

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 Appellee

Utah Court of Appeals

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#2

IN THE UTAH COURT OF APPEALS

IRA SACHS,

Plaintiff/Appellant.

vs.

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

Defendants/Appellees.

Case No. 20060257

ORAL ARGUMENT
REQUESTED

BRIEF OF APPELLEES JOSEPH S. LESSER AND
LOEB INVESTORS CO. XL

APPEAL FROM ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT; THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE TYRONE E. MEDLEY

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UTAH APPELLATE COURT

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JURISDICTION OF COURT OF APPEALS

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2001).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following rules and statutes are determinative or of central importance to this appeal:

1. Utah Real Estate Brokers Act, Utah Code Ann. § 61-2-1 *et seq.* (2005), a copy of which is attached hereto as Appendix A.
2. Utah Statute of Frauds, Utah Code Ann. § 25-5-4 (2004) , a copy of which is attached hereto as Appendix B.
3. Utah R. Civ. P. 56, a copy of which is attached hereto as Appendix C.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The claims of plaintiff, Ira Sachs ("Sachs"), are based entirely on an alleged oral finder's fee agreement for purportedly locating a purchaser for the United Park City Mines Company ("UPCM"), whose sole business was the leasing, development, and sale of its 8,300 acres of real property. Sachs tried to interject himself into the sale of UPCM, and now seeks in excess of two million dollars for making a few telephone calls in which he did nothing more than tell Gerald Jackson ("Jackson") (who helped form Capital

Growth Partners ("CGP"), which eventually purchased UPCM) something that Jackson, and everyone else who follows real estate in Park City, already knew.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT.

On March 31, 2005, defendants, Joseph S. Lesser ("Lesser") and Loeb Investors Co. XL ("Loeb"), filed a motion for summary judgment seeking to dismiss Sachs' claims on the grounds that: (1) no express or implied finder's fee agreement was ever made; (2) Sachs' claims were barred because he did not have a real estate license; (3) Sachs' claims were barred by the Statute of Frauds; and (4) Sachs failed to state a claim for intentional interference with prospective economic relations. On April 8, 2005, UPCM filed a motion for summary judgment on the same grounds.

Following oral argument on December 12, 2005, the district court issued a minute entry decision on February 6, 2006, granting defendants' motions for summary judgment in their entirety. In its minute entry ruling, the district court first held that the undisputed material facts demonstrated that no enforceable express or implied finder's fee agreement was ever entered into because: (1) no reasonable minds could differ that there was no meeting of the minds or mutual assent on the material terms of the alleged oral finder's fee agreement; (2) there was 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 (3) any finder's fee agreement was subject to further negotiation.

Second, the district court held that Sachs' claims are barred by the Utah real estate licensing statutes, Utah Code Ann. § 61-2-1 *et seq.* (2005) (the "Act"), as a matter of law because: (1) it is undisputed that Sachs did not have a real estate license; (2) UPCM's principal business was the leasing, development and sale of real property; (3) UPCM's only asset of significance was its real property; and (4) Utah law requires a real estate license to recover a finder's fee in connection with the sale of "real estate" which, by statutory definition, includes "business opportunities involving real estate."

Third, the district court ruled that Sachs' contract and quantum meruit claims are barred by the Utah Statute of Frauds as a matter of law because: (1) 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 UPCM; (2) it is undisputed that no writing exists that would satisfy the requirements of the Utah Statute of Frauds; and (3) quantum meruit and unjust enrichment claims cannot rescue claims otherwise precluded by the Utah Statute of Frauds.¹

On February 15, 2006, the district court entered a final judgment dismissing all of Sachs' claims with prejudice. The district court had previously granted CGP's motion for

¹ The district court also ruled that Sachs' claim for intentional interference with prospective and economic relations fails as a matter of law. However, Sachs does not appeal that ruling.

summary judgment and dismissed all of Sachs' claims against CGP with prejudice on September 13, 2005. Sachs filed his notice of appeal on March 16, 2006.

III. STATEMENT OF FACTS²

1. Sachs is a resident of Park City, Utah, and was a shareholder of UPCM at all relevant times. (R. at 2, 1114, 1141.)

2. Loeb is a New York partnership with its principal place of business in New York, New York. (R. at 2, 1114.) At all relevant times, Loeb owned a controlling interest in UPCM. (R. at 4, 1114.)

3. Lesser is the managing partner of Loeb. Lesser is the former chairman of UPCM's Board of Directors. (R. at 2, 1114.)

4. UPCM is a Delaware corporation whose "principal business . . . is the leasing, development and sale of real property located in or near Park City, Utah." (R. at 2-3, 1114-15.)

5. UPCM owns the surface estate to more than 8,300 acres of land, of which approximately 5,300 acres are leased to Deer Valley and the Park City Mountain Resort for skiing and related purposes. (R. at 3, 1115.) This real property is UPCM's "only asset of any significance whatsoever." (R. at 1210, 1257.)

² Many of Sachs' purported facts are not supported by his citations to the record, are not made on personal knowledge, are inadmissible, and contradict Sachs' own deposition testimony.

6. In or around 1999, UPCM attempted to develop a real estate project known as the Flagstaff Mountain Resort Project, which incorporated another real estate development project known as the Bonanza Mountain Resort Project (collectively the "Projects"). (R. at 3-4, 1115, 1210.)

7. In July 1999, UPCM entered into a letter of understanding with DMB Associates, Inc. ("DMB") to form a joint venture to develop the Projects. (R. at 4, 1210.)

8. The joint venture between UPCM and DMB was dissolved in December 2000 because, among other things, the parties could not agree on a business plan. (R. at 4, 1115, 1165-66, 1211.)

9. In late December 2000 or early January 2001, Hank Rothwell ("Rothwell"), UPCM's president, had discussions with Jackson, his friend and former business associate, about the possibility of purchasing UPCM themselves. (R. at 1211, 1258-59.)

10. Approximately two weeks after their initial discussions, Rothwell told Jackson he was not interested in purchasing UPCM but that Jackson should "go ahead [and] take a run at it." (R. at 1211, 1258-59.)

11. In early 2001, an article appeared in the Park Record newspaper that discussed the dissolution of the joint venture between UPCM and DMB. (R. at 5, 1211, 1255.)

12. Jackson testified that after publication of this article, it “was public information that [UPCM] was in play [and] publically [sic] for sale.” (R. at 1211, 1255.)

13. Sachs understood from reading the newspaper article that “it was apparent that someone would come in and pick up the ball” from DMB. (R. at 1211, 1267.)

14. Upon learning that the DMB joint venture had dissolved, Sachs contacted Rothwell because Sachs thought the Granite Land Company (“Granite”), which had an established business relationship with Sachs, would be a “natural partner” with UPCM in a joint venture to develop the Projects. (R. at 5, 1116, 1211.)

15. In March 2001, Sachs arranged a meeting between UPCM and Granite to discuss a potential joint venture. (R. at 1116, 1144, 1211.)

16. At the time he arranged the meeting, Sachs understood, based on his conversations with Rothwell, that UPCM was “interested in selling . . . all or part of [UPCM]” and that UPCM was “hopeful that Granite might purchase all or part of it.” (R. at 1212, 1264, 1266-67.)

17. Prior to the meeting, Sachs informed Granite’s principals that this was “an opportunity to buy into or all of [UPCM].” (R. at 1212, 1264.)

