

2006

Ira Sachs v. Joseph S. Lesser, Loeb Investors, and United Park City Mines Company : Brief of Appellee

Utah Court of Appeals

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Kathryn Collard; The Law Firm of Kathryn Collard; Attorney for Appellant.

Laura S. Scott; Shane D. Hillman; Parsons, Behle, and Latimer; Attorneys for Appellees .

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IN THE UTAH COURT OF APPEALS

IRA SACHS,

Plaintiff/Appellant,

vs.

JOSEPH S. LESSER, LOEB INVESTORS
CO. XL; and UNITED PARK CITY MINES
COMPANY,

Defendants/Appellees.

Appeal No. 20060257

District Court Case No. 040926707

BRIEF OF APPELLEE UNITED PARK CITY MINES COMPANY

Appeal from Order Granting Defendants' Motions for Summary Judgment
The Third Judicial District Court, Salt Lake County, Utah
The Honorable Tyrone E. Medley, Presiding

KATHRYN COLLARD (0697)
THE LAW FIRM OF KATHRYN
COLLARD, LC
9 Exchange Place, Suite 1111
Salt Lake City, UT 84111
Telephone: (801) 537-5625
Facsimile: (801) 537-5630

*Attorney for Plaintiff/Appellant
Ira Sachs*

LAURA S. SCOTT (6649)
SHANE D. HILLMAN (8194)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant/Appellee
United Park City Mines Company*

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201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant/Appellee
United Park City Mines Company*

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PARTIES

The appellant is plaintiff Ira Sachs (“Sachs”). The appellees are defendants United Park City Mines Company (“United Park”), Joseph S. Lesser (“Lesser”) and Loeb Investors Co. XL (“Loeb”). Sachs has not appealed the dismissal with prejudice of defendant Capital Growth Partners LLC (“Capital Growth”) and therefore Capital Growth is not a party to this appeal. (R. 2191-95; Sachs Brief at 5.)

STATEMENT OF JURISDICTION

Under Utah Code Ann. § 78-2a-3(2)(j), the Utah Court of Appeals has jurisdiction over this appeal from the Order Granting Defendants’ Motions for Summary Judgment (“Final Judgment”) entered by the trial court on February 15, 2006. (R. 2213-22.)

DETERMINATIVE STATUTES AND RULES

1. Utah Real Estate Brokers Act, Utah Code Ann. § 61-2-1 *et seq.* (2005);
2. Utah Statute of Frauds, Utah Code Ann. § 25-5-4 (2004); and
3. Rule 56 of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE, PROCEEDINGS AND FACTS

I. NATURE OF THE CASE.

Sachs alleges that he entered into an oral finder’s fee agreement with Lesser and Loeb to find a purchaser for United Park. (R. 9.) Sachs further alleges that he “found” Gerald Jackson (“Jackson”), a real estate developer, who formed Capital Growth to purchase United Park. (R. 17.) Sachs alleges that United Park breached the alleged agreement when it refused to pay him a finder’s fee after the transaction between Capital

Growth and United Park closed. (R. 17-18.) The trial court granted summary judgment in favor of United Park on the grounds that Sachs' claims are barred by the Utah Real Estate Broker's Act and the Utah Statute of Frauds. *See* Minute Entry Decision (R. 2208-12.) The trial court also granted summary judgment in favor of United Park on the grounds that the undisputed material facts demonstrate that no enforceable express or implied oral finder's fee agreement was ever entered into between Sachs and United Park and that the alleged agreement does not include all of the required material terms, such as the amount of the fee, and therefore was merely an agreement to agree. (*Id.*)

Sachs also asserted claims against Capital Growth for breach of contract and quantum meruit. (R. 17-20.) The trial court granted summary judgment in favor of Capital Growth on these claims. *See* Order Granting Capital Growth Partners LLC's Motion for Summary Judgment ("Capital Growth Order") (R. 2191-95.) Sachs has not appealed the Capital Growth Order. (R. 2191-95; Sachs Brief at 5.)

II. COURSE OF PROCEEDINGS.

1. On January 26, 2004, Sachs filed his Complaint and Demand for Jury Trial ("Complaint"). (R. 1-27.)

2. The Complaint alleges the following five Counts: (a) Count I – Declaratory Judgment; (b) Count II – Breach of Contract; (c) Count III – Quantum Meruit – Contract Implied in Law; (d) Count IV – Quantum Meruit – Contract Implied in Fact; and (e) Count V – Intentional Interference with Economic Relations. (R. 16-21.)

3. On February 19, 2004, Lesser and Loeb filed a Motion to Dismiss. United Park and Capital Growth joined in the Motion. (R. 31-53; 54-57.) On September 29, 2004, the trial court issued a Ruling and Order denying the Motion. (R. 157-90.)

4. United Park and Capital Growth filed an Answer on October 13, 2004. Loeb and Lesser filed an Answer on October 15, 2004. (R. 193-206; 207-18.)

5. On January 20, 2005, Capital Growth filed its Motion for Summary Judgment (“Capital Growth Motion”). (R. 525-27.)

6. On March 31, 2005, Loeb and Lesser filed their Motion for Summary Judgment (“Loeb Motion”). The Loeb Motion sought dismissal of all five Counts against Lesser and Loeb alleged in the Complaint. (R. 1082-84.)

7. On April 8, 2005, United Park filed its Motion for Summary Judgment (“United Park Motion”). The United Park Motion sought dismissal of all five Counts against United Park alleged in the Complaint. (R. 1206-08.)

8. The trial court heard oral argument on the Capital Growth Motion on July 27, 2005. On August 11, 2006, the trial court issued its Minute Entry granting the Capital Growth Motion. (R. 2160-62.) The trial court entered the Capital Growth Order on September 13, 2005. (R. 2191-95.)

9. The trial court heard oral argument on the United Park Motion and the Loeb Motion on December 12, 2005. On February 6, 2006, the trial court issued its Minute Entry Decision granting the Motions. (R. 2208-12.) The trial court entered the Final Judgment on February 15, 2006. (R. 2213-22.)

10. Sachs filed his Notice of Appeal on March 16, 2006. (R. 2224-25.) The appeal was transferred to the Utah Court of Appeals on March 23, 2006. (R. 2228.)

III. STATEMENT OF FACTS.

The following undisputed facts are material to the United Park Motion:¹

1. United Park is a Delaware corporation whose “principal business . . . is the leasing, development, and sale of real property located in or near Park City, Utah.” (R. 2-3; 1210.)

2. United Park “owns the surface estate to more than 8,300 acres of land.” (R. 3.) This real property is United Park’s “only asset of any significance whatsoever.” (R. 1210, 1257.)

3. In 1999, United Park was in the process of obtaining approvals to develop two real estate projects: the Flagstaff Mountain Resort Project and the Bonanza Flats Project (“Projects”). (R. 3-4; 1210.)

4. In July 1999, United Park “entered into a letter of understanding with DMB Associates, Inc. (“DMB”) to form a joint venture to develop” the Projects. (R. 4; 1210.)

5. This joint venture was “dissolved” on January 17, 2001. (R. 4; 1211; 1261.)

6. In late December 2000 or early January 2001, Jackson and Hank Rothwell, the president of United Park, had “serious discussions” about the possibility of purchasing United Park themselves. (R. 1211; 1261.)

¹ These facts are either alleged by Sachs in his various pleadings or undisputed by Sachs in response to the United Park Motion.

7. Approximately two weeks after these initial discussions, Rothwell told Jackson that he was not interested in purchasing United Park but that Jackson should “go ahead [and] take a run at it.” (R. 1211; 1261.)

8. In January or February 2001, an article appeared in the newspaper that discussed the dissolution of the joint venture with DMB. (R. 5; 1211.)

9. After publication of this article, it “was public information that [United Park] was in play [and] publicly for sale.” (R. 1211; 1255.)

10. Sachs testified that he understood from reading this same article that “it was apparent that someone would come in and pick up the ball” from DMB. (R. 1211; 1267.)

11. In March 2001, Sachs arranged a meeting between United Park and Granite Construction Company (“Granite”), a California development company with which he “had an established business relationship.” (R. 5; 1211.)

12. During this meeting, Granite and United Park discussed both an “acquisition” of United Park by Granite and a “joint venture” between Granite and United Park to develop the Projects. (R. 1212; 1266.)

13. Granite proposed a joint venture whereby Granite would construct improvements to United Park’s real property in lieu of providing any up-front cash to United Park for the joint venture. (R. 1116.)

14. Sachs testified that at no time before or after this meeting did he have any direct discussions with Rothwell or anyone else at United Park about his expectation of getting paid a finder’s fee by United Park in connection with a possible transaction with Granite. (R. 1212; 1265; 1271.)

15. Subsequently, Marne Obernauer (“Obernauer”), a business associate of Lesser, called Lesser, pursuant to Sachs’ request, to arrange a lunch meeting between Sachs and Lesser in New York. (R. 23.)

16. During his call to Lesser, Obernauer mentioned something about Granite, but did not know any details about the company. Lesser requested that Obernauer provide information about Granite prior to the lunch meeting. (R. 1117; 1176-77.)

17. Sachs arranged for a written brochure about Granite to be sent to Obernauer. The brochure “showed the extensiveness of their real estate development all over the country. Obernauer sent the Granite brochure to Lesser prior to the lunch meeting. (R. 1117; 1176; 1194; 1267.)

18. On or about May 2, 2001, Sachs, Lesser and Obernauer met for lunch in New York City. (R. 5; 1117; 1150; 1177; 1212.)

19. Sachs testified that during the lunch, Sachs and Lesser “talked extensively about Granite” and “that’s about it.” Sachs did not ask Lesser if United Park “was in negotiations with anyone else” nor did Sachs discuss with Lesser “any other potential buyer [or] joint venture partner by name.” (R. 1212; 1269.)

