

1995

# Wayne Takashi Satsuda and Seon Sil Satsuda, his wife v. Hasin Oh and Hyung Ja Oh, his wife : Brief of Appellant

Utah Court of Appeals

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DOCUMENT

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

DOCKET NO. 950569 CA

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs, Appellants & Cross  
Appellees

V.

HASIN OH and HYUNG JA OH,  
his wife,

Defendants and Appellees,

HASIN OH and MYUNG JA OH,  
his wife,

Third Party Plaintiffs & Appellees,

V.

KEE HONG UM and SHI JA UM,  
his wife,

Third Party Defendants, Appellees  
& Cross Appellants

**BRIEF OF APPELLATE**

District Court No. 910901751

Court of Appeals No. 950569-CA

Priority Classification: Priority No. **15**

APPEAL FROM 3RD DISTRICT COURT  
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50 West Broadway, 4th Floor  
Salt Lake City, UT 84101-2006

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**BRIEF OF APPELLANTS**

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**BRIEF OF APPELLANT**

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PLAINTIFFS/APPELLANTS (hereinafter “appellants” or “Satsudas”) submits the following as his brief of Appellant herein:

**JURISDICTIONAL AUTHORITY**

Jurisdiction to hear the above entitled appeal is conferred upon the Court pursuant to Utah Code Annotated 78-2-3(J).

### **STATEMENT OF CASE**

This civil appeal brought by the Appellants, Satsudas, as buyers and the Appellees, Ohs, as sellers of a forty (40) unit motel, known as Capitol Motel and located at 1792 South State Street, Salt Lake City, Utah.

Satsudas filed their complaint on March 15, 1991 alleging three cause of actions: (1) Breach of the Express Warranties contained in the Earnest Money Agreement between Satsudas and Ohs, dated November 16, 1989; (2) Intentional misrepresentation and failure to disclose, a breach of implied covenant to deal in good faith; and (3) Fraud (R.O.A. 2-7). Addendum No. 1:

Ohs filed a Motion to Dismiss for failure to joint an indispensable party, i.e., Ohs' predecessor, Ums, third party defendants. (R.O.A. 22-26). The motion was denied on June 24, 1991.

Ohs filed a Third Party Complaint against Ums. The first three causes of action is similar to Satsudas' complaint. Ohs added a fourth claim of action for indemnification and contribution for any judgment against Ohs by Satsudas; fifth cause of action requests punitive damages and the sixth cause of action alleges unjust enrichment (R.O.A. 52-56). Addendum No. 2:

Ums filed a Motion to Quash Service of Process on September 25, 1991. After various pleadings between Ohs and Ums, the Motion to Quash was granted on January 4, 1993 without prejudice (R.O.A. 163-165).

Ohs appealed the Order quashing the service of process (R.O.A. 177-178) on February 2, 1993.

Ohs' Motion to Reconsider or In the Alternative, Motion for Leave to File Third Party Complaint reiterating Satsudas' claims, requesting indemnity and reimbursement for Ums should Satsudas prevail in their claim against Ohs and adding three independent causes of action.

After the trial, the Court dismissed the plaintiffs' claim and Third Party Complaint and awarded Ohs Attorney's fees of \$44,959.86 (Judgment entered May 5, 1995 and June 9, 1995). Addendum 7-8.

Also the Court awarded Ums attorney's fees against Plaintiffs in the amount of \$56,126.77. (Supplemental Judgment entered July 7, 1995). Addendum 18-19.

### STATEMENT OF ISSUES

1. Whether the abrogation clause (paragraph O of Earnest Money Agreement) reserving express warranties survives the merger doctrine set forth in *Secor v. Knight*, 716 P.2d 970 (Utah 1986) *Maynard v. Wharton*, 284 Utah Adv. Rep. 35, February 23, 1996.

Appellate standard for review of the Court's determination is one of "correctness". *Schafir v. Harrigan*, 849 P.2d 1384, (Ut. App. 1984) No particular defense is given to the Court ruling on questions of law. *Provo River Water Users v. Morgan*, 857 P.2d 927, 931 (Utah 1993), *Embassy Group, Inc. v. Hatch*, 865 P.2d 1366 (Utah App. 1993).

2. Whether the express warranties in the Earnest Money Agreement as to the plumbing, heating, air conditioning, ventilating, electrical systems, comes within the exception to the merger doctrine, as collateral rights which survive the merger doctrine.

Appellate standard for review is one of correctness. *Schafir v. Harrigan*, Supra, *Provo Water Users Association v. Morgan*, Supra.

3. Whether representations and understanding of the Satsudas and Ohs that a forty (40) unit rental operation was being sold and purchased, renders the Ohs legally responsible for the cost of restoration and loss of profits arising from the closure of the units to meet the parties' understanding.

Standard for review is the Court's Finding of Facts are reviewed under a clearly erroneous standard. *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1281 (Utah 1993). The Court's Finding of Facts would be clearly erroneous if they are lacking in support as to be against the clear weight of the evidence. *Doelle vs. Bradley*, 784 P.2d 1176, 1178 (Utah 1989).

4. Whether the Ohs breached their obligation to perform and contact in good faith when Ohs represented that the Capitol Motel had forty (40) rental units and had income arising from the rents of forty (40) units after being advised by his predecessor, Ums, that five to six of the rooms were added without a building permit.

Standard for review: Appellant must marshal evidence in support of the findings and then demonstrate that despite the evidence the Court finding one so lacking in support as to be against the clear weight of evidence. *West Valley City v. Majestic Inv. Co.*, 818, P.2d 1311, 1313 (Utah App. 1991).

5. Whether Satsudas met their burden of proof, i.e.; clear and convincing evidence that Ohs' actions constituted fraud when Ohs sold a forty (40) unit remodeled motel, knew that some of the rooms were built without complying with code requirements. Satsudas were induced the purchase by the income reportedly to be made from a forty (40) unit operation and the Satsudas relied on Ohs' representation and could not have discovered that the rooms were not in conformity by the visual inspection of the premises.

Standard for review: The standard for review is similar to issue 3 and 4.

6. Whether Ohs are entitled to attorneys fees against Satsudas under wording of the Earnest Money Agreement which, if abrogated and merged into the closing documents, would necessarily eliminate any contractual basis for awarding Ohs attorney's fees.

Standard for Review is one of correctness and no particular deference given to the Trial Court ruling in question of law. *Provo River Water User v. Morgan*, Supra.

7. Whether the Deed of Trust and Trust Deed Note between Ohs and Satsudas serve as a contractual basis for awarding Ohs' attorney's fees when Satsuda were not in default in their obligation under the Trust Deed or Trust Deed Note.

Standard for Review is the same as Issue No. 6.

8. Whether the Assignment of Contract between the Ohs, as assignors and Satsudas, as Assignees, serve as a contractual bases for awarding attorney's fees to Ohs

against the Satsudas where there is no act or omission with the Satsudas to trigger a breach or default by Satsuda in relation with the Satsudas' performance in the real estate contract.

Standard for Review is the same as Issue No. 6.

9. Whether the Assignment of Contract between the Ohs and Satsudas can be a contractual bases for awarding attorney's fees to Ums against Satsudas when there is not breach or default by Satsudas in their performance to pay Ums.

Standard for Review is the same as Issue No. 6.

10. Whether the Real Estate Contract between the Ohs and Ums is a contract basis for awarding attorney's fees to Ums against the Satsudas where the Paragraph 15 of the real estate contract reads

"Attorney's Fees: Both parties agree that, should either party default in any of the covenants or agreements herein contained, the non-defaulting party or, should litigation be commenced, the prevailing party in litigation shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the Property, or in pursuing any remedy provided hereunder or by applicable law" and where there is no action enforcing or terminating the real estate contract for or against the Satsudas.

Standard for Review is the same as No. 6.

11. Whether the reasonableness of Ohs claim for attorneys fees can be legally sustained where the Ohs verified application for attorney's fees fails to state that the fees billed for the total representation of the case, i.e., defense of Satsudas claim and prosecution of third party complaint are fees customarily charged in the locality for similar services.

Standard for Review is the same as No. 6.

12. Whether the reasonableness of the fee charged by Grant W. P. Morrison, defendant's predecessor attorney can be legally sustained without a verification by Grant W. P. Morrison and based solely upon Mr. Morrison's billing to the Ohs.



12. Whether the reasonableness of the fee charged by Grant W. P. Morrison, defendant's predecessor attorney can be legally sustained without a verification by Grant W. P. Morrison and based solely upon Mr. Morrison's billing to the Ohs.

Standard for Review as to the reasonableness of attorney's fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of clear abuse. *Dixie State Bank v. Bracken*, 764 P2d 985 (UT 1988). Although considerable deference is accorded the factual finding, conclusions of law arising from these findings are to be reviewed for correctness and are given no special deference on appeal, *Bingham v. Bingham*, 872 P2d 1065.

13. Whether the reasonableness of the total fee claimed by the Ohs can be sustained where verified application for attorney's fees includes attorneys fees for the defense of Satsudas' claims and the prosecution of Third Party Complaint without delineating or segregating which fees are applicable to the separate actions.

Standard for review is same as issue No. 1 and No. 12 .

14. Whether the liability of Satsudas for Ums' attorney's fees can be legally sustained under the "pass through theory" under *Collier v. Heinz*, 827 P2d 982 (UT. App. 1992) where there is no breach of contract or negligence asserted or claimed by the Satsudas, Ohs or Ums and where there are no facts to support the trial court's finding that the third party attorney's fees is a necessary step by the defendant to defend Satsudas' claims.

Standard for review is one for corrections, *Provo River Waters Ass'n v. Morgan*, *Supra*.

15. Whether the trial Court erred in granting a partial summary judgment against the plaintiffs' damage claim when the plaintiffs' damages included cost of restoration and loss of income, over and above the benefit of the bargain rule.

Standard for review is one of correctness as stated in paragraph 1 and 2 above.

## **DETERMINATIVE PROVISIONS, STATUTES AND RULES**

The appellate is not aware of any determinative provisions, statutes or ordinances, rules or regulations which would be determinative of the appeal. The appellants will rely principally upon case law and building ordinances which are set forth in the table of contents

## **STATEMENT OF FACTS**

The parties entered into a Statement of Stipulated Facts. (R.O.A V3, 1184-1194). Addendum, 3. The essential facts, set forth in the Statement of Stipulated Facts may be summarized.

## **UMS-OHS HISTORY**

Mr. Um, an experienced real estate and involved in buying and selling of real estate, purchased the Capitol Motel on September 1, 1982. He owned and operated the motel for five years during which time he made improvements to the structure, altered some of the motel to operate a grocery store, and notably, converted the grocery store into five additional rental units, giving the Capitol Motel a total of forty (40) rooms available for rent.

Mr. Um knew that no building permit had been obtained for the conversion of the grocery store into these five additional rooms nor did Um instruct his contractor to obtain a permit. (RDA V3, 1786).

Mr. Um states that the kitchenette units were installed by his predecessor, i.e.; prior to September 1982. (Tr. 267, L 13-14). He placed an add in the 1984 telephone directory advertising kitchenette units (Tr. 267, L 14-15). No such kitchenettes were listed in the 1983 telephone directory. (Stip. Exh. #11).

Also in 1984, Mr. Um advertised forty (40) remodeled units in the telephone directory. (Sti. Exh. #11).

Mr. Um applies for and renews the Salt Lake City license for 34 rooms. (Statement of Stipulated Facts V3, 1187, par. 18). He further advises Oh to do the same. (Tr. 159, L20) (Tr. 164, L23).

In the negotiations with Oh, Um reported to Oh that he had remodeled and reconstructed and fixed up the rooms and made repairs to the motel. (Statement of Stipulated Facts, V3, P 1188, para. 2) On two occasions Um told Oh that the 5-6 rooms were built without a building permit (Tr. 158, L 22-25) (Tr. 159, L1-4) (Statement of Stipulated Facts, V3 P. 1192, Para. 46), Addendum 3.

Subsequently, in 1986, Um passed a fire inspection after repairs were made to repair the roof. (Tr. 1266, L. 8-11). However, the records show that the building permit was issued in October, 1984 (Stip. Exh. 26) and had nothing to do with the five additional units. (Tr. 168, L7-10)

The routine inspection by the Health Department and Fire Department noted deficiencies relating to each of their respective spheres of interest during 1982-1987. (Stip. Trial Exh., 2-7) For the most part, 34 rooms were listed in the business license from 1982 to 1989 when Satsudas purchased the motel.

### **SATSUDA-OH TRANSACTION**

Satsuda purchased the motel from Ohs in November, 1989. The earnest money for \$620,000.00 was signed on November 16, 1989. (Stip. Trial Exh. 14). Mr. Satsuda had no prior experience in the purchase or operation of a motel. (Tr.-5, L4).

During the negotiations, Ohs verbally represented and Ohs business card reported that Capitol Motel was a 40 unit motel (R.O.A. V3, 1190). This representation was consistent with the 1989-1990 Salt Lake Telephone Directory listing forty (40) remodeled rooms in 1989-90, an increase from 34 rooms listed in the same directory in 1983. (Stip. Exh. 11) (Tr. 9, L 15-18)

Additionally, Oh gave Satsuda income figures for 1987 through 1989 showing rental income from 40 rooms. (Statement of income figures were made by Mr. Kim, a real

estate agent who worked in behalf of Mr. Oh. (Tr. 242, L 10) (Tr. 246, L16-17) Mr. Kim got the income figure from Mr. Oh. (Tr. 243, L 15-16)

Subsequent income figures were provided by the Ohs in the fourth meeting. (Tr. 16, L 10-17, Exh. 38)

Mr. Kim testified that a forty (40) unit rental motel was involved and that Oh stated that Oh did not tell Mr. Kim that any units cannot be rentable” (Tr. 245, L6-9) and so represented to Satsuda (Tr. 245, L 11-12). Mr. Kim prepared the Earnest Money Agreement (Tr. 245, L14-15). Mr. Kim was paid \$6,200.00 by Ohs. (Tr. 246, L19)

The income figures were produced by Ohs at the second meeting (Tr. 10, Exh. 37). Again, income from the 40 units operation (Statement of Stipulated Facts, V3, 1194, Para. 35).

Thereafter, Satsudas inspected four to five rooms (Exhibit 38) selected by the Ohs, situated in the outside perimeter of the horse shoe shape building (Tr. 13, L 7-14). Satsudas were denied inspection of some thirteen rooms in the building housing the office because they were occupied (Tr. 13, L 18-24). Satsudas also inspected the laundry room also in the main perimeter of the horse shoe shaped building. (Tr. 18, L 14)

After the inspection of five rooms and laundry room, Ohs stated that they should trust him and that the other rooms would be in good condition as the four to five rooms inspected. (Tr. 20, L1-4)

Mr. Oh never reported that seven rooms had kitchenettes installed without building permits and that units 35, 36, 37, 38 and 39 were constructed without building permits. (Tr. 20, L5-11).

Mr. Satsuda and Ms. Satsuda raised the subject matter of the parking lots in their discussion with the Ohs. Oh stated that there was no problems. (Tr. 176, L8-9)

The following documents were signed at the closing on January 5, 1990. (Stip. Exh. 8)

1. Warranty Deed.

6. Trust Deed Note

7. Other documents relating to personal property

Satsudas commenced operation of the motel on January 1, 1990. (Stip. Facts, V3, 1190, Para. 38). He operated the motel for five days prior to the closing date of January 5, 1990. (Tr. 25, L25)

On January 2, 1990, Satsudas went to the Salt Lake Business Licensing Officer to get a business license for Capitol Motel under his name. He did not take the old license with him. (Tr. 26, L24-19) The clerk accessed the computer and wrote the application. (Tr. 26, L17-21). He did examine the business license on January 1, 1990 but did not notice the number of rooms listed.. . (Stip. Fact, 1191, Para. 39)

Satsudas received a receipt from the Business License Department.

Lawrence Suggars, Building License Inspector, came to the motel on January 31, 1990. He examined the rooms and ultimately issued a Notice of Deficiency in conjunction with plumbing and electrical inspectors called in by Mr. Suggars. (Tr. 30, L3-25). The plumbing and electrical deficiencies were hidden and not readily observable by walking into the room. (Tr. 31, L21-25) (Tr. 32, L18-212) (Tr. 33, L1-21).

The Notice of Deficiency (Stip. Exh. 15) states:

Code Violation -Interior Inspection

UHC 1001 (e,f) Units 2-7 have been converted to units with cooking facilities without conforming to electrical and plumbing requirements and must be brought up to code, open electrical, improper vents, traps and waist lines.

UHC 1001 (e,f,b) Units 0 and 34-40 have been added to the complex without conforming with plumbing and electrical requirements, open electrical, improper vents, traps and waist lines.

Further, the Notice of Deficiency states that the additional units were added without complying with the 21.12.010 of City Code which requires that all zoning codes be met at the time of conversion ....required parking provided.

“Each building is also required under Section 104 of the building code to meet all building codes at the time of the addition or alteration.”

“Because of the deficiency, the building was determined to be substandard and declared a public nuisance...” Addendum 3.

Unit #35 was permanently closed to occupancy Addendum 23.

Satsudas also received the notice and order from the Salt Lake City Corporation, Department of Building and Health Services, issued on February 12, 1990 requiring Satsudas to correct the deficiency listed in the Notice of Deficiency (Stip. Facts, Exhibit 29). Addendum 22.

The notice and order required that work to correct the deficiency commence within five days from the date and the notice or secure the rooms by having all doors locked. (Stip. Facts, Exh. 29). Pursuant to that notice and order and conversation with Larry Suggars, Satsudas closed rooms 0-7 upstairs and rooms 35 to 39 downstairs. (Tr. 37, L10-11). Room 35 and room 37 remained occupied with Mr. Suggars’ permission due to the tenant’s infirmities. (Tr. 37, 15-18). Mr. Suggars denies he told Satsudas to close the rooms. (Tr. 131)

Satsudas began construction on repairs of rooms 1 through 6. The cost of the restoration to conform to code was \$13,621.00 (Tr. 39, L21-25) (Stip. Exh. 16). These rooms were available for rent in September of 1990.

The other rooms, 0, 7, 35, 36, 37, 38 and 39 presented a different problem. Capitol Motel was only zoned for 33 rooms; i.e., one parking stall for each room. The restoration of the additional rooms could not be accomplished unless Satsuda obtained a parking variance (Stip. Facts, V3, 1192, Para. 48, 49). The variance was approved in November, 1990 and Satsudas incurred \$2,500.00 in attorney’s fees. (Stip. Facts, V3, 1192, Para. 50-52)

Restoration of rooms 0, 7, 36 through 39 started in February 1991 and completed in March, 1991 (Stip. Fact, V3, 1192, Para. 50, 5). Room 35 was permanently closed.

(Tr. 46, L7). Satsudas paid \$23,666.00 for the restoration of these rooms to conform to code (Tr. 46, L23

### **ARGUMENT**

#### **THE TRIAL COURT ERRED IN RULING THAT THERE WAS A CONTRACTUAL BASIS FOR THE AWARD OF ATTORNEY'S FEES TO OHS.**

The award of attorney's fees was mentioned in the Finding of Facts and Conclusions of Law and judgment dated May 2, 1995 (R.O.A. 1653) Addendum 7 and 8 in favor of defendants, Ohs, against plaintiffs, Satsudas, for attorney's fees. The award fails to be supported by any findings of fact as to the basis of the award of attorney's fees to Ohs.

The first Amended Order of Dismissal of Complaint and Third Party Complaint and Judgment in favor of the defendants, Ohs, against the Plaintiffs, Satsudas, for attorney's fees in paragraph 3 is the first factual basis for attorney's fees. (R.O.A. 1715). Addendum 12 and 13.

### **JUDGMENT STATES:**

The trial court's "finding that the attorney's fees requested are reasonable and necessary and that an adequate basis in contract exists for such award." Emphasis mine. (R.O.A. 001717, paragraph 4). Addendum 12 and 13.

The trial court fails to disclose which contract upon which the award of Ohs' attorney's fees is based and fails to make any finding to the basis therefore which would be sufficient to reverse the trial court's award.

However, a detailed examination of each of the contracts between the Satsudas and Ohs is made to determine as a matter of law, the correctness of the trial court's ruling. *Dixie State Bank v. Bracken*, 764 P2d 985 (Utah 1988).

## GENERAL LEGAL AUTHORITY

Attorney's fees are awardable only if provided for by statute or contract and if, by contract, only as the contract allows by its terms, *Dixie State Bank v. Bracken*, 764 P2d 985, 988 (Ut. 1988), *Mountain States broadcasting Co. v. Neale*, 783 P2d 551 (Ut. App. 1989); *Collier v. Heinz*, 827 P2d 982 (Ut. App. 1992), and cases cited therein; *Grahn v. Gregory*, 800 P2d 320 (Ut. App. 1990).

"In Utah, attorney's fees authorized by contract are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract". *Turtle Management, Inc., v. Haggis Management, Inc.*, 645 P2d 667, 671 (Ut. 1982); *Mountain States Broadcasting Co., v. Neale*, 783 P2d 551, 555-56 (Ut. App. 1989), *Maynard v. Wharton*, 284 Utah Ad. Rep. 35, filed February 23, 1996. Emphasis mine.

Plaintiffs' cause of action was for breach of warranties in the Earnest Money Agreement (Exh. 14), intentional misrepresentation and failure to bargain with the plaintiffs in good faith. Addendum 1.

Only one cause of action relied upon a written agreement, i.e.; Earnest Money Agreement between the Satsudas and Ohs. First Amended Findings of Fact and Conclusions of Law, paragraph 19, (R.O.A. 001708). Addendum 7 and 8.

## EARNEST MONEY AGREEMENT

The trial court ruled that under the merger doctrine set forth more recently in *Schafir v. Harrigan*, 849 P2d 1384, (Ut. App. 1984), the Earnest Money Agreement was merged into the closing documents, i.e.; Special Warranty Deed, Deed of Trust, Promissory Note and that delivery of the Warranty Deed. extinguished all of the terms of the November 16, 1989 Earnest Money Agreement.

The trial court's ruling needs to be consistently applied and if so applied, the Plaintiffs' claim for attorney's fees, based upon the Earnest Money Agreement must also fail. *Bodenhauser v. Patterson*, 563 P2d 1212 (Oregon 1977) held that a successful suit



and that delivery of the Warranty Deed. extinguished all of the terms of the November 16, 1989 Earnest Money Agreement.

The trial court's ruling needs to be consistently applied and if so applied, the Plaintiffs' claim for attorney's fees, based upon the Earnest Money Agreement must also fail. *Bodenhauser v. Patterson*, 563 P2d 1212 (Oregon 1977) held that a successful suit for rescission of a contract ordinarily includes the rescission of the provisions for attorney's fees contained in the contract.

In a similar vein, the Oregon Court of Appeals held that where the defendant successfully defendant an action brought under an Earnest Money Agreement and for damages arising out of breach of representations in the Earnest Money Agreement by claiming that there was a novation when the land sales contract was completed, the defendant was not entitled to attorney's fees under the Earnest Money Agreement which was no longer in existence and was not enforceable. *Witt v. Keller Roeheich*, 800 P2d 781 (Oregon App. 1990).

Whether it's a novation under Oregon Law, a merger under Utah law, the net effect is the same, i.e., the Earnest Money is no longer in existence and neither party can rely on its provisions for all award for attorney's fees.

Moreover, the language of the Earnest Money Agreement principally deals with the default of the Buyer and Seller's remedies and default of the Seller and Seller's remedies. (Para. H, Earnest Money Agreement, Stipulated Exh. 15). Addendum 21

*Maynard v. Wharton, Supra* is dispositive as to any award of attorney's fees to the Seller under an Earnest Money Agreement.

The Buyer brought suit under the Earnest Money Agreement alleging breach of contract, negligent representation and fraud arising from their purchase of real estate from the Sellers.

The Utah Court of Appeals applied the merger doctrine and affirmed the trial court in its findings that no fraud was proven.

More importantly, the Utah Court of Appeals reversed the trial court's award of attorney's fees to the sellers.

"Parties seeking an award of attorney's fees under contract must establish that the contract's term anticipated such an award". *Maynard v. Wharton, Supra*, p. 37. Emphasis mine.

The only basis for attorney's fees upon which the sellers rely is Paragraph "H" of the Earnest Money Agreement. *Maynard v. Wharton, supra*, p. 38. Similarly, in the instant case, paragraph H is the sole basis for Ohs attorney's fees. Paragraph H in both cases are identical.

The Wharton Court stated that paragraph H "requires those seeking an award of attorney's fees to show that the other party defaulted at least one of the covenants or agreements of the Earnest Money Agreement", at page 38.

The Court further states that "sellers did not point to any express warranties, covenants, or agreement on which the buyers defaulted; therefore, the sellers cannot invoke paragraph "h" as a basis for an award of attorney's fees", page 38.

"Paragraph H has its limits; it does not award attorney's fees to prevailing parties in every lawsuit related to Earnest Money Agreement. In short, paragraph "H" does not contemplate an award of attorney's fees for sellers just because the buyer sued". See *Carr v. Enoch Smith Co.*, 781 P2d 2392, 1296 (Utah App. 1995) holding buyers election of remedies under the Earnest Money Agreement was not a default that entitled sellers to attorney's fees", at p. 38.

*Carr v. Enoch Smith Company*, 781 P2d 1292 (Utah App. 1989). The Utah Court of Appeals reversed the trial court's award of attorney's fees for the defendant because the defendant took a defensive position in the suit involving specific performance under an Earnest Money Agreement, i.e.; the plaintiff failed to tender his own performance, therefore there was no contract. "There was no enforcing any rights under the Agreement

(Earnest Money Agreement) or arising from the breach thereof’ as required by the specific terms of the Earnest Money Agreement. (emphasis mine)

It was never alleged or sought to be proved that Satsudas, in any way, defaulted in any of the terms of the Earnest Money Agreement.

