

1995

# Wayne Takashi Satsuda and Seon Sil Satsuda v. Hasin Oh and Myung Oh : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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**BRIEF**

UTAH

DOCUMENT

IN THE UTAH COURT OF APPEALS

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WAYNE TAKASHI SATSUDA and  
SEON SIL SATSUDA, Plaintiffs,  
Appellants, and Cross-Appellees  
v.  
HASIN OH and MYUNG OH,  
Defendants/Appellees

.A10

DOCKET NO. 950569-CA

Case No. 950569-CA

HASIN OH and MYUNG OH,  
Third-Party Plaintiffs/  
Appellees  
v.  
KEE UM and SHI JA UM,  
Third-Party Defendants,  
Appellees and Cross-Appellants

**BRIEF OF  
APPELLEES HASIN OH AND MYUNG OH**

**Appeal from the Third Judicial District Court,  
In and For Salt Lake County  
The Honorable J. Dennis Frederick  
Argument Priority Classification 15**

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**FILED**

MAY 24 1996

**COURT OF APPEALS**

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### STATEMENT OF JURISDICTION

Jurisdiction over this appeal is proper under Section 78-2a-3(2)(j). The appellants' statement of jurisdiction is mistaken.

### STATEMENT OF THE CASE

This lawsuit arose out of the January 1990 sale of the Capitol Motel by Hasin Oh and Myung Oh (the "Ohs") to Wayne Takashi Satsuda and Seon Sil Satsuda (the "Satsudas"). The Ohs and Satsudas entered into an Earnest Money Sales Agreement for the sale on November 16, 1989 and executed the final closing documents in the transaction on or about January 5, 1990.

On March 15, 1990, the Satsudas initiated this civil action against the Ohs. In a Complaint setting out three causes of action, the Satsudas claimed that the Ohs had failed to tell them of zoning and regulatory code violations that plagued the Capitol Motel. The Satsudas maintained that as a result of these legal deficiencies, they were denied the benefit of their bargain in purchasing the Capitol Motel; were forced to initiate costly administrative proceedings to obtain a zoning variance; and were obliged to make extensive repairs to the Motel.

In their first cause of action, the Satsudas claimed that the Ohs breached warranties in the Earnest Money Sales Agreement in three respects:

1. the Capitol Motel had sufficient parking spaces under Salt Lake City zoning regulations to allow for the rental of only 33 of its 40 rooms at any time to the public;

2. Several of the Capitol Motel's rooms had inadequate ventilation as well as substandard plumbing and electrical fixtures; and

3. Seven of the Motel's rooms were constructed without a Salt Lake City building permit.

In their second and third claims, the Satsudas alleged that the Ohs intentionally misrepresented the physical condition of the Capitol Motel and the Motel's compliance with applicable zoning and regulatory requirements. The second cause of action took as its misrepresentations the three deficiencies set out in the First Cause of Action, while the Third Cause of Action maintained that although the Ohs represented that the Capitol Motel was a 40-unit motel, it was actually only a 33-room facility due to various health, safety, and building code violations that afflicted seven of its rooms.

On April 8, 1993, the Ohs filed a third-party action against the Ums from whom they had purchased the Capitol Motel in May 1987. In their Third-Party Complaint, the Ohs alleged that the Ums knew of the Capitol Motel's structural and legal faults yet failed to disclose them prior to the 1987 sale. The Ohs sought monetary damages from the Ums and indemnification for any damages for which they might be found liable to the Satsudas.

On February 14-15, 1995, trial was conducted to the Court, the Honorable Dennis Frederick presiding. At trial the Satsudas pressed only three claims against the Ohs. They argued that they were due monetary compensation for: (1) profits lost due to their



inability to rent the seven motel rooms that were constructed by the Ums without a building permit; (2) costs incurred to bring the seven rooms into compliance with Salt Lake City health and safety regulations; and (3) attorney's fees incurred to obtain a zoning variance authorizing the operation of a 40-room motel with only 33 parking stalls.

The District Court took the matter under advisement at the close of the evidence and on February 17, 1995 rendered its decision from the bench. In its ruling the Court declared that the Satsudas had failed to state any cause of action against the Ohs and, accordingly, dismissed their Complaint with prejudice. In light of the Satsudas' failure of proof, the Court also determined that the Ums could not be held liable to the Ohs on a theory of indemnity and therefore dismissed the Third Party Complaint with prejudice.

On May 2, 1995, Judge Frederick's "Order of Dismissal of Complaint and Third-Party Complaint and Judgment in Favor of Defendant Ohs against Plaintiff Satsudas for Attorney's Fees" (the "May 2 Order and Judgment") was entered on the judgment docket of the District Court. In the May 2 Order and Judgment, the Court memorialized the elements of its February 17 oral ruling. Specifically, the Court concluded:

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, [in the amount of \$44,959.86 plus post-judgment interest], the Court finding that the fees requested are reasonable and necessary and that an adequate bases in the contract exist for such an award.

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

May 2 Order and Judgment at 2-3; ROA, V. 4 at 1655-58. On June 5, 1995 the Satsudas filed a Notice of Appeal from the District Court's May 2 Order and Judgment.

On June 9, 1995, Judge Frederick's "First Amended Order of Dismissal of Complaint and Third Party Complaint and Judgment in Favor of Defendant Ohs Against Plaintiff Satsudas for Attorney's Fees (the "First Amended Order") was entered. The First Amended Order differed from the May 2 Order and Judgment in only one significant respect. Where the May 2 Order and Judgment stated that "[t]he Court denies the Third-Party Defendants Application for Attorney's Fees at this time, without prejudice subject to further proceedings concerning that application," the First Amended Order read "[t]he 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." On July 10, 1995, the Satsudas filed an "Amended Notice of Appeal" from the First Amended Order.

As directed by the First Amended Order, the Ums submitted supplemental findings of fact and conclusions of law pertaining to their claim for attorney's fees and drafted a proposed Supplemental Judgment that awarded them fees of \$56,126.77 plus post-judgment interest. On July 7, 1995 the District Court executed the Supplemental Judgment and its associated findings and conclusions. On July 27, 1995, the Satsudas filed a "Second Amended Notice of Appeal" from the July 7 Supplemental Judgment and on August 2, 1995, the Ums submitted their Notice of Appeal from the Supplemental Judgment.

#### STATEMENT OF FACTS

1. The Capitol Motel was in dilapidated condition when it was bought by Kee Hong Um and Shi Ja Um (the "Ums") on September 1, 1982. Immediately thereafter Salt Lake City officials closed the Capitol Motel entirely. ROA, V. 3 at 1185.

2. One room on the second floor of the Capitol Motel's main building had been converted from a storage area to a rental unit by Lon Garcia, the owner of the Capitol Motel prior to the Ums. Id. at 1186.

3. In the Spring of 1983 the Ums completed repairs to the Capitol Motel that restored all 34 of the Motel's licensed rental units to operation. Id. at 1185.

4. Also in the Spring of 1983, the Ums covered over the swimming pool on the Capitol Motel grounds to allow construction of a small grocery store on the Capitol Motel premises. Id. at 1186.

5. In January 1984, the Ums converted the grocery store into rental units, giving the Capitol Motel a total of 40 units available for rent when the Ohs purchased the property in 1987. Id.

6. The Ums knew that no building permit had been obtained for the conversion of the grocery store into the five rental units. The Ums did not instruct their construction contractor to obtain such a permit and none was obtained. Id.

