

2006

# Ira Sachs v. Joseph S. Lesser, Loeb Investors Co. XL, and United Park City Mines Company, Capital Growth Partners, and John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**IRA SACHS,**

**Plaintiff & Appellant,**

**v.**

**Case No. 20060257-CA  
040926707**

**JOSEPH S. LESSER, LOEB INVESTORS  
CO. XL, AND UNITED PARK CITY  
MINES COMPANY, CAPITAL GROWTH  
PARTNERS, AND JOHN DOES 1-10,**

**ORAL ARGUMENT  
REQUESTED**

**Defendants & Appellees.**

---

**BRIEF OF APPELLANT**

---

**On Appeal from the Judgment of the Third District Court In and For  
Salt Lake County, State Of Utah, The Honorable Tyrone E. Medley, presiding**

---

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**FILED  
UTAH APPELLATE COURTS**

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## **STATEMENT OF PARTIES**

The parties in this case are listed in the caption. In this brief, Plaintiff-Appellant Ira Sachs is referred to as “Plaintiff Sachs” and Defendants-Appellees Joseph S. Lesser and Loeb Investors, Inc., are referred to respectively as “Lesser” and “Loeb.” Defendant-Appellee United Park City Mines Company and former defendant Capital Growth Partners, Inc., are referred to respectively as “UPCM” and “CGP.” All statutory references are to Utah Code Ann. (1953), as amended, unless otherwise indicated.

## **STATEMENT OF JURISDICTION**

Jurisdiction of this appeal exists pursuant to §78-2a-3(2)(j), and Article VIII, §1, of the Utah Constitution. This appeal is from a final judgment entered February 15, 2006, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Tyrone E. Medley presiding. Plaintiff Sachs filed his Notice of Appeal on March 16, 2006. The Utah Supreme Court transferred the appeal to this Court on March 23, 2006.

## **STATEMENT OF ISSUES AND STANDARDS FOR APPELLATE REVIEW**

1. Did the district court err in granting summary judgment for Defendants on Plaintiff Sachs' claims for declaratory judgment and breach of an express or implied contract, based on its conclusion that no enforceable express or implied finder's fee agreement existed, or that the terms of the agreement were too indefinite to be enforced, or were merely an agreement to agree, where genuinely disputed issues of material fact remain for trial and Defendants are not entitled to judgment as a matter of law?

**Standard of Appellate Review:** The district court's decision to grant summary judgment is reviewed for correctness, granting no deference to the district court and

recognizing that “summary judgment is appropriate only when there is no genuinely disputed issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Swan Creek Village Homeowners Association, 2006 WL 22, ¶15; Pugh v. Draper City, 2005 UT 12, ¶7, 114 P.3d 546, Wardley Corp. v. Welsh, 346 Utah 962 P.2d 86, 89 (Utah App. 1998).

**Preservation of Issue:** Argument, Point I, Plaintiff’s Mem. Op. Lesser/Loeb Motion for Summary Judgment, R.1333-1339, at 1-7; Argument, Point I, Plaintiff’s Mem. Op. UPCM Motion for Summary Judgment, R.1636-1646, at 1-11; Tr., Hearing On Motions for Summary Judgment, R. 2235 at 22:20-30:3.

2. Did the district court err in granting summary judgment for Defendants on Plaintiff Sachs' claims for declaratory judgment and breach of contract, based on its conclusion that such claims were purportedly barred by the Utah Real Estate Broker's Act, §61-2-1 *et seq.* (“UREBA”), where genuinely disputed issues of material fact remain for trial and Defendants are not entitled to judgment as a matter of law?

**Standard of Appellate Review:** A question of statutory interpretation is reviewed for correctness, without deference to the conclusions of the trial court. State of Utah v. Mooney, 98 P.3d 420, 424, 2004 UT 49, ¶9, citing Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990).

**Preservation of Issue:** Argument, Point II, Plaintiff’s Mem. Op. Lesser/Loeb Motion for Summary Judgment, R. 1338-1350, at 6-18; Argument, Point II, Plaintiff’s Mem. Op. UPCM Motion For Summary Judgment, R. 1647-1656, at 12-21; Tr. Hearing on Motions for Summary Judgment, R. 2235, at 30:4-36:21.

3. Did the district court err in granting summary judgment for Defendants on Plaintiff Sachs' claims for declaratory judgment and breach of express or implied contract on the ground that they are purportedly barred by the Utah Statute of Frauds, where genuinely disputed issues of material fact remain for trial on these claims and Defendants are not entitled to judgment as a matter of law.

**Standard of Appellate Review:** Application of the statute of frauds is a question of law that is reviewed for correctness. Orlob v. Wasatch Medical Management, 124 P.2d 269, 275, 2005 UT App 430, citing Spears v. Warr, 2002 UT 24, ¶23, 44 P.3d 742.

**Preservation of Issue:** Argument, Point III, Plaintiff's Mem. Op. Lesser/Loeb Motion for Summary Judgment, R.1350-1352, at 18-20; Argument, Point III, Plaintiff's Mem. Op. UPCM Motion For Summary Judgment, R.1656-1657, at 21-22; Tr. Hearing on Motions for Summary Judgment, R.2235, at 36:22-37:16.

### **STATUTES DETERMINATIVE OF APPEAL**

Utah Real Estate Broker's Act ("UREBA"), §61-2-1 *et seq.*, Aplnt. Add. 4

Utah Statute of Frauds, §25-5-1 *et. seq.*, Aplnt. Add. 5

### **STATEMENT OF THE CASE**

#### **Nature of the Case**

This is an action for declaratory judgment and breach of express or implied contract, to enforce an a finder's fee agreement that arose when Lesser, as Chairman of the Board of UPCM and President of Loeb, the majority stockholder group of UPCM, requested Plaintiff Sachs to find a buyer for UPCM after receiving written notice of the finder's fee Plaintiff Sachs would charge for his services.



After Sachs located one Gerald Jackson, a real estate developer in Park City, Utah, to buy UPCM, Jackson formed a company, Capital Growth Partners, Inc., (“CGP”), which signed a confidentiality agreement with UPCM, and subsequently bought UPCM by purchasing the corporation's stock in a merger in which UPCM was the surviving corporation and retained all of its assets, including its real estate.

Thereafter, Defendants refused to pay Sachs his finder's fee, based on a ruse that Jackson was already in a deal with UPCM President Hank Rothwell to purchase UPCM at the time Sachs contacted Jackson to buy UPCM. After making extensive but ultimately unsuccessful attempts to negotiate the payment of the finder's fee, Plaintiff Sachs brought this action, asserting claims against Lesser, Loeb, UPCM and CGP, for declaratory judgment and breach of express or implied contract, and other claims which are not relevant to this appeal. *See*, Counts I-IV, Verified Complaint And Demand For Jury Trial, (“Verified Complaint”), at 1-20, R.1-24, 666-668.

### **Course of Proceedings**

Plaintiff Sachs filed his Complaint and Jury Demand on January 21, 2004. R.1-24. On February 23, 2004, Lesser and Loeb moved to dismiss the Complaint on the ground that the subject finder's fee agreement was purportedly subject to, and barred by, the New York Statute of Frauds. R. 51-53. UPCM and CGP joined the motion. R.54-57.

On September 27, 2004, Judge Bruce C. Lubeck heard oral argument on the motion to dismiss, R. 156, and on September 29, 2004, issued a Ruling and Order denying the motion to dismiss. R. 157-192.

On October 13, 2004, UPCM and CGP filed their Answer, R. 193-206, and on October 15, 2004, Lesser and Loeb filed their Answer. R. 207-218.

On January 20, 2005, CGP filed a motion for summary judgment on the ground that CGP was not a party to the finder's fee agreement and or otherwise liable for its alleged breach as a "successor" to UPCM. R. 525-568.

On February 5, 2005, Plaintiff Sachs filed a Verification of Complaint. R. 666-668.

On March 31, 2005, Lesser and Loeb filed a motion for summary judgment. R. 1082-1084. On April 8, 2005, UPCM filed a motion for summary judgment. R. 1206-1208.

### **Disposition In The Lower Court**

On September 13, 2005, the district court granted CGP's motion for summary judgment. R. 2191-2190. Plaintiff Sachs does not appeal this decision.

On December 12, 2005, the district court heard oral argument on the motions for summary judgment of Lesser, Loeb and UPCM, R. 2205. On February 6, 2006, the district court entered a Minute Entry Decision, granting the Defendants' motions and dismissing Plaintiffs' claims in this action. R. 2208-2212. On March 16, 2006, Plaintiff Sachs filed his Notice of Appeal to this Court. R. 2224-2225.

### **STATEMENT OF FACTS**

1. Plaintiff Ira Sachs is a long time resident of Park City, Utah, and was a stockholder in UPCM at all relevant times. For many years, Mr. Sachs has worked as a business consultant, assisting businesses in resolving problems and facilitating business transactions from his office in Park City. Prior to the events in this case, Plaintiff Sachs

received, and continues to receive, an annual fee from UPCM for soliciting Quest, a telecommunications company, to contract with UPCM for a cell phone cite, pursuant to an oral agreement. *See*, “Plaintiff’s Statement of Facts”, Plaintiff’s Mem. Op. Lesser and Loeb Motion For Summary Judgment, (“Pltf. Mem. Op. L&L”), ¶1-3, R.1321; “Statement of Facts” in Plaintiff’s Mem. Op. UPCM Motion For Summary Judgment, (“Pltf. Mem. Op. UPCM”), ¶1-3, R. 1624-1625; Verified Complaint, ¶1, 18-19, R. 2, 4-5; Sachs Dep., R. 1361-1362, at 20:8-24:16; Sachs Affidavit, ¶5-6, R.1442; Sachs UPCM stock certificate, R.1482-1483.

2. Defendant Joseph S. Lesser (“Lesser”) was the Chairman of the Board of Directors of the Defendant United Park City Mines (“UPCM”). Lesser also served as the President of Defendant Loeb Investors Co. XL (“Loeb”), the controlling shareholder group of UCPM, and conducted business of UCPM and Loeb within the State of Utah, at all relevant times. *See*, Pltf. Mem. Op. L&L, ¶¶ 4-5, R. 1321-1322; Pltf. Mem. Op. UPCM, ¶¶ 4-5, R. 1625; Verified Complaint, ¶3, R. 2, and Answer of Lesser and Loeb, ¶ 2, R. 208 (partially admitting allegations); Lesser Dep. R. 1402, at 18:17-21:24.

3. Defendant UPCM (“UPCM”) was a publicly traded New York Stock exchange company, with its principal place of business in Park City, Utah, and maintained its offices, employees and business operations, and conducted its annual stockholder meetings within the State of Utah at all relevant times. *See*, Pltf. Mem. Op. L&L, ¶6, R. 1322; Pltf. Mem. Op. UPCM, ¶6, R. 1625; Verified Complaint, ¶4, R.2; Sachs Affidavit, ¶¶ 7, 9, R.1442-1443.

4. The principal business of UPCM was the leasing, development and sale of its real property located in Utah, some of which UPCM was trying to develop into Resort Projects in Park City (“The Projects”) at the time of the events concerned in this action. *See*, Pltf. Mem. Op. L&L , ¶7, R.1332; Pltf. Mem. Op. UPCM, ¶7, R. 1625; Verified Complaint, ¶¶10-11, R. 3-4.

5. Hank Rothwell, the President of the UPCM, (“Rothwell”), resided in Salt Lake City, Utah, and conducted the business of UPCM at its principal offices in Park City, Utah, at all relevant times. *See*, Pltf. Mem. Op. L&L, ¶8, R. 1322; Pltf. Mem. Op. UPCM, ¶8, R. 1625; Verified Complaint, ¶12, R. 4; Pltf. Mem. Op. UPCM, ¶8, R. 1625.

6. In addition to their duties as officers of UPCM, Lesser and Rothwell were experienced and licensed real estate brokers and investors at all relevant times. *See*, Pltf. Mem. Op. L&L, ¶¶64-65, R. 1331; Pltf. Mem. Op. UPCM, ¶¶ 64-65, R. 1624; Lesser Real Estate License Record, R.1479; Lesser Dep. R. 1400-1402, at 13:15-24; 14:11-16; 16:13-17:18; 18:17-20:9; Rothwell Real Estate License Verification, R. 1480-1481; Rothwell Dep. R. 1392, 1398, at 10:16-12:25; 199:23-25.

7. In July of 1999, acting under Rothwell's direction, UPCM entered into a letter of understanding with DMB Associates, Inc., (“DMB”), to form a joint venture to develop The Projects. After nearly a year's delay, the joint venture was formed on June 15, 2000. *See*, Pltf. Mem. Op. L&L, ¶8, R. 1322; Pltf. Mem. Op. UPCM, ¶8, R. 1525; Verified Complaint, ¶¶ 14-15, R.4.

8. UPCM and DMB tried to reach an agreement on a business plan for seven months. When they failed to do so, the joint venture was dissolved on January 17, 2001

and UPCM became obligated to pay DMB the sum of \$2,445,030.00 in development costs, plus accrued interest, under a letter of understanding. *See*, Pltf. Mem. Op. L&L, ¶8, R. 1332; Pltf. Mem. Op. UPCM, ¶8, R. 1625; Verified Complaint, ¶15-16, R. 4; Sachs Dep., R. 1378, at 118:17-119:22.

9. At the time of the events referred herein, Plaintiff Sachs had been acquainted with Rothwell for 15 to 20 years. Rothwell knew Sachs was a deal maker and business consultant who worked on a fee basis. Pltf. Mem. Op. L&L, ¶9, R.1322; Pltf. Mem. Op. UPCM, ¶9, R. 1626; Sachs Dep., R. 1365, at 51:1-6.

10. In early 2001, Plaintiff Sachs learned of the failure of a joint venture between UPCM and DMB. He contacted one of his clients, Granite Land Company, and introduced Granite to Rothwell as a potential joint venturer for UPCM. By March 2001, Plaintiff Sachs had introduced key employees of Granite to Rothwell and others at a meeting hosted by Rothwell at the corporate offices of UPCM in Park City. Granite signed a confidentiality agreement with UPCM and subsequently engaged in negotiations regarding a possible sale or joint venture with UPCM. *See*, Pltf. Mem. Op. L&L, ¶11, R. 1323; Pltf. Mem. Op. UPCM, ¶11, R. 1626; Verified Complaint, ¶¶20-22, Sachs Dep. 1363-1366, at 42:16- 51:23; 62:7-13; Rothwell Dep. R. 1719, at 139:22-140:19.

11. On or about May 2, 2001, Sachs met with Lesser and a mutual friend, at Lesser's private club in New York City. During the meeting, Lesser expressed his strong displeasure regarding Rothwell's handling of the failed UPCM joint venture with DMB, stating that, "I do not think Hank Rothwell is capable of running a New York Stock Exchange company." Lesser also told Sachs that he and Loeb Investors had lost faith in

Rothwell and did not want to invest any more money in UPCM. Lesser requested Sachs to help him locate a joint venturer or purchaser for UPCM as quickly as possible, importuning Sachs to “get the job done, whether it's with Granite, or someone else, or a combination.” *See*, Pltf. Mem. Op. L&L, ¶¶14-15, R. 1323; Pltf. Mem. Op. UPCM, ¶¶14-15, R. 1626-1627; Verified Complaint, ¶¶ 23-26, R. 5-6; Sachs Dep. R. 1368-1371, at 73:23-86:13; 80:19-81:4; 87:8-88:25; Lesser Dep. R. 1405, at 47:18- 48:5.

12. Although the specific amount of the finder's fee was not discussed at the meeting, both Lesser and Sachs understood that Plaintiff Sachs would receive a usual and customary finder's fee for his efforts. A usual and customary fee for assisting in locating a buyer for a company is 3% of the sale price of the corporation. *See*, Pltf. Mem. Op. L&L, ¶¶ 16, R. 1323; Pltf. Mem. Op. UPCM, ¶16, R. 1627; Verified Complaint, ¶ 28-29, R. 6; Sachs Dep. R. 1384-1386, at 95:23-96:16; 145:8-148:8; 149:15-150:5; Tesch Memo, R. 1484.

13. Plaintiff Sachs does not have a real estate broker's license and was not acting as a broker, but as a professional business finder, in locating a buyer for UPCM, a New York Stock Exchange company, in response to Lesser's request. *See*, Pltf. Mem. Op. L&L, ¶63, R. 1331; Pltf. Mem. Op. UPCM, ¶63, R. 1624; Sachs Dep. R. 1384-1385, 145:8-148:8; Lesser Dep., R. 2202, at 44:3-13.

14. During Sachs' meeting with Lesser on May 2, 2001, Lesser did not mention or exclude Gerald Jackson, (“Jackson”), a Park City real estate developer, or any other person, or entity, as a potential joint venturer or purchaser Sachs might approach, except to say that in the event DRWK, a company UPCM was working with, located a joint

venturer or purchaser for UPCM, Sachs would not receive the fee. A contract between UPCM and DRKW dated June 14, 2001, did not include Jackson on the list of potential purchasers located by DRKW. *See*, Pltf. Mem. Op. L&L, ¶17-18, R. 1324; Pltf. Mem. Op. UPCM, ¶¶ 17-18, R. 1627; Verified Complaint, ¶30, R. 6; Sachs Dep. R. 1369-1372, at 80:19-81:22; 84:1-13; 88:1-10; 92:4-19; Lesser Dep. 1403-1404, at 36:18 -37:4; 43:13-44:10-19; DRKW Agreement, R. 1467-1477 (particularly 1469-1470).

15. Following the May 2, 2001 meeting with Lesser, Plaintiff Sachs returned home to Park City, Utah. Working primarily from his business office there, Plaintiff Sachs contacted several individuals regarding the purchase of UPCM. These individuals included Jackson and Bob Wells, both long time real estate developers residing in Park City, Utah. Plaintiff Sachs also contacted Scott Wilcox of Granite Land Company, a division of Granite Construction Company, a California company doing business in Utah. *See*, Pltf. Mem. Op. L&L, ¶19, R. 1324; Pltf. Mem. Op. UPCM, ¶19, R. 1627; Verified Complaint, ¶33, R. 7; Sachs Dep. R. 1371-1372, at 88:1-90:14; 90:25-92:19.

16. On the morning of May 17, 2001, Plaintiff Sachs delivered a letter to Rothwell, regarding Sachs' introduction of Granite and the finder's fee he expected for his services:

I write 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 you feel the same. Please let me know if you have any questions concerning such a finder's fee.

*See*, Aplnt. Add. 2; Pltf. Mem. Op. L&L, ¶27, R. 1325-1326; Pltf. Mem. Op. UPCM, ¶27, R. 1629; Verified Complaint, ¶¶ 43; Letter to Rothwell from Sachs, R. 1478; Sachs Dep., R. 1357, 1383-1384, 1386, at 141:11-143:6; 152:23-153:13; Rothwell Dep., R. 1395, at 152:7-18.

17. Plaintiff Sachs testified that the “prime developed lots” owned by UPCM, referred to in his letter of May 17, 2001, were valued at a little over two million dollars, which Sachs considered a fair finder's fee finding a purchaser for a New York Stock exchange company such as UPCM, based on his experience and the size of the deal. *See*, Pltf. Mem. Op. L&L, ¶27, R. 1326; Pltf. Mem. Op. UPCM, ¶28, R. 1629; Verified Complaint, ¶43, R. 9, Sachs Dep., R. 1384-1385, at 145:18-148:8.

18. Plaintiff Sachs testified that the value of his service did not depend on the time spent, but rather the result achieved -- in this case, using his experience and contacts to immediately locate a purchaser for UPCM as requested by Lesser in his phone call to Sachs on May 17, 2001. *See*, Pltf. Mem. Op. L&L, ¶29, R. 1326; Pltf. Mem. Op. UPCM, ¶29, R. 1629; Sachs Dep. R. 1381-1382; 1384-1385, at 133:3-134:10; 145:18-148:8; 149:15-150:5;

19. Plaintiff Sachs' letter of May 17, 2001, was received by Rothwell and transmitted to Lesser. Because Sachs had previously introduced Granite to UPCM and the two parties had already begun negotiations, Sachs mentioned Granite in this letter. However, later that afternoon, Lesser telephoned Sachs in Park City. Responding to Sachs' indication in the letter that Sachs would direct his efforts to finding a “potential buyer” or “joint venturer” for UPCM, Lesser adamantly told Sachs that, “I don't want a



joint venture partner. I want this sold.” Lesser directed Sachs to refer any prospective purchasers to Rothwell at UPCM. *See*, Pltf. Mem. Op. L&L, ¶¶30-31, R. 1326; Pltf. Mem. Op. UPCM, ¶¶30-31, R. 1629; Verified Complaint, ¶¶44-45, R. 9; Sachs Dep., R. 1387-1388, at 156:19-157:23; 159:21-161:24.

20. During his telephone call with Plaintiff Sachs on May 17, 2001, Lesser did not dispute the finder's fee proposed in Sachs' letter. Lesser did not state that Defendants would not pay Sachs' the proposed finder's fee, or indicate that there was any prospective purchaser for UPCM at that time. *See*, Pltf. Mem. Op. L&L, ¶¶56-58, R. 1329-1330; Pltf. Mem. Op. UPCM, ¶¶ 56-58, R. 1633; Verified Complaint, ¶56, R. 1329; Sachs Dep., R. 1372, 1378-1379; 1390, at 92:4-19; 210:1-211:4; 121:22-123:14; 129:20-130:21.

21. Lesser initially testified he did not recall telephoning Plaintiff Sachs on May 17, 2001, or the content of their conversation. However, Lesser's telephone records indicate that he telephoned Sachs at his office in Park City, Utah at 2:02 p.m. on May 17, 2001, and spoke with Sachs for eleven minutes. After being shown this record, Lesser did not deny that he telephoned Sachs on that date. *See*, Pltf. Mem. Op. L&L, ¶32, R. 1326; Pltf. Mem. Op. UPCM, ¶332, R. 1629; Lesser Dep., R. 1405-1406, at 49:6-51:25; 52:22-53:9; Lesser's phone records for May 17, 2001, R. 1561.

22. The following day, May 18, 2001, Sachs delivered a second letter to Rothwell by facsimile, confirming Lesser's preference for a purchaser for UPCM expressed in Lesser's phone call to Sachs on May 17, 2001. Sachs further stated that, “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 keep you apprised of all proposals, whether for sale or for a joint venturing of the project.” Rothwell and Lesser never responded to this letter or informed Sachs they would not pay the finder's fee Sachs had indicated he would charge for his services in the letter of May 17, 2001. *See*, Aplnt. Add. 3; Pltf. Mem. Op. L&L, ¶¶33, R. 1326; Pltf. Mem. Op. UPCM, ¶33, R. 1629; Verified Complaint, ¶45, R. 9; Letter to Rothwell from Sachs dated May 18, 2001, R. 1453; Sachs Dep., R. 1357, 1387-1388, 1390, at 154:13-158:11; 210:1-211:4; Rothwell Dep. R. 1396, at 167:21-168:3.

23. At all relevant times, Jackson resided in Park City, Utah. Plaintiff Sachs initially telephoned Jackson on Sachs' cell phone from Park City and reached Jackson in New York where he was traveling. During Sachs' initial conversation with Jackson, Jackson expressed immediate interest in the information that Sachs provided him concerning the new opportunity to purchase UPCM that existed based on the information Lesser had conveyed to Sachs in their meeting on May 2, 2001. *See*, Pltf. Mem. Op. L&L, ¶¶20-21, R. 1324; Pltf. Mem. Op. UPCM, ¶¶20-21, R. 1627-1628; Verified Complaint, ¶ 33-35, R. 7; Sachs Dep., R. 1376-1378, at 112:22-118:12; Jackson Dep. R. 1457-1460, at 17:23-18:16; 18:18-27:19.

24. During their conversation, Jackson never told Sachs that he was already working on a deal with Rothwell to purchase UPCM. To the contrary, Jackson thanked Sachs for the information he provided and told Sachs that he would like to take the UPCM deal down with institutional and other investors. Pltf. Mem. Op. L&L, ¶22, R.

1324-1325; Pltf. Mem. Op. UPCM, ¶22, R. 1628; Verified Complaint, ¶ 36, R. 8; Sachs Dep. R. 1377-1379, at 115:22-121:21; Jackson Dep. 1458-1460, at 20:18-27:19.