20. Sachs testified that the only “non-commonly known information” that he learned during the lunch was that Loeb, the controlling shareholder of United Park, was dissatisfied with Rothwell and felt that the “sooner they got [United Park] sold, the better it was.” Sachs did not view this information as “confidential.” (R. 1212-13; 1273.)

21. Sachs testified that during the lunch, “nothing at all” was said about a finder’s fee. Indeed, Sachs admits that at no time has anyone affiliated with United Park,

including Lesser or Rothwell, told him that he would be paid a finder's fee if he found a buyer for United Park. (R. 1213; 1270; 1280-81.)

22. Approximately two months after the meeting between Granite and United Park, Sachs sent a letter to Rothwell on May 17, 2001, regarding Granite. This letter was drafted with the assistance of Sachs' counsel at Prince Yeates. (R. 9; 1213; 1276-77.)

23. The May 17, 2001, letter states in its entirety as follows:

I am delighted that my introducing United Park City Mines to Granite Land Company appears to be heading in the right direction and I am pleased that the confidentiality letter has been signed. I certainly will continue to do everything in my power to bring together a mutually satisfactory agreement between these two parties. I took this opportunity to express this commitment to your chairman, Joe Lesser (sic), when he invited me to lunch at the Sky8Room in New York in early May.

I perceive this venture as joining two entities with the potential of creating one of the nations premier skiing and real estate developments. In other words, I think that both parties are in the right place at the right time. I hope you agree.

In that lunch with Joe Lesser, I was delighted to find that he seems to share our enthusiasm for this joint venture. I hope that this feeling is generally shared by the rest of your board. Most potential JV land development partners would still require a Granite Construction to do the development infrastructure. This JV partner comes with that capability. Joe gave me his encouragement to "get the job done."

I write this letter to remind you that I will expect a modest finder's fee if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us. While I believe we have an understanding as to this finder's fee, I do think that matters of this sort ought to be out on the table early on, and I hope that you feel the same.

Please let me know if you have any questions about such a finder's fee.

I look forward to continuing our quest to link these two parties for everyone's benefit, including the shareholders who overwhelming (sic) expressed their approval.

(emphasis added) (R. 1283) (Attached hereto as Addendum 1).

24. Sachs testified that when the letter was drafted, he did not have "anything specifically in mind [and he] was trying to draw [Rothwell] out to come up with something" for a finder's fee. Sachs admits that the language in the letter regarding the finder's fee "it's not clear here" and that he didn't even know which United Park project the lots would be in. (R. 1277.)

25. Sachs admits that Rothwell did not respond to the letter and the "specific amount of a finder's fee" was never discussed with Lesser, Rothwell or anyone affiliated with United Park. (R.1213.)

26. On May 18, 2001, Sachs sent another letter to Rothwell regarding Granite, which does not make any reference to a finder's fee. It states in its entirety as follows:

I understand after a conversation yesterday with Joe Lesser, that his preference would be to sell the company rather than enter into a joint venture. I had referred to a joint venture in yesterday's letter because I had understood that you would consider such a proposition (and that is obviously what Granite seeks), and because a joint venture purchaser might also work for everyone.

Happily, if you company's preference is sale, Granite, as I suggested in yesterday's letter, is still an excellent prospect. Another investor, together with Granite, would make an excellent purchaser. I am happy to re-direct my focus to obtaining such a joint venture purchaser.

Obviously, I will continue to keep you apprised of all

proposals, whether for sale or for a joint venturing of the project.

(emphasis added) (R. 9; 1213-14; 1278; 1284.) (Attached hereto as Addendum 2.)

27. Rothwell did not respond to the May 18, 2001, letter. (R. 1214; 1277.)

28. The agreement with Granite referenced in the May 17, 2001, letter and the May 18, 2001 letter never came to “fruition” because Granite did not enter into a joint venture with United Park or purchase United Park. (R. 1214.)

29. On June 2, 2001, an article appeared in the Park Record entitled “Merger Rumblings Heard at UPCM.” The article states United Park “was exploring strategies to raise money in order to fund the construction of Flagstaff Mountain Research and Bonanza Mountain Resort,” including “a sale or exchange of [United Park’s] capital stock, assets, projects or business to one or more parties . . .” (R. 1214; 1267.)

30. Sachs testified that sometime before the “end of the first week in June” 2001, he first contacted Jackson regarding United Park. (R. 1214; 1273.)

31. When Sachs contacted Jackson, Jackson already knew that United Park was for sale through his discussions with Rothwell and the articles in the Park Record. The only “new” information Sachs relayed to Jackson was that Sachs had lunch with Lesser in early May 2001 and that the “sooner” United Park was sold, the “better.” (R. 1198; 1214-15; 1256; 2052.)

32. On June 4, 2001, Sachs sent Jackson a facsimile coversheet regarding “JV Granite Const” requesting that Jackson call “after your talk with Hank Rothwell.” (R. 10; 1215; 1287.) (Attached hereto as Addendum 3).

33. Sachs testified that he did not discuss a finder's fee with Jackson. Nor did Sachs inform Jackson that he considered Jackson to be his "client." (R. 530; 560.)

34. Although Sachs was represented by counsel at this time, Sachs did not send United Park a letter or any other document indicating that he considered Jackson to be his "client" or that he expected to receive a finder's fee in the event of a transaction between Jackson and United Park. (R. 1974.)

35. After June 4, 2001, Sachs called Jackson on several occasions to inquire about Jackson's negotiations with United Park. (R.9; 1120.) Jackson merely gave Sachs the courtesy of returning his calls. Jackson testified that "Sachs called . . . so many times that it was a nuisance [but I] was not going to share any information with him" because he was an "outsider" to the entire transaction. (R. 2056-57; 2138-39.)

36. On or about February 21, 2002, Capital Growth "formally offered to purchase" United Park. (R. 11; 1215.)

37. On February 23, 2002, the Salt Lake Tribune published an article regarding Capital Growth's purchase of United Park. (R. 1215; 1278; 1288.)

38. The day after the article appeared in the Salt Lake Tribune, Sachs sent a fax to Rothwell regarding "completion of task." This was the first time Sachs notified United Park that he considered Jackson to be his "client." (R. 1215; 1279.)

39. Between June 2001 and February 2002, Sachs testified that the "only" thing he did to find a purchaser for United Park was "make periodic telephone calls" to Jackson. (R. 1215; 1279.)

40. Sachs never attended any meetings between United Park and Jackson, was never asked to sign a confidentiality agreement with United Park, and never participated in any negotiations with United Park. Sachs learned of Capital Growth's agreement to purchase United Park like the rest of the world, through a newspaper article. (R. 1977; 2021-22.)

41. On June 16, 2003, United Park and Capital Growth "completed a revised merger agreement whereby [United Park] became a wholly owned subsidiary of [Capital Growth]." (R. 14; 1215.)

42. After the closing of the transaction, Sachs repeatedly "accosted" Jackson at restaurants in Park City to discuss his claim for a finder's fee. In an attempt to be polite and not cause a scene, Jackson responded to Sachs' statement that he had an "arrangement" with Lesser by stating "good for [you]." Jackson also told Sachs that "that's between you and Lesser" and that he personally "didn't mind" if Lesser paid him a fee. (R. 1978; 2023; 2060.)

43. On August 19, 2003, Rothwell sent a facsimile to Sachs stating "Ira-United Park does not agree with your agency argument. Gerry [Jackson] and I have discussed UP [United Park] for years! We viewed you as a representative of Granite Construction only!" (R.1452; 2062) (Attached hereto as Addendum 4).

44. Sachs admits that did not forego any business opportunities by attempting to locate a purchaser for United Park. Indeed, Sachs testified that he spent no more than 10 hours attempting to find a buyer for United Park. (R. 1216; 1275-76.)

45. Sachs has never held a real estate license in Utah. His real estate license in New York lapsed “at least 15, 20 years ago.” (R. 1216; 1263.)

46. Sachs has never received a finder’s fee for the sale of a company. (R. 1970; 2005-07, 2045.)

SUMMARY OF ARGUMENTS

The trial court correctly ruled that Sachs’ claims against United Park fail as a matter of law because there is no genuine dispute that: (1) the only asset of any significance of United Park was its real property; (2) the principal business of United Park was the leasing, development and sale of real property; (3) Sachs suggested compensation in the form of “a couple of prime developed lots” in United Park’s new real estate project; and (4) Sachs never held a Utah real estate license. Consequently, the Utah Real Estate Broker’s Act, Utah Code Ann. § 61-2-1 -2-24, precludes Sachs from recovering compensation for allegedly finding a purchaser for United Park.

The trial court also correctly ruled that Sachs’ claims against United Park fail as a matter of law under the Utah Statute of Frauds, Utah Code Ann. § 25-5-1 -4-9. It is undisputed that United Park never signed any “writing” regarding the alleged finder’s fee agreement that complies with the Statute of Frauds. The Statute of Frauds also bars Sachs’ claims for quantum meruit and unjust enrichment. Although Sachs alleges that his “partial performance” removes the alleged agreement from the Statute of Frauds, the “partial performance” exception is inapplicable in an action for the recovery of a finder’s fee and, in any event, Sachs fails to satisfy the requirements of this exception.