**THE TRIAL COURT ERRED IN AWARDING ATTORNEY’S FEES TO THE OHS WHEN THE OHS FAILED TO ALLOCATE THE ATTORNEY’S FEES INCURRED FOR DEFENDING SATSUDAS’, ASSUMING THERE IS A CONTRACTUAL BASIS FOR SUCH AN AWARD.**

The records reflect that Ohs’ attorney divided their time in two activities: (1) The defense of Satsudas’ claim and (2) prosecution of their claim against the Ums.

The trial court expressed its concerns stating “I am somewhat concerned, given the identity...essential identity of their case between the defendants and third party defendants as that there not be a duplication in claimed fees to be paid here.” (R.O.A.; Transcript of Judge’s Ruling. (R.O.A. 2229, p. 8) Addendum 5.

In *Cottonwood Mall Company vs. Sine*, 830 P2d 2d 266 (Utah 1992), Utah Supreme Court, speaking through Justice Howe, reversed and remanded the trial court’s order on attorney’s fees where the proponent failed to distinguish between the work done that was subject to a fee award and work that was not, p. 269, stating:

“One who seeks an award of attorney’s fees must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney’s fees (2) unsuccessful claims for which there would have been an entitlement to attorney’s fees had the claim been successful and (3) claims for which there is no entitlement to attorney’s fees”. Citation omitted, page 271.

In *Schafir v. Hannigan*, Supra, the Utah Court of Appeals affirmed the trial court’s denial of seller’s attorney’s fees because the seller’s motion for attorneys fees stemmed

from the Earnest Money Agreement and “any fees or costs uniquely applicable to the (contractual) warranties are insignificant”, page 1393.

In *Selvage v. J. J. Johnson*, *Infra*, p. 15, the Court of Appeals states that it may be proper to deny a request for attorney’s fees if the requesting party fails to allocate in accordance with the directive of *Cottonwood Mall*, such a decision is within the trial court’s discretion, rather than being a strict legal mandate.

Nevertheless, the appellant urges this Court to deny the attorney’s fees for Ohs on the directive announced in the *Cottonwood Mall* case.

**THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT FINDING TO SUPPORT AWARD OF ATTORNEY’S FEES AND THE FINDING MADE BY THE TRIAL COURT WAS NOT SUPPORTED BY THE EVIDENCE.**

Ohs and Ums’ attorneys’ fees were presumably based upon contract. There is no specificity as to which contract or contract provision, and findings does not reflect any facts relied upon by the trial court. (R.O.A. V4, 1715-1718)

“The Trial Court must consider certain factors and make findings of fact supports its conclusions. Utah Appellate Courts have consistently encouraged the Trial Court to make findings and explain the factors which they considered relevant in arriving at an attorney’s fee award. *Selvage v. J. J. Johnson & Associates*, 282 Utah Adv. Rep. 16 (Utah App. Jan. 1996), citation omitted. *Cottonwood Mall Co, Supra*.

There are no facts to support the conclusion, Paragraph 12, First Amendment Findings of Fact (R.O.A. 001713), which reads:

“Third party defendants fees is a necessary step taken by the defendants to defend the complaint and the dismissal of third party plaintiff is a result of the dismissal of the complaint.”

Consequently, the trial court finds and concludes that third party attorney’s fees are to be passed through to as awarded directly against the plaintiff.”

The record reflects the following:

1. Third party complaint was the sole decision of defendants.
2. Ums are not a necessary party or an indispensable party under Rule 19. (R.O.A. VI, P100046), Order denying Defendant's Motion to Dismiss.
3. Satsudas had a telephone conversation with Um who corroborated the conversation, prior to the commencement of the action wherein Ums reported to Satsudas that he (Um) disclosed to Ohs that the five additional rooms had been built without a building permit (R.O.A., V3, P001192).

This was consistent with Mr. Um's testimony at trial. (R.O.A. Tr. 162). Based upon that representation from Um, Satsuda concluded that Ums should not be named as a co-defendant but a witness in behalf of the Satsudas, contrary to the trial court's remark that a "better posture of the case may well have been to name the third party defendants as defendants in that this issue (attorney's fees) was not as confused as it is." (R.O.A., Judge's Ruling, 002231, Tr. 8). Addendum 5.

4. Satsudas cannot be held responsible for independent action of the Ohs to file a third party complaint since the conflict between Satsudas and Ohs could well have been resolved without Ums as a party, but as a witness.

5. It is contradictory in terms to have the trial court deny the Rule 19 motion and find that the third party attorney's fees is a necessary step taken by the defendant to defend the complaint.

5. There is no findings of negligence or breach of contract by the Satsudas.

### **REAL ESTATE CONTRACT**

The real estate contract between the Ohs and Ums, dated May 1, 1989, contains the following pertinent language regarding attorney's fees. It reads: (Stip. Exh. 1)

"15. Attorney's Fees: Both parties agree that, should either party default in any of the covenants or agreements herein contained, the non-defaulting party, or should litigation be commenced, the prevailing party in litigation, shall be entitled to all costs and expenses,

including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the Property, or in pursuing any remedy provided hereunder or by applicable law.

Paragraph 16, Buyer default would not be applicable since at no time was alleged or proven that Satsudas or Ums were in default of the payments. In fact, Satsudas was required and did make the Ums payments directly to Ums under the Assignment of Contract, dated January 5, 1990, between Satsudas as assignees and Ohs as assignors. (Stip. Exh., L8)

It is clear that Satsudas were not a party to the Real Estate Contract between the Ohs and Ums; thus it is equally clear that the entitlement of Ohs' attorney's fees against the Satsuda cannot arise from the explicit terms of the real estate contract, except as may be construed through the Assignment of the Real Estate contract between Satsudas and Ohs. (Stip. Fact, #81.) The pertinent language of the assignment reads:

"2. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.

b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

The trial court did not enter any findings that Satsudas, as assignees, failed to keep, observe and perform the terms, conditions and provisions of agreement (real estate contract). Parenthesis mine. Nor do the facts establish any act or omission by Assignees (Satsudas) which would trigger the hold harmless clause of the assignment. Nor did either Ohs or Ums point to any defaults of the assignment as basis for attorney's fees for their attorneys. Ohs present the "pass through" theory to inflict Ums' attorney's fees upon

Satsudas. Ums present a violation of the assignment as a contractual basis, stating that Satsudas' act of filing the proceeding comes within the wording of the assignment.

The procedural aspects needs to be addressed at this point to emphasize that Ohs made the decision to file a third party complaint against the Ums.

Ums were not a necessary or indispensable party under Rule 19, URCP and the trial court so ruled in response to Ohs' Motion to Dismiss for failure to join Ums, as necessary or indispensable party. (R.O.A. V1, page 045, 046.)

Oh filed the third party complaint against the Ums alleging substantially the same cause of action alleged by Satsudas and addressing claims for identification and unjust enrichment. (R.O.A., V1, page 056)

Ohs third party complaint alleged only the Earnest Money Agreement between him and Ums as a contract claim in his third party complaint. This was acknowledged by the Ums in their trial brief.

"It should be noted that there is no allegation of negligence in any of the causes raised, by only contract and intentional torts, and only the earnest money or an unstated contract obligation is relied upon, and nowhere is the subsequent uniform real estate contract either relied upon or was acknowledged." (Third Party Defendant's trial brief, R.O.A. V3, P. 1315-1319).

Although, not expressly acknowledged, Ohs' trial brief made reference to the Earnest Money Agreement between Satsudas and Ohs as the only contract claim. (R.O.A. V1, 1195-1255). It is noteworthy to state that the abrogation clause of the Earnest Money Agreement is identical to *Maynard v. Wharton*, Supra, and contains an "as is" clause.

The merger doctrine effectively eliminates the Earnest Money Agreement and, with it, any basis for a contractual award of attorney's fees. *Maynard v. Wharton*, Supra.

The balance of Satsudas' claims sound in tort, i.e., good faith dealing and misrepresentation, upon which no contractual basis for attorney's fees exists.

The award of attorney's fees must first be analyzed as between Ohs and Ums before the hold harmless clause may be deemed a contractual basis for an award of attorney's fees.

Satsudas, were never in default on the Real Estate Contract, nor was there any finding made to indicate Satsudas' non-performance. In fact, Satsudas had completely performed their obligations under the Real Estate Contract as requested in the Assignment of Contract..

Thus, given the rule that attorney's fees would only be awarded strictly in accordance with contract, there exists no legal basis for an award of attorney's fees to either Ohs or Ums.

**THE TRIAL COURT ERRED IN GRANTING THE ATTORNEY'S FEES TO OHS AND UMS UNDER THE REAL ESTATE CONTRACT ASSUMING THAT THE REAL ESTATE WAS THE CONTRACTUAL BASIS.**

The reasoning used in *Maynard v. Wharton* , *Supra*, is equally applicable as entitlement of attorney's fees under the Real Estate Contract, i.e., attorney's fees should only be recoverable by the prevailing parties, which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the property or in pursuing any remedy provided hereunder or by applicable law.

Ums do not purport that their attorney's fees come within the language of the Real Estate Contract nor do they state that any of the attorney's fees were employed in accordance with Paragraph 15 of the Real Estate Contract.

*BLT Investment Company v. Snow*, 586 P2d 456 (Utah 1978) illustrates Utah's strict adherence contract basis for attorney's fees and awards of attorney's fees strictly in accordance therewith.

*BLT Investment Company* case involved an action for rescission. BLT was granted a rescission and attorney's fees by the trial court.



Utah Supreme Court affirmed the rescission but reversed the trial court's award of attorney's fees stating "Rescission extinguishes the contract" so effectually" that it "never had any existence". P. 458. Court cites *Bodenhauser v. Patterson*, 278 Or. 366, 563 P2d 1212 (1977).

*Bliss v. Anderson*, 585 P2d 29 (1987) another Oregon case, Court of Appeals ruled that a suit to recover arrearages arising from fraudulent or negligent misrepresentation made in the negotiations of the sale of a restaurant was a "suit in tort rather than a suit "to enforce the provisions of the contract".

*Stubbs v. Hemment*, 567 P2d 168 (Ut. 1977) again illustrates the strict adherence to contractual terms existing between the parties before awarding attorney's fees and the disallowance of attorney's fees not within the terms of the contract.

In the *Stubbs* case, plaintiff brought an action for foreclosure. The defendant counterclaimed for wrongful removal of property from the building. The Supreme Court affirmed the attorney's fees for foreclosure action and the trial court's reduction of attorney's fees by eliminating the fees on the "negotiation and defense of the counterclaim". P. 171

*Dick v. American National Mortgage*, 510 P2d 1096 (Ut. 1973). The Utah Supreme Court affirmed a summary judgment in favor of the vendors against the vendee's claim of settlement of interest on vendee's payment to vendor's predecessor in interest.

More germane to the instant case is the fact that the Dick Court denied the vendor's request for attorney's fees where the vendor had not breached the uniform real estate contract. (Italics mine).

If attorney's fees are recoverable by contract, "{a) party is entitled to only those fees attributable to the successful vindication of the contractual rights within the terms of the agreement". *Troyer v. Cushing*, 688 P2d 856, 858, (Utah 1984) cited in *Stacy Properties v. Wixen*, 766 P2d 1060 (Utah. App. 1988).

**THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO UMS AGAINST THE SATSUDAS IN THAT THERE WAS NO CONTRACTUAL BASIS FOR THE SAME AND A PASS THROUGH THEORY IS NOT APPLICABLE WHERE THERE IS NO BREACH OF CONTRACT OR NEGLIGENCE ON THE PART OF THE SATSUDAS.**

The trial court's ruling as to the award of attorney's fees for the Ums is confusing.

The trial court's verbal announcement as to attorney's fees states that "reasonable attorney's fees are awarded to the defendants and third party defendants, the amount of which is to be determined by submission of affidavits. (R.O.A., Judge's ruling, Tr. 7, L23; 8, L1-2). Addendum 5.

In response to plaintiffs' counsel, the court states:

"The Court: It's pursuant to the contract, at least at this stage. I am not committed in concrete Mr. Mitsunaga, to making the award. My notion is that if there is a legitimate basis, I presumed that there was because all of you requested them during the trial, if there is a legitimate basis for the award of attorney's fees, then I will make a determination as to reasonableness thereof and to whom they're to be awarded. However, if there is a contest as to the appropriateness of any award, then that may be addressed in the 4-501 application.

Mr. Mitsunaga: Okay, so that the Court is saying there's still an issue as to the entitlement and then after entitlement, the amount.

The Court: I'm saying that while I am ruling that fees are awardable to the defendants and the third party defendants, that's based simply upon the fact that everybody in this case sought them during the course of the trial and I therefore assumed that there was a provision providing for the same. If there's a dispute to that, then that can be addressed in the application under 4-501 for a determination of reasonableness.

Mr. Mitsunaga: Okay. That deals with the threshold issue of entitlement.

The Court: I'm not precluding you from claiming that they're not entitled. That's my point.

Mr. Mitsunaga: Okay.

The Court: All right. If there's nothing further, counsel, we'll be in recess."

Thus the Trial Court makes some vague reference as to the basis for awarding attorney's fees, i.e., "I assume that there was a provision providing for the same".

One thing is clear. The issue of entitlement was reserved at that point.

The minute entry, dated April 18, 1995 states that the Court is unable to rule on the reasonableness of the claimed fees of the third party defendants as no detailed analysis for "pass through" purpose is on file. (R.O.A. 1626-1627) Addendum 6

The Findings of Fact reflects the trial court's language which states that the "third party defendant's entitlement to attorney's fees and liability therefore, if awarded, are reserved for further proceeding." (R.O.A. 001644, p. 10) Addendum 7-8.

The Order denies the third party's application for attorney's fees without prejudice. (R.O.A. 001657) Addendum 7-8.

Satsudas filed an objection on May 1, 1995 stating that the Findings of Fact failed to state which particular contract upon which the attorney's fees award are based. (R.O.A. 001636) and that the Trial Court's prior minute entry on April 18, 1995, was tantamount to a denial of the third party's attorney's fees as against Satsudas.

The trial court's minute entry on May 9, 1995 states that court is persuaded that the third party defendants are entitled to be paid by the plaintiff. (R.O.A. 0001669) Addendum 11.

The Amended Findings of Fact and Conclusions of Law was signed by the trial court on June 9, 1995 and the Conclusions of Law awarded the third party defendants attorney's fees. : "At this time subject to further proceedings concerning the amount to be awarded". (R.O.A. 001704) Addendum 12.

The Order concludes that the third party defendants case was and “is a necessary step taken by the defendants to defend the complaint”...Third party defendant’s attorney’s fees are to be passed through to and awarded directly against the plaintiff”. (R.O.A. 001713, P. 20. (Italics mine)

The third party defendants filed a reply to plaintiff’s Objection to the Amended Findings of Fact and Conclusions of Law on June 8, 1995 (R.O.A. 001693), primarily admitting that “they can find no provision in contract (real estate contract or other agreements between the parties which allows recovery of their fees against the plaintiff unless and until they are first determined to be a cost or claim properly assessed against the defendants”. (R.O.A. 1695) (Emphasis mine) Addendum 13.

Thus, the Ums needed “at least a finding that they attorney’s fees were necessarily and reasonably incurred to defend against Ohs’ action against them”. (R.O.A. 001695)

Presumably, the Ums rely upon paragraph 3b of the Assignment of Contract.

Thereafter a Supplemental Findings of Fact and Order of Dismissal was entered on July 6, 1995 (R.O.A. 2795-99), reciting that the basis of the attorney’s fees arises from Paragraph 3b of the Assignment of the Real Estate Contract and that the third party costs and attorney’s fees are necessary and reasonably incurred to defend against the defendants third party action and were “costs, claims and demands upon defendants, arising by reason of an act or omission of the plaintiff, to-wit: initiating the instant action and requirement of a commencement of a third party action. (R.O.A. 001795) The defendants, however, rely in the application for the “pass through” theory on Ums’ attorney’s fees. They do not claim they are responsible for Ums’ attorney’s fees arising from the Real Estate Contract..

The trial court again changed the basis for the award of attorney’s fees from the “pass through” which is not contractual, but is awardable arising from a breach of a contractual obligation when attorney’s fees were reasonably foreseeable and consequential damages. *Collier v. Heinz*, 827 P2d 982 (Ut. App. 1992) or awardable under the third

party tort rule, *South Sanpitch Co. v. Pack*, 765 P2d 1279 (Ut. App. 1980) to a contractual basis, i.e., paragraph 3b of the Assignment of Real Estate Contract.

In view of the wording of the trial court in the Supplemental Findings, the Appellants do not address the “pass through” theory of attorney’s fees, except to reiterate that the same would not be applicable for reasons set forth in *Collier and South Sanpitch Co.* and *Broadwater v. Old Republic Sur.* 854 P2d 523 (Ut. 1993). *South Sanpete Co.*, also contains the following admonition:

“Of course, care must be taken in cases like this to insure not only that the attorney’s fees are otherwise properly calculated, e.g., *Dixie State Bank v. Bracken*, 764 P2d 985 (Utah 1988), but also that an allocation is made between recoverable fees incurred in litigation with third parties and non-recoverable fees incurred in pursuing the negligent defendant or expended in a cause of action not proximately necessitated by that defendant’s negligence”., Page 283.

Whereas the pass through theory of attorney’s fees on the third party action may (without conceding) permit Ohs’ attorney’s fees; it is too far reaching to state the “pass through” theory would subject Satsudas to Ums’ attorney’s fees.

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY’S FEES BASED UPON PARAGRAPH 3B OF THE ASSIGNMENT OF THE REAL ESTATE CONTRACT.**

The defendants, in its third party complaint, never requested third party attorney’s fees as an element of costs. Moreover, the defendants, in filing their affidavit for attorney’s fees does not list on “costs” which include third party defendant’s attorney’s fees. The thrust of their basis for attorney’s fees comes from *Collier v. Heinz*, (R.O.A. 1484).

Under the Real Estate Contract, paragraph 15, the Ohs would be obligated to Ums attorney’s fees under the prevailing party concept. Paragraph 15 must be read in its entirety and if so read would require the following:

- a. Default by either party in any of the covenants and agreements herein contained.
- b. Litigation be commenced (regarding default by either party).
- c. Prevailing parties in litigation shall be entitled to reasonable attorneys fees
- d. which may arise or be incurred
- e. from enforcing or terminating the contract or
- f. in obtaining possession of the party.
- g. or in pursuing any remedy provided hereunder.

Neither the Ohs nor the Ums make the claim that their attorney's fees fall within paragraph 15 or submitted any facts that their attorney's fees were incurred pursuing any remedy provided in the Real Estate Contract.

"In order to recover all of his requested attorney's fees, Selvage must demonstrate that there is either a contractual or statutory authorization for such an award". *Selvage v. J. J. Johnson & Associates*, 282 Utah Adv. Rep. 16, filed January 19, 1996).

However, as stated, a careful reading of the paragraph 15 in its entire context would not include any litigation arising between the parties (Ohs and Ums) but must be limited to litigation arising from the four corners of the Real Estate Contract.

It is unlikely that a Court would award either party, prevailing party attorney's fees in a personal injury action between them. Yet, the defendants would have the Court so hold. Defendants reply to the Memorandum in Support of Verified Application of Attorney's fees. (R.O.A. 1583, 1591)

Third party defendants agree in principle with the appellant's position. Third party defendant reply to Plaintiff's Objections. (R.O.A. 1695, p. 3).

**THE ASSIGNMENT OF CONTRACT, PARAGRAPH B3 DOES NOT PROVIDE A LEGAL BASIS FOR AWARD OF UMS' ATTORNEY'S FEES.**

Paragraph 3a requires that Satsudas, as assignees, keep, observe and perform all of the terms, conditions and provisions of the Agreement (Real Estate Contract) that are to be kept, observed and performed by the Assignors.

Paragraph 3b must be read in conjunction with the duties assumed by Satsudas in paragraph 3a and in doing so, it is apparent that any acts or omissions by the Satsudas must fall within the acts or omission or the duties he is bound to perform; thus triggering the hold harmless portion of paragraph 3b. Any other construction of paragraph 3b would lead to disastrous and even ridiculous scenarios, never contemplated by the parties or the Court. *Maynard v. Wharton, Supra; Carr v. Enoch Smith Co., Supra.*

**THE TRIAL COURT'S CONCLUSION THAT THE OHS' ATTORNEY'S FEES IS REASONABLE IS NOT SUPPORTED BY FINDINGS NECESSARY TO ARRIVE AT LEGAL CONCLUSION. THUS, THE TRIAL COURT ABUSED ITS DISCRETION.**

Generally, the trial court's award of attorney's fees will be affirmed absent an abuse of discretion. *Dixie State Bank v. Bracken, Supra.* Further, the reasonableness of the amount of attorney's fees is within the sound discretion of the trial court. *Jenkins v. Bailey*, 676 P2d 391 (Utah 1984).

The trial court award must be based upon and supported by the evidence in the record. These factors include the difficulty of the issues involved, reasonableness of time spent, fees charged in the locality for similar services, and the necessity of bringing an action to vindicate rights. *Baldwin v. Burton*, 850 P2d 1188 (Utah 1993).

*Saunders v. Sharp*, 818 P2d 574 (Ut. App. 1991) and case cited therein, stands for the proposition that "attorney's fees should be awarded on the basis of evidence and findings of fact should be made which support the award." *Cabrerra v. Cottrell*, 694 P2d 622 (Utah 1985). This court has reversed attorney's fees awards when the trial court failed to make appropriate findings and conclusions of law. See e.g. *Matter of Estate of Grimm*, 784 P2d 1238-1249, (Utah App. 1989). ("The absence in record before us of findings and conclusion as the issue of attorney's fees compels remand to the trial court to correct that deficiency in the record). Cert denied, 795 P2d 1138 (Utah 1990)."

In the instant case, there are no facts recited to support the reasonableness of the Ohs' attorney's fees.

Moreover, as stated earlier, the failure of the Ohs to allocate their attorney's fees between the defense of Satsudas' claim and prosecution of Ohs' claim against Satsudas as the failure of the trial court to require the allocation is fatal to Ohs' claim for attorney's fees.

This issue is also germane to Ums' attorney's fees' claim for attorney's fees.

**THE TRIAL COURT ERRED IN THE APPLICATION OF THE  
MERGER DOCTRINE WHERE THE EARNEST MONEY AGREEMENT  
PROVIDES FOR EXISTENCE OF COLLATERAL RIGHTS.**

Satsudas and Ohs entered into an Earnest Money Agreement dated November 16, 1989. (Stip. Trial Exh. 14) Addendum 21.

The terms of the Earnest Money Agreement are not similar to *Maynard v. Wharton's* Earnest Money Agreement.

The appellants contends that there are two provisions in the instant Earnest Money Agreement that survive the merger doctrine; each of the provisions providing for collateral rights which survive the execution and delivery of the deed by the Seller.

The first is the express warranty clause, found in paragraph C (a) stating that Sellers has received no claims or notice of any building or zoning violations concerning the property which has not or will not be remedied prior to closing and C (c) the plumbing, heating, air conditioning and ventilation systems, electrical systems and appliances shall be in sound and satisfactory working order.

Paragraph O, Abrogation: Except for express warranties under this Agreement, execution and delivery of the final closing documents shall abrogate this Agreement. (Italics mine)

The instant abrogation clause differs from the abrogation clause found in *Schafir v. Harrigan*, 849 P2d 1384, (Ut. App. 1994) and *Secor v. Knight*, 716 P2d 790, 792 (Ut. 1986) in that the abrogation in Schafir case stated: "Execution of the final Real Estate



Contract, if any, shall abrogate this Agreement.” P, 1392. There was no express reservation as to express warranties.

The Earnest Money Agreement between the Ohs and Ums, dated February 28, 1987, contains the same language found in the Schafir and Secor cases.

At trial, through stipulated facts, the following was established:

1. Larry Suggars, Salt Lake City Building Inspector, discovered and found the deficiencies which he set forth in the Notice of Deficiencies dated June 31, 1990, post marked February 12, 1990.

2. The Notice of Deficiencies noted were the building, electrical and plumbing. (Stip.Trial Exh. 15.) Addendum 23.

More particularly, Units 1 through 7 were converted into cooking facilities without conforming to electrical and plumbing requirements and must be brought up to code.

Units 0 and 34 through 40 were added without conforming with plumbing and electrical requirement.

Other listed deficiencies relating to Unit 0 through 7 and 34 through 40 stated improper ventilation, smoke detector lacking, electrical hazards and weakening wall. Also, Room 35 was permanently closed because there was no approved window or exterior door for emergency escape or rescue.

Appellants contend the trial court completely ignored the express warranties in reaching its decision on the merger doctrine. This is an error at law.

Not only does the express warranties claim survive the merger doctrine, but also paragraph e of the Earnest Money Agreement states:

- (e) Buyer Inspection. buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present condition, except: buyer will inspect more units before acceptance and it should be all operational condition.

*Stubbs v. Hemmert*, 567 P2d 168 (Utah 1977), held that clause that Seller remove from the building “All equipment and shelving, except the “two walk in coolers with their equipment” survived the merger doctrine.

The Stubbs’ Court, after set forth the doctrine of merger, states:

{2.3} However, if the original contract calls for performance by the seller of some act, collateral to conveyance of title, his obligations with respect thereto survive the deed and are not extinguished by it. Whether the terms of the contract are collateral, or are part of the obligation to convey and therefore unenforceable after delivery of the deed, depends to a great extent on the intent of the parties with respect thereto. When seller’s performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary. (Italics mine)

The intent of the Satsudas was that the motel would be a turn-key operation. (R.O.A. Tr. 23) and there is no question that Ohs were selling and Satsudas were purchasing forty (40) rentable units.

The Earnest Money Agreement was prepared by Mr. Kim who assisted Ohs in the sale of the motel. (R.O.A. Tr. 225)

Ohs permitted Satsudas to commence operating the motel five days before the closing. (Stip. Fact, V3, p. 01190) . Regardless of whether Ohs were aware of the deficiencies, the deficiencies were in fact recorded and constituted a violation of the express warranties.

*Ales v. Merrit v. Ales*, 486 N. W. 2d 592 (Iowa, App. 1992), states: “Seller warrants that the heating and air conditioning systems, plumbing and electrical systems, all appliances, and all other mechanical equipment included as part of the purchase price, will be in working order as of the date of possession, with the following exceptions:

McNamura wrote in “No exceptions”, Page 593..

