enter a lease-purchase contract with Alpine, then any such lease-purchase contract is void.²

The Trial Court's ruling is helpful in determining that MATC had no authority to purchase the subject real property, because it states that "MATC was unable to purchase the Property at the time because it did not have the right, independent of legislative action, to acquire real property," (R. 506 p. 87:14). However, the Trial Court does not elaborate on this point, and elaboration is necessary to understanding the extent of MATC's authority in 2004.

In May 2004, MATC was a campus of the Utah College of Applied Technology. UCA § 53B-2a-105(5) (2003). At that time, the Utah College of Applied Technology was different than other higher education institutions because it was not a "body politic and corporate" like the institutions listed in chapter 2 of title 53B, which had the right to "take, hold, lease, sell, and convey real and personal property as the interest of the institution requires." UCA § 53B-2-101 (2000) (Utah College of Applied Technology is specifically not listed among the entities in this section). Instead, the Utah College of Applied Technology was governed by Title 53B, chapter 2a of the Utah Code, entitled "Utah College of Applied Technology." That chapter authorized the Utah College of Applied Technology only to "enter into a lease with other higher education institutions, public school districts, state agencies, or business and industry for [a specified term]."

² More accurately, the contract is voidable by Alpine, because MATC would not be able to escape liability by voiding its own contract, *see Midwest Realty v. West Jordan*, 541 P.2d 1109 (Utah 1975) ("the city cannot escape payment by taking advantage of its own errors"). In any event, MATC could not enforce the agreement against Alpine.

UCA § 53B-2a-113(1) (2000).

The Utah College of Applied Technology became a “body politic and corporate” in 2005 by chapter 227 of the general legislative session (House Bill 86 as enrolled), entitled “Utah College of Applied Technology Amendments.” Although the Trial Court’s ruling is silent as to this bill, it was argued at trial that the existence of this bill shows that this bill was not passed until after MATC entered into the lease-purchase agreement, and MATC did not have authority to enter into the lease-purchase agreement in May 2004. (R. 506 p. 173:14-24). This bill, among other things, “establishes the Utah College of Applied Technology as a body politic and corporate” and “authorizes campuses [of the Utah Applied Technology College] to enter into lease-purchase agreements, subject to certain approvals.” When section that allowed the Utah College of Applied Technology to enter into a lease with other higher education institutions, UCA § 53B-2a-113(1) (2000), was amended; and the following subsection was added:

- (2) (a) In accordance with Subsection 53B-2a-112(2), a college campus may enter into a lease-purchase agreement if:
 - (i) there is a long-term benefit to the state;
 - (ii) the project is included in both the campus and Utah College of Applied Technology master plans;
 - (iii) the lease-purchase agreement includes language that allows termination of the lease;
 - (iv) the lease-purchase agreement is approved by the campus board of directors and the board of trustees; and
 - (v) the lease-purchase agreement is:
 - (A) reviewed by the Division of Facilities Construction and Management;
 - (B) reviewed by the State Building Board; and
 - (C) approved by the Legislature.
- (b) An approval under Subsection (2)(a) shall include a recognition of:
 - (i) all parties, dates, and elements of the agreement;
 - (ii) the equity or collateral component that creates the benefit; and

(iii) the options dealing with the sale and division of equity.

The fact that this subsection was added, together with the provision that states that this chapter “authorizes” the Utah College of Applied Technology to enter into lease-purchase agreements emphasizes the point that the Utah College of Applied Technology was not able to enter into lease-purchase agreements before the 2005 general legislative session and was able to do so afterwards.

B. ALTHOUGH THE LEGISLATURE ARGUABLY RATIFIED THE LEASE-PURCHASE AGREEMENT BETWEEN MATC AND ALPINE SCHOOL DISTRICT, SUCH SUBSEQUENT RATIFICATION SHOULD NOT BROADEN DEFENDANTS’ LIABILITY UNDER THE MODIFIED LISTING AGREEMENT.

It might be argued that chapter 225 of the 2005 general legislative session ratifies the lease-purchase agreement entered into by MATC, and that the defendants should therefore pay a second commission to plaintiffs. *See Ogden City v. Bear Lake & River Water-Works & Irrigation Co.*, 18 Utah 279, 55 P. 385, 1898 Utah LEXIS 124 (a city’s contract that initially was ultra vires and void was ratified by subsequent legislative action), *see Zion’s First National Bank Corp. v. Clark Clinic Corp.*, 762 P.2d 1090, 92 Utah Adv. Rep. 34; 1988 Utah LEXIS 97 (ratification of an agent’s unauthorized act relates back to the time the unauthorized act occurred). However, the foregoing cases can and should be distinguished from the present case. Those cases dealt solely with the relationship between the parties, including a contract that was later ratified (analogously in this case, Alpine School District and MATC). Defendant does not contest the notion that the legislature’s ratification may have ultimately made the lease-purchase agreement enforceable by MATC against Alpine School District. The case at hand deals with an

entirely different question, namely, a term in the Modified Listing Agreement that makes the defendants liable to plaintiff realtors for a commission on the condition that the property is “sold to a tenant” within a specified time. It is defendant’s position that the subsequent ratification by the legislature of the initially void installment sale from Alpine School District to MATC should not expand defendants’ liability.

“A court is not at liberty to disregard the language chosen by the parties and broaden the liability in favor of one party at the expense of the other.” *Riche v. Jenkins*, 641 P.2d 148, 150; 1982 Utah LEXIS 881. To require defendants to pay a commission based on MATC’s ultra vires and void lease-purchase agreement with Alpine School District would constitute a miscarriage of justice. Defendants were aware that MATC wished to but was unable to buy the property, (R. 338 paragraphs 12-14, R. 506 p. 137:2-12) and all parties were charged with knowledge of the law, and the law in effect at the time did not authorize MATC to purchase the subject property. Alpine School District was willing and able to purchase the subject property and did so; whatever side deals Alpine School District made with MATC had nothing to do with defendants, especially when the transaction between the entities was ultra vires and void.³

³ At trial, John York was asked: Did you have any involvement with the financing or other issues that took place between a, Alpine School District or UVSC or MATC? A: No I didn’t. Q: And why is that? A: Because it was their building. It was none of my business what they did with it after they bought it. Q: Was it a cash sale? A: Yes. (R. 506 p. 142:1-9).

C. DEFENDANT DOES NOT OWE A COMMISSION UNDER THE MODIFIED LISTING AGREEMENT BECAUSE MATC WAS NOT A “READY, WILLING, AND ABLE” BUYER WITHIN 180 DAYS OF THE EXPIRATION OF ITS LEASE.

Defendants should not have been required to pay a second commission to Plaintiffs because the tenant, MATC, was not “able” to buy the property, hence plaintiffs did not procure a “ready, willing, and able” buyer. The general rule in real estate contracts is: “Absent a contractual provision, which conditions the right to a commission on the performance of the buyer, the general rule accepted in Utah is that a broker has earned his commission upon the procuring of a buyer who is *ready, willing and able* and who is accepted by the seller.” *Bushnell Real Estate v. Nielson*, 672 P.2d 746, 1983 Utah LEXIS 1195 (emphasis added).⁴ In *Bushnell*, a buyer was procured who was “ready, willing, and able,” but subsequently refused to perform at closing. The trial court granted summary judgment in favor of the realtor and ordered the seller to pay the realtor a commission, and the Utah Supreme Court affirmed, holding further that “[t]he broker is not an insurer of the subsequent performance of the contract and is not deprived of his right to a commission by the failure or refusal of the buyer to perform.” Here, unlike in *Bushnell*, the tenant could not effectively buy the property in question because the tenant was without legal capacity to do so, and for the tenant to do so would have been a void and ultra vires act.

⁴ It is noted that the language “accepted by the seller” could be emphasized here, because the “seller,” which is defined in the Modified Listing Agreement as the defendants, had nothing to do with the transaction between Alpine School District and MATC, and MATC therefore could not have been “accepted by the seller.”

The “ready, willing, and able” rule can be modified by contract. Such was the case in *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, 94 P.3d 292, 203 Utah Adv. Rep. 33; 2004 Utah LEXIS 122, where a listing contract provided that a commission was due “If . . . [the realtor] procures, *or presents an offer to purchase* said property from [a buyer named in the contract], at the price and upon the terms and conditions set forth herein, or, at any other price or upon any other terms or conditions acceptable to [the seller].” The offer was procured and presented, but the buyer was not able to obtain financing. The seller argued that the “ready, willing, and able” rule was not satisfied because the buyer was not “able” to purchase the property; the court held, however, that the rule had been modified by the contract clause providing for a commission if the seller “presents an offer to purchase” the property from the specific buyer.

In this case, in contrast to *Fairbourn*, although it may be that the “ready, willing, and able” rule was modified by the clause stating that a commission is due if the property is “sold to a tenant” during a specified period of time, the modification only serves to strengthen the rule by adding that the buyer need not only be “ready, willing, and able,” but that *in addition*, the property must actually be “sold”⁵ within 180 days of the expiration of the lease.

⁵ It should be noted that in *Fairbourn*, the seller also argued that a certain clause in the contract, stating that the commission was “due and payable at closing” created a condition precedent that closing must actually occur in order for a commission to be due. The Supreme Court rejected this argument, holding that to assign that meaning would render meaningless the clause that the seller agrees to pay a commission in the event that an offer was presented. Here, however, in the case at bar, the term “sold” takes the leap that the contract in *Fairbourn* did not take, and creates a requirement that the sale actually be consummated.

Even assuming *arguendo* that the defendants should be liable for a commission because MATC's void and ultra vires transaction was ultimately ratified by the legislature, it is noteworthy that MATC did not become "able" to buy the property until the 2005 general legislative session, more than 180 days after the expiration of its lease with the defendants. The lease agreement between MATC and the defendants terminated when defendants sold the subject property to Alpine School District, due to the following term in the lease (See trial exhibit 16, addendum 2):

Transfer of Landlord's Interest. In the event of a sale or conveyance by Landlord of Landlord's interest in the Premises other than a transfer for security purposes only, Landlord shall be relieved from and after the date specified in any such notice of trawler (sic) of all obligations and liabilities to Tenant which accrue after such sale or conveyance on the part of Landlord, provided that any funds in the possession of Landlord at the time of transfer in which Tenant has an interest shall be delivered to the successor Landlord. This Lease shall not be affected by any such sale or transfer and Tenant shall attorn to the purchaser or other transferee provided that all of Landlords obligations accruing hereunder from and after such sale or transfer are assumed in writing by such purchaser or transferee.

Thus, MATC was not a "ready, willing, and able" buyer of the property in May 2005 when the lease terminated or within 180 days of May 2005, and hence a commission is not due.

CONCLUSION


Based on the foregoing facts and argument, defendants move this court to reverse the trial court's ruling and find that the subject real property was in fact not "sold to a tenant" within the meaning of the parties' real estate listing agreement, and that therefore a second commission is not owing from defendants to plaintiffs, and to direct the trial court to enter judgment for the defendants, and award them their costs and attorneys fees

at the trial level and on appeal based on the provisions of the "Modified Listing Agreement."

RESPECTFULLY SUBMITTED this 22 day of
December, 2006.

SCRIBNER & McCANDLESS, P.C.

BY:

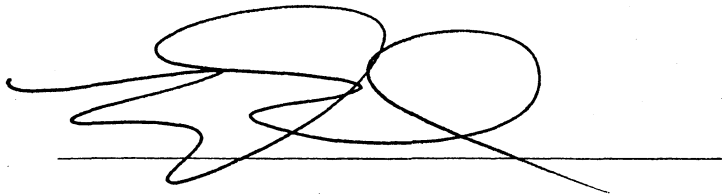
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DONALD E. McCANDLESS
THOMAS J. SCRIBNER
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that on this 22, day of December, 2006, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Brief to:

STEPHEN QUESENBERRY
J. BRYAN QUESENBERRY
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Attorneys for Appellee

A handwritten signature in black ink, appearing to read 'D. McCandless', is written over a horizontal line.