7. The Ums never notified Salt Lake City officials that the five additional units were constructed on the Capitol Motel premises. Id.

8. The Ums did not amend their business license for the Capitol Motel after adding the five new units. Instead, the Ums annually renewed their business license to show only a 34-unit motel. Id. at 1187.

9. During the Ums' ownership of the Capitol Motel, the Salt Lake City-County Health Department and the Salt Lake City Fire Department inspected the Motel's buildings and grounds. Both agencies found that the Motel met applicable inspection standards after repairs were completed in 1982-83. Id. at 1186.

10. On March 21, 1985, the Capitol Motel was inspected by Salt Lake City officials under Construction Permit No. 33603 and approved for occupancy. Id. at 1186.

11. After passing inspection on March 21, 1985, the Ums never received any written notice that the additional five units

did not meet Salt Lake City building code standards. Id. at 1187.

12. Thereafter, the Ums operated the Capitol Motel with a total of 40 rooms available for rent to the public. Id.

13. From March 21, 1985 until January 1990, the Capitol Motel passed every health, building, and fire inspection following the construction of the five additional rooms. Id.

14. 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" for \$550,000.00. Id.

15. Between the execution of the February 1987 Earnest Money Sales Agreement and the closing of the sale of the Capitol Motel, the Ums told the Ohs that they could earn a good income from the operation of the and gave the Satsudas copies of the Motel's handwritten income and expense statement. The Ums also told the Ohs that they had remodeled or repaired most of the rooms in the Capitol Motel and had made repairs to the main building of the Motel. Id. at 1187-88

16. In conjunction with the 1987 sale of the Capitol Motel, the Ums also told the Ohs that the Motel had up to 40 units available for rental. Id. at 1188.

17. The Ohs visited the Capitol Motel about ten times prior to executing the February 1987 Earnest Money Sales Agreement. During those visits the Ohs inspected only a few rooms on the ground floor of the Motel's main building. Id. at 1188.

18. The Ohs did not obtain a professional inspection of the Capitol Motel before purchasing it from the Ums. Id.

19. At no time before or after the 1987 sale of the Capitol Motel did the Ohs expressly ask the Ums to provide information about parking, building inspections, construction of additional rooms, putting additional rooms into service, or inspection of the Motel property by the Ums or Salt Lake City officials. Id.

20. On March 20, 1987, the Salt Lake City/County Health Department inspected the Capitol Motel and found only minor infractions of health regulations such as dust under a bed, a dirty bathroom, and no lid on the Motel dumpsters. Id.

21. On May 1, 1987, the Ums as sellers and the Ohs as buyers executed a Uniform Real Estate Contract for the purchase of the Capitol Motel. The purchase price of the Motel was \$540,000.00. Id. at 1189.

22. During their ownership of the Capitol Motel, the Ohs advertised to the public that the Motel had 40 rental units. In addition, the Ohs consistently rented more than 34 units at a time to the public. Id.

23. The Salt Lake City Fire Department conducted fire safety surveys on the Capitol Motel in 1982, 1984, 1986, in November 1989, January 1990, February 1990, and June 1993. Id. at 1189.

24. The Salt Lake City Fire Department's "Premises History Report" for the Capitol Motel shows that minor fire code

violations were noted in the Fire Department's 1986 inspection. These discrepancies were promptly corrected. Id.

25. The Premises History Report also shows that the Capitol Motel passed fire safety surveys on November 7, 1989 and January 4, 1990, just before the Ohs sold the property to the Satsudas. Id.

26. On November 16, 1989, the Ohs executed an Earnest Money Sales Agreement with the Satsudas for the sale of the Capitol Motel for \$620,000.00. Id. at 1189-90.

27. During the negotiations for the sale of the Capitol Motel to the Satsudas, the Ohs represented orally and on Mr. Oh's business card that the Capitol Motel was a 40-unit motel. Id. at 1190.

28. Also during negotiations for the sale of the Capitol Motel to the Satsudas, Mr. Oh gave the Satsudas his business records which showed the Capitol Motel's daily income figures for 1987 through September 1989. The Ohs' business records showed the number of the Capitol Motel's units that were rented at any one time. Id.

29. The Satsudas submitted an offer to purchase the Capitol Motel to a Mr. Kim, the Ohs' sales agent, after two meetings with the Ohs at the Capitol Motel. Id.

30. The Satsudas inspected the Capitol Motel's laundry room, boiler rooms, and four or five rental units prior to closing their purchase of the Capitol Motel. Id. at 1190.

31. Prior to closing on their purchase of the Capitol Motel, the Satsudas neither requested nor obtained an inspection of the Motel's buildings and grounds by a professional inspector or any other third party. Id.

32. The Satsudas began operating the Capitol Motel on January 1, 1990. Id.

33. The Ohs displayed the Capitol Motel's business license on the wall of the Motel office. The Satsudas examined the business license there on January 1, 1990, four days before they closed on their purchase of the Motel. Id. at 1191.

34. On January 5, 1990, the Ohs assigned their purchaser's interest in the May 1, 1987 Uniform Real Estate Contract to the Satsudas. Id.

35. On or about January 31, 1990, Lawrence Suggars, an enforcement officer with the Salt Lake City Department of Building and Housing Services, inspected the Capitol Motel premises. Mr. Suggars was accompanied on his inspection by representatives of the Salt Lake City Fire Department and Salt Lake City Health Department. Id.

36. During the course of his inspection of the Capitol Motel, Mr. Suggars called in additional Salt Lake City building inspectors to examine the Capitol Motel's electrical and plumbing systems. Id. at 1191.

37. On February 12, 1990, the Salt Lake City Department of Building and Housing Services issued a "Notice of Deficiencies"



to the Satsudas stating that the Capitol Motel was in violation of certain city health and safety ordinances. Id.

38. By letter dated February 22, 1990, Robert M. Bridge, the Salt Lake City Business License Supervisor, advised the Satsudas that the Capitol Motel's business license would not be approved due to the incorrect number of rental units listed on the license. Immediately thereafter the Satsudas corrected the number of units shown on their license. Id. at 1191-92.

39. The Satsudas contacted the Ums about the Notice of Deficiencies. At that time, Mr. Um told Mrs. Satsuda that he had fully disclosed to the Ohs the fact that the five additional rental units at the Capitol Motel had been built without a building permit. Id. at 1192.

40. When the Ohs sold the Capitol Motel to the Satsudas, parking at the Motel was limited to only 33 vehicles, less than one vehicle per rentable room at the Motel. Id.

41. The Satsudas spent approximately \$2,500 in attorneys fees to obtain a variance in the parking requirements in order to allow the rental of all 40 of the Capitol Motel's rooms. Id.

42. During his January 1990 inspection of the Capitol Motel, Lawrence Suggars determined rooms 0, 7 and 35-39 were plumbed incorrectly and had substandard electrical wiring. Id.

43. These remaining five rooms at the Capitol Motel were remodeled after the parking variance was approved by Salt Lake City in November 1990. Construction on rooms 0, 7 and 35-39 started in February 1991 and was completed in March 1991. Id.

44. On January 5, 1994, the Satsudas sold the Capitol Motel for \$860,000, a sum \$240,000 greater than the price they paid for the Motel in January 1990. Id.

#### STATEMENT OF ISSUES

For purposes of responding to the Opening Brief, and for those purposes only, the Ohs will adopt the Statement of Issues supplied by the Satsudas. In truth, there is no legitimate basis, either in law or in fact, for this appeal.