Finally, the trial court correctly dismissed Sachs' breach of contract claims because no enforceable express or implied finder's fee agreement was ever entered into between Sachs and United Park. United Park never agreed to pay Sachs a finder's fee and there was no meeting of the minds or mutual assent on the "critical" terms of the alleged agreement, including the identity of Sachs' client and the amount of the finder's fee. Further, the undisputed material facts demonstrate that Sachs did not in fact "find" Jackson, who was already in negotiations with United Park when Sachs first called him. Accordingly, the trial court correctly granted summary judgment in favor of United Park and this Court should affirm the Final Judgment.²

ARGUMENT

I. SACHS HAS NOT APPEALED THE DISMISSAL OF HIS CLAIM FOR INTENTIONAL INTERFERENCE WITH EXISTING AND/OR PROSPECTIVE ECONOMIC RELATIONS.

In the Complaint, Sachs alleges five Counts against United Park: (a) Declaratory Judgment; (b) Breach of Contract; (c) Quantum Meruit – Contract Implied in Law; (d) Quantum Meruit – Contract Implied in Fact; and (e) Intentional Interference with Existing and/or Prospective Economic Relations. (R. 16-21.) The Final Judgment dismisses all Counts against United Park. (R. 2213-22.) Sachs does not challenge the trial court's granting of summary judgment in favor of United Park on his intentional interference with existing and/or prospective economic relations claim. Consequently, this Court should affirm the dismissal of Count V of the Complaint.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE ARE

² United Park also joins in the brief of Lesser and Loeb.

NO GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT IN FAVOR OF UNITED PARK.

Sachs generally that there are “genuinely disputed issues of material fact that remain for trial” on all of his claims against United Park. Sachs fails to identify any such material facts, however. Pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Summary judgment is not precluded “simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted.” *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1978). A “genuine issue of fact” only exists “where, on the basis of the facts in the record, reasonable minds could differ on whether defendant’s conduct measures up to the required standard.” *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). When a moving party “challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.” *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 31, 54 P.3d 1054. The nonmoving party must then present “evidence that could be interpreted to satisfy the elements of the claim.” *Id.* at ¶ 35. This evidence must be “more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.” *Id.* at ¶ 31.

In this case, there are no genuine issues of material fact that relate to the United Park Motion. The trial court correctly applied the law to these undisputed material facts and this Court should affirm the Final Judgment.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT SACHS' CLAIMS FOR A FINDER'S FEE FAILED AS A MATTER OF LAW BECAUSE HE DOES NOT HAVE A VALID REAL ESTATE LICENSE AS REQUIRED BY THE UTAH REAL ESTATE BROKERS ACT.

The trial court correctly ruled that Sachs' claims are barred because Utah law specifically precludes any person without a valid real estate license from recovering any compensation for facilitating real estate transactions or finding potential purchasers of real estate. It is undisputed that United Park's only asset of any significance was its real property. It is also undisputed that Sachs has never been properly licensed as a real estate broker or agent in Utah. Accordingly, Sachs' claims fail as a matter of law and this Court should affirm the Final Judgment.

The Utah Real Estate Brokers Act ("UREBA"), Utah Code Ann. §§ 61-2-1 –2- 24, specifically provides that "[i]t is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent within this state without a license obtained under this chapter." A "principal real estate broker" includes any person "who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of" the sale or purchase of "real estate."³ *Id.* § 61-2-2(12)(d); *see also Diversified General Corp. v. White Barn Golf Course, Inc.*, 584 P.2d 848, 852 (Utah 1978) (holding that § 61-2-2 applies to finder's agreements); *Andalex*

³ There is no *de minimis* exception to the real estate licensing provisions. "[O]ne act, for valuable consideration, of buying, selling, leasing, managing, or exchanging real estate for another, or of offering for another to buy, sell, lease, manage, or exchange real estate, requires the person performing, offering, or attempting to perform the act to be licensed as a principal real estate broker, an associate real estate broker, or a real estate sales agent as set forth in this chapter." Utah Code Ann. § 61-2-17.

Resources, Inc. v. Myers, 871 P.2d 1041, 1045 (Utah Ct. App. 1994) (“The act of finding or locating a prospective buyer falls within the reach of the broker licensing statutes.”).

Further, section 61-2-18 provides:

No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

“‘Real estate’ includes leaseholds and business opportunities involving real estate.” *Id.* at § 61-2-2(14). This expansive definition reflects the legislature’s intention that the real estate licensing provisions be given broad application. *Chade v. Morgan*, 339 P.2d 1019, 1021 (Utah 1959) (“[T]he legislature saw fit to include within the definition of the term ‘real estate’ leaseholds and other interests less than leaseholds. This clearly indicates the intention of the legislature that a broad coverage be given to the term ‘real estate’ for the purposes of this Act.”).

In light of this clear prohibition, it is not surprising that there are no published Utah cases involving suit by an unlicensed person seeking to recover a commission under a purported finder’s fee agreement relating to the sale of a business involving real estate opportunities. There are a number of cases from other jurisdictions, however, that have considered this issue. The majority of these cases have concluded that an unlicensed broker may not recover a commission or finder’s fee relating to the sale or ownership transfer of a business involving a real estate component, regardless of how *de minimus* that component may be. See *Chapin v. Neuhoﬀ Broadcasting-Grand Island*, 684 N.W.2d

588, 593 (Neb. 2004) (“[T]he Act’s licensure requirement for real estate brokers applies to transactions that involve any real estate or improvements thereon.”); *Blackthorne Group, Inc. v. Pines of Newmarket, Inc.*, 848 A.2d 725, 2004 WL 840281, *5 (N.H. 2004) (“[T]he Act expressly defines ‘real estate’ to include ‘business opportunities which involve any interest in real estate. The use of the word ‘any’ means that the Act applies regardless of whether real estate is ‘incidental’ to the transaction. The Act thus applies to the broker of business opportunities involving real estate, no matter how *de minimis* the real estate interest.”); *GDC Environmental services, Inc. v. Ransbottom Landfill*, 740 N.E.2d 1254, 1258 (Ind. Ct. App. 2000) (stating that it is “the majority rule that if a sale of a business involves any real estate component, no matter how *de minimus*, the unlicensed broker is denied recovery of any commission.”); *Lieff v. Medco Professional Services*, 973 P.2d 1276, 1278 (Colo. Ct. App. 1998) (holding that licensing statute precluded unlicensed plaintiff from recovering commission where sale of corporate stock resulted in transfer of a leasehold).

A lesser number of courts have adopted a rule that an unlicensed person will not be precluded from potentially recovering a commission if the real estate component is “merely incidental” to the sale of the entire business, *i.e.*, real estate was not a significant asset of the company or the motivating factor for the sale.⁴ *GDC Environmental*, 740 N.E. 2d 1254, 1258 (Ind. Ct. App. 2000) (adopting majority rule, but noting that a minority of “jurisdictions hold that an unlicensed broker is not precluded from recovering

⁴ An extreme minority of courts have adopted the rule suggested by Sachs.

a commission if the real estate component is ‘merely incidental’ to the sale of the entire business.”); *Thomas v. Daubs*, 684 N.E.2d 1011, 1015 (Ill. Ct. App. 1997) (adopting rule permitting “unlicensed broker to collect his fee only when the real estate is incidental to the transaction.”); *March Group, Inc. v. Bellar*, 908 S.W.2d 956, 960 (Tenn. Ct. App. 1995) (“Where the sale of a business involves only a transfer of stock, the real estate owned by the corporation should be viewed as incidental to the sale *unless it is the business’ principal asset.*”) (emphasis added).

The trial court correctly ruled that Sachs’ claims fail as a matter of law under application of either rule. There is no dispute that the “only asset of any significance” of United Park was its real property and that the principal business of United Park was the leasing, development and sale of real property. There is also no dispute that Sachs has never held a Utah real estate license.⁵ Accordingly, the trial court correctly determined that Sachs’ claims are barred as a matter of law by Utah Code Ann. §§ 61-2-18.

Sachs asserts four arguments challenging the trial court’s decision. First, Sachs asserts that UREBA does not bar Sachs’ claims because it is a “penal statute” that must be “strictly construed to avoid criminalizing conduct not clearly prohibited under its provisions.” (Sachs Brief at 37.) Sachs next argues that “it was the stock of [United Park] that was sold, not its real property” and therefore UREBA does not apply. (Sachs Brief at 41.) Third, Sachs argues that his “offer to accept his finder’s fee in the form of two prime developed lots” is irrelevant. (Sachs Brief at 43.) Finally, Sachs argues that UREBA is “not offended” because Rothwell and Lesser are themselves licensed real

⁵ Sachs formerly held a New York real estate license that expired 15-20 years ago.

estate agents. (Sachs Brief at 44.)⁶ Sachs' arguments are without merit and the trial court correctly ruled that Sachs' finder's fee claims are barred by UREBA.

A. UREBA is a Comprehensive Scheme Enacted to Regulate Real Estate Sales and Brokerage Practices and is Not a Penal Statute.

Sachs' assertion that he should be excused from complying with UREBA because it is a "penal statute" is erroneous. Sachs completely ignores the fact that he has neither been charged with criminal violations of UREBA nor has any reasonable belief that he might be so prosecuted.⁷ Indeed, Sachs is not even a defendant in this action. Moreover, UREBA is not a penal statute, but rather a comprehensive scheme enacted to regulate the practice of real estate sales and brokerage practices. "[A] statute is not penal simply because its violation is a Class [A] misdemeanor." *Evelyn v. Commonwealth*, 621 S.E.2d 130, 136 (Va. Ct. App. 2005). Rather, a court must examine the legislature's intended purpose in enacting the statute. As stated more fully by the United States Supreme Court:

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the

⁶ Although Sachs also argues that "genuinely disputed issues of material fact also preclude summary judgment on these claims," Sachs fails to identify any disputed issues of fact that are material to the issue of whether UREBA bars his claim for a finder's fee. (Sachs Brief at 36.)

⁷ Thus, there are no "due process" concerns such as those found in *State v. Mooney*, 2004 UT 49, ¶ 17 (Criminal prosecution of defendant under Utah Controlled Substances Act).

evident purpose of the legislature.