(7) We next address the question of whether the plumbing system, which did not meet code standards, could be considered to be in working order. We conclude the plumbing system was not in working order. The Scott County Health Department required the system to be reconstructed to provide proper sewage treatment and disposal. The system which was in place did not properly treat or dispose of sewage and thus could not be said to be in working order”.

*Fleiser v. Lettison*, 557 N.E. 2d 383 (Ill. 1 Dist. 1990)

“In an action for fraud, one of the issue deal with whether the electrical system was in ‘good working order.’ The Illinois court stated where the vendors (home sale) agreed that the mechanical, electrical, plumbing, heating, cooling system and appliances were in good working order and would be maintained in that condition to the date of possession, ‘good working order’ did not mean only that the specific system were in good working order to the last of vendor’s knowledge”.

The appellant Court disagreed with the trial court’s ruling that an electrical system in a house is in ‘good working order’ mainly if all the lights worked. Rather, to be in good working order, we believe that it is necessary that there be no major defects in or problems with the underlying wiring in that system”. (emphasis ours) P. 390.

Defendants take great pains to establish that Oh was not made aware of any code violations, apparently to dispel the notion that Ohs may have breached paragraph c of the Earnest Money Agreement.

However, as noted above, the Express Warranties , Paragraph C(c) states the plumbing, heating, air conditioning and ventilation system, electrical system and appliances be in sound and satisfactory working condition at closing. Ohs’ awareness is not relevant to violation of express warranties.

The subject rooms lacked “sound and working conditions”, especially regarding plumbing and electrical system. Room 35 lacked any legal ventilation.

Should the Court rule the Express Warranties survive the merger doctrine and that there is a breach of the Express Warranties, the appellants would be entitled to reasonable attorney's fees on the Earnest Money Agreement, to include attorney's fees at trial and on appeal. *Rosenlof v. Sullivan*, 676 P2d 372 (UT. 1983).

**THE TRIAL COURT ERRED IN NOT AWARDING SATSUDAS COSTS OF CORRECTING THE ELECTRICAL AND PLUMBING DEFICIENCIES.**

The evidence is undisputed that Satsudas, upon receiving the Notice of Deficiency, took measures to correct the same.

Satsudas, at a minimum incurred out of repairs for rooms 1 through 6 in the amount of \$13,621.00. Further, Satsudas incurred costs of \$23,660.00 for restoration of Rooms 0, 7, 35 to 39 which was completed in March of 1991.

In this connection and as a corollary to the Satsudas claim for damages, the appellants states that the trial court's Order granting Ohs' partial summary judgment was in error as a matter of law.

Essentially, Satsudas claimed two measures of damages. One, loss of the benefit of the bargain rule and two, out of pocket expenses incurred in correcting the deficiencies. (R.O.A. V1, 00002, Plaintiff's complaint, Paragraphs 22 and 23) Addendum 1.

The trial court ordered a partial summary of judgment on the issue of damages (R.O.A. V1, P. 905-907). The Order, reduced in substance, relies on the fact that Satsudas sold the motel in January, 1994 for \$860,000.00, a sum that is \$260,000.00 greater than the purchase price from Ohs. (Stip. Fact, V3, 1184,1193) thereby limiting plaintiff's damage to \$1.00 if they prevail..

There was a dispute as to the measure of damages in the sense that Ohs claim that Satsudas sold the motel four years after they purchased it at a higher price establishes that the value of the motel at the time of the breach (January, 1990) as being in excess of the

purchase price paid by the Satsudas (\$620,000.00); therefore, the contractual damages of benefit of the bargain does not apply.

No affidavits were submitted by Ohs to support this assertion and since no affidavit was submitted, the Satsudas did not submit counter-affidavits.

One stipulated fact is clear. Satsudas did expend at least \$37,281.00 to cure the deficiencies arising from the Ohs' violation of the express warranties contained in Paragraph (c) of the Earnest Money Agreement.

The trial court's reliance on *Soffe v. Ridd*, 659 P2d 1082 (UT 1983) case is misplaced. This case dealt with the vendor attempting to retain the amounts paid (\$20,725.00) under a real estate contract.

In a forfeiture proceeding, the Seller incurred loss of fair rental value as "well as costs of cleaning, repairs, labor, fire insurance, title insurance and sewer fee", P. 1083.

The trial court offset the actual damage (\$5,895.50) against the buyer payment (\$20,725.00) and awarded the buyer a judgment for \$14,829.50 and accrued interest on buyer's counterclaim. The trial court did not allow the sellers benefit of the bargain damages because the seller failed to produce evidence that the property had diminished in value and to the contrary, there is evidence that the property had increased in value above the initial contract price. The general rule in Real Estate Contract is that fair market value should be determined at the time of the breach, *Bellon v. Melnor*, infra, P. 1094.

Thus, whereas the sellers were not awarded any damages under the benefit of the bargain rule, they were nevertheless awarded some damage. The case would stand for the proposition that a loss of benefit of bargain damages does not preclude the award of the proven damages, such as costs of cleaning, repairs, labors, etc..

Similarly, *Bellon v. Melmar*, 808 P2d 1089 (Utah 1991) does not exclude other damages when the benefit of the bargain rule is ruled out because of the appreciation of subject property. The Bellon Court affirmed the award of \$1,774.52 delinquent taxes and other damages totaling \$50,132.03 while denying the sellers any damage for benefit and

the bargain because the subject property increased in value. Again, the loss of benefit of bargain rule does not preclude the other damages other than nominal damages.

*Harris v. Shell Development*, 594 P2d 731 (Nev. 1979), the Nevada Supreme Court ruled that where the market value of the land at the time of the purchaser's breach was higher than the purchase price, the vendor is only entitled to nominal damages plus proved consequential damages which includes recovery of out of pocket expenses, including an approval and other miscellaneous items foreseeable at inception of the contract. The Court affirmed the award of \$4,369.34, plus \$535.00 attorney's fees in consequential damages.

This Court should rule that the trial court's ruling is incorrect and afford no deference to the trial court's legal conclusions.

**THE COURT ERRED NOT FINDING FRAUD ON THE PART OF  
THE OHS IN THE NEGOTIATIONS AND COMPLETION OF THE SALE  
OF THE CAPITOL MOTEL.**

The standard for review is that clearly erroneous standard, *Alta Indust. LTD v. Hurst*, 846 P2d 1281 (Utah 1993).

The Court's findings of fact would be clearly erroneous if they are lacking in support as to be against the clear weight of the evidence. *Doelle v. Bradley*, 784 P2d 1176 (Utah 1989).

Appellant must marshall evidence in the support of the findings and the demonstration that despite the evidence, the Court's finding is lacking in support as to be against the clear weight of the evidence. *West Valley City v. Majestic Inv. Co.*, 818 P2d 1311, 1313 (Utah App. 1991).

Stipulated Facts, R.O.A. V3, 1184-1194 needs to be examined Addendum 3.

Reference with to be made to the Stipulated Facts (Stip. Facts) and Findings of Facts. (F o F).

Mr. Um purchased the Capitol Motel in 1982. (F o F V3, V4, 1644-1654).

Mr. Um made various repairs to the motel in 1983 to bring it up to code suitable for occupancy. In doing so, he got and passed inspection, largely performed by the Salt Lake City Health Department . (Stip. Exh. 2).

Other inspections by the Fire Department also were approved. (Stip. Exh. 2).

In 1984, the addition of six additional units were completed without a building permit from Salt Lake City and giving the motel a forty (40) unit rental capacity. (Stip. Facts, V3, 1186, paragraph 12, 13.)

Mr. Um knew that the additional rooms were built without a building permit; he did not instruct his contractor to obtain a permit. (Stip. Facts, V3 1186, para. 14).

The motel passed the health and building fire inspection until February, 1990. when Larry Suggars inspected the motel and filed the Notice of Deficiencies. (Stip. Exh. #15).

Ums represented to Ohs that it was a 40 unit motel. (Stip. Facts, V3 1190).

Mr. Um advised Oh on a couple of occasions that Ums had “added” five or six rooms to the motel without a building permit. (Tr. P. 158; R.O.A. 002100, L.22-25; Tr. p. 259, R.O.A. 002101, L 2)

Mr. Um represented to Ohs that forty (40) rooms were available for rent as he was operating the motel as a 40 unit operation. (Stip. Facts. 4, R.O.A. V3, 1187, para. 28).

In the years of Ums’ operations, they consistently reported a 34 room on the annual license application. (Stip. Facts, para. 7 V3, 1187; para 18; F of F, para 7; R.O.A. 1644-1654).

This 34 room reporting apparently was to the economic advantage to Ums and to the Ohs since the license fee is great for a forty (40) unit motel than a thirty-four (34) unit Motel. (Stip. Facts, para. 8, R.O.A. 1187, F of F, para. 8)

The Ums reported income for a forty (40) unit motel as did the Ohs report to Satsudas the income from a forty (40) unit motel. (Stip. Facts, V3, 1190).

Other facts will be brought out in argument.

The elements of fraud are clearly established in a number of Utah cases.

“The full measure of the plaintiffs duty was the use of reasonable care and observation in connection with these representations. Having done so, it does not lie with” the defendant’s mouth to say that they were too gullible and shouldn’t have believed him. Tr. 276.

*Smith v. Pearman*, 548 P2d (Utah 1976). Purchaser brought action for rescission on a contract for sale of duplex apartment.

The property was listed by the real estate agent.. It was being used as a duplex. The property was listed in a newspaper as a duplex and as a valuable asset in assessing the sale price.

The apartment was subsequently found to be in violation of local zoning ordinances and the tenants were notified by the city to vacate the property.

Justice Henroid upheld the trial court’s order to rescind the contract for sale of the property, notwithstanding the fact the parties did not realize the apartment was in violation of the zoning ordinance and that no bad faith was alleged.

*Elder v. Clawson of Tuttle Realty*, 802 Utah (1963). In an action for rescission, the Utah Supreme Court states that fraud may be committed by suppression of the truth as well as suggestion of falsehood. Silence must relate to a material fact known to the party and which it is the legal duty to communicate to the other contracting party, whether the duty arises from a relationship of trust, from confidence, inequality of condition and knowledge or other attendant circumstances. P. 804.

The Court affirmed the rescission in the Elder case and points out the experience of the seller, lack of experience of the buyer and the seller failed to point out the effect of quarantine on noxious weed located on the property. P. 803.

Whereas there is no fiduciary obligation existing between a buyer and seller of real property ...an agent is licensed by the state and is required to meet the standard of “honesty, integrity, truthfulness, explanation and competency”.



In this state the rule of *caveat emptor* does not apply to those dealing with a licensed real estate agent, *Schafir v. Harrigan, Supra*.

In this case, Mr. Kim was a licensed real estate agent and solicited the Satsudas in purchasing the Capitol Motel (Tr. 241) although no listing agreement was signed with Ohs. (Tr. 242). He was paid \$6,200.00 as a commission or finder's fee by Mr. Oh. (Tr. 222)

Mr. Kim and Mr. Oh stated that the income figures for a forty (40) unit motel operation was presented to Satsudas in the pre-negotiations of the sale (Exh. 36, Tr. 224, Tr. 243). 40 units rentable (Tr. 245).

Mr. Kim prepared the Earnest Money Agreement. (Exh. 14, Tr. 245).

Whereas the Schafir case dealt with a proceeding brought directly against the real estate agent and others, the appellants believe the representations of Mr. Kim and the active and verbal representations by Mr. Oh that a forty (40) rentable unit was being purchased by the Satsudas and was reasonably replied by Satsudas.

The appellant is well aware of the *Maack v. Resource Design & Constr., Supra* decided in March 1994.

The Maack case involved an Earnest Money Agreement and "as is" clause. There is not "as is" clause in the instant case.

Maack case had a one year builder warranty covering defects, materials and workmanship. The plaintiff, a licensed attorney, did not review the warrant nor have the house inspected.

Material to the case at hand, the Maack Court discusses fraudulent non-disclosure stating:

"...the theory requires that the non-disclosed information must be material, known to the party failing to disclose and there must be a legal duty to disclose" citing *First Security Bank v. Banbury Development*, 786 P2d 12326 (Utah 1990).

“The question of whether a duty exists is answered by “reference to all of the circumstances to the case and by comparing facts not disclosed with the object and end in view by the contracting parties.”

“The proponent of such legal duty has the burden and persuasion and its existence prevents a question of law”. Page 78.

Citing the Restatement of Torts, sec. 551 (2) (b) at 119 (1977), the Maack Court states that “a party to transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . matters known to him that he knows to be necessary to prevent his partial or unambiguous statement of the facts from being misleading.” Page 78.

In the instant case, Ohs have a duty to disclose, at the least, the fact that five to six rooms were made without a building permit. Mr. Um testified that he advised Oh on two different occasions. Mr. Oh had a duty to disclose that the forty (40) rental units were not listed as such in the Salt Lake business license, a fact he was keenly made aware of by Mr. Um and by himself applying for a business license for Capitol Motel during the period of his ownership, 1987 to 1990. (Exh. 3, Tr. 202).

Moreover, Oh was aware that improvements on the motel would require a building permit. He put on aluminum siding in the office portion of the motel (middle building) by Top Shelf Construction and obtained a building permit in 1989. (Tr. 207, Exh. 32).

The failure of Ohs to disclose the total rental units, i.e.; forty (40) units to Salt Lake City is a breach of his duty imposed by Salt Lake City. It should not be any less of a duty when he deals with a proposed purchaser.

Had Oh disclosed the discrepancies between the 34 rooms licensed by Salt Lake City and the actual rentable units (40 rooms), this would have at least put Satsudas on notice that something was amiss and the Satsudas failure to further investigate may well have fallen below the exercise of reasonable care imposed by the Maack case.

The fact that the City License, posted in the office, does not and should not trigger the Satsudas duty to exercise reasonable care. Mr. Oh was the only one who was aware of this discrepancy and had a duty to call that fact to the Satsudas.

Moreover, the Ohs aware of the five to six rooms were built without permit. Apparently, the trial court did not recognize this fact; therefore in its finding is clearly against the weight of the evidence.

Satsudas on January 2, 1990 went to the Salt Lake City Licensing Department and filed their application for a business license, got a receipt, and were unaware of any problem at the time of closing (Tr. 28), held on January 5, 1990. Mr. Oh still remains silent.

Similarly, Mr. Oh was aware of when he sold the motel that he did not have forty (40) parking stalls for forty rental units. Although he claims not to have known about the one parking stall for one rental unit, he had the duty to abide by the parking ordinance in place at the time and the law should impute this knowledge to him and other property owners who holds himself out to the public or potential purchasers that the sellers property conforms with, at a minimum, building and zoning requirements.

Ms. Satsuda stated that she discussed parking with Mr. Oh and Mr. Oh stated “no problem” (Tr. 176). She was especially interested in parking because of the parking problems she experienced at the Korean Restaurant which the Satsudas owned prior to the purchase of the Capitol Motel. (Tr. 175)

A parking variance was obtained in November of 1990 and the Satsudas expended \$2,500.00 in attorney’s fees in connection therewith. (Stip. Facts, Para. 49 -52).

A reasonable inspection of the rooms would not have yielded the fact that the kitchenette in rooms 1-7 were put in without permit or that rooms 35-39 were constructed without a building permit.

The defects in the electrical and plumbing were latent defects. (Tr. 32-33). Rooms 1 - 6, the kitchenette rooms, the defects were not observable to the naked eye (as stated by

Mark H. Bowman, General Contractor would inspect the rooms and did the repairs. (Tr. 142); although he did not have to ‘knock down any walls or saw through any walls. (Tr. 151, L 10-19).

Nor would the visual inspection of room 35 put Satsudas on notice that room 35 did not comply with the building code because of the lack of outside ventilation.

Room 35 was permanently closed. (Larry Suggars, Tr. 131).

Maack case states, (citation omitted), “fraudulent concealment course of action, inter alia, that “. .a careful, reasonable inspection on the part of the purchaser would not disclose the defect”.

Nor, as stated in Maack case, “That a duty to disclose in a vendor-vendee transaction exists only where a defect is not discoverable by reasonable care”. (citation omitted)

As to whether there was an exercise of reasonable diligence on the part of Satsudas in the purchasing of the motel, it should be emphasized that in inspection of the rooms would not have yielded the defects, or would inspection of the Salt Lake City records would not have yielded the defects, i.e.; kitchenettes built without permit; rooms added without building permits or zoning violations.

### **CONCLUSION**

The appellants respectfully submits that the trial court’s error in not finding fraud on the part of the Ohs in concealing a material factor to Satsudas, namely that some of the hotel rooms did not conform to code when it was represented to the Satsudas that it was a forty (40) unit rentable motel.

Further, the express warranties survive the merger doctrine and the warranties were breached by the Ohs since Rooms 1 to 7, and 36 to 39 had electrical and plumbing defects, thus rendering those systems not in a satisfactory working condition.

As a result of the non-disclosure by the Ohs and/or the breach of Express Warranties by the Ohs, Satsudas suffered out-of-pocket expenses including reasonable attorney's fees at trial and on appeal.

Moreover, Ohs cannot rely upon the other documents, Deed of Trust and Trust Promissory Note to serve as a basis for their attorney's fees since there was no breach.

Similarly, the Real Estate Contract between and Ohs and Ums cannot serve as a contractual basis for attorney's fees since there was no default or breach of any of the covenants of the Real Estate Contract.

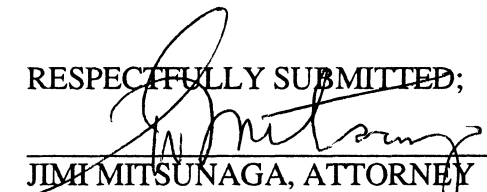
The Assignment of Contract does not serve as a basis for Ohs' attorney's fees for the same reason, i.e., no breach of Satsudas' responsibilities under the Assignment of Contract.

Finally, the attorney's fees for Ums against the Satsudas cannot be sustained because the Ums' attorney's fees are incurred as defending Ohs' claim, not Satsudas. No facts are stated to support the conclusion that Ums' attorney's fees were "cost, claim or damages" suffered by the Ohs.

Appellants respectfully urge the Court to reverse the Judgment by the trial court and enter relief as stated by the appellants.

DATED this 13 day of March, 1996.

RESPECTFULLY SUBMITTED;

  
JIM MITSUNAGA, ATTORNEY

## DELIVERY CERTIFICATE

Delivered two copies of Brief of Appellants this 14 day of March, 1996 to the attorneys for the Defendant/Appellees and Attorney for \the Third Party Defendants/Appellees at:

MR. JEFFERY WESTON SHIELDS  
Attorney for Defendants/Appellees  
8900 Parkside Tower  
215 South State Street  
Salt Lake City, UT 84111-2340

MR. STEPHEN R. SMITH, JR.  
Attorney for Third Party Defendants/Appellees  
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Salt Lake City, UT 84101-2006

A handwritten signature in cursive script, likely of Stephen R. Smith, Jr., written over a horizontal line.

**ADDENDUM TO BRIEF OF APPELLANTS  
PLEADINGS**

1. Complaint.
2. Third Party Complaint. dated April 19, 1993.
3. Stipulation of Facts as to Undisputed Facts, filed February 13, 1995.
4. Stipulated Trial Exhibits, filed February 13, 1995.
5. Transcript of Judge's Ruling, February 17, 1995.
6. Minute entry dated April 19, 1995.
7. Findings of Facts and Conclusions of Law entered May 2, 1995.
8. Order of Dismissal of Complaint and Third Party Complaint and Judgment in Favor of Defendants Ohs Against Plaintiffs Satsudas for Attorney's Fees, filed May 2.
9. Proposed Order of Dismissal and Judgment, and Request for Clarification of Minute Entry.
10. Third Party Defendants Motion to Open, Alter or Amend Judgment.
12. First Amended Finding of Facts and Conclusions of Law, filed June 9, 1995.
13. First Amended Order of Dismissal of Complaint and Third Party Complaint and Judgment in Favor of Defendants Ohs Against Plaintiffs Satsudas for Attorney's Fees, dated June 9, 1995.
14. Minute Entry dated June 12, 1995.
15. Notice of Appeal filed June 5, 1995.
16. Minute Entry dated July 7, 1995.
17. Amended Notice of Appeal filed July 10, 1995.

18. Supplemental Findings of Fact and Conclusions of Law Regarding Assessment of Third Party Defendants' Attorney's' Fees Against Plaintiffs dated July 7, 1995.
19. Supplement Judgment of Third Party Defendants' Attorneys' Fees Awarded Plaintiffs
20. Second Amended Notice of Appeal entered July 27, 1995.

#### **TRIAL EXHIBITS**

21. Earnest Money Agreement between Ohs and Ums
22. Notice and Order dated February 12, 1990
- 23.. Notice of Deficiencies
24. Earnest Money Sales Agreement between Satsudas and Ohs



Tab 1

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FILED  
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THIRD JUDICIAL DISTRICT  
BY *C. Beverley*

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

---

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

vs.

HASIN OH and MYUNG JA  
OH, his wife,

Defendants.

COMPLAINT

Civil No. *910901751 CN*

Judge:

**JUDGE J. DENNIS FREDERICK**

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The plaintiffs, for a cause of action alleges:

GENERAL ALLEGATIONS

1. That the plaintiffs and defendants are residents of Salt Lake County, State of Utah.
2. That the contract hereinafter alleged was entered into in Salt Lake County, State of Utah.
3. The real property, which is the subject matter of the contract is located in Salt Lake County, State of Utah.
4. That said contract is to be performed in Salt Lake County, State of Utah.

### **SPECIFIC ALLEGATIONS**

5. That the parties entered in an Earnest Money Sales Agreement listing the defendants as sellers and the plaintiffs as buyers on November 16, 1989.

6. That said Earnest Money Sales Agreement states, in substance, that defendants (sellers) would sell to the plaintiffs (buyers) a motel known as the Capitol Motel, located at 1749 South State Street, Salt Lake City, Salt Lake County, State of Utah.

7. A copy of the Earnest Money Sales Agreement is attached as Exhibit A to this complaint.

8. The Earnest Money Sales Agreement provided, among other terms, a purchase price of Six Hundred Twenty Thousand Dollars (\$620,000.00) for the Capitol Motel.

9. Pursuant to said agreement the plaintiffs paid the defendants the sum of One Hundred Thousand Seven Hundred Thirty Four Dollars and sixty eight cents (\$100,734.68) which includes a Five Thousand Dollar (\$5,000.00) deposit on November 21, 1989.

10. Moreover, the plaintiff assumed the prior indebtedness to the defendant's predecessor, Kee Hong Um and Shi Ja Um, his wife, and agreed to pay the defendants the balance of One Hundred and Two Thousand Dollars (\$102,000.00) over a period of ten (10) years.

### **FIRST CAUSE OF ACTION**

11. The plaintiffs incorporates paragraph 1 through 9 in the First Cause of Action.

12. Paragraph C of the Earnest Money Sales Agreement reads:

C. Seller Warranties: Seller warrants that (a) Seller has received no claims nor notice of any building or zoning violation concerning the property which has not nor will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

13. That the defendants breached the Earnest Money Sales Agreement dated on or about November 16, 1989.

14. The Capitol Motel, subject matter of the Earnest Money Sales Agreement, was represented by the defendants as a forty (40) unit motel when, in fact, the Capitol Motel lacked adequate parking spaces for a forty (40) unit motel, according to the Uniform Housing Code (UHC), Salt Lake City Corporation.

15. Further, several units were in violation of the aforesaid code. A copy of the code violations, issued by Lawrence Suggars, Salt Lake City Department of Building and Housing Services is attached hereto and made a part hereof.

16. Further, seven (7) units of the motel was built without an authorized building permit from the Salt Lake City Corporation.

17. The defendants had knowledge of the aforesaid deficiencies and failed to disclose the same to the plaintiffs.

18. The failure of the defendants to disclose the deficiencies is in violation of the seller's warranty as stated in paragraph 12 above.

19. As a result of defendant's breach of warranty, the plaintiff suffered general and special damages as set forth in paragraph 22 and 23 below.

#### SECOND CAUSE OF ACTION

20. The plaintiff incorporates paragraphs 1 through 19 in the Second Cause of Action.

21. That the defendants had a duty to disclose the deficiencies noted in paragraph 15 and the failure to disclose a ~~breach of the express~~ and/or implied covenant to deal in good faith to the plaintiffs.

22. ~~As a result~~ of defendants intentional misrepresentation, the plaintiffs suffered general damages which is the difference between the value of the property as represented and its actual value as purchased. The general damages is one hundred thousand eight thousand five hundred thirty eight dollars and fifty cents (\$108,538.50). The plaintiffs reserves the right to amend the amount of general damages.

23. As a result of defendants intentional misrepresentations, the plaintiffs suffered special damages which arises from the special circumstances and directly trace-

able to the failure of the defendants to discharge contractual obligations. The special damages suffered by the plaintiff are the costs of correcting the deficiencies, obtaining a variance for the additional seven (7) units, attorney's fees and construction costs. The special damages up to date of the complaint is thirteen thousand six hundred twenty one dollars (\$13,621.00) for construction costs, attorney's fees of approximately five thousand dollars (\$5,000.00), future construction of twenty three thousand six hundred sixty dollars (\$23,660.00) and loss of revenue, an amount to be determined. The plaintiff reserves the right to amend its special damages.

#### THIRD CAUSE OF ACTION

24. The plaintiff incorporates paragraphs 1 through 23 in the third cause of action.

25. The plaintiffs were inexperienced in matters and estate transactions dealing with motel purchases.

26. That to the best knowledge and information of the plaintiffs, the defendants have had experience in the buying and selling of real estate and motels in particular.

27. That the defendants represented to the plaintiffs that the gross incomes of Capitol Motel was Two Hundred Thousand Dollars (\$200,000.00) gross per year.

28. The defendants represented that the Capitol Motel was a forty (40) unit motel.

29. That defendant represented the Capitol Motel as a forty (40) unit by the Salt Lake City Business Registration.

30. That the plaintiffs relied upon the oral representation of the defendants and was induced in the purchase of the Capitol Motel by the defendants requested purchase price of Six Hundred and Twenty Thousand Dollars (\$620,000.00).