#### SUMMARY OF ARGUMENT

The format of the argument that follows generally tracks the presentation of argument in the Satsudas' Opening Brief. With respect to the Satsudas' claim that there was no basis in contract for the District Court's award of attorney's fees against them, the Ohs show the Court multiple sources in contract for that award as well as evidence in the record before the District Court that costs and fees were warranted under the terms of those agreements.

In reply to the Satsudas' assertion that the District Court erred in its award of fees in favor of the third party defendants and against them, the Argument shows that under established Utah decisional law, taxing of a third-party defendant's fees directly against the plaintiff in the case in chief is warranted where it was foreseeable that the plaintiff's claims, though ultimately unsuccessful, would trigger the third party action.

The Argument next takes on the Satsudas' twin claims of fraud against the Ohs, both of which relate to the land sale

transaction from which this litigation stems. The Argument demonstrates that under the doctrines of caveat emptor and merger, as recently defined and illuminated in the decisions of this Court, both claims are barred as a matter of law.

Finally, the Argument addresses the Satsudas' belated special damages claim. This claim sounds in a theory of "loss of the bargain" and concerns costs of repair to the Capitol Motel that the Satsudas incurred, if at all, in 1991. Citing case law arising in Utah and other jurisdictions that have treated the issue, the Argument shows that this claim was extinguished by the Satsudas' realization of an embarrassingly great profit on the sale of the Capitol Motel in 1994.

#### ARGUMENT

**THE DISTRICT COURT PROPERLY DETERMINED THAT  
THE SATSUDAS ARE LIABLE FOR THE ATTORNEY'S FEES  
THAT THE OHS AND THE UMS INCURRED IN THIS LITIGATION.**

Beginning on page 14 of their Opening Brief, the Satsudas inflict on this Court and the other parties to this appeal sixteen pages of virtually impenetrable prose and legal argument in opposition to the District Court's award of attorney's fees to the Ohs and the Ums. The thesis of this segment of the Opening Brief escapes detection but at the risk of injecting unwanted precision to the Satsudas' contentions on attorneys fees, the Ohs will represent to the Court that the relevant issues with respect to this matter are these:

1. Is there any basis in contract for the District Court's award of attorneys fees in favor of the Ohs and against the Satsudas?

2. Is there any basis in contract for the District Court's award of attorneys fees in favor of the Ums and against the Satsudas?

3. May the "third party fee" rule be employed to tax the Ums' attorney's fees directly against the Satsudas?

As the Ohs show in the remainder of this Brief, the District Court rested its decision to assess the Ohs' and Ums' attorney's fees directly against the Satsudas on a sound legal foundation. It therefore is incumbent on this Court to conclude that the District Court acted within the bounds of its discretion in awarding those fees and to affirm that Court's ruling. However, should the Court determine that the Ohs' Brief presents persuasive arguments in favor of the award of their fees and costs against the Satsudas, it may sustain the District Court's decision based on those arguments even if the District Court did not consider them. State v. Elder, 815 P.2d 1341, 1344 n.4 (Utah App. 1991).

**THERE ARE LEGALLY SUFFICIENT BASES  
IN CONTRACT TO SUPPORT THE TRIAL COURT'S  
AWARD OF ATTORNEYS FEES IN FAVOR OF THE OHS.**

On or immediately after January 5, 1990, the Ohs and the Satsudas executed several interrelated documents to consummate the sale of the Capitol Motel to the Satsudas. The terms of at

least two of these documents provide a sufficient contractual basis to support the District Court's award of attorney's fees in favor of the Ohs.

A.    **The January 5, 1990 Deed of Trust.**   On January 5, 1990, the Satsudas, as trustors, and the Ohs, as beneficiaries, executed a "Deed of Trust with Assignment Of Rents" in conjunction with the sale of the Capitol Motel. The Deed of Trust designated the Capitol Motel as security for the Satsudas' obligation to pay the Ohs approximately \$102,000.00 for their interest in the Motel. See Stipulated Trial Exhibit No. 8, Addendum to this Brief, No. 1. The Deed of Trust contains the following provisions with respect to attorney's fees:

4.    [The Satsudas agree] to appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of [the Ohs] or Trustees; and should [the Ohs] or Trustee elect to appear in or defend any such actions or proceeding, to pay all costs and expenses, including cost of evidence of title and attorneys fees in a reasonable sum incurred by [the Ohs] or Trustee

\* \* \* \*

7.    Should [the Satsudas] fail to . . . do any act as herein provided, then [the Ohs] or Trustee but without obligation to do so and without notice to or demand upon [the Satsudas] and without releasing [the Satsudas] from any obligation hereof, may . . . commence; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of [the Ohs] or Trustee; . . . and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including

cost of evidence of title, employ counsel,  
and pay his reasonable fees.

Id. (Emphasis added).

Paragraph 4 of the Deed of Trust imposes on the Satsudas the obligation to bear "all costs and expenses" that the Ohs may incur in defending their security interest in the Capitol Motel. Paragraph 7, which must be read in harmony with Paragraph 4, defines, by way of example, the type of activities in which the Ohs may engage to defend those rights and, of necessity, the source of the costs and expenses that may be levied against the Satsudas should the Ohs deem themselves unsecured under the Deed of Trust.

In their Complaint, the Satsudas alleged that the Ohs breached certain warranties in the November 16, 1989 Earnest Money Sales Agreement as well as other implied warranties concerning accommodations at the Capitol Motel. Also by way of their Complaint, the Satsudas attempted to undermine the legitimacy of the January 1990 sale of the Capitol Motel by claiming that the Ohs intentionally misrepresented the condition of seven of the Motel's rooms prior to the sale. Finally, the Satsudas' Complaint argued that the Ohs misrepresented the revenues available from the operation of the Capitol Motel.

Whether each of the Satsudas' causes of action is considered in isolation or in conjunction with its companions, the objective of the Satsudas' Complaint remains constant. By initiating litigation in the District Court, the Satsudas attempted to

overturn and abandon the contractual agreements by which the Capitol Motel was conveyed to them two months earlier. Implicit in the Satsudas' assault on their contractual arrangements with the Ohs was an attack on the rights the Ohs obtained as sellers of the Capitol Motel and beneficiaries under the Deed of Trust.

The Complaint called into question two aspects of the Capitol Motel that were central to the negotiation and sale of that property in January 1990. They first challenged the Capitol Motel as a going commercial concern, alleging that the Motel's historical revenue data were misleading and that its projected earnings were overstated. The Complaint also attacked the Capitol Motel's legitimacy under Salt Lake City regulatory codes, maintaining that the Motel was renovated and expanded in violation of health, safety, and building codes and that the Motel's business license was obtained by fraud.

When the Satsudas launched their legal campaign against the Capitol Motel with their March 1990 Complaint, they directly challenged the security interest that the Ohs held in the Motel. Furthermore, by naming the Ohs as defendants, they gave the Ohs no choice but to enter the litigation to defend not only their own conduct but also the value of the Motel as security for the Satsudas' purchase obligation.

It is hard to imagine conduct by a trustor better calculated than was the Satsudas' to invoke the protections afforded the Ohs by Paragraphs 4 and 7 of the Deed of Trust. The Satsudas

voluntarily entered into the purchase of the Capitol Motel; they voluntarily executed the Deed of Trust; and they voluntarily dragged the Ohs into the District Court litigation. They now cannot be heard to protest having to discharge their obligation to fund the cost of their breach of faith with the Ohs.