DONALD E. McCANDLESS

ADDENDUM “1”

EXHIBIT NO. 3
CASE NO: 040407039
DATE: 11/3/05 CLK

LISTING AGREEMENT & AGENCY DISCLOSURE

This Is a Legally Binding Agreement, Read Carefully Before Signing

This Agreement is entered into by and between Tom Heal Commercial Real Estate, Inc. (the "Company") and JOHN YORK (the "Seller").

1. **TERM OF LISTING.** The Seller hereby grants the Company, including TOM HEAL BUAISE WALKER (the "Seller's Agent") as the authorized agent for the Company, starting on 28th day of MARCH 2001, and ending at 5:00 P.M. on the 29th day of SEP 2001. (the "Listing Period"), the Exclusive Right to Sell, Lease, or Exchange certain real property owned by Seller, described as: COMMERCIAL BUILDING AT 759 EAST PACIFIC DRIVE, AMERICAN FORK, UTAH (the "Property"), at the price and terms stated on the attached property data information form, or at such other price and terms to which the Seller may agree in writing. The Seller's Agent agrees to use reasonable efforts to find a buyer or tenant for the Property.

2. **BROKERAGE FEE.** If, during the Listing Period, the Company, the Seller's Agent, the Seller, another real estate agent, or anyone else locates a party who is ready, willing and able to buy, lease, or exchange (collectively referred to as "acquire") the Property, or any part thereof, at the listing price and terms to which the Seller may agree in writing, the Seller agrees to pay to the Company a brokerage fee in the amount of six percent (6%) of such acquisition price. In the case of a lease of the Property, the commission shall be the commission percentage times the aggregate of all lease payments during the full term of the lease. Seller shall be obligated to pay a commission of six percent (6%) on any and all lease renewals or leased space additions at the time of such renewals or additions of additional space leased, payable at the time of such renewals or lease additions. The brokerage fee, unless otherwise agreed in writing by the Seller and the Company, shall be due and payable on (a) the date of closing of the acquisition of the Property; or (b) 50% due and payable when the lease is signed, and 50% due and payable upon the first day of the lease commencement; or (c) the first day of the lease renewal commencement; or (d) the date the option is signed. In the event the Property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company a commission equal to six percent (6%) of the sale price. The Company is authorized to share the brokerage fee with another brokerage participating in any transaction arising out of this Listing Agreement.

3. **PROTECTION PERIOD.** If within twelve months after the termination or expiration of this Listing Agreement, the Property is acquired, leased or exchanged by any party to whom the Property was offered or shown by the Company, the Seller's Agent, the Seller, another real estate agent, or by any other person during the Listing Period, the Seller agrees to pay to the Company the brokerage fee stated in Section 2 unless the Seller is obligated to pay a brokerage fee on such acquisition to another brokerage pursuant to another valid listing contract entered into after the expiration or termination date of this Listing Agreement.

4. **SELLER WARRANTIES/DISCLOSURES.** The Seller warrants to the Company that the individual(s) entity listed above as the "Seller" represent all of the record owners of the Property. The Seller warrants that it has marketable title and established right to sell, lease, or exchange the Property. The Seller agrees to execute the necessary documents of conveyance and to prorate general taxes, insurance, rents, interest and other expenses affecting the Property to the agreed date of possession. The Seller agrees to furnish the buyer at closing good and marketable title with a policy of title insurance in the amount of the purchase price. In the event the acquisition includes personal property, the Seller agrees to sign a Bill of Sale with warranties as to title to the personal property. The Seller agrees to fully inform the Seller's Agent regarding the Seller's knowledge of the condition of the Property. Upon signing of this Listing Agreement, the Seller agrees to personally complete and sign a Seller's Property Condition Disclosure statement. The Seller agrees to indemnify and hold harmless the Seller's Agent and the Company against any claims which may arise from: (i) the Seller's providing incorrect or inaccurate information regarding the Property, (ii) the Seller's failure to disclose material information regarding the Property, including, but not limited to, the condition of all appliances, heating, plumbing, and electrical fixtures and equipment, sewer, and moisture or other problems in the roof or foundations, and the location of property lines; or (iii) any injuries resulting from any unsafe conditions within the Property.

5. **DESIGNATION AND AUTHORIZATION OF AGENCY RELATIONSHIPS.** By signing this Listing Agreement, the Seller agrees that the Seller's Agent and the Principal Broker will represent the Seller. The Seller authorizes the Seller's Agent or the Principal Broker to appoint another agent in the Company to also represent the Seller, in the event the Seller's Agent or the Principal Broker will be unavailable to service the Property. Initials XCM
Authorization for Limited Agency. The Seller is advised the Seller is not required to accept a limited agency situation in the Company. However, it is the business practice of Company to participate in In-House Sales. In the event the In-House Sale involves limited agency, the Seller agrees that Seller's Agent and the Principal Broker are authorized to represent both the Seller and a prospective Buyer as Limited Agents. Seller further authorizes that the Seller's Agent may exclusively represent Seller, another agent in the Company may exclusively represent Buyer, and the Principal Broker will act as a Limited Agent. Initials XCM

6. **PROFESSIONAL ADVICE.** The Company and the Seller's Agent are trained in the marketing of real estate. Neither the Company, nor the Seller's Agent are trained to provide the Seller or any prospective buyer with legal or tax advice, or with technical advice regarding the physical condition of the Property. If the Seller desires advice regarding: (i) legal or tax matters; (ii) the physical condition of the Property, or (iii) this Listing Agreement, the Seller's Agent and the Company STRONGLY RECOMMEND THAT THE SELLER OBTAIN SUCH INDEPENDENT ADVICE.

7. **ATTORNEY FEES.** In case of the employment of an attorney in any matter arising out of this Listing Agreement, the Seller shall pay all costs and attorney fees, whether the matter is resolved through court action or otherwise. If, through no fault of the Company, any litigation arises out of the Seller's employment of the Company under this Listing Agreement (whether before or after a closing), the Seller agrees to indemnify the Company and the Seller's Agent from all costs and attorney fees incurred by the Company and/or the Seller's Agent in pursuing and/or defending such action. Any commissions due under the terms of this agreement that are not paid within five days of due date shall be subject to a ten percent late penalty and shall bear interest at the rate of two percent per month until paid.

8. **MULTIPLE LISTING SERVICE.** The Company is authorized and instructed to offer this Property through the Wasatch Front Regional Multiple Listing Service. The Company is further authorized to disclose after closing the final terms and sales price of the Property.

9. **KEY AND KEY BOX.** The Company ☒ IS, ☐ IS NOT authorized to have a key to the Property. The Company ☐ IS, ☒ IS NOT authorized to have a keybox installed on the Property.

10. **SIGNAGE.** The Company is authorized to place an appropriate sign on the Property.

11. **ATTACHMENT.** The provisions of the attached MLS property data information form are incorporated by this reference. In order to complete the property data information form, the Seller's Agent may provide the Seller with a courtesy estimate of the square footage of the Property. As an estimate, the square footage figure shall not be relied upon by the Seller or the Buyer in their decision to purchase/sell/lease the Property.

12. **EARNEST MONEY DEPOSITS.** As part of an offer to purchase the Property, a potential buyer will typically deliver an Earnest Money Deposit to the brokerage which assists the buyer in preparing that offer. The Company is hereby authorized and directed to accept on behalf of the Seller, and to hold in its trust account, any Earnest Money Deposit delivered to the Company by a potential buyer.

14. **FACSIMILE (FAX) DOCUMENT.** Facsimile transmission of a signed copy of this Listing Agreement, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. If this transaction involves multiple owners this Listing Agreement may be executed in counterparts.

15. **ENTIRE AGREEMENT.** This Listing Agreement, including the Seller's Property Condition Disclosure statement, and the attached MLS property data information form, contains the entire agreement between the parties relating to the subject matter of this Listing Agreement. This Listing Agreement may not be modified or amended except in writing signed by the parties thereto.

THE UNDERSIGNED Seller does hereby agree to the terms of this Listing Agreement.

X [Signature] M. YL 3-28-01 [Signature] York 3-28-01
SELLER Date SELLER Date

THIS LISTING AGREEMENT shall become effective only upon acceptance by the Company as evidence by its signature below. ACCEPTED by the Company

by [Signature] FOR 3-28-01 FOR
(Authorized Seller's Agent) Date (Principal Broker) Date
Tom Harte Commercial Real Estate, INC WALKER & COMPANY REAL ESTATE

AGENCY RELATIONSHIPS

AGENCY RELATIONS. The following is a brief but very important explanation regarding the nature of agency relationships between the Seller, the Buyer, the Company and the real estate agents involved.

1. **Principal or Branch Broker.** Every real estate agent must affiliate with a real estate broker. The Broker is referred to as a Principal Broker or a Branch Broker (if the brokerage has a branch office). The broker is responsible for operation of the brokerage and for the professional conduct of all agents.

2. **Right of Agents to Represent Seller and/or Buyer.** An agent may represent, through the brokerage, a seller who wants to sell property or a buyer who wants to buy property. On occasion, an agent will represent both seller and buyer in the same transaction. When an agent represents a seller, the agent is a "Seller's Agent", when representing a buyer, the agent is a "Buyer's Agent", and when representing both seller and buyer, the agent is a "Limited Agent".

3. **Requirement of Written Agreement.** To represent a seller, a buyer, or both as a Limited Agent, a written agreement is required. Except as provided below, the Principal/Branch Broker also represents whoever the agent represents; and regardless of whom the agent represents, the agent owes a duty of honesty and fair dealing to all parties to the transaction.

4. **Seller's Agent.** A Seller's Agent works to assist the seller in locating a buyer and in renegotiating a transaction suitable to the seller's specific needs. A Seller's Agent has fiduciary duties to the seller which include loyalty, full disclosure, confidentiality, diligence, obedience, reasonable care, and holding safe monies entrusted to the agent.

5. **Buyer's Agent.** A Buyer's Agent works to assist the buyer in locating and negotiating the acquisition of a property suitable to that buyer's specific needs. A Buyer's Agent has the same fiduciary duties to the buyer that the Seller's Agent has to the Seller.

6. **Limited Agent.** A Limited Agent represents both seller and buyer in the same transaction and works to assist in negotiating a mutually acceptable transactions. A Limited Agent has fiduciary duties to both seller and buyer. However, those duties are "limited" because the agent cannot provide to both parties undivided loyalty and full disclosure of all information known to the agent. For this reason, a Limited Agent must remain neutral in the representation of a seller and buyer, and may not disclose to either party information likely to weaken the bargaining position of the other, such as, the highest price the buyer will pay or the lowest price the seller will accept. A Limited Agent must, however, disclose to both parties material information known to the Limited Agent regarding a defect in the Property and/or the ability of each party to fulfill agreed upon obligations.

7. **In-House Sale.** If the buyer for the seller's Property is also represented by an agent in the Company, that transaction is commonly referred to as an "In-House Sale". Most In-House Sales involve limited agency because seller and buyer are represented by one or more agents in the Company. In-house Sales can occur in any of the following ways:

7.1 **In-House Sale/One Agent.** In this situation there is only one agent in the Company involved in the transaction that agent represents both Seller and Buyer. Therefore, the Seller's Agent and the Principal Branch Broker are required to: (i) act as Limited Agents; and (ii) inform the Seller regarding the limited agency when a buyer, who is also represented by the Seller's Agent, first expresses an interest in the Property.

7.2 **In-House Sale/Two Agents.** In this situation there are two different agents in the Company involved in the transaction. One represents the Seller, one represents the Buyer, and the Principal/Branch Broker acts as a Limited Agent. In such a transaction, the Seller's Agent is required to inform the Seller regarding the limited agency of the Principal/Branch Broker when a buyer represented by another agent in the company, first expresses an interest in the Property.