31. That the defendants representation was material to the plaintiffs' decision to enter into the purchase agreement.

32. That the defendants representations were false and the defendants knew the representation were false, both as to existing facts and future facts.

33. That the fact that seven (7) of the units were built without a building permit from Salt Lake City Corporation was a material fact which the defendants had a duty to disclose because of the relation of trust and in quality of condition and knowledge of the parties.

34. That as a result of the defendants' conduct, the plaintiffs suffered loss of the bargain and incurred additional expenses in bringing the motel to meet Salt Lake Building Code requirements. The loss of the bargain was the loss suffered by the plaintiff as being the difference between the purchase price of the subject property and actual value of the subject property.

35. The additional expenses incurred by the plaintiffs to bring the motel to the Building Code requirement as listed in paragraph 23 above.

#### FOURTH CAUSE OF ACTION - PUNITIVE DAMAGES

36. The plaintiffs incorporates paragraphs 1 to 35 in the fourth cause of action.

37. The aforesaid representations and conduct was wilful, intentional and malicious on the part of the defendants.

38. That the plaintiff is entitled to punitive damages in the sum not to exceed fifty thousand dollars (\$50,000.00), attorney's fees and costs of court.

39. That the Earnest Money Sales Agreement, attached as Exhibit A, provides, in substance, that the defaulting party shall pay all costs and expenses, including reasonable attorney's fees.

40. That the plaintiffs are entitled to reasonable attorney's fees from the defendants, plus all costs and expenses.

WHEREFORE, the plaintiffs pray for judgment in favor of the plaintiffs and against the defendants as follows:

(1) First Cause of Action: General damages in the sum of \$108,538.00, special damages in the sum of \$42,281.00, plus loss of revenues provable at the time of trial, reasonable attorney's fees, costs and expenses of court.

(2) Second Cause of Action: General damages in the sum of \$108,538.00, special damages in the



sum of \$42,281.00, plus loss of revenues provable at the time of trial, reasonable attorney's fees, costs and expenses of court.


(3) Third Cause of Action: General damages in the sum of \$108,538.00, special damages in the sum of \$42,281.00, plus loss of revenues provable at the time of trial, reasonable attorney's fees, costs and expenses of court.

(4) Fourth Cause of Action: Punitive damages not to exceed \$50,000.00, attorney's fees and costs and expenses.

(5) Reasonable attorney's fees, costs and expenses provable at the time of trial and,

(6) Such other and further relief as the Court deems meets the premises.

DATED this 15th day of March, 1990.

  
JIMI MITSUNAGA  
Attorney for the Plaintiffs

Plaintiffs' address:

Capitol Motel  
1749 South State Street  
Salt Lake City, UT

Tab 2

Grant W. P. Morrison 3666  
Attorney for Defendants  
1200 East 3300 South  
Salt Lake City, Utah 84106  
Telephone: (801) 485-7999

FILED DISTRICT COURT  
Third Judicial District

APR 19 1993

*Ann D. Harbo*  
SALT LAKE COUNTY

IN THE THIRD JUDICIAL DISTRICT COURT

Def.

SALT LAKE COUNTY, STATE OF UTAH

---

WAYNE TAKASHI SATSUDA and	:	
SEON SIL SATSUDA, his wife,	:	
	:	THIRD PARTY COMPLAINT
Plaintiffs,	:	
vs.	:	
	:	Judge Frederick
HASIN HO and MYUNG JA OH,	:	Case No. 910901751
his wife,	:	
	:	
Defendants,	:	
vs.	:	
	:	
HASIN OH and MYUNG JA OH,	:	
his wife,	:	
	:	
Third Party	:	
Plaintiffs,	:	
vs.	:	
	:	
KEE HONG UM and SHI JA UM,	:	
his wife,	:	
	:	
Third Party	:	
Defendants.	:	

---

COMES NOW Grant W. P. Morrison, attorney for Defendants and Third Party Plaintiffs Hasin Oh and Myung Ja Oh, who hereby complain and allege as follows:

1. Hasin Oh and Myung Ja Oh are residents of Salt Lake County, State of Utah and were so at all times mentioned herein.

2. A contract purporting to sell property located at 1749 South State, Salt Lake City, Utah was executed in Salt Lake County,

State of Utah.

3. The property in dispute at 1749 South State, Salt Lake City, Utah is located in Salt Lake County, State of Utah.

FIRST CAUSE OF ACTION

4. On or about February 28, 1987, Third Party Plaintiffs purchased a motel from Kee Hong Um and Shi Ja Um (Earnest Money Agreement attached as Exhibit A, Uniform Real Estate Contract attached as Exhibit B).

5. Pursuant to Exhibit A, the property was described as a "40 unit motel".

6. This property was subsequently sold to Wayne Takashi Satsuda and Seon Satsuda on or about November 21, 1989. The Satsudas are suing the Oh's for breach of contract, violation of warranty, and so forth within the above-entitled action.

7. Paragraph 6 of the Earnest Money Sales Agreement (Exhibit A states in pertinent part, "Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has or will not be remedied prior to closing."

8. The Third Party Defendants breached the Earnest Money Sales Agreement dated February 28, 1987.

9. At the time the Earnest Money Sales Agreement was signed, February 28, 1987, the Sellers represented the property to be in conformity with all code requirements and to be a 40 room motel, yet there were serious Uniform Housing Code, City Code and Zoning Code violations (Exhibit C).

10. That of the 40 rooms alleged, seven (7) of these units

were built without an authorized building permit.

11. That had these code violations been brought to the attention of Third Party Plaintiffs that they would never had agreed to purchase the motel or would not have purchased the motel until these violations had been satisfied.

12. As a result of Third Party Defendant's breach of warranty the Plaintiff suffered general damages and special damages in an amount to be determined at trial and attorney's fees, costs and expenses of court.

#### SECOND CAUSE OF ACTION

13. The Third Party Plaintiffs incorporate paragraphs 1 through 12 as fully set forth herein.

14. The Third Party Defendant's had a duty to disclose the deficiencies heretofore described and the failure to disclose these deficiencies is a breach of the express and/or implied covenant to deal in good faith.

15. As a result of Third Party Defendant's intentional misrepresentation, the Third Party Plaintiffs suffered general damages which is the difference between the value of the property as represented and its actual value as purchased.

16. That Third Party Plaintiff is entitled to recover general and special damages as a result of Third Party Defendants actions in an amount to be determined at trial and attorney's fees, costs and expenses of court.

#### THIRD CAUSE OF ACTION

17. Third Party Plaintiffs incorporate paragraphs 1 through 16 as fully set forth herein.

18. That Third Party Defendants intentionally misrepresented that the property was free of zoning and code violations and committed fraud in the inducement by selling a property that Third Party Plaintiffs knew was in violation of City and other ordinances.

19. That as a result of Third Party Defendant's fraud, Third Party Plaintiffs have suffered general and special damages in an amount to be proven at trial and attorney's fees, costs and expenses of court.

#### FOURTH CAUSE OF ACTION

20. Third Party Plaintiff's reincorporate paragraphs 1 through 19 as fully set forth herein.

21. That Third Party Defendants represented the motel to be a 40 unit motel.

22. That the additional 7 units were built without a building permit.

23. That Third Party Plaintiff's subsequently sold the motel to the Satsudas, who within this lawsuit is seeking damages against Third Party Plaintiff's for having to bring the motel into compliance with city and other codes.

24. That Third Party Plaintiff is entitled to indemnification and contribution for any judgment against the Ohs by Satsudas with respect to the subject property, with Plaintiffs alleging special damages up to date of the complaint at thirteen thousand six hundred twenty one dollars, for construction costs, attorney's fees of five thousand dollars, future construction costs of twenty-three thousand dollars, and so forth. The Third Party Plaintiffs reserve

the right to amend its special damages.

#### FIFTH CAUSE OF ACTION

25. Paragraphs 1 through 24 are incorporated as fully set forth herein.

26. Third Party Defendants actions and conduct were willful, wanton, intentional and malicious so as to warrant punitive damages.

27. That Third Party Plaintiffs are entitled to punitive damages in the amount of \$100,000 and for attorneys fees and costs of this action.

28. That the Earnest Money Sales Agreement, attached as Exhibit A, provides that the defaulting party shall pay all costs and expenses, including reasonable attorney's fees.

29. That the Third Party Plaintiffs are entitled to reasonable attorney's fees from the Third Party Defendants plus all costs and expenses.

#### SIXTH CAUSE OF ACTION

30. Paragraphs 1 through 29 are incorporated as fully set forth herein.

31. That Third Party Defendants are unjustly enriched because of the inflated value of the purchase price and the fact that subsequent improvements have been necessary to bring the motel in conformity with code, and Third Party Plaintiffs are entitled to the cost of the improvements and the difference between the purchase price and the true fair market value of the property at the time of sale.

WHEREFORE, the Third Party Plaintiffs pray for judgment in

favor of the Third Party Plaintiff and against the Third Party Defendants as follows:

1. First Cause of Action: General Damages in an amount to be proven at trial and reasonable attorney's fees, costs and expenses of court.

2. Second Cause of Action: General and special damages, reasonable attorney's fees, costs and expenses of court in an amount to be proven at trial.

3. Third Cause of Action: General and special damages in an amount to be proven at trial, and reasonable attorney's fees, costs and expenses of court.

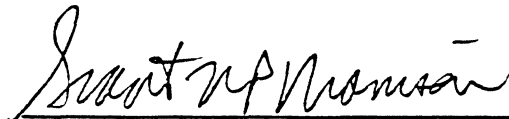
4. Fourth Cause of Action: Indemnification and contribution damages in an amount to be proven at trial and reasonable attorney's fees, costs and expenses of court.

5. Fifth Cause of Action: Punitive damages in the amount of \$100,000, reasonable attorney's fees, costs and expenses of court.

6. Sixth Cause of Action: General and special damages, reasonable attorney's fees, costs and expenses of court.

7. Such other and further relief as the Court deems meets the premises.

DATED this 8th day of April, 1993.

  
Grant W. P. Morrison  
Attorney for Third Party  
Plaintiffs and Defendants



Tab 3

FILED  
DISTRICT COURT

95 FEB 13 PM 4:29

THE THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY

*By [Signature]*

Jeffrey Weston Shields, (2948)  
PURSER & EDWARDS, L.L.C.  
39 Market Street, Third Floor  
Salt Lake City, Utah 84101-2104  
Telephone: (801) 532-3555  
Attorneys for Defendants and  
Third-Party Plaintiffs

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

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

V.

HASIN OH and MYUNG JA OH,  
his wife,

Defendants,

\*\*\*\*\*

HASIN OH AND MYUNG JA OH,  
his wife,

Third-Party Plaintiffs,

V.

KEE HONG UM and SHI JA UM,  
his wife,

Third-Party Defendants.

STATEMENT OF  
STIPULATED FACTS

Civil No. 910901751

Judge J. Dennis Frederick

Plaintiffs Wayne Takashi Satsuda and Seon Sil Satsuda,  
Defendants Hasin Oh and Myung Ja Oh, and Third-Party Defendants Kee  
Hong Um and Shi Ja Um, by and through their attorneys of record,  
stipulate to the following facts for all purposes and proceedings  
at trial in this matter.

1. Kee Hong Um ("Um") was experienced in the real estate business and involved in the buying and selling of real estate prior to May 1982.

2. The Capitol Motel had 35 rooms before construction of the five additional units in 1983.

3. Um hired a contractor that would build the five additional units. The contractor he hired did not obtain a building permit.

4. When Um sold the Capitol Motel to Hasin Oh ("Oh") in 1987, 39 rooms were available for rental.

5. Um never notified Salt Lake City officials that the five additional units were constructed on the Capitol Motel premises.

6. The Capitol Motel, located at 1749 South State Street, Salt Lake City, Utah was bought by the Ums as virtually condemned on September 1, 1982 and was shut down entirely by the City that fall.

7. Um completed repairs on the Capitol Motel in the spring of 1983, bringing the motel back up to its original 34 licensed units.

8. Um did not obtain a building permit before making the repairs in 1982-83.

9. During the Ums' ownership of Capitol Motel, the Salt Lake City-County Health Department and Salt Lake City Fire Department inspected the Capitol Motel premises. Each department found that the motel met its inspection standards, after repairs were completed in 1982-83.

10. The building was inspected under construction permit 33603 and approved on March 21, 1985.

11. One room on the second floor of the Capitol Motel's main building was converted from storage room to a rental room by Um's Seller, Juan Garcia.

12. In the Spring of 1983, a swimming pool upon the premises was covered over so that a small grocery store could be constructed.

13. The grocery store was converted into five additional rental units in January 1984, giving the Capitol Motel a total of 40 units available for rent when the Ohs purchased the property in 1987.

14. Um knew that no building permit had been obtained for the conversion of the grocery store into the five rooms and Um did not instruct his contractor to obtain a permit, and no building permit was obtained.

15. After passing inspection on March 21, 1985, the Ums never received any written notice that the additional five units did not meet any code requirements.

16. The new Capitol Motel continued to pass every health, building and fire inspection after the additional five rooms were constructed until Lawrence Suggars inspected the premises in January 1990.

17. Thereafter the Ums operated the Capitol Motel with a total of up to 40 rooms available for rental to the public.

18. The Ums did not alter their business license application after adding the five new units, continuing to renew their license each year to show only a 34 unit motel on the face of the license.

19. The licensing fees for a 40-room motel would be higher than for a 34-room motel. The Ums were aware of the higher fees.

20. On February 28, 1987 the Ums executed an Earnest Money Sales Agreement with the Ohs for the sale of "a 40 unit motel called Capitol Motel" located at 1749 South State Street, Salt Lake County, State of Utah for the sum of \$550,000.00.

21. Between the execution of the Earnest Money and the closing, Um represented to the Ohs that good income could be made

from the motel and provided a hand-written income and expense statement to the Ohs. Um also stated that he had remodeled or reconstructed and fixed up most of the rooms and had made repairs to the motel.

22. On March 20, 1987, the Salt Lake City/County Health Department inspected the Capitol Motel and found only minor infractions such as dust under a bed, filth in a bathroom and no lids on the dumpsters.

23. The Ums represented to the Ohs that the Capitol Motel had up to 40 units available for rent.

24. The Ohs went to the Capitol Motel about ten times during the month before the Earnest Money Sales Agreement between the Ums as sellers and the Ohs as buyers was signed and inspected only a couple of rooms on the ground floor of the main building.

25. The Ohs did not obtain a professional inspection of the property prior to closing.

26. At no time before the commencement of this action did the Ohs expressly request that the Ums provide information regarding parking, building inspections, construction of additional rooms, putting additional rooms into service, or inspection of more of the property by the Ohs, their agents, or city building inspectors.

27. On May 1, 1987, Ums and Ohs executed a Uniform Real Estate Contract for the principal sum of \$540,000.00 (EXHIBIT 1 herein).

28. The Ohs consistently rented more than 34 units at the Capitol Motel and advertised to the public that the Capitol Motel was a 40-unit motel.

29. On February 21, 1989, building permit number 38372 was issued for the installation of aluminum siding and fascia on the front of the central building of the New Capitol Motel by the Top Shelf Construction Company. Final inspection of the siding was conducted and approved by Salt Lake City on September 14, 1989.

30. Salt Lake City Fire Department fire safety surveys were conducted on the Capitol Motel in 1982, 1984, 1986, November 1989, January 1990, February 1990 and June 1993. The Fire Department's "Premises History" report shows that the property had some minor violations discovered in 1986 which were promptly corrected, and that the motel passed the fire safety surveys of November 7, 1989 and January 4, 1990 just before the Ohs sold the property to the Satsudas.

31. On November 16, 1989 the Ohs executed an Earnest Money Sales Agreement with the Satsudas for the sale of the

"Capitol Motel" located at 1749 South State Street, Salt Lake County, State of Utah for the sum of \$620,000.00.

32. During the negotiations for the Capitol Motel, the Ohs represented orally and on Mr. Oh's business card that the Capitol Motel was a 40-unit motel.

33. During the negotiations for the sale of the property, Hasin Oh gave Satsuda daily income figures for the motel for the period 1987 through September 1989 that he maintained in his five steno books. The steno notebooks showed how many of the 40 rooms were rented at any one time.

34. The Satsudas made an offer to purchase the Capitol Motel to a Mr. Kim, the Ohs' agent, after two meetings with the Ohs at the Capitol Motel.

35. During pre-closing discussions, Mr. Oh indicated that he had put aluminum framed windows in place of the original wood framed windows.

36. The Satsudas inspected four or five rental rooms, the laundry room, and boiler rooms.

37. The Satsudas did not obtain a third-party inspection of the property prior to closing.

38. Satsudas began operating the motel on January 1, 1990.



39. The Capitol Motel's business license was hanging on the wall in the motel office and was first examined by the Satsudas on January 1, 1990.

40. On January 5, 1990, the Uniform Real Estate Contract between Ums and Ohs was assigned to Satsudas.

41. After the Suggars' inspection in January 1990, the Satsudas were advised by the Salt Lake Building Inspection office that there were no records of the five additional rooms.

42. The Satsudas received a "Notice of Deficiencies" from Lawrence Suggars, Enforcement Officer, Salt Lake City Department of Building and Housing Services, dated January 31, 1990, postmarked February 12, 1990.

43. After the Satsudas changed the license and utilities into their own name, Salt Lake City building inspector, Larry Suggars, a fire inspector, and a health department inspector came out to examine the property.

44. Larry Suggars called in electrical and plumbing inspectors for further inspection.

45. By letter dated February 22, 1990, Robert M. Bridge, the Salt Lake City Business Supervisor, advised the Satsudas that the Capitol Motel's business license would not be approved due to

the incorrect number of units listed. The Satsudas corrected the number of units on his business license application.

46. The Satsudas contacted the Ums about the Notice of Deficiencies and Um declared to Mrs. Satsuda that he (Um) had fully disclosed to the Ohs that the five additional rooms had been built without a building permit.

47. Room 0 through 7, which had kitchenettes, were inspected in January 1990 and found to be plumbed incorrectly and to have electrical wiring that was not up to code.

48. Parking for the Capitol Motel was zoned for only 33 rooms.

49. A parking variance that allowed the Capitol Motel to rent up to 40 units was obtained in November 1990.

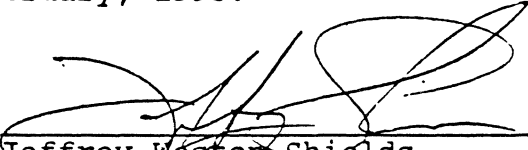
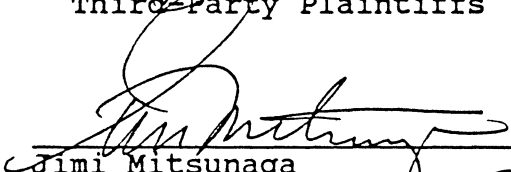
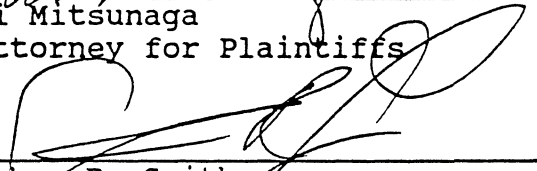
50. The remaining five rooms were remodeled after the parking variance was approved by Salt Lake City in November 1990.

51. Construction on rooms 0, 7 and 35 through 39 started in February 1991 and was completed in March 1991.

52. The Satsudas spent approximately \$2,500.00 in attorney's fees to obtain a variance on the parking requirements for the 40 unit motel.

53. The Satsudas sold the Capitol Motel on January 5, 1994 for \$860,000.00, a sum that is \$240,000.00 more than the purchase price from the Ohs.

DATED this 13 day of February, 1995.

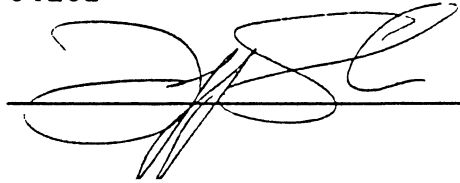
  
\_\_\_\_\_  
Jeffrey Weston Shields  
Attorney for Defendants and  
Third-Party Plaintiffs  
\_\_\_\_\_  
Jimi Mitsunaga  
Attorney for Plaintiffs  
\_\_\_\_\_  
Stephen R. Smith  
Attorney for Third-Party  
Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 13<sup>th</sup> day of February, 1995, I served a true and correct copy of the foregoing **STATEMENT OF STIPULATED FACTS**, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Stephen R. Smith, Esq.  
236 South 300 East  
Salt Lake City, Ut 84111

Jimi Mitsunaga, Esq.  
731 E. South Temple  
Salt Lake City, Ut 84102



A handwritten signature in dark ink, appearing to read 'Jimi Mitsunaga', is written over a horizontal line.

Tab 4

FILED  
DISTRICT COURT

95 FEB 13 PM 4:29

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

THOMAS J. J. DISTRICT  
SALT LAKE COUNTY  
By *Ann B. Hanks*

WAYNE TAKASHI SATSUDA and	)	
SEON SIL SATSUDA, his wife,	)	
	)	
Plaintiffs,	)	
vs.	)	STIPULATED TRIAL
	)	
HASIN OH and MYUNG JA OH,	)	EXHIBITS
his wife,	)	
	)	
Defendants	)	Civil No. 910901751
vs.	)	Judge J. Dennis Frederick
	)	
KEE HONG UM and SHI JA UM,	)	
his wife, and John Does 1-10	)	
Third-Party Defendants	)	

The parties hereby stipulate to the admission of the following exhibits for trial:

<u>Exh #</u>	<u>Date</u>	<u>Description</u>
1	5-1-87	UNIFORM REAL ESTATE CONTRACT between Kee Hong Um and Shi Ja Um as Seller and Hasin Oh and Myung Ja Oh as Buyer; \$540,000.00.
2	82-88	HOUSING, OFFICIAL INSPECTION REPORT, Salt Lake City-County Health Department; 1986-87, 40 units.
3	5-5-87	HASIN OH BUSINESS LICENSE APPLICATION for the Capitol Motel, with 34 rooms, granted June 26, 1987.

- 4        1-11-88        BUSINESS LICENSE RECEIPT, New Capitol Motel (renewal application).
- 5        9-14-89        BUILDING PERMIT SCREEN PRINTOUTS, permit #38372, for aluminum siding.
- 6        1982-93        Capitol Motel PREMISE HISTORY: license application, inspections record for fire inspections.
- 7        1-2-90        WAYNE SATSUDA BUSINESS LICENSE APPLICATION for the Capitol Motel, with 34 rooms, granted October 2, 1990.
- 8        1-5-90        Documents conveying interest in the Capitol Motel from Hasin Oh and Myung Oh as Sellers to Wayne Takashi Satsuda and Seon Sil Satsuda as Buyer: Warranty Deed; Assignment of Contract between Mr. Oh and Mr. Um to Mr. Satsuda for \$417,902.79; Bill of Sale (with warranties) for all equipment and supplies; Assignment of Contract (for security) re: promissory note for \$102,100; Request for Notice, for copy of any notice default or sale to be sent to Satsuda; Deed of Trust with assignment of rents for \$102,100; Trust Deed Note for \$102,000 with addendum; Buyers Settlement Statement with Amortization Schedule; Assignment & Assumption of Lease between RCA and the Capitol Motel; UCC Financing Statement re: all equipment and supplies; Policy of Title Insurance issued by Associated Title.
- 9        2-22-90        NOTICE OF ZONING VIOLATION; Letter from Robert M. Bridge, Business License Supervisor to Capitol Motel re: Business License Application Status; Lawrence Suggars inspector.
- 10       10-2-90        STIPULATION AND AGREEMENT in the matter of: Lawrence Suggars and Wayne Satsuda re: business license approval.
- 11       1983-1990       Salt Lake City TELEPHONE DIRECTORIES, showing Capitol Motel advertisement, 34 rooms in 1983, 40 rooms 84-90.

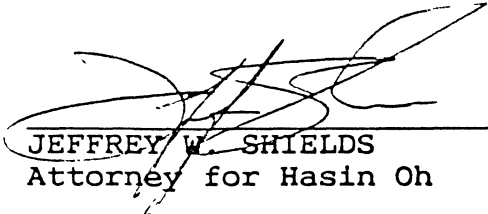
- 12        1993        Oriental Real Estate Directory - Mr. Kim, top producer.
- 13        undated       Handwritten notes re: \*Permanent\* loss of room #35; per unit loss of income during remodeling.
- 14        11-14-89       EARNEST MONEY SALES AGREEMENT, accepted by the Oh's 11-16-89, subject to purchase of Imperial 400 Motel.
- 15        1-31-90        NOTICE OF DEFICIENCIES of Building, Electrical and Plumbing codes; permits to be obtained. Lawrence Suggars, enforcement officer.
- 16        7-5-90        BID PROPOSAL AND SPECIFICATIONS, Commercial Remodeling Company (estimate), \$13,621, with standard form of agreement between owner and contractor.
- 17        12-6-90        Letter from Commercial Remodeling Company to Wayne @ Capitol Motel re: bid proposal for repairs need to comply with cods, describing SCOPE OF WORK. 12-13-90 note- Larry Sugars, must start by 2-1-91.
- 18        9-7-90        VARIANCE REQUEST to Board of Adjustment, received by Development Service 9-7-90 & 10-2-90 (only an estimate of repairs needed, doesn't show work done).
- 19        11-5-90        FINDINGS AND ORDER, Case no. 1418-B, before the Board of Adjustment, Report of the Commission re: Variance appeal.
- 20        11-7-91        ABSTRACT OF FINDINGS AND ORDER re: 11-5-90 decision of the board of adjustment, variance to become null and void if permit if not taken out in six months from 11-27-90, acknowledged 11-7-91, recorded 12-12-91.
- 21        1/90-  
          4/93        CAPITOL MOTEL EXPENSE SHEETS. Handwritten lists of monthly expenditures.