25. During Sachs' initial conversation with Jackson, and pursuant to Lesser's prior instructions to Sachs to refer any potential purchasers for UPCM to Rothwell, Sachs suggested that Jackson contact Rothwell at UPCM and sign a confidentiality agreement so that Jackson could obtain the confidential financial information concerning UPCM Jackson would need to make an offer to buy UPCM and to register Jackson as Sachs' client. *See*, Pltf. Mem. Op. L&L, ¶23, R. 1325; Pltf. Mem. Op. UPCM, ¶23, R. 1628; Verified Complaint, ¶ 37, R. 8; Sachs Dep. R. 1364, 1377-1378, at 48:25-29; 117:4-12, 118:4-12; SOF, ¶19, *supra*, at 11.

26. Sachs told Jackson that he would also contact Rothwell to advise him of Jackson's interest in purchasing UPCM. Sachs invited Jackson to contact Sachs' client, Granite, and offered to call Granite to see if Granite was interested in joining Jackson to buy UPCM. *See*, Pltf. Mem. Op. L&L, ¶¶ 23-24, R. 1325; Pltf. Mem. Op. UPCM, ¶¶23-24, R. 1628; Verified Complaint, ¶37; Sachs Dep. R. 1378, 1387-1388, at 119:22-120:15; 157:24-158:12.

27. Following his initial conversation with Jackson, Sachs contacted Scott Wilcox at Granite and spoke to him about the possibility of Granite going in with Jackson to buy UPCM. Jackson also contacted Granite at Plaintiff Sachs' suggestion. *See*, Pltf. Mem. Op. L&L, ¶25, R. 1325; Pltf. Mem. Op. UPCM, ¶25, R. 1628; Sachs Dep. R. 1378, 1387-1388, at 119:22-120:22; 135:3-18; 157:24-158:12, Jackson Dep., R. 1460-1461, at 28:17-31:5.

28. Plaintiff Sachs also immediately telephoned Hank Rothwell at UPCM's office in Park City, Utah, from his (Sachs') office in Park City, and informed Rothwell of Jackson's interest in putting together a group of investors to buy UPCM. During this conversation, Sachs told Rothwell that Jackson's interest in buying UPCM had been sparked by information Sachs had received from Lesser in their May 2, 2001 luncheon meeting in New York. Plaintiff Sachs did not inform Rothwell about Lesser's criticism of Rothwell's performance during Sachs' prior meeting with Lesser, because Sachs did not want to cause problems between the two men. *See*, Pltf. Mem. Op. L&L, ¶26, R. 1325; Pltf. Mem. Op. UPCM, ¶26, R. 1628-1629; Verified Complaint, ¶¶39-40, R. 8.

29. Following his initial solicitation of Jackson as a purchaser for UPCM, Sachs continued to communicate with Jackson by phone, facsimile and telephone. Based on Jackson's initial indication that he could get investors together to buy UPCM, and because Plaintiff Sachs believed that Jackson knew Park City very well and had the skills to put together a deal of this size, Sachs did not pursue any other prospective buyers for UPCM. *See*, Pltf. Mem. Op. L&L, ¶¶34-35, R. 1327; Pltf. Mem. Op. UPCM, ¶¶ 34-35, R. 1630; Verified Complaint, ¶¶ 46-47, R. 8, Sachs Dep. R. 1378, 1382-1383, at 118: 4-12; 135:19-139:2; Jackson Dep. R. 1462 at 39:21-40:5.

30. On June 4, 2001, Plaintiff Sachs sent Jackson a facsimile from Sachs' office in Park City, Utah, encouraging Jackson to contact him when Jackson had spoken with Rothwell regarding a confidentiality agreement. *See*, Pltf. Mem. Op. L&L, ¶36, R. 1327; Pltf. Mem. Op. UPCM, ¶36, R. 1630; Verified Complaint, ¶48, R. 10; Facsimile message from Sachs to Jackson dated June 4, 2001, R. 1539.

31. Subsequently, while Plaintiff Sachs was traveling on business in Moscow, Russia, he received a telephone call from Jackson indicating he had contacted Rothwell regarding his interest in purchasing UPCM. *See*, Pltf. Mem. Op. L&L, ¶37, R. 1327; Pltf. Mem. Op. UPCM, ¶37, R. 1628; Verified Complaint, ¶49, R. 10; Jackson Dep., R. 1462, at 39:21-41:8.

32. On July 9, 2001, Jackson entered into a confidentiality agreement with UPCM through Aspen Ranch Corp., a Utah corporation owned by Jackson. *See*, Pltf. Mem. Op. L&L, ¶38, R. 1327; Pltf. Mem. Op. UPCM, ¶38, R. 1630; Verified Complaint, ¶53; *See*, Merger Information Statement, under heading “Background of Merger”, at 5-6, R. 1538.

33. Jackson admits he did not sign a confidentiality agreement with UPCM until after Plaintiff Sachs first contacted him about purchasing UPCM. *See*, Pltf. Mem. Op. L&L, ¶40, R. 1327; Pltf. Mem. Op. UPCM, ¶40, R. 1630; Sachs Dep. R. 1389, at 162: 14-163: 10; Jackson Dep. R. 1461, at 31:6-16; 32:1-33:6.

34. Jackson also admits he did not speak with Lesser about purchasing UPCM until after he signed the confidentiality agreement with UPCM. *See*, Pltf. Mem. Op. L&L, ¶39, R. 1327; Pltf. Mem. Op. UPCM, ¶39, R. 1630; Jackson Dep. R. 1464, at 94:10-25.

35. On July 31, 2001, Jackson formed Capital Growth Partners (“CGP”), a Utah limited liability company, involving a group of investors, for the express purpose of purchasing UPCM by acquiring 100% of the capital stock of UPCM. *See*, Pltf. Mem. Op. L&L, ¶41, R. 1327; Pltf. Mem. Op. UPCM, ¶41, R. 1631; Verified Complaint, ¶51, R.10; Jackson Dep., R. 1456-1457, at 12:5-13:23; 16:5-17:1; Merger Agreement, under heading

“Background of the Merger”, R. 1538.

36. During the second half of 2001, Plaintiff Sachs communicated with Jackson frequently regarding his progress in purchasing UPCM. *See*, Pltf. Mem. Op. L&L, ¶42, R. 1328; Pltf. Mem. Op. UPCM, ¶42, R. 1631; Sachs Affidavit, ¶36, R. 1448; Jackson Dep., R. 1462, at 41:9-24.

37. Jackson admits that he never told Plaintiff Sachs not to call him, or that he he wasn't interested in Sachs' help, or that Jackson was already in a deal with Rothwell to purchase UPCM. *See*, Pltf. Mem. Op. L&L, ¶43, R.1328; Pltf. Mem. Op. UPCM, ¶43, R. 1631; Jackson Dep. R.1462-1463, at 41:9-47:15.

38. On October 25, 2001, Jackson's company, CGP, entered into a non-disclosure agreement with DRKW, an investment banking firm hired by UPCM to facilitate the purchase of UPCM. *See*, Pltf. Mem. Op. L&L, ¶44, R. 1328; Pltf. Mem. Op. UPCM, ¶44, R. 1631; Verified Complaint, ¶56, R. 11; *See also*, Merger Agreement, under heading “Background of the Merger”, R.1527 (sixth paragraph).

39. On February 21, 2002, CGP offered to purchase UPCM from its current shareholders, including the stock of Loeb Investors, for \$25 per share, for a total of approximately \$81,300,000. *See*, Pltf. Mem. Op. L&L, ¶ 45, R. 1328; Pltf. Mem. Op. UPCM, ¶45, R. 1631; *See also*, Merger Agreement, under heading “Background of the Merger”, R. 1528 (¶¶3-4).

40. About this time, Jackson telephoned Plaintiff Sachs in Park City, Utah. Jackson confirmed that Sachs' activities in soliciting him as a purchaser for UPCM and stated that he had no problem with Sachs receiving a large finder's fee. *See*, Pltf. Mem.

Op. L&L, ¶46, R. 1328; Pltf. Mem. Op. UPCM, ¶46, R. 1631; Verified Complaint, ¶58; Sachs Affidavit, ¶38, R. 1448.

41. Thereafter, in March and April, 2002, Plaintiff Sachs personally contacted Lesser, Rothwell and Craig Terry, an attorney for UPCM, from his business office in Park City, Utah, concerning the payment of his finder's fee, which Defendants refused to pay. *See*, Pltf. Mem. Op. L&L, ¶46, R. 1328; Pltf. Mem. Op. UPCM, ¶46, R. 1631; Verified Complaint, ¶¶ 59-64, R. 11-12; Sachs Affidavit, ¶¶ 39-40, R. 1770.

42. In May 2002, Plaintiff Sachs had Joe Tesch, an attorney in Park City, Utah, contact Rothwell regarding the payment of his finder's fee. In a meeting with Rothwell on May 29, 2002, Tesch informed Rothwell that his research indicated that a 3% finder's fee was reasonable, and that Rothwell agreed that Plaintiff Sachs “would not [find a buyer] for UPCM simply as a volunteer.” Rothwell also admitted that had Granite purchased UPCM, Sachs would have been entitled to a fee, and that Lesser agreed that Sachs would have been entitled to a fee. Although Rothwell stated that Jackson was already working on buying UPCM when Sachs contacted him, Rothwell admitted he had no documentation to support this assertion. *See*, Pltf. Mem. Op. L&L, ¶46-47, R. 1328; Pltf. Mem. Op. UPCM, ¶46-47, R. 1631; Verified Complaint, ¶59-67, R. 11-12; *See*, Tesch Memo of Meeting with Rothwell dated May 30, 2002, R. 1484.

43. Lesser agrees that Plaintiff Sachs would have been entitled to a finder's fee if he had found Granite or Jackson to purchase UPCM, but denies that Plaintiff Sachs found Jackson to purchase UPCM. *See*, Pltf. Mem. Op. L&L, ¶46, R. 1328; Pltf. Mem. Op. UPCM, ¶46, R. 1631; Lesser Dep. R.1411-1412, at 129:6 -130:17.

44. On or about June 16, 2003, Jackson, through CGP, completed a merger with UPCM, by purchasing “all of the outstanding common stock” of UPCM, for \$21.00 per share, for a total of \$67.2 million. In the merger, UPCM became a wholly owned subsidiary of CGP. UPCM was the surviving corporation in the merger and retained all of its assets and liabilities, including its real estate. *See*, Pltf. Mem. Op. L&L, ¶¶49, R. 1328; Pltf. Mem. Op. UPCM, ¶¶49, R. 1631; Verified Complaint, ¶¶82, R. 14; Jackson Dep., R. 900, at 80:20-24; Rothwell Dep., R. 1396, at 169:3- 25; Agreement and Plan of Merger, Article I, Sec. 101 (a)-(d), R. 901-902.

45. In July 2003, Plaintiff Sachs received information that Jackson had informed a Park City real estate agent, Sharon Leise, that Sachs would be paid a fee for bringing Jackson to purchase UPCM. *See*, Pltf. Mem. Op. L&L, ¶50, R. 1329; Pltf. Mem. Op. UPCM, ¶50, R. 1632; Sachs Dep. R. 2129, at 201:10 - 202:12.

46. Subsequently, Plaintiff Sachs made additional requests to UPCM for the payment of his finder's fee for locating Jackson to purchase UPCM, but Defendants also denied these requests. *See*, Pltf. Mem. Op. L&L, ¶51, R. 1329; Pltf. Mem. Op. UPCM, ¶51, R. 1632; Verified Complaint, ¶¶ 81-86, R. 14; Sachs Affidavit, ¶51, R. 1632.

47. On August 11, 2003, Plaintiff Sachs met Jackson in Park City, Utah. During their conversation, Jackson indicated that Rothwell had previously informed him that UPCM’s investment banking firm, DRKW, wasn’t going to get a finder's fee because they had not solicited Jackson, and that Jackson had later been surprised to learn that DRKW had been paid, because Sachs had solicited him to purchase UPCM. Sachs told Jackson that he was going to New York to try to resolve his finder's fee claim with



Lesser, and Jackson gave Sachs his business card with the number where he could be reached. Subsequently, Plaintiff Sachs sent a letter to Lesser with Jackson's business card, and requested a meeting to resolve his claim. *See*, Pltf. Mem. Op. L&L, ¶52, R. 1329; Pltf. Mem. Op. UPCM, ¶52, R. 1632; Verified Complaint, ¶¶88-91, R. 15-16; Sachs Affidavit, ¶¶ 50-52, R. 1450; Facsimile and letter from Sachs to Lesser, dated August 13, 2001, R. 862-864.

48. Lesser admits that DRKW did not locate anyone to purchase UPCM at the price range set for the sale of the corporation. *See*, Pltf. Mem. Op. L&L, ¶53, R. 1329; Pltf. Mem. Op. UPCM, ¶53, R. 1632; Lesser Dep., R. 1404, 1410, at 44:16-19; 120:18-121: 25. The information provided to stock holders of UPCM regarding the background of merger merely states that Jackson “became aware of our interest in securing an investor or being sold.” *See*, “Background of the Merger”, R. 1864.

49. On August 19, 2003, Plaintiff Sachs sent another request for payment of his finder's fee to Rothwell at UCPM's offices in Park City, Utah. Rothwell again refused payment, claiming that UPCM had only viewed Sachs as the representative of Granite. Plaintiff Sachs then sent Rothwell additional information regarding the facts supporting his right to payment of the finder's fee, but no payment was forthcoming. *See*, Pltf. Mem. Op. L&L, ¶¶ 54-55, R. 1329; Pltf. Mem. Op. UPCM, ¶¶ 54-55, R. 1632-1633; Verified Complaint, ¶¶91-92; Fax from Rothwell to Sachs dated August 19, 2003, R. 1452.

50. From the time of Sachs' meeting with Lesser on or about May 2, 2001, until the merger between UPCM and CGP closed on July 18, 2003, Lesser and Rothwell never informed Sachs that Jackson was excluded as a buyer for which Plaintiff Sachs could

receive a finder's fee, or that Sachs would not receive a finder's fee for Jackson's purchase of UPCM. *See*, Pltf. Mem. Op. L&L, ¶56, R. 1329-1330; Pltf. Mem. Op. UPCM, ¶56, R. 1633; Sachs Dep., R. 1372, 1378-1379, at 92: 4-19; 121:22-123:14; 129:20-130:21; Rothwell Dep., R. 1396, at 167:20-168:9; Lesser Dep. 1412, at 133:2-21.

51. Had Lesser and Rothwell done so, Plaintiff Sachs would have searched for another potential buyer for UPCM that would have outbid Jackson in order to receive the finder's fee. *See*, Pltf. Mem. Op. L&L, ¶59, R. 1330; Pltf. Mem. Op. UPCM, ¶ 59, R. 1633; Sachs Dep. R. 1383, at 140:14-20.

52. Jackson, although not licensed as a real estate broker, has been a real estate developer in the Park City area for over fifteen years. *See*, Pltf. Mem. Op. L&L, ¶66, R. 1331; Pltf. Mem. Op. UPCM, ¶66, R. 1634; Jackson Dep., R. 1455-1456, 1465, at 5:6-24; 108:5-109:12.

53. Jackson testified that during the merger of CGP and UPCM, his interests were being looked after by "100 lawyers." *See*, Pltf. Mem. Op. L&L, ¶66, R. 1331; Pltf. Mem. Op. UPCM, ¶66, R. 1634; Jackson Dep. R. 1457, at 15:10-17.

54. The merger of UPCM and CGP was a complicated commercial transaction in which the parties' interests were represented by numerous attorneys and consultants. UPCM was also represented by DRKW, an investment banking firm. *See*, Pltf. Mem. Op. L&L, ¶67, R. 1331; Pltf. Mem. Op. UPCM, ¶67, R. 1634; Merger Agreement, "Information Statement", R. 1521-1533; Lesser Dep. R.1403, at 36:18-37:4.

55. Prior to the filing of this action, Lesser, Loeb, Rothwell and UPCM were sued in an action alleging fraud in the merger between UPCM and CGP due to inside

dealing, styled *Pennsylvania Avenue Partners v. United Park City Mines*, Case No. 030500337. In his deposition in that case, Rothwell testified under oath that he only knew Jackson socially, when, in fact, according to Jackson's sworn deposition testimony in this case, Jackson and Rothwell were partners in real estate development businesses and companies from 1985 through 1998, including a period of six years after Rothwell became President of UPCM, a highly material fact which was not disclosed to shareholders of UPCM in connection with the merger. *See*, Pltf. Mem. Op. L&L, ¶68, R. 1331-1332; Pltf. Mem. Op. UPCM, ¶68, R. 1334-1335; *Compare*, Rothwell Dep. (Pennsylvania Avenue), R. 1574-1576, and Jackson Dep. R. 1458, 1465, at 21:14-18, 107:25-109:12. *See also*, Rothwell Dep., R. 1392, at 12:22-13:9 (testifying that he was President of UPCM from September, 1991, through July 31, 2003).

56. In the event Jackson did have an undisclosed inside deal with Rothwell to purchase UPCM prior to the time that Plaintiff Sachs first contacted Jackson, which Plaintiff Sachs disputes, Rothwell and Jackson had a motive to mislead Plaintiff Sachs to believe that he would receive a finder's fee for bringing Jackson in as the buyer for UPCM, so that Plaintiff Sachs would not go out and find another purchaser who would compete with Jackson to purchase UPCM. Jackson and Rothwell also have a motive to support Lesser in denying Plaintiff Sachs' right to receive a finder's fee for locating Jackson to purchase UPCM. *See*, Pltf. Mem. Op. L&L, ¶69, R. 1331; Pltf. Mem. Op. UPCM, ¶69; Sachs Dep. R. 1383 at 140:14-20.

## **SUMMARY OF THE ARGUMENT**

**Point I      The District Court Erred In Granting Summary Judgment For Defendants On Plaintiff's Claims For Declaratory Judgment And Breach of Express Or Implied Contract, Where Genuinely Disputed Issues Of Material Fact Remain For Trial And Defendants Are Not Entitled To Summary Judgment As A Matter Of Law**

The district court erred in granting summary judgment for Defendants Lesser, Loeb and UPCM, on Plaintiff Sachs' claims for declaratory judgment and breach of express or implied finder's fee contract, based on its conclusions that there was no meeting of the minds, no mutual assent, that the contract is too indefinite to be enforced and is merely an agreement to agree. Record evidence demonstrates that genuinely disputed issues of material fact remain for trial on these claims. Additionally, Defendants are not entitled to judgment on these claims as a matter of law, because Lesser's request to Plaintiff Sachs to find a purchaser for UPCM, after receiving written notice of the fee Plaintiff would charge for his services, created an enforceable express contract under Utah law. The material terms of the agreement are contained in Plaintiff Sachs' written finder's fee offer or are shown by extrinsic evidence, and are thus sufficiently definite to be enforced as an express contract under Utah law. Alternatively, record evidence not addressed by the district court demonstrates the existence of a contract implied in fact or in law, and Defendants are not entitled to summary judgment as a matter of law on Plaintiff Sachs' claims for quantum meruit recovery.

**Point II      The District Court Erred In Granting Summary Judgment For Defendants On Plaintiff Sachs' Claims For Declaratory Judgment And Breach of Express Or Implied Contract, Based On Its Incorrect Conclusion That These Claims Are Barred Under The Utah Real Estate Broker's Act**

The district court erred in granting summary judgment on Plaintiff Sachs' claims for declaratory judgment and breach of express or implied finder's fee contract on the grounds that the contract is purportedly barred under the Utah Real Estate Broker's Act (“UREBA”), because Plaintiff Sachs was not a licensed real estate broker and because Plaintiff Sachs agreed to receive his finder's fee in the form of “two prime developed lots in the new Project” owned by UPCM. Conversely, record evidence demonstrates that Plaintiff Sachs did not engage in any “real estate” transaction for which licensure is required under UREBA.

Because UREBA is a penal statute, it must be strictly construed to avoid criminalizing conduct not expressly prohibited by its provisions. Thus, the parties' finder's fee agreement is not barred as “a business opportunity involving real estate” under UREBA, because this term is not defined in UREBA and on its face, is distinguishable from the terms “business” or “corporation.” Also, because the purpose of UREBA is not to protect experienced, licensed real estate brokers such as Rothwell and Lesser, UREBA does not bar Plaintiff Sachs' finder's fee claims in this action.

**Point III      The District Court Erred In Granting Summary Judgment For Defendants On Plaintiff Sachs' Claims For Declaratory Judgment And Breach of Express Or Implied Contract, Based On Its Incorrect Conclusion That These Claims Are Barred By The Utah Statute Of Frauds**

The district court erred in granting summary judgment on Plaintiffs Sachs' claims

for declaratory judgment and breach of express or implied contract on the ground that they are purportedly barred under §25-5-4 of the Utah Statute of Frauds as an “agreement involving the sale or purchase of real property.” Record evidence demonstrates that the parties' finder's fee contract did not involve “the sale or purchase of real property” of UPCM and is thus not barred under §25-5-4(5) of the Utah Statute of Frauds.

Alternatively, Plaintiff Sachs full performance of the finder's fee agreement takes the agreement out of the Statute of Frauds.

### **ARGUMENT**

#### **POINT I THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SACHS' CLAIMS FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT, WHERE GENUINELY DISPUTED ISSUES OF MATERIAL FACT REMAIN FOR TRIAL AND DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW**

The district court granted summary judgment for Lesser, Loeb and UPCM on Plaintiff Sachs' claims for declaratory judgment and breach of an express or implied contract, based on its conclusions that

[t]he undisputed material facts demonstrate that no enforceable express or implied finder's fee agreement was ever entered into... [and that] 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. *See, Bunnell v. Bills*, 368 P.2d 597 (Utah 1962), and *Carter v. Sorensen*, 90 P.3d 637 (Utah 2004).

Minute Entry Decision, ¶2(a), at 2, R. 2209, Aplnt. Add. 1.

Plaintiff Sachs respectfully asserts that the district court erred in so concluding,

because genuinely disputed issues of material fact remain for trial and Defendants Lesser, Loeb and UPCM are not entitled to summary judgment as a matter of law for the reasons discussed below.

**A. Lesser's Request, On Behalf of Loeb and UPCM, That Sachs Find A Buyer For UPCM, After Written Notice Of The Finder's Fee Sachs Charged For His Services, Resulted In An Express Or Implied Finder's Fee Contract**

**1. Express Contract**

The only points of mutual agreement necessary to create a valid finder's fee contract 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. Plaintiff Sachs' May 17, 2001 letter to Rothwell identifies Sachs as the finder, identifies the person to be found as a joint venturer or purchaser for UPCM, and describes the fee as "a couple of prime developed lots in the new Project, cash or some other consideration acceptable to both of us." Defendants' assent to the agreement is supplied by Lesser's request to Plaintiff Sachs to find a purchaser for UPCM after receiving notice of the fee Plaintiff Sachs expected for his services. *See*, SOF, ¶¶16-22, *supra*, at 10-13.

The fact that Lesser and Rothwell did not, verbally or in writing, assent to the finder's fee stated in Plaintiff Sachs' letter, does not mean that "there was no meeting of the minds or mutual assent on the material terms of the alleged finder's fee agreement", or that the "contract was too indefinite" to be enforced, as the district court concluded, citing Bunnell v. Bills, 368 P.2d 597, 600 (Utah 1962).<sup>1</sup> Minute Entry Decision, ¶2(a), at

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<sup>1</sup> In Bunnell, *supra*, at 600, the Utah Supreme Court rejected the defendant Stevens' contention that the agreement failed to adequately set forth the price and terms relating to

2, R. 2209, Aplnt. Add. 1. As this Court has noted, to be considered with the foregoing principles of Bunnell, is the further proposition that

[T]he parties to a contract are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent. *A contract is not fatally defective as to price if there is an agreement as to some formula or method for fixing it.*

Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 366, (Utah App., 1998) quoting Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979) (Emphasis supplied)

In Central Missouri Prof. Svcs. v. Shoemaker, 108 S.W.3d 6, 9 (Mo. App. W.D. 2003), the Missouri Court of Appeals held that an oral fee contract existed where the defendant instructed the plaintiff to commence work after receiving the plaintiff's proposed charges for the work, citing the "well settled rule of law" that

‘[A] written offer may be orally accepted. The result is an oral contract embodying the terms of the writing.’ Moore v. Kuehn, 602 S.W.2d 713, 718 (Mo. App. 1980). ‘Although a written contract is not signed by one or both of the parties, the acceptance by one of the performance of the other gives validity to the instrument and imposes on the acceptor the obligations provided by the contract.’ Hahn v. Forest Hills Constr. Co., 334 S.W.2d 383, 385-86 (Mo. App. 1960).