Trop v. Dulles, 356 U.S. 86, 96 (1959). Accordingly, where a statute's primary purpose is regulatory or non-penal, the statute should be construed liberally, not narrowly as Sachs would suggest. See *Evelyn*, 621 S.E.2d at 137 ("the statute has a primarily regulatory, non-penal purpose and should be construed liberally in favor of the public interest rather than against it."); see also *Viking Pools, Inc. v. Maloney*, 770 P.2d 732, 607, n.4 (Cal. 1989) ("If a statute's purpose is not to punish but to accomplish some other legitimate governmental purpose, then the statute is considered nonpenal. Hence, given the statute's purpose, like other statutes that provide for disciplinary action against licensees, the Contractors' State License Law is not penal in nature.").

The Virginia Court of Appeals' decision in *Evelyn* is illustrious of this principle. In *Evelyn*, the Court was asked to consider the intent and effect of Virginia's statutory scheme regulating the use and ownership of riparian lands within the State. *Id.* at 133-140. Pursuant to state statute, a riparian landowner was entitled to build a "pier" or "landing" upon his or her property without first obtaining a permit. *Id.* at 136. The statute provided, however, that a permit was required if the structure would encroach upon state owned "subaqueous riverbeds" *unless* such was "necessary" for placement of the "pier" or similar structure. *Id.* Construction of a "pier" (or similar structure) over state owned "beds of the bays, ocean, rivers, streams, or creeks" without a permit constituted a "Class 1 misdemeanor." *Id.* at 135. The pertinent statutes did not define relevant terms such as "pier" and "necessary." *Id.* at 136-37. Appellant constructed—without a permit—a pier that encroached upon state-owned "subaqueous riverbeds." *Id.*

at 132. The pier had a roof and second story structure, which the Virginia permitting agency determined (after the pier was completed) was not necessary or essential to the pier. *Id.*

Ultimately, the Virginia Court of Appeals agreed that the roof and second story structure was not “necessary” to the construction of the pier and ordered that it be removed by the appellant. *Id.* at 139. In so doing, the Court rejected appellant’s argument that the undefined terms in the statutory scheme must be construed narrowly and in a fashion favorable to the appellant because the statutory scheme was purportedly “penal” in that it provided for criminal penalties. *Id.* at 136-37. The Court determined that the statute was not penal, but rather was a comprehensive regulatory scheme designed to protect rights of use and ownership of state owned lands. *Id.* As such, the Court determined that the terms in question should be construed liberally and in line with the understood intentions of the Virginia State Legislature. *Id.* at 137.

UREBA, like the statute in *Evelyn*, is not penal because its primary purpose is not to punish, but rather to provide comprehensive regulations regarding issues of public concern. As indicated by a plain reading of UREBA, its principal intent is to protect the public by regulating real estate sales and brokerage practices. *See* Utah Code Ann. § 61-2-1 -2-24; *Global Recreation, Inc. v. Cedar Hills Dev. Co.*, 614 P.2d 155, 158 (Utah 1980) (stating that the provisions governing real estate sales were enacted for the “protection of members of the public who rely on licensed real estate brokers and salesmen to perform tasks that required a high degree of honesty and integrity. The licensing requirements and the provisions designed to enforce compliance therewith are

designed to assure such honesty and integrity.”); *Blackthorne Group, Inc. v. Pines of Newmarket, Inc.*, 848 A.2d 725, 728 (N.H. 2004) (describing act strikingly similar to UREBA as “establishing a comprehensive system for regulating real estate sales and brokerage practices. It’s purpose is to ‘regulate the practice of real estate brokers and salespersons . . . to ensure that they meet and maintain minimum standards which promote public understanding and confidence in the business of real estate brokerage.”). Accordingly, the provisions of UREBA are not primarily penal in nature and should be read liberally, not narrowly as urged by Sachs.⁸

Moreover, contrary to Sachs’ assertion, the definition of “real estate” is to be interpreted expansively for purposes of Utah’s real estate licensing statutes. As clearly stated by the Utah Supreme Court, it was “the intention of the legislature that a broad coverage be given to the term ‘real estate’ for the purposes of this Act.” *Chade v. Morgan*, 339 P.2d 1019, 1021 (Utah 1959). As noted by the Court, the expansive scope of UREBA is readily evidenced by the legislature’s defining “real estate” to include “interests less than leaseholds.” *Id.* The legislature broadened the scope of UREBA even

⁸ The provisions of UREBA are no more penal than are the myriad of other statutes contained in the Utah Code that regulate various occupations and professions. For example, the Utah Medical Practice Act sets forth over-arching regulations regarding the practice of medicine, including licensing requirements, board supervision and other matters. *See* Utah Code Ann. § 58-67-1 -67-803. Also included within the Utah Medical Practice Act is a provision for possible imposition of criminal penalties for violating certain portions of the Act. The inclusion of such penalty provisions within the overall regulatory scheme cannot reasonably be construed to mean that the Utah Medical Practice Act is a penal statute.

further by defining “real estate” to specifically include “business opportunities involving real estate.” *See* Utah Code. Ann. § 61-2-2(14).⁹

B. The Trial Court Correctly Determined that UREBA Applied Even Though the Real Estate was Transferred Via the Purchase of Corporate Stock.

As demonstrated above, the vast majority of courts to have considered the issue

⁹ Sachs does not dispute that “business opportunities involving real estate” is included within the definition of “real estate” under UREBA. Rather, Sachs contends that because “business opportunities involving real estate” is not presently defined in the statute, it is necessarily vague and ambiguous and must be construed by the Court in a manner most favorable to him. Sachs’ assertion is antithetical to the long standing rule of law that the courts are to give undefined terms their ordinary meaning as believed to be intended by the legislature. As recently stated by the Utah Supreme Court:

Our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meant. Furthermore, we read the plain language of the statue as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.

State v. Holm, 2006 UT 31, ¶ 16 (internal citations omitted).

Sachs also cites *Andersen v. Johnson*, 160 P.2d 725 (Utah 1945) for the proposition that “definitions of the terms ‘real estate broker’ and ‘real estate’ [should not be extended] by implication.” (Sachs Brief at 37.) In *Andersen*, the plaintiff assisted the defendant real estate broker in obtaining a listing for a farm. In return for this assistance, defendant agreed to pay him one-third of his commission once the farm was sold. Plaintiff did not list the farm, obtain a buyer for the farm, or otherwise participate in the sale of the farm. After the farm was sold, defendant refused to pay plaintiff one-third of his commission. Plaintiff sued and defendant defended on the grounds that his claim was barred by the statutory provisions regulating real estate brokers. The Utah Supreme Court held that the statute “does not cover such an act.” *Id.* at 728. In holding that it would be improper to “stretch” the meaning of the statute to include plaintiff, the Court likened plaintiff’s assistance to the abstractor who prepared the abstract of the property or the stenographer who typed the contract of sale or the deed or the lease used in the transaction. *Id.* 729. As explained in the concurring opinion, such persons are not “active participants in any contract affecting real estate” and have only a “casual” or “remote” role in the transaction. *Id.* at 730.

have determined that statutes such as UREBA strictly preclude an unlicensed person from seeking to recover compensation for brokering or finding potential buyers for businesses or corporations with significant real estate assets. This rule applies even if the sale merely contemplates the transfer of corporate stock. *Everett v. Goodloe*, 602 S.E.2d 284, 289 (Ga. Ct. App. 2004) (“The sale of all of the stock of the corporation was in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction.”); *Lieff, supra*, at 1278 (“We conclude that there is no requirement that real estate or a leasehold be transferred from one legal entity to another to trigger the licensure requirements. Rather, where, as here, the corporation whose entire stock is sold holds a leasehold that becomes the buyer’s leasehold as a result of the sale, whether by transfer from the seller or otherwise, an indirect change in a leasehold interest, and therefore, the licensure requirements apply.”); *All Points Traders, Inc. v. Barrington Assocs.*, 259 Cal. Rptr 780, 784 (Cal. Ct. App. 1989) (rejecting plaintiff’s argument that “when a business is transferred through the purchase and sale of stock, rather than a purchase of assets and goodwill, the business opportunity licensing requirements do not apply.”).¹⁰

¹⁰ Sachs’ contention that the statutes involved in the cases relied on by the trial court are drastically different from Utah’s real estate licensing provisions is inaccurate. UREBA specifically provides that “[r]eal estate’ includes leaseholds and business opportunities involving real estate.” Utah Code Ann. § 61-2-2(14). This provision is similar in substance to the statutes at issue in the cases cited by United Parks. See *Chapin, supra*, at 593 (applying Nebraska Real Estate License Act, which does not expressly include businesses within scope of act); *Blackthorne, supra*, at 728 (“[T]he Act expressly defines ‘real estate’ to include ‘business opportunities which involve any interest in real estate.’”);

Whether the sale is for a corporation's real property or merely for all of the corporation's stock, the net effect is the same.¹¹ Wisely, the legislature recognized this fact and determined that the scope of UREBA is to extend to "business opportunities involving real estate."¹² The sale of a corporation whose sole significant asset is real estate and whose essential purpose is the development of such real estate falls squarely within the ambit of UREBA.¹³

GDC Environmental, supra, at 1258 ("Indiana's Licensing Act, unlike that of some states, does not expressly include the sale of a business within the statutory definition of broker activities that must be licensed."); *Lieff, supra*, at 1278 (statute requiring real estate license for anyone "negotiating or attempting or offering to negotiate the listing, sale, purchase, exchange, or lease of a business or business opportunity or the goodwill thereof or any interest therein when such act or transaction involves, directly or indirectly, any change in the ownership or interest in real estate, or in a leasehold interest or estate, or in a business or business opportunity which owns an interest in real estate or in a lease-hold."); *March, supra*, at 960 (applying Tennessee real estate licensing provisions, which do not expressly include businesses within scope of act).