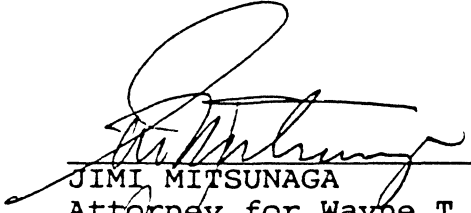
22	4/90	STATEMENT prepared for Kee Hong Um signature re: disclosure to OH of units built without permit, unsigned.
23	1983-86	Handwritten INCOME AND EXPENSE sheets marked Confidential-Agent use only, do not distribute.
24	1987	ADDENDUM TO UNIFORM REAL ESTATE CONTRACT form, between Mr. and Mrs. Um as Sellers and Mr. and Mrs. Oh as Buyers.
25	9-22-82	BUSINESS LICENSE RECEIPT, new owner of the New Capitol Motel, 34 rooms.
26	10-22-84	BUILDING PERMIT INFORMATION: permit screen, developers screen, inspection screen printout.
27		GENERAL MOTEL LAYOUT BLUEPRINT.
28		MAIN OFFICE, ADDITIONAL 5 ROOMS DETAIL BLUEPRINT.
29	2-12-90	NOTICE AND ORDER to the Capitol Motel, Wayne Satsuda from Salt Lake Building and Housing Services, pursuant to inspection of 1-31-90.
30	8-30-90	FINAL DENIAL LETTER to Capitol Motel from Salt Lake Business Licensing, failure to correct deficiencies.
31	1985-86	Handwritten expense sheets for the Capitol Motel, totaling \$63,870.10, signed by Kee Hong Um. (Exhibit to Hasin Oh deposition).
32	2-17-89	CONSTRUCTION AGREEMENT between Hasin Oh-Capitol Motel and Top Shelf Construction, \$10,300 for replacement of window, siding installation and rain gutters. (Exhibit 6 to Hasin Oh deposition).
33	4/83	Handwritten Contract for Construction between Kee Um and Pearson Construction.

- 34      Spring '83      Expense accounting for purchase expenses re:  
Kee Um's purchase contract from Juan Garcia.
- 35      2-28-87      EARNEST MONEY AGREEMENT between Hason Oh and  
Kee Um for purchase of Capital Motel

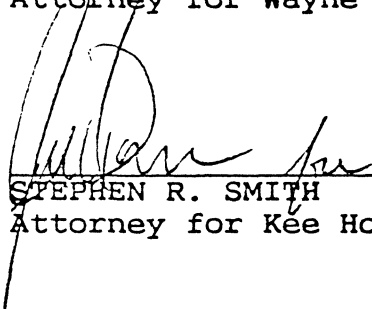
Dated this 13th day of February, 1995.



\_\_\_\_\_  
JEFFREY W. SHIELDS  
Attorney for Hasin Oh



\_\_\_\_\_  
JIMI MITSUNAGA  
Attorney for Wayne T. Satsuda



\_\_\_\_\_  
STEPHEN R. SMITH  
Attorney for Kee Hong Um

Tab 5

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

FEB 17 1995

SA LAKES  
C. Buerley

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

vs.

HASIN OH and MYUNG JA OH,  
his wife,

Defendants,

vs.

KEE HONG UM and SHI JA UM,  
his wife, and John Does 1-10,

Third-Party Defendants.

Case No. CIV 910901751 CN

REPORTER'S TRANSCRIPT  
OF JUDGE'S RULING

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

Friday, February 17, 1995

ANNA M. BENNETT, CSR  
License No. 22-106796-7801  
240 East 400 South  
Salt Lake City, Utah 84111  
535-5203

A P P E A R A N C E S

For the Plaintiffs:

JIMI MITSUNAGA  
Attorney at Law  
731 East South Temple  
Salt Lake City, Utah 84102-1221  
322-3551

For the Defendants:

JEFFREY WESTON SHIELDS  
LAWRENCE R. DINGIVAN  
Attorneys at Law  
PURSER & EDWARDS, L.L.C.  
39 Market Street, Third Floor  
Salt Lake City, Utah 84101-2104  
532-3555

For the Third-Party  
Defendants:

STEPHEN R. SMITH, JR.  
Attorney at Law  
236 South 300 East  
Salt Lake City, Utah 84111  
364-5635

JEROLD D. MCPHEE  
Attorney at Law  
431 South 300 East, Suite 101  
Salt Lake City, Utah 84111  
322-1616

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The instant matter was tried to the bench on February the 14th and the 15th, 1995. The case was then taken under advisement to enable this Court to further consider the testimony elicited and the exhibits received. Having now done so, this Court is prepared to rule.

In addition, plaintiffs claim that defendants intentionally misrepresented or fraudulently concealed the above-described pertinent facts in the Earnest Money Sales Agreement and that defendants failed to bargain with the plaintiffs in good faith and in accord with the rules of fair dealing.

1           Plaintiffs sought loss of benefit of the bargain  
2 damages, as well as punitive damages initially. The  
3 stipulated facts arrived at between the parties herein are  
4 accepted to the extent that they are material and to the  
5 extent that they are not modified by this Court's percep-  
6 tion of the evidence as follows.

7           The credible and persuasive evidence establishes,  
8 in this Court's view, as follows. Third-party defendants  
9 acquired the subject property in 1982. They made several  
10 modifications to the property by hiring contractors. In  
11 1983 third-party defendants hired a contractor and  
12 converted certain space into six additional rental rooms.  
13 Exhibit 33, stipulated facts 2, 11, 12 and 13. Third-party  
14 defendants thought that all work constructed and paid for  
15 would be done pursuant to both code and building permit  
16 regulations. Stipulated fact number 3. It was not until  
17 the work was completed that third-party defendants became  
18 aware that a building permit had not been obtained. It  
19 was not until January 1990, after the plaintiffs took  
20 possession, that third-party defendants became aware that  
21 there existed zoning and building code deficiencies.

22           Third-party defendants sold the property to the  
23 defendants on May 1, 1987, for \$540,000, stipulated  
24 facts 20 and 27, Exhibit 1, which consisted of 39 units.  
25 Stipulated fact 4. Third-party defendants did not disclose

1 the additional units to Salt Lake City, choosing to renew  
2 their business license by mail. Exhibit 3, stipulated  
3 facts 5 and 18.

4 The fees for licensing a 40-unit motel were more  
5 than they are for a 34-unit motel. Stipulated fact 19.

6 While third-party defendants owned the property,  
7 numerous inspections were conducted by the Salt Lake City  
8 and County Health Department, as well as the Salt Lake  
9 City Fire Department. Said inspections were satisfactory.  
10 Stipulated facts 9, 10, 22 and 30.

11 No notice of any deficiencies occurred until  
12 Lawrence Suggars, a trainee inspector, inspected in  
13 January 1990. Stipulated facts 15 and 16. The plaintiff  
14 took possession January 1, 1990, prior to closing. What  
15 they thought they were purchasing was a 40-unit motel  
16 which complied with all building codes and zoning  
17 requirements.

18 They met with the defendants mostly at the property  
19 approximately four times prior to closing and only inspected  
20 on the third occasion some four or five rooms, the boiler  
21 and laundry rooms. Stipulated facts 24 and 36. No third-  
22 party inspection was obtained, though the plaintiffs had  
23 every right to obtain such pursuant to paragraph B of the  
24 Earnest Money Sales Agreement. Stipulated fact 37.  
25 Defendants did not prohibit further inspections. Indeed,



1 as of at least January 1, 1990, some four days before  
2 closing, plaintiffs were in possession, stipulated fact 38,  
3 had all the keys and unfettered access to the premises.  
4 Stipulated fact 25.

5 No information was requested by the plaintiffs  
6 during these meetings with regard to parking, building  
7 inspections, construction history, et cetera. Stipulated  
8 fact 26. Moreover, the business license reflecting 34  
9 units approved for rental hung at all pertinent times on  
10 the wall in the office, even after the possession date of  
11 January 1, 1990, of the plaintiffs. Yet, that document  
12 was not examined by the plaintiffs until January 1 of 1990,  
13 which still, however, was some four days prior to closing.  
14 Stipulated fact 39.

15 Plaintiffs had executed an Earnest Money Sales  
16 Agreement to purchase the property as a represented 40-unit  
17 motel for some \$620,000 on November 16, 1989. Stipulated  
18 fact 31, Exhibit 14.

19 After Suggars's inspection in January of 1990,  
20 plaintiffs were advised of the deficiencies on or about  
21 the 12th of February, 1990. Stipulated facts 41, 42, 43,  
22 44 and 45, and Exhibits 2, 9, 15 and 29.

23 Plaintiffs obtained a parking variance at a cost of  
24 some \$2,500 in attorney's fees. Stipulated facts 52 and 48.  
25 They remodeled the deficient units to comply with code,

1 except for unit 35, which was permanently closed. Stipulated  
2 facts 50 and 51. Plaintiffs completely closed certain units  
3 during remodeling which was not required by Salt Lake City.  
4 Plaintiffs thereafter sold the property on January 5, 1994,  
5 during the pendency of this case for some \$850,000,  
6 240,000 more than their purchase price. Stipulated fact 53.

7 This Court is persuaded by the evidence, the credible  
8 evidence, that neither the defendants nor the third-party  
9 defendants were aware of any building or zoning violations,  
10 or particularly the effect or meaning of such violations.  
11 The defendants and third-party defendants speak broken  
12 English and their understanding of the effect of claimed  
13 violations, in this Court's view, is lacking.

14 Moreover, this Court is persuaded that the doctrine  
15 of merger as addressed in the defendant's and third-party  
16 defendant's trial briefs bars the claim of breach of  
17 warranties for the reasons specified in those briefs.

18 That leaves then the question of fraudulent misre-  
19 presentation. To establish a claim of fraudulent misrepre-  
20 sentation or concealment in a land sale transaction the  
21 plaintiffs must establish by clear and convincing evidence  
22 that representations were made concerning presently  
23 existing material facts which were false and which the  
24 representor knew to be false and/or made recklessly, knowing  
25 that he had insufficient information or knowledge upon which

1 to base such representation for the purpose of inducing the  
2 other party to act upon it and the other party indeed does  
3 act reasonably in ignorance of the falsity and relies on  
4 the false representation, to his injury.

5 Necessary to such a finding, as set forth in the  
6 cases of Maack versus Resource Design, 875 P.2d. 570,  
7 Court of Appeals 1994, and Schafir versus Harrigan, 245  
8 Utah Advanced Reports 15, Utah Appeals 1994, necessary to  
9 such a finding of fraudulent misrepresentation is clear  
10 and convincing evidence that the defendants and, in turn,  
11 the third-party defendants intentionally or actively  
12 concealed claimed defects. This must be shown in the face  
13 of establishing that the plaintiffs, after careful and  
14 reasonable inspection, would not have discovered said  
15 defects. This, plaintiffs have failed to establish.  
16 Plaintiffs have not established that they reasonably relied  
17 on the alleged false statements. The plaintiffs have failed  
18 to establish that they exercised reasonable diligence in  
19 verifying these alleged falsities.

20 For the foregoing reasons, this Court finds no  
21 cause of action on the plaintiff's Complaint and the  
22 third-party Complaint.

23 Reasonable attorney's fees are awarded to the  
24 defendants and the third-party defendants, the amount of  
25 which is to be determined by submission of affidavits

1 pursuant to Rule 4-501 of the Code of Judicial Adminis-  
2 tration.

3 I am somewhat concerned, given the identity --  
4 essential identity of role in this case between the  
5 defendants and the third-party defendants, that there not  
6 be duplication in claimed fees to be paid here. While it  
7 is true that a better posture of the case may well have  
8 been to name third-party defendants as defendants so that  
9 this issue was not as confused as it is, the fact is that  
10 is not the case, so I am confronted with the need to make  
11 a determination about fees to the defendants and then, in  
12 turn, fees to the third-party defendants, but I find no  
13 cause of action on either the Complaint or the third-party  
14 Complaint.

15 Mr. Shields, I want you to do the Findings of Fact,  
16 Conclusions of Law and Judgment, submit that to your  
17 colleagues for approval as to form.

18 Are there any questions, counsel?

19 MR. MITSUNAGA: Your Honor, may I inquire as to the  
20 basis for awarding the defendants attorney's fees in the  
21 matter? Is it pursuant to the contract or --

22 THE COURT: It's pursuant to the contract, at least  
23 at this stage. I am not committed in concrete, Mr.  
24 Mitsunaga, to making the award. My notion is that if  
25 there is a legitimate basis, and I presumed that there was

1 because all of you requested them during the trial, if  
2 there's a legitimate basis for the award of attorney's  
3 fees, then I will make a determination as to the reason-  
4 ableness thereof and to whom they're to be awarded.

5 However, if there is a contest as to the appropriate-  
6 ness of any award, then that may be addressed in the 4-501  
7 application.

8 MR. MITSUNAGA: Okay, so that the Court is saying  
9 there's still an issue as to the entitlement and then  
10 after entitlement, the amount.

11 THE COURT: I'm saying that while I am ruling that  
12 fees are awardable to the defendants and the third-party  
13 defendants, that's based simply upon the fact that  
14 everybody in this case sought them during the course of the  
15 trial and I therefore assumed that there was a provision  
16 providing for the same. If there's a dispute to that, then  
17 that can be addressed in the application under 4-501 for  
18 a determination of reasonableness.

19 MR. MITSUNAGA: Okay. That deals with the  
20 threshold issue of entitlement.

21 THE COURT: I'm not precluding you from claiming  
22 that they're not entitled. That's my point.

23 MR. MITSUNAGA: Okay.

24 THE COURT: All right. If there's nothing further,  
25 counsel, we'll be in recess.

(Whereupon, the proceedings were concluded.)

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Tab 6

APR 19 1995

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

---

SATSUDA, WAYNE TAKASHI	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910901751 CN
	:	DATE 04/18/95
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
OH, HASIN	:	COURT CLERK CLB
OH, MYUNG JA	:	
DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY.  
D. ATTY.

---

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION (OHS' MOTION FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW) DATED APRIL 11, 1995 AND NOTICE TO SUBMIT FOR DECISION (DEFENDANT OHS' VERIFIED APPLICATION FOR AWARD OF ATTORNEY'S FEES) DATED APRIL 11, 1995, THE COURT RULES AS FOLLOWS:

1. DEFENDANT OHS' MOTION FOR ENTRY OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IS GRANTED FOR THE REASONS SPECIFIED IN THE SUPPORTING MEMORANDA.

2. DEFENDANT OHS' VERIFIED APPLICATION FOR AWARD OF FEES, ETC. IS GRANTED FOR THE REASONS SPECIFIED IN THE SUPPORTING MEMORANDA.

3. THIS COURT DETERMINES THE FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND NECESSARY AND APPROVES THE SAME. THIS COURT IS UNABLE TO RULE ON THE REASONABLENESS OF CLAIMED FEES OF THIRD-PARTY DEFENDANTS UM AS NO DETAILED ANALYSIS FOR "PASS THROUGH" PURPOSES IS ON FILE.

4. COUNSEL FOR DEFENDANTS IS TO SUBMIT THE APPROPRIATE ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.



Case No: 910901751 CN

Certificate of Mailing

I certify that on the 18<sup>th</sup> day of April, 1995,

I sent by first class mail a true and correct copy of the  
attached document to the following:

JIMI MITSUNAGA  
Atty for Plaintiff  
731 EAST SOUTH TEMPLE  
SALT LAKE CITY UT 84102

JEFFREY WESTON SHIELDS  
Atty for Defendant  
39 MARKET STREET  
3RD FLOOR  
SALT LAKE CITY UT 84101-2104

STEPHEN R. SMITH  
Atty for Defendant  
50 WEST BROADWAY  
4TH FLOOR  
SALT LAKE CITY UT 84101-2006

District Court Clerk

By: C. Beverley

Deputy Clerk

Tab 7

MAY - 4 1995

THE COURT REPORTER

MAY 2 1995

SALT LAKE COUNTY

Submitted By:  
Jeffrey Weston Shields, (2948)  
PURSER & EDWARDS, L.L.C.  
39 Market Street, Third Floor  
Salt Lake City, Utah 84101-2104  
Telephone: (801) 532-3555  
Attorneys for Defendants and  
Third-Party Plaintiffs

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

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

V.

HASIN OH and MYUNG JA OH,  
his wife,

Defendants,

\*\*\*\*\*

HASIN OH AND MYUNG JA OH,  
his wife,

Third-Party Plaintiffs,

V.

KEE HONG UM and SHI JA UM,  
his wife,

Third-Party Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 910901751

Judge J. Dennis Frederick

Trial in this matter was conducted by the Court, sitting  
without a jury, on February 14 and 15, 1995. The Plaintiffs, Wayne  
Takashi Satsuda and Seon Sil Satsuda, were represented by Jimi

Mitsunaga. The Defendants and Third-Party Plaintiffs, Hasin Oh and Myung Ja Oh, were represented by Jeffrey Weston Shields and Lawrence R. Dingivan. The Third-Party Defendants, Kee Hong Um and Shi Ja Um, were represented by Stephen R. Smith, Jr. and Jerald D. McPhee. The Court, having heard the testimonial evidence presented at trial, having examined the documentary evidence, having examined the exhibits whose relevance and admissability were stipulated to by the parties prior to trial or ruled on by the Court during trial, and having reviewed the parties' Stipulated Statement of Undisputed Facts, now enters its findings of fact and conclusions of law pursuant to Utah Rule of Civil Procedure 52(a).

#### FINDINGS OF FACT

The Court makes the following findings with respect to factual matters at issue at the time of trial:

1. The Third-Party Defendants acquired the Capitol Motel ("Property") in 1982.
2. The Third-Party Defendants made several modifications to the Property by hiring contractors.
3. In 1983 the Third-Party Defendants hired a contractor and converted certain space on the premises of the Property into six additional rental rooms. The Third-Party Defendants thought that all work undertaken by the contractor to build the six additional

rooms and paid for by them would be done pursuant to all applicable codes and building permit regulations promulgated by Salt Lake City.

4. The Third-Party Defendants did not become aware that the construction of the six additional rental rooms had not been performed under a Salt Lake City building permit until after the construction was completed.

5. It was not until January 1990, after the Plaintiffs took possession of the property, that the Third-Party Defendants became aware that there existed zoning and building code deficiencies on the Property.

6. The Third-Party Defendants sold the property to the Defendants on May 1, 1987 for \$540,000.00 through execution of a Uniform Real Estate Contract. At that time, the Property consisted of 39 units.

7. The Third-Party Defendants did not disclose the existence of the additional rental units to Salt Lake City, and chose to renew their business license by mail.

8. The fees for licensing a 40-unit motel were more than they are for a 34-unit motel.

9. While the Third-Party Defendants owned the Property, numerous inspections were conducted by the Salt Lake City and

County Health Department as well as the Salt Lake City Fire Department. The results of these inspections were satisfactory.

10. No notice of any zoning or building code deficiencies on the property occurred until Lawrence Suggars, a trainee inspector, inspected the property in January 1990.

11. The Plaintiffs took possession of the Property on January 1, 1990, prior to closing.

12. At the time they took possession of the Property, the Plaintiffs thought they were purchasing a 40-unit motel which complied with all building codes and zoning requirements.

13. The Plaintiffs met with the Defendants, mostly on the Property, approximately four times prior to closing and inspected, on the third occasion, only four or five rental rooms, as well as the boiler and laundry rooms.

14. The Plaintiffs obtained no third-party inspection though they had every right to obtain such an inspection pursuant to paragraph B of the Earnest Money Sales Agreement of November 16, 1989.

15. The Defendants did not prohibit further inspection by the Plaintiffs.

16. As of at least January 1, 1990, some four days before closing, the Plaintiffs were in possession of the Property and had all the keys and unfettered access to the Property.

17. During their meetings with the Defendants prior to closing, the Plaintiffs requested no information from Defendants or Defendants' agents with regard to parking, building inspections, construction history and other matters.

18. The Property's business license, reflecting 34 units approved for rental, hung at all pertinent times on the wall in the Capitol Motel office, even after the Plaintiffs acquired possession of the Property on January 1, 1990.

19. The Plaintiffs did not examine the Property's business license until January 1, 1990, a date some four days prior to closing. On November 16, 1989, the Plaintiffs had executed an Earnest Money Sales Agreement to purchase the Property as a 40-unit motel for some \$620,000.00.

20. The sale of the Motel to the Plaintiffs by Defendants closed on January 5, 1990 by execution of closing documents which included an assignment to Plaintiffs of Third-Party Defendants' Uniform Real Estate Contract with Defendants

21. On February 12, 1990, the Plaintiffs were advised of the zoning and building code deficiencies disclosed by the Lawrence Suggars inspection of January 1990.

22. The Plaintiffs obtained a zoning variance for the Property's parking lot at a cost of approximately \$2,500.00 in attorney's fees.

23. The Plaintiffs remodeled deficient rental units on the Property to comply with applicable Salt Lake City codes except for unit 35 which was permanently closed. The Plaintiffs completely closed certain other rental units during remodeling, an action which was not required by Salt Lake City.

24. The Plaintiffs sold the Property on January 5, 1994, during the pendency of this case for some \$860,000.00, \$240,000.00 more than their purchase price.

25. Neither the Defendants nor the Third-Party Defendants were aware of any building or zoning violations, or particularly, the effect or meaning of such violations.

26. The Defendants and Third-Party Defendants speak broken English and their understanding of the effect of claimed violations is lacking. The facts contained in the parties' Statement of Stipulated Facts, dated February 13, 1995 are accepted by the Court and incorporated in the Court's Statement of Facts to the extent



that those facts are material to matters presented at trial and to the extent that those Statements of Fact are not modified by the immediately preceding enumerated Statements of Fact.

#### CONCLUSIONS OF LAW

In light of the Statements of Fact enumerated immediately above and the facts included in the parties' "Statement of Stipulated Facts" incorporated to the extent stated above, the Court makes the following conclusions of law:

1. The Doctrine of Merger as defined and illuminated in Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977), and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994) bars the Plaintiffs' cause of action for breach of warranty which was grounded in the provisions of the November 16, 1989 Earnest Money Sales Agreement. The Defendants' execution and delivery of a Warranty Deed to the Plaintiffs on or about January 5, 1990 constituted the Defendants' full performance of their contractual obligations to deliver title to the Property to the Plaintiffs. Delivery of the Warranty Deed extinguished all terms of the November 16, 1989 Earnest Money Sales Agreement and rendered those terms unenforceable.

2. Neither fraud nor the existence of collateral rights, both of which are exceptions to the Doctrine of Merger, preclude operation of that Doctrine in this case. The Plaintiffs fail to

present clear and convincing evidence that fraud tainted the execution of the Warranty Deed on or about January 5, 1990 and, in addition, the Plaintiffs fail to demonstrate that any of the obligations the Defendants incurred under the November 16, 1989 Earnest Money Sales Agreement were collateral to the obligation to convey title to the Property to the Plaintiffs. Accordingly, none of the obligations the Defendants incurred under the Earnest Money Sales Agreement survived delivery of the Warranty Deed to the Plaintiffs on January 5, 1990.

3. To establish their claim of fraudulent misrepresentation or fraudulent concealment in the land sale transaction between the Plaintiffs and the Defendants, the Plaintiffs were obliged to establish by clear and convincing evidence that the Defendants made representations concerning presently existing material facts which were false and which the Defendants knew to be false and/or made recklessly, in that the Defendants had insufficient information or knowledge upon which based those representations, yet the representations were made for the purpose of inducing the Plaintiffs to act upon them. In addition, the Plaintiffs were obliged to show that they did indeed act reasonably in ignorance of the falsity of the Defendants' representation and relied upon those false representations to their injury.

4. Under the holding of Maack v. Resource Design, 879 P.2d 570 (Utah App. 1994) and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), the Plaintiffs were obliged to demonstrate by clear and convincing evidence that the Defendants and, in turn, the Third-Party Defendants, intentionally or actively concealed claimed defects in the property. This showing must be made in conjunction with the showing by the Plaintiffs that, after careful and reasonable inspection, they would not have discovered the defects which they claim were intentionally or actively concealed from them by the Defendants.

5. The Plaintiffs failed to establish this showing by clear and convincing evidence.

6. In addition, the Plaintiffs did not establish by clear and convincing evidence that they reasonably relied on the allegedly false statements made by the defendants.

7. In addition, the Plaintiffs failed to establish that they exercised reasonable diligence in verifying the Defendants' allegedly false statements.

8. Because the Plaintiffs have failed to establish these essential elements of a claim of fraudulent misrepresentation or fraudulent concealment by clear and convincing evidence, the

Plaintiffs have failed to establish their cause of action against the Defendants.

9. For the same reasons, the Defendants have failed to establish their causes of action in their Third-Party Complaint.

10. Consequently, no cause of action is found on either the Complaint or the Third-Party Complaint.

11. Reasonable attorney's fees are awarded to the Defendants, the amount of which is to be determined by the submission of affidavits by the parties. Third-party Defendants' entitlement to attorney's fees, and liability therefore if awarded are reserved for further proceedings.

DATED this 2<sup>nd</sup> day of <sup>MAY</sup>~~April~~, 1995.

BY THE COURT:

/s/  
J. Dennis Frederick  
District Court Judge

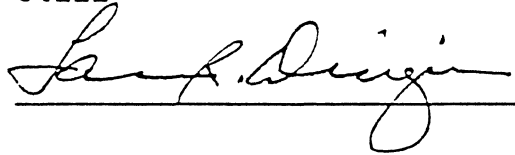
CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> day of February, 1995, I served a true and correct copy of the foregoing FINDINGS OF FACTS AND CONCLUSIONS OF LAW, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Stephen R. Smith, Esq.  
236 South 300 East  
Salt Lake City, Ut 84111

Jimi Mitsunaga, Esq.  
731 E. South Temple  
Salt Lake City, Ut 84102

Jerald D. McPhee, Esq.  
431 South 300 East, Suite 101  
Salt Lake City, Ut 84111

  
\_\_\_\_\_

Tab 8

Third Judicial District

MAY 2 1995

SALT LAKE COUNTY

Jeffrey Weston Shields, (2948)  
PURSER & EDWARDS, L.L.C.  
39 Market Street, Third Floor  
Salt Lake City, Utah 84101-2104  
Telephone: (801) 532-3555  
Attorneys for Defendants and  
Third-Party Plaintiffs

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

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

V.