18. During the March meeting, UPCM, Granite and Sachs discussed both an “acquisition” and a “joint venture.” (R. at 1212, 1266.) Granite proposed a joint venture

whereby Granite would construct improvements to UPCM's real property without providing any up-front cash to UPCM for the joint venture. (R. at 1116.)

19. Sachs testified that during the meeting, a finder's fee was never discussed:

Q. Okay. But as I understand your testimony, you had no express communications with Mr. Rothwell about receiving a finder's fee during the meeting you had with Granite.

...

A. That's correct.

...

Q. All right, but my question to you is, there was no discussion of a finder's fee between you and Mr. Rothwell during the meeting with Granite.

A. It would have been inappropriate. Customs and procedures are that you don't involve the purchaser in a conversation like that.

(R. at 1116, 1145-46.)

20. In fact, Sachs admits he never had any direct discussions with Rothwell or anyone else at UPCM about his purported interest in getting paid a finder's fee by UPCM in connection with a possible transaction with Granite. (R. at 1213, 1270, 1280-81.)

21. Subsequently, Marne Obernauer ("Obernauer"), a business associate of Lesser, called Lesser, pursuant to Sachs' request, to arrange a lunch meeting between Sachs and Lesser in New York. (R. at 5, 1116, 1171-72, 1175-76, 2048.)

22. Lesser agreed to meet with Sachs in New York in early May 2001. (*Id.*)

23. During his call to Lesser, Obernauer mentioned something about Granite, but did not know any details about the company. (R. at 1117, 1176-77.)

24. Lesser requested that Obernauer provide information about Granite prior to his meeting with Sachs. (*Id.*)

25. Sachs arranged for a written brochure about Granite to be sent to Obernauer. The brochure reflected that Granite had experience in the construction of, among other things, airports and bridges. (R. at 1117, 1177, 1194.)

26. Obernauer sent Lesser the Granite brochure prior to Lesser's meeting with Sachs. (R. at 1117, 1177.)

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

28. Sachs testified that during the lunch, Sachs and Lesser "talked extensively about Granite" and a potential joint venture between Granite and UPCM. (R. at 1117, 1181, 1212, 1269.)

29. Sachs testified that he did not ask Lesser if UPCM "was in negotiations with anyone else," nor did he discuss with Lesser "any other potential buyer [or] joint venture partner by name." (R. at 1212, 1269.)

30. Instead, the sole purpose of the lunch meeting was to determine whether Granite would be a potential joint venturer with UPCM. (R. at 2042, 2098-99.)

31. Sachs admitted that he and Lesser did not discuss a finder's fee during the lunch:

Q. Okay. All right. What if anything, was said during the early May 2001 luncheon about a finder's fee?

A. Nothing.

Q. Nothing at all?

A. Nothing.

(R. at 28, 1117-18, 1153, 1213.)

32. According to Sachs' own testimony, the only "non-commonly known information" that Sachs learned during the lunch was that Loeb, the controlling shareholder of UPCM, was allegedly dissatisfied with Rothwell and purportedly felt that the "sooner they got [UPCM] sold, the better it was." Sachs did not view this information as "confidential" information. (R. at 1212-1213, 1273.)

33. On May 17, 2001, upon the advice of his attorney, Sachs sent a letter to Rothwell stating as follows:

I am delighted that my introducing United Park City Mines to Granite Land Company appears to be heading in the right direction and I am pleased that the confidentiality letter has been signed. I certainly will continue to do everything in my power to bring together a mutually satisfactory agreement between these two parties. I took the opportunity to express this commitment to your chairman, Joe Lessor [sic],

when he invited me to lunch at the Sky 8 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 [sic], 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 Granite Construction to do the development infrastructure. This JV partner comes with that compatibility. 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 overwhelming [sic] expressed their approval.

(R. at 1118, 1195, 1213.)

34. Sachs testified that he did not have anything specifically in mind with respect to the "consideration acceptable to both of us." Rather, he was trying "to draw [Rothwell] out to come up with something." (R. at 1975, 2054-55, 2127.)

35. Sachs never discussed the specific amount of a finder's fee with Lesser, Rothwell or anyone affiliated with UPCM. (R. at 6, 1213.)

36. Sachs claims that on May 18, 2001, after receiving Sachs' letter of May 17, 2001, Lesser called Sachs and stated that he was no longer interested in a joint venture and that he wanted UPCM sold. (R. at 1119, 1155-56.)

37. On May 18, 2001, Sachs wrote a letter to Rothwell stating:

I understand, after a conversation yesterday with Lessor [sic], 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 [sic], 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.

(R. at 1119, 1196.)

38. Rothwell never responded to Sachs' letters of May 17 and 18, 2001. (R. at 1214, 1277.)

39. The contemplated agreement with Granite referenced in Sachs' letters of May 17 and 18, 2001, never came to fruition because Granite never entered into a joint venture with or purchased UPCM. (R. at 1120, 1192, 1214, 1277.)

40. Sachs admits that neither Lesser nor anyone else affiliated with Loeb ever told Sachs that Sachs would be paid a finder's fee for finding a buyer.

Q. Did Mr. Lesser ever say to you, Ira, go find me a buyer and I'll pay you a fee?

A. No.

Q. Did anyone other than Mr. Lesser affiliated with Loeb Investors, as that phrase is used in Paragraph 15, ever say to you, Ira, go find a buyer for United Park City Mines and you'll get paid a fee?

A. You mean Loeb Investors or -

Q. Yes.

A. No.

(R. at 1119, 1157.)

41. On June 2, 2001, an article appeared in the Park Record entitled "Merger Rumblings Heard at UPCM." The article stated that UPCM "was exploring strategies to raise money in order to fund the construction of Flagstaff Mountain Research and

Bonanza Mountain Resort," including "a sale or exchange of UPCM's capital stock, assets, projects or business to one or more parties" (R. at 1214, 1267, 1285.)

42. Sachs first contacted Jackson regarding UPCM the same week the article appeared in the Park Record. (R. at 7, 1214, 1273.)

43. When Sachs contacted Jackson, Jackson already knew that UPCM was for sale through discussions he had had with Rothwell, his long-time friend, and through the newspaper articles in the Park Record. (R. at 1120, 1169, 1198, 1214.) Jackson testified as follows:

Q. During your first conversation with Mr. Sachs, I want you to tell me to the best of your recollection exactly what he told you and exactly what you told him.

...

THE WITNESS: I believe you're referring to the conversation that we think took place in May or June of 2001.

Mr. Sachs called me and recommended-I think he said, why don't you buy the mining company, or something like that.

And I said, I'm already looking at it.

And he said, do you need any money?

And I said no.

And he said, well, Granite guys would be very interested in doing the site work and putting some money into the transaction. Why don't you call them. And he gave me the phone number and I agreed to call him.

Q. Do you recall anything else about that first conversation with Mr. Sachs?

A. Yeah. I was very uncomfortable discussing the deal at all, but again, I didn't want to be rude, and I-that's -that was all I told him. It was probably said, as I said to everyone, it's a public company, I can't discuss it. That point was made very early to me and I took it to heart.

(R. at 1976, 2051, 2144.)

44. The only new information Sachs relayed to Jackson was that Sachs had had lunch with Lesser in early May 2001 and that the sooner UPCM was sold, the better.