And though Paragraphs 4 and 7 hold the Satsudas responsible for a broad range of the Ohs' legal costs and fees, these complementary provisions can hardly be found oppressive under the circumstances of this case. It was not the actions of an unforeseen stranger to the Deed of Trust that triggered litigation and with it the Satsudas' obligation to bear the Ohs' attorney's fees. Rather, it was the conduct of the Satsudas themselves. They, after all, filed the March 15, 1993 Complaint against the Ohs, thereby forcing the Ohs to enter and defend litigation challenging their legal rights in the Capitol Motel.

B. The January 5, 1990 Assignment Of Contract. Even if the Deed of Trust provided insufficient legal grounds for the District Court's assessment of the Ohs' attorney's fees against the Satsudas, a contemporaneous and related document supplies an adequate basis in contract to sustain the award. The fundamental document of the Ums' 1987 sale of the Capitol Motel to the Ohs is a Uniform Real Estate Contract that the Ohs and Ums executed on May 1, 1987. See Stipulated Trial Exhibit No. 1, Addendum to this Brief, No. 2. To implement the Ohs' subsequent sale of the Capitol Motel to the Satsudas in 1990, the Ohs transferred their



buyers' interest in the May 1987 Uniform Real Estate Contract to the Satsudas by executing an "Assignment of Interest" on January 5, 1990. See Stipulated Trial Exhibit No. 8; Addendum to this Brief, No. 3.

Under Paragraph 3.b. of the Assignment of Interest, and in consideration of the Ohs' transferring their interest in the 1987 Contract to them, the Satsudas agreed to "save and hold harmless [the Ohs] of and from any and all actions, suits, costs, damages, claims and demands whatsoever" that were caused by the Satsudas' own conduct." Id., ¶ 3.b. (Emphasis added).

The deliberately inclusive language of Paragraph 3.b. establishes the Satsudas' obligation to pay the Ohs' attorney's fees beyond good faith dispute. This key provision of the Assignment of Contract is not merely an indemnity provision. That is, it does not defer the Satsudas' obligation to safeguard the Ohs' financial well-being until the Ohs are found legally responsible for payment of a sum certain in costs or fees or damages. Instead, Paragraph 3.b. requires the Satsudas to come forward at the moment the Ohs are exposed to even a threat of monetary loss and insulate the Ohs from all financial harm.<sup>2</sup>

Moreover, Paragraph 3.b does not confine the Satsudas' contractual duty to hold the Ohs harmless to instances in which

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2 Nothing in the text of Paragraph 3.b. limits its application to the defense of the Ohs in legal matters. It also is intended to protect the Ohs' interests in equitable proceedings, administrative forums, and other quasi-judicial settings.

the Satsudas breach a contractual obligation either to the Ohs or to the Ums. Nor is it limited in application to matters in which third parties, responding to "acts" of the Satsudas, initiate proceedings against the Ohs. Paragraph 3.b. is drafted quite broadly and obliges the Satsudas to hold the Ohs harmless from the consequences of any "act" by the Satsudas that ensnares the Ohs' by virtue of their former status as a party to the 1987 Contract.

Here too, the Satsudas' own conduct is the key to their obligation to pay the attorney's fees that the Ohs incurred in this case. The Satsudas commenced the District Court litigation, charging the Ohs with intentional misrepresentation in the transactions by which they acquired the Ohs' buyers' interest in the 1987 Contract. Having taken this deliberate step against the Ohs, the Satsudas became responsible for the financial consequences that their lawsuit imposed on them. The District Court recognized this straightforward cause and effect relationship--and the Satsudas' agreement to be bound by Paragraph 3.b.--when it directed the Satsudas to pay the Ohs' costs and legal fees. Because there is an adequate basis in the record to support this action by the District Court, this Court must reject the Satsudas' petition to be excused from their consensual undertaking "to hold harmless" and affirm the District Court's award of attorney's fees in favor of the Ohs.

**THERE ARE LEGALLY SUFFICIENT BASES  
IN CONTRACT TO SUPPORT THE DISTRICT COURT'S  
AWARD OF ATTORNEYS FEES IN FAVOR OF THE UMS.**

Under paragraph 15 of the May 1987 Contract, the Ums and the Ohs agreed that:

Should either party default in any of the covenants or agreements contained herein, 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.

See Addendum to this Brief, No. 2 at 2.

Though Paragraph 15's mutual indemnification pact was originally binding on the Ums and the Ohs, the record shows clearly the Satsudas willingly assumed the Ohs' obligations and exposure to financial liability explicit in its terms. A proper interpretation of Paragraph 15 must be informed by the text of the Assignment of Contract. Under Paragraph 3.a. of the Assignment, the Satsudas agreed that in consideration of the Ohs transfer of the 1987 Contract to them, they would "duly keep, observe and perform all of the terms, conditions and provisions of the [1987 Contract] that are to be kept by the [Ohs]." Addendum to this Brief, No. 3.

The legal implications of Paragraph 3.b. for the Satsudas could not be more certain. As this court has recognized, an assignment of a contract does not "operate to cast upon the

assignees the duties and obligations or the liabilities imposed by the contract on the assignor." Hansen v. Green River Group, 748 P.2d 1102, 1104 n.3 (Utah App.1988). However, a well-established exception to the general rule in Hansen arises where the assignee of a contract assumes the contractual liabilities of his assignor. Id. Through the vehicle of Paragraph 3.a., that is precisely what the Satsudas did; they expressly and voluntarily agreed to "keep, observe and perform all of the terms, conditions and provisions of the [1987 Contract] that are to be kept by the [Ohs]," among them the obligation of the Ohs to be held accountable for attorney's fees the Ums may incur to vindicate their rights under the 1987 Contract.

As of January 5, 1990, the Satsudas held all of the Ohs' right, title, and interest in and all liabilities under the 1987 Contract. The Ums therefore were entitled, in the wake of the Assignment of Contract, to exercise their rights under paragraph 15 of the May 1987 Uniform Real Estate Contract to seek reimbursement of all costs and expenses, including a reasonable attorney's fee, either to enforce the terms of the Uniform Real Estate Contract against the Satsudas or to pursue any remedy made available to them by applicable law. As a result, there was an adequate contractual basis in place at the time the Ohs joined the Ums to this lawsuit as third-party defendants to impose responsibility for the Ums' attorney's fees directly on the

Satsudas. It is therefore disingenuous for the Satsudas to argue to the contrary in this appeal.

**THE OHS ARE ENTITLED TO HAVE UMS' ATTORNEY'S  
FEES AWARDED DIRECTLY AGAINST THE SATSUDA AS  
A COST OF DEFENDING THIS LITIGATION.**

In post-trial proceedings before the District Court, see ROA, V.4 at 1472-85, the Ohs argued that under the holding in Collier v. Heinz, 827 P.2d 982 (Utah App. 1982), they may recover as consequential damages against the Satsudas any attorney's fees the District Court awarded against them and in favor of the Ums. As the Ohs pointed out to the District Court, such a recovery from the Satsudas is permissible because the Ohs' litigation with the Ums was a foreseeable consequence of the Satsudas' litigation with the Ohs. ROA, V.4 at 1484-85. In their Opening Brief, the Satsudas argue that this is not an appropriate case for application of the "third party fee" rule because this case does not precisely track the facts of Collier v. Heinz.