HASIN OH and MYUNG JA OH,  
his wife,

Defendants,

\*\*\*\*\*

HASIN OH AND MYUNG JA OH,  
his wife,

Third-Party Plaintiffs,

V.

KEE HONG UM and SHI JA UM,  
his wife,

Third-Party Defendants.

:  
:  
: ORDER OF DISMISSAL OF  
:  
: COMPLAINT AND THIRD PARTY  
:  
: COMPLAINT AND JUDGMENT IN  
:  
: FAVOR OF DEFENDANT OHS  
:  
: AGAINST PLAINTIFF SATSUDAS  
:  
: FOR ATTORNEY'S FEES

Civil No. 910901751

Judge J. Dennis Frederick

The above captioned matter came before the Court, sitting without jury, for trial, the Honorable J. Dennis Frederick, District Court Judge, presiding, on February 14 and 15, 1995. Plaintiffs were represented by their counsel of record, Jimi Mitsunaga, Esq. Defendants and Third Party Plaintiffs were represented by their counsel of record, Jeffrey Weston Shields,

Esq. and Lawrence R. Dingivan, Esq. of and for Purser & Edwards, L.L.C. Third Party Defendants were represented by their counsel of record, Stephen R. Smith, Esq. of Mooney Associates and Jerold D. McPhee, Esq. The Court received evidence, heard the testimony of witnesses, and took the matter under advisement. On February 17, 1995, the Court rendered its Findings of Fact, Conclusions of Law and Decision from the bench. Subsequent to the February 17, 1995 decision, and pursuant to directions of the Court, the Defendants and Third Party Defendants filed their applications for award of attorney's fees upon which the Court rendered its decision by Minute Entry dated April 18, 1995. The Court, being duly advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law, it is now by the Court

ORDERED AS FOLLOWS:

1. The Complaint of Plaintiffs against Defendants Hasin Oh and Myung Ja Oh be and herewith is dismissed, with prejudice, on the merits, the Court finding no cause of action thereon.

2. The Third Party Complaint against Third Party Defendants Kee Hong Um and Shi Ja Um be and herewith is dismissed with prejudice, on the merits, the Court finding no cause of action thereon as a result of the Court finding no cause of action on the Complaint.

3. Defendants Hasin Oh and Myung Ja Oh are awarded their attorney's fees as requested against Plaintiffs Wayne Takashi



Satsuda and Seon Sil Satsuda, as specified below, the Court finding that the fees requested are reasonable and necessary and that an adequate basis in contract exists for such an award.

4. The Court denies the Third Party Defendants' Application for Attorney's Fees at this time, without prejudice, subject to further proceedings concerning that application.

BASED UPON THE FOREGOING, JUDGMENT IN FAVOR OF HASIN OH AND MYUNG JA OH AND AS AGAINST PLAINTIFFS WAYNE TAKASHI SATSUDA AND SEON SIL SATSUDA IS ENTERED AS FOLLOWS:

1. In the principal sum of \$44,959.86;
2. Interest shall accrue thereon until paid at the maximum post-judgment rate;
3. This judgment shall be augmented in the amount of reasonable costs and attorney's fees which may be incurred in the collection thereon as may be shown by competent affidavit.

DATED this 2<sup>nd</sup> day of ~~April~~<sup>MAY</sup>, 1995.

BY THE COURT

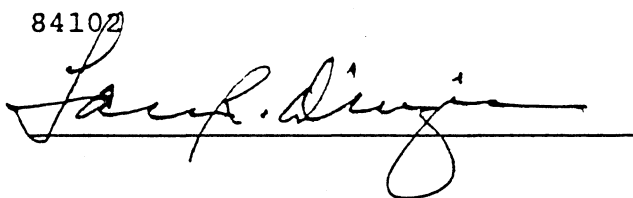
/s/  
J. Dennis Frederick  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of April, 1995, I served a true and correct copy of the foregoing ORDER OF DISMISSAL OF COMPLAINT AND THIRD PARTY COMPLAINT AND JUDGMENT IN FAVOR OF DEFENDANT OHS AGAINST PLAINTIFF SATSUDAS FOR ATTORNEY'S FEES, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Stephen R. Smith, Esq.  
MOONEY LAW FIRM  
50 West Broadway, Fourth Floor  
Salt Lake City, Ut 84101-2006

Jimi Mitsunaga, Esq.  
731 E. South Temple  
Salt Lake City, Ut 84102

A handwritten signature in cursive script, appearing to read "Stephen R. Smith", is written over a horizontal line.

Tab 9

Stephen R. Smith, Jr. #3015  
 Attorney for third party Defendants  
 Mooney Law Firm  
 50 West Broadway, 4th Floor  
 Salt Lake City, Utah 84101-2006  
 Telephone: (801)364-5635

FILED  
 MAY 1 11 51 AM '95  
 BY *John Nail*

**In the Third Judicial District Court  
 Salt Lake County, State of Utah**

	---oooOooo---	
Wayne Takashi Satsuda and	:	
Seon Sil Satsuda, his wife,	:	<b>Objection to Defendants'</b>
Plaintiffs,	:	<b>Findings of Fact and</b>
vs.	:	<b>Conclusions of Law, and</b>
	:	<b>Proposed Order of Dismissal</b>
Hasin Oh and Myung Ja Oh, his wife,	:	<b>and Judgment, and Request for</b>
Defendants,	:	<b>Clarification of Minute Entry</b>
=====	:	
	:	
Hasin Oh and Myung Ja Oh, his wife,	:	
third-party Plaintiffs,	:	
vs.	:	Case No. 910901751
	:	
Kee Hong Um and Shi Ja Um, his wife,	:	Judge Frederick
third-party Defendants.	:	
	---oooOooo---	

Comes now third party Defendants, Kee Hong Um and Shi Ja Um, represented by their attorney of record, Stephen R. Smith, Jr., who submit the following objections to paragraph 11 of the conclusions of law of Defendants' (Ohs) findings of fact and conclusions of law, and to paragraph four of Defendants' proposed Order of Dismissal of Complaint and Judgment in Favor of Defendant Ohs Against Plaintiff Satsudas for Attorney's fees. Additionally, third-party Defendants request the Court to clarify its minute entry of April 18, 1995 at paragraph 3 regarding the reasonableness of the attorney's fees claimed by third-party Defendants and how a detailed analysis for "pass through" purposes effects their contractual right to an award of attorneys fees against Defendants. Having no material dispute with Defendants' statement of

facts, the Ums propose one addition finding that third-party Defendants have incurred attorneys' fees and costs in the sum of \$56,083.60.

### **Facts**

1. On February 17, 1995, at the conclusion of the Court's bench ruling herein, Stephen R. Smith, Jr. and Jerold D. McPhee both submitted their most recent affidavits for attorneys fees for third-party Defendants. Both affidavits were submitted in accordance with the requirement of Rule 4-505, Code of Judicial Administration. Mr. McPhee's affidavit reflected reasonable attorney's fees in the sum of \$7,627.50 for 56.5 hours spent in the preparation and trial of this matter, and was accompanied by his invoice and a detailed billing sheet. Mr. Smith's affidavit reflected reasonable attorney's fees and costs in the sum of \$48,456.10 for 461 hours of work and \$2,356.10 in costs, and was accompanied by 70 pages of itemization of each time charge and cost. Total reasonable attorneys' fees in the sum of \$56,083.60 were affirmed and documented the very moment that the Court ruled to award them to third-party Defendants.

2. Neither Plaintiffs nor Defendants have challenged third-party Defendants' entitlement to an award of prevailing party reasonable attorneys fees against either or both of them pursuant to the provisions of Paragraph 15 of the Uniform Real Estate Contract entered into between the parties which provides:

Both parties agree that, should either party default in any of the covenants or agreements herein contained, the non-defaulting party or, should litigation be commenced, the prevailing party in litigation, shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the Property, or in pursuing any remedy provided hereunder or by applicable law.

3. Although Plaintiffs and Defendants have engaged in extensive argument regarding the reasonableness of Defendants' attorneys' fees, Plaintiffs have not challenged the reasonable of third-party Defendants' attorneys' fees; Defendants have raised third-party Defendants' attorneys' fees only as a justification of their own, being somewhat lower.

4. Paragraph 11 of Defendants' conclusions of law provides "Third-party Defendants' entitlement to attorneys' fees, and liability therefore if awarded are reserved for further proceedings." The quoted language was nowhere in any of the previous proposed findings of fact and conclusions of law submitted by Defendants, and was not in the Court's bench ruling of February 17, 1995.

5. On February 17, 1995 the Court ruled, commencing at page 7, line 23, of the Reporter's Transcript of Judge's Ruling: "Reasonable attorney's fees are awarded to the defendants and the third-Party defendants, the amount of which is to be determined by submission of affidavits pursuant to Rule 4-501 of the Code of Judicial Administration."

### **Argument**

The source for the confusion of Defendants' findings and order is in the Courts' minute entry of April 18, 1995, where it determines in paragraph 3 that

the fees sought by defendants are reasonable and necessary and approves the same. This Court is unable to rule on the reasonableness of claimed fees of third-party Defendants Um as no detailed analysis for "pass through" purposes is on file.

Defendant Ohs have drafted their documents to reflect that only their fees are approved, ignoring that third-party Defendants Ums are also defendants, and that most other references distinguish

between which defendant is being referred to, if a distinction is intended to be made. The more reasonable interpretation is that the fees sought by both defendants, including third-party Defendants, are found to be reasonable and are approved, but that a question remains as to which portion of third-party Defendants' fees may be passed through to Plaintiffs by Defendants.

Third-party Defendants are clearly entitled to an award of their attorney's fees as prevailing parties pursuant to the provisions of the real estate contract which governs the sale of the subject real estate. Their fees are fully documented and have not been contested by either opposing party. These fees should at least be awarded against Defendants and third-party Plaintiffs, whose action against third-party Defendants was fully non-suited.

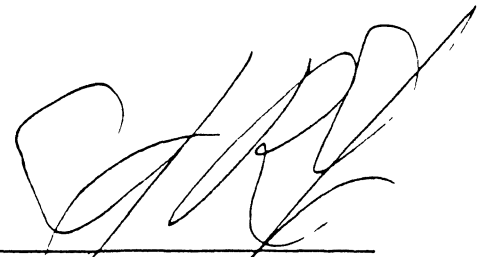
Defendants have prepared the findings and order to leave unresolved third-party Defendants' right to attorneys' fees along with the amount sought. To allow Defendants their fees as reasonable in the face of strong criticism by Plaintiffs while denying third-party Defendants their unopposed fees is inconsistent with the Court's own previous rulings, the contracts governing the parties, the caselaw, and logic. Third-party Defendants respectfully request the Court to clarify its minute entry regarding their attorneys' fees, the reasonableness of the amount sought, and what issues remain to be detailed for pass through analysis.

### **Conclusion**

Third-party Defendants are entitled by contract to an award of their reasonable attorneys' fees against Defendants as prevailing parties, which right the other parties have not opposed. The attorneys for third-party Defendants have submitted affidavits which conform to the all requirements for awards of attorneys fees and which are fully detailed to support the sum of

\$56,083.60 incurred by third-party Defendants as both reasonable and necessary to defend this action. Defendants should be ordered to prepare findings and an order both expressly entitling third-party Defendants to an award of their reasonable attorneys' fees incurred in defending this action, and finding that the amount sought, \$56,083.60 is approved and awarded as a judgment against third-party Plaintiffs.

Dated this 26th day of April, 1995.


  
\_\_\_\_\_  
Stephen R. Smith, Jr.  
Attorney for third party Defendants

#### **Certificate of Service by Mail**

I hereby certify that on the 26th day of April, 1995 a true and correct copy of the foregoing document was mailed, first class postage prepaid, to the offices of the attorneys for Plaintiffs and Defendants as follows:

Jimi Mitsunaga, Esq.  
731 East South Temple  
Salt Lake City, Utah 84102

Jeffrey Weston Shields, Esq.  
Purser & Edwards, P.C.  
39 Market Street, 3rd Floor  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
Stephen R. Smith, Jr.



Tab 10

Stephen R. Smith, Jr. #3015  
Attorney for third party Defendants  
Mooney Law Firm  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101-2006  
Telephone: (801)364-5635

FILED  
DISTRICT COURT

95 MAY 12 AM 9:43

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY


By Ann B. Hanks  
DEPUTY CLERK

In the Third Judicial District Court  
Salt Lake County, State of Utah

	—oooOooo—	
Wayne Takashi Satsuda and	:	
Seon Sil Satsuda, his wife,	:	
Plaintiffs,	:	Third-Party Defendants'
vs.	:	Motion to Open, Alter,
	:	or Amend Judgment
Hasin Oh and Myung Ja Oh, his wife,	:	
Defendants,	:	
=====	:	
Hasin Oh and Myung Ja Oh, his wife,	:	
third-party Plaintiffs,	:	
vs.	:	Case No. 910901751
Kee Hong Um and Shi Ja Um, his wife,	:	
third-party Defendants.	:	Judge Frederick
	—oooOooo—	

Comes now third party Defendants, Kee Hong Um and Shi Ja Um, represented by their attorney of record, Stephen R. Smith, Jr., who, pursuant to Rule 59, Utah Rules of Civil Procedure, moves the Court to open, alter, and amend its judgment entered on May 2, 1995 for the reasons stated in their Objection to Defendants' Findings of Fact and Conclusions of Law, and Proposed Order of Dismissal and Judgment, and Request for Clarification of Minute Entry previously filed herein. Oral argument is requested.

Dated this 10th day of May, 1995.

  
Stephen R. Smith, Jr.  
Attorney for third party Defendants

### Certificate of Service by Mail

I hereby certify that on the 10th day of May, 1995 a true and correct copy of the foregoing document was mailed, first class postage prepaid, to the offices of the attorneys for Plaintiffs and Defendants as follows

Jimi Mitsunaga, Esq  
731 East South Temple  
Salt Lake City, Utah 84102

Jeffrey Weston Shields, Esq  
Purser Edwards & Shields, L L C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340

  
\_\_\_\_\_  
Stephen R. Smith, Jr

Tab 11

MAY 11 1995

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

---

SATSUDA, WAYNE TAKASHI	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910901751 CN
	:	DATE 05/09/95
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
OH, HASIN	:	COURT CLERK CLB
OH, MYUNG JA	:	
DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY.  
D. ATTY.

---

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION ON SATSUDAS' AND UMS' OBJECTIONS TO OHS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED ORDER AND JUDGMENT DATED MAY 5, 1995, THE COURT RULES AS FOLLOWS:

1. THIS COURT IS PERSUADED THAT THIRD-PARTY DEFENDANTS ARE ENTITLED TO REASONABLE ATTORNEY'S FEES TO BE PAID BY PLAINTIFFS. THE OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE DENIED AND/OR SUSTAINED ACCORDINGLY.

2. COUNSEL FOR DEFENDANTS TO PREPARE THE APPROPRIATE ORDER.

Case No: 910901751 CN

Certificate of Mailing

I certify that on the 9<sup>th</sup> day of May, 1995,

I sent by first class mail a true and correct copy of the  
attached document to the following:

JIMI MITSUNAGA  
Atty for Plaintiff  
731 EAST SOUTH TEMPLE  
SALT LAKE CITY UT 84102

JEFFREY WESTON SHIELDS  
Atty for Defendant  
800 PARKSIDE TOWER  
215 SOUTH STATE STREET  
SALT LAKE CITY UT 84111

STEPHEN R. SMITH  
Atty for Defendant  
50 WEST BROADWAY  
4TH FLOOR  
SALT LAKE CITY UT 84101-2006

District Court Clerk

By: C. Bowley

Deputy Clerk

Tab 12

JUN 14 1995

THIRD JUDICIAL DISTRICT

JUN 9 1995

SALT LAKE COUNTY

By \_\_\_\_\_

Submitted By:  
Jeffrey Weston Shields, (2948)  
PURSER EDWARDS & SHIELDS, L.L.C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340  
Telephone: (801) 532-3555  
Attorneys for Defendants and  
Third-Party Plaintiffs

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

WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, his wife,

Plaintiffs,

V.

HASIN OH and MYUNG JA OH,  
his wife,

Defendants,

\*\*\*\*\*

HASIN OH AND MYUNG JA OH,  
his wife,

Third-Party Plaintiffs,

V.

KEE HONG UM and SHI JA UM,  
his wife,

Third-Party Defendants.

FIRST AMENDED FINDINGS  
OF FACT AND CONCLUSIONS  
OF LAW

Civil No. 910901751

Judge J. Dennis Frederick

Trial in this matter was conducted by the Court, sitting  
without a jury, on February 14 and 15, 1995. The Plaintiffs, Wayne  
Takashi Satsuda and Seon Sil Satsuda, were represented by Jimi



Mitsunaga. The Defendants and Third-Party Plaintiffs, Hasin Oh and Myung Ja Oh, were represented by Jeffrey Weston Shields and Lawrence R. Dingivan. The Third-Party Defendants, Kee Hong Um and Shi Ja Um, were represented by Stephen R. Smith, Jr. and Jerold D. McPhee. The Court, having heard the testimonial evidence presented at trial, having examined the documentary evidence, having examined the exhibits whose relevance and admissability were stipulated to by the parties prior to trial or ruled on by the Court during trial, and having reviewed the parties' Stipulated Statement of Undisputed Facts, and having considered and ruled upon certain post-trial motions concerning the form of orders and award of attorney's fees now enters its findings of fact and conclusions of law pursuant to Utah Rule of Civil Procedure 52(a).

#### FINDINGS OF FACT

The Court makes the following findings with respect to factual matters at issue at the time of trial:

1. The Third-Party Defendants acquired the Capitol Motel ("Property") in 1982.
2. The Third-Party Defendants made several modifications to the Property by hiring contractors.
3. In 1983 the Third-Party Defendants hired a contractor and converted certain space on the premises of the Property into six

additional rental rooms. The Third-Party Defendants thought that all work undertaken by the contractor to build the six additional rooms and paid for by them would be done pursuant to all applicable codes and building permit regulations promulgated by Salt Lake City.

4. The Third-Party Defendants did not become aware that the construction of the six additional rental rooms had not been performed under a Salt Lake City building permit until after the construction was completed.

5. It was not until January 1990, after the Plaintiffs took possession of the property, that the Third-Party Defendants became aware that there existed zoning and building code deficiencies on the Property.

6. The Third-Party Defendants sold the property to the Defendants on May 1, 1987 for \$540,000.00 through execution of a Uniform Real Estate Contract. At that time, the Property consisted of 39 units.

7. The Third-Party Defendants did not disclose the existence of the additional rental units to Salt Lake City, and chose to renew their business license by mail.

8. The fees for licensing a 40-unit motel were more than they are for a 34-unit motel.

9. While the Third-Party Defendants owned the Property, numerous inspections were conducted by the Salt Lake City and County Health Department as well as the Salt Lake City Fire Department. The results of these inspections were satisfactory.

10. No notice of any zoning or building code deficiencies on the property occurred until Lawrence Suggars, a trainee inspector, inspected the property in January 1990.

11. The Plaintiffs took possession of the Property on January 1, 1990, prior to closing.

12. At the time they took possession of the Property, the Plaintiffs thought they were purchasing a 40-unit motel which complied with all building codes and zoning requirements.

13. The Plaintiffs met with the Defendants, mostly on the Property, approximately four times prior to closing and inspected, on the third occasion, only four or five rental rooms, as well as the boiler and laundry rooms.

14. The Plaintiffs obtained no third-party inspection though they had every right to obtain such an inspection pursuant to paragraph B of the Earnest Money Sales Agreement of November 16, 1989.

15. The Defendants did not prohibit further inspection by the Plaintiffs.

16. As of at least January 1, 1990, some four days before closing, the Plaintiffs were in possession of the Property and had all the keys and unfettered access to the Property.

17. During their meetings with the Defendants prior to closing, the Plaintiffs requested no information from Defendants or Defendants' agents with regard to parking, building inspections, construction history and other matters.

18. The Property's business license, reflecting 34 units approved for rental, hung at all pertinent times on the wall in the Capitol Motel office, even after the Plaintiffs acquired possession of the Property on January 1, 1990.

19. The Plaintiffs did not examine the Property's business license until January 1, 1990, a date some four days prior to closing. On November 16, 1989, the Plaintiffs had executed an Earnest Money Sales Agreement to purchase the Property as a 40-unit motel for some \$620,000.00.

20. The sale of the Motel to the Plaintiffs by Defendants closed on January 5, 1990 by execution of closing documents which included an assignment to Plaintiffs of Third-Party Defendants' Uniform Real Estate Contract with Defendants

21. On February 12, 1990, the Plaintiffs were advised of the zoning and building code deficiencies disclosed by the Lawrence Suggars inspection of January 1990.

22. The Plaintiffs obtained a zoning variance for the Property's parking lot at a cost of approximately \$2,500.00 in attorney's fees.

23. The Plaintiffs remodeled deficient rental units on the Property to comply with applicable Salt Lake City codes except for unit 35 which was permanently closed. The Plaintiffs completely closed certain other rental units during remodeling, an action which was not required by Salt Lake City.

24. The Plaintiffs sold the Property on January 5, 1994, during the pendency of this case for some \$860,000.00, \$240,000.00 more than their purchase price.

25. Neither the Defendants nor the Third-Party Defendants were aware of any building or zoning violations, or particularly, the effect or meaning of such violations.

26. The Defendants and Third-Party Defendants speak broken English and their understanding of the effect of claimed violations is lacking. The facts contained in the parties' Statement of Stipulated Facts, dated February 13, 1995 are accepted by the Court and incorporated in the Court's Statement of Facts to the extent

that those facts are material to matters presented at trial and to the extent that those Statements of Fact are not modified by the immediately preceding enumerated Statements of Fact.

#### CONCLUSIONS OF LAW

In light of the Statements of Fact enumerated immediately above and the facts included in the parties' "Statement of Stipulated Facts" incorporated to the extent stated above, the Court makes the following conclusions of law:

1. The Doctrine of Merger as defined and illuminated in Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977), and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994) bars the Plaintiffs' cause of action for breach of warranty which was grounded in the provisions of the November 16, 1989 Earnest Money Sales Agreement. The Defendants' execution and delivery of a Warranty Deed to the Plaintiffs on or about January 5, 1990 constituted the Defendants' full performance of their contractual obligations to deliver title to the Property to the Plaintiffs. Delivery of the Warranty Deed extinguished all terms of the November 16, 1989 Earnest Money Sales Agreement and rendered those terms unenforceable.

2. Neither fraud nor the existence of collateral rights, both of which are exceptions to the Doctrine of Merger, preclude operation of that Doctrine in this case. The Plaintiffs fail to

present clear and convincing evidence that fraud tainted the execution of the Warranty Deed on or about January 5, 1990 and, in addition, the Plaintiffs fail to demonstrate that any of the obligations the Defendants incurred under the November 16, 1989 Earnest Money Sales Agreement were collateral to the obligation to convey title to the Property to the Plaintiffs. Accordingly, none of the obligations the Defendants incurred under the Earnest Money Sales Agreement survived delivery of the Warranty Deed to the Plaintiffs on January 5, 1990.

3. To establish their claim of fraudulent misrepresentation or fraudulent concealment in the land sale transaction between the Plaintiffs and the Defendants, the Plaintiffs were obliged to establish by clear and convincing evidence that the Defendants made representations concerning presently existing material facts which were false and which the Defendants knew to be false and/or made recklessly, in that the Defendants had insufficient information or knowledge upon which based those representations, yet the representations were made for the purpose of inducing the Plaintiffs to act upon them. In addition, the Plaintiffs were obliged to show that they did indeed act reasonably in ignorance of the falsity of the Defendants' representation and relied upon those false representations to their injury.

4. Under the holding of Maack v. Resource Design, 879 P.2d 570 (Utah App. 1994) and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), the Plaintiffs were obliged to demonstrate by clear and convincing evidence that the Defendants and, in turn, the Third-Party Defendants, intentionally or actively concealed claimed defects in the property. This showing must be made in conjunction with the showing by the Plaintiffs that, after careful and reasonable inspection, they would not have discovered the defects which they claim were intentionally or actively concealed from them by the Defendants.

5. The Plaintiffs failed to establish this showing by clear and convincing evidence.

6. In addition, the Plaintiffs did not establish by clear and convincing evidence that they reasonably relied on the allegedly false statements made by the defendants.

7. In addition, the Plaintiffs failed to establish that they exercised reasonable diligence in verifying the Defendants' allegedly false statements.

8. Because the Plaintiffs have failed to establish these essential elements of a claim of fraudulent misrepresentation or fraudulent concealment by clear and convincing evidence, the



Plaintiffs have failed to establish their cause of action against the Defendants.

9. For the same reasons, the Defendants have failed to establish their causes of action in their Third-Party Complaint.

10. Consequently, no cause of action is found on either the Complaint or the Third-Party Complaint.

11. Reasonable attorney's fees are awarded to the Defendants, the amount of which is to be determined by the submission of affidavits by the parties.

12. Third-Party Defendants are entitled to an award of their reasonable attorney's fees. The Court concludes that the Third Party case was and is a necessary step taken by Defendants to defend the Complaint and the dismissal of the Third Party Complaint is a direct result of dismissal of the Complaint. Consequently, the Court finds and concludes that Third Party Defendants' attorneys fees are to be passed through to and awarded directly against Plaintiffs. The amount of Third-Party Defendants' Fees shall be determined by submission of affidavits and in accordance with Rule 4-505, Utah Code of Judicial Administration.

DATED this 9<sup>th</sup> day of ~~May~~<sup>June</sup>, 1995.