(R. at 1214, 1215, 1256, 2052.)

45. On June 4, 2001, Sachs sent Jackson a facsimile coversheet regarding "JV Granite Const" requesting that Jackson call Sachs "after your talk with Hank Rothwell."

(R. at 1215, 1287.)

46. Sachs continued to contact Jackson regarding Jackson's contemplated purchase of UPCM. (R. at 9, 1120.)

47. Jackson merely gave Sachs the courtesy of returning his calls. Jackson testified that "Sachs called . . . so many times that it was a nuisance [but I] was not going to share any information with him." In fact, Jackson viewed Sachs as an outsider to the entire transaction. (R. at 2056-57, 2138-39.)

48. On February 21, 2002, CGP, a new company that Jackson helped form, formally offered to purchase UPCM for approximately \$81.3 million. (R. at 11, 1215.)

49. On February 23, 2002, the Salt Lake Tribune published an article regarding CGP's proposed purchase of UPCM. (R. at 1215, 1279, 1288.)

50. Sachs never attended any meetings between UPCM and Jackson, was never asked to sign a confidentiality agreement with UPCM and never participated in any negotiations with UPCM. In fact, Sachs learned of CGP's agreement to purchase UPCM like the rest of the world, through a newspaper article. (R. at 1977, 2021-22.)

51. The day after the article appeared in the Salt Lake Tribune, Sachs sent a fax to Rothwell regarding "completion of task." This was the first time Sachs notified UPCM that he considered Jackson to be his "client." (R. at 1215, 1279, 1289.)

52. According to Sachs, between June 2001 and February 2002, the "only" thing Sachs did to find a purchaser for UPCM "was make periodic telephone calls" to Jackson. (R. at 1215, 1279.)

53. On or about June 16, 2003, UPCM and CGP completed a revised merger whereby UPCM became a wholly owned subsidiary of CGP. CGP paid approximately \$67.2 million for UPCM's shares. (R. at 14, 1215.)

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

55. On August 19, 2003, Rothwell sent Sachs a facsimile stating that:

Ira-United Park does not agree with your agency argument.
Gerry [Jackson] and I had discussed UP for years! We
viewed you as a representative of Granite Construction only!

(R. at 1452, 2062.)³

56. According to Sachs, Sachs spent no more than ten hours total attempting to find a buyer for UPCM. (R. at 1121, 1159.)

57. Sachs did not forgo any business opportunities by allegedly attempting to locate a purchaser for UPCM. (R. at 1121, 1159.)

58. Sachs did not have a Utah real estate license at any relevant time. Sachs' real estate license in New York lapsed at least 15 to 20 years ago. (R. at 1121, 1162.)

³ Sachs' assertion that Rothwell failed to disclose under oath in the *Pennsylvania Avenue Partners v. United Park City Mines* case that he only knew Jackson socially is highly misleading. Rothwell actually testified as follows:

Q: Do you know [Jackson] in any other capacity other than a- do you know him in a capacity other than a *professional capacity* in relation to this Capital Growth?

A. We-I'm-I've known [Jackson] for a long time *socially*.
It's a small town. I see him at social functions.

(Emphasis added.)

Rothwell reasonably understood the question to be whether he knew Jackson other than professionally. As Rothwell pointed out in his deposition in this case, he was not asked if he had any prior business dealings with Jackson. (R. at 1981, 2013, 2014.)

59. Sachs has never received a finder's fee for the sale of a company. (R. at 1970, 2005-07, 2045.)

SUMMARY OF THE ARGUMENT

Sachs' claims are based entirely upon an alleged oral finder's fee agreement for supposedly locating a purchaser for UPCM. By his complaint, Sachs seeks a three percent (3%) commission of UPCM's \$67.2 million sale price. The Court should affirm the district court's order granting defendants' motions for summary judgment dismissing Sachs' claims with prejudice because the undisputed evidence shows that Sachs' claims fail as a matter of law.

First, Sachs was not licensed to sell real estate at any relevant time. The principal business of UPCM was the leasing, development, and sale of real property located in or near Park City, Utah, and said real property was UPCM's only asset of any significance. Utah's real estate licensing statutes specifically preclude the recovery of compensation for finding a buyer of a business whose assets consist of real estate. Utah Code Ann. § 61-2-2(14) ("real estate" includes business opportunities involving real estate").

Second, the alleged finder's fee agreement was not in writing. Therefore, Sachs' claims also are barred by the Utah Statute of Frauds. Utah Code Ann. § 25-5-4 ("every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" must be in writing). Sachs' attempt to circumvent the Statute of Frauds

by asserting claims for quantum meruit, unjust enrichment and partial performance are also unavailing. Utah courts have consistently held that a person seeking to recover a commission relating to the sale of real property may only recover by contract, not by quantum meruit or unjust enrichment. *Watson v. Odell*, 198 P. 772 (Utah 1921).

Likewise, Utah courts have long held that “partial performance” is inapplicable to such actions and will not save an agreement that otherwise fails under the Statute of Frauds. *Case v. Ralph*, 56 Utah 243, 188 P. 640 (1920).

Finally, the alleged oral finder’s fee agreement was never made. By Sachs’ own admission, defendants never promised to pay Sachs a finder’s fee for locating a purchaser for UPCM. The alleged oral finder’s fee agreement is not sufficiently definite or certain to demonstrate a meeting of the minds between Sachs and the defendants with respect to the material terms, including the amount of compensation. Moreover, at all relevant times, Sachs claimed to represent Granite, which never purchased UPCM. Sachs did not “find” a purchaser for UPCM. Jackson knew that UPCM was for sale well before Sachs approached him. In fact, when Sachs first approached Jackson, the sale of UPCM was a matter of public record. Sachs did not provide any information to Jackson regarding UPCM that he did not already know. Accordingly, Sachs provided no benefit to defendants and neither an express nor implied contract was made. In short, Sachs’ claims fail as a matter of law and the district court’s judgment must be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED SACHS' CLAIMS BECAUSE HE DID NOT HAVE A REAL ESTATE LICENSE.

In Utah, 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.” Utah Code Ann. § 61-2-1. Consequently, a person may not bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any services which are only authorized to be performed by a licensed principal real estate broker. Utah Code Ann. § 61-21-18(1).⁴

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 the negotiation of” the sale of “real estate.” *Id.* § 61-2-2(12)(d) (emphasis added); *see also Diversified General Corp. v. White Barn Golf Course, Inc.*, 584 P.2d 848, 852 (Utah 1978) (holding § 61-2-2 applies to finder’s agreements); *Andalex Resources v. Myers*,

⁴ The full text of Utah Code Ann. § 61-2-18(1) provides:

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

871 P.2d 1041, 1045 (Utah Ct. App. 1994) (“The act of finding or locating a prospective buyer falls within the reach of the broker licensing statutes.”). “**Real estate**” includes “leaseholds and **business opportunities involving real property.**” Utah Code Ann. § 61-2-2(14) (emphasis added). This expansive definition reflects the legislature’s intention that the real estate licensing provisions be given broad application. *Chade v. Morgan*,⁹ Utah 2d 125, 339 P.2d 1019, 1021 (1959) (“[T]he legislature saw fit to include within the definition of the term ‘real estate’ leaseholds and other interests less than leaseholds. This clearly indicates the intention of the legislature that a broad coverage be given to the term ‘real estate’ for the purposes of the Act.”).