The court also relied on its prior decision in Moore, supra. There, after receiving a proposal for various home repairs and the charges for making them, the defendant told the plaintiff, “The roof ought to be fixed, so get on it.” Id. at 718. The court found that an express oral contract existed, noting that the only offer to which the defendant's

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the “Bunnell property”, holding that “the receipt expressly states that such property has an agreed value of \$15,000, and that it is to constitute part of the consideration for the Alta (Lodge)....” Nothing in Bunnell indicates that assent to the terms of a contract must be in writing to be enforceable, or that the price term of an agreement that can be shown by extrinsic evidence is not enforceable.



acceptance could have related was the plaintiff's earlier written proposal, such that its terms “necessarily controlled the oral contract established at that point.” Central Missouri, *supra*, at 9, quoting Moore, *supra*, at 718.

In Moore, *supra*, the Missouri Court of Appeals also explained that acceptance of a written offer “need not be made by the spoken or written word; it may also come through the offeree’s conduct or failure to act”, citing the Restatement (Second) of Contracts §21(1) for the rule that

Frequently, services are rendered under circumstances such that the party benefited thereby knows the terms on which they are being offered. If he receives the benefit of the services in silence, when he had a reasonable opportunity to express his rejection of the offer, he is assenting to the terms proposed and thus accepts the offer.

Id. at 718-719, ¶¶ 12-14.

Although the district court held that the “there is a lack of definiteness and material terms such as price” and that “any finder's fee agreement was subject to further negotiation”, Minute Entry Decision, ¶2(a), at 2, R. 2209, Aplnt. Add. 1, Plaintiff Sachs provided undisputed sworn testimony that the “couple of prime developed lots in the new project” owned by UPCM referenced in his May 17, 2001 letter, had a value of approximately two million dollars. Plaintiff Sachs testified that this amount, representing about 3% of the purchase price of UPCM, 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. *See*, SOF, ¶¶ 17-18, *supra*, at 11.

That Lesser and Rothwell accepted the finder’s fee stated in Sachs’ May 17, 2001, letter is shown by evidence that when Lesser telephoned Sachs after receiving the letter,

he told Sachs to forget a joint venture partner for UPCM's Projects and to find a buyer or buyers for UPCM as quickly as possible, and never questioned the amount of the finder's fee. *See*, SOF, ¶¶19-22, 50, *supra*, at 11-12, 20.

On May 18, 2001, Plaintiff Sachs sent Rothwell a follow-up letter stating, "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", and that "I will continue to keep you apprised of all proposals..." *See*, SOF, ¶22, *supra*, at 12-13. Thus, as of May 18, 2001, both Lesser and Rothwell were fully aware that Plaintiff Sachs was working to find one or more purchasers for UPCM for the finder's fee referenced in his letter of May 17, 2001. Despite this knowledge, and although they had numerous opportunities to do so, Lesser and Rothwell never informed Sachs that they had any questions about the finder's fee, including the amount of the fee, and never informed Sachs they would not pay him the finder's fee at any time prior to the date Jackson purchased UPCM. *See*, SOF, ¶¶ 20-21, 50, *supra*, at 12, 20.

Based on the foregoing evidence, a reasonable jury could find that Lesser and Rothwell understood the fee Plaintiff Sachs expected for his services, such that there was a meeting of the minds on the amount of the fee at the time Lesser requested Sachs to find a buyer for UPCM, and hence no need for further negotiation of the contract. Even if the district court considered the price term to be ambiguous, Plaintiff Sachs' testimony as to the amount of the fee is extrinsic evidence that must be considered by a jury, precluding summary judgment. Republic Group, Inc. v. Won-Door Corporation, 883 P.2d 285, 295 (Utah App. 1994) (internal citations omitted).

The instant case is immediately distinguishable from Carter v. Sorensen, 2004 UT 33, 90 P.3d 637, cited by the district court. *See*, Minute Entry Decision, ¶2(a) at 2, R. 2209, Aplnt. Add. 1. There, Carter was seeking to obtain water rights under an option contract to repurchase land previously sold to the defendant Sorensen. The contract only specified an option price to repurchase the land and did not specify any separate price for repurchasing the water rights. Moreover, the price of the water rights could not be determined from extrinsic evidence. On these facts, the Utah Supreme Court sustained the trial court's finding that the option contract was unenforceable as to the water rights. Carter, *supra*, at ¶¶4,5,11. By contrast, in the instant case, Plaintiff Sachs' testimony regarding the value of the “couple of prime developed lots in the new Project” on which his finder’s fee was predicated, is extrinsic evidence of the amount of the finder’s fee to be considered by the jury, thus precluding summary judgment. *See*, SOF, ¶¶16-17, *supra*, at 10-11.

Moreover, the price term not being expressed in dollars, but by means of “cash, a couple of prime developed lots in the new Project, or some other consideration acceptable to both of us”, referenced in Sachs' May 17, 2001 letter, *See*, SOF, ¶¶16-21, *supra*, at 10-12, is incidental to the agreement and no bar to its enforcement. “When the major aspects of a contract are specified with requisite certainty, this Court will not allow incidental details...in a contract...to deny specific performance.” Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 363 (Utah App. 1998), quoting Reed v. Alvey, 610 P.2d 1374, 1378-79 (Utah 1980). In Reed, the Utah Supreme Court held that even “agreements to agree,” which are sufficiently definite, may be enforced. Id.

Based on the foregoing, the district court's grant of summary judgment for Defendants on Plaintiff Sachs' claims for declaratory judgment and breach of express contract is incorrect and should be reversed. Additionally, under the rationale of Central Missouri discussed above, Lesser's oral request to Sachs to find him a purchaser for UPCM after receiving written notice of the finder's fee Sachs expected for his services in finding a joint venturer or purchaser for UPCM, constituted an oral acceptance of Sachs' written offer, resulting in an "express" finder's fee contract between the parties. Thus, the district court's finding that no express finder's fee contract was formed, is incorrect as a matter of law and must be reversed.

## **2. Implied Contract**

Under Utah law, a plaintiff may plead alternative causes of action for breach of contract and breach of implied contract and go to trial on both claims. Parrish v. Tahtaras, 318 P.2d 642, 645 (1957), citing U.R.Civ.P.54(c)(1); Morris v. Russell et ux., 236 P.2d 451, 454 (Utah 1951), citing U.R.Civ.P. 8(e)(2) and 54(c)(1). Thus, even if Plaintiff Sachs is not entitled to recover his finder's fee under an "express" contract theory, genuinely disputed issues of material fact preclude summary judgment on Plaintiff Sachs' claims for breach of an implied contract and Defendants are not entitled to summary judgment as a matter of law.

In Scheller v. Dixie Six Corp., 753 P.2d 971 (Utah App., 1988), this Court held

When a party, for some reason, is not entitled by the express terms of a contract to recover payment for services rendered, he or she might nonetheless be entitled to recover in quantum meruit. Recovery under quantum meruit presupposes that no enforceable contract

exists...[Quantum meruit is] rooted in justice to prevent the defendant's enrichment at the plaintiff's expense.

Id. at 975, citing Davies v. Olson, 746 P.2d 264, 268-269 (Utah App. 1987).

In Davies, this Court described the two branches of quantum meruit and the elements of proof for each branch:

Contract implied in law, also known as quasi-contract or unjust enrichment, is one branch of *quantum meruit*. A quasi-contract is not a contract at all, but rather is a legal action in restitution... The elements of a quasi-contract or a contract implied in law, are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it....

A contract implied in fact is the second branch of *quantum meruit*. A contract implied in fact is a "contract" established by conduct. The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation.

Id. at 269. (Internal citations omitted)

In the instant case, Plaintiff Sachs presented substantial record evidence to satisfy the elements of both branches of *quantum meruit*, for damages based on a contract implied in law, Count III, and based on a contract implied in fact, Count IV, Verified Complaint, R. 1-24, creating genuinely disputed issues of material fact for trial.

**a. Quantum Meruit Based On A Contract Implied In Law**

**Element No. 1:** "the defendant received a benefit", Davies, *supra*, at 269.

Plaintiff Sachs' evidence demonstrates that in response to Lesser's request, Plaintiff Sachs found Gerald Jackson as a buyer for UPCM, and that Jackson subsequently created an entity, CGP, which purchased UPCM by buying the stock of the corporation, from which

Defendants “received a benefit” of approximately \$67.2 million. *See*, SOF, ¶11-44, *supra*, at 8-19.

**Element No. 2:** “an appreciation or knowledge by the defendant of the benefit”, *Davies, supra*, at 269. Plaintiff Sachs' evidence demonstrates that Lesser and Rothwell knew that Plaintiff Sachs was directing his efforts to finding a purchaser for UPCM with the expectation of receiving a finder's fee based on: (1) Sachs’ letters of May 17 and 18, 2001; (2) Sachs' phone call to Rothwell advising him of Jackson's interest in purchasing UPCM based on the information Sachs provided to Jackson; (3) the fact that Lesser and Rothwell never told Sachs they would not pay the finder's fee prior to the time Jackson purchased UPCM, and (4) that Lesser and Rothwell acknowledged the existence of the agreement by stating that Sachs would have received the finder’s fee if his client Granite had purchased UPCM. *See*, SOF, ¶¶ 16-22,28,41-43,56, *supra*, at 11-13, 17-18.

**Element No. 3:** “under circumstances that would make it unjust for the defendant to retain the benefit without paying for it”, *Davies, supra*, at 269. Plaintiff Sachs’ evidence indicates that Defendants received \$67.2 million as the direct result of Sachs' efforts in locating Jackson to buy UPCM based on a direct request from Lesser, after Lesser received notice of the fee Plaintiff Sachs would charge for his services. Additionally, Plaintiff's evidence shows that Lesser and Rothwell never told Sachs that Jackson was excluded as a party he could approach to buy UPCM, or that they wouldn't pay his fee at anytime prior to the time Jackson purchased UPCM, and that a finder's fee amounting to 3% of the purchase price paid for UPCM is a reasonable and customary fee for the services performed by Plaintiff Sachs. *See*, SOF, ¶¶ 15- 56, *supra*, at 10-22. Thus,

it would be unjust for Defendants not to pay Sachs the agreed finder's fee under these circumstances.

**b. Plaintiff Sachs' Evidence Regarding His Claim For Quantum Meruit Relief Based On A Contract Implied In Fact**

**Element No. 1:** "the defendant requested the plaintiff to perform work", Davies, *supra*, at 269. Plaintiff Sachs presented sworn testimony that Lesser requested him to find a joint venturer or purchaser for UPCM in their meeting on May 2, 2001, and that on May 17, 2001, after receiving Sachs' letter of the same date, Lesser telephoned Plaintiff Sachs and told him that he was no longer interested in a joint venturer for UPCM, and wanted Sachs to find him one or more parties to buy UPCM as soon as possible. *See*, SOF, ¶¶ 11,16, *supra*, at 8-10;

**Element No. 2:** "the plaintiff expected the defendant to compensate him or her for his services", Davies, *supra*, at 269. Plaintiff Sachs' evidence shows that he sent Rothwell a letter on May 17, 2001 confirming his understanding that he would receive a finder's fee for locating a joint venturer or buyer for UPCM, and a letter on May 18, 2001, confirming Lesser's preference for a purchaser and that he would direct his efforts toward finding a buyer or buyers for UPCM. *See*, SOF, ¶¶16-22, *supra*, at 10-13.

**Element No. 3:** "the defendant knew or should have known that the plaintiff expected compensation", Davies, *supra*, at 269. Plaintiff Sachs' evidence shows that the Defendants knew or should have known that the plaintiff expected compensation based on: (1) Plaintiff Sachs' letter of May 17, 2001 confirming his understanding of the fee he would receive for finding a joint venturer or purchaser for UPCM; (2) Lesser's May 17

phone call requesting Sachs to find a purchaser for UPCM; (3) Sachs' May 18, 2001 letter confirming that he will focus his efforts on finding a buyer for UPCM; and (4) Plaintiff Sachs' telephone call to Rothwell advising him of Jackson's interest in purchasing UPCM based on Sachs' efforts. *See*, SOF, ¶¶16-22, *supra*, at 11-13.

Even assuming the parties did not agree as to the amount of the finder's fee described in Sachs' May 17, 2001 letter, which Plaintiff Sachs disputes, the measure of recovery under a contract implied in law "is the value of the benefit conferred on the defendant... If the amount is unexpressed, the courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff's services." *Davies, supra*, at 269 (internal citations omitted).

The measure of recovery under a contract implied in fact is, "the amount the parties intended as the contract price. If that amount is unexpressed, courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff's services." *Davies, supra*, at 269-270, citing Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am.U.L.Rev. 547, 556 (1986). *See also, Turnkey Corp. v. Rappeport*, 720 P.2d 115, 119 (Ariz. App. 1986) (*quantum meruit* recovery allowed where only element of contract disputed was the value of services rendered).

Accordingly, the district court's finding that the terms of Plaintiff Sachs' finder's fee contract with Defendants is too indefinite to be enforced, or is merely an agreement to agree, is incorrect and should be reversed. Additionally, genuinely disputed issues of material fact concerning Plaintiffs' claims for breach of implied contract based on *quantum meruit* preclude summary judgment on these claims and require reversal of the



district court's decision granting summary judgment for Defendants on these claims.

**POINT II THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S FINDER'S FEE CLAIMS BECAUSE PLAINTIFF SACHS DID NOT ENGAGE IN ANY TRANSACTION INVOLVING "REAL ESTATE" REQUIRING LICENSURE UNDER UREBA**

The district court erred in granting summary judgment for Lesser, Loeb and UPCM on all of Plaintiff Sachs' finder's fee claims, on the ground that such claims are barred by the defense of "illegality" under §61-2-1 and §61-2-18(1) of the Utah Real Estate Broker's Act ("UREBA"), Aplnt. Add. 4, based on findings that,

Plaintiff did not have a real estate license...[UPCM's] principal business was the leasing, development and sale of real property, and that its' [UPCM's] only asset of significance was its real property. Even plaintiff attempted to negotiate compensation in the form of ... "a couple of prime developed lots in the new project..." .....The Court further relies on upon Andalex Resources v. Myers, 871 P.2d 1041 (Utah App. 1994), and the majority rule set forth in Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 848 A.2d 725 (N.H. 2004).

*See*, Minute Entry Decision, ¶2(b), at 2-3, R. 2209-2210, Aplnt. Add. 1.

As Plaintiff Sachs will demonstrate, neither UREBA nor the decisions relied on by the district court, preclude Plaintiff Sachs' finder's fee claims as a matter of law and genuinely disputed issues of material fact also preclude summary judgment on these claims.

**A. As A Penal Statute, UREBA Must Be Strictly Construed To Avoid Criminalizing Conduct Not Plainly Prohibited Under Its Provisions**

In State of Utah v. Mooney, 2004 UT 49, ¶11, the Utah Supreme Court held that "a question of statutory interpretation is reviewed for correctness, without deference to the conclusions of the trial court" and that "the primary source of guidance in statutory

interpretation is the plain and ordinary meaning of the statutory language.”

UREBA is penal in nature. Section 61-2-17 of UREBA, Aplnt Add. 4, provides that violations of the Act are punishable as a “Class A Misdemeanor” for the first offense, with a term of imprisonment not to exceed six months, and that any second or subsequent violation is punishable as a third degree felony with a term of imprisonment not to exceed two years. Additionally, any person who receives money or its equivalent, as a commission, compensation, or profit by or in consequence of a violation of the act, may be assessed an additional penalty of not less than the amount of the money received and not more than three times the amount of the money received, as determined by the court.

Because UREBA is penal in nature, it must be strictly construed to avoid criminalizing conduct not clearly prohibited under its provisions. “[Due process] guarantees do not permit enforcement of a penal statute that forbids an act in terms so vague that persons of common intelligence must necessarily guess at the statute's meaning and differ as to its application.” State v. Mooney, *supra*, ¶17. Thus, the Court should refuse to extend the UREBA licensing requirements beyond their plain meaning.

In Andersen v. Johnson, 160 P.2d 725 (Utah 1945), the Utah Supreme Court held that an individual who accompanied a licensed real estate broker on a visit to a farm owner and assisted the broker in obtaining a listing on the farm, was not acting as “a real estate broker” or a “real estate salesman” within UREBA, such that the lack of a real estate broker’s license did not bar his recovery on the broker’s agreement to pay him a commission for this service. In reaching this result, the Utah Supreme Court refused to extend the definitions of the terms “real estate broker” and “real estate” by implication,

stating that “Had the legislature intended to prohibit one from assisting a real estate broker to secure listings, it could have done so without difficulty.” *Id.* at 729.<sup>2</sup>

Section 61-2-2(14) of UREBA defines the term “real estate” as including “leaseholds and business opportunities involving real property.” (Emphasis supplied). Although the district court held that Plaintiffs’ Sachs’ efforts in finding of a buyer for UPCM, is “a business opportunity involving real estate” under the definition of “real estate” in §61-2-2 (14), the term “business opportunity involving real property” is nowhere defined in UREBA. Even at face value, the term “business opportunity involving real property” is readily distinguishable from the terms “business” and “corporation”, which terms are not contained in the definition of “real estate” under §61-2-2(14) of UREBA. Had the Utah Legislature desired to prohibit an individual from finding a buyer for a corporation or business for a fee, without being licensed under

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<sup>2</sup> In 1945, when the Utah Supreme Court decided *Andersen*, UREBA defined “real estate” in §82-2-2 as “leaseholds and other interests less than leaseholds.” *See*, *Aplnt. Add. 7*, at 7. In 1953, UREBA was moved to Chapter 61, but the definition of “real estate” remained the same. *See*, §61-2-2, *Id.* at 10. In 1963, UREBA defined “real estate” as “leaseholds and business opportunities” and the term “business opportunity” was defined as “an existing business, business and the good will attached thereto or any one or combination thereof.” *Id.*, at 13. In 1983, UREBA defined “real estate” as including “timeshare interests” and the term “business opportunity” was amended to include a “business franchise.” *Id.*, at 16. ***In 1985, the definition of “real estate” in UREBA was amended to include “leaseholds, business opportunities, and all timeshare interests ....involving real property.” The term “business franchise” was removed from the definition of “real estate” and the definition of “business opportunity” was removed in its entirety.*** *Id.*, at 19. (Emphasis supplied) In 1987, the definition of “real estate” was amended to “leaseholds and business opportunities involving real property.” The term “business opportunities” is undefined. *Id.*, at 21. In 1989, 1991, 1996, 1997 and 2003, UREBA was amended, but the definition of “real estate” was not changed. In 1996, the definition of “real estate” was moved to its current position at subparagraph (14). *Id.*, at 4. *See also*, 2005 Supp. (showing history of amendments to UREBA), *Id.* at 4.

UREBA, “it could have done so without difficulty.” See, Andersen, *supra*, at 729. The fact that the Utah Legislature, in 1985, specifically deleted the definition of “business opportunity” which then included “an existing business; a business and its good will; a business franchise, or any combination of them”, argues against an interpretation of the term “business opportunity” as encompassing “an existing business” or a “business and its good will.” Because the term “business opportunity involving real property” is undefined in UREBA, “[T]he ambiguity in the statute is such that the scope of its ... prohibition cannot be decisively interpreted by lawyers, to say nothing of citizens untrained in the law. This weighs strongly against any interpretation that would enable the state to initiate criminal prosecution based on arguably legitimate conduct.” State of Utah v. Mooney, *supra*, at ¶18.

Based on the foregoing, the Court should strictly interpret UREBA and hold that its ambiguous term “business opportunity involving real estate” did not require Plaintiff Sachs to be licensed as a real estate broker to find a buyer for UPCM, a public corporation, and does not bar Plaintiff Sachs’ claims to recover his finder’s fee.

**B. Plaintiff Sachs Was Not Required To Be Licensed As A Real Estate Broker To Find A Buyer For UPCM, A New York Stock Exchange Corporation, Where The Buyer Purchased UPCM By Acquiring 100% Of Its Common Stock In A Merger In Which UPCM Was The Surviving Corporation And Retained Its Assets, Including Its Real Estate**

In 17 Williston on Contracts, §51.2 (4th Ed. 2006), the nature of the property interest represented by corporate stock is described as follows:

Shares of stock, which represent the holder’s partial but undivided ownership of the corporation, constitute a property interest quite distinct from the capital or tangible assets of the corporation. The capital is the

property of the artificial person, the corporation; the shares are the property of the several shareholders. Incorporeal in their nature, the shares are generally classed as personal property. The fact that the entire capital may be invested in real estate does not change the character of the shares of the corporation as personal property. Even though the company may exist for the sole purpose of owning and dealing in real estate, its shares are nevertheless personal property.

*See, Id.*, Full text (citing cases), Aplnt. Add. 6.

In Utah, corporate stock has historically been considered as “personal property” rather than “real property.” *See, e.g., Nielson v. Nielson*, 780 P.2d 1264, 1267 (Utah App. 1989) (plaintiff awarded stock as personal property in divorce); *Linder v. Utah Southern Oil Co.*, 269 P.2d 847, 848 (Utah 1954) (citing Utah Code Ann. (1953), §16-2-34, providing that: “Stock shall be deemed personal property...”; *Pace v. Pace Bros. Co. et al.*, 59 P.2d 1, 4 (Utah 1936) (Utah statutes authorizing corporations to buy and sell personal property and declaring stock to be personal property do not authorize corporation to purchase its own stock).

In *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366 (3rd Cir. 1990), the Court of Appeals for the Third Circuit held that a finder’s fee contract in connection with the sale of the stock of a corporation, part of whose assets consisted in land, was not rendered unenforceable because the plaintiff finder was not licensed under the Pennsylvania real estate broker’s act, based on the “well established” principle that “The shares of a corporation constitute a species of property entirely distinct and different from the corporate property,” and that “this distinction is predicated neither on the number of shareholders, the size of the corporation, or the nature of its assets...” *Id.* at 1370. (Internal citations and quotations omitted.) Similarly, in *Silvertooth v. Kelley*, 91 P.2d

1112, 1114 (Or. 1939), the Oregon Supreme Court held that an individual did not require a real estate broker's license to find a purchaser for the stock of a corporation, holding that

Shares of stock in a corporation are personal property (13 American Jurisprudence 293) even where the property of the corporation consists wholly of real estate: Fletcher Cyc. Corporations (Permanent Edition) § 5096 ... The corporation, Horse Heaven Mines, still has title to the real property. It was the stock in the corporation that was sold.

As in Gruber and Silvertooth, it was the stock of UPCM that was sold, not its real property, which UPCM retained in the transaction. Thus, the purchase of such stock, constituting “personal property”, did not involve the “sale or exchange of *real property*” requiring licensure under UREBA.

Although the district court relies on Andalex Resources v. Myers, 871 P.2d 1041 (Utah App. 1994) to support its conclusion that Plaintiff Sachs was required to be licensed as a real estate broker to obtain a fee for finding Jackson to purchase UPCM, Minute Entry Decision, ¶2(b), at 2-3, R. 2209-2210, Aplnt Add. 1, Andalex involved the sale of coal leases that are “leaseholds” within the definition of “real estate” in §61-2-2(14) of UREBA, whereas the stock of a public corporation is not “real estate.”

The district court's reliance on “the majority rule set forth in Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 848 A.2d 725 (N.H. 2004)”, Minute Entry Decision, Id., is also unwarranted. No “majority rule” is stated in Blackthorne. The only reference to the laws of other jurisdictions in Blackthorne is at p. 730, where the court refers to Kazmer-Standish Consul. v. Schoeffel Instrum., 445 A.2d 1149 (1982). There, the New

Jersey Supreme Court referred to the Court of Appeals and Errors decision 1933 decision in Kenney v. Patterson Milk & Cream Co. 110 N.J.L. 141, 164 A. 274 (E & A. 1933), for the “majority rule” “permitting a broker to recover a commission on the personalty in the sale of a business that also includes real estate if the listing agreement apportions the commissions between personalty and realty.” Kazmer, *supra*, at 1151-52. However, as the court observed in Kazmer, “unlike statutes of thirteen other jurisdictions, the New Jersey Act does not expressly apply to the brokering of **business opportunities**,” *Id.* at 1151, n.1 (citing Utah as one of the thirteen states that apply to the brokering of business opportunities), 1152. (Emphasis supplied)

Because the New Jersey real estate broker’s statute differs from UREBA, and the definition of “business opportunities” that existed in UREBA at the time Kenney and Kazmer were decided, has been completely deleted from UREBA, these cases are of no assistance in determining whether Plaintiff Sachs’ finder’s fee claims are barred under the more recent versions of UREBA.