¹¹ Sachs cites two cases – *Silvertooth v. Kelley*, 91 P.2d 1112, 1114 (Or. 1939) and *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366 (3rd Cir. 1990) – for the proposition that brokerage of the stock of a corporation does not fall within real estate licensing provisions regardless of whether the corporation owns real property, significant or otherwise. (Sachs Brief at 40.) *Silvertooth* and *Gruber* did reach this conclusion. However, *Silvertooth*, which was decided in 1939 (and whose state statutes did not include "business opportunity" within the definition of "real estate"), and *Gruber* are in the extreme minority and Sachs does not assert otherwise. Further, a subsequent Third Circuit panel found the *Gruber* opinion to be largely erroneous and based upon faulty reasoning and interpretation of case law. *Cooney v. Ritter*, 939 F.2d 81, 86-88 (3rd Cir. 1991). The Third Circuit in *Cooney* ultimately rejected the holding in *Gruber* and determined that, under New Jersey law, real estate licensing provisions did apply to the sale of corporate stock. *Id.* at 88. As such, the Court determined that an unlicensed broker could only recover compensation on the purchase price of corporate stock that was attributable to the personal property of the corporation. *Id.*

¹² Sachs essentially concedes that his claims would be barred if United Park and Capital Growth had structured the transaction as an asset purchase.

¹³ In addition, there is no dispute that the potential purchasers allegedly contacted by Sachs – Bob Wells at Deer Valley, Granite and Jackson – are all real estate developers.

C. UREBA Bars Sachs' Claims Regardless of Alleged "Sophistication" of Lesser, Loeb and United Park.

Finally, Sachs' argument that the "purpose" of UREBA is not offended by enforcing the alleged oral finder's fee agreement is unavailing. (Sachs Brief at 43-44.) This argument completely ignores the fact that this Court has specifically rejected the argument that "the presumed purpose" of UREBA means that "sophisticated" parties are not entitled to the protections of the statute. *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1045 (Utah Ct. App. 1994). In *Andalex*, this Court specifically stated:

We disagree with Myers' premise that the presumed purpose of a statute overrides its literal terms. *** Even if we accept the argument that the purpose of the statute overrides the statute's unambiguous language, the services provided by Myers still fall within the purpose of the licensing statutes. The legislature clearly intended the licensing requirements to apply to "finders." Further, nothing suggests that "sophisticated" corporate entities such as Andalex should not be entitled to the same protections as the general public under the statute.

Id. at 1045 & n.6 (internal citations omitted).¹⁴

United Park is fully entitled to invoke the protections of UREBA and the trial court correctly ruled that Sachs' claims are barred by UREBA.

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT SACHS' CLAIM FOR A FINDER'S FEE BASED ON AN ALLEGED ORAL AGREEMENT IS BARRED BY THE UTAH STATUTE OF FRAUDS.

The trial court also correctly determined that Sachs' claims fail as a matter of law because the alleged oral finder's fee agreement is barred by the Utah Statute of Frauds,

¹⁴ The only cases cited by Sachs in support of this argument are mechanic's lien cases. These cases are simply not applicable.

which is intended to protect parties such as United Park from “fraudulent and fictitious claims for commission” by parties such as Sachs. *See Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co.*, 779 P.2d 230, 234 (Utah Ct. App. 1989). The Utah Statute of Fraud provides:

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4.¹⁵ This provision applies with equal force to purported “finder’s agreements.” *Machan*, 779 P.2d at 234 (The Statute of Frauds “applies broadly to agreements requiring compensation for brokering real estate, including finder’s agreements, and not just to contracts employing brokers to purchase or sell real estate for compensation.”); *C.J. Realty, Inc. v. Willey*, 758 P.2d 923, 927 (Utah Ct. App. 1988) (holding that the Statute of Frauds “applies to the commission agreements of real estate

¹⁵ As noted in Section III, *supra*, under Utah law, “‘real estate’ includes leaseholds and business opportunities involving real estate.” *See* Utah Code Ann. § 61-2-2(14). Statutes are considered to be *in pari materia* and must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. *J.J.W. v. State, Div. of Child and Family Services*, 33 P.3d 59, 63 (Utah Ct. App. 2001). When considering statutes related to the same subject matter, courts will attempt to construe them in harmony such that effect is given to every provision in all of them. *I.M.L. v. State*, 61 P.3d 1038, 1047 (Utah 2002). Moreover, “where two statutes treat the same subject matter, and one statute is general while the other is specific, the specific provision controls.” *Floyd v. Western Surgical Assoc.*, 773 P.2d 401, 404 (Utah Ct. App. 1989). Accordingly, “real estate,” for purposes of the Utah Statute of Frauds, should be defined the same as under UREBA.

brokers generally and not just to contracts employing brokers to ‘purchase or sell real estate for compensation.’”).

To comply with the Statute of Frauds, a finder’s fee agreement “must contain all the essential terms and provisions of the contract to which the parties have agreed.” *Machan*, 779 P.2d at 234. These “critical terms” include: the identity of the finder; the finder’s clients; the property owner who will owe a commission to the finder if a transaction is closed; and the commission rate. *C.J. Realty*, 758 P.2d at 928. Further, the “writings must so clearly evidence the fact that a contract was made, and what its terms are, ‘that there is no serious possibility that the assertion of the contract is false.’” *Machan*, 779 P.2d at 235 (quoting 2 A. Corbin, *Corbin on Contracts* § 512 at 547 (1950)). Based on the undisputed material facts, the trial court correctly held that Sachs’ alleged oral finder’s fee agreement is an agreement relating to the purchase or sale of real estate that does not comply with the Statute of Frauds.

In his brief, Sachs first argues that the trial court erroneously characterized his alleged oral finder’s fee agreement as “relat[ing] to the purchase or sale of real estate.” Sachs argues that the alleged agreement “relates to finding a buyer for [United Park], the corporation, rather than finding a buyer for the real estate assets of [United Park].” (Sachs Brief at 46.) As established in Section III, *supra*, the alleged agreement “relates to the purchase or sale of real estate” because United Park’s “only asset of any significance” was its real property and the principal business of United Park was the leasing, development and sale of real property. Indeed, Sachs introduced Granite as a “potential land development partner” that is capable of doing the “development infrastructure” for

United Park's real estate and thereby creating with United Park "one of the nation's premier skiing and real estate developments." Sachs also suggested that his compensation be in the form of "couple of prime developed lots in the new project." *Id.* The fact that the transaction was ultimately structured as a "stock purchase" rather than an "asset purchase" does not change the nature of the transaction.¹⁶ Indeed, Capital Growth purchased United Park in order to develop the real estate owned by United Park and Sachs' arguments regarding the "form" of the transaction is nothing more than an attempt to elevate form over substance. Accordingly, the trial court correctly concluded that Sachs' alleged oral finders' fee agreement is subject to the Statute of Frauds.

The trial court also correctly held that Sachs' alleged agreement fails to comply with the Statute of Frauds. Sachs admits that the alleged agreement was oral, not written, which by itself, is fatal to his claims. Sachs' alleged agreement also does not set out the "the critical terms" necessary for a finding of an enforceable finder's fee agreement, including the identity of his alleged "client" or the "commission" rate. The only person or entity referred to in any written correspondence between Sachs and United Park is Granite. Sachs has not identified one writing, much less a writing signed by United Park, that mentions Jackson or a potential transaction between United Park and Jackson. Applying this Court's holding in *Machan*, these letters do not "evidence the purported agreement *vis a vis* [Jackson] that [Sachs] seeks to enforce." *See Machan*, 779 P.2d at 236. Indeed, "it is elementary that compliance with the statute of frauds cannot be

¹⁶ Sachs has submitted no evidence that he had any idea what the form of the transaction would be at the time he introduced Granite to United Park.

effected by producing a writing of some contract different from the contract on which the party is basing his claim.” *Id.* Thus, Sachs has failed to demonstrate his compliance with the Statute of Frauds with respect to Jackson, regardless of the “sufficiency” of Sachs’ “hypothetical lawsuit to enforcement payment of a [finder’s fee] upon the sale of [United Park] to [Granite Construction].” *Id.* at 235-6. Accordingly, the trial court correctly determined that the May 17, 2001, and May 18, 2001, letters, alone or combined, do not satisfy the Statute of Frauds.¹⁷

Lastly, Sachs argues that he falls under the “partial performance” exception to the Statute of Frauds. (Sachs Brief at 48.) The trial court, however, correctly rejected this argument because Utah courts have long held that such exception does not apply in the context of claims for commissions relating to real property transactions. *See Case v. Ralph*, 188 P. 640, 642 (Utah 1921) (holding that “a real estate broker or agent cannot recover commission for services rendered in either selling or procuring a purchase for real property unless . . . there is an express contract” and that “performance or part performance of a parol agreement is unavailing”).

Even if this exception is applicable to Sachs’ alleged agreement, the undisputed material facts show that Sachs has not satisfied the requirements of this exception. To remove the alleged agreement from the Statute of Frauds, Sachs must prove by “strong evidence” that (1) the oral agreement and its terms are clear and definite; (2) the acts

¹⁷ Sachs does not dispute that under *Young v. Buchanan*, 259 P.2d 876, 877 (Utah 1953), his assertion of quantum meruit or unjust enrichment claims cannot save his claims for breach of an oral finders’ fee agreement if such agreement is barred by the Statute of Frauds. (Sachs Brief at 47.)

done in performance of the oral agreement are equally clear and definite; and (3) the acts are in reliance on the contract. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of United Park would result in fraud on Sachs. *See Spears v. Warr*, 2002 UT 24, ¶ 22; *see also Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983) (The critical observation to make in assessing what constitutes sufficient part performance is that it must be proved by strong evidence). The doctrine of “partial performance” must be applied with “great care” and the acts allegedly taken must be “substantial.” *Coleman v. Dillman*, 624 P.2d 713, 715 (Utah 1981); *Jenkins v. Percival*, 962 P.2d 796, 801 (Utah 1998).