Thus, the language of the Utah real estate licensing statutes provides that (1) if a party brings an action in a Utah court, (2) for compensation, (3) for acts resulting in the sale or exchange of real estate, (4) he or she must have the requisite broker license in order to recover the fee. *Anadalex*, 871 at 1045 (citing Utah Code Ann. §§ 61-2-4, 61-2-18 (1993)).

The majority rule in jurisdictions with similar real estate licensing statutes is that if a sale of an ongoing business contains any real estate component, no matter how *de minimus*, an unlicensed broker will be denied any commission. *See Blackthorne Group, Inc. v. Pines of Newmarket, Inc.*, 848 A.2d 725, 731 (N.H. 2004); *Chapin v. Neuhoff Broadcasting-Grand Island*, 684 N.W.2d 588, 593 (Neb. 2004); *GIDC Environmental*

Services, Inc. v. Ransbottom Landfill, 740 N.E.2d 1254, 1258 (Ind. Ct. App. 2000); *Leiff v. Medco Professional Services*, 973 P.2d 1276, 1278 (Co. Ct. App. 1998); *Lockridge v. Hale*, 764 S.W.2d 84 (Ky. Ct. App. 1989); *Ford v. American Medical Intern, Inc.*, 422 N.W.2d 67 (Neb. 1988); *Knight v. Johnson*, 741 S.W.2d 842 (Mo. Ct. App. 1987); *Berchenko v. Fulton Federal Savings & Loan Ass.*, 261 S.E.2d 643 (Ga. 1979); *Thomas v. Jarvis*, 518 P.2d 532 (Kan. 1974); *Brakhage v. Georgetown Associates, Inc.*, 523 P.2d 145, 147 (Colo. Ct. App. 1974); *Bonasera v. Roffe*, 442 P.2d 165 (Ariz. Ct. App. 1968); *Folsom v. Callen*, 131 N.E.2d 902 (Ind. Ct. App. 1953); *Doran v. Imeson Aviation, Inc.*, 419 F.Supp. 586 (D. Wyo. 1976).⁵

In *Blackthorne*, for example, the plaintiff attempted to recover a commission for the sale of an assisted living facility business with assets consisting of, among other things, real property. 848 A.2d at 727. The trial court dismissed the action for failure to

⁵ The minority rule is that an unlicensed plaintiff will not be precluded from potentially recovering a commission if the real estate component is “merely incidental” to the sale of the entire business, *i.e.*, real estate was not a significant asset of the company or a motivating factor for the sale. *GDC Environmental*, 740 N.E.2d at 1258 (adopting majority rule, but noting that a minority of “jurisdictions hold that an unlicensed broker is not precluded from recovering a commission if the real estate component is ‘merely incidental’ to the sale of the entire business”); *Thomas v. Daubs*, 684 N.E.2d 1011, 1015 (Ill. Ct. App. 1997) (adopting rule permitting “unlicensed broker to collect his fee only when the real estate is incidental to the transaction”); *March Group, Inc. v. Bellar*, 908 S.W.2d 956, 960 (Tenn. Ct. App. 1995) (“Where the sale of a business involves only a transfer of stock, the real estate owned by the corporation should be viewed as incidental to the sale unless it is the business’ principal asset.”).

state a claim because the plaintiff did not have a license to sell real estate. *Id.* at 728. On appeal, the plaintiff argued that he was entitled to a finder's fee because the company's real estate was only "incidental" to the sale of the business and because the defendant was a sophisticated business entity that the statute was not meant to protect. *Id.* at 730. In affirming the trial court's dismissal, the New Hampshire Supreme Court held that:

More importantly, the Act expressly defines "real estate" to include "business opportunities which involve any interest in real estate." [Citation omitted.] The use of the word "any" means that the Act applies regardless of whether real estate is "incidental" to the transaction. The Act thus applies to the brokering of business opportunities involving real estate, no matter how *de minimus* the real estate interest.

As the sale of the defendant's business undisputably involved real estate, the Act applied to the sale, even if, as the plaintiff contends, its dominant purpose was not the sale of real estate. Applying the Act to the sale of the business is consistent with the Act's purpose, which is to protect the "public" from unscrupulous real estate brokers. [citation omitted.] The plain language of the Act refutes the plaintiff's assertion that the Act was intended to protect only unsuspecting homebuyers, to the exclusion of sophisticated business entities. [Citation omitted.]

Similarly, in *Doran*, the plaintiff was employed to find a buyer for the defendant's business, with assets consisting of leases, buildings, fuel storage, and equipment. 419 F. Supp. at 587. Applying Wyoming law, the trial court found that because "the assets of [the business] which were to be sold included leases . . . , real estate was involved." *Id.* at 588. As a result, the plaintiff's "activities in producing a purchaser for [the business]

constitute[d] sufficient grounds for holding that he was acting as a real estate broker.” *Id.* at 587.

Finally, in *Leiff*, the plaintiff brought an action to recover a commission pursuant to a contract for the sale of a business. 973 P.2d at 1280. The business’ assets included a lease. *Id.* The trial court granted summary judgment holding that the real estate licensing laws required dismissal of the plaintiff’s claims. *Id.* On appeal, the plaintiff argued that the real estate licensing requirements did not apply because the lease was not transferred as part of the sale of the business. *Id.* Rather, the business’ entire stock was sold. *Id.* In rejecting the plaintiff’s argument, the Colorado Court of Appeals concluded as follows:

We conclude that there is no requirement that real estate or a leasehold be transferred from one legal entity to another to trigger the licensure requirements. Rather, where, as here, the corporation whose entire stock is sold holds a leasehold that becomes the buyer’s leasehold as a result of the sale, whether by transfer from the seller or otherwise, an indirect change in a leasehold interest, and therefore, the licensure requirements apply.

Id. at 1278.

Here, as in the cases cited above, it is undisputed that UPCM’s only asset of any significance is its real estate and that its principal business is the leasing, development, and sale of real property. Therefore, under the application of either the minority or majority rule, the sale of UPCM constituted a “business opportunity involving real estate” which required Sachs to have a real estate license under Utah law. Because it is

undisputed that Sachs did not have a license at any relevant time, his claims were properly dismissed.

Sachs argues that his claims are not barred by the Act because: (1) the Act is a penal statute and must be strictly construed; (2) the merger of UPCM was structured as a stock sale rather than an asset purchase; (3) Sachs' offer to accept a finder's fee in the form of prime developed lots did not require him to be licensed under the Act; (4) he is exempt from the Act; and (5) the purpose of the Act is not offended by enforcing the alleged finder's fee agreement. Each of these arguments is without merit.

A. The Utah Real Estate Brokers Act Is Not Penal and Should Be Broadly Construed.

Sachs' contention that the Act is penal and should be strictly construed is meritless. If the purpose of a statute is not to punish but to accomplish some other legitimate governmental purpose, the statute is considered non-penal. *Viking Pools, Inc. v. Maloney*, 770 P.2d 732, 735 (Cal. 1999).