Blackthorne is also distinguishable from the facts of this case, because the plaintiff in Blackthorne was an unlicensed real estate broker who agreed to find a buyer and negotiate the sale of the **real property assets** of a business. “The defendant and Fortis closed on the **asset sale** of the assisted living facility.” Blackthorne, *supra*, at 727-728. (Emphasis supplied) Conversely, Plaintiff Sachs was not a real estate broker and did not offer or agree to find a buyer for UPCM’s real property assets. Thus, the district court’s grant of summary judgment for Defendants on Plaintiff’s finder’s fee claims based on his lack of a broker’s license under UREBA, is incorrect and must be reversed.

**C. Plaintiff Sachs' Offer To Accept His Finder's Fee In The Form Of Two Prime Developed Lots Or The Equivalent In Cash Or Some Other Consideration, Did Not Require Him To Be Licensed Under UREBA**

The district court concluded that Plaintiff Sachs' offer to receive payment of his finder's fee in the form of “a couple of prime developed lots in the new project” owned by UPCM, brings the parties' finder's fee agreement under UREBA. *See*, Minute Entry Decision, ¶2(b), at 2-3, R. 2209-2210, Aplnt. Add. 1. This conclusion erroneously conflates agreements for which licensure is required under UREBA, with the nature of the compensation an individual may receive in an agreement for which licensure is not required under UREBA. Additionally, the district court furnishes no legal authority supporting this construction of UREBA.

Thus, the district court's dismissal of Plaintiff Sachs' finder fee claims, based on Plaintiff Sachs' offer to take his finder's fee in real property owned by UPCM, is incorrect and should be reversed.

**D. The Purpose Of UREBA Is Not Offended By Enforcing An Agreement By A Principal Of A Corporation, On Behalf Of The Corporation And Its Majority Shareholders, To Pay A Finder's Fee To A Professional Business Finder For Locating A Purchaser For The Corporation**

In American Rural Cellular v. Systems Comm., 890 P.2d 1035, 1040 (Utah App. 1995), a case for satisfaction of a mechanic's lien brought by an unlicensed contractor, this Court considered the common law exceptions to the general rule that an unlicensed contractor cannot recover payment. Quoting Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990), the Court held that, “the Utah Legislature's adoption of a statutory bar to recovery ‘does not preclude the application of the previous common law



exception to the general rule of non-recovery.’ *Id.* at 169.” Regarding the common law exception, the Court stated that

The common law exceptions to the general rule are all grounded in the notion that there is no need for rigid insistence on proper licensure when the public is otherwise protected from the harm that the licensing statute was designed to prevent, that is, inept and financially irresponsible builders. A canvass of germane cases reveals that Utah courts have found several factors relevant to whether the purpose of the licensing statute has been met. First, the courts have emphasized that when the contracting party possesses knowledge and expertise in the field, it is not within the class of persons in need of the protection that the licensing statute was intended to provide. Thus, the Utah Supreme Court allowed an unlicensed contractor to recover when the contracting party was itself a licensed contractor. (Emphasis supplied. Internal citations omitted.)

In American Rural, this Court relied on the Utah Supreme Court’s decision in Fillmore Products v. Western States Paving, 561 P.2d 687, 690 (Utah 1977) for the proposition that

the owners, because they were themselves licensed contractors and therefore informed of the necessity and purpose of licensing, could not “invoke application of the general rule of denying relief to an unlicensed contractor solely because of the latter’s non-licensing when a contract for construction is struck between them.”

American Rural, *supra*, at 1041, quoting Fillmore, *supra*, at 690.

Similarly, in this case, Lesser, the Chairman of the Board of UPCM, and President of Defendant Loeb Investors Co. XL, the majority shareholder of UPCM, who engaged Plaintiff Sachs to find a buyer for UPCM, is himself a licensed real estate broker in New York and has represented investors, including the Defendant Loeb Investors, for more than thirty years. *See*, SOF, ¶6, *supra*, at 7. Hank Rothwell, the President of UPCM, to whom Lesser instructed Sachs to refer any potential buyers, has been employed in real

estate development and investment for over twenty years and is also licensed as a real estate broker in Utah. *See*, SOF, ¶6, *supra*, at 7. These experienced and licensed real estate brokers certainly did not require the “protection” of the licensing provisions of UREBA designed to protect consumers in the residential housing market from unscrupulous real estate brokers, in their dealings with Plaintiff Sachs, and should not be permitted to invoke the licensing requirements of UREBA to defeat Plaintiff Sachs’ finder's fee claims.

For all of the foregoing reasons, the district court's decision granting summary judgment on Plaintiff Sachs' finder's fee claims as barred by UREBA, should be reversed.

**POINT III THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFF SACHS' CONTRACT CLAIMS AND QUANTUM MERUIT CLAIMS ARE BARRED BY THE STATUTE OF FRAUDS AND GENUINELY DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT**

**A. The Plain Language Of The Utah Statute Of Frauds Does Not Require An Oral Contract To Find A Purchaser For A Corporation For A Fee To Be In Writing To Be Enforceable**

The district court also granted Defendants' motion for summary judgment on Plaintiff Sachs' contract and quantum meruit claims, concluding that these claims “are barred by the Utah Statute of Frauds, U.C.A. §25-5-4 (1998).” This conclusion is, in turn, based on conclusions that “it is *undisputed* that the alleged finder's fee agreement relates to the sale or purchase of real estate as the only significant asset owned by defendant United Park City Mines”, and “that it *undisputed* that no writing exists that would satisfy the requirements of the Utah Statute of Frauds.” *See*, Minute Entry Decision, ¶2(c), at 3-4, R. 2210-2211, Aplnt. Add.1. (Emphasis supplied)

Plaintiff Sachs respectfully submits of the foregoing conclusions are incorrect because they are based on an erroneous characterization of Plaintiff Sachs' finder's fee claims in this action as involving an “agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation” under §25-5-4(5) of the Utah Statute of Frauds.<sup>3</sup> Mackintosh v. Hampshire, 832 P.2d 1298, 1301-1302 (Utah App. 1992) (reversing decision that agreement was barred by statute of frauds based on trial court's erroneous characterization of plaintiff's claim as one for an interest in real property.)

Additionally, contrary to the district court's finding, Plaintiff Sachs presented substantial record evidence and argument to prove that the finder's fee agreement relates to finding a buyer for UPCM, the corporation, rather than finding a buyer for the real estate assets of UPCM. The district court fails to address this evidence, and then concludes, without reference to any evidence in the record, that it is “undisputed” that the finder's fee agreement “relates to the purchase or sale of real estate.”<sup>4</sup> *See*, Minute Entry

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<sup>3</sup> The district court did not indicate which subsection of the Utah Statute of Frauds it relied on to bar the Plaintiffs' claims. Based on the district court's citation of Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co., 779 P.2d 230, (Utah App. 1989), discussing subsection (5) of §25-5-4, Plaintiff Sachs can only surmise that this subsection served as the basis for the district court's decision.

<sup>4</sup> In opposing Defendants' motions for summary judgment, Plaintiff Sachs presented substantial evidence and argument disputing the district court's conclusion that the finder's fee agreement relates to the “sale or purchase of real estate” and demonstrating that the agreement related to finding a buyer for UPCM, the corporation, and not its real property assets. *See*, Pltf. Mem. Op. UPCM, Response to ¶¶1-2, 25, R. 1606, 1619, and Argument, R.1650-1653; Pltf. Mem. Op. L&L, Response to ¶38, and Argument, R. 1338-1347; SOF, ¶¶13-17, 35, 38-39, 44 *supra*, at 9, 16 -18.

Decision, ¶2(c), at 3-4, R. 2210-2211, Aplnt. Add. 1. Because Sachs' finder's fee agreement is not "an agreement authorizing or employing an agent or broker to purchase or sell *real estate* for compensation", §25-5-4(5) of the Utah Statute of Frauds does not apply to bar Plaintiff Sachs' finder's fee agreement with Defendants. (Emphasis supplied) Consequently, no writing is necessary to satisfy the statute and Plaintiff Sachs' claims for *quantum meruit* and unjust enrichment are not barred under Young v. Buchanan, 259 P.2d 876 (Utah 1953), as the district court incorrectly concluded. *See*, Minute Entry Decision, Id.

The Utah Statute of Frauds, U.C.A. §25-5-4 (1998), applies to six types of agreements. *See*, Aplnt. Add. 5. "The primary source of guidance in statutory interpretation is the plain and ordinary meaning of the statute." State of Utah v. Mooney, 2004 UT 49, ¶11, citing Dick Simon Trucking, Inc. v. State Tax Comm'n, 2004 UT 11, ¶17. Under §25-5-4(5), an oral agreement "authorizing or employing an agent or broker to purchase or sell real estate for compensation", including agreements for finding a party to purchase or sell *real estate*, is void without a writing. Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co., 779 P.2d 230, 234 (Utah App. 1989) (Emphasis supplied.) However, an oral agreement to find a buyer for a corporation for a fee, the type of agreement at issue in this case, is not among the list of agreements required to be in writing to be enforceable under the Utah Statute of Frauds. *See*, SOF, ¶3, *supra*, at 6. Had the Utah Legislature desired to require such agreements to be in writing, it could have easily and expressly so provided.

Because Plaintiff Sachs' finder's fee agreement with the Defendants in this case is

not required to be in writing under the plain language of the Utah Statute of Frauds, the district court's decision holding that Plaintiffs' finder's fee claims against Defendants are barred by the Utah Statute of Frauds, is incorrect and must be reversed.

**B. Plaintiff Sachs' Performance Of The Finder's Fee Agreement Permits Its Enforcement Even If The Utah Statute of Frauds Applies**

Section §25-5-8 of the Utah Statute of Frauds provides that

Nothing in this chapter contained shall be construed to abridge the powers of the courts to compel the specific performance of agreements in case of part performance thereof.

Thus, an agreement otherwise invalid under the Utah Statute of Frauds may be enforced through a court's equitable prerogatives if a party, relying on the oral agreement, partially performs its contractual obligations. Jenkins v. Percival, 962 P.2d 796, 801 (Utah 1998). The doctrine of part performance was fashioned by courts of equity not to annul the statute of frauds, but only to prevent its being made a means of perpetrating a fraud. Coleman v. Dillman, 624 P.2d 713, 715 (Utah 1991).

“Part performance which will avoid [the] statute of frauds may consist of any act which puts [the] party performing in such position that nonperformance by other [party] would constitute fraud.” In re Madsen's Estate, 259 P.2d 595, 601 (Utah 1953). The standard for part performance sufficient to take the agreement outside the Utah Statute of Frauds is: (1) the oral contract and its terms must be clear and definite; (2) the acts done in performance of the contract must be equally clear and definite; and (3) the acts must be in reliance on the contract. Spears v. Warr, 2002 UT 24, ¶22.

As to the first prong, Plaintiff Sachs' evidence shows that his letter of March 17, 2001, constituted an offer to find a purchaser for UPCM, the corporation, for a finder's

fee in the amount of “a couple of prime developed lots in the new project” owned by UPCM, having a value of approximately two million dollars, or the equivalent in cash, or some other consideration, and that Lesser accepted this offer by requesting Plaintiff to find a purchaser for UPCM after receiving written notice of the fee Sachs would charge for his services. Plaintiff Sachs' evidence also shows that Lesser and Rothwell never repudiated the agreement or stated they would not pay Sachs' fee prior to the time Jackson purchased UPCM. *See*, SOF, ¶¶ 11,12,14,16-22, *supra*, at 8-12.

As to the second prong, Plaintiff Sachs presented evidence to show that he performed clear and definite acts pursuant to the contract, including: (1) corresponding with the Defendants regarding the finder's fee he expected and indicating that he was focusing his efforts to locate a purchaser for UPCM; (2) contacting prospective purchasers; (3) contacting Jackson about buying UPCM; (4) advising Jackson to contact Rothwell to obtain a confidentiality agreement; (5) providing Jackson with a reference to Granite as a potential joint purchaser; (6) calling Granite to discern its interest in purchasing UPCM with Jackson; (7) calling Rothwell to inform him of Jackson's interest in purchasing UPCM based on the new information Sachs provided Jackson; (8) calling Jackson frequently to support him in purchasing UPCM; (9) discussing his finder's fee with Jackson; and (10) requesting payment of his finder's fee after Jackson bought UPCM. *See*, SOF, ¶¶ 15-16, 18-31, 36, 40, 41-44, 46-47, 49 *supra*, at 10-20.

As to the third prong, Plaintiff Sachs presented evidence showing his acts in reliance on the contract, including his testimony that he worked a fee basis, and that a fee for finding a buyer for a corporation is usual and customary; his correspondence with

Defendants stating his expectation of a fee for his services, and Rothwell's admission that Plaintiff Sachs would not have undertaken his efforts to find a purchaser for UPCM as a "volunteer." *See*, SOF, ¶¶1, 12-13, 16-22, 42, *supra*, at 9, 10-13, 18.

At a minimum, this evidence is sufficient to raise a jury question on the issue of whether Plaintiff's performance is sufficient to take his finder's fee agreement outside the Statute of Frauds, thus precluding summary judgment.

Because Plaintiff Sachs' finder's fee agreement is not barred by the Utah Statute of Frauds and/or because his full performance of the agreement takes it outside the Statute, the district court's decision granting summary judgment for Defendants on Plaintiffs' claims as barred by the Statute of Frauds, is incorrect and must be reversed.

### CONCLUSION

Plaintiff Sachs' claims against Defendants Lesser, Loeb and UPCM are not barred under UREBA or the Utah Statute of Frauds. The finder's fee contract at issue is sufficiently definite to be enforceable as an express or implied contract and genuinely disputed issues of material fact preclude summary judgment on these claims.

Accordingly, the district court's contrary conclusions and decision granting summary judgment for Defendants on Plaintiff Sachs' claims are incorrect and must be reversed and the case remanded to the district court for a trial on the merits.

DATED and respectfully submitted this 10th day of July 2006.

  
KATHRYN COLLARD  
Attorney for Plaintiff

## CERTIFICATE OF DELIVERY

I hereby certify that on this 10th day of July, 2006, I had a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** hand delivered to counsel for Defendants, at their office addresses listed below:

Mr. Anthony C. Kaye  
Mr. Jason D. Boren  
Ballard Spahr Andrews & Ingersoll, LLP  
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Post Office Box 45898  
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Attorneys for Defendant -Appellees  
United Park City Mines Company

  
KATHRYN COLLARD  
Attorney for Plaintiff-Appellant



## **INDEX TO APPELLANT'S ADDENDUM**

1. Minute Entry Decision, dated February 6, 2006
2. Letter from Sachs to Rothwell, dated May 17, 2001
3. Letter from Sachs to Rothwell, dated May 18, 2001
4. Utah Real Estate Brokers Act, "UREBA", U.C.A. §61-2-1, *et seq.*
5. Utah Statute of Frauds, U.C.A. §25-5-1 *et seq.*
6. 17 Williston on Contracts, §51.2 (4th Ed. 2006)
7. U.C.A. and Laws of Utah, §61-2-2 (§82-2-2) Historical Excerpts

Tab 1

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

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IRA SACHS,	:	MINUTE ENTRY DECISION
Plaintiff,	:	CASE NO. 040926707
vs.	:	
JOSEPH S. LESSER, LOEB INVESTORS	:	
CO. XL, AND UNITED PARK CITY	:	
MINES COMPANY, CAPITAL GROWTH	:	
PARTNERS, AND JOHN DOES 1-10,	:	
Defendants.	:	

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Defendants Lesser, Loeb and United Park City Mines' Motions for Summary Judgment were taken under advisement by the Court after the submission of Memoranda and oral argument by counsel. United Park City Mines' Motion for Leave to File Amended Answer was previously submitted to the Court for decision. After further review and consideration, the Court rules as follows.

1 United Park City Mines' Motion for Leave to File Amended Answer is granted. Leave to amend pleadings is to be freely granted when the Motion is not untimely, nor futile and when no prejudice results to the party opposing the Motion by having the new claim or defense adjudicated. Norman v. Arnold, 57 P.3d 997 (Utah). In this case, the Motion for Leave to File Amended Answer was timely filed in accordance with the governing Scheduling Order. Plaintiff was on notice of the

defense of illegality from defendant Loeb's Answer which was adopted by defendant United Park City Mines. Finally, the amendment is not futile and plaintiff has failed to demonstrate any prejudice.

2(a) Defendants Lesser, Loeb and United Park City Mines' Motions for Summary Judgment are granted. 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. See, Bunnell v. Bills, 368 P.2d 597 (Utah 1962), and Carter v. Sorensen, 90 P.3d 637 (Utah 2004).

(b) Defendants Lesser, Loeb and United Park City Mines' Motions for Summary Judgment are granted. It is undisputed that in Utah no person may bring or maintain an action in any Utah court for the recovery of a finder's fee in connection with the sale of real estate, unless properly licensed, Utah Code Ann., Section 61-2-18. Further, 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". Finally, for purposes of our real estate

licensing statute, "real estate" includes leaseholds and business opportunities involving real estate". In the present case, it is undisputed that at the relevant time, plaintiff did not have a real estate license. It is also undisputed that defendant United Park City Mines' principal business was the leasing, development and sale of real property, and that United Park City Mines' only asset of significance was its real property. Even plaintiff attempted to negotiate compensation in the form of "...a couple of prime developed lots in the new project...." Consequently, the Court finds that plaintiff's claims are barred by Utah Code Ann., Sections 61-2-1 and 61-2-18(1). The Court further relies upon Andalex Resources v. Myers, 871 P.2d 1041 (Utah App. 1994), and the majority rule as set forth in Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 848 A.2d 725 (N.H. 2004).

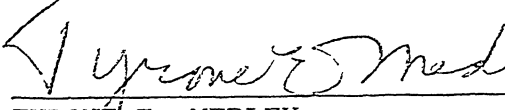
(c) Defendants Lesser, Loeb and United Park City Mines' Motions for Summary Judgment are granted. The Court finds that plaintiff's contract claims and quantum meruit claims are barred by the Utah Statute of Frauds, Utah Code Ann., Section 25-5-4 (1998). In the present case as previously noted, it is undisputed that the alleged finder's fee agreement relates to the sale or purchase of real estate as the only significant asset owned by defendant United Park City Mines. It is undisputed that no writing exists that would satisfy the requirements of the Utah Statute of Frauds. See, Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co., 779 P.2d 230 (Utah

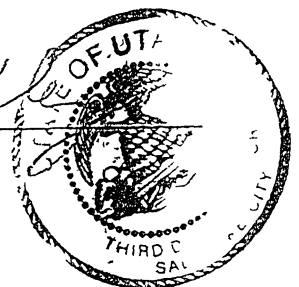
App. 1989). Additionally, quantum meruit or unjust enrichment claims cannot rescue claims otherwise precluded by the Utah Statute of Frauds. See, Young v. Buchanan, 259 P.2d 876 (Utah 1953). Finally, based upon the progression of this case, development of the record and briefing, it is appropriate for this Court to reconsider Judge Lubeck's prior decision.

(d) Defendants Lesser, Loeb and United Park City Mines' Motions for Summary Judgment are granted. The Court finds that plaintiffs' claim for Intentional Interference with Prospective Economic Relations Claim fails as a matter of law for failure to establish any genuine issue of material fact as to all of the necessary elements of this cause of action, as set forth in Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982). Further, plaintiff has not filed a defamation claim against defendants, and defendants' denial of plaintiff's claims are privileged and there are no genuine issues of material fact as to disclosure to third parties resulting in damages.

3 Counsel for defendants are instructed to submit an Order consistent with this Minute Entry and Rule 7(f).

Dated this 3 day of February, 2006.

  
TYRONE E. MEDLEY  
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry and Order, to the following, this 10 day of February, 2006:

Kathryn Collard  
Attorney for Plaintiff  
9 Exchange Place, Suite 1111  
Salt Lake City, Utah 84111

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Salt Lake City, Utah 84111-2221

Laura S. Scott  
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Attorneys for Defendants United Park  
City Mines and Capital Growth Partners  
201 S. Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, Utah 84145-0898

J. Ashley

Tab 2



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  
MOScow - 011-7-095-200-4526

IS/rjp

EXHIBIT

000 15

Tab 3

May 18, 2001

HAND DELIVERED / FAXED

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

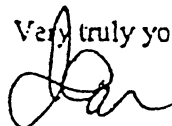
Dear Hank,

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.

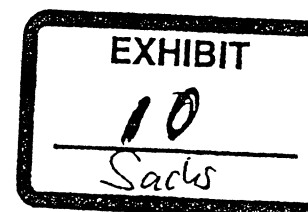
Happily, if your company's preference is sale, Granite, as I suggested in yesterday's letter, is still an excellent prospect. Another investor, together with Granite, would make an excellent purchaser. I am happy to re-direct my focus to obtaining such a joint venture purchaser.

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/rp



Tab 4

(a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than  $\frac{2}{3}$  of its circulation outside this state during the past 12 months; or

(b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

(7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.

(b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another.

(c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

(b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last-known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

1997

#### 61-1-27. Construction of chapter.

This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

1983

#### 61-1-28. Citation of chapter.

This chapter may be cited as the Utah Uniform Securities Act.

1983

#### 61-1-29. Savings clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application.

1983

#### 61-1-30. Prior law repealed — Savings clause.

(1) The Securities Act, Title 61, Chapter 1, Utah Code Annotated 1953, as amended by Chapter 129, Laws of Utah 1957, is hereby repealed except as saved in this section.

(2) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this chapter, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this chapter.

(3) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this chapter had not been passed. They are considered to have been filed, entered, or imposed under this chapter, but are governed by prior law.

(4) Prior law applies in respect of any offer or sale made within one year after the effective date of this chapter pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law.

(5) Judicial review of all administrative orders as to which review proceedings have not been instituted by the effective date of this chapter are governed by Section 61-1-23, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after the effective date of this chapter.

1983

## CHAPTER 2

### DIVISION OF REAL ESTATE

#### Section

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**61-2-1. License required.**

(1) It 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.

(2) It is unlawful for any person outside the state 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 with respect to real estate located within the state without a license obtained under this chapter.

1996

**61-2-2. Definitions.**

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

1997

### 61-2-3. Exempt persons and transactions.

(1) (a) Except as provided in Subsection (1)(b), a license under this chapter is not required for:

(i) any person who as owner or lessor performs the acts described in Subsection 61-2-2(12) with reference to property owned or leased by that person;

(ii) a regular salaried employee of the owner or lessor of real estate who, with reference to nonresidential real estate owned or leased by the employer, performs the acts enumerated in Subsections 61-2-2(12)(a) and (b);

(iii) a regular salaried employee of the owner of real estate who performs property management services with reference to real estate owned by the employer, except that the employee may only manage property for one employer;

(iv) a person who performs property management services for the apartments at which that person resides in exchange for free or reduced rent on that person's apartment;

(v) a regular salaried employee of a condominium homeowners' association who manages real property subject to the declaration of condominium that established the homeowners' association, except that the employee may only manage property for one condominium homeowners' association; and

(vi) a regular salaried employee of a licensed property management company who performs support services, as prescribed by rule, for the property management company.

(b) Subsection (1)(a) does not exempt from licensing:

(i) employees engaged in the sale of properties regulated under Title 57, Chapter 11, Utah Uniform Land Sales Practices Act and Title 57, Chapter 19, Timeshare and Camp Resort Act;

(ii) employees engaged in the sale of cooperative interests regulated under Title 57, Chapter 23, Real Estate Cooperative Marketing Act; or

(iii) any person whose interest as an owner or lessor was obtained by him or transferred to him for the purpose of evading the application of this chapter, and not for any other legitimate business reason.

(2) A license under this chapter is not required for:

(a) isolated transactions by persons holding a duly executed power of attorney from the owner;

(b) services rendered by an attorney at law in performing his duties as an attorney at law;

(c) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(d) a trustee or its employees under a deed of trust or a will; or

(e) any public utility, its officers, or regular salaried employees, unless performance of any of the acts set out in Subsection 61-2-2(12) is in connection with the sale, purchase, lease, or other disposition of real estate or investment in real estate unrelated to the principal business activity of that public utility.

(3) (a) Except as provided in Subsection (3)(b), a license under this chapter is not required for any person registered to act as a broker-dealer, agent, or investment

advisor under the Utah and federal securities laws in the sale or the offer for sale of real estate if:

(i) the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934; and

(ii) the security is registered for sale pursuant to the Securities Act of 1933 or by Title 61, Chapter 1, Utah Uniform Securities Act.

(b) The exemption in Subsection (3)(a) does not apply to exempt or resale transactions.

1996

### 61-2-4. One act for compensation qualifies person as broker or sales agent.

Except as provided in Section 61-2-3, one 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.