Sachs fails the first requirement because it is undisputed that Sachs *never* discussed a finder’s fee with anyone at United Park. The *only* alleged basis for the oral finder’s fee agreement is the May 17, 2001, letter from Sachs to United Park. A cursory reading of this letter shows that there are no “clear and definite” terms. Granite is the only potential “client” referred to in the letter. Jackson is not mentioned anywhere in the letter. Nor has Sachs submitted any writing that refers to Jackson, much less Jackson as his client, or a potential transaction between Jackson and United Park. The proposed “finder’s fee” set forth in the May 17, 2001, is vague and ambiguous. Sachs suggests a “modest fee” in the form of “cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us.” No reasonable jury could construe phrases such as “modest fee” and “consideration acceptable to both of us” as “clear and definite” terms regarding the amount of the finder’s fee.

Sachs also fails the second requirement because he has not provided any evidence of “clear and definite acts” done in the performance of the alleged agreement that relate exclusively to Jackson. All of the acts allegedly performed by Sachs – corresponding with United Park and calling Jackson and Granite – were done in connection with Granite’s interest in United Park.¹⁸ Thus, Sachs has failed to show any acts that are “exclusively referable” to the alleged agreement for Jackson. *See Holmgren Bros., Inc. v. Ballard*, 534 P.2d 611, 614 (Utah 1975) (holding that “such acts as are relied on must be exclusively referable to the contract.”); *In re Roth’s Estate*, 269 P.2d 278, 281 (Utah 1954) (“[T]he equitable doctrine of part performance is based on estoppel and unless the acts of part performance are exclusively referable to the contract there is nothing to show that the plaintiff relied on it or changed his position to his prejudice, so as to give rise to an estoppel.”).

For these same reasons, Sachs fails the third requirement of demonstrating that these acts were done in reliance on the alleged agreement regarding Jackson. The only “evidence” cited by Sachs is his self-serving testimony that “he worked a [sic] fee basis, and that a fee for finding a buyer for a corporation is usual and customary.” (Sachs Brief at 49.)¹⁹ It is undisputed that Sachs did not forgo any other business opportunities to pursue a purchaser for United Park. Sachs spent “less than 10 hours” on pursuing a

¹⁸ The other acts alleged by Sachs – “discussing the finder’s fee with Jackson and requesting payment of his finder’s fee after Jackson bought [United Park] – were done *after* Capital Growth purchased United Park and thus can not be considered acts in furtherance of his alleged oral finder’s fee agreement. (Sachs’ Brief at 49.)

¹⁹ Sachs has no basis for making this statement. It is undisputed that he has never received a fee for the sale of a company before.

purchaser for United Park, including the time he spent on Granite.²⁰ Although Sachs argues that he would have found another purchaser to “outbid” Jackson, he fails to identify one such purchaser. Accordingly, the trial court properly rejected Sachs’ partial performance argument and the Court should affirm the trial court’s grant of summary judgment in favor of United Park on the grounds that the alleged agreement is barred by the Statute of Frauds.

V. SACHS CLAIMS FAIL BECAUSE THERE IS NO ENFORCEABLE ORAL AGREEMENT BETWEEN SACHS AND UNITED PARK.

The trial court also correctly ruled that Sachs’ declaratory judgment and breach of contract claims (Counts I and II) fail as a matter of law. It is Minute Entry Decision, the trial court held:

The undisputed material facts demonstrate that no enforceable express or implied finder’s fee agreement was ever entered into. In this Court’s view, no reasonable minds could differ that there was no meeting of the minds or mutual assent on material terms of the alleged finder’s fee agreement, that there is a lack of definiteness and material terms such as price, and no reasonable method to calculate price, manifesting an intent of the parties to be bound thereby, and that any finder’s fee agreement was subject to further negotiation.

Sachs argues that the trial court erred because the May 17, 2001, letter formed an “express” finder’s fee contract and included the “points of mutual agreement necessary to

²⁰ Although Sachs argues that “this evidence is sufficient to raise a jury question on the issue of whether [his] performance is sufficient to take his finder’s fee agreement outside the Statute of Frauds,” this “evidence” simply cannot be interpreted to satisfy the elements of the [exception].” *See Shaw Resources Limited v. Pruitt, Gushee & Bachtell*, P.C., 2006 UT App 313, ¶ 22 (stating that the trial court “must consider each element of the claim under the appropriate standard of proof” on a motion for summary judgment).

create a valid finder's fee contract [which are] (1) the identity of the finder; (2) the thing or person to be found; and (3) the fee to be paid to the finder." (Sachs' Brief at 26.) Sachs then argues that even though United Park never responded to this letter, United Park's "assent" was nevertheless "supplied by Lesser's request to Plaintiff Sachs to find a purchaser for [United Park] after receiving notice of the fee Plaintiff Sachs expected for his services." As discussed further below, the trial court correctly determined that there was no enforceable express or implied contract between United Park and Sachs.

A. The Trial Court Correctly Determined that There Was No Express or Implied Contract Between United Park and Sachs Because There Was No Assent or Acceptance by United Park.

Sachs admits that he never discussed a finder's fee with United Park and that United Park never told him it would pay him a finder's fee. Sachs, however, argues that an express contract was formed when United Park did not respond to the May 17, 2001, or otherwise specifically tell him it would not pay a finder's fee in connection with a transaction between Jackson and United Park. (Sachs Brief at 26.) –This argument is fatally defective as a matter of law. As the Utah Supreme Court explained:

A binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms.

Bunnell v. Bills, 368 P.2d 597, 600 (Utah 1962). See also *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978) ("Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms."). In this case, it is undisputed that United Park never told Sachs it would pay him a finder's fee if he found a purchaser for United Park. Nor did United Park respond to the May 17,

2001, letter or May 18, 2001, letter. Moreover, Sachs alleged conversation with Jackson about United Park occurred weeks *after* he sent these letters to United Park. Thus, there was no reason for United Park to respond to the May 17, 2001, letter, which refers to Granite only, by specifically telling Sachs that it would not pay him the finder's fee if *Jackson* purchased United Park. Under these circumstances and contrary to Sachs' assertion, United Park's silence did not constitute acceptance. Instead, by not responding to the letter, United Park rejected Sachs' "offer" of a finder's fee. *See McGurn v. Bell Microproducts, Inc.*, 284 F.3d 86, 90 (1st Cir. 2002) ("As a general rule, silence in response to an offer to enter into a contract does not constitute an acceptance of the offer."); 1 Arthur Linton Corbin, *Corbin on Contracts* § 3.19 (West 1993) ("It should be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so."); *see also Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995) ("An acceptance must unconditionally assent to all material terms presented in the offer, including price and method of performance, or it is a rejection of the offer.").

The only legal authority cited by Sachs in support of his "silence is acceptance" argument are the Missouri cases of *Central Missouri Prof. Svcs. v. Shoemaker*, 108 S.W.3d 6 (Mo. App. W.D. 2003) and *Moore v. Kuehn*, 602 S.W.2d 713, 718 (Mo. App. 1980). The facts in these cases are not even remotely similar to the undisputed facts in these cases. In *Shoemaker*, the plaintiff submitted a written proposal for engineering services to the defendant. The defendant instructed the plaintiff to proceed with the work, which it did. The Missouri court addressed the issue of whether the defendant's

“verbal acceptance” of the proposal created an oral contract binding on the defendant. The defendant accepted the invoices from plaintiff but later refused to pay them. The Missouri court concluded that there was a binding contract because “it is a well settled rule of law that a written offer may be orally accepted.” *Id.* at 9. In *Moore*, plaintiff prepared a proposal to repair defendant’s roof. After receiving the proposal, defendant told plaintiff that “the roof ought to be fixed, so get on it.” *Id.* at 718. In contrast, Sachs admits that United Park never responded to his May 17, 2001, letter and that this letter refers to Granite, not Jackson. Thus, there was no oral acceptance of Sachs’ proposal. Indeed, Sachs admits that he never discussed a finder’s fee with United Park in connection with Jackson’s potential purchase of United Park and that the first time he informed United Park that he expected a finder’s fee in connection with *Jackson* was in February 2002, after Capital Growth formally offered to purchase United Park and this offer was publicly reported in the Park Record. Thus, any alleged “acceptance” of the “offer” in the May 17, 2001, letter by virtue of United Park’s “silence” necessarily referred to Granite only.

Further, Sachs concedes that the “critical terms” of a finder’s fee agreement includes “the finder’s clients.” *See C.J. Realty*, 758 P.2d at 928. Again, the only “client” identified in the May 17, 2001, and May 18, 2001, letters, which were drafted by Sachs’ legal counsel, is Granite. And, despite the fact that Sachs was represented by legal counsel when he allegedly spoke with Jackson in early June 2001, Sachs did not send a similar letter to United Park identifying Jackson as his “client” or requesting a finder’s fee in the event that a transaction between Jackson and United Park came to “fruition.”

Thus, even if an express finder's fee agreement did exist by virtue of the May 17, 2001, letter, it was limited to Granite and did not encompass Jackson or Capital Growth. *See Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co.*, 779 P.2d 230, 234 (Utah Ct. App. 1989) ("It is elementary that compliance with the Statute of Frauds cannot be effected by producing a writing of some contract different from the contract on which the party is basing his claim.").