Here, the purpose of the Act is to protect members of the public who rely on licensed real estate brokers and salesmen to perform tasks that require a high degree of honesty and integrity. *Global Recreation, Inc. v. Cedar Hills Development Co.*, 614 P.2d 155, 158 (Utah 1980); *Anderson v. Johnson*, 108 Utah 417, 160 P.2d 725 (1945). The licensing requirements and the provisions designed to enforce compliance therewith are designed to assure such honesty and integrity. *Id.* Because the purpose of the Act is to

accomplish a legitimate government purpose, rather than to punish, it is non-penal and not to be narrowly construed. Sachs is not being criminally prosecuted or fined for violating the Act. Therefore, his argument that the Act is penal misses the mark.

More importantly, the Utah Supreme Court has held that the Act's definition of "real estate" should be broadly, rather than strictly, construed. *Chade v. Morgan*, 9 Utah 2d 125, 339 P.2d 1019, 1021 (1959) ("[T]he legislature saw fit to include within the definition of the term 'real estate' leaseholds and other interests less than leaseholds. This clearly indicates the intention of the legislature that a broad coverage be given to the term 'real estate' for the purposes of this Act.").

In light of the legislature's intention that the definition of "real estate" be broadly construed, Sachs was required to have a license. The Act specifically precludes any person, without a valid real estate license, from recovering any compensation for facilitating real estate transactions or finding potential purchasers of real estate. Utah Code Ann. § 61-2-18. "'Real estate'" includes leaseholds and business opportunities involving real property." *Id.* § 61-2-2(14).

Sachs' reliance on *Anderson v. Johnson*, 18 Utah 417, 160 P.2d 725 (1945), is misplaced. As noted above, the Utah Supreme Court in *Chade v. Morgan*, held that the term "real estate" should be given broad rather than narrow construction. Moreover, at the time *Anderson* was decided, the Act's definition of "real estate" did not include "business opportunities involving real property." *Anderson*, 160 P.2d at 727. In fact, the Act's definition of "real estate" did not include a "business opportunity" until 1963, nearly twenty years after *Anderson* was decided. See, ApInt. Add. 7, at 13.

Although “business opportunities” is not specifically defined in the Act, its plain meaning clearly encompasses the sale of UPCM, whose only asset of any significance is real property. *See State v. Richardson*, 2006 UT App. 238, ¶ 12, 139 P.3d 278, 280 (When interpreting the plain language of a particular statute, “courts presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.”); *Alternative Options and Services for Children v. Chapman*, 2004 UT App. 488, ¶ 35, 106 P.3d 744, 752 (When interpreting statutory language, the court is to look at the ordinary meaning of the word, and if the ordinary meaning results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the statute, it is not the duty of the court to assess the wisdom of the statutory scheme.); *All Points Traders, Inc. v. Barrington Assocs.*, 259 Cal. Rptr. 780, 784 (Cal. Ct. App. 1989) (In accordance with principle of statutory interpretation that courts must give effect to the words of a statute according to their usual and ordinary meaning, “business opportunity” encompasses any transfer of ownership of an entire ongoing business in corporate form whether by transfer of all the stock or all the assets.)⁷ Here, the plain meaning of business opportunity includes the

⁷ Even under a strict statutory construction, Sachs is required to hold a real estate license. *Springer v. Rosauer*, 641 P.2d 1216, 1218 (Wash. Ct. App. 1982) (recognizing that even though penal statutes must be strictly construed, a “person authorized to find a buyer for all of the stock of a corporation for compensation has been held to be a real estate business opportunity broker within the meaning of th[e] statute”)

sale of UPCM, and such a meaning does not result in an application that is unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the Act.⁸

B. Sachs Was Required to Possess a Real Estate License Even Though the Transaction Was Structured as a Stock Purchase.

Sachs' contention that he was not required to hold a real estate broker's license because the transaction was effectuated as a merger/stock purchase, as opposed to an asset purchase, is untenable. Courts that have addressed this precise issue have rejected it, recognizing that the licensing statutes would be reduced to feckless formalities if they could be simply avoided by structuring the transaction as a stock purchase rather than an asset purchase.

In *All Points Traders, Inc. v. Barrington Assocs.*, for example, the plaintiff "suggest[ed] that when a business is transferred through the purchase and sale of stock, rather than a purchase of assets and goodwill, the business opportunity licensing requirements do not apply." 259 Cal. Rptr. 780, 784 (Cal. Ct. App. 1989). In rejecting this argument, the court held that "[t]his view exalts *form* over *substance* of the regulated transaction and ignores the purposes of the regulation." *Id.* (emphasis in original).

⁸ Sachs contends that had the legislature intended the Act to cover mere business brokers, it could have expressly provided so. This argument is also without merit. The Act provides for a number of exemptions to the licensing requirement, but there is no exemption for "business brokers." Utah Code Ann. § 61-2-3. When a statute specifically provides for exceptions, items not excluded are covered by the statute. *Chapin v. Neuhooff Broadcasting-Grand Island, Inc.*, 684 N.W.2d 588, 593 (Neb. 2004).

Similarly, in *Everett v. Goodloe*, 268 S.E.2d 284 (Ga. Ct. App. 2004), the plaintiff alleged that “she found a buyer for the Abaco Inn [a hotel owned by the defendant] and that Goodloe agreed to pay her a fee for her assistance.” *Id.* at 287. Because the buyer purchased “100 percent of the stock” of the company, and the “deed to the real property remained unchanged,” the plaintiff “argued that a real estate license [wa]s not required to collect a fee.” *Id.* at 288. The *Everett* court, however, recognized that:

[t]he sale of all of the stock of the corporation was in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction.

Id. at 289 (internal quotation marks omitted; alteration in original).⁹

For similar reasons, this Court must reject Sachs’ attempt to defeat the intent of the licensing statute by skirting its mandates. Simply because UPCM and CGP found it more expedient to structure the deal as a stock purchase, rather than some other form,

⁹ See also *Lieff v. Medco Professional Services, Corp.*, 973 P.2d 1276 (Colo. Ct. App. 1998) (“We conclude that there is no requirement that real estate or a leasehold be transferred from one legal entity to another to trigger the licensure requirements. Rather, where, as here, the corporation whose entire stock is sold holds a leasehold that becomes the buyer’s leasehold as a result of the sale, whether by transfer from the seller or otherwise, an indirect change in a leasehold interest, and therefore, the licensure requirements apply.”); *Brakhage v. Georgetown Associates, Inc.*, 523 P.2d 145 (Colo. Ct. App. 1974) (Plaintiff could not recover finder’s fee in connection with transaction involving shares of corporation which owned interest in real estate); *Shortt v. Knob City Investment Company, Inc.*, 292 S.E.2d 737 (N.C. Ct. App. 1982) (sale of 100 percent of stock constituted sale of corporation’s property).

cannot relieve Sachs of his burden of holding a real estate broker's license to recover a fee.