1996

### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of Commerce a Division of Real Estate. It is responsible for the administration and enforcement of:

(a) this chapter;

(b) the Real Estate Education, Research, and Recovery Fund under Title 61, Chapter 2a;

(c) Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;

(d) Title 57, Chapter 19, Timeshare and Camp Resort Act;

(e) Title 57, Chapter 23, Real Estate Cooperative Marketing Act; and

(f) Title 61, Chapter 2b, Real Estate Appraiser Registration and Certification Act.

(2) The division is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director holds his office at the pleasure of the governor.

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services.

(4) On or before October 1 of each year, the director shall, in conjunction with the department, report to the governor and the Legislature concerning the division's work for the preceding fiscal year ending June 30.

(5) The director, in conjunction with the executive director, shall prepare and submit to the governor and the Legislature a budget for the fiscal year next following the convening of the Legislature.

1993

### 61-2-5.1. Procedures — Adjudicative proceedings.

The Division of Real Estate shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its adjudicative proceedings.

1997

### 61-2-5.5. Real Estate Commission created — Functions — Appointment, qualifications, and terms of members — Expenses.

(1) There is created within the division a Real Estate Commission. The commission shall:

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents, real estate companies, and branch offices;

- (ii) prelicensing and postlicensing education curricula, examination procedures, and the certification and conduct of real estate schools, course providers, and instructors;
  - (iii) proper handling of funds received by real estate licensees, and brokerage office procedures and recordkeeping requirements;
  - (iv) property management; and
  - (v) standards of conduct for real estate licensees;
- (b) establish, with the concurrence of the division, all fees as provided in this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act;
- (c) conduct all administrative hearings not delegated by it to an administrative law judge relating to the licensing of any applicant, conduct of any licensee, or the certification or conduct of any real estate school, course provider, or instructor regulated under this chapter;
- (d) with the concurrence of the director, impose sanctions against licensees and certificate holders as provided in Section 61-2-11;
- (e) advise the director on the administration and enforcement of any matters affecting the division and the real estate sales and property management industries;
- (f) advise the director on matters affecting the division budget;
- (g) advise and assist the director in conducting real estate seminars; and
- (h) perform other duties as provided by this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act.
- (2) (a) The commission shall be comprised of five members appointed by the governor and approved by the Senate.
- (b) Four of the commission members shall have at least five years' experience in the real estate business and shall hold an active principal broker, associate broker, or sales agent license.
- (c) One commission member shall be a member of the general public.
- (d) No more than one commission member may be appointed from any given county in the state
- (3) (a) Except as required by Subsection (b), as terms of current commission members expire, the governor shall appoint each new member or reappointed member to a four-year term ending June 30.
- (b) Notwithstanding the requirements of Subsection (a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of commission members are staggered so that approximately half of the commission is appointed every two years.
- (c) A commission member may not serve more than one consecutive term.
- (d) Members of the commission shall annually select one member to serve as chair.
- (4) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
- (5) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (b) Members may decline to receive per diem and expenses for their service.
- (6) The commission shall meet at least monthly. The director may call additional meetings at his discretion or upon the request of the chair or upon the written request of three or more commission members. Three members constitute a quorum for the transaction of business.

1996

#### 61-2-6. Licensing procedures and requirements.

(1) The Real Estate Commission shall determine the qualifications and requirements of applicants for a principal broker, associate broker, or sales agent license. The division, with the concurrence of the commission, shall require and pass upon proof necessary to determine the honesty, integrity, truthfulness, reputation, and competency of each applicant for an initial license or for renewal of an existing license. The division, with the concurrence of the commission, shall require an applicant for a sales agent license to complete an approved educational program not to exceed 90 hours, and an applicant for an associate broker or principal broker license to complete an approved educational program not to exceed 120 hours. The hours required by this section mean 50 minutes of instruction in each 60 minutes; and the maximum number of program hours available to an individual is ten hours per day. The division, with the concurrence of the commission, shall require the applicant to pass an examination approved by the commission covering the fundamentals of the English language, arithmetic, bookkeeping, real estate principles and practices, the provisions of this chapter, the rules established by the Real Estate Commission, and any other aspect of Utah real estate license law considered appropriate. Three years' full-time experience as a real estate sales agent or its equivalent is required before any applicant may apply for, and secure a principal broker or associate broker license in this state. The commission shall establish by rule the criteria by which it will accept experience or special education in similar fields of business in lieu of the three years' experience.

(2) (a) The division, with the concurrence of the commission, may require an applicant to furnish a sworn statement setting forth evidence satisfactory to the division of the applicant's reputation and competency as set forth by rule.

(b) The division shall require an applicant to provide his social security number, which is a private record under Subsection 63-2-302(1)(g).

(3) A nonresident principal broker may be licensed in this state by conforming to all the provisions of this chapter except that of residency. A nonresident associate broker or sales agent may become licensed in this state by conforming to all the provisions of this chapter except that of residency and by being employed or engaged as an independent contractor by or on behalf of a nonresident or resident principal broker who is licensed in this state.

(4) An applicant who has had a real estate license revoked shall be relicensed as prescribed for an original application, but may not apply for a new license until at least five years after the revocation. In the case of an applicant for a new license as a principal broker or associate broker, the applicant is not entitled to credit for experience gained prior to the revocation of license.

1997

#### 61-2-7. Form of license — Display of license.

The division shall issue to each licensee a wall license showing the name and address of the licensee. The seal of the state shall be affixed to each license. Each license shall contain any other matter prescribed by the division and shall be delivered or mailed to the address furnished by the licensee. The wall licenses of principal brokers, associate brokers, and sales agents who are affiliated with an office shall be kept in the office to be made available on request.

1991

#### 61-2-7.1. Change of address — Failure to notify.

Each licensee or certificate holder shall notify the division in writing of any change of principal business location or home street address within ten business days of the change. In providing an address to the division a physical location or street address must be provided. Failure to notify the division of a change of business location is separate grounds for



disciplinary action against the licensee or certificate holder. A licensee or certificate holder will be considered to have received any notification which has been mailed to the last address furnished to the division by the licensee. 1991

#### 61-2-7.2. Reporting requirements.

The following must be reported in writing to the division within ten business days:

- (1) conviction of any criminal offense; or
- (2) filing a personal or brokerage bankruptcy. 1991

#### 61-2-8. Discharge of associate broker or sales agent by principal broker — Notice.

If an associate broker or sales agent is discharged by a principal broker, the principal broker shall, within three days, notify the division in writing. The principal broker shall address a communication to the last-known residence address of that associate broker or sales agent advising him that notice of his termination has been delivered or mailed to the division. It is unlawful for any associate broker or sales agent to perform any of the acts under this chapter, directly or indirectly, from and after the date of receipt of the termination notice until affiliation with a principal broker has been established. 1988

#### 61-2-9. Examination and license fees — Renewal of licenses — Education requirements — Activation of inactive licenses — Recertification — Licenses of firm, partnership, or association — Miscellaneous fees.

- (1) (a) Upon filing an application for a principal broker, associate broker, or sales agent license examination, the applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for admission to the examination.
- (b) A principal broker, associate broker, or sales agent applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for issuance of an initial license or license renewal.
- (c) Each license issued under this subsection shall be issued for a period of not less than two years as determined by the division with the concurrence of the commission.
- (d) (i) Any new sales agent applicant shall submit fingerprint cards in a form acceptable to the division at the time the license application is filed and shall consent to a fingerprint background check by the Utah Bureau of Criminal Identification and the Federal Bureau of Investigation regarding the application.
- (ii) The division shall request the Department of Public Safety to complete a Federal Bureau of Investigation criminal background check for each new sales agent applicant through the national criminal history system (NCIC) or any successor system.
- (iii) The cost of the background check and the fingerprinting shall be borne by the applicant.
- (e) (i) Any new sales agent license issued under this section shall be conditional, pending completion of the criminal background check. If the criminal background check discloses the applicant has failed to accurately disclose a criminal history, the license shall be immediately and automatically revoked.
- (ii) Any person whose conditional license has been revoked under Subsection (e)(i) shall be entitled to a post-revocation hearing to challenge the revocation. The hearing shall be conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) A license expires if it is not renewed on or before its expiration date. Effective January 1, 1992, as a condition of renewal, each active licensee shall demonstrate competence by viewing an approved real estate education video program and completing a supplementary workbook, or complete 12 hours of professional education approved by the division and commission within each two-year renewal period. The division with the concurrence of the commission shall certify education which may include, but shall not be limited to, state conventions, home study courses, video courses, and closed circuit television courses. The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years upon a finding of reasonable cause and under conditions established by rule.

(b) For a period of 30 days after the expiration date, a license may be reinstated upon payment of a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2 and upon providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

(c) After this 30-day period, and until six months after the expiration date, the license may be reinstated by:

- (i) paying a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2;
- (ii) providing to the division proof of satisfactory completion of the applicable hours of prelicensing education required under Section 61-2-6, which must be completed within six months prior to reinstatement, or providing to the division evidence of successful completion of the respective sales agent or broker licensing examination within six months prior to reinstatement; and
- (iii) providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

(d) A person who does not renew his license within six months after the expiration date shall be relicensed as prescribed for an original application.

(3) As a condition for the activation of an inactive license, a licensee shall supply the division with proof of:

- (a) successful completion of the respective sales agent or broker licensing examination within six months prior to activation; or
- (b) the successful completion of the number of hours of continuing education that the licensee would have been required to complete under Subsection (2)(a) if the licensee's license had been on active status, up to the number of hours required for original licensure. Credit shall be given only for education that has been taken within the five years preceding activation, except that at least 12 hours of the education must have been taken within 12 months preceding activation.

(4) A principal broker license may be granted to a corporation, partnership, or association if the corporation, partnership, or association has affiliated with it an individual who has qualified as a principal broker under the terms of this chapter, and who serves in the capacity of a principal broker. Application for the license shall be made in accordance with the rules adopted by the division with the concurrence of the commission.

(5) The division may charge and collect reasonable fees determined by the commission with the concurrence of the division under Section 63-38-3.2 to cover the costs for:

- (a) issuance of a new or duplicate license;
- (b) license histories or certifications;
- (c) certified copies of official documents, orders, and other papers and transcripts;
- (d) certifying real estate schools, courses, and instructors, the fees for which shall, notwithstanding Section 13-1-2, be deposited in the Real Estate Education, Research, and Recovery Fund; and
- (e) other duties required by this chapter.

(6) If a licensee submits or causes to be submitted a check, draft, or other negotiable instrument to the division for payment of fees, and the check, draft, or other negotiable instrument is dishonored, the transaction for which the payment was submitted is void and will be reversed by the division if payment of the applicable fee is not received in full.

(7) The fees under this chapter and the additional license fee for the Real Estate Education, Research, and Recovery Fund under Section 61-2a-4 are in lieu of all other license fees or assessments that might otherwise be imposed or charged by the state or any of its political subdivisions, upon, or as a condition of, the privilege of conducting the business regulated by this chapter, except that a political subdivision within the state may charge a business license fee if the licensee maintains a place of business within the jurisdiction of the political subdivision. Unless otherwise exempt, each licensee under this chapter is subject to all taxes imposed under Title 59, Revenue and Taxation.

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#### 61-2-10. Restriction on commissions — Affiliation with more than one broker — Specialized licenses — Designation of agents or brokers.

(1) It is unlawful for any associate broker or sales agent to accept valuable consideration for the performance of any of the acts specified in this chapter from any person except the principal broker with whom he is affiliated and licensed.

(2) An inactive associate broker or sales agent is not authorized to conduct real estate transactions until the inactive associate broker or sales agent becomes affiliated with a licensed principal broker and submits the required documentation to the division. An inactive principal broker is not authorized to conduct real estate transactions until the principal broker's license is activated with the division.

(3) No sales agent or associate broker may affiliate with more than one principal broker at the same time.

(4) (a) Except as provided by rule, a principal broker may not be responsible for more than one real estate brokerage at the same time.

(b) In addition to issuing principal broker, associate broker, and sales agent licenses authorizing the performance of all of the acts set forth in Subsection 61-2-2(12), the division may issue specialized sales licenses and specialized property management licenses with the scope of practice limited to the specialty. An individual may hold a specialized license in addition to a license to act as a principal broker, an associate broker, or a sales agent. The commission may adopt rules pursuant to Title 63, Chapter 46a, Utah Administrative Procedures Act, for the administration of this provision, including prelicensing and postlicensing education requirements, examination requirements, affiliation with real estate brokerages or property management companies, and other licensing procedures.

(c) An individual may not be a principal broker of a brokerage and a sales agent or associate broker for a different brokerage at the same time.

(5) Any owner, purchaser, lessor, or lessee who engages the services of a principal broker may designate which sales agents or associate brokers affiliated with that principal broker will also represent that owner, purchaser, lessor, or lessee in the purchase, sale, lease, or exchange of real estate, including a transaction relating to real estate.

1996

#### 61-2-11. Investigations — Subpoena power of division — Grounds for disciplinary action.

The division may investigate or cause to be investigated the actions of any principal broker, associate broker, sales agent, real estate school, course provider, or school instructor licensed or certified by this state, or of any applicant for licensure or certification, or of any person who acts in any of those capacities within this state. The division is empowered to subpoena witnesses, take evidence, and require by subpoena duces tecum the production of books, papers, contracts, records, other documents, or information considered relevant to the investigation. The division may serve subpoenas by certified mail. Each failure to respond to a subpoena is considered as a separate violation of this chapter. The commission, with the concurrence of the director, may impose a civil penalty in an amount not to exceed \$500 per violation, impose educational requirements, and suspend, revoke, place on probation, or deny renewal, reinstatement, or reissuance of any license or any certification if at any time the licensee or certificate holder, whether acting as an agent or on his own account, is found guilty of:

- (1) making any substantial misrepresentation;
- (2) making any false promises of a character likely to influence, persuade, or induce;
- (3) pursuing a continued and flagrant course of misrepresentation, or of making false promises through agents, sales agents, advertising, or otherwise;
- (4) acting for more than one party in a transaction without the informed consent of all parties;
- (5) acting as an associate broker or sales agent while not licensed with a licensed principal broker, representing or attempting to represent a broker other than the principal broker with whom he is affiliated, or representing as sales agent or having a contractual relationship similar to that of sales agent with other than a licensed principal broker;
- (6) failing, within a reasonable time, to account for or to remit any monies coming into his possession that belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;
- (7) paying or offering to pay valuable consideration, as defined by the commission, to any person not licensed under this chapter, except that valuable consideration may be shared with a licensed principal broker of another jurisdiction or as provided under the Professional Corporation Act or the Limited Liability Company Act;
- (8) being unworthy or incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;
- (9) failing to voluntarily furnish copies of all documents to all parties executing the documents;
- (10) failing to keep and make available for inspection by the division a record of each transaction, including the names of buyers and sellers or lessees and lessors, the identification of the property, the sale or rental price, any monies received in trust, any agreements or instructions from buyers and sellers or lessees and lessors, and any other information required by rule;
- (11) failing to disclose, in writing, in the purchase, sale, or rental of property, whether the purchase, sale, or rental is made for himself or for an undisclosed principal;
- (12) regardless of whether the crime was related to real estate, being convicted of a criminal offense involving moral turpitude within five years of the most recent application, including a conviction based upon a plea of nolo contendere, or a plea held in abeyance to a criminal offense involving moral turpitude;

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(13) advertising the availability of real estate or the services of a licensee in a false, misleading, or deceptive manner;

(14) in the case of a principal broker or a licensee who is a branch manager, failing to exercise reasonable supervision over the activities of his licensees and any unlicensed staff;

(15) violating or disregarding this chapter, an order of the commission, or the rules adopted by the commission and the division;

(16) breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction;

(17) any other conduct which constitutes dishonest dealing;

(18) unprofessional conduct as defined by statute or rule; or

(19) suspension, revocation, surrender, or cancellation of a real estate license issued by another jurisdiction, or of another professional license issued by this or another jurisdiction, based on misconduct in a professional capacity that relates to character, honesty, integrity, or truthfulness.

1997

#### 61-2-12. Disciplinary action — Judicial review.

(1) (a) Before imposing an educational requirement, a civil penalty, revoking, suspending, placing on probation, or denying the renewal, reinstatement, or reissuance of any license or certificate based on violation of Section 61-2-11, the division shall give notice to the licensee or certificate holder and schedule an adjudicative proceeding.

(b) If the licensee is an active sales agent or active associate broker, the division shall inform the principal broker with whom the licensee is affiliated of the charge and of the time and place of the hearing.

(c) If after the hearing the commission determines that any licensee or certificate holder is guilty of a violation of this chapter, the license or certificate may be suspended, revoked, denied reissuance, or a civil penalty may be imposed by written order of the commission in concurrence with the director.

(2) (a) Any applicant, certificate holder, licensee, or person aggrieved, including the complainant, may obtain judicial review or agency review by the executive director of any adverse ruling, order, or decision of the director and the commission.

(b) If the applicant, certificate holder, or licensee prevails in the appeal and the court finds that the state action was undertaken without substantial justification, the court may award reasonable litigation expenses to the applicant, certificate holder, or licensee as provided under Title 78, Chapter 27a, Small Business Equal Access to Justice Act.

(c) (i) No order, rule, or decision of the director and the commission may take effect until the time for appeal to the court has expired.

(ii) If an appeal is taken by a licensee, the division shall stay enforcement of the commission's action in accordance with the provisions of Section 63-46b-18.

(iii) The appeal shall be governed by the Utah Rules of Appellate Procedure.

(3) The commission and the director shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in their adjudicative proceedings.

1993

#### 61-2-13. Grounds for revocation of principal broker's license — Automatic inactivation of affiliated associate brokers' and sales' agents licenses.

(1) Any unlawful act or any violation of this chapter committed by any real estate sales agent or associate broker

employed or engaged as an independent contractor by or on behalf of a licensed principal broker or committed by any employee, officer, or member of a licensed principal broker is cause for the revocation, suspension, or probation of the principal broker's license, or for the imposition of a fine against the principal broker in an amount not to exceed \$500 per violation.

(2) The revocation or suspension of a principal broker license automatically inactivates every associate broker or sales agent license granted to those persons by reason of their affiliation with the principal broker whose license was revoked or suspended, pending a change of broker affiliation. A principal broker shall, prior to the effective date of the suspension or revocation of his license, notify in writing every licensee affiliated with him of the revocation or suspension of his license.

1991

#### 61-2-13.5. Court-ordered discipline.

The division shall promptly withhold, suspend, restrict, or reinstate the use of a license issued under this chapter if so ordered by a court.

1997

#### 61-2-14. List of licensees to be available.

The division shall make available at reasonable cost a list of the names and addresses of all persons licensed by it under this chapter.

1983

#### 61-2-15, 61-2-16. Repealed.

1973

#### 61-2-17. Penalty for violation of chapter.

(1) Any individual violating this chapter, in addition to being subject to a license sanction or a fine ordered by the commission, is, upon conviction of a first violation, guilty of a class A misdemeanor. Any imprisonment shall be for a term not to exceed six months. If the violator is a corporation, it is, upon conviction of a first violation, guilty of a class A misdemeanor.

(2) Upon conviction of a second or subsequent violation, an individual is guilty of a third degree felony. Imprisonment shall be for a term not to exceed two years. If a corporation is convicted of a second or subsequent violation, it is guilty of a third degree felony.

(3) Any officer or agent of a corporation, or any member or agent of a partnership or association, who personally participates in or is an accessory to any violation of this chapter by such corporation, partnership, or association, is subject to the penalties prescribed for individuals.

(4) If any person receives any money or its equivalent, as commission, compensation, or profit by or in consequence of a violation of this chapter, that person is liable for an additional penalty of not less than the amount of the money received and not more than three times the amount of money received, as may be determined by the court. This penalty may be sued for in any court of competent jurisdiction, and recovered by any person aggrieved for his own use and benefit.

(5) All fines imposed by the commission and the director under this chapter shall, notwithstanding Section 13-1-2, be deposited into the Real Estate Education, Research, and Recovery Fund to be used in a manner consistent with the requirements of the Real Estate Recovery Fund Act.

1993

#### 61-2-18. Actions for recovery of compensation restricted.

(1) 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.

(2) No sales agent or associate broker may sue in his own name for the recovery of a fee, commission, or compensation

for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated. 1985

#### 61-2-19. Repealed.

1983

#### 61-2-20. Rights and privileges of real estate licensees.

Real estate licensees may fill out only those legal forms approved by the commission and the attorney general, and those forms provided by statute, with the following exceptions:

(1) Principal brokers and associate brokers may fill out any documents associated with the closing of a real estate transaction.

(2) Real estate licensees may fill out real estate forms prepared by legal counsel of the buyer, seller, lessor, or lessee.

(3) If the commission and the attorney general have not approved a specific form for the transaction, principal brokers, associate brokers, and sales agents may fill out real estate forms prepared by any legal counsel, including legal counsel retained by the brokerage to develop these forms. 1993

#### 61-2-21. Remedies and action for violations.

(1) (a) If the director has reason to believe that any person has been or is engaging in acts constituting violations of this chapter, and if it appears to the director that it would be in the public interest to stop such acts, he shall issue and serve upon the person an order directing that person to cease and desist from those acts.

(b) Within ten days after receiving the order, the person upon whom the order is served may request an adjudicative proceeding.

(c) Pending the hearing, the cease and desist order shall remain in effect.

(d) If a request for a hearing is made, the division shall follow the procedures and requirements of Title 63, Chapter 46b.

(2) (a) After the hearing, if the commission and the executive director agree that the acts of the person violate this chapter, the executive director shall issue an order making the cease and desist order permanent.

(b) If no hearing is requested and if the person fails to cease the acts, or after discontinuing the acts, again commences the acts, the executive director shall file suit in the name of the Department of Commerce and the Division of Real Estate, in the district court in the county in which the acts occurred or where the person resides or carries on business, to enjoin and restrain the person from violating this chapter.

(c) The district courts of this state shall have jurisdiction of these suits.

(3) The remedies and action provided in this section may not interfere with, or prevent the prosecution of, any other remedies or actions including criminal proceedings. 1989

#### 61-2-22. Separability.

If any provision of this chapter, or the application of any provision to any person or circumstance, is held invalid, the remainder of this chapter shall not be affected thereby. 1985

#### 61-2-23. Repealed.

1988

#### 61-2-24. Mishandling of trust funds.

(1) The division may audit principal brokers' trust accounts or other accounts in which a licensee maintains trust funds under this chapter. If the division's audit shows, in the opinion of the division, gross mismanagement, commingling, or mis-

use of funds, the division, with the concurrence of the commission, may order a complete audit of the account by a certified public accountant at the licensee's expense, or take other action in accordance with Section 61-2-12.

(2) The licensee may obtain agency review by the executive director or judicial review of any division order.

(3) If it appears that a person has grossly mismanaged, commingled, or otherwise misused trust funds, the division, with or without prior administrative proceedings, may bring an action in the district court of the district where the person resides or maintains a place of business, or where the act or practice occurred or is about to occur, to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter. Upon a proper showing, the court shall grant injunctive relief or a temporary restraining order, and may appoint a receiver or conservator. The division is not required to post a bond in any court proceeding. 1996

### CHAPTER 2a

#### REAL ESTATE RECOVERY FUND

##### Section

61-2a-1.

Citation.

61-2a-2.

Purpose.

61-2a-3.

Education, Research, and Recovery Fund.

61-2a-4.

Additional license fee — Purpose.

61-2a-5.

Notice to division — Judgment against real estate licensee — Fraud, misrepresentation, or deceit — Verified petition for order directing payment from fund — Limitations and procedures.

61-2a-6.

Real Estate Division — Authority to act upon receipt of petition.

61-2a-7.

Court determination and order.

61-2a-8.

Insufficient funds to satisfy judgments — Procedure and interest.

61-2a-9.

Division subrogated to judgment creditor — Authority to revoke license.

61-2a-10.

Failure to comply with all provisions constitutes a waiver.

61-2a-11.

Director of Department of Commerce — Authority to take disciplinary action not limited.

61-2a-12.

Moneys accumulated — Excess set aside — Purpose.

##### 61-2a-1. Citation.

This act shall be known and may be cited as the "Real Estate Recovery Fund Act." 1975

##### 61-2a-2. Purpose.

The purposes of this chapter are as follows:

(1) To establish a Real Estate Education, Research, and Recovery Fund that shall reimburse the public out of the fund for damages up to \$10,000 caused by real estate licensees in a real estate transaction. This chapter applies to damages caused by individual licensees. Reimbursement may not be made for judgments against corporations, partnerships, associations, or other legal entities.