B. The Trial Court Correctly Determined that There Was No Express or Implied Contract Between United Park and Sachs Because There Was Meeting of the Minds on the Material Terms of a Finder's Fee Agreement.

The trial court also correctly determined that there was no meeting of the minds or mutual assent on the material terms of the alleged oral finder's fee agreement and that there is a lack of definiteness with respect to price and no reasonable method to calculate price. In Utah, a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed. *Bunnell* at 600. A "meeting of the minds is essential to the formation of any contract and this meeting of the minds must be spelled out, either expressly or implicitly, with sufficient detail to be enforced. *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 294 (Utah Ct. App. 1994) (citing *Valcarce v. Bitters*, 362 P.2d 427, 428 (Utah 1961)). An "agreement to agree" is "unenforceable because [it] leaves open material terms for future consideration, and the courts cannot create these terms for the parties." *Harmon v. Greenwood*, 596 P.2d 636, 639 (Utah 1979). The "legal consequence of a missing price term is the unenforceability of

the agreement.” *Carter v. Sorensen*, 2004 UT 33, ¶ 11.²¹ Agreements that lack material terms, particularly financial terms, are incapable of being enforced by the courts because “[c]ourts are simply not equipped to make monetary decisions impacted by the fluctuating commercial world and are even less prepared to impose paternalistic agreements on litigants.” *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 502 (Utah 1988).

Assuming that United Park’s silence constituted “acceptance” of Sachs’ offer to find a joint venture partner or purchaser for United Park, and assuming further that Sachs’ offer somehow included Jackson even though he is not mentioned in the offer, the letter vaguely proposes “cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us” as the “fee” for finding a joint venture partner or purchaser for United Park. This language clearly demonstrates that any such fee would be subject to further negotiation between Sachs and United Park. Indeed, Sachs admits that when he drafted the letter with the assistance of his counsel at Prince Yeates, he did not have “anything specifically in mind [and he] was trying to draw [Rothwell] out to come up with something.” Under these circumstances, the trial court correctly determined that there was no binding contract between United Park and Sachs that it could or should enforce. *See Barnard v. Barnard*, 700 P.2d 1113, 1114 (Utah 1985); *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1200 (10th Cir. 2000)

²¹ Sachs argues that *Carter* is distinguishable. (Sachs Brief at 30). In *Carter*, it would have been theoretically possible to value the water rights using a fair market value analysis. The point is that there was no evidence, extrinsic or otherwise, that the parties intended the purchase price of the water rights to be their fair market value. *Carter, supra*, at ¶ 11.

(“If the parties intend to negotiate further terms of an agreement, a manifestation of willingness to enter into the agreement is only preliminary, and does not demonstrate the existence of a binding contract.”).

In his brief, however, Sachs argues that there was a “meeting of the minds on the amount of the finder’s fee” because the “couple of prime developed lots in the new project” had a value of approximately \$2 million and that such amount “was an appropriate finder’s fee based on his experience, the expedited manner in which he found a buyer and the size of the deal.” (Sachs’ Brief at 26 and 28.) Sachs misunderstands Utah law and the trial court’s ruling. The issue is not whether it is theoretically possible to place a value on the “prime developed lots” in United Park’s real estate development project. The issue is whether there was a “meeting of the minds” by United Park and Sachs on material terms such as the amount of the finder’s fee. A simple review of the May 17, 2001, letter, coupled with United Park’s lack of response to the letter and Sachs’ admission that he was simply trying to “draw Rothwell out” by sending the letter, establishes that there was no such meeting of the minds as a matter of law. The letter states, in relevant part:

I write this letter to remind you that I will expect a **modest finder’s fee** if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, **or some other consideration acceptable to both of us**. While I believe we have an understanding as to this finder’s fee, I do think that matters of this sort ought to be out on the table early on, and I hope that you feel the same.

(emphasis added).

Importantly, the May 17, 2001, letter states that amount of the finder's fee would have to "acceptable to both of us." This language clearly indicates that Sachs anticipated that the amount of the finder's fee would need to be further negotiated between the parties. As such, the May 17, 2001, letter "is too indefinite and uncertain for enforcement." See *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 373-4 (Utah 1996). Nor does the May 17, 2001, letter state a method for determining a finder's fee. It simply suggests a "modest finder's fee," which is impliedly different from a "reasonable finder's fee."²² It suggests "cash or a couple of prime developed lots in the new project." It does not suggest that a "cash" fee would need to equal the value of such lots.

Moreover, contrary to Sachs' suggestion, there is no "extrinsic evidence" for the jury to consider regarding the amount of the finder's fee. (Sachs' Brief at 29.) Sachs admits that he had NO discussions with Lesser, Loeb or United Park about the finder's fee. The only "communication" between Sachs and United Park (or Lesser and Loeb) regarding the finder's fee is the May 17, 2001. The May 17, 2001, letter does not refer to a "reasonable" or "customary" finder's fee. Thus, there is no basis for extrinsic evidence regarding a "reasonable" or "customary fee." Nor is Sachs' self-serving testimony that 3% of the purchase price of United Park is "an appropriate finder's fee based on his experience, the expedited manner in which he found a buyer and the size of the deal" admissible extrinsic evidence because it does not help "delineate the intent" of United Park or Sachs. See *Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980) ("In reviewing the

²² The payment of \$2 million for a mere 10 hours of "work" is certainly not "modest."

written agreement evidencing the contract, and any ambiguity inherent in the language used, extrinsic evidence may be considered by the court to delineate the intent of the parties”). Sachs has not offered any such extrinsic evidence that would be admissible to show United Park’s intent regarding the amount of the finder’s fee.

Finally, Sachs’ argument that the “price term” is “incidental to the agreement” is completely without merit. (Sachs Brief at 30.) The “finder’s fee” is the “major aspect” of the alleged agreement. It is certainly not an “incidental detail.” In *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317 (Utah 1976), the Utah Supreme Court held that the failure of the parties to agreement on the “rental rate” for the renewal term of the lease rendered the renewal option unenforceable. *Id.* at 364. In *Brown’s Shoe Fit Co. v. Olch*, this Court held that the lack of a “price term in the option period” made a letter outlining the lease terms “too vague and indefinite” to be unenforceable. 955 P.2d 357, 365 (Utah Ct. App. 1998).²³ Based on these undisputed facts and Utah law, the trial court correctly ruled that Sachs’ breach of contract claims fail as a matter of law.

C. The Trial Court Correctly Determined that There Was No Implied Contract Between United Park and Sachs.

In his brief, Sachs argues that even if he “is not entitled to recover under an ‘express’ contract theory, genuinely disputed issues of material fact preclude summary

²³ In contrast, in *Reed v. Alvey*, *supra*, the purchase price of the property was specified in the written agreement. Although the written description of the real property was “concededly vague and incomplete on its face, i.e., corner of Hillview and Ninth East,” the Utah Supreme Court held that “everyone connected with the deal knew what land was involved” and therefore this ambiguity did not render the written agreement unenforceable. Nor did the lack of payment *terms*. 610 P.2d at 1377.

judgment on [his] claims for breach of an implied contract . . .” (Sachs Brief at 31.)²⁴ As discussed above, Sachs’ “unjust enrichment” claims are barred by UREBA and the Statute of Frauds. Even assuming that they are not, the trial court correctly determined that Sachs’ unjust enrichment claims fail as a matter of law.

Quantum merit has two distinct branches: contract implied in law or “quasi-contract” and contract implied in fact. *Scheller v. Dixie Six Corp.*, 753 P.2d 971 (Utah Ct. App. 1988). In order to prevail on a contract implied in law claim against United Park, Sachs must prove that (a) he conferred a benefit on United Park; (b) United Park had an appreciation or knowledge of the benefit; (c) under such circumstances as to make it inequitable for United Park to retain the benefits without payment of its value. *American Towers Owners Ass’n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1190 (Utah 1996). There must be some misleading act, request for services, or the like by United Park to support such an action. *See Commercial Fixtures & Furnishings, Inc. v. Adams*, 564 P.2d 773 (Utah 1977). In order to establish a contract implied in fact, Sachs must establish that: (a) United Park requested that he perform the work; (b) Sachs expected United Park to compensate him for the services; and (c) United Park knew or should have known that he expected compensation. *Dixie Six Corp.*, 753 P.2d. at 975.

The undisputed facts, however, clearly demonstrate that Sachs does not satisfy these requirements as a matter of law. With respect to an alleged “contract implied in law,” it is undisputed that Sachs did not confer a benefit on United Park. Sachs admits

²⁴ Again, Sachs fails to identify any material facts that are in dispute.

that at the time of his initial telephone conversation to Jackson, the fact that United Park was “for sale” had been public information for several months. Sachs does not dispute that Jackson was already pursuing a possible purchase of United Park as a result of his discussions with Rothwell in late December 2000 or early January 2001, six months before Sachs’ telephone call. Sachs further admits that he provided no other “assistance” to either United Park or Jackson. He did not attend meetings, participate in due diligence or negotiate the terms and condition of the purchase.²⁵ Indeed, he was never asked to sign a confidentiality agreement and did not learn of the execution of the agreement between Capital Growth and United Park until he read about it in the newspaper like the rest of the world. Thus, the sum total of the alleged “benefit” conferred on United Park is one telephone call that lasted less than 5 minutes in which already public information was conveyed to Jackson. This was certainly not a “benefit” to United Park, much less a benefit entitling Sachs to receive over \$2 million in a “finder’s fee.”