The cases cited by Sachs are inapposite. In *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990), for example, the court applied Pennsylvania law. Under the applicable Pennsylvania statute, "real estate" is defined as "[a]ny interest or estate in land, whether corporeal, incorporeal, freehold or nonfreehold, whether the land is situated in this Commonwealth or elsewhere including leasehold interests and time share and similarly designated interests." 63 Pa. Cons. Stat. § 455.201. The definition of "real estate" under the Pennsylvania statute, therefore, does not include the concept of a "business opportunity," and it is different in the most relevant aspect from the Utah statute.¹⁰

Further, a subsequent Third Circuit panel found the *Gruber* opinion to be largely erroneous and based upon faulty reasoning and interpretation of case law. *Cooney v. Ritter*, 939 F.2d 81, 86-88 (3d Cir. 1991). In *Cooney*, the Third Circuit ultimately rejected the holding in *Gruber* and determined that, under New Jersey law, real estate licensing provisions applied to the sale of corporate stock. *Id.* at 88. As such, the court

¹⁰ *Gruber* is distinguishable for the additional reason that the company, whose stock was purchased, had limited real estate assets. 899 F.2d at 1368.

determined that an unlicensed broker could only recover on the purchase price of corporate stock that was attributable to the personal property of the corporation. *Id.*

Sachs cannot draw support from *Silvertooth v. Kelley*, 91 P.2d 1112 (Or. 1939), for the same reason. The definition of “real estate” under the controlling Oregon statute does not include the term “business opportunity.” See Or. Rev. Stat. § 696.010 (2005).

Sachs’ attempt to distinguish the cases relied upon by the district court are equally unavailing. First, although *Blackthorne* does not refer to its decision as being part of the majority rule, it is undisputed that “the majority rule [is] that if a sale of a business involves any real estate component, no matter how *de minimus*, the unlicensed broker is denied recovery of any commission.” *GDC Environmental Services, Inc. v. Ransbottom Landfill*, 740 N.E.2d 1254, 1258 (Ind. Ct. App. 2000).

Second, the unlicensed real estate broker in *Blackthorne* did not agree to find a buyer and negotiate the “sale of the real property assets of the business,” as Sachs suggests. (Aplnt. Brief at 42.) Rather “the parties orally agreed that the defendant would retain the plaintiff to *locate a qualified buyer for the business* and assist in the due diligence, negotiation and closing process.” 848 A.2d at 727 (emphasis added). Thus, contrary to Sachs’ argument, the district court’s reliance on *Blackthorne* was entirely appropriate.

Third, the district court's reliance on *Andalex Resources v. Meyers*, 871 P.2d 1041 (Utah Ct. App. 1994), was correct because *Andalex* stands for the proposition that the Act bars both contract and quasi-contract claims for compensation brought by a "finder" who is unlicensed. 871 P.2d at 1045. Here, the district court dismissed Sachs' contract and quasi-contract claims for his failure to comply with the licensing requirements. The fact that *Andalex* involved the sale of leaseholds rather than the sale of stock is irrelevant.

C. The District Court Did Not Rule That Sachs' Offer to Accept His Finder's Fee in the Form of Two Prime Developed Lots Required Him to Be Licensed Under the Act.

Sachs next contends that the district court erroneously ruled that Sachs' offer to receive payment of his alleged finder's fee in the form of "a couple of prime developed lots in the new project," required him to be licensed under the Act. The district court made no such ruling.

Rather, the district court concluded that the sale of UPCM was a "business opportunity involving real property" requiring Sachs to have a real estate license. (R. at 2209-10.) In its minute entry, the district court simply pointed out that Sachs knew that the sale of UPCM was a "business opportunity involving real estate" as evidenced by, among other things, Sachs' offer to be paid in the form of developed lots owned by UPCM. Accordingly, Sachs' argument fails. (*Id.*)

D. Sachs Is Not Exempt From the Act.

Sachs' argument that there are "common law exceptions" to the licensing statute is simply unsustainable. The cases referenced by Sachs to support this contention discuss the licensing requirements of contractors. Neither *American Rural Cellular v. Systems Communication Corp.*, 390 P.2d 1035 (Utah Ct. App. 1995), nor *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990), addresses a real estate broker's licensing requirement. The common law exception discussed in those two cases is limited to the contractor's licensing statute and is entirely irrelevant to the present issues.

E. Requiring Sachs to Have a License Is Not Contrary to the Act's Purpose.

Sachs' argument that the Act was not intended to protect sophisticated parties such as Lesser, UPCM and Rothwell also fails. This argument was expressly rejected by the Utah Court of Appeals in *Andalex Resources, v. Myers*, 871 P.2d 1041 (Utah Ct. App. 1994).

In *Andalex*, the plaintiff asserted that because he did not deal with the general public, which the Act was meant to protect, but rather approached sophisticated contacts, his actions did not fall under the purpose of the licensing provisions and should not be governed by them. *Id.* at 1045.

In rejecting this argument, this Court held that:

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

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

For precisely the same reason, Sachs' contention that the licensing statute does not protect defendants must be rejected.

II. THE DISTRICT COURT PROPERLY DISMISSED SACHS' CLAIMS FOR FAILING TO COMPLY WITH THE UTAH STATUTE OF FRAUDS.

The Utah Statute of Frauds requires "every agreement authorizing or employing an agent or broker to purchase or sell **real estate** for compensation" to be in writing. Utah Code Ann. § 25-5-4(1)(c) (emphasis added). This provision applies with equal force to purported "finder's agreements." *Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co.*, 779 P.2d 230, 234 (Utah Ct. App. 1989) (The Statute of Frauds "applies broadly to agreements requiring compensation for brokering real estate, including finder's agreements, and not just to contracts employing brokers to purchase or sell real estate for compensation."); *C.J. Realty, Inc. v. Willey*, 758 P.2d 923 (Utah Ct. App. 1988) (The Statute of Frauds "applies to the commission agreements of real estate

brokers generally and not just to contracts employing brokers to “purchase or sell real estate for compensation.”). To comply with the Statute of Frauds, a finder’s fee agreement “must contain all the essential terms and provisions of the contract to which the parties have agreed.” *Machan*, 779 P.2d at 234. At a minimum, a finder’s fee agreement must contain “the critical terms of a finder’s fee agreement,” including the identity of the finder, the finder’s clients, the property owner who will owe a commission to the finder if a transaction is closed, and the commission rate. *See C.J. Realty*, 758 P.2d at 928. Further, the “writings must so clearly evidence the fact that a contract was made, and what its terms are, that there is no serious possibility that the assertion of the contract is false.” *Machan*, 779 P.2d at 235 (quoting 2A. Corbin, *Corbin on Contracts* § 512 at 547 (1950)).

Sachs’ alleged oral finder’s fee agreement fails to meet these requirements. As explained above, the term “real estate” includes, by statutory definition, “business opportunities involving real estate.” Utah Code Ann. § 61-2-2(14). Because the sale of UPCM (whose only significant asset was real estate) was a “business opportunity involving real estate,” any agreement to locate a buyer for UPCM had to be in writing. *Machan*, 779 P.2d at 234. It is undisputed that no writing satisfying the statute of frauds exists.

A. The Statute of Frauds Requires an Oral Contract to Find a Purchaser of a Corporation to Be in Writing Where the Corporation's Assets Consist Primarily of Real Property.

Sachs next contends that 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 and that had the legislature so intended, it could have easily and expressly so provided.

Sachs' argument ignores the law.

Statutes are considered to be *in pari materia* and must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. *J.J.W. v. State, Div. of Child and Family Services*, 2001 UT App. 271, ¶ 15, 33 P.3d 59, 63. When considering statutes related to the same subject matter, courts will attempt to construe them in harmony such that effect is given to every provision in all of them. *I.M.L. v. State*, 2002 UT App. 110, ¶ 19, 61 P.3d 1038, 1047. Moreover, "where two statutes treat the same subject matter, and one statute is general while the other is specific, the specific provision controls." *Floyd v. Western Surgical Assoc.*, 773 P.2d 401, 404 (Utah Ct. App. 1989).