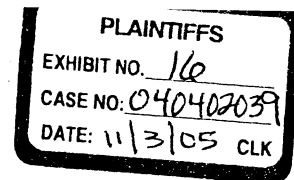
7.3 **In-House Sale/All Agents.** In this situation all agents in the Company, including the Principal/Branch Broker, represent both the Seller and the Buyer as Limited Agents. In such a transaction, the Seller's Agent is required to inform the Seller regarding the Limited Agents. In such a transaction, the Seller's Agent is required to inform the Seller regarding the limited agency when a buyer also represented by an agent in the Company, first expresses an interest in the Property.

8. **Conflicts With The In-House Sale.** There are conflicts associated with an In-House Sale; for example, agents affiliated with the Company discuss with each other the needs of their respective buyers or sellers. Such discussions could inadvertently compromise the confidentiality of information provided to those agents. For that reason, the Company has policies designed to protect the confidentiality of discussions between agents and access to confidential client and transactions files.

9. **Duties of Buyer and Seller.** The above duties of the real estate agent(s) in a real estate transaction do not relieve a Seller or Buyer from the responsibility to exercise good business judgment in protecting their respective interests. Real Estate agents are licensed to market real estate. Real estate agents are not trained or licensed to provide the Buyer or the Seller with legal or tax advice, or with technical advice regarding the physical condition of the property, the real estate agent(s) below strongly recommend that the Buyer and the Seller obtain such independent professional advice.

X [Signature] M. YL Seller's initials

ADDENDUM “2”



LEASE AGREEMENT WITH OPTION TO PURCHASE

This Lease Agreement With Option to Purchase (the "Agreement") is made and entered into between the Board of Education of Alpine School District, a body corporate, hereinafter called "LESSOR", and Mountainland Applied Technology College: A Utah College of Applied Technology Campus, a public institution of higher education in the State of Utah, hereinafter called "LESSEE".

RECITALS

1. Mountainland Applied Technology College and its predecessor in interest has provided its educational programs in a leased facility in American Fork, Utah known as the former ACE Hardware Building. The Alpine School District has recently acquired ownership of this building and surrounding property.

2. Alpine School District desires have Mountainland Applied Technology College continue to provide its educational programs to students of the Alpine School District and other students at this American Fork location on a long-term basis and therefore desires to lease the building and surrounding property to Mountainland Applied Technology College together with providing Mountainland Applied Technology College with an option to purchase the building and surrounding property.

3. Mountainland Applied Technology College desires to continue to provide its educational programs at this American Fork location, to lease the building and surrounding property, and to have an option to purchase the building and property at some time in the future.

NOW THEREFORE, the parties, for valid consideration herein acknowledged and received, mutually agree to the following:

SECTION 1. LEASED PREMISES

1.1 LESSOR does hereby lease and rent unto LESSEE, and LESSEE does hereby take as tenant under LESSOR, that certain real property located in Utah County, State of Utah, and more particularly described as approximately 3.79 acres together with all buildings and other improvements now or hereafter located thereon and affixed thereto (hereinafter collectively referred to as the "Buildings"), located at 759 East Pacific Drive, American Fork, Utah 84003 (hereinafter referred to as the "Property"), and any and all privileges, easements, and appurtenances belonging thereto or granted herein. The Property and the Buildings are hereinafter collectively referred to as the "Premises". A legal description of the Property and a map of the Premises are attached hereto and incorporated herein as Exhibit "A" to this Agreement.

SECTION 2. TERM OF LEASE

2.1 The term of the lease of the Premises shall be for a period of twelve (12) years and seven (7) months, which term shall commence July 1, 2004 and shall expire January 31, 2017 unless sooner terminated pursuant to the terms, covenants, and conditions of this Agreement.

SECTION 3. CONSIDERATION

3.1 As monthly rent for the Premises, LESSEE shall pay to LESSOR, on the first day of each and every calendar month during the term of this Agreement, an amount equal to the amount set forth in accordance with the following schedule:

| | | |
|---------------|-----------------------------------|-----------------------|
| Year 1 | July 1, 2004 to June 30, 2005 | \$20,416.67 per month |
| Year 2 | July 1, 2005 to June 30, 2006 | \$21,233.33 per month |
| Year 3 | July 1, 2006 to June 30, 2007 | \$22,082.67 per month |
| Year 4 | July 1, 2007 to June 30, 2008 | \$22,965.97 per month |
| Year 5 | July 1, 2008 to June 30, 2009 | \$23,884.61 per month |
| Year 6 | July 1, 2009 to June 30, 2010 | \$24,840.00 per month |
| Year 7 | July 1, 2010 to June 30, 2011 | \$25,833.60 per month |
| Year 8 | July 1, 2011 to June 30, 2012 | \$26,866.94 per month |
| Year 9 | July 1, 2012 to June 30, 2013 | \$27,941.62 per month |
| Year 10 | July 1, 2013 to June 30, 2014 | \$29,059.28 per month |
| Year 11 | July 1, 2014 to June 30, 2015 | \$30,221.65 per month |
| Year 12 | July 1, 2015 to June 30, 2016 | \$31,430.52 per month |
| Year 13 | July 1, 2016 to December 31, 2016 | \$32,687.74 per month |
| Final Payment | Jan 31, 2007 | \$13,913.54 |

3.2 All rental payments shall be made payable and delivered to LESSOR at the following address:

Alpine School District
575 North 100 East
American Fork UT 84003

SECTION 4. OPTION TO PURCHASE

4.1 Notwithstanding anything to the contrary in this Agreement, LESSEE shall have the right to purchase the Premises, all in accordance with the terms and conditions contained herein. LESSOR hereby grants to LESSEE the exclusive right and option to purchase the Premises, as more specifically described and set forth in Exhibit A. LESSEE may exercise its exclusive right and option to purchase the Premises at any time during the term of this Agreement.

4.2 The purchase price of the Premises has been fully negotiated by the parties, and shall be in accordance with the Purchase Price Schedule set forth and incorporated herein by this reference as Exhibit B.

4.3 To exercise the option, LESSEE shall give LESSOR sixty (60) days written notice of its intention to purchase the Premises, specifying the date on which the Premises are to be purchased (the "Closing Date"). Upon exercise of the said option, the parties shall enter into a Purchase and Sale Agreement containing the customary provision for a sale of commercial real estate in Utah County, Utah. On the Closing Date, LESSEE shall provide LESSOR with a payment of the purchase price and LESSOR shall deliver to LESSEE the Premises free and clear of any and all liens and encumbrances, together with a Warranty Deed conveying good and marketable title, free and clear of all liens and encumbrances.

4.4 Without limitation to any other termination provisions of this Agreement, in the event LESSEE exercises its option to purchase the Premises, this Agreement shall terminate upon the closing of all terms and conditions of the Purchase and Sale Agreement, or upon the transfer of title of the Premises to LESSEE.

4.5 Notwithstanding anything to the contrary contained herein, upon expiration of the term of this Agreement, and provided that all monthly rental payments set forth herein have been paid, LESSEE shall be deemed to have purchased the Premises and shall be vested with all rights and title to the Premises. LESSOR agrees that upon the occurrence of the events as provided in this Section 4.5, LESSOR shall deliver to LESSEE the documents specified in Section 4.3, and shall comply with the provisions of this Section 4, as if LESSEE had exercised its option, in writing, to purchase the Premises.

SECTION 5. REPRESENTATIONS

5.1 LESSOR warrants and represents that it is the lawful owner of the Premises and that it has the right to lease the same as herein provided.

5.2 LESSOR warrants and represents that LESSEE shall peaceably and quietly hold and enjoy the full possession and use of the Premises during the term of this Agreement.

5.3 LESSOR warrants and represents that it has no intention of selling the Premises to any third parties during the term of the Agreement. However, in the event a sale of the Premises is contemplated by LESSOR, LESSOR shall notify LESSEE as soon as possible, in writing, of its intent to sell the Premises and shall make any acceptance or offer of the sale of the Premises contingent upon LESSEE's exclusive right to exercise its option to purchase the Premises, either before or after the contemplated sale of the Premises to some third party.

5.4 LESSEE has had sufficient opportunity to inspect the real property and structures associated with this lease. LESSEE enters into this agreement accepting the property in an "as

is" condition and agrees that it will be fully responsible to remediate any pre-existing defects with the property or structures irrespective of whether the defects are known to the parties at the time this agreement is executed

SECTION 6 IMPROVEMENTS

6.1 The parties acknowledge that the Buildings will need to be improved and remodeled in order for LESSEE to adequately meet the anticipated growth in programs and students served by LESSEE. Therefore, LESSOR agrees to improve and remodel the Buildings, with such work to commence at anytime after approval of this agreement, but no later than December 31, 2004. Plans and specifications for improvements and remodeling shall be agreed on by both the LESSEE and LESSOR prior to commencing any work. LESSEE shall provide LESSOR with a tenant improvement payment in the amount of \$295,000 by July 1, 2004, or earlier, if improvement and remodeling should commence before July 1, 2004. LESSOR agrees to fund improvements and remodeling to a target cost of \$600,000, which is built into the payment schedule in Section 3.1. If, at the conclusion of the improvement and remodeling work, LESSOR has expended an amount other than \$600,000, LESSOR and LESSEE shall recalculate the amount of each monthly payment over the term of this agreement to reflect the actual amount expended for such improvements.

LESSOR will recalculate the payment schedule in Section 3.1 to reflect the actual amount expended. LESSOR and LESSEE shall agree to any changes in the payment schedule, prior to an updated payment schedule replacing Section 3.1 and becoming an exhibit to this agreement.

6.2 LESSOR agrees that in order to effectuate the purposes of this Agreement, it will make, execute, acknowledge and transmit any contracts, purchase orders, receipts, writings and instructions with any other person, firm, or corporations, and in general do all things which may be required or proper, all for the acquisition, construction, and improvement of the Premises.

6.3 LESSOR and LESSEE shall jointly review and inspect all aspects of the construction, remodel and improvements and shall compile a list of those items to be corrected, finished, or completed. LESSOR shall be deemed to have substantially performed all of such work when the same has been entirely completed.

6.4 In the event all items of said improvements, remodeling, and repairs are not completed within sixty (60) days of March 31, 2005, to the complete satisfaction of LESSEE, LESSEE shall have the right to secure services to complete said improvements, remodeling, and repairs and to deduct the cost thereof from any rental payment due, except however, if such delays are caused by an action or inaction of LESSEE, in which case a time extension of said sixty (60) days will be granted for such additional time warranted by LESSEE'S action or inaction.

SECTION 7. UTILITIES

7.1 LESSEE agrees to pay for the following utilities furnished to the Premises during the term hereof, to-wit: electricity, heat, water, sewer, air conditioning, snow removal and office building standard cleaning services.

SECTION 8. INSURANCE

8.1 LESSEE further agrees to maintain property and liability insurance on the Premises and to keep the Premises fully insured to protect the same from loss or damage by fire, vandalism and malicious mischief at all times during the term of this Agreement. LESSEE's hazard insurance shall insure the interest of both LESSOR and LESSEE, as they may appear from time to time in the Buildings and Property. LESSOR shall be named as an additional insured on all such policies of insurance. All costs of such insurance shall be borne by the LESSEE. LESSEE shall be responsible for damages to all personal property it may locate in the Premises.

SECTION 9. REPAIR AND MAINTENANCE

9.1 All repairs and maintenance of the Leased Premises shall be made by, and at the sole cost and expense of, LESSEE. Without limitation, LESSEE shall be responsible for 1) all roof and structural repairs, wind damage, and glass breakage; 2) providing full service repair and maintenance of heating and air conditioning equipment; 3) all plumbing repairs or maintenance; and 4) providing ground and parking lot maintenance. LESSEE agrees to provide such repairs and maintenance that LESSEE deems to be necessary and reasonable, in a timely and efficient manner, and to have adequate maintenance procedures in place during the term of this Agreement.