The Satsudas confuse the vitality of the general "third party fee" rule with the acknowledged need to examine the facts of each case where the general rule is invoked to determine its applicability. Satsudas maintain that Ohs' misapplication of the general rule may be gleaned by reviewing two Utah decisions, South Sanpitch Co. v. Pack, 765 P.2d 1279 (Utah App. 1988) and Broadwater v. Old Republic Surety, 854 P.2d 523 (Utah 1993). Neither of these cases supports Satsudas' argument that Ohs

cannot invoke the "third party contract" rule to recover their fees in litigating with the Ums.

In South Sanpitch, a title company negligently failed to timely record the Plaintiff's deed. As a result the Plaintiff was forced to file a quiet title action against a third party. The Plaintiff sued the title company for the attorney's fees incurred in maintaining the quiet title action. The Court of Appeals allowed the recovery of those fees as part of the damages stemming from the title company's negligence, id. at 1282-83, stating the "third party fee" rules as follows:

[E]ven where a contract does not provide for attorney's fees in the event of litigation between the parties, fees can be recovered as damages for breach of contract in certain situations. See, e.g., Pacific Coast Title Insurance Co. v. Hartford Accident and Indem. Co., 7 Utah 2d 377, 325 P.2d 906 (1958). Likewise, it is settled that when the natural consequence of one's negligence is another's involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages.

South Sanpitch, 765 P.2d at 1282.<sup>3</sup>

The Satsudas argue that the third party fee rule applies here because they had no control over Ohs' decision to file a third party complaint against the Ums; they had no privity of contract with the Ums; the main case involves a suit between the

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3 The opinion in Broadwater v. Old Republic Surety, in citing South Sanpitch, merely holds that the South Sanpitch doctrine does not apply in a conversion case brought against a transfer agent by the shareholder of a corporation. Broadwater, 854 P.2d at 534-35.

Satsudas and the Ohs, not the Satsudas and the Ums; and the Ums were found not to be indispensable parties early in the case. These arguments are unavailing because issues of privity of contract, decisions to file the third party litigation, and determinations of indispensable party status are not determinative of the application of the third party fee rule.

Neither South Sanpitch nor Broadwater declares or implies that such factors govern the application of the third-party tort rule. Rather, the test is one of "foreseeability" of third party litigation being triggered by the actions of the party against whom the claim for fees is pressed. Consequently, the question the Court needs to resolve here is whether it was foreseeable that the Satsudas' lawsuit against the Ohs would cause the Ohs to enter into litigation against the Ums. The answer is a resounding "yes." This because Satsudas' allegations, as Satsudas well knew, drew into issue events that occurred and conditions that arose at the Capitol Motel while the Ums owned those premises. The only question as to the Ohs was whether the Ohs knew of these occurrences and conditions when they sold the Capitol Motel to the Satsudas. Clearly this factual predicate demonstrates the kind of "foreseeability" of a third party action contemplated in South Sanpitch, Broadwater and Collier v. Heinz. Consequently, the District Court was on firm ground, both factually and legally, when it awarded the Ums' attorney's fees as well as Ohs' attorney's fees against the Satsudas.

**THE ATTORNEY'S FEES REQUESTED BY OHS ARE  
REASONABLE AND SHOULD BE AWARDED BY THE COURT.**

In their Opening Brief, the Satsudas attack the reasonableness of the amount of attorney's fees, \$44,959.86, that the District Court awarded the Ohs at the close of trial. Among the Satsudas' objections is a complaint that the attorney's fees request for the Ohs' prior counsel, Grant W.P. Morrison, contains no independent statement that the hours spent were necessary or reasonable or that the hourly rate reflected in Mr. Morrison's billings is customary in the community for similar services. See Opening Brief at 6.

This criticism reveals the Satsudas' failure to marshal the evidence put before the District Court on the reasonableness of costs and fees claimed by the Ohs. On March 14, 1995, counsel for the Ohs submitted their Verified Application for attorney's fees to the District Court. That Application identifies every attorney and other legal professional who provided legal services to the Ohs; describes the legal services provided by each professional; specifies the billing rate of each professional; shows the total number of hours billed by each professional; summarizes the total dollar amount billed to the Ohs by each professional or retained law firm; states that all legal services provided to the Ohs were reasonably necessary and performed at a billing rate customary in the local community; and incorporates comprehensive, itemized billing statements spanning the entire course of the litigation before the District Court. See ROA, V.4



at 1472-1540. For the Satsudas to now claim on appeal that the attorney fee billings are somehow lacking in detail is to confess that they have either ignored or misunderstood the plain record before the District Court. The Satsudas' challenge to the specificity of the Ohs' billings is simply contrived and may be dismissed by this Court out of hand.

The Satsudas next maintain that counsel for the Ohs have failed to distinguish the billable hours spent prosecuting the third party complaint from the billable hours spent defending against the principal action. With this criticism the Satsudas ask this Court to impose on the Ohs an impossible standard of proof. The issues in the Complaint and the Third Party Complaint were inextricably intertwined because all of the conditions in the property of which Satsudas complained were caused during Ums' ownership of the Capitol Motel. Thus, most of the discovery taken and pleadings filed with respect to the issues of creation and knowledge of conditions at the Capitol Motel implicated the Ums as both percipient witnesses and parties on all such issues. For example, all parties not only attended but also participated in the deposition of Kee Um. Mr. Um's testimony was clearly relevant to the prosecution of claims and defenses in the main case as well as the advancement of the Ohs' third party claim. Because of the nature of the claims in this case, the contractual relationships among all parties, and the serial ownership of the real property at issue by all parties, the rule the Satsudas ask

this Court to impose on the Ohs calls for the etching of an infinitely fine line through the middle of all pre-trial and trial proceedings in the six-year history of this litigation. On one side of the line would be all costs and fees attributable to the case in chief; on the other side--and presumably distinct from all else--would be the costs and fees arising in the third party action. The Ohs submit that such an exercise is best left to Jesuits as it can yield only imaginary results and create distinctions on paper where none exist in fact.

Perhaps the best evidence of the reasonableness of the Ohs' claim for attorney's fees is contained in the "bottom line" of the March 14, 1995 Verified Fee Application. Although the Ohs were the only parties in this litigation involved in both the case in chief and the third party action, their fee claim is nearly \$12,000.00 less than that of the Ums, the third party defendants.

The Ohs' Application for Attorney's Fees, as presented to the District Court on March 14, 1995, is abundantly reasonable. The Satsudas are well aware of the extensive work to which Ohs were put in defending this claim and advancing the Third Party Complaint. Given that the Satsudas are responsible, either directly or through their presumed faculties of reasonable foreseeability, for all the attorney's fees generated in this protracted litigation, they cannot be heard to complain about the

inescapable consequences of their own litigiousness.

**THE SATSUDAS' CLAIMS OF FRAUD  
FAIL AS A MATTER OF LAW**

The Satsudas assert that the District Court exceeded the bounds of its discretion when it determined that the Ohs were not liable for fraud in the negotiations and sale of the Capitol Motel. The Satsudas maintain on appeal that the Ohs are culpable because they fraudulently concealed information about (a) the discrepancy between the number of Capitol Motel parking spaces and number of rentable rooms; (b) the condition of the Motel's plumbing and electrical systems; and © the construction of seven rooms at the Motel without benefit of a Salt Lake City building permit. The Satsudas also argue that even if the Ohs did not conceal these structural and regulatory deficiencies, they nonetheless failed to disclose them anytime prior to the January 1990 closing.