(2) To provide revenue for improving the real estate profession through education and research with the goal of making real estate salesmen more responsible to the public. 1989

##### 61-2a-3. Education, Research, and Recovery Fund.

There is created a segregated special trust fund to be known as the Real Estate Education, Research, and Recovery Fund. The actual interest earned on the Real Estate Education, Research, and Recovery Fund shall be deposited into the fund. At the commencement of each fiscal year, \$100,000 shall be

Tab 5

- (a) three members shall represent nonconsumptive wildlife interests;
- (b) one member shall represent consumptive wildlife interests, and
- (c) one member shall represent agricultural interests.
- (3) (a) Except as required by Subsection (b), members are appointed to four-year terms of office
- (b) Notwithstanding the requirements of Subsection (a), the executive director shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of committee members are staggered so that approximately half of the committee is appointed every two years.
- (4) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
- (5) The committee shall advise:
- (a) the Wildlife Board, regarding rules and broad policy affecting the program, and
- (b) the division, regarding broad administrative matters relating to the Wildlife Heritage program.
- (6) The committee may make recommendations on:
- (a) incentives and public relations strategies to develop and increase participation in the program; and
- (b) the funding of specific projects within the program.
- (7) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (b) Members may decline to receive per diem and expenses for their service. 1996
- 23-26-4. Wildlife Heritage certificate — Benefits — Use of revenue.**
- (1) (a) A resident or nonresident, 12 years of age or older, upon payment of \$15, may receive a Wildlife Heritage certificate
- (b) A resident or nonresident, under 12 years of age, upon payment of \$5, may receive a Wildlife Heritage certificate.
- (2) The Wildlife Heritage certificate allows the holder to receive the benefits and participate in the activities of the Wildlife Heritage program as determined by the Wildlife Board and the division.
- (3) Revenue from the sale of Wildlife Heritage certificates shall be used for activities and projects that fulfill the program's purposes as specified in Section 23-26-2, including:
- (a) information and education;
- (b) the establishment and enhancement of non-consumptive wildlife management areas that are managed consistent with Section 23-14-18;
- (c) wildlife and ecosystem research; and
- (d) administration, development, and promotion of the program.
- (4) Revenue from the sale of Wildlife Heritage certificates may be used for emergency feeding of wildlife. 1993
- 23-26-5. Wildlife Heritage Account — Contents — Use of fund monies.**
- (1) There is created a restricted account within the General fund known as the Wildlife Heritage Account.
- (2) The contents of the account shall consist of:
- (a) revenue from the sale of Wildlife Heritage certificates;
- (b) donations received for the Wildlife Heritage program; and
- (c) interest accrued on account monies.
- (3) Monies in the account shall be used as provided in Section 23-26-4.

- (4) The Wildlife Board shall report to the 1994 Legislature on funds received and programs developed. 1993

## TITLE 24

### FORESTRY AND FIRE CONTROL

(Repealed by Laws 1961, ch. 53, § 21; 1973, ch. 36, § 1; 1988, ch. 121, § 18.)

## TITLE 25

### FRAUD

#### Chapter

1. Fraudulent Conveyances [Repealed].
2. Sale of Merchandise in Bulk [Repealed].
3. Leases and Sales of Livestock [Repealed].
4. Marketing Wool [Repealed].
5. Statute of Frauds.
6. Uniform Fraudulent Transfer Act.

#### CHAPTER 1

##### FRAUDULENT CONVEYANCES [REPEALED]

25-1-1 to 25-1-16. Repealed. 1988

#### CHAPTER 2

##### SALE OF MERCHANDISE IN BULK [REPEALED]

25-2-1 to 25-2-5. Repealed. 1965

#### CHAPTER 3

##### LEASES AND SALES OF LIVESTOCK [REPEALED]

25-3-1 to 25-3-4. Repealed. 1965

#### CHAPTER 4

##### MARKETING WOOL [REPEALED]

25-4-1 to 25-4-3. Repealed. 1965

#### CHAPTER 5

##### \* STATUTE OF FRAUDS \*

#### Section

- 25-5-1. Estate or interest in real property.
- 25-5-2. Wills and implied trusts excepted.
- 25-5-3. Leases and contracts for interest in lands.
- 25-5-4. Certain agreements void unless written and signed.
- 25-5-5. Representation as to credit of third person.
- 25-5-6. Promise to answer for obligation of another — When not required to be in writing.
- 25-5-7. Contracts by telegraph deemed written.
- 25-5-8. Right to specific performance not affected.
- 25-5-9. Agent may sign for principal.

#### 25-5-1. Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or

conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. 1953

#### 25-5-2. Wills and implied trusts excepted.

Section 25-5-1 shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law. 1995

#### 25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing. 1953

#### \* 25-5-4. Certain agreements void unless written and signed.

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:

- (1) every agreement that by its terms is not to be performed within one year from the making of the agreement;
- (2) every promise to answer for the debt, default, or miscarriage of another;
- (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;
- (4) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;
- \* (5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation;
- (6) every credit agreement.

(a) As used in Subsection (6):

(i) "Credit agreement" means an agreement by a financial institution to lend, delay, or otherwise modify an obligation to repay money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation. "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means a state or federally chartered bank, savings and loan association, savings bank, industrial loan corporation, credit union, or any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) Except as provided in Subsection (6)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the party against whom enforcement of the agreement would be sought. For purposes of this act, a signed application

constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (6)(b):

- (i) the rendering of financial advice by a creditor to a debtor;
- (ii) the consultation by a creditor with a debtor; or
- (iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

- (i) the debtor is provided with a written copy of the terms of the agreement;
- (ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and
- (iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered. 1996

#### 25-5-5. Representation as to credit of third person.

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith. 1953

#### 25-5-6. Promise to answer for obligation of another — When not required to be in writing.

A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

(2) Where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety.

(3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancel the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person.

(4) Where a factor undertakes for a commission to sell merchandise and to guarantee the sale.

(5) When the holder of an instrument for the payment of money upon which a third person is or may become

liable to him transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument. 1953

#### 25-5-7. Contracts by telegraph deemed written.

Contracts made by telegraph shall be deemed to be contracts in writing, and all communications sent by telegraph and signed by the person sending the same, or by his authority, shall be deemed to be communications in writing. 1953

#### 25-5-8. Right to specific performance not affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof. 1953

#### 25-5-9. Agent may sign for principal.

Every instrument required by the provisions of this chapter to be subscribed by any party may be subscribed by the lawful agent of such party. 1953

### CHAPTER 6

#### UNIFORM FRAUDULENT TRANSFER ACT

Section	
25-6-1.	Short title.
25-6-2.	Definitions.
25-6-3.	Insolvency.
25-6-4.	Value — Transfer.
25-6-5	Fraudulent transfer — Claim arising before or after transfer.
25-6-6.	Fraudulent transfer — Claim arising before transfer.
25-6-7.	Transfer — When made.
25-6-8.	Remedies of creditors.
25-6-9.	Good faith transfer.
25-6-10.	Claim for relief — Time limits.
25-6-11.	Legal principles applicable to chapter.
25-6-12	Construction of chapter.
25-6-13.	Applicability of chapter.

#### 25-6-1. Short title.

This chapter is known as the "Uniform Fraudulent Transfer Act." 1988

#### 25-6-2. Definitions.

In this chapter:

##### (1) "Affiliate" means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement, or a person

substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

(a) property to the extent it is encumbered by a valid lien;

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(c) an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in Subsection (7)(a)(ii);

(iv) a corporation of which the debtor is a director, officer, or person in control; or

(v) a limited liability company of which the debtor is a member or manager;

(b) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner;

(v) a general partner in a partnership described in Subsection (7)(b)(iv);

(vi) a limited liability company of which the debtor is a member or manager; or

(vii) a relative of a general partner, director, officer, or person in control of the debtor;

(c) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(c)(iii);

(v) a limited liability company of which the debtor is a member or manager; or

(vi) a person in control of the debtor;

(d) if the debtor is a limited liability company:

(i) a member or manager of the debtor;

(ii) another limited liability company in which the debtor is a member or manager;

(iii) a partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(d)(iii);

(v) a person in control of the debtor; or

(vi) a relative of a general partner, member, manager, or person in control of the debtor;

(e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and



Tab 6

Williston on Contracts  
Database updated June 2006

Richard A. Lord  
Chapter 51. Contracts for the Sale of Securities  
I. Introduction

References

§ 51:2. Nature of property interest

**West's Key Number Digest**

West's Key Number Digest, 349BTT\_Securities Regulation  349Bk5.25(1), 349Bk5.25(2)

Shares of stock, which represent the holder's partial but undivided ownership of the corporation, constitute a property interest quite distinct from the capital or tangible assets of the corporation.[FN24] The capital is the property of the artificial person, the corporation; the shares are the property of the several shareholders.[FN25] Incorporeal in their nature, the shares are generally classed as personal property,[FN26] and have frequently been so declared by statute,[FN27] although they are, in truth, a peculiar kind of personal property.[FN28] The fact that the entire capital may be invested in real estate does not change the character of the shares of the corporation as personal property.[FN29] Even though the company may exist for the sole purpose of owning and dealing in real estate, its shares are nevertheless personal property.[FN30] Although corporate shares do not, of course, constitute an indebtedness of the corporation to the shareholders,[FN31] they have often been regarded in the nature of choses in action,[FN32] although not always in the strict legal sense.[FN33]

There is a clear distinction made between "capital stock" of a corporation and the "certificates of stock." The "capital stock" is the substance, the thing of real value, the money or property of the corporation invested to make up its capital; while a "certificate of stock" is but the evidence of an ownership of a part or share of the capital stock of a corporation. These certificates are assignable and carry with them to the assignee the evidence of title, and, in some respects, they might be denominated as the muniment of title.[FN34]

[FN24]

**Federal:**

Wright v. Georgia Railroad & Banking Co, 216 U.S. 420, 30 S. Ct. 242, 54 L. Ed. 544 (1910) (capital stock of an incorporated company is the capital upon which the business is to be undertaken and is represented by the property of every kind acquired by the company; shares are the mere certificates which represent a subscriber's contribution to the capital stock and measure his interest in the company).

## 17 Williston on Contracts § 51:2 (4th ed.)

Wabash Ry. Co. v. American Refrigerator Transit Co., 7 F.2d 335 (C.C.A. 8th Cir. 1925).

Asher v. Bone, 100 F.2d 315 (C.C.A. 9th Cir. 1938).

Nelson v. U.S., 222 F. Supp. 712 (D. Idaho 1963) (court emphasized fact that a corporation is an entity separate and distinct from the individual shareholders; clearly, the assets of the corporation are to be distinguished from the shares of stock owned by the individual stockholders and must be so treated for tax purposes).

**Cal:**

Union Bank v. Anderson, 232 Cal. App. 3d 941, 283 Cal. Rptr. 823 (5th Dist. 1991), reh'g denied, (Aug. 23, 1991) and reh'g denied, (Aug. 26, 1991).

In re Mercantile Guaranty Co., 263 Cal. App. 2d 346, 69 Cal. Rptr. 361 (1st Dist. 1968).

**Del:**

Buechner v. Farbenfabriken Bayer Aktiengesellschaft, 38 Del. Ch. 490, 154 A.2d 684 (1959).

**Idaho:**

Pincock v. Pocatello Gold and Copper Min. Co., Inc., 100 Idaho 325, 597 P.2d 211 (1979).

**Kan:**

Hunt v. Eddy, 150 Kan. 1, 90 P.2d 747 (1939).

Stevenson v. Metsker, 130 Kan. 251, 286 P. 673 (1930).

**La:**

Succession of McGuire, 151 La. 514, 92 So. 40 (1922).

**NM:**

McCauley v. Tom McCauley & Son, Inc., 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

**Tenn:**

State ex rel. Lowell Wiper Supply Co. v. Helen Shop, Inc., 211 Tenn. 107, 362 S.W.2d 787 (1962).

**Tex:**

Turner v. Cattleman's Trust Co. of Ft. Worth, 215 S.W. 831 (Tex. Comm'n App. 1919).

McClory v. Schneider, 51 S.W.2d 738 (Tex. Civ. App. Amarillo 1932), writ dismissed w.o.j., (Nov. 28, 1932).

**W Va:**

Lambert v. Huff, Andrews & Thomas Co., 82 W. Va. 362, 95 S.E. 1031, 1 A.L.R. 650 (1918).

**Treatises and Practice Aids**

Fletcher Cyclopedia of the Law of Private Corporations (perm. ed.) §§ 5096, 5100.

17 Williston on Contracts § 51:2 (4th ed.)

[FN25]

**Federal:**

Bank of Commerce v. State of Tennessee, 161 U.S. 134, 16 S. Ct. 456, 40 L. Ed. 645 (1896).  
State of Tennessee v. Whitworth, 117 U.S. 129, 6 S. Ct. 645, 29 L. Ed. 830 (1886).  
Dewing v. Perdicaries, 96 U.S. 193, 24 L. Ed. 654 (1877).

**Idaho:**

State v. Dunlap, 28 Idaho 784, 156 P. 1141 (1916).

**Ill:**

In re Greenleaf, 184 Ill. 226, 56 N.E. 295 (1900).'

**Kan:**

Miller's Estate v. Executrix of Miller's Estate, 90 Kan. 819, 136 P. 255 (1913), reh'g denied, 136 P. 932 (Kan. 1913).

**Mich:**

City of Detroit v. Kresge, 200 Mich. 668, 167 N.W. 39 (1918).

**Mont:**

State v. Walker, 70 Mont. 484, 226 P. 894 (1924).

**Ohio:**

Lee v. Sturges, 46 Ohio St. 153, 19 N.E. 560 (1889).

**Tenn:**

State ex rel. Lowell Wiper Supply Co. v. Helen Shop, Inc., 211 Tenn. 107, 362 S.W.2d 787 (1962);

**Va:**

Carnegie Trust Co. v. Security Life Ins. Co. of America, 111 Va. 1, 68 S.E. 412 (1910).

**Wash:**

Spokane & Eastern Trust Co. v. Spokane County, 70 Wash. 48, 126 P. 54 (1912).

[FN26]

**Federal:**

Jellenik v. Huron Copper-Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647 (1900).  
AFP Imaging Corp. v. Ross, 780 F.2d 202 (2d Cir. 1985).

## 17 Williston on Contracts § 51:2 (4th ed.)

Snyder v. Commissioner of Internal Revenue, 73 F.2d 5 (C.C.A. 3d Cir. 1934), cert. granted, 294 U.S. 701, 55 S. Ct. 510, 79 L. Ed. 1237 (1935) and aff'd, 295 U.S. 134, 55 S. Ct. 737, 79 L. Ed. 1351 (1935), reh'g denied, 295 U.S. 769, 55 S. Ct. 913, 79 L. Ed. 1710 (1935).

Harrell v. Allen, 439 F.2d 1005 (5th Cir. 1971).

Capital Parks, Inc. v. Southeastern Advertising & Sales System, Inc., 864 F. Supp. 14 (W.D. Tex. 1993), aff'd, 30 F.3d 627, 30 Fed. R. Serv. 3d 184 (5th Cir. 1994).

Stockton v. Lucas, 482 F.2d 979 (Emer. Ct. App. 1973) (sale of stock in cooperative corporation is sale of personalty, not realty).

**Ala:**

Hoglan v. Moore, 219 Ala. 497, 122 So. 824 (1929).

**Fla:**

Cruising World, Inc. v. Westermeyer, 351 So. 2d 371 (Fla. Dist. Ct. App. 2d Dist. 1977).

**Iowa:**

Dawson v. National Life Ins. Co. of U.S., 176 Iowa 362, 157 N.W. 929 (1916).

**Md:**

Lowndes v. Cooch, 87 Md. 478, 39 A. 1045 (1898).

**Miss:**

Fayard v. Fayard, 293 So. 2d 421, 69 A.L.R.3d 1322 (Miss. 1974) (shares of stock are universally considered personal property).

**Mo:**

Strong v. Crancer, 335 Mo. 1209, 76 S.W.2d 383 (1934).

**Ohio:**

Bradley v. Bauder, 36 Ohio St. 28, 1880 WL 58 (1880).

**Okla:**

Litchfield v. Henson Oil Co., 1915 OK 1072, 53 Okla. 550, 157 P. 137 (1915).

**Pa:**

In re Oliver's Estate, 184 Pa. 306, 39 A. 72 (1898).

**Tex:**

Automobile Mortg. Co. v. Ayub, 266 S.W. 134 (Tex. Comm'n App. 1924).

[FN27] See, e.g.:

17 Williston on Contracts § 51:2 (4th ed.)

9 Delaware Code § 159.

Ohio Revised Code § 1701.24(a).

**Idaho:**

State v. Dunlap, 28 Idaho 784, 156 P. 1141 (1916).

**Kan:**

Miller's Estate v. Executrix of Miller's Estate, 90 Kan. 819, 136 P. 255 (1913), reh'g denied, 136 P. 932 (Kan. 1913).

**La:**

Succession of McGuire, 151 La. 514, 92 So. 40 (1922).

**Mass:**

Herbert v. Simson, 220 Mass. 480, 108 N.E. 65 (1915).

**Mont:**

State v. Walker, 70 Mont. 484, 226 P. 894 (1924).

**NY:**

Pierpoint v. Hoyt, 260 N.Y. 26, 182 N.E. 235, 83 A.L.R. 1195 (1932), rev'd on other grounds, 236 A.D. 802, 259 N.Y.S. 956 (2d Dep't 1932).

**Ohio:**

Anderson v. Durr, 100 Ohio St. 251, 126 N.E. 57, 17 A.L.R. 82 (1919), aff'd, 257 U.S. 99, 42 S. Ct. 15, 66 L. Ed. 149 (1921).

**W Va:**

Lambert v. Huff, Andrews & Thomas Co., 82 W. Va. 362, 95 S.E. 1031, 1 A.L.R. 650 (1918).

[FN28]

**NY:**

Parsons v. Lipe, 158 Misc. 32, 286 N.Y.S. 60 (Sup 1933), aff'd, 243 A.D. 681, 277 N.Y.S. 426 (4th Dep't 1935), aff'd, 269 N.Y. 630, 200 N.E. 31 (1936) and aff'd, 243 A.D. 681, 277 N.Y.S. 428 (4th Dep't 1935), aff'd, 269 N.Y. 630, 200 N.E. 31 (1936) supra.

[FN29]

**Federal:**

17 Williston on Contracts § 51:2 (4th ed.)

Jellenik v. Huron Copper-Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647 (1900).  
McKane v. Burke, 132 F. 688 (C.C.D. Nev. 1904).

**Fla:**

Cruising World, Inc. v. Westermeyer, 351 So. 2d 371 (Fla. Dist. Ct. App. 2d Dist. 1977).

**NY:**

In re Jones' Estate, 172 N.Y. 575, 65 N.E. 570 (1902).  
Silverman v. Alcoa Plaza Associates, 37 A.D.2d 166, 323 N.Y.S.2d 39, 9 U.C.C. Rep. Serv. 429 (1st Dep't 1971) (cooperative apartment stock).

**Ohio:**

Anderson v. Durr, 100 Ohio St. 251, 126 N.E. 57, 17 A.L.R. 82 (1919), aff'd, 257 U.S. 99, 42 S. Ct. 15, 66 L. Ed. 149 (1921).  
Bradley v. Bauder, 36 Ohio St. 28, 1880 WL 58 (1880).

**Ore:**

Silvertooth v. Kelley, 162 Or. 381, 91 P.2d 1112, 122 A.L.R. 1329 (1939).

[FN30]

**Fla:**

Cruising World, Inc. v. Westermeyer, 351 So. 2d 371 (Fla. Dist. Ct. App. 2d Dist. 1977).

**Mass:**

Herbert v. Simson, 220 Mass. 480, 108 N.E. 65 (1915).

[FN31]

**Federal:**

Ashley v. Quintard, 90 F. 84 (C.C N.D. Ohio 1898).  
Gundry v. Reakirt, 173 F. 167 (C.C.E.D. Pa. 1909).

**Ill:**

Pease v. Chicago Crayon Co., 235 Ill. 391, 85 N.E. 619 (1908).

**Utah:**

Commercial Nat. Bank v. Chambers, 21 Utah 324, 61 P. 560 (1900), aff'd, 182 U.S. 556, 21 S. Ct. 863, 45 L. Ed. 1227 (1901).

[FN32]

17 Williston on Contracts § 51:2 (4th ed.)

**Federal:**

Tucker v. Curtin, 148 F. 929 (C.C.A. 1st Cir. 1906).  
Allen-West Commission Co. v. Grumbles, 129 F. 287 (C.C.A. 8th Cir. 1904).  
Church v. Citizens' St. R. Co., 78 F. 526 (C.C.D. Ind. 1897).

**Ala:**

Nelson v. Owen, 113 Ala. 372, 21 So. 75 (1896).  
Nabring v. Bank of Mobile, 58 Ala. 204, 1877 WL 1295 (1877).

**Ill:**

Russell v. Louis Melind Co., 331 Ill. App. 182, 72 N.E.2d 869 (1st Dist. 1947).

**Maine:**

Bahre v. Pearl, 595 A.2d 1027, 16 U.C.C. Rep. Serv. 2d 780 (Me. 1991) (discussing common-law rule).

**Mass:**

Herbert v. Simson, 220 Mass. 480, 108 N.E. 65 (1915).

**W Va:**

Lambert v. Huff, Andrews & Thomas Co., 82 W. Va. 362, 95 S.E. 1031, 1 A.L.R. 650 (1918).

[FN33]

**Federal:**

Continental Nat Bank of New York v. Eliot Nat Bank of Boston, 7 F. 369 (C.C.D. Mass. 1881).  
Ashley v. Quintard, 90 F. 84 (C.C.N.D. Ohio 1898).

**Maine:**

Bahre v. Pearl, 595 A.2d 1027, 16 U.C.C. Rep. Serv. 2d 780 (Me. 1991) (common-law rule altered by statute).

**NY:**

Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 161 N.Y.S.2d 418, 141 N.E.2d 812, 61 A.L.R.2d 1309 (1957).

**W Va:**

Young v. Garred, 90 W. Va. 767, 112 S.E. 181, 23 A.L.R. 1317 (1922).

[FN34] The application of this distinction with regard to choice of law is discussed in § 51:7.



17 Williston on Contracts § 51:2 (4th ed.)

**NY:**

Pierpoint v. Hoyt, 260 N.Y. 26, 182 N.E. 235, 83 A.L.R. 1195 (1932), rev'd, 236 A.D. 802, 259 N.Y.S. 956 (2d Dep't 1932).  
Nowy Swiat Pub. Co. v. Misiewicz, 246 N.Y. 58, 158 N.E. 19, 61 A.L.R. 433 (1927).  
Holmes v. Camp, 219 N.Y. 359, 114 N.E. 841 (1916).  
Lockwood v. United States Steel Corporation, 209 N.Y. 375, 103 N.E. 697 (1913).  
United States Radiator Corporation v. State, 208 N.Y. 144, 101 N.E. 783 (1913).  
In re Bronson, 150 N.Y. 1, 44 N.E. 707 (1896).  
Francis v. New York & B.E.R. Co., 108 N.Y. 93, 15 N.E. 192 (1888).  
Jermain v. Lake Shore & M.S. Ry. Co., 91 N.Y. 483, 1883 WL 12540 (1883).  
Wheeler v. Millar, 90 N.Y. 353, 1882 WL 12775 (1882).  
Burrall v. Bushwick R. Co., 75 N.Y. 211, 1878 WL 12731 (1878).  
Burr v. Wilcox, 22 N.Y. 551, 1860 WL 7929 (1860).  
Parsons v. Lipe, 158 Misc. 32, 286 N.Y.S. 60 (Sup 1933), aff'd, 243 A.D. 681, 277 N.Y.S. 426 (4th Dep't 1935), aff'd, 269 N.Y. 630, 200 N.E. 31 (1936) and aff'd, 243 A.D. 681, 277 N.Y.S. 428 (4th Dep't 1935), aff'd, 269 N.Y. 630, 200 N.E. 31 (1936) *supra*.

**Treatises and Practice Aids**

Fletcher Cyclopedia of the Law of Private Corporations (perm. ed.) § 5092.

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WILLSTN-CN § 51:2

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Tab 7

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**2005 Supplement**

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**REPLACEMENT VOLUME 6C**

**2000 EDITION**

**Place with Corresponding Bound Volume.**

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the Publisher's Editorial Staff

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Grainger, 2004 UT 61, 504 Utah Adv. Rep. 7, 96 P.3d 927.