SECTION 10. USE OF PREMISES

10.1 LESSEE shall use and occupy the Premises for educational purposes associated with LESSEE's duties as an applied technology college. LESSEE shall not at any time use or occupy or permit the Premises to be used or occupied in any manner which would in any way violate any certificate of occupancy issued for the building, and shall not use or permit the Premises to be used or occupied in whole or in part in a manner which may violate the laws, orders, ordinances, rules, regulations, or requirements of any department of federal or state governments.

10.2 LESSEE agrees to permit LESSOR and any authorized representatives of LESSOR to enter the Premises with twenty-four (24) hours prior notice to LESSEE to fulfill any of LESSOR'S obligations under this Lease.

SECTION 11. DAMAGE OR DESTRUCTION OF LEASED PREMISES

11.1 In the event that any of the Buildings or Property shall be damaged or destroyed by fire or by any other means and are thereby made unusable for a period of more than thirty (30) days, at any time during the term of this Agreement, LESSEE shall then have the option to terminate this Agreement per Section 17.

11.2 If any of the Buildings or the Property are partially destroyed or damaged by fire or by any other means, yet can continued to be used by the LESSEE for its educational programs, this Agreement shall continue in full force and effect for the remainder of the term and repairs shall be completed by LESSEE within ninety (90) days from the date of such destruction or damage.

SECTION 12. LESSEE'S PERSONAL PROPERTY & FIXTURES

12.1 All personal property and fixtures placed in or upon the Premises by LESSEE shall not become part of the Premises and LESSEE shall be privileged to remove the same at the termination or expiration of the Agreement.

SECTION 13. TERMINATION & SURRENDER OF LEASED PREMISES

13.1 Except in the event of an exercise of its option to purchase or except in the event of a purchase in accordance with Section 4.5 of this Agreement, LESSEE agrees to quit and surrender peaceable possession of the Premises to LESSOR if this Agreement is terminated. LESSEE agrees to leave the Premises in as good a state of repair and sanitary condition as when received, reasonable wear and tear and damage by the elements or by fire excepted.

SECTION 14. DEFAULT

14.1 LESSOR shall be held in default if LESSOR fails to comply with any provision of this Agreement for at least ten (10) business days after LESSOR receives written notice from LESSEE specifying the nature of the non-compliance by LESSOR. Said ten (10) day period shall be extended if more than ten (10) days is reasonably required for such cure and LESSOR immediately, upon receipt of said written notice, commences or has commenced such cure and thereafter diligently proceeds to cure such default within thirty (30) days. In the event LESSOR fails to timely cure such default, LESSEE may perform whatever LESSOR is obligated to do by the provisions of this Agreement. LESSOR agrees that LESSEE shall not be liable for any damages to LESSOR from such action, whether caused by negligence of LESSEE or otherwise.

14.2 LESSEE shall be held in default if LESSEE fails to comply with any provision of this Agreement for at least ten (10) business days after LESSEE receives written notice from LESSOR specifying the nature of the non-compliance by LESSEE. Said ten (10) day period shall be extended if more than ten (10) days is reasonably required for such cure and LESSEE

immediately, upon receipt of said written notice, commences or has commenced such cure and thereafter diligently proceeds to cure such default within thirty (30) days. In the event LESSEE fails to timely cure such default, LESSOR may perform whatever LESSEE is obligated to do by the provisions of this Agreement. LESSEE agrees that LESSOR shall not be liable for any damages to LESSEE from such action, whether caused by negligence of LESSOR or otherwise.

SECTION 15. COSTS & ATTORNEY'S FEES

15.1 In case of default in carrying out the terms and conditions of this Agreement, the party in default agrees to pay a reasonable attorney's fee and all costs of the other party in enforcing this Agreement. If a breach of contract is alleged by either party against the other party, fifteen (15) days prior written notice of default shall be given to the other party before any legal action is taken or in any other action or proceeding brought by either party against the other pertaining to or arising out of this Agreement.

SECTION 16. MANNER OF GIVING NOTICE

16.1 Any notice to be given by either party to the other pursuant to the provisions of this Agreement or of any law, present or future, shall be in writing and delivered personally to the party to whom notice is to be given, or by certified mail, return receipt requested, addressed to the party for whom it is intended at the address stated below or such other address as it may have designated in writing. Notice shall be deemed to have been duly given, if delivered personally, upon receipt thereof, and if mailed, upon the third day after mailing thereof.

If to LESSEE:

Campus President
Mountainland Applied Technology College
987 South Geneva Road
Orem UT 84058

If to LESSOR:

Superintendent
Alpine School District
575 North 100 East
American Fork UT 84003

With a Copy to:

Chair, Board of Directors
Mountainland Applied Technology College
987 South Geneva Road
Orem UT 84058

With a Copy to:

President, Board of Education
Alpine School District
575 North 100 East
American Fork UT 84003

SECTION 17. LESSEE'S OPTION TO TERMINATE LEASE

17.1 If, at any time during the term of this Agreement, the State of Utah fails to fund the continued operation of the educational programs provided by the LESSEE on the Premises, then LESSEE shall have the right to terminate this Agreement upon one (1) year written notice to LESSOR.

17.2 The parties acknowledge that the growth of, and demand for, LESSEE's educational programs, is anticipated in large part due to the students of the Alpine School District, and therefore LESSEE may be required to consider relocation of such educational programs. The parties acknowledge that the obligations and responsibilities of the LESSEE under this Agreement are similar to those more often expected of a lessor or owner of property. Therefore, in the event LESSEE, in its sole reasonable discretion, determines the Premises are no longer adequate for its needs, LESSEE may provide LESSOR with written notification of its intent to terminate this Agreement (the "Notice of Intention to Terminate"). In such an event, the parties intention is to provide both the LESSOR and the LESSEE with an equitable distribution of the net equity (or net loss) of the Premises, all in accordance with the following:

LESSOR has one or two options - either retain ownership of the Premise or sell the Premises. Therefore, within thirty (30) days after receipt of the Notice of Intention to Terminate, LESSOR shall either:

1. Inform LESSEE that LESSOR will not sell the Premises, which, in turn, will result in the following obligations:

a. The Agreement shall terminate on the first day of the month following the 90th day after which LESSOR received the Notice of Intention to Terminate. Until then, LESSEE will continue to be responsible for all monthly rental payments and all other obligations due under this Agreement.

b. LESSOR shall reimburse LESSEE a percentage portion (the "Percentage Portion") of the fair market value of the Premises. The fair market value of the Premises shall be determined by averaging the appraisal price of two independent commercial appraisals, performed by licensed, certified appraisers with familiarity and expertise in Utah County, Utah. One of the appraisers shall be paid and chosen by the LESSOR, and the other appraiser shall be paid and chosen by the LESSEE. Both appraisals shall be completed within sixty (60) days of LESSOR's receipt of the Notice of Intention to Terminate. By mutual agreement and consent of both the LESSOR and LESSEE, a single appraisal may be used to determine the fair market value of the Premises.

c. LESSEE's Percentage Portion, is a percentage that gradually escalates during the term of this Agreement. The Percentage Portion has been fully negotiated by the parties, and is set forth in Exhibit C, which is attached hereto and incorporated herein by this reference.

d. LESSEE's percentage portion of the fair market value of the Premises shall be due and payable by LESSOR to LESSEE on the first day of the

month on which the Agreement is terminated as set forth in subsection a, above.

OR

2. Inform LESSEE that LESSOR will sell the Premises, which, in turn will result in the following obligations of the parties:

- a. LESSOR shall immediately make all reasonable good faith efforts to sell the Premises;
- b. LESSEE shall remain a tenant with all of its rights and responsibilities under the terms of this Agreement until the Premises are sold;
- c. Upon the date of closing, LESSOR shall pay LESSEE a Percentage Portion of the sale price set forth in Exhibit C, less reasonable costs and expenses incurred by LESSOR in selling the Premises. The exact Percentage Portion shall be as set forth in Exhibit C.
- d. In the event that the sale price is less than the amount shown in Exhibit B on the date of sale, LESSEE shall be responsible to pay the difference to LESSOR through continuation of monthly lease payments at the time of sale or a lump sum within one year of the sale.

SECTION 18. FORCE MAJEURE

18.1 If either party hereto shall be delayed or prevented from the performance of any act required hereunder by reason of acts of God, strikes, lockouts, labor disputes, inability to procure materials, restrictive governmental laws or regulations or other cause without fault and beyond the control of the party obligated (financial inability excepted), performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay; provided, however, nothing in this Section shall excuse LESSEE from the payment of any rentals required of LESSEE hereunder except as expressly provided elsewhere in this Agreement.

SECTION 19. SEVERABILITY AND ASSIGNMENT

19.1 Each and every covenant and agreement contained in this Agreement is, and shall be construed to be, a separate and independent covenant and agreement. If any term or provision of this Agreement or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which is invalid or unenforceable, shall not be affected.

19.2 Neither LESSOR nor LESSEE shall assign, transfer, mortgage, pledge, hypothecate or encumber this Agreement or the lease therein or any interest therein, either voluntarily or involuntarily, without the prior, written approval of the other party, which approval may be withheld due to the sole discretion of such party.

SECTION 20. MARGINAL CAPTIONS

20.1 The various headings and numbers herein and the grouping of the provisions of this Agreement into separate sections and paragraphs are for the purpose of convenience only and shall not be considered a part hereof.

SECTION 21. GOVERNING LAW

21.1 This Agreement shall be governed and construed in accordance with the laws of the State of Utah, without giving effect to the choice of law provisions hereof.

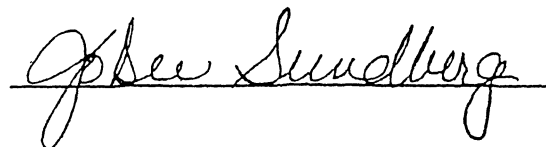
SECTION 22. ENTIRE AGREEMENT

22.1 This Agreement and any Exhibits attached hereto, and forming a part hereof, set forth all of the covenants, promises, agreements, conditions, and understandings between LESSOR and LESSEE governing the Premises. There are no covenants, promises, agreements, conditions and understandings, either oral or written, between them other than those herein set forth. In the event the provisions of any Exhibit conflict with the provisions of this Agreement, the Agreement shall govern. Except as herein provided, no subsequent alterations, amendments, changes or additions to this Agreement shall be binding upon LESSOR or LESSEE unless and until reduced to writing and signed by both parties. Submission of this instrument by LESSEE to LESSOR for examination shall not bind LESSEE in any manner, and no lease, contract, option, agreement to lease or other obligation of LESSEE shall arise until this instrument is signed by LESSEE and delivered to LESSOR.

IN WITNESS WHEREOF, the parties hereto sign and cause this Lease to be executed.

LESSEE

LESSOR



Date: 5/14/04

Date: 5/14/2004

Christie Hulet Chair
Mountainland Applied Technology
College Board of Directors

JoDee Sundberg, President
Alpine School District
Board of Directors

EXHIBIT A

PROPERTY DESCRIPTION

Commencing at a point which is 896.983 feet North and 1101.244 feet West of the East quarter corner of Section 24, Township 5 South, Range 1 East, Salt Lake Base and Meridian; (basis of bearing is the State Coordinate System); thence North $73^{\circ}21'01''$ West 369.853 feet; thence North $0^{\circ}26'01''$ East 473.459 feet; thence South $70^{\circ}10'48''$ East 379.483 feet; thence South $0^{\circ}47'38''$ West 450.782 feet to the point of beginning.