A. **Fraudulent Concealment.** This Court recently addressed the tort of fraudulent concealment in the setting of a land sale transaction. In Maack v. Resource Design & Construction, Inc., 875 P.2d 570 (Utah App. 1994), the Court considered an appeal by the purchaser of a private residence who had leveled multiple tort claims against both the seller and the builder of his home. In the District Court, the purchaser alleged that the seller and the builder had either concealed or failed to disclose several structural problems that afflicted his residence. That Court

granted plenary summary judgment in favor of both defendants on all claims.

In affirming the judgment of the District Court, the Maack Court adopted the Restatement (Second) of Torts §550 as its working definition of the intentional tort of fraudulent concealment. Section 550 declares:

One party to a transaction who by concealing or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the non-existence of the matter that the other was thus prevented from discovering.

Maack, 875 P.2d at 578. Because the purchaser in Maack could not support his claim of fraudulent concealment by offering evidence that proved the defendants intentionally or actively concealed defects in the home, the Court of Appeals concluded that the Plaintiff's claim for fraudulent concealment failed as a matter of law. Maack, 875 P.2d at 578.

As in Maack, here the Satsudas did not--and could not--show that the Ohs intentionally concealed (or even knew of) any defect in the Capitol Motel prior to or during the January 1990 sale of the Motel. Even if there were a modicum of evidence in the record to support such a contention, the Satsudas' claims still would fail. Utah law requires a showing by "clear and convincing" evidence of all facts that support a claim of fraud. Secor v. Knight, 716 P.2d 790, 794 (Utah 1986). Because an

essential component of Satsudas' claim for fraudulent concealment against the Ohs is lacking, the claim fails as a matter of law.

Even if the Satsudas were able to show that the Ohs intentionally hid any of the deficiencies of which they complain, they still may not recover on a theory of fraudulent concealment. As the Court explained in Maack, a purchaser may maintain such a claim only where "a careful, reasonable inspection on the part of the purchaser would not disclose the defect." Maack, 875 P.2d at 578 (quoting Atherton Condominium Bd. v. Blume Dev., 799 P.2d 250, 261 (Wash. 1990)). The Maack Court's insistence that allegedly hidden material information escape a careful, reasonable inspection picks up the thread of the Court's ruling earlier in the same opinion that the proponent of a claim of fraud or misrepresentation must show that it reasonably relied on the defendant's false statements. "Fraud as related to [the] purchase of real estate may not be predicated on alleged false statements the truth of which could have been ascertained with reasonable diligence by the party asserting their falsity." Maack, 875 P.2d at 577 (citation omitted). Accordingly, for a plaintiff to prevail on a claim of misrepresentation, it must demonstrate that it took reasonable steps to ascertain the truth of the representations at issue or that its reliance on those representations, without some further inquiry, was reasonable under the circumstances. Id.

The record in this case contains no evidence that the Satsudas took any steps to investigate the state of affairs that underlie their claims of intentional misrepresentation. There is no evidence that the Satsudas even inquired about the alleged violation of health, safety, or zoning codes on the Capitol Motel premises. Nor is there evidence that they retained the services of a building inspector to advise them on the Motel's compliance with applicable city regulations. Yet this is precisely what the Satsudas agreed to do under the terms of the Earnest Money Sales Agreement. Paragraph B of that document provides:

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 by Buyer to Seller or the Listing or 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 inspection shall be allowed by Seller but arranged for and paid by Buyer.

(Emphasis added.)<sup>4</sup> In addition, under Section 1.(e) of the Earnest Money Sales Agreement, the following handwritten text appears: "Buyer will inspect more units before acceptance and it should be [sic] all operational condition." See Addendum to Opening Brief, No. 24. Yet, it is undisputed that the Satsudas

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4 "Section 6" of the Earnest Money Sales Agreement reads as follows: "SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: N/A." See Addendum to Opening Brief, No. 24.

made only a cursory inspection of the Motel premises and never retained a professional inspector to examine the grounds of or improvements to commercial real estate for which they were willing to part with two-thirds of a million dollars. One may conclude from the Satsudas' failure to take even these rudimentary steps to protect their \$620,000 investment in the Capitol Motel that they did not exercise the reasonable diligence that must be frustrated by a seller's actions in order to maintain a claim of fraudulent concealment.

B. **Fraudulent Failure to Disclose.** The Satsudas' claim on appeal that the District Court erred in not finding the Ohs liable for fraudulently failing to disclose deficiencies in the zoning, plumbing and electrical systems, or construction of the Capitol Motel also fails as a matter of law. To prevail on this cause of action at trial, the Satsudas were required to demonstrate that the information that they claim they failed to receive was material to their decision to purchase the Capitol Motel, See Maack, 875 P.2d at 576-77, and that the information was known to the Ohs at the time of that transaction. In addition, the Satsudas must show that the Ohs had a legal duty to communicate the information to them. First Security Bank v. Banberry Development, 786 P.2d 1326, 1328 (Utah 1990); Maack, 875 P.2d at 578.

With respect to this last element of a claim of fraudulent non-disclosure, it is essential to remember that in Utah, the

general rule is that no fiduciary duties run between a buyer and seller of real property. Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980); superseded by statute on other grounds, 846 P.2d 1307 (Utah 1993); Schafir v. Harrigan, 879 P.2d 1384, 1390; Secor v. Knight, 716 P.2d 790, 795 (Utah 1986). The Utah courts have recognized a narrow exception to this broad rule. In Banberry Development, the Utah Supreme Court adopted the position of the Restatement (Second) of Torts §551(2)(b) that:

One party to a business transaction is under a duty to exercise reasonable care to disclose to [another party] before the transaction is consummated...matters known to him that he knows to be necessary to prevent his partial or unambiguous statement of facts from being misleading.

Banberry Development, 786 P.2d at 1330-31. This duty of disclosure arises, whoever, only where a defect in the premises being sold is not discoverable by reasonable care. Banberry Development, 786 P.2d at 1331; Maack, 875 P.2d at 579. Moreover, the doctrine of caveat emptor, which applies to the sale of used commercial property in Utah, Schafir, 879 P.2d at 1388-89, bars a claim of failure to disclose even latent defects because it is assumed that the buyer has a reasonable opportunity to inspect the premises. Id.; compare Maack, 875 P.2d at 583 (caveat emptor applies to the sale of used residential property). As pointed out above, there is no evidence in the record that the Satsudas made any inquiry, reasonable or otherwise, into any of the deficiencies that they claim afflict the Capitol Motel before



purchasing that real property and its improvements. Accordingly, the District Court properly refused to fasten liability on the Ohs for the consequences of those deficiencies under a theory of fraudulent failure to disclose.

**THE OHS CARRIED OUT THEIR OBLIGATIONS  
UNDER THE EARNEST MONEY AGREEMENT**

The Satsudas next argue on appeal that the District Court erred as a matter of law in concluding that the Ohs were not liable for breach of the warranties set out in paragraph C of the Earnest Money Sales Agreement of November 16, 1989. See ROA, V.4 at 1467, 1650. In that clause of the Earnest Money Agreement, the Ohs warranted to the Satsudas that they had received no claim or notice of building or zoning violations, that all obligations in the form of taxes, assessments, mortgages, liens and other encumbrances were current before closing, and that the plumbing, heating, air conditioning and ventilating systems, electrical systems, and appliances in the Capitol Motel were in satisfactory working condition at closing. See Addendum to Opening Brief, No. 24 at 1. In the Satsudas' view, the deficiencies in a portion of the Motel's plumbing and electrical systems evidences a breach of the warranties extended to them under paragraph C. Opening Brief at 30-34.