## 61-1-26. Scope of the act — Service of process.

### NOTES TO DECISIONS

#### In personam jurisdiction.

This section provides a substitute method for service of process, assuming that jurisdiction over the defendant is proper, it does not provide

for personal jurisdiction over a defendant absent minimum contacts. MFS Series Trust III v. Grainger, 2004 UT 61, 504 Utah Adv. Rep. 7, 96 P.3d 927.

## CHAPTER 2

### DIVISION OF REAL ESTATE

Section		Section	
61-2-2.	Definitions.	61-2-11.	Investigations — Subpoena power of division — Grounds for disciplinary action.
61-2-5.5.	Real Estate Commission created — Functions — Appointment — Qualification and terms of members — Expenses — Meetings.	61-2-11.5.	Investigations related to an undivided fractionalized long-term estate.
61-2-6.	Licensing procedures and requirements.	61-2-12.	Disciplinary action — Judicial review.
61-2-7.1.	Change of information — Failure to notify — Notification to an applicant, licensee, or certificate holder.	61-2-21.	Remedies and action for violations.
61-2-9.	Examination and license fees — Background check — Renewal of licenses — Education requirements — Activation of inactive licenses — Recertification — Licenses of firm, partnership, or association — Miscellaneous fees.	61-2-25.	Sales agents — Affiliated with broker as independent contractors or employees — Presumption.
		61-2-26.	Rulemaking required for offer or sale of an undivided fractionalized long-term estate — Disclosures — Management agreement.
		61-2-27.	Exclusive brokerage agreement.

#### 61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than the principal broker's main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

- (7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.
- (b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.
- (8) "Director" means the director of the Division of Real Estate.
- (9) "Division" means the Division of Real Estate.
- (10) "Executive director" means the director of the Department of Commerce.
- (11) "Main office" means the address which a principal broker designates with the division as the principal broker's primary brokerage office.
- (12) "Principal real estate broker" and "principal broker" means any person:
- (a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or
  - (ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);
  - (b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether the person's compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;
  - (c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;
  - (d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and
  - (e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.
- (13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:
- (i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;
  - (ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or
  - (iii) authorizing expenditures for repairs to the real estate.
- (b) "Property management" does not include:
- (i) hotel or motel management;
  - (ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or
  - (iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

X (14) "Real estate" includes leaseholds and business opportunities involving real property. X

(15) "Real estate sales agent" and "sales agent" mean any person affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

(20) (a) "Undivided fractionalized long-term estate" means an ownership interest in real property by two or more persons that is a:

(i) tenancy in common; or

(ii) any other legal form of undivided estate in real property including:

(A) a fee estate;

(B) a life estate; or

(C) other long-term estate.

(b) "Undivided fractionalized long-term estate" does not include a joint tenancy.

X History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R.S. 1933, 82-2-2; L. 1939, ch. 106, § 1; C. 1943, 82-2-2; L. 1963, ch. 146, § 1; 1983, ch. 257, § 2; 1985, ch. 162, § 2; 1987, ch. 73, § 32; 1989, ch. 225, § 87; 1991, ch. 165, § 8; 1996, ch. 102, § 2; 1997, ch. 106, § 1; 2003, ch. 264, § 1; 2005, ch. 257, § 2.

Amendment Notes. — The 2003 amendment, effective May 5, 2003, rewrote Subsec-

X tion (15) which read "Real estate sales agent" and 'sales agent' means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12)." X

The 2005 amendment, effective May 2, 2005, added Subsection (20) and made stylistic changes in the section

### 61-2-5.5. Real Estate Commission created — Functions — Appointment — Qualification and terms of members — Expenses — Meetings.

(1) There is created within the division a Real Estate Commission. The Commission shall:

(a) make rules for the administration of this chapter that are not inconsistent with this chapter, including:

(i) licensing of:

(A) principal brokers;

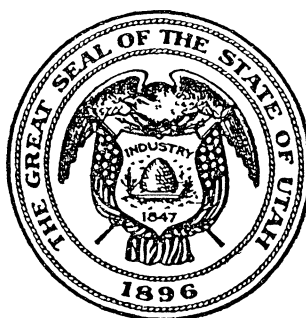
(B) associate brokers;

(C) sales agents;

(D) real estate companies; and

(E) branch offices;

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UTAH CODE ANNOTATED  
1943



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VOLUME 5

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Published December 31, 1942, by  
Authority of an Act of the Legislature  
Effective January 2, 1943

## CHAPTER 2

## REAL ESTATE BROKERS

- |         |                                 |          |                              |
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| 82-2-1. | License Required.               | 82-2-9.  | Broker's License — Fee —     |
| 82-2-2. | "Real Estate Broker" —          |          | Carries Right to Sales-      |
|         | "Real Estate" Defined.          |          | man's License—Expiration     |
| 82-2-3. | "Real Estate Salesman" De-      |          | —Renewal—Revocation.         |
|         | defined.                        | 82-2-10. | Salesman's Right to Commis-  |
| 82-2-4. | [Real Estate Broker or Sales-   |          | sion Restricted.             |
|         | man] — One Act for Com-         | 82-2-11. | Revocation or Suspension of  |
|         | compensation Sufficient to Con- |          | License—Grounds.             |
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|         | Cards.                          | 82-2-15. | Colonization Projects — Re-  |
| 82-2-8. | Termination of Salesman's       |          | ports on.                    |
|         | Employment — Notice —           | 82-2-16. | Id. Prerequisite to Sales.   |
|         | Return of License and           | 82-2-17. | Penalty for Violation of     |
|         | Card.                           |          | Chapter.                     |

**82-2-1. License Required.**

It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.

(L. 21, p. 304, § 1.)

**History.**

As amended by L. 39, ch. 106, eff. May 9, adding "copartnership or corporation" after "person" in first line and adding matter at end of second line.

**Comparable provisions.**

Cal. Gen. Laws, Act 112, § 1 (identical, except that concluding words are as follows: " \* \* \* without first obtaining a license from the State Real Estate Division").

Idaho Code, § 53-2205, Mont. Rev. Codes, § 4060 (unlawful for any person to engage in business, or act in capacity of, real estate broker without first obtaining license).

Iowa Code 1939, § 1905.20 (requiring procurement of license from Iowa real estate commissioner).

**Cross-references.**

Statute of frauds, brokers' contracts as within, 33-5-4, subd. (5).

**Decisions from other jurisdictions.****— Iowa.**

Written contract of exclusive agency for the sale of real estate held not to be construed as preventing the owner from

making a sale without liability for a commission. *Hedges Co. v. Shanahan*, 195 Iowa 1302, 190 N. W. 957.

Employment of broker to sell real estate is not a renunciation or abdication of owner's right to sell as an incident of his ownership. *Reeve v. Shoemaker*, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

The existence of a contract of employment is essential to the right of a broker to a commission. *Reeve v. Shoemaker*, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

A broker suing for commissions for making a land sale has the burden of proving (1) the contract of employment, (2) that he produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, (3) that plaintiff was efficient moving cause of sale, and (4) the implied contract to pay commission for services. *Wareham v. Atkinson*, 215 Iowa 1096, 247 N. W. 534.

**A. L. R. notes.**

Constitutionality of statute or ordinance requiring real estate brokers to procure a license, 59 A. L. R. 1501.

**82-2-2. "Real Estate Broker"—"Real Estate" Defined.**

The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations,



foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

It is expressly provided that a real estate broker shall have the right to fill out and complete such statutory or securities commission approved forms of legal documents that may be necessary to any real estate transaction to which the said broker is a party as principal or agent.

\* The term "real estate" as used in this chapter shall include leaseholds and other interests less than leaseholds. (L. 29, p. 121, § 2.) \*

#### History.

As amended by L. 39, ch. 106, eff. May 9, making material changes in text and adding all matter after "real estate" in eighth line from end of first paragraph.

#### A. L. R. notes.

Authority of real estate broker to bind employer by representations to purchaser as to the character or condition of the property, 57 A. L. R. 111.

Broker from out of state as within ap-

plication and effect of statute relating to real estate brokers, 86 A. L. R. 640.

Broker's lien to secure his compensation for procuring sale of real estate, 58 A. L. R. 1497.

Duration of real estate broker's contract which specifies no time, 28 A. L. R. 893.

Duty of broker to inform principal of enhanced value of property, 53 A. L. R. 136.

Failure of title as fault or default of

# UTAH CODE ANNOTATED 1953

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE  
STATE IN FORCE AT THE CLOSE OF THE TWENTY-NINTH  
LEGISLATURE, REGULAR AND FIRST  
SPECIAL SESSIONS, 1951

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TEN VOLUMES

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Sales to Water and Irrigation

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ing (1) the contract of employment, (2) that he produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, (3) that plaintiff was efficient moving cause of sale, and (4) the implied contract to pay commission for services. *Wareham v. Atkinson*, 215 Iowa 1096, 247 N. W. 534.

#### Collateral References.

Brokers—3.

12 C.J.S. Brokers § 8.

Real estate brokers, 8 Am. Jur. 1016, Brokers § 59 et seq.

Character and extent of liability on real estate broker's statutory bond, 17 A. L. R. 2d 1012.

Constitutionality of statute or ordinance requiring real estate brokers to procure a license, 59 A. L. R. 1501.

**61-2-2. "Real estate broker"—"Real estate" defined.**—The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

It is expressly provided that a real estate broker shall have the right to fill out and complete such statutory or securities commission approved forms of legal documents that may be necessary to any real estate transaction to which the said broker is a party as principal or agent.

\* The term "real estate" as used in this chapter shall include leaseholds \* and other interests less than leaseholds.

History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R. S. 1933, 82-2-2; L. 1939, ch. 106, § 1; C. 1943, 82-2-2.

#### Compiler's Note.

The 1939 amendment made material changes in text and added the last sentence of the first paragraph.

#### 1. Construction and application.

Plaintiff, who by oral agreement assisted licensed broker in obtaining listing of certain land, could not be deprived of his commission when land was sold by broker, since plaintiff was neither real estate broker as defined in this section nor real estate salesman as defined in 61-2-3. And *erson v. Johnson*, 108 U. 417, 160 P. 2d 725.

#### Collateral References.

Brokers ⇔ 2.  
12 C.J.S. Brokers § 1.

Authority of real estate broker to bind employer by representations to purchaser as to the character or condition of the property, 57 A. L. R. 111.

Broker from out of state as within application and effect of statute relating to real estate brokers, 86 A. L. R. 640.

Broker's lien to secure his compensation for procuring sale of real estate, 58 A. L. R. 1497.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 A. L. R. 2d 1410.

Duration of real estate broker's contract which specifies no time, 28 A. L. R. 893.

Duty of broker to inform principal of enhanced value of property, 53 A. L. R. 136.

Failure of title as fault or default of owner within exception in contractual provision denying broker's right to commissions if sale is not closed, 56 A. L. R. 913.

Liability of broker to purchaser for overstating lowest price at which owner is willing to sell, 8 A. L. R. 1383.

Liability of real estate agent or broker to employer because of unfit character of purchaser or tenant procured by him, 60 A. L. R. 1379.

Real estate broker's rights and remedies in respect of property or proceeds for payment or security of his compensation, 125 A. L. R. 921.

Real estate broker's right to commissions as affected by owner's ignorance of fact that purchaser had been contacted by broker, 142 A. L. R. 275.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 A. L. R. 2d 504.

Relative rights and liabilities of vendor and his broker to down payment or earnest money forfeited by vendee for default under real estate contract, 9 A. L. R. 2d 495.

Right of real estate broker to commissions where he was unable to procure an offer of the owner's price from one whom he interested, and who subsequently, without his intervention, purchased at that price, 9 A. L. R. 1194.

Right of real estate broker to list competing properties of different owners, 71 A. L. R. 699.

Skill and care required of real estate broker, 62 A. L. R. 1357.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 A. L. R. 2d 376.

Who is real estate agent, salesman, or broker within meaning of statute, 56 A. L. R. 480, 167 A. L. R. 774.

**61-2-3. "Real estate salesman" defined.**—The term "real estate salesman" shall mean and include any person employed or engaged by or on behalf of a licensed real estate broker to do or to deal in any act or transaction set out or comprehended by the definition of a real estate broker in section 61-2-2 for compensation or otherwise

History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R. S. 1933, 82-2-3; L. 1939, ch. 106, § 1; C. 1943, 82-2-3.

#### Compiler's Notes.

The 1939 amendment rewrote text of entire section.

The reference in this section to "section

61-2-2" appeared in Code 1943 as "section 82-2-2."

#### 1. Broker or salesman defined.

One who merely assists a real estate broker to secure listings does not come within the provisions of our real estate brokers' law. He does not come within the definition of a real estate broker or

**L A W S**

of the

**STATE OF UTAH, 1963**

Passed by

**REGULAR SESSION**

of the

**THIRTY-FIFTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake

January 14, 1963

And Adjourned Sine Die on

March 14, 1963

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been filed, entered, or imposed under this act, but are governed by prior law.

(4) Prior law applies in respect of any offer or sale made within one year after the effective date of this act pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law.

(5) Judicial review of all administrative orders as to which review proceedings have not been instituted by the effective date of this act are governed by section 61-1-23, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within sixty days after the effective date of this act.

Approved March 21, 1963.

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## CHAPTER 146

H. B. No. 124.

(Passed March 14, 1963. In effect May 14, 1963.)

### REAL ESTATE BROKER

**An Act Relating to Real Estate Brokers, Providing That the Securities Commission May Issue Cease and Desist Orders and Seek Injunctive Relief for Violations of the Chapter; and Amending Sections 61-2-2, 61-2-5, 61-2-9, and 61-2-11, 61-2-19, Utah Code Annotated 1953, Relating to the Duties of Real Estate Brokers and Providing That Business Opportunities Shall Be Included in the Definition of Real Estate; Increasing Compensation of Board of Real Estate Examiners; Providing for Certain Changes in Fees; Providing that Brokers May Share Commissions With Licensed Brokers in Other Jurisdictions; and Adding Sections 61-2-21 and 61-2-22 to Prescribe Course of Action in Case of Violations and Savings Clause.**

*Be it enacted by the Legislature of the State of Utah:*

#### **Section 1. Sections Amended.**

Sections 61-2-2, 61-2-5, 61-2-6, 61-2-9 and 61-2-11, 61-2-19, Utah Code Annotated 1953, are amended to read:

#### **61-2-2. "Real Estate Broker"—"Real Estate" Defined.**

The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells

or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee, in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

\* The term "real estate" as used in this chapter shall include leaseholds and business opportunities. \*

The term "business opportunity" as used in this Chapter shall mean and include an existing business, business and the good will attached thereto or any one or combination thereof.

#### 61-2-5. Securities Commission—Board of Real Estate Examiners.

(a) It shall be the duty of the State securities commission, herein referred to as the commission, to administer and provide for the enforcement of all provisions of this chapter. A board of real estate examiners, herein referred to as the board, and the office of real estate director, herein referred to as the director, are hereby established under the appointment, direction and supervision of the securities commission. The commission shall appoint a board of three real estate examiners, each of whom shall, for at least five years prior to the date of his appointment, have been engaged in the real estate business, and shall have been a licensed real estate broker in the State of Utah for three years next prior to his appointment. Not more than one member of the board shall be appointed from any one county in the state. The board members shall be appointed for terms of one year, two years and three years, upon creation of the board, and upon expiration of the respective terms, new appointments shall be made for terms of three years. The board of real estate examiners shall, upon its own motion or upon the verified complaint in writing of any person, cause to be made an investigation of the conduct of any licensee mentioned in the

**LAWS**  
of the  
**STATE OF UTAH, 1983**

Passed at the  
**REGULAR SESSION**

of the  
**FORTY-FIFTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake  
January 10, 1983  
and Adjourned Sine Die on  
March 10, 1983  
and

**FIRST SPECIAL SESSION**

June 23rd, July 14, 15 and 21, 1983

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## CHAPTER 257

S B No 178

(Passed March 10, 1983 In effect May 10, 1983 )

## DIVISION OF REAL ESTATE AMENDMENTS - SUNSET REVIEW

By Senator Carling

AN ACT RELATING TO REAL ESTATE; CLARIFYING THE ROLE OF THE DIVISION OF REAL ESTATE AND ITS DUTIES; MAKING CHANGES IN THE LICENSING OF BROKERS AND SALESMEN; PROVIDING FOR THE LICENSING OF PRINCIPAL BROKERS; AND PROVIDING TECHNICAL CHANGES.

THIS ACT AMENDS SECTIONS 61-2-1, 61-2-4, 61-2-7, 61-2-8, 61-2-10, 61-2-13, 61-2-14, 61-2-17, 61-2-18, AND 61-2-20, UTAH CODE ANNOTATED 1953, SECTION 61-2-2, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 146, LAWS OF UTAH 1963, SECTION 61-2-6, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 194, LAWS OF UTAH 1979, AND SECTIONS 61-2-9, 61-2-11, 61-2-12, AND 61-2-21, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 225, LAWS OF UTAH 1981; ENACTS SECTION 61-2-5.5, UTAH CODE ANNOTATED 1953; REPEALS AND REENACTS SECTION 61-2-3, UTAH CODE ANNOTATED 1953, AND SECTION 61-2-5, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 225, LAWS OF UTAH 1981; AND REPEALS SECTION 61-2-19, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 193, LAWS OF UTAH 1969.

*Be it enacted by the Legislature of the State of Utah:*

**Section 1. Section amended.**

Section 61-2-1, Utah Code Annotated 1953, is amended to read:

**61-2-1. License required.**

It ~~[shall be]~~ is unlawful for any person~~[, copartnership or corporation]~~ to engage in the business, act in the capacity of, advertise or assume to act as a principal real estate broker, real estate broker, or a real estate salesman within this state without ~~[first obtaining]~~ a license obtained under ~~[the provisions of]~~ this chapter.

**Section 2. Section amended.**

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 146, Laws of Utah 1963, is amended to read:

**61-2-2. Definitions.**

As used in this chapter:

(1) ~~[The term]~~ "Principal real estate broker" and "principal broker" ~~[within the meaning of this chapter shall]~~ means: (a) ~~[include]~~ all persons~~[, partnerships, associations and corporations, foreign and domestic,]~~ who for another and for ~~[a fee, commission or other]~~ valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting ~~[a fee, commission or other]~~ valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements

thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate[-]; and (b) ~~[The term "real estate broker" shall also include]~~ any person, ~~[partnership, association or corporation]~~ employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who ~~[shall sell or exchange or offer or attempt or agree]~~ sells, exchanges or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

~~[The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of (or) a will nor to their employees.]~~

(2) "Real estate broker" and "broker" means any person employed or engaged by or on behalf of a licensed principal real estate broker to perform any act set out in subsection (1) for valuable consideration, who has qualified under the provisions of this chapter as a real estate broker.

(3) "Real estate salesman" and "salesman" means any person employed or engaged by or on behalf of a licensed principal real estate broker to perform any act set out in subsection (1) for valuable consideration.

\* (4) ~~[The term "real"]~~ "Real estate" ~~[as used in this chapter shall include]~~ \* includes leaseholds, ~~[and]~~ business opportunities, and all timeshare interests (including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust).

\* (5) ~~[The term "business"]~~ "Business opportunity" ~~[as used in this chapter shall mean and include]~~ \* means an existing business, a business and ~~[the]~~ its good will, ~~[attached thereto]~~ a business franchise, or any ~~[one or]~~ combination~~[thereof]~~ of them.

### Section 3. Section repealed and reenacted.

Section 61-2-3, Utah Code Annotated 1953, is repealed and reenacted to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to: (1) any person who as owner or lessor performs the acts set out in section 61-2-2(1) with reference to property owned or leased by such person; (2) isolated transactions by persons holding a duly executed power of attorney from the owner; (3) services rendered by an attorney at law in performing his duties as an attorney at law; (4) a

**LAWS**  
of the  
**STATE OF UTAH, 1985**

Passed at the  
**GENERAL SESSION**  
of the  
**FORTY-SIXTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake  
January 14, 1985  
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February 27, 1985

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Published by Authority

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**CHAPTER 162****H. B. No. 284**

Passed February 27, 1985

Effective April 29, 1985

**REAL ESTATE AMENDMENTS**

By Richard J. Bradford

AN ACT RELATING TO THE SECURITIES COMMISSION; REVISING THE REAL ESTATE BROKERS CHAPTER; REDEFINING TERMS; REQUIRING THE DIVISION OF REAL ESTATE AND THE REAL ESTATE COMMISSION TO WORK IN CONCURRENCE WITH EACH OTHER; CHANGING THE APPLICATION REQUIREMENTS; REVISING NONRESIDENT LICENSURE REQUIREMENTS; CHANGING THE FORM OF THE LICENSE AND RENEWAL DATE; GIVING THE DIVISION SUBPOENA POWER IN INVESTIGATIONS; ADDING TO PROHIBITED CONDUCT; CHANGING SOME APPEAL PROCEDURES; PROVIDING FINES TO BE DEPOSITED IN THE REAL ESTATE RECOVERY FUND; REQUIRING FORM APPROVAL; PROVIDING FOR LICENSE FEE RENEWAL; LIMITING THE AMOUNT RECOVERABLE FROM THE REAL ESTATE RECOVERY FUND; AND PROVIDING FOR REVOCATION OF LICENSURE.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS

**AMENDS:**

- 61-2-1, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-2, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-3, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-4, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5.5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-6, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-7, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-8, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-9, AS LAST AMENDED BY CHAPTER 15, LAWS OF UTAH 1984, SECOND SPECIAL SESSION, WHICH TAKES EFFECT JULY 1, 1985
- 61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983

- 61-2-10, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-11, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-12, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-13, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-17, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-18, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-20, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-22, AS ENACTED BY CHAPTER 146, LAWS OF UTAH 1963
- 61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983
- 61-2a-4, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983
- 61-2a-5, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983
- 61-2a-9, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

*Be it enacted by the Legislature of the state of Utah*

**Section 1. Section Amended.**

Section 61-2-1, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read

**61-2-1. License required.**

It 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 ~~salesman~~ sales agent within this state without a license obtained under this chapter

**Section 2. Section Amended.**

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read

**61-2-2. Definitions.**

As used in this chapter

(1) "Principal real estate broker" and "principal broker" means

(a) ~~all persons~~ any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises,

who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate, and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate

(2) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (1) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(3) "Real estate ~~[salesman]~~ sales agent" and "~~[salesman]~~ sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (1) for valuable consideration

(4) "Real estate" includes leaseholds, business opportunities, and all timeshare interests (including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust) involving real property

(5) ~~["Business opportunity" means an existing business, a business and its good will, a business franchise, or any combination of them]~~ "Commission" means the Real Estate Commission established under this chapter

(6) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(7) "Director" means the director of the Division of Real Estate

(8) "Division" means the Division of Real Estate

(9) "Executive director" means the director of the Department of Business Regulation

### Section 3. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as enacted by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-3. Exempt persons and transactions.

This chapter does not apply to

(1) any person who as owner or lessor performs the acts set out in ~~[section]~~ Subsection 61-2-2 (1) with reference to property owned or leased by such person,

(2) isolated transactions by persons holding a duly executed power of attorney from the owner,

(3) services rendered by an attorney at law in performing his duties as an attorney at law,

(4) a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court,

(5) a trustee or its employees under a deed of trust or a will ~~[or their employees]~~, or

(6) any public utility or ~~[to]~~ the officers or regular employees thereof, unless performance of any of the acts set out in Subsection 61-2-2 (1) is in connection with the sale, purchase, lease, or other disposition of real estate or investment therein unrelated to the principal business activity of such public utility

### Section 4. Section Amended.

Section 61-2-4, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-4. One act for compensation qualifies person as broker or sales agent.

One act, for valuable consideration, of buying, selling, leasing, or exchanging real estate for another, or of offering for another to buy, sell, lease, or exchange real estate, ~~[qualifies]~~ requires the person performing, offering, or attempting to perform the act to be licensed as a principal real estate broker, ~~[a]~~ an associate real estate broker, or a real estate ~~[salesman under]~~ sales agent as set forth in this chapter

### Section 5. Section Amended.

Section 61-2-5, Utah Code Annotated 1953, as enacted by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of Business Regulation a Division of Real Estate. It is responsible for the administration and enforcement of this chapter, the Real Estate Education, Research, and Recovery Fund, and the Utah Uniform Land and Timeshare Sales Practices Act

(2) The division ~~[shall be]~~ is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director ~~[shall hold]~~ holds his office at the pleasure of the governor

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be

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interest in a project is essentially noncommercial. For purposes of this subsection, the offering of fewer than ten interests in a project is considered essentially noncommercial.