EXHIBIT B

PURCHASE PRICE SCHEDULE

In the event the LESSEE exercises its right to purchase the Premises, all in accordance with Sections 4 and 17 of the Agreement, the purchase/sale price shall be as set forth as follows:

| IF THE CLOSING DATE IS ON ANY DAY DURING: | THEN THE PURCHASE PRICE SHALL BE: |
|--|--------------------------------------|
| July 2004 | \$ 2,900,000 |
| August 2004 | \$ 2,890,420 |
| September 2004 | \$ 2,880,804 |
| October 2004 | \$ 2,871,152 |
| November 2004 | \$ 2,861,463 |
| December 2004 | \$ 2,851,739 |
| January 2005 | \$ 2,841,977 |
| February 2005 | \$ 2,832,180 |
| March 2005 | \$ 2,822,345 |
| April 2005 | \$ 2,812,474 |
| May 2005 | \$ 2,802,565 |
| June 2005 | \$ 2,792,620 |
| July 2005 | \$ 2,782,637 |
| August 2005 | \$ 2,771,799 |
| September 2005 | \$ 2,760,919 |
| October 2005 | \$ 2,749,999 |
| November 2005 | \$ 2,739,039 |
| December 2005 | \$ 2,728,037 |
| January 2006 | \$ 2,716,993 |
| February 2006 | \$ 2,705,909 |
| March 2006 | \$ 2,694,783 |
| April 2006 | \$ 2,683,615 |
| May 2006 | \$ 2,672,405 |
| June 2006 | \$ 2,661,153 |
| July 2006 | \$ 2,649,859 |
| August 2006 | \$ 2,637,672 |
| September 2006 | \$ 2,625,438 |
| October 2006 | \$ 2,613,160 |
| November 2006 | \$ 2,600,835 |
| December 2006 | \$ 2,588,463 |
| January 2007 | \$ 2,576,046 |
| February 2007 | \$ 2,563,582 |
| March 2007 | \$ 2,551,071 |
| April 2007 | \$ 2,538,513 |
| May 2007 | \$ 2,525,908 |
| June 2007 | \$ 2,513,256 |

EXHIBIT B

(Page 2)

PURCHASE PRICE SCHEDULE

| IF THE CLOSING DATE IS ON ANY DAY DURING: | THEN THE PURCHASE PRICE SHALL BE: |
|--|--------------------------------------|
| July 2007 | \$ 2,500,556 |
| August 2007 | \$ 2,486,924 |
| September 2007 | \$ 2,473,241 |
| October 2007 | \$ 2,459,506 |
| November 2007 | \$ 2,445,720 |
| December 2007 | \$ 2,431,882 |
| January 2008 | \$ 2,417,993 |
| February 2008 | \$ 2,404,051 |
| March 2008 | \$ 2,390,057 |
| April 2008 | \$ 2,376,010 |
| May 2008 | \$ 2,361,911 |
| June 2008 | \$ 2,347,759 |
| July 2008 | \$ 2,333,554 |
| August 2008 | \$ 2,318,375 |
| September 2008 | \$ 2,303,139 |
| October 2008 | \$ 2,287,846 |
| November 2008 | \$ 2,272,496 |
| December 2008 | \$ 2,257,088 |
| January 2009 | \$ 2,241,623 |
| February 2009 | \$ 2,226,099 |
| March 2009 | \$ 2,210,517 |
| April 2009 | \$ 2,194,877 |
| May 2009 | \$ 2,179,178 |
| June 2009 | \$ 2,163,420 |
| July 2009 | \$ 2,147,604 |
| August 2009 | \$ 2,130,770 |
| September 2009 | \$ 2,113,874 |
| October 2009 | \$ 2,096,914 |
| November 2009 | \$ 2,079,891 |
| December 2009 | \$ 2,062,803 |
| January 2010 | \$ 2,045,652 |
| February 2010 | \$ 2,028,436 |
| March 2010 | \$ 2,011,156 |
| April 2010 | \$ 1,993,811 |
| May 2010 | \$ 1,976,401 |
| June 2010 | \$ 1,958,926 |

EXHIBIT B
(Page 3)

PURCHASE PRICE SCHEDULE

| IF THE CLOSING DATE IS ON ANY DAY DURING: | THEN THE PURCHASE PRICE SHALL BE: |
|--|--|
| July 2010 August 2010 September 2010 October 2010 November 2010 December 2010 January 2011 February 2011 March 2011 April 2011 May 2011 June 2011 | \$ 1,941,385 \$ 1,922,783 \$ 1,904,111 \$ 1,885,369 \$ 1,866,557 \$ 1,847,674 \$ 1,828,721 \$ 1,809,696 \$ 1,790,600 \$ 1,771,432 \$ 1,752,193 \$ 1,732,881 |
| July 2011 August 2011 September 2011 October 2011 November 2011 December 2011 January 2012 February 2012 March 2012 April 2012 May 2012 June 2012 | \$ 1,713,497 \$ 1,693,005 \$ 1,672,437 \$ 1,651,791 \$ 1,631,067 \$ 1,610,266 \$ 1,589,387 \$ 1,568,430 \$ 1,547,394 \$ 1,526,279 \$ 1,505,085 \$ 1,483,811 |
| July 2012 August 2012 September 2012 October 2012 November 2012 December 2012 January 2013 February 2013 March 2013 April 2013 May 2013 June 2013 | \$ 1,462,458 \$ 1,439,948 \$ 1,417,353 \$ 1,394,674 \$ 1,371,910 \$ 1,349,060 \$ 1,326,125 \$ 1,303,103 \$ 1,279,996 \$ 1,256,801 \$ 1,233,520 \$ 1,210,152 |

EXHIBIT B
(Page 4)

PURCHASE PRICE SCHEDULE

| IF THE CLOSING DATE IS ON ANY DAY DURING | THEN THE PURCHASE PRICE SHALL BE: |
|---|--------------------------------------|
| July 2013 | \$ 1,186,695 |
| August 2013 | \$ 1,162,031 |
| September 2013 | \$ 1,137,275 |
| October 2013 | \$ 1,112,426 |
| November 2013 | \$ 1,087,483 |
| December 2013 | \$ 1,062,447 |
| January 2014 | \$ 1,037,317 |
| February 2014 | \$ 1,012,093 |
| March 2014 | \$ 986,774 |
| April 2014 | \$ 961,361 |
| May 2014 | \$ 935,852 |
| June 2014 | \$ 910,247 |
| July 2014 | \$ 884,546 |
| August 2014 | \$ 857,585 |
| September 2014 | \$ 830,522 |
| October 2014 | \$ 803,358 |
| November 2014 | \$ 776,092 |
| December 2014 | \$ 748,724 |
| January 2015 | \$ 721,253 |
| February 2015 | \$ 693,679 |
| March 2015 | \$ 666,001 |
| April 2015 | \$ 638,220 |
| May 2015 | \$ 610,335 |
| June 2015 | \$ 582,345 |
| July 2015 | \$ 554,250 |
| August 2015 | \$ 524,839 |
| September 2015 | \$ 495,317 |
| October 2015 | \$ 465,685 |
| November 2015 | \$ 435,941 |
| December 2015 | \$ 406,086 |
| January 2016 | \$ 376,119 |
| February 2016 | \$ 346,040 |
| March 2016 | \$ 315,848 |
| April 2016 | \$ 285,542 |
| May 2016 | \$ 255,123 |
| June 2016 | \$ 224,590 |

EXHIBIT B
(Page 5)

PURCHASE PRICE SCHEDULE

| IF THE CLOSING DATE IS ON ANY DAY DURING: | THEN THE PURCHASE PRICE SHALL BE: |
|--|--------------------------------------|
| July 2016 | \$ 193,943 |
| August 2016 | \$ 161,921 |
| September 2016 | \$ 129,779 |
| October 2016 | \$ 97,516 |
| November 2016 | \$ 65,132 |
| December 2016 | \$ 32,627 |

EXHIBIT C

LESSEE'S PERCENTAGE PORTION OF THE FAIR MARKET VALUE OF THE PREMISES

LESSEE'S Percentage Portion of the fair market value of the Premises is set forth as follows:

| DURING THE MONTH OF: | LESSEE'S PERCENTAGE PORTION IS: |
|-------------------------|------------------------------------|
| July 2004 | 9.38% |
| August 2004 | 9.67% |
| September 2004 | 9.97% |
| October 2004 | 10.28% |
| November 2004 | 10.58% |
| December 2004 | 10.88% |
| January 2005 | 11.19% |
| February 2005 | 11.49% |
| March 2005 | 11.80% |
| April 2005 | 12.02% |
| May 2005 | 12.42% |
| June 2005 | 12.73% |
| July 2005 | 13.04% |
| August 2005 | 13.38% |
| September 2005 | 13.72% |
| October 2005 | 14.06% |
| November 2005 | 14.41% |
| December 2005 | 14.75% |
| January 2006 | 15.10% |
| February 2006 | 15.44% |
| March 2006 | 15.79% |
| April 2006 | 15.95% |
| May 2006 | 16.49% |
| June 2006 | 16.84% |
| July 2006 | 17.19% |
| August 2006 | 17.57% |
| September 2006 | 17.96% |
| October 2006 | 18.34% |
| November 2006 | 18.72% |
| December 2006 | 19.11% |
| January 2007 | 19.50% |
| February 2007 | 19.89% |
| March 2007 | 20.28% |
| April 2007 | 20.67% |
| May 2007 | 21.07% |
| June 2007 | 21.46% |

EXHIBIT C
(Page 2)

LESSEE'S PERCENTAGE PORTION
OF THE FAIR MARKET VALUE
OF THE PREMISES

| DURING THE MONTH OF: | LESSEE'S PERCENTAGE PORTION IS: |
|-------------------------|------------------------------------|
| July 2007 | 21.86% |
| August 2007 | 22.28% |
| September 2007 | 22.71% |
| October 2007 | 23.14% |
| November 2007 | 23.57% |
| December 2007 | 24.00% |
| January 2008 | 24.44% |
| February 2008 | 24.87% |
| March 2008 | 25.31% |
| April 2008 | 25.75% |
| May 2008 | 26.19% |
| June 2008 | 26.63% |
| July 2008 | 27.08% |
| August 2008 | 27.55% |
| September 2008 | 28.03% |
| October 2008 | 28.50% |
| November 2008 | 28.98% |
| December 2008 | 29.47% |
| January 2009 | 29.95% |
| February 2009 | 30.43% |
| March 2009 | 30.92% |
| April 2009 | 31.41% |
| May 2009 | 31.90% |
| June 2009 | 32.39% |
| July 2009 | 32.89% |
| August 2009 | 33.41% |
| September 2009 | 33.94% |
| October 2009 | 34.47% |
| November 2009 | 35.00% |
| December 2009 | 35.54% |
| January 2010 | 36.07% |
| February 2010 | 36.61% |
| March 2010 | 37.15% |
| April 2010 | 37.69% |
| May 2010 | 38.24% |
| June 2010 | 38.78% |

EXHIBIT C

(Page 3)

LESSEE'S PERCENTAGE PORTION OF THE FAIR MARKET VALUE OF THE PREMISES

| DURING THE MONTH OF: | LESSEE'S PERCENTAGE PORTION IS. |
|-------------------------|------------------------------------|
| July 2010 | 39.33% |
| August 2010 | 39.91% |
| September 2010 | 40.50% |
| October 2010 | 41.08% |
| November 2010 | 41.67% |
| December 2010 | 42.26% |
| January 2011 | 42.85% |
| February 2011 | 43.45% |
| March 2011 | 44.04% |
| April 2011 | 44.64% |
| May 2011 | 45.24% |
| June 2011 | 45.85% |
| July 2011 | 46.45% |
| August 2011 | 47.09% |
| September 2011 | 47.74% |
| October 2011 | 48.38% |
| November 2011 | 49.03% |
| December 2011 | 49.68% |
| January 2012 | 50.33% |
| February 2012 | 50.99% |
| March 2012 | 51.64% |
| April 2012 | 52.30% |
| May 2012 | 52.97% |
| June 2012 | 53.63% |
| July 2012 | 54.30% |
| August 2012 | 55.00% |
| September 2012 | 55.71% |
| October 2012 | 56.42% |
| November 2012 | 57.13% |
| December 2012 | 57.84% |
| January 2013 | 58.56% |
| February 2013 | 59.28% |
| March 2013 | 60.00% |
| April 2013 | 60.72% |
| May 2013 | 61.45% |
| June 2013 | 62.18% |