The Satsudas' breach of warranty theory fails to account for the doctrine of merger that applies in the sale of commercial real property and improvements. The Utah Supreme Court has explained the workings of that doctrine's mechanism as follows:

The doctrine of merger...is applicable when the acts to be performed by the seller in a contract relate only the delivery of title to the buyer. Execution and delivery of a deed by the seller then usually constitute full performance on [the seller's] part, and acceptance of the deed by the buyer manifests his acceptance of that performance even though the estate conveyed may differ from that promised I the antecedent agreement. Therefore, in such a case, the deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable.

Stubbs v. Hemmert, 567 P.2d 168, 169 (Utah 1977) (footnotes omitted, emphasis added).

The vitality and effect of the doctrine of merger was affirmed in Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), a case whose facts are remarkably similar to those underlying this case. In Schafir the plaintiffs (the Schafirs) brought a claim of breach of warranty against the defendants (the Harrigans), contending that the Harrigans had breached the terms of paragraph C of the Earnest Money Sales Agreement that the parties had executed. Citing the Utah Supreme Court's statement of the doctrine in Stubbs, the Court of Appeals concluded that the doctrine of merger extinguished the terms of an Earnest Money Sales Agreement and elevated the subsequently executed warranty deed to the status of final, binding agreement between buyer and seller. Schafir, 879 P.2d at 1392. Because the Schafirs had accepted a warranty deed for their property, the Court concluded that they were barred as a matter of law from arguing that the Harrigans had breached the warranties of paragraph C in the

Earnest Money Sales Agreement unless they could show that the warranties on which they were relied were carried forward through the warranty deed or otherwise survived the delivery and acceptance of the deed. Id. Observing that the warranties preserved in a warranty deed do not include notice of building code violations, the Schafir Court affirmed the District Court's grant of summary judgment in favor of the Harrigans. Id.

The merger doctrine recognizes several exceptions, including fraud and the existence of collateral rights in a contract of sale. Embassy Group Inc. v. Hatch, 865 P.2d 1366, 1371-72 (Utah App. 1993).<sup>5</sup> Proof of fraud precludes invocation of the doctrine. But as the Utah Supreme Court has explained, in order to prevail on a claim of fraud, all of the elements of that tort must be established by clear and convincing evidence. Secor v. Knight, 716 P.2d 790, 794 (Utah 1986); Embassy Group Inc., 865 P.2d at 1371. The collateral rights exception bars merger only where "the seller's performance involves some act collateral to the conveyance of title, with the result that those obligations 'survive the deed and are not extinguished by it.'" Embassy Group Inc., 865 P.2d at 1372 (quoting Stubbs v. Hemmert, 567 P.2d 168, 169 (Utah 1977)). Thus if a preliminary land sales contract contains terms that are collateral to the conveyance of title,

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5 The doctrine also recognizes exceptions for mutual mistake in drafting and ambiguity in the final documents. Maynard v. Wharton, 912 P.2d 446, 450 (Utah App. 1996). Neither of these exceptions has been put at issue in this appeal.

those terms will survive the delivery of a warranty deed to buyer. Embassy Group Inc., 865 P.2d at 1372. Terms in a land sale contract that relate to the title of the property conveyed or encumbrances on that title "are not considered to be collateral because they relate to the same subject matter as the deed." Secor, 716 P.2d at 793.

Here the Satsudas find themselves in the same situation as the plaintiffs in Schafir. They are attempting (and attempted at trial) to invoke certain warranties memorialized in an Earnest Money Sales Agreement. But as the Court in Schafir concluded, the entirety of such an agreement is extinguished by the subsequent delivery of a warranty deed to the buyer of the property. Accordingly, the Satsudas fare no better than the plaintiffs in Schafir; their cause of action for breach of warranty fails as a matter of law. Moreover, neither the exception for fraud or collateral rights bars the application of merger in this case. As the Ohs demonstrated above, the Satsudas may not maintain their twin claims of intentional misrepresentation (read: fraud) as a matter of law. Nor can the Satsudas point to any evidence in the record of this case that proves the warranties of paragraph C of the Earnest Money Sales Agreement were not directly tied to the Ohs' obligation under the Warranty Deed to convey title to the Capitol Motel. Because neither of these exceptions barred the application of the doctrine of merger in this case, the Earnest Money Sales

Agreement ceased to exist on or about January 5, 1990 and was not available at trial as a foundation for the Satsudas' claim of breach of warranty.

**THE SALE OF THE CAPITOL MOTEL AT A PROFIT  
FOLLOWING COMMENCEMENT OF THIS SUIT NEGATES  
SATSUDAS' CLAIM FOR SPECIAL DAMAGES.**

The Satsudas also find error in the District Court's refusal to award them compensation for the special damages that they allegedly incurred to correct electrical and plumbing problems in several of the Capitol Motel's rooms. Opening Brief at 34-36. According to the Satsudas the cost of these repairs totaled \$37,281.00. Id. at 35. As a preliminary matter, the Ohs register their objection to the appearance of this issue in the Satsudas' Opening Brief. As was pointed out above, this issue was not listed in the Satsudas' Docketing Statement nor was it specified in the Satsudas' various Notices of Appeal. See, for example, ROA V. 4 at 1832-33.

The Satsudas claim for an award of the "special damages" that they allegedly incurred to make repairs to the Capitol Motel offers this Court absolutely no legal foundation on which to base any relief from the final judgment of the District Court. First, the entire claim rests exclusively on the Earnest Money Sales Agreement executed by and between the Satsudas and the Ohs on November 16, 1989. But as the Satsudas argue strenuously in their Opening Brief in opposition to the Ohs' claim for attorneys fees, Opening Brief at 14-17, that Agreement went out of

existence on January 5, 1990, due to the execution of the Ohs' Warranty Deed on that date.<sup>6</sup> How is it that the Earnest Money Sales Agreement has no existence when an award of the Ohs' attorney's fees is at issue yet retains vitality as a legal predicate for the Satsudas' claim for special damages? As this Court has held repeatedly, see, for example, Schafir, 879 P.2d at 1392, the doctrine of merger extinguishes the terms of an earnest money sales agreement upon the execution of a warranty deed between a buyer and a seller.

Nor can there be any bona fide assertion that any of the recognized exceptions to the abrogation of an earnest money sales agreement came into play to preserve past the date of closing an obligation on the part of the Ohs to ensure that the Capitol Motel's plumbing and electrical systems satisfied Salt Lake City building codes. As was shown above, this notion was expressly rejected by this Court in Schafir. See id., 879 P.2d at 1392.

Though its origins are uncertain, the Satsudas' claim for special damages appears to be grounded in the premise that the Capitol Motel was worth less than what they paid for it in the January 5, 1990 sale. In other words, the Satsudas are attempting to claim on appeal that the District Court denied them damages rooted in a theory of "loss of the bargain."