BY THE COURT:

/s/  
J. Dennis Frederick  
District Court Judge

Tab 13

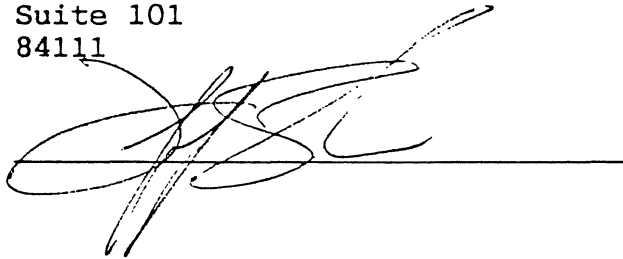
CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of May, 1995, I served a true and correct copy of the foregoing **FIRST AMENDED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Stephen R. Smith, Esq.  
236 South 300 East  
Salt Lake City, Ut 84111

Jimi Mitsunaga, Esq.  
731 E. South Temple  
Salt Lake City, Ut 84102

Jerold D. McPhee, Esq.  
431 South 300 East, Suite 101  
Salt Lake City, Ut 84111

A handwritten signature in black ink, appearing to be "J. McPhee", is written over a horizontal line.

Tab 14

Tab 15

JUN 14 1995

JUN 9 1995

Jeffrey Weston Shields, (2948)  
PURSER EDWARDS & SHIELDS, L.L.C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340  
Telephone: (801) 532-3555  
Attorneys for Defendants and  
Third-Party Plaintiffs

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

-----

WAYNE TAKASHI SATSUDA and	:	FIRST AMENDED
SEON SIL SATSUDA, his wife,	:	ORDER OF DISMISSAL OF
	:	COMPLAINT AND THIRD PARTY
Plaintiffs,	:	COMPLAINT AND JUDGMENT IN
	:	FAVOR OF DEFENDANT OHS
V.	:	AGAINST PLAINTIFF SATSUDAS
	:	FOR ATTORNEY'S FEES
	:	
HASIN OH and MYUNG JA OH,	:	
his wife,	:	
	:	
Defendants,	:	
*****	:	
	:	
HASIN OH AND MYUNG JA OH,	:	Civil No. 910901751
his wife,	:	
	:	
Third-Party Plaintiffs,	:	Judge J. Dennis Frederick
	:	
V.	:	
	:	
KEE HONG UM and SHI JA UM,	:	
his wife,	:	
	:	
Third-Party Defendants.	:	

-----

The above captioned matter came before the Court, sitting without jury, for trial, the Honorable J. Dennis Frederick, District Court Judge, presiding, on February 14 and 15, 1995. Plaintiffs were represented by their counsel of record, Jimi Mitsunaga, Esq. Defendants and Third Party Plaintiffs were

represented by their counsel of record, Jeffrey Weston Shields, Esq. and Lawrence R. Dingivan, Esq. of and for Purser & Edwards, L.L.C. Third Party Defendants were represented by their counsel of record, Stephen R. Smith, Esq. of Mooney Associates and Jerold D. McPhee, Esq. The Court received evidence, heard the testimony of witnesses, and took the matter under advisement. On February 17, 1995, the Court rendered its Findings of Fact, Conclusions of Law and Decision from the bench. Subsequent to the February 17, 1995 decision, and pursuant to directions of the Court, the Defendants and Third Party Defendants filed their applications for award of attorney's fees upon which the Court rendered its decision by Minute Entry dated April 18, 1995. The Court also considered and ruled upon other post-trial motions concerning the form of orders and Third Party Defendants' attorney's fees. The Court, being duly advised in the premises, and having heretofore entered its First Amended Findings of Fact and Conclusions of Law, it is now by the Court

ORDERED AS FOLLOWS:

1. The Complaint of Plaintiffs against Defendants Hasin Oh and Myung Ja Oh be and herewith is dismissed, with prejudice, on the merits, the Court finding no cause of action thereon.

2. The Third Party Complaint against Third Party Defendants Kee Hong Um and Shi Ja Um be and herewith is dismissed with prejudice, on the merits, the Court finding no cause of action

thereon as a result of the Court finding no cause of action on the Complaint.

3. Defendants Hasin Oh and Myung Ja Oh are awarded their attorney's fees as requested against Plaintiffs Wayne Takashi Satsuda and Seon Sil Satsuda, as specified below, the Court finding that the fees requested are reasonable and necessary and that an adequate basis in contract exists for such an award.

4. The Court awards the Third Party Defendants' reasonable attorney's fees at this time subject to further proceedings concerning the amount to be awarded which shall be the subject of a further order and judgment.

BASED UPON THE FOREGOING, JUDGMENT IN FAVOR OF HASIN OH AND MYUNG JA OH AND AS AGAINST PLAINTIFFS WAYNE TAKASHI SATSUDA AND SEON SIL SATSUDA IS ENTERED AS FOLLOWS:

1. In the principal sum of \$44,959.86;
2. Interest shall accrue thereon until paid at the maximum post-judgment rate;
3. This judgment shall be augmented in the amount of reasonable costs and attorney's fees which may be incurred in the collection thereon as may be shown by competent affidavit.

DATED this 9th day of ~~May~~<sup>June</sup>, 1995.

BY THE COURT

/s/  
J. Dennis Frederick  
District Court Judge

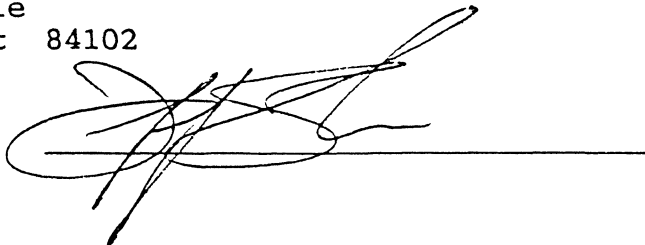


CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of May, 1995, I served a true and correct copy of the foregoing ORDER OF DISMISSAL OF COMPLAINT AND THIRD PARTY COMPLAINT AND JUDGMENT IN FAVOR OF DEFENDANT OHS AGAINST PLAINTIFF SATSUDAS FOR ATTORNEY'S FEES, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Stephen R. Smith, Esq.  
MOONEY LAW FIRM  
50 West Broadway, Fourth Floor  
Salt Lake City, Ut 84101-2006

Jimi Mitsunaga, Esq.  
731 E. South Temple  
Salt Lake City, Ut 84102

A handwritten signature in black ink, appearing to be "Jimi Mitsunaga", is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

Tab 16

JUN 14 1995

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

---

SATSUDA, WAYNE TAKASHI	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910901751 CN
	:	DATE 06/09/95
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
OH, HASIN	:	COURT CLERK CLB
OH, MYUNG JA	:	
DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY.  
D. ATTY.

---

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION DATED JUNE 7, 1995 AND NOTICE TO SUBMIT FOR DECISION THIRD-PARTY DEFENDANTS' MOTION TO OPEN, ALTER, OR AMEND JUDGMENT AND PLAINTIFFS' OBJECTION TO DEFENDANTS' AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED JUNE 8, 1995, THE COURT RULES AS FOLLOWS:

1. PLAINTIFFS' OBJECTION TO AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND JUDGMENT IS DENIED FOR THE REASONS SPECIFIED IN THE MEMORANDUM IN OPPOSITION.

2. THE AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND JUDGMENT ARE EXECUTED JUNE 9, 1995.

3. THIRD-PARTY DEFENDANTS' MOTION TO OPEN, ETC. IS GRANTED TO THE EXTENT THAT JUDGMENT IS AWARDED THIRD-PARTY DEFENDANTS AGAINST PLAINTIFFS FOR FEES IN THE AMOUNT OF \$56,126.77 FOR THE REASONS SPECIFIED IN THE SUPPORTING MEMORANDA.

4. COUNSEL FOR THIRD-PARTY DEFENDANTS TO PREPARE SUPPLEMENTAL PERTINENT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER & JUDGMENT.

Case No: 910901751 CN

Certificate of Mailing

I certify that on the 12<sup>th</sup> day of June, 1995,

I sent by first class mail a true and correct copy of the  
attached document to the following:

JIMI MITSUNAGA  
Atty for Plaintiff  
731 EAST SOUTH TEMPLE  
SALT LAKE CITY UT 84102

JEFFREY WESTON SHIELDS  
Atty for Defendant  
800 PARKSIDE TOWER  
215 SOUTH STATE STREET  
SALT LAKE CITY UT 84111

STEPHEN R. SMITH  
Atty for Defendant  
50 WEST BROADWAY  
4TH FLOOR  
SALT LAKE CITY UT 84101-2006

District Court Clerk

By:

C. Bowerley  
Deputy Clerk

Tab 17

JIMI MITSUNAGA #2279  
Attorney for the Plaintiffs  
731 East South Temple  
Salt lake City, UT 84102-1221

Telephone: (801) 322-3551  
Facsimile: (801) 322-3554

FILED  
COURT  
95 JUN -5 PM 4:06  
CLERK OF COURT  
BY \_\_\_\_\_

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

=====

WAYNE TAKASHI SATSUDA and )  
SEON SIL SATSUDA, his wife, )

Plaintiffs, - *Appellants* )

v. )

HASIN OH and HYUNG JA OH, )  
his wife, )

Defendants. *Appellee* )

HASIN OH and MYUNG JA OH, )  
his wife, )

Third Party Plaintiffs, )

v.. )

KEE HONG UM and SHI JA UM, )  
his wife, )

Third Party Defendants. )  
=====

NOTICE OF APPEAL

Civil No. 910901751

Judge J. Dennis Frederick

1. Notice is hereby given that the plaintiffs and appellants, Wayne Takashi Satsuda and Seon Sil Satsuda, through Jimi Mitsunaga, attorney for the plaintiffs and appellants, appeal to the Utah Court of Appeal the final judgment of the Honorable J. Dennis Frederick entered in this matter on May 5, 1995.

2. The appeal is taken from the entire judgment.

DATED June 5, 1995.

---

JIMI MITSUNAGA  
Attorney for Plaintiffs and Appellant

**MAILING CERTIFICATION**

MAILED A COPY of the foregoing Notice of Appeal this 5 day of  
June, 1995 to the attorneys for the Defendants and Third Party  
Plaintiffs and Third Party Defendants, respectively, at:

MR. JEFFREY WESTON SHIELDS  
PURSER & EDWARDS  
ATTORNEYS AT LAW  
89090 PARKSIDE TOWER  
215 SOUTH STATE STREET  
SALT LAKE CITY, UT 84111-2340

MR. STEVEN R. SMITH, ESQ.  
ATTORNEY AT LAW  
MOONEY LAW FIRM  
50 WEST BROADWAY, FOURTH FLOOR  
SALT LAKE CITY, UT 84101-2006

---

Tab 18



JUL 11 1995

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

---

SATSUDA, WAYNE TAKASHI	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910901751 CN
	:	DATE 07/07/95
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
OH, HASIN	:	COURT CLERK CLB
OH, MYUNG JA	:	
DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY.  
D. ATTY.

---

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION THIRD-PARTY DEFENDANTS' PROPOSED SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF, THIRD-PARTY DEFENDANTS' ATTORNEYS' FEES AWARDED AGAINST PLAINTIFFS DATED JULY 7, 1995, THE COURT RULES AS FOLLOWS:

1. PLAINTIFFS' OBJECTION TO THIRD-PARTY DEFENDANTS' PROPOSED SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, ETC. IS DENIED FOR THE REASONS SPECIFIED IN THE OPPOSING MEMORANDA.

2. THE SUBMITTED SUPPLEMENTAL JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW, ETC. ARE EXECUTED JULY 7, 1995.

Case No: 910901751 CN

Certificate of Mailing

I certify that on the 7<sup>th</sup> day of July, 1995,  
I sent by first class mail a true and correct copy of the  
attached document to the following:

JIMI MITSUNAGA  
Atty for Plaintiff  
731 EAST SOUTH TEMPLE  
SALT LAKE CITY UT 84102

JEFFREY WESTON SHIELDS  
Atty for Defendant  
800 PARKSIDE TOWER  
215 SOUTH STATE STREET  
SALT LAKE CITY UT 84111

STEPHEN R. SMITH  
Atty for Defendant  
50 WEST BROADWAY  
4TH FLOOR  
SALT LAKE CITY UT 84101-2006

District Court Clerk

By: C. Beverley  
Deputy Clerk

Tab 19

JIMI MITSUNAGA #2279  
Attorney for the Plaintiffs  
731 East South Temple  
Salt Lake City, UT 84102-1221

Telephone: (801) 322-3551  
Facsimile: (801) 322-3554

FILED  
DISTRICT COURT

95 JUL 10 PM 1:34

CLERK OF DISTRICT COURT

BY \_\_\_\_\_  
DEPUTY CLERK

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

=====

WAYNE TAKASHI SATSUDA and )  
SEON SIL SATSUDA, his wife. )

Plaintiffs and Appellants. )

V.. )

HASIN OH and HYUNG JA OH, )  
his wife, )

Defendants and Appellees )

HASIN OH and MYUNG JA OH, )  
his wife, )

Third Party Plaintiffs. )

V. )

KEE HONG UM and SHI JA UM. )  
his wife, )

Third Party Defendants. )

=====

AMENDED NOTICE OF  
APPEAL

Civil No. 910901751


Judge J. Dennis Frederick

1. Amended Notice of Appeal: Notice is hereby given that the plaintiff and appellants, Wayne Takashi Satsuda and Seon Sil Satsuda, his wife, through Jimi Mitsunaga, attorney, appeals to the Utah Court of Appeals the final judgment of the Honorable J. Dennis Frederick entered as the First Amended Order of Dismissal of Complaint and Third Party Complaint and judgment in favor of the defendant against the plaintiffs, Satsudas, for attorney's fees rendered on June 9, 1995.

2. The first Notice of Appeal was filed on June 5, 1995, appealing the judgment rendered on May 5, 1995.

3. The appeal costs bond has been duly posted with the Clerk of the Court.
4. The Trial Judge has entered a minute entry dated June 9, 1995 wherein the Court instructed the Third Party Defendant to prepare a Supplemental Order of Dismissal on the issue of the Third Party Defendants' Attorney's Fees.
5. The Supplemental Order has not yet been executed by the Court.
6. The plaintiffs/appellants desire to pursue their rights to appeal on all prior judgments rendered by the Trial Court in the above entitled matter.

Dated this 10 day of July, 1995.

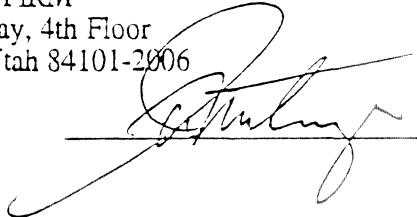
  
JIM MITSUNAGA  
Attorney for the plaintiffs/appellants

#### MAILING CERTIFICATE

MAILED a copy of the foregoing Amended Notice of Appeal this 10 day of July, 1995 by U. S. mail, postage prepaid to the attorneys for the defendant/appellees and Third Party defendants at:

Mr. Jeffrey Weston Shields, Esq.  
Attorney for the Defendants  
PURSER & EDWARDS, L.L.C.  
8900 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340

Mr. Stephen R. Smith, Jr.  
Attorney for Third Party Defendants  
MOONEY LAW FIRM  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101-2006



JUL 7- 1995

By C. Bauer SAL-BAKE COMPANY

conclusions of law which shall be supplemental to the first amended findings of fact and conclusions of law already signed and entered herein.

### **Supplemental Findings of Fact**

1. With the dismissal of third party Plaintiffs' action against them with prejudice, third party Defendants have prevailed against third party Plaintiffs.

2. The Uniform Real Estate Contract entered into by third party Defendants as Sellers and third party Plaintiffs as Buyers, and later assumed by Plaintiffs, provides in paragraph 15 that "the prevailing party in litigation, shall be entitled to all costs and expenses, including a reasonable attorney's fee" for pursuing any remedy provided by the Contract "or by applicable law."

3. The Uniform Real Estate Contract entered into by third party Defendants as sellers and third party Plaintiffs as buyers, and later assumed by Plaintiffs, provides in paragraph 12, regarding expenses of the property, that ". . . Buyer agrees to repay Seller upon demand all such sums so advanced and paid by Seller together with interest thereon from date of payment of said sums at the rate of the greater of (1%) or one percent (1.0%) per month until paid . . ."

4. Paragraph 3b of the Assignment of the Uniform Real Estate Contract obligates the Plaintiffs, as assignees, to hold harmless the Defendants, as assignors, from "any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees."

5. Third party Defendants' costs and attorneys fees necessarily and reasonably incurred to defend against Defendants' third party action were "costs, claims, and demands" upon

Defendants arising by reason of an act or omission of Plaintiffs, to wit: this action initiated by Plaintiffs and requiring commencement of the third party action.

6. On February 17, 1995 Stephen R. Smith, Jr. and Jerold D. McPhee each submitted affidavits and billing records in support of costs and reasonable attorneys fees in the sum of fifty-six thousand one hundred twenty-six dollars and seventy-seven cents (\$56,126.77) necessarily incurred by third party Defendants in the defense of this matter. Concurrently, copies of these affidavits and supporting records were hand-delivered to opposing counsel.

7. Neither opposing counsel for Plaintiffs nor Defendants and third party Plaintiffs have submitted any evidence or argument disputing the reasonableness of the amount of fees sought or the nature of the work done to earn these fees.

8. The nature of the work performed by the attorneys for third party Defendants in this matter was prolonged and reasonably complicated.

9. The number of hours spent to prosecute the claim to judgment, in excess of 516, are substantiated by the billing records submitted with the affidavits and have not been contested by either opposing party.

10. The fees sought are reasonable for comparable legal services, being within a few thousand dollars of the fees awarded Defendants and third party Plaintiffs.

11. Based upon the undisputed and uncontroverted evidence on record before the Court, as of February 17, 1995, third party Defendants incurred necessary and reasonable costs and attorneys fees in the sum of fifty-six thousand one hundred twenty-six dollars and seventy-seven cents (\$56,126.77).



### **Supplemental Conclusions of Law**

1. Third party Defendants' attorneys fees affidavits satisfy each of the requirements of Rule 4-505 of the Code of Judicial Administration regarding the legal basis of the award, the nature of the work performed by the attorneys, the number of hours spent to prosecute the claim to judgment, and in affirming the reasonableness of the fees for comparable legal services.

2. Pursuant to paragraph 15 of the uniform real estate contract, third party Defendants are entitled to an award against Defendants and third party Plaintiffs of all their costs and reasonable attorneys fees incurred in defending this action.

3. Pursuant to their Assignment of Contract and hold harmless agreement with Plaintiffs, Defendants and third party Plaintiffs are entitled to an award of the fees incurred by third party Defendants as a cost to be assigned directly against Plaintiffs.

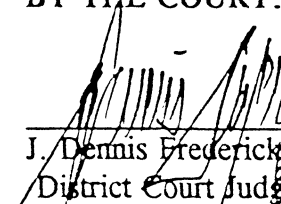
4. By the contracts governing their respective rights and obligations in the subject property, third party Defendants are entitled to recover judgment directly against Plaintiffs, jointly and severally, for their costs and attorneys fees reasonably incurred in the sum of fifty-six thousand one hundred twenty-six dollars and seventy-seven cents (\$56,126.77).

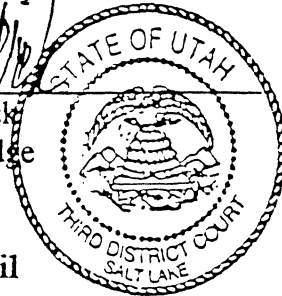
5. Said attorneys fees are an obligation created under the Uniform Real Estate Contract entered into between the parties, and as such are an expense of the property subject to accrual of contract interest at the rate of one percent (1%) per month until paid.

6. And it is further concluded that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

Dated this 7-11 day of July, 1995.

BY THE COURT:

  
J. Dennis Frederick  
District Court Judge

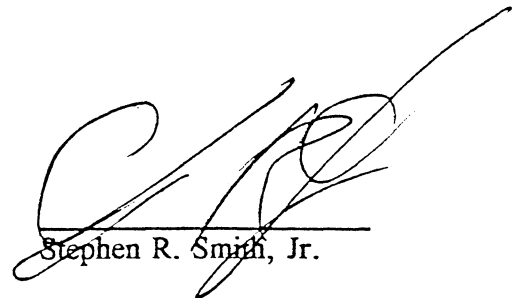


**Certificate of Service by Mail**

I hereby certify that on the 19th day of June, 1995 a true and correct copy of the foregoing document was mailed, first class postage prepaid, to the offices of the attorneys for Plaintiffs and Defendants as follows:

Jimi Mitsunaga, Esq.  
731 East South Temple  
Salt Lake City, Utah 84102

Jeffrey Weston Shields, Esq.  
Purser Edwards & Shields, L.L.C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340

  
Stephen R. Smith, Jr.

Tab 20

Stephen R. Smith, Jr. #3015  
 Attorney for third party Defendants  
 C/O Mooney Law Firm  
 50 West Broadway, 4th Floor  
 Salt Lake City, Utah 84101-2006  
 Telephone: (801)364-5635

**JUDGEMENT**

FILED JUL 7 1995  
 Third Judicial District

JUL 7 1995

By C. Sawyer  
 SALT LAKE COUNTY  
 CLERK

In the Third Judicial District Court  
 Salt Lake County, State of Utah

	---	oooOooo---	
Wayne Takashi Satsuda and	:		
Seon Sil Satsuda, his wife,	:		
Plaintiffs,	:	Supplemental Judgment of	
vs.	:	of Third Party Defendants'	
	:	Attorneys' Fees Awarded	
	:	Against Plaintiffs	
Hasin Oh and Myung Ja Oh, his wife,	:		
Defendants,	:		
=====	:	2201353	
	:	7-13-95	
Hasin Oh and Myung Ja Oh, his wife,	:		
third-party Plaintiffs,	:	8:02 am	
vs.	:	Case No. 910901751	
	:		
Kee Hong Um and Shi Ja Um, his wife,	:	Judge Frederick	
third-party Defendants.	:		
	:		
		---	oooOooo---

219 9943

Third Party Defendants' motion to open, alter, or amend judgment regarding their attorneys' fees came on for decision by the Court without hearing on June 9, 1995. Plaintiffs' counsel, Jimi Mitsunaga, filed a written response, as did Defendants' and third party Plaintiffs' counsel, Jeffrey Weston Shields. The Court, being duly advised in the premises, and having heretofore entered its Supplemental Findings of Fact and Conclusions of Law Regarding Assessment of Third Party Defendants' Attorneys Fees Against Plaintiffs, it is now by the Court

**Ordered As Follows:**

1. Third party Defendants Kee Hong Um and Shi Ja Um are awarded their attorney's fees as requested against Plaintiffs Wayne Takashi Satsuda and Seon Sil Satsuda, as specified

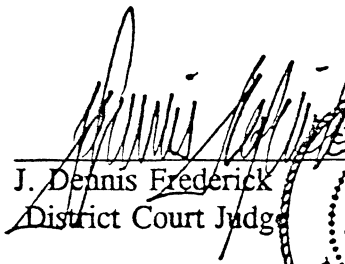
below, the Court finding that the fees requested are reasonable and necessary and that an adequate basis in contract exists for such an award.

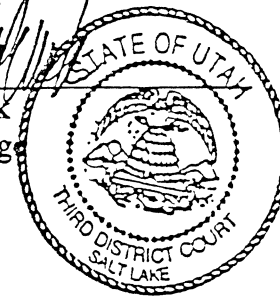
Based upon the foregoing, Judgment in favor of Kee Hong Um and Shi Ja Um and as against Plaintiffs Wayne Takashi Satsuda and Seon Sil Satsuda is entered as follows:

1. In the principal sum of \$56,126.77;
2. Interest shall accrue thereon at the contract rate of one percent (1%) per month until paid; and
3. This judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

Dated this 17<sup>th</sup> day of July, 1995.

BY THE COURT:

  
J. Dennis Frederick  
District Court Judge

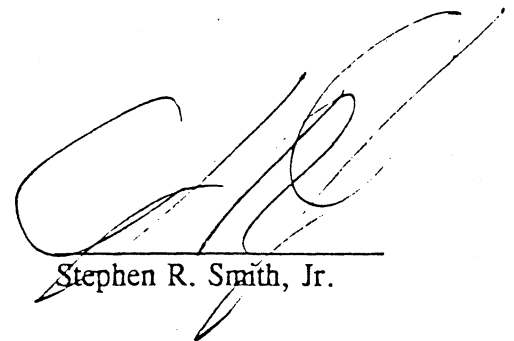


### Certificate of Service by Mail

I hereby certify that on the 19th day of June, 1995 a true and correct copy of the foregoing document was mailed, first class postage prepaid, to the offices of the attorneys for Plaintiffs and Defendants as follows:

Jimi Mitsunaga, Esq.  
731 East South Temple  
Salt Lake City, Utah 84102

Jeffrey Weston Shields, Esq.  
Purser Edwards & Shields, L.L.C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340



Stephen R. Smith, Jr.

Tab 21

JUL 27 1995

SALT LAKE COUNTY

JIMI MITSUNAGA #2279  
 Attorney for the Plaintiffs  
 731 East South Temple  
 Salt lake City, UT 84102-1221

Telephone: (801) 322-3551  
 Facsimile: (801) 322-3554

By \_\_\_\_\_

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

=====	
WAYNE TAKASHI SATSUDA and	)
SEON SIL SATSUDA, his wife,	)
	)
Plaintiffs and Appellants.	)
	)
HASIN OH and HYUNG JA OH,	)
his wife,	)
	)
Defendants and Appellees	)
	)
HASIN OH and MYUNG JA OH,	)
his wife,	)
	)
Third Party Plaintiffs,	)
	)
V.	)
	)
KEE HONG UM and SHI JA UM,	)
his wife,	)
	)
Third Party Defendants.	)

**SECOND AMENDED NOTICE  
 OF APPEAL**

Civil No. 910901751

Judge J. Dennis Frederick

1. The Second Amended Notice of Appeal is hereby given that the plaintiffs/appellants, Wayne Takashi Satsuda and Seon Sil Satsuda, his wife, through Jimi Mitsunaga, attorney of record, appeals to the Utah Court of Appeals on the final judgment of dismissal of the Honorable J. Dennis Fredericks entered as the Supplemental Findings of Facts and Conclusions of Law regarding assessment of the Third Party Defendants attorney's fees against the plaintiff, rendered on July 7, 1995.