EXHIBIT C
(Page 4)

LESSEE'S PERCENTAGE PORTION
OF THE FAIR MARKET VALUE
OF THE PREMISES

| DURING THE MONTH OF: | LESSEE'S PERCENTAGE PORTION IS: |
|-------------------------|------------------------------------|
| July 2013 | 62.92% |
| August 2013 | 63.69% |
| September 2013 | 64.46% |
| October 2013 | 65.24% |
| November 2013 | 66.02% |
| December 2013 | 66.80% |
| January 2014 | 67.58% |
| February 2014 | 68.37% |
| March 2014 | 69.16% |
| April 2014 | 69.96% |
| May 2014 | 70.75% |
| June 2014 | 71.55% |
| July 2014 | 72.36% |
| August 2014 | 73.20% |
| September 2014 | 74.05% |
| October 2014 | 74.90% |
| November 2014 | 75.75% |
| December 2014 | 76.60% |
| January 2015 | 77.46% |
| February 2015 | 78.32% |
| March 2015 | 79.19% |
| April 2015 | 80.06% |
| May 2015 | 80.93% |
| June 2015 | 81.80% |
| July 2015 | 82.68% |
| August 2015 | 83.60% |
| September 2015 | 84.52% |
| October 2015 | 85.45% |
| November 2015 | 86.38% |
| December 2015 | 87.31% |
| January 2016 | 88.25% |
| February 2016 | 89.19% |
| March 2016 | 90.13% |
| April 2016 | 91.08% |
| May 2016 | 92.03% |
| June 2016 | 92.98% |

EXHIBIT C
(Page 5)

LESSEE'S PERCENTAGE PORTION
OF THE FAIR MARKET VALUE
OF THE PREMISES

| DURING THE MONTH OF: | LESSEE'S PERCENTAGE PORTION IS: |
|-------------------------|------------------------------------|
| July 2016 | 93.94% |
| August 2016 | 94.94% |
| September 2016 | 95.94% |
| October 2016 | 96.95% |
| November 2016 | 97.96% |
| December 2016 | 98.98% |

ADDENDUM “3”

1/11/06 JFC

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

| | |
|--|---|
| TOM HEAL COMMERCIAL REAL ESTATE, et al., Plaintiffs, vs. JOHN YORK and LESA YORK, Defendants. | CASE NUMBER: 040402039 DATED: JANUARY 11, 2005 RULING ANTHONY W. SCHOFIELD, JUDGE |
|--|---|

Trial in this matter was held on November 3, 2005. After taking the matter under advisement and considering the evidence presented to the court, the parties' arguments and the relevant law, I am persuaded that plaintiffs are entitled to a commission on the sale of defendants' property to the Alpine School District.

Findings of Fact

I find that the following facts have been proven by a preponderance of the evidence:

1. Plaintiffs, Tom Heal Commercial Real Estate and Walker & Company Real Estate, are licensed real estate agents.
2. Defendants John and Lesa York ("Yorks") are former owners of a

commercial building located at 759 East Pacific Drive, American Fork, Utah (“the Property”).

3. In June 2000 Yorks entered into a listing agreement with plaintiffs to sell or lease the Property for them.

4. After the term of that listing agreement ended, in March 2001 the Yorks signed a second listing agreement (the “Modified Listing Agreement”).

5. The Modified Listing Agreement provides that “if the Property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company [plaintiffs] a commission equal to six percent (6%) of the sale price.” (¶ 2.)

6. In July 2001, the Yorks entered into a lease of the property with Utah Valley State College (UVSC) and Mountainland Advanced Technology Center (MATC). The lease provided for a lease term of eleven years.

7. The lease was signed by Brad Cook as representative of both institutions.

8. At the time the lease was entered into MATC and UVSC each were legislatively created institutions of higher education.

9. At the time of the lease, MATC was an arm of UVSC and UVSC administered MATC’s finances, payroll, and tuition.

10. Subsequently MATC was made a subsidiary of Utah Applied Technology college and was renamed Mountainland Applied Technology College.

11. As a result of this action, MATC became independent of UVSC and was granted its own budget.

12. After this change in its status, MATC continued to pay rent to the Yorks and use the Property.

13. After about two years, Robert Brems, president of MATC, approached the Yorks about the purchase of the Property by MATC.

14. MATC was unable to purchase the Property at the time because it did not have the right, independent of legislative action, to acquire real property, it did not have a budget for such capital purchases and it required prior approval of the legislature before it could make real property purchases.

15. In order to avoid the necessity of legislative approval, MATC sought out Alpine School District ("Alpine"), another legislatively created educational entity with has autonomous ability to raise money and purchase property.

16. Alpine was interested in helping MATC acquire property and retain its location because many of Alpine's high school students receive vocational training from MATC.

17. Alpine purchased the Property for \$2,656,000 and then entered into a lease-purchase agreement with MATC.

17. The lease-purchase agreement signed May 14, 2004, between Alpine and MATC, provides, in relevant part:

- A. The term of the lease is 12 years and 7 months.
- B. MATC has a right of first refusal to purchase the Property at any time.
- C. The purchase price of the Property decreases steadily according to a fixed schedule and becomes \$0 by the end of the lease term. Thus, if MATC

makes all of the lease payments, at the end of the lease Alpine must transfer the Property to MATC without further payment of any type.

- D. The total amount of rent payments from MATC to Alpine over the entire term of the lease amount to \$4,075,889.02, which, over the lease term, is roughly equivalent to 4.25% interest compounded annually over the price for which Alpine purchased the Property.
- E. MATC may terminate the lease early only at two specified times without being in default – the fourth year and the seventh year.
- F. If MATC chooses to terminate the lease early, it must reimburse Alpine any unused real estate commission paid by Alpine.
- G. If the agreement is terminated either voluntarily or by default, MATC will surrender the property to Alpine.

19. From both tax and financial accounting standpoints, the lease is a capital lease, which is the equivalent of a purchase. This is so because the primary determinant, from both financial and tax accounting standpoints, is the amount of the residual that must be paid at the conclusion of the lease term in order for the tenant to purchase the property. If the residual is 10% of the purchase price or less, the lease will be treated as a purchase for tax and financial accounting. Here the residual is zero. Thus, this lease must be treated as disguised purchase by the tenant as all it must do to acquire the property is to make its monthly rent payments, all of which are credited toward the ultimate purchase price of the Property.

20. Senator Curtis Bramble, a Utah State Senator and an accountant, testified

about the intent of the legislature with respect to applied technology colleges acquiring real property through lease/purchases rather than outright purchases because by the lease/purchase mechanism the legislature did not have to fund a capital purchase budget for major college facilities, but the properties nonetheless could be acquired over time by making lease/purchase payments.

21. MATC and Alpine did not at any relevant time have rights to control each other's decisions nor funds, nor did they share profits or losses from any transactions at issue.

22. In this case the sale to Alpine was for the sum of \$2,656,000. If a commission of 6% is applied in this case, the commission will be \$159,360, which is 6% of \$2,656,000.

23. The Modified Listing Agreement provides that if either party has to resort to litigation to protect their rights under the agreement, they are entitled to an award of attorney's fees.

24. In this case plaintiffs have incurred attorney's fees in prosecuting their claim to a commission.

Analysis and Ruling

The resolution of this matter hangs on one question: Did the sale to Alpine, combined with the lease-purchase agreement between Alpine and MATC, amount to a sale to MATC? If so, plaintiffs are entitled to a commission on that sale; if not, no commission is due.

In order to prevail, plaintiffs must overcome the fact that the tenant, MATC, and the purchaser, Alpine, are separate legal entities. The plaintiffs sought to overcome this fact in two ways. Plaintiff's first theory focused on the cooperation between the entities, alleging that Alpine and MATC were in a partnership and bought the property on behalf of the partnership. Plaintiff's second theory focused on the nature of the lease-purchase agreement between Alpine and MATC, arguing that it constituted a purchase by MATC. I consider plaintiff's arguments in order, rejecting the first and accepting the second.

A. Despite their cooperation, the purchase by Alpine alone is not a purchase by MATC.

The evidence produced at trial established that Alpine bought the Property for the benefit of MATC and in cooperation with MATC. Nevertheless, I am persuaded that this cooperation does not make Alpine and MATC partners nor joint venturers in the legal sense that makes one liable for the actions of the other. Although Alpine was acting on behalf of MATC, the Modified Listing Agreement provides for a commission only where the tenant itself, not someone acting on the tenant's behalf, purchases the Property.

1. Alpine and MATC did not act in a joint venture because they did not share control, profits, or losses nor have a profit motive.

The law restricts the term partnership or joint venture to specific types of relationships because those terms make the parties involved liable for each other's actions. In order to bring such liability upon each other, partners or joint venturers normally must have "a mutual right to control, a right to share in the profits," and "a duty to share in any losses which may be sustained." *Harline v. Campbell*, 728 P.2d 980, 982

(1986). Also, while not-for-profit entities may be partners or joint venturers, the activities must be “for the purpose of making a profit.” *Id.* Plaintiffs correctly point out that there must be “a community of interest in the performance” for a partnership or joint venture to exist, *id.*, but in saying this, the case law merely explains or supplements the requirements of profit-motive and mutual control. Here, MATC and Alpine had no mutual rights of control nor commingling of funds. Their primary motive, rather than profit, is the educational benefit to the students. The only profit involved, if any, is the 4.25% annual interest over the purchase price that Alpine is collecting from MATC, a relationship one would not expect of partners.

2. The language of the Modified Listing Agreement does not provide for a commission based on cooperation alone.

Since Alpine and MATC were not partners nor joint venturers, the sale to Alpine does not trigger the clause in the Modified Listing Agreement providing for a commission if the Property is “sold to a tenant,” even though Alpine was clearly acting on behalf of the tenant MATC. I am aware of precedent in other jurisdictions that has awarded a real estate commission where a person acting on behalf of the tenant purchases for the tenant’s use, but that precedent applies only when the real estate agreement provides for that situation specifically. *See Ackerman v. Citron*, 150 A. 2d 50 (N.J. 1959) (commission awarded when agreement allowed commission for a sale to “anyone acting on the tenant’s behalf,” and tenant corporation’s president bought property for the corporation’s use); *Feist & Feist Realty Corp. v. Hansford Properties, Inc.*, 724 F.2d 31 (3d Cir. 1983) (no commission awarded where chairman of board purchased property in

behalf of tenant corporation, because contract did not specifically so provide). Thus, the sale to Alpine alone is not a sale to MATC despite Alpine's cooperation with MATC.

B. The lease between Alpine and MATC was in fact an installment purchase.

Although I have rejected the notion that the relationship between Alpine and MATC makes the sale to Alpine a sale to the tenant MATC, I am persuaded that MATC did in fact purchase the property, and a commission therefore is due. Specifically, the lease-purchase agreement between Alpine and MATC purports to be a lease, but is in fact an installment purchase by MATC. Although I am normally hesitant to construe a document to be anything other than what it purports to be on its face, I am convinced that doing so is the proper course in this case.

1. This court looks to state commercial law for guidance in distinguishing a true lease from a disguised installment sale.

The idea of construing a lease-purchase agreement as an installment sale is not the invention of this court. Significantly, a recent edition of Black's Law Dictionary under the definition of "lease-purchase agreement" states, "[s]uch a lease is usu[ally] treated as an installment sale." *Black's Law Dictionary Lease-Purchase Agreement* 900 (7th ed. 1999). The dictionary entry appears to focus on the sale of goods and is consistent with *Utah Code Ann.* § 70A-1-201(37)(b), part of the Uniform Commercial Code which sets forth standards for construing lease-purchase agreements as installment sales reserving a security interest. According to the Utah Supreme Court, in interpreting that statute:

When a commercial transaction for the sale of equipment is in the form of a lease but in fact is intended to be a sale, the payments, even though called 'lease payments,' are legally considered installment payments on

the purchase price. At the end of such a "lease," there is either a nominal payment required to exercise the option to purchase or a final payment which, although sizeable in relation to the value of the goods, leaves the lessee no economic alternative but to exercise the option.

Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483, 485 (1986).

Although there is no Utah statute extending the reasoning of *UCA* § 70A-1-201(37)(b) from the sale of goods to the sale of real estate, at least one federal judge, in construing a real estate lease-purchase agreement for purposes of the Federal Truth in Lending Act, has held that "[i]n drawing a distinction between disguised sales and true leases, it is also appropriate to look to state commercial law for guidance." *Davis v. Colonial Securities Corp.*, 541 F. Supp. 302, 305-306 (E. D. Pa. 1982), *appeal dismissed without opinion*, 720 F. 2d 661 (3d Cir. 1983).

The issue in *Davis* was that certain disclosure provisions would apply if the transaction was a sale, but would not apply if the transaction was a lease. In deciding that the lease was actually a sale, the judge found it "highly significant" that the lessee "had the right to purchase the premises for the nominal consideration of \$1.00" at the end of the lease term of ten years, and was further persuaded because "the rental payments were effectively credited towards the eventual purchase price. Thus, plaintiff acquired an equity interest in the as the payments were made." *Id.* at 306. The "mere fact that the lessee had an option to terminate the lease" was not sufficient to change the result. *Id.*

2. The terms of the lease-purchase agreement between Alpine and MATC is, in substance, an installment sale.

The terms of the lease agreement that the judge in *Davis* found significant are substantially similar to the terms of the lease between Alpine and MATC in the present

case. MATC has the option to buy the Property at any time during the lease term of twelve years and seven months, and the price for which MATC would buy the property diminishes steadily each month until it becomes zero at the end of the term. The sum of the entire amount of rent paid over twelve years and seven months is equivalent to the purchase price with an average rate of 4.5% interest compounded annually, a favorable interest rate for a purchaser. Thus, MATC, unlike a renter, receives an equity interest in the property with each payment. The fact that MATC has the option to surrender the property at two points in time without being held in default does not alter the fact that MATC is acquiring such equity. Since “[i]t is the duty of the court to look to substance rather than to form,” *MacKay v. Hardy*, 896 P.2d 626, 629 (Utah 1995), the lease between Alpine and MATC should be treated as an installment sale to MATC. Alpine’s role in the transaction is only that of a financier.

C. MATC’s purchase triggers a commission under the Modified Listing Agreement because it occurred within the term of MATC’s lease.

The Modified Listing Agreement provides that a commission is due if sale to a tenant occurs during the term of the tenant’s lease or within 180 days of the expiration of that term. No credible evidence was presented showing that the Modified Listing Agreement was not valid. Although the Property was sold to Alpine before Alpine sold it to MATC, the intermittent sale in my view does not alter the fact that the tenant purchased the Property. Since the tenant’s purchase occurred during the term of the lease, the provision of the Modified Listing Agreement regarding the sale to a tenant is triggered by the purchase. A commission of six percent of the sale price, or \$159,360 is due under

the terms of the Modified Listing Agreement.

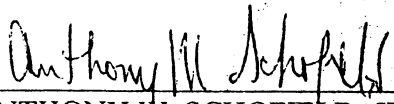
As well, the Modified Listing Agreement provides for an award of attorney's fees to the prevailing party in litigation under the agreement. Here plaintiffs have prevailed, have incurred attorney's fees, and are entitled to an award of reasonable attorney's fees in this matter. Their counsel should promptly prepare an affidavit of attorney's fees and file with the court.

Conclusion

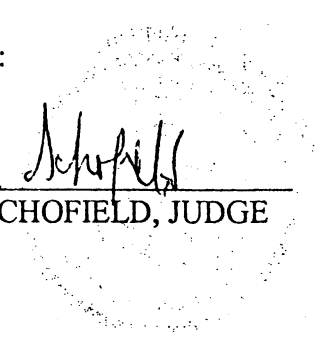
For the foregoing reasons, I conclude that MATC was a tenant procured by the plaintiffs, which then purchased the Property within the term of the lease. Plaintiffs are due a commission for the subsequent sale. Plaintiffs also are entitled to an award of attorney's fees. Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, plaintiffs' counsel is directed to prepare an appropriate order.

Dated this 11 day of January, 2006.

BY THE COURT:



ANTHONY W. SCHOFIELD, JUDGE



MAILING CERTIFICATE

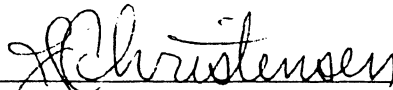
I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 11 day of January, 2006:

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LORI WOFFINDEN
CLERK OF THE COURT

By


Deputy Clerk

ADDENDUM “4”

CHAPTER 2

INSTITUTIONS OF HIGHER EDUCATION

| Section | | Section | |
|------------|---|------------|--|
| 53B-2-101. | Institutions of higher education — Corporate bodies — Powers. | | the president of each institution — Approval by board of trustees. |
| 53B-2-104. | Memberships of board of trustees — Terms — Vacancies — Oath — Officers — Bylaws — Quorum — Committees — Compensation. | 53B-2-107. | Appropriations reallocation. |
| | | 53B-2-108. | Appropriations reallocation. |
| | | 53B-2-109. | Notice to local government when constructing student housing. |
| 53B-2-106. | Duties and responsibilities of | | |

53B-2-101. Institutions of higher education — Corporate bodies — Powers.

(1) The following institutions of higher education are bodies politic and corporate with perpetual succession and with all rights, immunities, and franchises necessary to function as such:

- (a) the University of Utah;
- (b) Utah State University;
- (c) Weber State University;
- (d) Southern Utah University;
- (e) Snow College;
- (f) Dixie State College of Utah;

- (g) the College of Eastern Utah;
 - (h) Utah Valley State College;
 - (i) Salt Lake Community College; and
 - (j) the Utah College of Applied Technology.
- (2) (a) Each institution may have and use a corporate seal and may, subject to Section 53B-20-103, take, hold, lease, sell, and convey real and personal property as the interest of the institution requires.
- (b) Each institution is vested with all the property, franchises, and endowments of, and is subject to, all the contracts, obligations, and liabilities of its respective predecessor.
- (c) (i) Each institution may enter into business relationships or dealings with private seed or venture capital entities or partnerships consistent with Utah Constitution Article VI, Section 29, Subsection (2).
- (ii) A business dealing or relationship entered into under Subsection (2)(c)(i) does not preclude the private entity or partnership from participating in or receiving benefits from a venture capital program authorized or sanctioned by the laws of this state, unless otherwise precluded by the specific law that authorizes or sanctions the program.
- (iii) Subsections (2)(c)(i) and (ii) also apply to the Utah College of Applied Technology created in Title 53B, Chapter 2a, Utah College of Applied Technology.

History: C. 1953, 53B-2-101, enacted by L. 1987, ch. 7, § 8; 1987, ch. 167, § 12; 1990, ch. 12, § 3; 1990, ch. 13, § 2; 1994, ch. 63, § 2; 2000, ch. 7, § 2; 2005, ch. 89, § 1; 2005, ch. 227, § 2.

Amendment Notes. — The 2005 amendment by ch. 89, effective May 2, 2005, added Subsection (2)(c).

The 2005 amendment by ch. 227, effective May 2, 2005, added Subsection (1)(j), making a related change.

This section has been reconciled by the Office of Legislative Research and General Counsel.

53B-2a-105. Utah College of Applied Technology — Composition.

The Utah College of Applied Technology is composed of the following college campuses:

- (1) the Bridgerland Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Box Elder School District;
 - (b) the Cache School District;
 - (c) the Logan School District; and
 - (d) the Rich School District;
- (2) the Ogden-Weber Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Ogden City School District; and
 - (b) the Weber School District;
- (3) the Davis Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Davis School District; and
 - (b) the Morgan School District;
- (4) the Salt Lake/Tooele Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Salt Lake City School District;
 - (b) the Granite School District;
 - (c) the Jordan School District;
 - (d) the Murray School District; and
 - (e) the Tooele School District;
- (5) the Mountainland Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Alpine School District;
 - (b) the Nebo School District;
 - (c) the Provo School District;
 - (d) the South Summit School District;
 - (e) the North Summit School District;
 - (f) the Wasatch School District; and
 - (g) the Park City School District;
- (6) the Uintah Basin Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Daggett School District;
 - (b) the Duchesne School District; and
 - (c) the Uintah School District;
- (7) the Southwest Applied Technology College Campus which serves the geographic area encompassing:
 - (a) the Beaver School District;
 - (b) the Garfield School District;
 - (c) the Iron School District; and
 - (d) the Kane School District;
- (8) the Dixie Applied Technology College Campus which serves the geographic area encompassing the Washington School District; and
- (9) the Southeast Applied Technology College Campus which serves the geographic area encompassing:

- (a) the Carbon School District;
- (b) the Emery School District;
- (c) the Grand School District; and
- (d) the San Juan School District.

History: C. 1953, 53B-2a-105, enacted by L. 2001 (1st S.S.), ch. 5, § 20; 2003, ch. 233, § 5; 2003, ch. 289, § 9.

Amendment Notes. — The 2003 amendment by ch. 233, effective July 1, 2003, deleted former Subsection (7), listing the Central Applied Technology College and the school districts in the geographic area it served, and redesignated the following subsections accordingly.

The 2003 amendment by ch. 289, effective July 1, 2003, substituted “college campuses” for “regional applied technology colleges” in the

introductory phrase and made related changes in terminology throughout; deleted Subsection (b) from Subsections (1) to (6), (8), and (10), pertaining to the inclusion of “facilities, equipment, and personnel” of the listed institutions; made changes in subsection designations; and made stylistic changes.

This section has been reconciled by the Office of Legislative Research and General Counsel.

Effective Dates. — Laws 2001 (1st S.S.), ch. 5, § 35 makes the act effective on September 1, 2001.

**53B-2a-113. College campuses — Leasing authority —
Lease-purchase agreements — Report.**

(1) In accordance with Subsection 53B-2a-112(2), a college campus may enter into a lease with other higher education institutions, public school districts, state agencies, or business and industry for a term of:

(a) one year or less with the approval of the campus board of directors; and

(b) more than one year with the approval of the board of trustees and:

(i) the approval of funding for the lease by the Legislature prior to a college campus entering into the lease; or

(ii) the lease agreement includes language that allows termination of the lease without penalty.

(2) (a) In accordance with Subsection 53B-2a-112(2), a college campus may enter into a lease-purchase agreement if:

(i) there is a long-term benefit to the state;

(ii) the project is included in both the campus and Utah College of Applied Technology master plans;

(iii) the lease-purchase agreement includes language that allows termination of the lease;

(iv) the lease-purchase agreement is approved by the campus board of directors and the board of trustees; and

(v) the lease-purchase agreement is:

(A) reviewed by the Division of Facilities Construction and Management;

(B) reviewed by the State Building Board; and

(C) approved by the Legislature.

- (b) An approval under Subsection (2)(a) shall include a recognition of:
 - (i) all parties, dates, and elements of the agreement;
 - (ii) the equity or collateral component that creates the benefit; and
 - (iii) the options dealing with the sale and division of equity.
- (3) (a) Each college campus shall provide an annual lease report to the board of trustees that details each of its leases, annual costs, location, square footage, and recommendations for lease continuation.
 - (b) The president of the Utah College of Applied Technology shall compile and distribute an annual combined lease report for all college campuses to the Division of Facilities Construction Management and to others upon request.
- (4) The Utah College of Applied Technology shall use the annual combined lease report in determining planning, utilization, and budget requests.

History: C. 1953, 53B-2a-113, enacted by L. 2003, ch. 289, § 17; 2005, ch. 227, § 7.

Amendment Notes. — The 2005 amendment, effective May 2, 2005, added Subsections

(1)(b)(i) to (2)(b)(iii) and made related changes.

Effective Dates. — Laws 2003, ch. 289, § 20 makes the act effective on July 1, 2003.