### Section 32. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 162, Laws of Utah 1985, is amended to read:

#### 61-2-2. Definitions.

As used in this chapter:

[(2)] (1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection [(4)] (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

[(5)] (2) "Commission" means the Real Estate Commission established under this chapter.

[(6)] (3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

[(7)] (4) "Director" means the director of the Division of Real Estate

[(8)] (5) "Division" means the Division of Real Estate.

[(9)] (6) "Executive director" means the director of the Department of Business Regulation.

[(4)] (7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

[(4)] (8) "Real estate" includes leaseholds[,] and business opportunities[, and all timeshare interests

(including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust)] involving real property.

[(3)] (9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection [(4)] (7) for valuable consideration.

### Section 33. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as last amended by Chapters 162 and 235, Laws of Utah 1985, is amended to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to:

(1) any person who as owner or lessor performs the acts set out in Subsection 61-2-2 [(4)] (7) with reference to property owned or leased by that person;

(2) isolated transactions by persons holding a duly executed power of attorney from the owner;

(3) services rendered by an attorney at law in performing his duties as an attorney at law;

(4) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(5) a trustee or its employees under a deed of trust or a will;

(6) any public utility or [the] its officers or regular employees [of it], unless performance of any of the acts set out in Subsection 61-2-2 [(4)] (7) is in connection with the sale, purchase, lease, or other disposition of real estate or investment [therein] in real estate unrelated to the principal business activity of that public utility; or

(7) any person registered to act as a broker-dealer, agent, or investment advisor under the Utah and federal securities laws in the sale of, or offer to sell, real estate where the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934 and which security is registered for sale pursuant to the Securities Act of 1933 or by the Utah Uniform Securities Act. This exemption does not apply to exempt or resale transactions.

**LAWS**  
**of the**  
**STATE OF UTAH**

**passed at the**  
**1989 GENERAL SESSION**

**of the**  
**FORTY-EIGHTH LEGISLATURE**

**Convened at the Capitol in the City of Salt Lake**  
**January 9, 1989**  
**and Adjourned Sine Die on**  
**February 22, 1989**

**Published by Au**

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shall serve until their respective successors are appointed and qualified.

(4) The board shall meet at least quarterly on a regular date to be fixed by the board and at such other times at the call of the director or any two members of the board. Four members shall constitute a quorum for the transaction of business. Actions of the board shall require a vote of a majority of those present.

(5) Each member of the board shall, by sworn and written statement filed with the Department of ~~[business regulation]~~ Commerce and the lieutenant governor, disclose any position of employment or ownership interest that the member has with respect to any entity or business subject to the jurisdiction of the division. This statement shall be filed upon appointment and must be appropriately amended whenever significant changes occur in matters covered by the statement.

(6) The members of the board shall receive no salary but shall be paid a per diem allowance, as provided by law, for each day actually spent in the performance of their duties, and travel expenses as allowed under Section 63-1-15 and the rules and regulations promulgated under that section.

#### Section 87. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 73, Laws of Utah 1987, is amended to read

#### 61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Commission" means the Real Estate Commission established under this chapter.

(3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(4) "Director" means the director of the Division of Real Estate.

(5) "Division" means the Division of Real Estate.

(6) "Executive director" means the director of the Department of ~~[Business Regulation]~~ Commerce.

(7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or at-

tempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

(8) "Real estate" includes leaseholds and business opportunities involving real property.

(9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration.

#### Section 88. Section Amended.

Section 61-2-5, Utah Code Annotated 1953, as last amended by Chapter 182, Laws of Utah 1988, is amended to read:

#### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of ~~[Business Regulation]~~ Commerce a Division of Real Estate. It is responsible for the administration and enforcement of this chapter, the Real Estate Education, Research, and Recovery Fund, the Utah Uniform Land Sales Practices Act, and the Timeshare and Camp Resort Act.

(2) The division is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director holds his office at the pleasure of the governor.

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services.

(4) On or before the first day of October of each year the director shall, in conjunction with the department, report to the governor and the Legislature concerning the division's work for the preceding fiscal year ending June 30.

(5) The director, in conjunction with the executive director, shall prepare and submit to the governor

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(2) a statement whether or not the developer has ever been:

(a) convicted of a felony, or any misdemeanor involving theft, fraud, or dishonesty; or

(b) enjoined from, assessed any civil penalty for, or found to have engaged in the violation of any law designed to protect consumers,

(3) a brief description of the developer's experience in timeshare, camp resort, or any other real estate development,

(4) a brief description of the interest which is being offered in the project;

(5) a description of any provisions to protect the purchaser's interest from loss due to foreclosure on any underlying financial obligation of the project;

(6) a statement of the maximum number of interests in the project to be marketed, and a commitment that this maximum number will not be exceeded unless disclosed by filing an amendment to the registration as provided in Section 57-19-9 prior to the amendment becoming effective;

(7) any event which has occurred as of the date of the offer which may have a material adverse effect on the operation of the project; and

(8) any other information the director considers necessary for the protection of purchasers.

#### Section 7. Section Amended.

Section 57-19-20, Utah Code Annotated 1953, as enacted by Chapter 73, Laws of Utah 1987, is amended to read:

#### 57-19-20. Injunctive relief — Cease and desist order.

(1) Whenever it appears to the director that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter, and that it would be in the public interest to stop those acts or practices, the director may either:

(a) seek injunctive relief as provided in Rule 65A, Utah Rules of Civil Procedure; or

(b) issue an administrative cease and desist order.

(2) If an administrative cease and desist order is issued pursuant to Subsection (1), the person upon whom the order is served may, within ten days after receiving the order, request that a hearing be held before an administrative law judge. ~~[The director shall schedule the hearing within 15 days after receipt of the request from the person upon whom the order was served and give notice of the hearing in writing to him.]~~ If a request for a hearing is made, the division shall follow the procedures and requirements of Chapter 46b, Title 63, Administrative Procedures Act. Pending the hearing, the order remains in effect.

(3) If, at the hearing, a finding is made that there has been a violation of this chapter, the director, with the concurrence of the executive director, may issue an order making the cease and desist order

permanent. If no hearing is requested, and if the person fails to cease the act or practice, or after discontinuing the act or practice again commences it, the director shall file suit in the district court of the county in which the act or practice occurred, or where the person resides or carries on business, to enjoin and restrain the person from violating this chapter.

(4) Whether or not the director has issued a cease and desist order, the attorney general, in the name of the state or of the director, may bring an action in any court of competent jurisdiction to enjoin any act or practice constituting a violation of any provision of this chapter, and to enforce compliance with this chapter or any rule or order under this chapter. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted.

#### Section 8. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 225, Laws of Utah 1989, is amended to read:

#### 61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection [(7)] (9) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

[(2)] (3) "Commission" means the Real Estate Commission established under this chapter.

[(3)] (4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

[(4)] (5) "Director" means the director of the Division of Real Estate.

[(5)] (6) "Division" means the Division of Real Estate.

[(6)] (7) "Executive director" means the director of the Department of Commerce.

(8) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

[(7)] (9) "Principal real estate broker" and "principal broker" means ~~[(a)]~~ any person:

(a) (i) who ~~[for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration,]~~ sells or lists for sale, buys, exchanges, ~~[purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list,]~~ or auctions ~~[, or offers or attempts or agrees to collect rent-~~

~~al for the use of] real estate [or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in], options on real estate, or [the] improvements [thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate] on real estate with the expectation of receiving valuable consideration; or~~

~~(ii) who advertises, offers, attempts, or otherwise holds himself[, itself, or themselves] out [as] to be engaged in the business [of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate] described in Subsection (i); [and]~~

~~(b) [any person,] employed by or on behalf of the owner [or owners of lots or other parcels] of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (a), whether his compensation is at a stated salary [or upon], a commission [or] basis, upon a salary and commission basis, or otherwise [to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.];~~

~~(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management by:~~

~~(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;~~

~~(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or~~

~~(iii) ordering or otherwise arranging for repairs to the real estate;~~

~~(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (a) and (c); and~~

~~(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.~~

~~[(8)] (10) "Real estate" includes leaseholds and business opportunities involving real property.~~

~~[(9)] (11) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection [(7) for valuable consideration] (9).~~

#### Section 9. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as last amended by Chapters 48 and 73, Laws of Utah 1987, is amended to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to:

(1) any person who as owner or lessor performs the acts set out in Subsection 61-2-2 [(7)] (9) with reference to property owned or leased by that person or any regular salaried employee of that person, except that this exemption does not apply to employees engaged in sales of property intended for residential use or engaged in the sales of properties regulated under Chapter 11, Title 57, Utah Uniform Land Sales Practices Act, nor does it apply to any person whose interest as an owner or lessor was obtained by him or transferred to him for the purpose of evading the application of this chapter and not for any other legitimate business reason;

(2) isolated transactions by persons holding a duly executed power of attorney from the owner;

(3) services rendered by an attorney at law in performing his duties as an attorney at law;

(4) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(5) a trustee or its employees under a deed of trust or a will;

(6) any public utility, its officers, or regular employees, unless performance of any of the acts set out in Subsection 61-2-2 [(7)] (9) is in connection with the sale, purchase, lease, or other disposition of real estate or investment in real estate unrelated to the principal business activity of that public utility; or

(7) any person registered to act as a broker-dealer, agent, or investment advisor under the Utah and federal securities laws in the sale or the offer for sale of real estate, where the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934 and which security is registered for sale pursuant to the Securities Act of 1933 or by [the] Chapter 1, Title 61, Utah Uniform Securities Act. This exemption does not apply to exempt or resale transactions.

#### Section 10. Section Amended.

Section 61-2-5.5, Utah Code Annotated 1953, as last amended by Chapter 48, Laws of Utah 1987, is amended to read:

#### 61-2-5.5. Real Estate Commission created — Functions — Appointment, qualifications, terms, and compensation of members — Meetings.

(1) There is created within the division a Real Estate Commission. The commission shall:

~~[(a) promulgate rules relating to the licensing and conduct of principal brokers, associate brokers, sales agents, real estate schools, and school instructors;]~~

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents, real estate companies, and branch offices;

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## CHAPTER 102

## H. B. 102

Passed February 27, 1996

Approved March 11, 1996

Effective April 29, 1996

DIVISION OF  
REAL ESTATE AMENDMENTS

Sponsor Gerry A Adair

AN ACT RELATING TO THE DIVISION OF REAL ESTATE; ADDING CERTAIN DEFINITIONS; EXEMPTING CERTAIN PERSONS FROM LICENSING REQUIREMENTS; REVISING THE DUTIES OF THE REAL ESTATE COMMISSION; MODIFYING CERTAIN REQUIREMENTS FOR LICENSING; REVISING MANDATES IMPOSED ON BROKERS; CREATING A CAUSE OF ACTION FOR MISHANDLING OF TRUST FUNDS; AND MAKING TECHNICAL CORRECTIONS.

This act affects sections of Utah Code Annotated 1953 as follows

## AMENDS:

61-2-1, as last amended by Chapter 162, Laws of Utah 1985

61-2-2, as last amended by Chapter 165, Laws of Utah 1991

61-2-3, as last amended by Chapters 165 and 262, Laws of Utah 1991

61-2-4, as last amended by Chapter 162, Laws of Utah 1985

61-2-5 5, as last amended by Chapter 165, Laws of Utah 1991

61-2-9, as last amended by Chapter 313, Laws of Utah 1994

61-2-10, as last amended by Chapter 186, Laws of Utah 1995

61-2-11, as last amended by Chapter 146, Laws of Utah 1993

## ENACTS:

61-2-24, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah*

**Section 1. Section 61-2-1 is amended to read:**

**61-2-1. License required.**

(1) It 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

(2) It is unlawful for any person outside the state 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 with respect to real estate located within the state without a license obtained under this chapter

**Section 2. Section 61-2-2 is amended to read:**

**61-2-2. Definitions.**

As used in this chapter

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection [(9)] (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office

(3) "Commission" means the Real Estate Commission established under this chapter

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity

[(5)] (8) "Director" means the director of the Division of Real Estate

[(6)] (9) "Division" means the Division of Real Estate

[(7)] (10) "Executive director" means the director of the Department of Commerce

[(8)] (11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office

[(9)] (12) "Principal real estate broker" and "principal broker" means any person

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration, or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (i),

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise,

(c) who, with the expectation of receiving valuable consideration, manages property owned

by another person or who advertises or otherwise holds himself out to be engaged in property management [by:];

~~[(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;]~~

~~[(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or]~~

~~[(iii) ordering or otherwise arranging for repairs to the real estate;]~~

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections 12(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13)(a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel management unless the hotel is a condominium hotel; or

(ii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

~~[(10)]~~ (14) "Real estate" includes leaseholds and business opportunities involving real property.

~~[(11)]~~ (15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection ~~[(9)]~~ (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

**Section 3. Section 61-2-3 is amended to read:**

### **61-2-3. Exempt persons and transactions.**

~~[This]~~ (1) (a) Except as provided in Subsection (1)(b), a license under this chapter ~~[does]~~ is not ~~[apply to]~~ required for:

~~[(1)(a)]~~ (i) any person who as owner or lessor performs the acts ~~[set out]~~ described in Subsection 61-2-2 ~~[(9)]~~ (12) with reference to property owned or leased by that person ~~[or any regular salaried employee of that person];~~

(ii) a regular salaried employee of the owner or lessor of real estate who, with reference to nonresidential real estate owned or leased by the employer, performs the acts enumerated in Subsections 61-2-2(12)(a) and (b);

(iii) a regular salaried employee of the owner of real estate who performs property management services with reference to real estate owned by the employer, except that the employee may only manage property for one employer;

(iv) a person who performs property management services for the apartments at which that person resides in exchange for free or reduced rent on that person's apartment;

(v) a regular salaried employee of a condominium homeowners' association who manages real property subject to the declaration of condominium that established the homeowners' association, except that the employee may only manage property for one condominium homeowners' association; and

(vi) a regular salaried employee of a licensed property management company who performs support services, as prescribed by rule, for the property management company.

(b) ~~[the exemption in]~~ Subsection (1)(a) does not ~~[apply to]~~ exempt from licensing:

~~[(i) employees engaged in the sale of property intended for residential use;]~~

~~[(ii)]~~ (i) employees engaged in the sale of properties regulated under Title 57, Chapter 11, Utah Uniform Land Sales Practices Act and Title 57, Chapter 19, Timeshare and Camp Resort Act;

~~[(iii)]~~ (ii) employees engaged in the sale of cooperative interests regulated under Title 57, Chapter 23, Real Estate Cooperative Marketing Act; or

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**1997 FIRST SPECIAL SESSION**  
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**1997 SECOND SPECIAL SESSION**

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Publication Authorized by the Utah Legislature

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## CHAPTER 106

## S. B. 200

Passed March 4, 1997

Approved March 12, 1997

Effective May 5, 1997

NIGHTLY RENTAL PROPERTY  
MANAGERS

Sponsor Alarik Myrin

AN ACT RELATING TO SECURITIES, REAL ESTATE DIVISION; AMENDING THE DEFINITION OF PROPERTY MANAGEMENT TO EXCLUDE RENTAL OF CERTAIN PUBLIC ACCOMMODATIONS FOR ANY PERIOD LESS THAN 30 CONSECUTIVE DAYS AND THE MANAGEMENT OF THESE RENTALS; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows

## AMENDS:

61-2-2, as last amended by Chapter 102, Laws of Utah 1996

*Be it enacted by the Legislature of the state of Utah*

Section 1. Section 61-2-2 is amended to read:

## 61-2-2. Definitions.

As used in this chapter

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office

(3) "Commission" means the Real Estate Commission established under this chapter

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity

(8) "Director" means the director of the Division of Real Estate

(9) "Division" means the Division of Real Estate

(10) "Executive director" means the director of the Department of Commerce

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office

(12) "Principal real estate broker" and "principal broker" means any person

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration or

(ii) who advertises, offers attempts or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i),

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis upon a salary and commission basis, or otherwise,

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management,

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c), and

(e) except for mortgage lenders title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration

(13)(a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by

(i) advertising for, arranging negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate

(ii) collecting agreeing offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected, or

(iii) authorizing expenditures for repairs to the real estate

(b) "Property management" does not include

(i) hotel or motel management [~~unless the hotel is a condominium hotel~~], [or]

(ii) rental of tourist accommodations including hotels motels tourist homes condominiums condominium hotels mobile home park accommodations campgrounds or similar public accommodations for any period of less than 30

consecutive days, and the management activities associated with these rentals, or

~~[(4)]~~ (iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate

(14) "Real estate" includes leaseholds and business opportunities involving real property

(15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12)

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis

(17) "Reinstatement" means restoring a license that has expired or has been suspended

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires

**LAWS**  
**of the**  
**STATE OF UTAH**

**passed at the**

**2002 FIFTH SPECIAL SESSION**  
**2002 SIXTH SPECIAL SESSION**  
**2003 GENERAL SESSION**  
**2003 FIRST SPECIAL SESSION**

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**CHAPTER 264****S. B. 198**

Passed March 4, 2003

Approved March 21, 2003

Effective May 5, 2003

**DIVISION OF REAL ESTATE -  
DEFINITIONS AMENDMENTS**

Sponsor. John L. Valentine

This act modifies the Securities Division - Real Estate Division section of the Utah Code. The act establishes that a real estate sales agent may be engaged either as an independent contractor or as an employee of a licensed principal real estate broker. The act establishes that the relationship between a sales agent and broker is an independent contractor relationship unless there is clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship. The act makes technical changes to the renewal of a principal broker's, associate broker's, or sales agent's license. The act makes technical changes to the process of activating an inactive license.

This act affects sections of Utah Code Annotated 1953 as follows

**AMENDS:**

61-2-2, as last amended by Chapter 106, Laws of Utah 1997

61-2-9, as last amended by Chapter 351, Laws of Utah 1997

**ENACTS:**

61-2-25, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

**Section 1. Section 61-2-2 is amended to read:**

**61-2-2. Definitions.**

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as

a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected, or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" ~~[means] mean any person [employed or engaged as an independent contractor by or on behalf of] affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).~~

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

**Section 2. Section 61-2-9 is amended to read:**

**61-2-9. Examination and license fees --  
Renewal of licenses -- Education  
requirements -- Activation of inactive  
licenses -- Recertification -- Licenses of  
firm, partnership, or association --  
Miscellaneous fees.**

(1) (a) Upon filing an application for a principal broker, associate broker, or sales agent license examination, the applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for admission to the examination.

(b) A principal broker, associate broker, or sales agent applicant shall pay a nonrefundable fee as determined by the commission with the

concurrence of the division under Section 63-38-3.2 for issuance of an initial license or license renewal.

(c) Each license issued under this subsection shall be issued for a period of not less than two years as determined by the division with the concurrence of the commission.

(d) (i) Any new sales agent applicant shall submit fingerprint cards in a form acceptable to the division at the time the license application is filed and shall consent to a fingerprint background check by the Utah Bureau of Criminal Identification and the Federal Bureau of Investigation regarding the application.

(ii) The division shall request the Department of Public Safety to complete a Federal Bureau of Investigation criminal background check for each new sales agent applicant through the national criminal history system (NCIC) or any successor system.

(iii) The cost of the background check and the fingerprinting shall be borne by the applicant.

(e) (i) Any new sales agent license issued under this section shall be conditional, pending completion of the criminal background check. If the criminal background check discloses the applicant has failed to accurately disclose a criminal history, the license shall be immediately and automatically revoked.

(ii) Any person whose conditional license has been revoked under Subsection (1)(e)(i) shall be entitled to a post-revocation hearing to challenge the revocation. The hearing shall be conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) A license expires if it is not renewed on or before its expiration date. Effective January 1, 1992, as a condition of renewal, each active licensee shall demonstrate competence by viewing an approved real estate education video program and completing a supplementary workbook, or complete 12 hours of professional education approved by the division and commission within each two-year renewal period. The division with the concurrence of the commission shall certify education which may include, but shall not be limited to, state conventions, home study courses, video courses, and closed circuit television courses. The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years upon a finding of reasonable cause and under conditions established by rule.

(b) For a period of 30 days after the expiration date, a license may be reinstated upon payment of a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2 and upon providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

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~~(ix)~~ (S) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

~~(b)~~ (ii) "Security" does not include any:

~~(i)~~ (A) insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period;

~~(ii)~~ (B) interest in a limited liability company in which the limited liability company is formed as part of an estate plan where all of the members are related by blood or marriage, there are five or fewer members, or the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company ~~(- Evidence); or~~

~~(i)~~ (I) a whole long-term estate in real property;

~~(ii)~~ (II) an undivided fractionalized long-term estate in real property that consists of ten or fewer owners,

~~(iii)~~ (III) an undivided fractionalized long-term estate in real property that consists of more than ten owners if, when the real property estate is subject to a management agreement:

~~(A)~~ the management agreement permits a simple majority of owners of the real property estate to not renew or to terminate the management agreement at the earlier of the end of the management agreement's current term, or 180 days after the day on which the owners give notice of termination to the manager;

~~(B)~~ the management agreement prohibits, directly or indirectly, the lending of the proceeds earned from the real property estate or the use or pledge of its assets to any person or entity affiliated with or under common control of the manager; and

~~(C)~~ the management agreement complies with any other requirement imposed by rule by the Real Estate Commission under Section 61-2-26.

~~(iii)~~ For purposes of Subsection (1)(x)(ii)(B), evidence that members vote or have the right to vote or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company.

~~(25)~~ (y) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

~~(2)~~ (i) "Undivided fractionalized long-term estate" means an ownership interest in real property by two or more persons that is a:

~~(A)~~ tenancy in common; or

(B) any other legal form of undivided estate in real property including:

(I) a fee estate;

(II) a life estate, or

(III) other long-term estate.

(ii) "Undivided fractionalized long-term estate" does not include a joint tenancy.

~~[(26)-(a)]~~ (aa) (i) "Viatical settlement interest" means the entire interest or any fractional interest in any of the following that is the subject of a viatical settlement:

~~[(i)]~~ (A) a life insurance policy, or

~~[(ii)]~~ (B) the death benefit under a life insurance policy

~~[(b)]~~ (ii) "Viatical settlement interest" does not include the initial purchase from the viator by a provider of viatical settlements.

(bb) "Whole long-term estate" means a person or persons through joint tenancy owns real property through.

(i) a fee estate;

(ii) a life estate; or

(iii) other long-term estate.

~~[(27)]~~ (cc) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive of legal holidays listed in Section 63-13-2.

(2) A term not defined in ~~[Section 61-1-13]~~ this section shall have the meaning as established by division rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community

(3) (a) This Subsection (3) applies to:

(i) the offer or sale of a real property estate exempted from the definition of security under Subsection (1)(x)(ii)(C); or

(ii) the offer or sale of an undivided fractionalized long-term estate that is the offer of a security.

(b) A person who, directly or indirectly receives compensation in connection with the offer or sale as provided in this Subsection (3) of a real property estate is not an agent, broker-dealer, investment adviser, or investor adviser representative under this chapter if that person is licensed under Chapter 2, Division of Real Estate, as:

(i) a principal real estate broker;

(ii) an associate real estate broker; or

(iii) a real estate sales agent.

(4) The list of real property estates excluded from the definition of securities under Subsection (1)(x)(ii)(C) is not an exclusive list of real property estates or interests that are not a security.

**Section 2. Section 61-2-2 is amended to read:**

**61-2-2. Definitions.**

37

As used in this chapter

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under ~~the provisions of~~ this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than ~~his~~ the principal broker's main office

(3) "Commission" means the Real Estate Commission established under this chapter

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity

(8) "Director" means the director of the Division of Real Estate

(9) "Division" means the Division of Real Estate

(10) "Executive director" means the director of the Department of Commerce

(11) "Main office" means the address which a principal broker designates with the division as ~~his~~ the principal broker's primary brokerage office

(12) "Principal real estate broker" and "principal broker" means any person

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration, or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i),

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether ~~his~~ the person's compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise,

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise

holds himself out to be engaged in property management,

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c), and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration

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(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected, or

(iii) authorizing expenditures for repairs to the real estate

(b) "Property management" does not include

(i) hotel or motel management,

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals, or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate

(14) "Real estate" includes leaseholds and business opportunities involving real property

(15) "Real estate sales agent" and "sales agent" mean any person affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12)

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis

(17) "Reinstatement" means restoring a license that has expired or has been suspended

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license