2. The First Notice of Appeal was filed on June 5, 1995, appealing the judgment rendered on May 5, 1995.

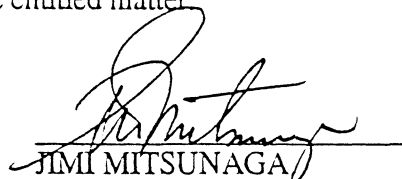


3. The Amended Notice of Appeal was rendered on July 10, 1995, appealing the First Amended Order of the Dismissal of the Complaint and Third Party defendant's Affidavit and judgment in favor of the defendant and against the plaintiffs for attorney's fees rendered on June 9, 1995.

4. The Appeal Court Bond has been duly posted with the Clerk of the Court.

5. The plaintiffs/appellants desire to pursue their rights to appeal on all prior judgments rendered by the Trial Court in the above entitled matter.

Dated this 27 day of July, 1995.

  
JIMI MITSUNAGA  
Attorney for the Plaintiffs/  
Appellants

#### MAILING CERTIFICATE

MAILED a copy of the foregoing Second Amended Notice of Appeal by U. S.  
mail, postage prepaid, this 27 day of July, 1995 to:

Mr. Jeffrey Weston Shields, Esq.  
Attorney for the Defendants  
PURSER & EDWARDS, L.L.C.  
8900 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340

Mr. Stephen R. Smith, Jr.  
Attorney for Third Party Defendants  
MOONEY LAW FIRM  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101-2006



Tab 22

REALTOR®

This is a legally binding contract. Read both front and back carefully before signing.

# EARNEST MONEY RECEIPT

DATE FEB. 28, 1987

The undersigned Buyer Ha Sin Oh and myong JA Oh hereby deposits with Agent/Broker/Company

EARNEST MONEY the amount of Five thousand and no/100 Dollars (\$ 5,000 ), in the form of personal check which shall be deposited in accordance with applicable State Law

Received by \_\_\_\_\_ Agent/Broker Company

## OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 1749 So. State St in the City of Salt Lake City County of Salt Lake Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way government patents or state deeds of record approved by Buyer in accordance with Section 4. Said property is more particularly described as a 40 UNIT motel called CAPITAL motel

### CHECK APPLICABLE BOXES

☒ IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Other \_\_\_\_\_

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_

(a) Included items. Unless excluded below this sale shall include all fixtures and any of the following items if presently attached to the property: plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: \_\_\_\_\_

(b) Excluded items. The following items are specifically excluded from this sale: R.C.H. T.V., Satellite system on lease

(c) Connections. Seller represents that the above property is connected to: ☒ public sewer, ☐ septic tank, ☐ municipal water, ☐ well, ☐ natural gas, ☐ irrigation water/secondary system, ☐ other sanitary system (specify) \_\_\_\_\_

(d) Utilities, Improvements, and Other Rights. The property presently has or is served by the following: ☒ public water main, ☐ well, ☐ water stub in, ☐ sewer main, ☐ private water main, ☐ gas main, ☒ electric distribution line, ☒ gas distribution line, ☐ telephone, ☐ ingress and egress by private easement, ☐ dedicated road, ☐ crops, ☐ sidewalk, ☐ curb & gutter, ☐ water rights, specify \_\_\_\_\_, ☐ mineral rights, specify \_\_\_\_\_, ☐ other, specify \_\_\_\_\_

(e) Survey. A certified survey ☐ shall be furnished at the expense of N/A prior to closing, ☐ shall not be furnished

(f) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section (d) above accepts it in its present physical condition, except N/A

2. PURCHASE PRICE AND FINANCING. The total purchase price for the property is Five hundred fifty thousand and no/100 Dollars (\$ 550,000 ) which shall be paid as follows:

\$ 5,000 which represents the aforescribed EARNEST MONEY DEPOSIT

\$ 45,000 representing the approximate balance of CASH DOWN PAYMENT at closing plus \$30,000

\$ \_\_\_\_\_ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_ which includes ☐ principal, ☐ interest, ☐ taxes, ☐ insurance

\$ 500,000 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at 10 % per annum with monthly payments of \$ 4,825.15 which includes ☒ principal, ☒ interest, ☐ taxes, ☐ insurance.

\$ \_\_\_\_\_ representing balance, if any, including refinancing, to be paid as follows: 20 year amortize

Balance of contract \$500,000 will be amortized for 20 years with 10% interest which balloon payment \$50,000 on 4 years from date of closing (which is principal reduction)

\$ 550,000 TOTAL PURCHASE PRICE

If outside financing is required, Buyer agrees to use best efforts to procure same and this offer is made subject to Buyer qualifying for and lending institution granting said loan. Buyer agrees to make application for said loan within \_\_\_\_\_ days after Seller's acceptance of this Agreement at an interest rate not to exceed \_\_\_\_\_ %.

Buyer further agrees to obtain a written commitment for said loan and if the commitment is not obtained within a reasonable time, this Agreement is voidable at the option of Seller.

FHA, VA or special conventional financing is contemplated. Seller agrees to pay the lesser of \_\_\_\_\_ discount points or \$ \_\_\_\_\_

this Agreement involves the assumption of an existing loan for the purpose of refinancing.

...the above property, subject to encumbrances and exceptions noted herein, evidenced by a duly recorded title insurance policy for the amount of purchase price and abstract of title brought current with an attorney's opinion. See Paragraph 4.

4. **INSPECTION OF TITLE.** Within \_\_\_\_\_ days after acceptance of this offer, Seller shall provide Buyer with either a commitment for title insurance or an abstract of title brought current with an attorney's opinion. Buyer shall have a period of \_\_\_\_\_ days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall mail written notice thereof, by certified mail, return receipt requested, within the prescribed time period. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not cured through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: Determine at closing  
JOINT TENANT

6. **SELLER WARRANTIES.** Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing. Exceptions to the above shall be limited to the following: N/A

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: NONE

\*Closing cost shall be share  
8. **CLOSING OF SALE.** This Agreement shall be closed on or before June 1, 1987 at a reasonable location to be designated by Seller, subject to Paragraph K on the reverse side hereof. Upon demand, Buyer and Seller shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Paragraph L on reverse side, shall be made as of ☐ date of possession ☒ date of closing ☐ other DATE OF CLOSING shall be either CAPITAL PLAZA 3540 or lease contract or on or before June 1, 1987

9. **POSSESSION.** Seller shall deliver possession to Buyer on Closing unless extended by mutual agreement of parties.

10. **GENERAL PROVISIONS.** Unless otherwise indicated above, the General Provisions on the reverse side hereof are incorporated into this Agreement by reference.

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until \_\_\_\_\_ (AM/PM) \_\_\_\_\_, 19\_\_\_\_, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

DATE 2/28/87

SIGNATURE OF BUYER

X/ [Signature]

CHECK ONE

**ACCEPTANCE OF OFFER TO PURCHASE**

☐ Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

**COUNTER OFFER**

☐ Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications or specified in the attached Addendum and presents said COUNTER OFFER for Buyer's acceptance.

DATE 2/28/87

SIGNATURE OF SELLER

TIME \_\_\_\_\_ (AM-PM)

[Signature]  
[Signature]

**REJECTION**

☐ Seller hereby REJECTS the foregoing offer. \_\_\_\_\_ (Seller's Initials)

**AGREEMENT TO PAY REAL ESTATE COMMISSION**

CHECK ONE

☐ This property is listed by \_\_\_\_\_ Listing Agent/Broker Company, and a real estate commission shall be paid in accordance with the Sales Agency Agreement. The Selling Agent/Broker Company is \_\_\_\_\_

N/A Listing and Selling Agent/Broker Company as been authorized to offer this property for sale and Seller agrees to pay a real estate commission of \_\_\_\_\_ as consideration for its efforts in procuring Buyer. Said commission shall be payable at closing or upon Seller's default on this Agreement, whichever occurs first. The amount or due date thereof cannot be changed without the prior consent of the Listing and Selling Agent/Broker Company.

E \_\_\_\_\_

SIGNATURE OF SELLER

\_\_\_\_\_

## DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must therefore be completed)

A ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures

SIGNATURE OF SELLER

SIGNATURE OF BUYER

Date

Date

Date

Date

B ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_ 19 \_\_\_\_ by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer Sent by \_\_\_\_\_

## GENERAL PROVISIONS

(refer to item 10 on REVERSE side)

A **COUNTER OFFERS** Any counter offer made by Seller or Buyer shall be in writing and if attached hereto shall incorporate all the provisions of this Agreement not expressly modified or excluded therein

B **DEFAULT/INTERPLEADER AND ATTORNEY'S FEES** In the event of default by Buyer Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller Both parties agree that should either party default in any of the covenants or agreements herein contained the defaulting party shall pay all costs and expenses including a reasonable attorney's fee which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law whether such remedy is pursued by filing suit or otherwise In the event the Agent/Broker company holding the earnest money deposit is required to file an Interpleader action in court to resolve a dispute over the earnest money deposit referred to herein the Buyer and Seller agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the Agent/Broker Company in bringing such action

C **CONDITION OF WELL** Seller warrants that any private well serving the property has to the best of Seller's knowledge provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right

D **CONDITION OF SEPTIC TANK** Seller warrants that any septic tank serving the property is to the best of Seller's knowledge in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards

E **EXISTING TENANT LEASES** If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer within five (5) working days from the date of this Agreement a copy of all existing leases (and any amendments thereto) affecting the property Unless written objection is given by Buyer to Seller or Seller's agent within five (5) working days thereafter Buyer shall take title subject to such leases If objection is made within such five (5) day period Seller shall have ten (10) working days from date of receipt of said objection to remedy such objection If not so remedied within the stated time this Agreement shall be null and void

F **CHANGES DURING TRANSACTION** During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made nor new leases entered into nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer

G **RISK OF LOSS** All risk of loss or damage to the property shall be borne by the Seller until closing In the event there is loss or damage to the property between the date hereof and the date of closing by reason of fire vandalism flood earthquake, or acts of God and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed

H **ACCELERATION CLAUSE** Seller shall provide to Buyer written verification as to whether or not any notes mortgages deed of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale If any such document so provides and holder does not waive the same or unconditionally approve the sale, then within five (5) days after notice of nonwaiver or disapproval by the date of closing whichever is earlier Buyer shall have the option to declare this Agreement null and void by giving notice to Seller or Seller's agent In such case all earnest money received under this Agreement shall be returned to buyer It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void

I **TITLE INSURANCE** If title insurance is elected Seller authorizes the Listing Agent/Broker Company to order a preliminary commitment for standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated Seller agrees to pay any cancellation charge

location, present value, future value, income therefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspections shall be allowed by Seller but arranged for and paid by Buyer. If size or square footage is a material consideration in making this purchase, it is advised that Buyer personally measure or verify lot or improvement dimensions.

**K. CLOSING-UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, fire, flood, or extreme weather, governmental regulations, or acts of God or similar occurrences; then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fourteen (14) days beyond the closing date provided herein. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

**L. CLOSING COSTS.** Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless this sale is FHA VA or conventionally financed, in which case fees shall be paid according to FHA, VA or conventional lending regulations. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents and interests on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

**M. ASSUMED OBLIGATIONS.** If the property is subject to an existing contract, mortgage, deed of trust or other encumbrance which either the Seller or the Buyer is to continue to pay, then the Seller or Buyer agrees to pay the same in accordance with its terms, and, upon default, the other shall have the right to make any payments necessary to cure said default, and the payments so made, together with interest at the rate of 18% per annum thereon, shall be immediately due and owing to the party making the same.

**N. REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

**O. AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

**P. AGENT'S REPRESENTATIONS.** Seller and Buyer acknowledge that neither the Selling or Listing Agent/Broker Company has made any representations or warranties concerning the condition of the property, boundary lines or size, Buyer's financing ability, or any other matter concerning the property or the parties, unless otherwise noted herein or in writing separately.

**Q. AGENCY DISCLAIMER.** Selling Agent/Broker Company may have entered into an agreement to represent the Seller.

**R. TIME IS OF ESSENCE.** Time is of the essence in the Agreement.

**S. ABROGATION.** Execution of a final real estate contract, if any, shall abrogate this Agreement.

**T. COMPLETE AGREEMENT - NO VERBAL AGREEMENTS.** This instrument constitutes the entire Agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or affect this agreement.

THIS IS THE APPROVED FORM OF THE UTAH REAL ESTATE COMMISSION JULY 1, 1983

Tab 23

SALT LAKE CITY CORPORATION  
DEPARTMENT OF BUILDING AND HOUSING SERVICES  
451 South State Street, Room 406  
Salt Lake City, Utah 84111

Date Issued February 12, 1990  
Cert. Mail No. \*

## NOTICE AND ORDER

TO: \*P 113 668 611  
Capital Motel  
1749 South State Street  
Salt Lake City, Utah 84115

\*P 113 668 612  
Wayne T. Satsuda  
328 Ivy Lane  
Salt Lake City, Utah 84115

RE: 1749 South State Street, Salt Lake City, Utah / Sidwell Number 16-18-304-004

**NOTICE:** Notice is hereby given that the subject property is found to be in violation of Salt Lake City Building and Housing Ordinances necessary to maintain the life, health, safety and general welfare of the inhabitants of Salt Lake City. This Notice is pursuant to an inspection on which was conducted on January 31, 1990 SEE INSPECTION REPORT.

**ORDER:** You are hereby ordered to correct these deficiencies within thirty (30) days.  
TO REPAIR:

1. Commence the required work within five (5) days, and complete the required work within thirty (30) days from service of this Notice and Order.
2. Obtain required permits for repair before starting the work.

OR: Secure the building by one of the following methods:

- A. Insuring that the building remain secured by having all doors locked and all windows closed and intact with all other openings effectively closed.
- B. Obtain a boarding permit and board your building and clean grounds as per requirements of city ordinance within ten (10) days.

FAILURE TO COMPLY:

IF YOU FAIL TO OBEY THIS ORDER WITHIN THE TIME ALLOTTED, THIS DEPARTMENT IS EMPOWERED TO TAKE THE FOLLOWING ACTIONS:

- File a Certificate of Noncompliance to be recorded against the property,
- Order the building vacated and posted to prevent further occupancy,
- Cause the building to be repaired, with the costs charged to the owner(s),
- Initiate criminal action against the person(s) to whom this Order is directed,
- Have the building(s) boarded,
- Remove all trash and debris, and/or
- File a lien with the county recorder for the cost incurred plus \$170 administrative fee at the owners expense.

RIGHT TO APPEAL:

Any person having any record, title, or legal interest in this building may appeal this Notice and Order. Obtain forms from Room 406 and appeal in writing to the Housing Advisory and Appeals Board within thirty (30) days from date of service of this Notice and Order. Failure to appeal within the time specified will constitute a waiver of all rights to an administrative hearing in this matter.

TIME EXTENSIONS MAY BE GRANTED BY THE HOUSING OFFICER. ALL REQUEST FOR TIME EXTENSIONS MUST  
BE IN WRITING.

NAME Lawrence Suggars  
PHONE 535-7670



Tab 24

NOTICE OF DEFICIENCIES

Property Inspected, 1749 South State Street, Date of inspection January 31, 1990  
Salt Lake City, Utah

The inspection revealed that the following conditions were not in compliance with the requirements of the following codes:

X Uniform Housing Code (UHC) Uniform Code for Abatement of Dangerous Buildings (UCADB)  
Salt Lake City Ordinance (SLOO)

The deficiencies indicate that the following permits must be obtained before repairs are started:

X Building X Electrical Mechanical X Plumbing Board & Secure

Licensed contractors are required to obtain the following permits:

X Building X Electrical Mechanical X Plumbing

For permit information, please call 535-7751.

DEPOSITION  
EXHIBIT

52

7/20/93

Code Violation EXTERIOR INSPECTION

UHC 1001(m) Handrails are missing.

UHC 1001(m) The corridors must be of one hour fire resistive construction (existing plaster or 1/2 gypsum wall board in good condition will be acceptable). All doors must be solid wood doors not less than 1 1/3" thick and maintained self closing. These provisions do not apply if an approved automatic sprinkler system is provided for all corridors, stairs, exits, and other common areas.

Code Violation INTERIOR INSPECTION

UHC 1001(e,f) Units 1-7 have been converted to units with cooking facilities without conforming to electrical and plumbing requirements and must be brought up to code, open electric, improper vents, traps, and waist lines.

UHC 1001(e,f,b) Units 0 and 34-40 have been added to the complex without conforming with plumbing and electrical requirements, open electrical, improper vents, traps, and waist lines.

Unit 0-7 and 34-40

UHC 1001(b) The minimum ventilation from outside is not provided.

UHC 1001(e) Smoke detectors are required to be installed per Uniform Building Code 1210.

Unit #35

UHC 1001(b) The minimum natural light requirement is not provided.

UHC 1001(b) The minimum ventilation from outside is not provided.

UHC 1001(b) The ceiling covering is sagging or missing.

UHC 1001(b) The sleeping room or bedroom is not provided with an approved window or exterior door for emergency escape or rescue.

Unit #34

UHC 1001(b) The ceiling covering is sagging or missing.

Unit #37

UHC 1001(c) Floor is weak, unlevel, or has holes.

Unit #5

UHC 1001(e) Multiple adaptors and portable cords (zip cords) are being used in a hazardous way.

Unit #38

UHC 1001(e) Multiple adaptors and portable cords (zip cords) are being used in a hazardous way.

Hallways

UHC 1001(e) The hallway is not provided with adequate light.

UHC 1001(b) The ceiling covering is sagging or missing.

City records indicate that additional dwelling units have been added to this building without complying with 21.12.010 of the City Code which requires that all zoning codes be met at the time of conversion which include number of dwelling units allowed in the particular zone, minimum lot area requirements, and required parking provided.

Each building is also required under Section 104 of the Building Code to meet all building codes at the time of any addition or alteration.

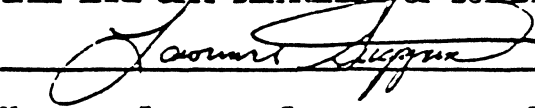
UHC Sec 202 Because of the above deficiencies, these buildings are determined to be substandard and are hereby declared a public nuisance which must be abated by repair, rehabilitation, demolition or removal.

UHC 1104(b) DUE TO THE DEFICIENCIES NOTED ON THE DEFICIENCY LIST, UNIT #35 IS CLOSED TO OCCUPANCY, AS OF January 31, 1989, UNTIL ALL PERMITS ARE OBTAINED, REPAIRS ARE MADE, AND THE UNIT IS RELEASED TO OCCUPANCY BY THIS OFFICE.

Following correction of deficiencies, an inspection must be scheduled through this office.

NOTE: \*A COPY OF THIS DEFICIENCY LIST MUST BE SUBMITTED WITH EACH REQUIRED PERMIT.

SALT LAKE CITY DEPARTMENT OF BUILDING AND HOUSING SERVICES

  
Name Lawrence Sugars, Telephone No. 535-7670

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



## GENERAL PROVISIONS (Sections)



**A. INCLUDED ITEMS.** Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property, plumbing, heating air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

**B. INSPECTION.** Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

**C. SELLER WARRANTIES.** Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing, (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing, and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

**CONDITION OF WELL.** Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and needed use of the well or wells is authorized by a state permit or other legal water right.

**E. CONDITION OF SEPTIC TANK.** Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

**F. ACCELERATION CLAUSE.** Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

**G. TITLE INSPECTION.** Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

**H. TITLE INSURANCE.** If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and no encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

**I. EXISTING TENANT LEASES.** If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

**J. CHANGES DURING TRANSACTION.** During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

EARNEST MONEY RECEIPT

(1) 00 (X) 25Y Enopg 11/14/09  
DATE

The undersigned Buyer WAYNE TAKASHI SATSUDA hereby deposits with Brokerage as EARNEST MONEY the amount of ONE THOUSAND ONLY Dollars (\$ 1000.00) in the form of PERSONAL CHECK DEPOSIT UPON ACCEPTANCE which shall be deposited in accordance with applicable State Law

Brokerage

Phone Number

Received by

OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 1749 S. STATE ST. in the City of SALT LAKE County of SALT LAKE Utah subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section G Said property is owned by HA SIN, OH as sellers, and is more particularly described as CAPITOL MOTEL

CHECK APPLICABLE BOXES

☒ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other N/A  
☒ IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Condo ☐ Other N/A

(a) Included Items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property

The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title ALL THE EQUIPMENT FOR BUSINESS OPERATION AND SUPPLIES

(b) Excluded Items. The following items are specifically excluded from this sale PERSONAL ITEMS

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price  
☒ public sewer ☒ connected ☐ well ☐ connected ☐ other ☒ electricity ☒ connected  
☐ septic tank ☐ connected ☐ irrigation, water / secondary system ☐ ingress & egress by private easement ☐ dedicated road ☐ paved  
☐ other sanitary system ☐ of shares ☐ Company ☐ master antenna ☐ prewired ☐ curb and gutter  
☐ public water ☐ connected ☐ TV antenna ☐ natural gas ☐ connected ☐ other rights

(d) Survey. A certified survey ☐ shall be furnished at the expense of N/A prior to closing, ☐ shall not be

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present condition, except BUYER WILL INSPECT MORE UNITS BEFORE ACCEPTANCE AND IT SHOULD BE ALL OPERATIONAL

2. PURCHASE PRICE AND FINANCING. The total purchase price for the property is SIX HUNDRED TWENTY FOUR THOUSAND ONLY Dollars (\$ 620,000.00) which shall be paid as follows

\$ 1000.00 which represents the aforescribed EARNEST MONEY DEPOSIT.

\$ 99,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing

\$ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer which obligation bears interest at % per annum with monthly payments of \$

which include: ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other

\$ 41,790.00 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at % per annum with monthly payments of \$ 1,338.10

which include: ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other

\$ 102,100.00 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: 10 YEARS - 10% INTEREST - APPROX. PAYMENT OF 1,338.10 PER MONTH

\$ 14,000.00 Other BUYER MADE MORE EARNEST MONEY DEPOSIT 11/1/09 AND BUYER'S CASH DOWN PAYMENT AT CLOSING WILL BE REDUCE TO \$95,000.00

\$ 620,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best effort to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within 10 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed % If Buyer does not qualify for the assumption and/or financing within 10 days after Seller's acceptance of this Agreement, this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to 2 mortgage points, not to exceed \$ 0 In addition, seller agrees to pay \$ 0 to be used for Buyer's other loan costs

...shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by (X) a current policy of title insurance in the amount of purchase price. ( ) an abstract of title brought current with an attorney's opinion (See Section H).

4. INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer (X) has ( ) has not reviewed any condominium CC & R's prior to signing this Agreement.

5. VESTING OF TITLE. Title shall vest in Buyer as follows: JOINT TENANCY

6. SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: ALL

Exceptions to the above and Section C shall be limited to the following:

7. SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: BUYER WILL ACCEPT THIS OFFER WITH SATISFACTION AND INSPECTION OF INCOME AND EXPENSE SHEET. BUYER & SELLER WILL NOT RENEGOTIATE ON DOWN PAYMENT IN CASE OF BUYER'S HOUSE NOT CLOSED.

8. CLOSING OF SALE. This Agreement shall be closed on or before DEC 27, 1989, 19\_\_ at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R shall be made as of ☐ date of possession ☐ date of closing ☐ other

9. POSSESSION. Seller shall deliver possession to Buyer on \_\_\_\_\_ unless extended by written agreement of parties.

10. AGENCY DISCLOSURE. At the signing of this Agreement the listing agent \_\_\_\_\_ represents ( ) Seller (X) Buyer. Buyer and Seller confirm that prior to signing this Agreement written disclosure of the agency relationship(s) was provided to him/her. ( ) and ( ) Buyer's initials ( ) and ( ) Seller's initials.

11. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

12. AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall have until (AM/PM) \_\_\_\_\_, 19\_\_ to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

Wayne T. Satsura Nov 16, 1989 328 Ely Lane 486-8535 5766689  
(Buyer's Signature) (Date) (Address) (Phone) (SSN/TAX ID)

Robert S. Satsura Nov 16, 1989 Sam's as above 486-8535 5766689  
(Buyer's Signature) (Date) (Address) (Phone) (SSN/TAX ID)

CHECK ONE  
☒ ACCEPTANCE OF OFFER TO PURCHASE. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

☐ REJECTION. Seller hereby REJECTS the foregoing offer. (Seller's Initials) \_\_\_\_\_

☐ COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT to the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (AM/PM) \_\_\_\_\_, 19\_\_ to accept the terms specified below.

SELLER ACCEPT THIS OFFER SUBJECT TO SELLER CAN  
PURCHASE OF IMPERIAL 400 MOTEL WHICH IS ON GOING ESCROW

Wayne T. Satsura 11/16/89 11:10 p.m. 486-8535 5766689  
(Seller's Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

Robert S. Satsura 11/16/89 11:10 p.m. 486-8535 5766689  
(Seller's Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

CHECK ONE:  
☐ ACCEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER  
☐ REJECTION. Buyer hereby REJECTS the COUNTER OFFER. \_\_\_\_\_ (Buyer's Initials)  
☐ COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

(Buyer's Signature) (Date) (Time) (Buyer's Signature) (Date) (Time)

### DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed)

A. ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:  
SIGNATURE OF SELLER \_\_\_\_\_ SIGNATURE OF BUYER \_\_\_\_\_

\_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_  
\_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_, 19\_\_ by \_\_\_\_\_  
Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by \_\_\_\_\_  
THIS FORM HAS BEEN APPROVED BY THE NATIONAL REAL ESTATE BOARD

**K. AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrant his or her authority to do so and to bind Buyer or Seller.

**L. COMPLETE AGREEMENT — NO ORAL AGREEMENTS.** This instrument constitutes the entire agreement between the parties and supersedes and cancels all and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

**M. COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein.

**N. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damage or to institute suit to enforce any rights of Seller. In the event of default by Seller or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney fees incurred by the principal broker in bringing such action.

**O. ABROGATION.** Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

**P. RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

**Q. TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strike, fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

**R. CLOSING COSTS.** Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

**S. REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those accepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

**T. NOTICE.** Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

**U. BROKERAGE.** For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

**V. DAYS.** For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

PAGE FOUR OF A FOUR PAGE FORM.