Here, it is clear that the Act and the Utah Statute of Frauds relate to the same class of persons and things (*i.e.* broker's and the sale of real estate) and have the same purpose and object. Thus, the statutes should be construed together and the Act's more specific definition of "real estate" should control in this case.

B. The Alleged Agreement Was Not Removed From the Statute of Frauds by Part Performance.

Sachs' contention that he may recover under the doctrine of part performance is simply incorrect. In *Case v. Ralph*, 9 Utah 2d 125, 188 640 (1920), the Utah Supreme Court recognized that under the statute of frauds, "a real estate broker or agent cannot recover commission for services rendered in either selling or procuring a purchaser for real property unless . . . there is an express contract," and that "performance or part performance of a parol agreement is unavailing." *Id.* at 642; *accord Smith Realty Co. v. Dipietro*, 77 Utah 176, 292 P. 915, 917 (1930).

Additionally, even if the doctrine of part performance was available, Sachs has failed to establish the requisite elements with "strong" evidence. *Spears v. Warr*, 2002 UT 24, ¶ 24, 44 P.3d 742. To recover under the doctrine of part performance, Sachs must show,

[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. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate.

Id. Sachs has not established any of these elements. First, the terms of the alleged contract were anything but clear and definite. Sachs' letter of May 17, 2001, proposes

consideration of “cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us.” *See*, Statement of Facts (“SOF”) ¶ 34, *supra*. Sachs himself admitted that he did not have anything specific in mind with respect to the “consideration acceptable to both of us.” Rather, he was trying “to draw [Rothwell] out to come up with something.” *Id.* ¶ 35. Moreover, there was never any agreement as to the amount of any fee or any calculation to determine it. *Id.* ¶ 36.

Second, Sachs did not perform clear and definite acts pursuant to the alleged contract. Rather, Sachs made a few calls relating to Granite, whom Sachs purported to represent all along. Sachs never attended any meetings between UPCM and Jackson, was never asked to sign a confidentiality agreement with UPCM and never participated in any negotiations with UPCM. *Id.* ¶ 51. In fact, Sachs only learned of CGP’s agreement to purchase UPCM like the rest of the world, through a newspaper article. *Id.*

Third, Sachs’ efforts were not done in reliance on the alleged contract. As referenced above, all of Sachs’ efforts were in pursuit of a deal he was attempting to arrange for his client Granite. *Id.* Thus, Sachs’ claims were properly dismissed.

III. THE DISTRICT COURT PROPERLY DISMISSED SACHS' DECLARATORY RELIEF AND CONTRACT CLAIMS BECAUSE NO EXPRESS OR IMPLIED CONTRACT WAS MADE.

A. There Is no Express Contract.

Sachs admits that defendants did not assent either verbally or in writing to the finder's fee stated in Sachs' letter. Sachs nevertheless claims that his letter of May 17, 2001, provided a formula or method for fixing the price. In that regard, Sachs claims that he provided testimony that the "couple of prime developed lots in the new project" owned by UPCM referenced in his letter had a value of approximately two million dollars and that this amount represented about 3% of the purchase price of UPCM, which was an appropriate finder's fee based on his experience and the size of the deal. Sachs' argument is without merit for several reasons.

First, by Sachs' own admission, the only purchaser about which defendants and Sachs had any discussions was Granite. Sachs' letters only discussed Granite. SOF ¶¶ 34, 38. For example, the letter of May 17, 2001, states: "I certainly will continue to do everything in my power to bring together a mutually satisfactory agreement **between these two parties**" and that "I look forward to continuing our quest to link **these two parties** for everyone's benefit" *Id.* ¶ 34. (emphasis added). Sachs' letter of May 18, 2001, is to the same effect. This letter states: "I understand, after a conversation with Joe Lessor [sic], that his preference would be to sell the company rather than to

enter into a joint venture.” *Id.* ¶ 38. It then discusses a possible sale of UPCM to Granite: “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.” *Id.* The only tenable interpretation of these letters is that any purported express agreement about a finder’s fee was limited to a deal between UPCM and Granite.

Second, in responding to Sachs’ letters, Lesser purportedly stated “I don’t want a joint venture partner. I want this sold.” Lesser did not tell Sachs to go find another buyer or that Sachs would be paid a finder’s fee. *Id.* ¶ 37.

Third, Sachs’ testimony that a couple of prime developed lots were worth \$2 million and that this amount is approximately 3% of UPCM’s purchase price is nothing other than speculation and conjecture, which cannot defeat a motion for summary judgment. *Glover v. Boy Scouts of America*, 923 P.2d 1383, 1388 (Utah 1996). In that regard, Sachs’ testimony is based on information he learned after the purported finder’s fee agreement was made. At the time Sachs purported to enter into the alleged agreement, the development had not been completed and there was no established purchase price for UPCM. Indeed, CGP and UPCM originally agreed to a purchase price of approximately \$83 million, which was subsequently reduced to approximately \$67 million. SOF ¶¶ 49, 54.

Finally, Sachs' reliance on *Central Missouri Professional Services, Inc. v. Shoemaker*, 108 S.W.3d 6 (Mo. App. W.D. 2003), is misplaced. The facts in *Shoemaker* are not remotely similar to the undisputed facts in this case. In *Shoemaker*, the plaintiff instructed the defendant to proceed with the work, which it did. At issue was whether the defendant's "verbal acceptance" of a written proposal created an oral contract binding on the defendant. The defendant had accepted invoices from the plaintiff but later refused to pay them. The Missouri court concluded that there was a binding contract because "it is a well settled rule of law that a written offer may be orally accepted." *Id.* at 9.

In contrast, Sachs admits that defendants never responded to his letter of May 17, 2001. Moreover, it is undisputed that this letter refers only to Granite. Based on the foregoing, no reasonable jury could find that an express agreement was ever made.

B. There Is no Implied Contract.

To prove the existence of an implied-in-fact contract, Sachs must show: (1) the defendant requested the plaintiff to perform 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. *Promax Development Corp. v. Mattson*, 943 P.2d 247, 259 (Utah Ct. App. 1997) (citing *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987)). To establish an implied-in-law contract, also called a quasi-contract or unjust enrichment, Sachs is required to prove: (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. *Id.* “[T]he test” is whether “[u]nder all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid and that the defendant should have reasonably expected to pay for such services.” *McCollum v. Clothier*, 121 Utah 311, 241 P.2d 468, 470 (1952). Sachs cannot establish these elements.

First, Sachs did not confer any benefit on Defendants. At the time of his initial telephone conversation with Sachs, it is undisputed that Jackson already knew UPCM was for sale and was working on a purchase. *See*, SOF ¶ 44. It is also undisputed that Sachs did not tell Jackson anything about UPCM that he did not already know. Moreover, Sachs admits that he provided no other assistance to UPCM or Jackson. He did not attend meetings, participate in due diligence, or negotiate the terms and conditions of the purchase. *Id.* ¶ 51. Accordingly, Sachs did not find Jackson as a purchaser for UPCM and did not confer any benefit on Defendants.