Further, the undisputed facts show that Sachs fails to satisfy the remaining elements of a breach of implied in law contract claim, namely, that United Park had “an “appreciation” of this alleged benefit under ‘circumstances as to make it inequitable’ for United Park to retain this alleged benefit without payment of its value.” *See American Towers Owners* at 1190. Sachs’ only “evidence” of an alleged “appreciation” is the May 17, 2001. (Sachs’ Brief at 33). This letter, of course, does not refer to Jackson at all. Sachs also submitted no evidence that it would be unjust for United Park to “retain the

²⁵ Indeed, Sachs testified that from May 2001 to July 2003, he spent “no more than 10 hours” allegedly finding a purchaser for United Park.

benefit.” Sachs simply states that Capital Growth purchased United Park for approximately \$67 million. (*Id.*). Given that it was public knowledge that United Park was for sale and that Jackson was already in negotiations with United Park, Sachs fails to show how his 5 minute telephone call to Jackson in June 2001 was the “procuring cause” of this transaction. With these undisputed facts, the trial court correctly determined that Sachs’ contract implied in law claim failed as a matter of law.

With respect to his implied in fact contract claim, Sachs concedes that United Park never told him that if he found a buyer for United Park, he would be paid a finder’s fee. Thus, he fails to satisfy the first element of an implied in fact contract. Nevertheless, Sachs argues that United Park’s non-response to his May 17, 2001 letter created an “implied finder’s fee contract” between Sachs and United Park. (Sachs Brief at 34). In support of this argument, Sachs cites the Arizona case of *Turnkey Corp. v. Rappeport*, 720 P.2d 115 (Ariz. App. 1986). This case is easily distinguishable. In *Turnkey*, the plaintiff was a general contractor. *Id.* at 116. Before the job that was the subject of the lawsuit, the plaintiff had done at least three jobs for the defendant, all on a “cost plus 10% overhead plus 10% profit basis plus sales tax.” *Id.* The plaintiff argued that the current job was also done on this same basis. *Id.* at 117. The defendant, having paid the first three invoices for this last job, refused to pay the final invoice arguing that he set a “top limit on the total expenditure.” *Id.* The defendant never denied asking the plaintiff to perform the work. *Id.* Under these facts, the Arizona court held that there was an implied contract between the parties. *Id.* at 118.

Here, United Park did not ask Sachs to perform any services and, more importantly, there is no “course of dealing” in similar transactions that would demonstrate that the “relations” between United Park and Sachs have been such to create a “duty” on the part of United Park to either accept or reject Sachs’ proposal. Thus, United Park’s “silence” with respect to his alleged offer was not “acceptance” of his alleged offer. And, for the reasons set forth above, there is simply no evidence that a reasonable jury could believe that would prove that United Park knew or should have known that Sachs expected to be paid a finder’s fee in connection with Jackson’s purchase of United Park. Accordingly, the trial court correctly ruled that Sachs’ claims for implied contract fail as a matter of law.

D. Sachs’ Claims Also Fail as a Matter of Law Because the Undisputed Facts Show that Sachs Did Not “Find” Jackson as a Buyer for United Park.

Even assuming for the sake of argument that an enforceable contract exists, the undisputed facts demonstrate that Sachs did not “find” Jackson as a purchaser for United Park. It is undisputed that Jackson and Rothwell were discussing a possible purchase of United Park approximately six months before Sachs’ telephone call to Jackson. Sachs admits that the fact that United Park was “for sale” was public information in late January 2001 or early February 2001. Sachs, however, continues to argue that he “found” Jackson because no one told him of the discussions between Jackson and Rothwell. Ignoring that United Park had no duty to inform Sachs of these negotiations, there are several obvious flaws with Sachs’ argument. First, as Lesser testified, Sachs was a “total stranger” and therefore he would not have discussed such matters with him. Sachs also

admits that he never asked United Park if it was negotiating with other parties and that he never mentioned any potential purchasers to Lesser or United Park other than Granite. United Park certainly had no reason to volunteer this information to Sachs. Second, as Jackson testified, United Park was a public company and therefore he was under explicit instructions not to discuss his negotiations with anyone. Third, Rothwell viewed Sachs as a representative of Granite only and therefore would have no reason to mention United Park's negotiations with Jackson. And finally, Sachs never sent United Park any type of written document regarding Jackson prior to Capital Growth's offer to purchase United Park in February 2002. Based on these undisputed facts, the trial court correctly held that no reasonable minds could differ that Sachs did not "find" Jackson as a purchaser for United Park.

CONCLUSION

Sachs' claims are barred by the Utah Real Estate Brokers Act and the Utah Statute of Frauds. Even if Sachs' claims were not barred, these claims nevertheless fail as a matter of law because no enforceable agreement was entered into between United Park and Sachs. Accordingly, this Court should affirm the Final Judgment.

DATED this 7th day of September, 2006.



LAURA S. SCOTT
SHANE D. HILLMAN
PARSONS BEHLE & LATIMER
Attorneys for Defendants and Appellees
United Park City Mines Company and
Capital Growth LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2006, I caused to be served, via U.S. mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE UNITED PARK CITY MINES COMPANY** to:

Kathryn Collard
THE LAW FIRM OF KATHRYN
COLLARD, LC
9 Exchange Place, Suite 1111
Salt Lake City, UT 84111

Anthony C. Kaye
Jason D. Boren
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
201 S Main, Suite 600
Salt Lake City, UT 84111-2221



Tab 1

May 17, 2001

HAND DELIVERED

Mr. Hank Rothwell
United Park City Mines
P. O. Box 1450
Park City, UT

Dear Hank,

I am delighted that my introducing United Park City Mines to Granite Land Company appears to be heading in the right direction and I am pleased that the confidentiality letter has been signed. I certainly will continue to do everything in my power to bring together a mutually satisfactory agreement between these two parties. I took the opportunity to express this commitment to your chairman, Joe Lessor, when he invited me to lunch at the Sky8 Room in New York in early May.

I perceive this venture as joining two entities with the potential of creating one of the nation's premier skiing and real estate developments. In other words, I think that both parties are in the right place at the right time. I hope you agree.

In that lunch with Joe Lessor, I was delighted to find that he seems to share our enthusiasm for this joint venture. I hope that this feeling is generally shared by the rest of your board. Most potential JV land development partners would still require a Granite Construction to do the development infrastructure. This JV partner comes with that capability. Joe gave me his encouragement to "get the job done."

I write this letter to remind you that I will expect a modest finder's fee if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us. While I believe that we have an understanding as to this finder's fee, I do think that matters of this sort ought to be out on the table early on, and I hope that you feel the same.

Please let me know if you have any questions about such a finder's fee.

I look forward to continuing our quest to link these two parties for everyone's benefit, including the shareholders who overwhelmingly expressed their approval.

Very truly yours,



P. C. 649-9865
M05COW-011-7.095-200.4526

IShp

EXHIBIT
Q

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Tab 2

May 18, 2001

HAND DELIVERED / *10-11*

Mr. Hank Rothwell
United Park City Mines
P. O. Box 1450
Park City, UT

Dear Hank,

I understand, after a conversation yesterday with Joe Lessor, that his preference would be to sell the company rather than enter into a joint venture. I had referred to a joint venture in yesterday's letter because I had understood that you would consider such a proposition (and that is obviously what Granite seeks), and because a joint venture purchaser might also work for everyone.

Happily, if your company's preference is sale, Granite, as I suggested in yesterday's letter, is still an excellent prospect. Another investor, together with Granite, would make an excellent purchaser. I am happy to re-direct my focus to obtaining such a joint venture purchaser.

Obviously, I will continue to keep you apprised of all proposals, whether for sale or for a joint venturing of the project.

Very truly yours,



IS/np

EXHIBIT

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Sachs

Tab 3

IRA SACHS & CO

103031, Россия, Moscow, ул. Петровка, д. 14, стр. 1
Tel.: (095) 200-4448, 200-4449; Факс: (095) 200-4480, 200-4349

Strag Lodge # 33
PO Box 3000
Park City, Utah 84060

Tel. 435.649.9865 801
Cell 801.259.8012 574 8012
Fax 435.649.6880

Fax Transmission Sheet

Date: 6/4/01

To: JERRY JACKSON
6074371000

Fax: 607 ~~801~~ 937.1000 ✓

Company: _____ Dept: _____

RE: JV GRANITE CONST.

From: _____ No. Pages: _____

Message: JERRY
PLS CALL AFTER YOUR TALK
WITH HANK ROTHWELL
BEST WISHES FROM
THE WAGGAT MTN'S

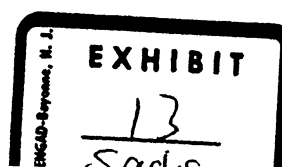
If any pages are missing please call 435.649.9865

Tr.

Please Note:

This message is intended for the use of the addresser and may contain information that is privileged and confidential.

If you are not the intended recipient you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please notify us by telephone immediately at the above number. Thank you.



000 24

Tab 4

435-649-9885 home
801-574-8012 cell
435-649-6880 fax

**Ira Sachs and
Company**

Fax

To: Hank Rothwell	From: Ira Sachs
Fax: 435-655-7479	Pages: 8
Phone: 435-649-8011	Date: 8/19/2003
Fax: United Park City Mines	CC:

☒ Urgent ☐ For Review ☐ Please Comment ☒ Please Reply ☐ Please Recycle

Good Day Hank

If you would please, make the corrections you feel necessary, based on your documentation or interpretation of the facts. Please do this at your earliest convenience and fax to me your corrections so that we may go forward with this issue. Or, if you can show that this memo to Joe is wrong, I would be happy to back off!

If I do not hear from you, I will assume the facts mentioned are essentially correct. →

Best Wishes

Ira Sachs

435-649-9885 home

435-649-6880 fax

801-574-8012 cell

IRA - United Park does not agree with your Agency Argument and I had discussed UPK for years? ~~Worried~~ Worried you as a Representative of Granite Construction ONLY?

Hank

000100