ADDENDUM “5”

FILED
Fourth Judicial District Court
of Utah County, State of Utah
2/22/06
Deputy

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Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

TOM HEAL COMMERCIAL REAL
ESTATE, INC., and WALKER &
COMPANY REAL ESTATE,

Plaintiffs,

vs.

JOHN YORK and LESA YORK,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 040402039

Division No. 8

The Court, having held a bench trial in the above-captioned matter on November 3, 2005, with all parties present, Plaintiffs being represented by Stephen Quesenberry of Hill, Johnson & Schmutz, and Defendants being represented by Donald E. McCandless of Scribner & McCandless; and having heard all witnesses presented by the parties, having received evidence as set forth in the record, and having heard the arguments of the parties, hereby makes the

following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. Plaintiffs, Tom Heal Commercial Real Estate and Walker & Company Real Estate, are licensed real estate agents in the State of Utah.
2. Defendants John and Lesa York (“Yorks”) are former owners of a commercial building and associated real property located at 759 East Pacific Drive, American Fork, Utah County, Utah (“the Property”).
3. In June 2000, the Yorks entered into a listing agreement with plaintiffs to sell or lease the Property for them. The initial listing price in that agreement was \$2.3 million. This listing agreement was admitted as Exhibit 2.
4. After the term of that listing agreement ended, the Yorks signed a second listing agreement (the “Modified Listing Agreement”) in March 2001. This Agreement was admitted as Exhibit 3.
5. Paragraph 2 of the Modified Listing Agreement provides that “if the Property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company [plaintiffs] a commission equal to six percent (6%) of the sale price.”
6. Clay Christensen (of Alpine School District (“Alpine)) first contacted the listing

¹ These *Findings of Fact and Conclusions of Law* incorporate by reference the Court’s January 11, 2006 *Ruling*, and also supplement said *Ruling*.

real estate agents (i.e. Plaintiffs) on or about April 16, 2001 in conjunction with the lease and sale that are at issue in this lawsuit (which was several weeks after the signing of the Modified Listing Agreement). Tom Heal and Blaine Walker showed the property to him. Mr. Christensen was followed by others negotiating on behalf of Mountainland Applied Technology Center (MATC).

7. A negotiation period ensued between MATC and Plaintiffs, as demonstrated by various letters that were introduced as Exhibits 4, 5 and 7. Exhibit 4 is the first letter of intent relating to the eventual leasing of the properties, and is dated April 23, 1001. Exhibit 5 is a May 9, 2001 letter addressed from the Yorks' agent, Tom Heal, to Royanne Boyer, Dean of Mountainland Advanced Technology Center. Exhibit 7 is a letter from Brad Cook of Utah Valley State College (UVSC) to Commissioner Cecelia Foxley, of the Utah System of Higher Education. In this letter, Mr. Cook refers to "an initiative of the Mountainland Applied Technology Center Service Region (MATCSR) Board and Alpine School District" when discussing the subject property.

8. At all times pertinent hereto, Alpine had a vested interest in making sure that MATC could remain at the Property, and did what it could to make sure that happened.

9. In July 2001, the Yorks entered into a lease of the property with UVSC and MATC. The lease provided for a term of ten years. This lease was admitted as Exhibit 6. The lease was signed by Mr. Cook as representative of both institutions. This lease was signed within the term of the Modified listing agreement. Rob Brems, the President of MATC, considered

MATC to be the tenant.

10. At the time the lease was entered into, MATC and UVSC each were legislatively-created institutions of higher education.

11. At the time of the lease, MATC was an arm of UVSC and UVSC administered MATC's finances, payroll, and tuition.

12. Subsequently MATC was made a subsidiary of Utah Applied Technology College and was renamed Mountainland Applied Technology College (still referred to herein as "MATC").

13. As a result of this action, MATC became independent of UVSC and was granted its own budget.

14. After this change in its status, MATC continued to pay rent to the Yorks and occupy the Property. MATC corresponded with the Yorks about the property. For example, Exhibit 8 is a letter from Ms. Boyer to Mr. York about certain tenant improvements that MATC wanted to make. Exhibit 12 is a letter from Mr. Brems to an appraiser, wherein Mr. Brems acknowledges that MATC leases the subject property from the Yorks.

15. After about two years, Mr. Brems approached the Yorks about the purchase of the Property by MATC. Purchasing the Property was Mr. Brems' idea and project, which he came up with during the term of the lease. Mr. York then called Mr. Heal and told him that MATC had made an offer to purchase the property, and asked Mr. Heal to participate in analyzing the

offer. After performing an analysis of the offer, Mr. Heal suggested that the sales price should be \$2.6 million (MATC's first offer was only \$2,000,050, as set forth in Exhibit 9).

16. MATC was unable to purchase the Property on its own at the time because it did not have the right (independent of legislative action) to acquire real property, it did not have a budget for such capital purchases, and it required prior approval of the legislature before it could make real property purchases.

17. In order to avoid the necessity and difficulty of obtaining legislative approval, MATC sought out Alpine, another legislatively-created, state-funded educational entity which has autonomous ability to raise money and purchase property.

18. Alpine was interested in helping MATC acquire property and retain its location because many of Alpine's high school students receive vocational training from MATC. In fact, a large percentage of MATC's students came from Alpine, and received services from MATC that were only available there.

19. Alpine, as set forth above, to facilitate MATC purchasing the property, advanced the funds, and closed on the Property for \$2,600,000² on May 27, 2004.

20. Two weeks before this date, on May 14, 2004, Alpine and MATC entered into a lease-purchase agreement (trial exhibit 16), which provides, in relevant part:

² Through the efforts, expertise and counsel of Plaintiff Tom Heal, Yorks were able to ask for and obtain \$300,000 more in price for the property than the property had been previously listed for (\$2,300,000).

- A. The term of the lease is 12 years and 7 months.
- B. MATC has a right of first refusal to purchase the Property at any time.
- C. The purchase price of the Property decreases steadily and proportionately according to a fixed schedule and becomes \$0 by the end of the lease term. Thus, if MATC makes all of the lease payments, at the end of the lease Alpine must transfer the Property to MATC without further payment of any type (i.e. title automatically transfers upon payment of all the lease payments).
- D. The total amount of rent payments from MATC to Alpine over the entire term of the lease amount was \$4,075,889.02, which is roughly equivalent to 4.25% interest per annum over the price for which Alpine purchased the Property.
- E. If the lease is terminated either voluntarily or by default, MATC will surrender the property to Alpine but receive a reimbursement.³

21. From both tax and financial accounting standpoints, the lease is an installment sale or a "capital lease", which is the equivalent of a purchase. This is so because the primary

³ The evidence also established that Mr. Brems both had the idea for the purchase and negotiated the terms of the purchase with the Yorks. Mr. Brems obtained and paid for the appraisal used in the purchase from the Yorks. Mr. Brems figured out the unique financing mechanism which was eventually used by MATC to obtain the building. MATC paid 25% of the purchase price and acted like an owner in every way under the lease option, taking on any and all obligations associated with the property. MATC provided the same services, in the same way, to its students from the first day of the lease with the Yorks until the time of trial, with no plans to change.

determinant, from both financial and tax accounting standpoints, is the amount of the residual that must be paid at the conclusion of the lease term in order for the tenant to purchase the property. If the residual is 10% of the purchase price or less, the lease will be treated as a purchase for tax and financial accounting. Here the residual is zero. Thus, this lease must be treated as a “disguised” purchase by the tenant as all it must do to acquire the Property is to make its monthly rent payments, all of which are credited toward the ultimate purchase price of the Property.

22. Senator Curtis Bramble, a Utah State Senator and a certified public accountant, testified about the intent of the legislature with respect to applied technology colleges acquiring real property through lease/purchases rather than outright purchases. He explained that through the lease/purchase mechanism the legislature did not have to fund a capital purchase budget for major college facilities. Meanwhile, the properties nonetheless could be acquired over time by making installment or lease/purchase payments. Senator Bramble testified (and was not contradicted by any other witness) that the lease/purchase transaction was actually a purchase by MATC with Alpine acting as the lender.

23. MATC and Alpine did not at any relevant time have rights to control each other's decisions or funds. Nor did they share profits or losses from any transactions at issue. The evidence showed that MATC contributed \$620,000 of the purchase price to the Yorks (see trial exhibit 11, addendum B, and trial exhibit 15 which detail this payment). The sale occurred

during the term of the Modified Listing Agreement by being within the term of the original lease from the Yorks to MATC. The Court is persuaded that MATC did in fact purchase the Property, and a commission therefore is due. Specifically, the lease-purchase agreement between Alpine and MATC purports to be a lease, but is in fact an installment purchase by MATC (and MATC was the tenant on the original lease).

24. In this case the sale to MATC (facilitated by Alpine) was for the sum of \$2,600,000. If the contractually-determined commission of 6% is applied, the commission will be \$156,000, which is 6% of \$2,600,000. The Yorks have refused to pay this commission to Plaintiffs.

25. The Modified Listing Agreement provides that if either party has to resort to litigation to protect their rights under the agreement, they are entitled to an award of attorney's fees.

26. In this case Plaintiffs have incurred attorney's fees in prosecuting their claim to a commission.

27. The Modified Listing Agreement also provides that "[a]ny commissions due under the terms of this agreement that are not paid within five days of due date shall be subject to a ten percent late penalty and shall bare [sic] interest at the rate of two percent per month until paid."

28. The commission was not paid within five days of due date, which was the closing of the sale (settlement date) – i.e. May 27, 2004 (see trial exhibit 17). Ten percent of the \$156,000

commission is \$15,600, for a total commission and penalty owing of \$171,600. Interest on that sum at the rate of two percent per month is \$112.83 per day (based on a 365 day year).

29. The Court, having weighed the evidence and having observed all witnesses as they testified, finds that the Yorks have not met their burden of proof on the affirmative defenses of mistake, misrepresentation, duress, undue influence, lack of consideration, unconscionability, fraud, and breach of fiduciary duties (as set forth in paragraph 35 of the Answer). No credible evidence was presented showing that the Modified Listing Agreement was not valid. The Court further finds that Plaintiffs will not receive a “double commission” as claimed by the Yorks, but rather will receive what was anticipated by the contract between the parties.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court makes the following Conclusions of Law:


1. Exhibit 3, the Modified Listing Agreement, was a valid, binding contract, supported by consideration.
2. Plaintiffs fully performed their obligations under said agreement.
3. The Defendants breached said agreement by failing to pay the commission set forth therein, and Plaintiffs were damaged as set forth above, and are entitled to thus receive their commission, penalty, interest and attorneys fees as set forth in the contract.
4. The Court find that judgment should be entered against the Yorks and in favor of the

Plaintiffs in the amount of \$156,000 for the commission, \$15,600 for the penalty, and interest at the rate of two percent per month (which is \$112.83 per day based on a 365 day year). As of January 31, 2006, the total interest due would be \$69,382.78. This will increase by the amount of \$112.83 until a judgment is entered. Thereafter, the entire judgment shall bear interest at the rate of 24% per annum until paid (as 2% per month is the contract rate of interest), and as set forth in U.C.A §15-1-4, "... a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties, which shall be specified in the judgment."

5. Plaintiffs, as the prevailing party, should be awarded their reasonable attorney's fees and costs under the terms of the Modified Listing Agreement, and shall be able to collect the costs and fees they incur in collecting on said judgment, as well as the costs and fees on appeal should they prevail. The amount of attorneys fees shall be established by attorney affidavit submitted by Plaintiff.

6. The Yorks have not met their burden of proof on any affirmative defense that they have asserted in this matter.

ENTERED this 22 day of February, 2006.



District Court Judge Anthony Schofield

NOTICE

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, notice of any objection to the pleading above shall be submitted to the Court and counsel within five days after service. If no such objection is so submitted, the Court may enter this order.

This proposed judgment is served by hand delivery on the Court and opposing counsel on the 1st day of February, 2006.



Stephen Quesenberry