Second, it is undisputed that defendants neither knew or should have known that Sachs expected to receive a fee as a consequence of Jackson’s or CGP’s purchase of UPCM. By Sachs’ own admission, the only purchaser about which defendants and Sachs had any discussions was Granite. Sachs’ letters only discussed Granite, and Sachs had no

further communications with defendants regarding a finder's fee between May 17, 2001, and the time of CCGP's purchase of UPCM. *Id.* ¶¶ 34, 37. Because Sachs never notified defendants he expected to be compensated in the event either Jackson or CCGP purchased UPCM, there is no basis upon which defendants could have had such an expectation. *See ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 259 (Utah Ct. App. 1997) (holding that where the plaintiff fails to inform the defendant of the essential facts, the defendant cannot have known the plaintiff expected to be compensated).¹¹

Sachs argues that an implied contract was made because he sent a letter to Rothwell on May 17, 2001, that referenced a finder's fee and that Rothwell and Lesser "never advised . . . Sachs that they would not pay him a finder's fee according to the terms proposed in his letter." However, Sachs' letters only discuss a possible deal between UPCM and Granite. The only tenable interpretation of the letters is that any purported express agreement about a finder's fee was limited to a deal between UPCM and Granite.¹²

¹¹ Sachs complains that had Jackson or the defendants told him he was not eligible for a finder's fee in the event a deal was consummated between them, he would have found another buyer or altered his actions. But the law does not impose a duty upon defendants to disabuse Sachs of his erroneous beliefs: "[T]he law should not require everyone to keep on guard against such possibilities by warning persons offering services that no pay is to be expected." *McCollum*, 241 P.2d at 470.

¹² The May letters were written by Sachs; therefore, responsibility for any misunderstanding between the parties with respect to the legal effect of those letters

(continued...)

This conclusion is supported by the cases Sachs cites. In *Moore v. Kuehn*, 602 S.W.2d 713 (Mo. App. 1980), the plaintiff contractor had submitted a written proposal to the defendant for various repair projects. *Id.* at 718. Instead of signing the proposal, as the plaintiff asked, the defendant requested time to study the proposal, though he told the plaintiff to begin the repair work. *Id.* Eventually, the plaintiff completed all of the proposed work without objection, but the defendant refused to pay the plaintiff, citing the lack of a contract. *Id.* The court, however, found that by knowingly permitting the plaintiff to perform the repair work, the defendant had accepted the written offer, and that the written proposal constituted the terms of the contract. *Id.* (“The terms of that writing therefore necessarily controlled the oral contract established at that point.”).

In sum, Sachs was, at most, an officious intermeddler in the transaction between CGP and UPCM. As such, it would be unjust to permit him to recover a multi-million dollar fee for alleged work that conferred no benefit on defendants and about which defendants were completely unaware. See *Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 323 (Okla. Ct. App. 1993) (Compensation under quasi-contract is not mandated

(...continued)

which Sachs argues accurately reflect the parties’ agreement - - lies with Sachs. *U.P.C., Inc. v. R.O.A. Gen., Inc.*, 909 P.2d 945, 954 (Utah Ct. App. 1999) (noting the general rule that unresolved ambiguities in a document will ultimately be construed against the drafter).

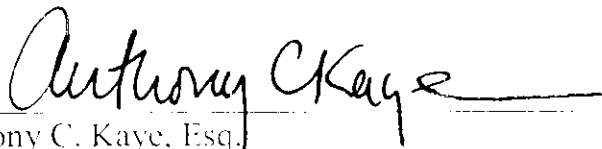
where services were rendered in the expectation of a hoped-for contract or simply to gain a business advantage).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order dismissing Sachs' claims with prejudice.

RESPECTFULLY SUBMITTED this 7th day of September 2006.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

A handwritten signature in black ink, reading "Anthony C. Kaye", with a long horizontal flourish extending to the right.

Anthony C. Kaye, Esq.

Jason D. Boren, Esq.

Attorneys for Defendants/Appellees,

Joseph S. Lesser and Loeb Investors Co. XL

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September 2006, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES JOSEPH S. LESSER AND LOEB INVESTORS CO. XI** to be mailed, via First-Class Mail, postage prepaid, to the following:

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Exhibit A

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(Utah Code, 2004 Edition - as of 2004 General Session)

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(Title 61. Securities Division - Real Estate Division)

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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" 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.

2003

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) Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;
- (c) Title 57, Chapter 19, Timeshare and Camp Resort Act;

- (d) Title 57, Chapter 23, Real Estate Cooperative Marketing Act;
- (e) Chapter 2a, Real Estate Education, Research, and Recovery Fund;
- (f) Chapter 2b, Real Estate Appraiser Licensing and Certification Act; and
- (g) Chapter 2c, Utah Residential Mortgage Practices 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 the office of director 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.

2000

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 - 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 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)(h).

(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.

2004

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 send the division a signed statement notifying the division 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 sent to the last address furnished to the division by the licensee.

2000

61-2-7.2 Reporting requirements.

Principal brokers, associate brokers, and sales agents shall send the division a signed statement notifying the division of the following within ten business days:

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

2000

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, send the division a signed statement notifying the division of the discharge. 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 sent 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.

2000

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.

(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)(c)(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) (i) A license expires if it is not renewed on or before its expiration date.

(ii) As as a condition of renewal, each active licensee shall demonstrate competence:

(A) by viewing an approved real estate education video program and completing a supplementary workbook; or

(B) by completing 12 hours of professional education approved by the division and commission within each two-year renewal period.

(iii) The division with the concurrence of the commission shall certify education which may include state conventions, home study courses, video courses, and closed circuit television courses.

(iv) The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years:

(A) upon a finding of reasonable cause, including military service; and

(B) under conditions established by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(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 12 hours of continuing education:

(A) in addition to the requirements for a timely renewal; and

(B) on a subject determined by the commission by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; 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) (a) As a condition for the activation of an inactive license that was in an inactive status at the time of the licensee's most recent renewal, the licensee shall supply the division with proof of:

(i) successful completion of the respective sales agent or broker licensing examination within six months prior to applying to activate the license; or

(ii) the successful completion of 12 hours of continuing education that the licensee would have been required to complete under Subsection (2)(a) if the license had been on active status at the time of the licensee's most recent renewal.

(b) The commission may, in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, establish by rule:

(i) the nature or type of continuing education required for reactivation of a license; and

(ii) how long prior to reactivation the continuing education must have been completed.

(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.

2004

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 preclicensing 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, or in exercising an option 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;

(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) An order, rule, or decision of the director and the commission shall take effect and become operative 30 days after the service thereof unless otherwise provided in the order.

(ii) If an appeal is taken by a licensee, the division may 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.

1999

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

61-2-17 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

61-2-20 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, Administrative Procedures Act.

(2) (a) After the hearing, if the commission and the director agree that the acts of the person violate this chapter, the 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 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.

1999

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

61-2-24 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 misuse 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

61-2-25 Sales agents - Affiliated with broker as independent contractors or employees - Presumption.

A sales agent may be affiliated with a licensed principal real estate broker either as an independent contractor or as an employee. The relationship between sales agent and broker is presumed to be 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.

2003

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Exhibit B

1953

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

(1) 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:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) 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;

(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2) (a) As used in Subsections (1)(f) and this Subsection (2):

(i) (A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "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) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) (i) Except as provided in Subsection (2)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) 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 (2)(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.

Exhibit C

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.