Assuming for purposes of responding to this theory that the Satsudas actually made repairs to the Capitol Motel, they still

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The Ohs agree. See supra at 34-37.

were barred from recovering those costs at trial. Where, as here, real property that is the subject of a "loss of the bargain" claim appreciates in value, Utah law declares that the appreciation negates the claimant's entitlement to damages for loss of advantageous bargain. In Soffe v. Ridd, 659 P.2d 1082 (Utah 1983), the plaintiff (Soffe) sold a house to the defendant (Ridd) under a Uniform Real Estate Contract and then sued to recover possession of the property and terminate the contract when Ridd defaulted. Id. at 1083. Soffe sought to retain \$20,725 paid under the contract by Ridd as liquidated damages. Id. Ridd counterclaimed seeking to avoid the contractual forfeiture of all monies paid under the contract on grounds of unconscionability. Id. Ridd prevailed on his counterclaim in the District Court based on the Court's determination that Soffe did not sustain the loss of an advantageous bargain. Id. at 1083-84. Soffe appealed the District Court's refusal to literally enforce the liquidated damages provision.

The Supreme Court affirmed the District Court's dismissal of Soffe's loss of bargain claim:

The plaintiff produced no evidence that the property had diminished in value. Mr. Ridd, one of the buyers, testified that when he and his wife vacated, the property was worth a substantial amount more than the contract price....

Id. at 1085. (Emphasis added.) Thus, without evidence of actual diminution in value, loss of bargain damages are not recoverable. Similarly, in Bellon v. Malnar, 808 P.2d 1089 (Utah 1991), the

plaintiff's assignee entered into a real estate contract to purchase from defendant Malnar 76 acres of land together with water stock for \$152,000. Id. at 1091. Malnar subsequently claimed a default and obtained possession of the property. The plaintiff subsequently brought an action against Malnar for "equitable restitution" of the down payment and the installments which were forfeited to Malnar. Id. at 1092. At trial, the plaintiff presented evidence that the property was worth \$180,000. Id.

The District Court first computed Malnar's offsetting damages resulting from the default by initially subtracting the total amount paid in principal, \$50,080.65, from \$152,000, the contract price, leaving \$101,919. The District Court then added \$10,247 for accrued interest due when the default occurred and \$1,774 for delinquent real property taxes and water assessments and thus calculated the balance owing to Malnar at the time of the default at \$113,941. Id. at 1092. Continuing the calculation to arrive at a decision on plaintiff's equitable restitution claim, the trial court then subtracted that balance, \$113,941, from the total amount in value that Malnar had received at the forfeiture, \$185,075 (the trial court found \$5,075 in extra value forfeited in addition to the \$180,000 value of the property) and awarded judgment against Malnar in favor of plaintiffs in the sum of \$71,133. Id. Malnar appealed.



The Supreme Court held that the District Court had erred in its calculation of offsetting damages:

The contract price of the property was \$152,000. The value of the property, including the disputed 6 acres, at forfeiture was \$180,000. Malnar is not entitled to loss of the bargain damages when the property has appreciated in value.

Id. at 1096 (citing Soffe v. Ridd, 659 P.2d at 1085).

Other jurisdictions are in accord with this rule. In Yank v. Juhrend, 729 P.2d 941 (Ariz. App. 1986), a case strikingly similar to this one, a purchaser of land brought an action for rescission and loss of the bargain damages, claiming that the land he had purchased had been illegally subdivided by the seller. As here, the factual basis of the claim was failure of the seller to conform with municipal codes and ordinances. However, the plaintiff, Yank, testified that the property had appreciated in value. Id. at 943. Based on that testimony, the Arizona Court of Appeals succinctly ruled that "because Yank testified at the hearing on the preliminary injunction that the property was then worth...more than the purchase price, he was not entitled to any damages." Id. (Emphasis added.)

In Harris v. Shell Development Corporation Nevada Inc., 594 P.2d 731 (Nev. 1979), the vendor of an apartment complex brought an action against the purchaser and the escrow agent for breach of contract. The purchaser cross-claimed against the escrow agent. Id. at 732-33. Based upon a finding of fact that the

market value of the land at the time of the purchaser's breach was higher than the purchase price, the Nevada court held:

Generally, where the purchaser breaches an executory real estate contract, the vendor is entitled to recover damages measured by the difference between the contract price and the market value of the land on the date of breach (citation omitted). Where, as here, the market value of the land at the time of the breach is higher than the purchase price, the vendor is entitled to only nominal damages plus provable consequential damages.

Id. at 734.

With respect to special damages, the Utah Supreme Court, in Soffe v. Ridd, 659 P.2d 1082 (Utah 1983), affirmed without comment the District Court's ruling that the seller did not sustain a loss of an advantageous bargain and that she was not entitled to an offset for improvements which she made after retaking possession which put the premises in better condition than they were in at the time the buyers took possession. Id. at 1083-84, 1085. In other words, and contrary to the holding in Harris, the Utah courts apply the rule that such special/consequential damages are "absorbed" into the property's appreciated value.

In this case, Judge Frederick, sitting as the finder of fact, was not called on to speculate about the appreciated value of the Capitol Motel or rely upon approximations, such as appraisals. Here, the optimal finder of fact as to value, the marketplace of willing buyers and sellers, rendered its "verdict"

in the form of an actual, arms-length market sale. After all, the best measure of value of property is what a willing buyer will pay to a willing seller under non-distressed circumstances.

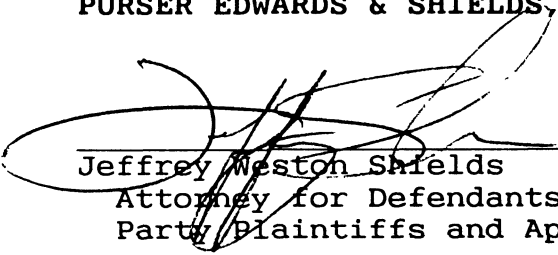
Clearly, the marketplace proved the Satsudas' damages to be illusory. The marketplace declared that the alleged defects in the plumbing and electrical systems had no measurable adverse effect on the value of the Capitol Motel. Accordingly, the Satsudas' "loss of bargain" special damages claims fail as a matter of law against the setting of undisputed facts in this record.

#### CONCLUSION

In the preceding Brief, The Ohs have shown that each and every issue raised by the Satsudas either ignores the evidence put before the District Court or has no basis in law. For these reasons, the Ohs respectfully ask this Court to affirm the Final Judgment of the District Court in all respects.

DATED this 22 day of May, 1996.

PURSER EDWARDS & SHIELDS, L.L.C.



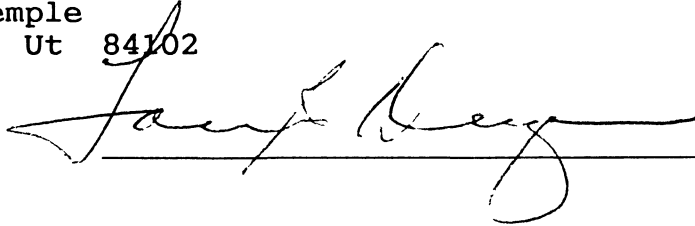
Jeffrey Weston Shields  
Attorney for Defendants, Third-  
Party Plaintiffs and Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 1996, I served a true and correct copy of the foregoing **BRIEF OF APPELLEES HASIN OH AND MYUNG OH**, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

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

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



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**ADDENDUM TO BRIEF OF HASIN OH AND MYUNG JA OH**

Trial Exhibits (all three of the following documents were included in Trial Exhibit No. 8)

1. Deed Of Trust With Assignment of Rents, January 5, 1990.
2. Uniform Real Estate Contract, May 1, 1987
3. Assignment of Contract, January 5, 1990

Tab 1

WHEN RECORDED MAIL TO

Name Hasin Oh  
Street 476 South State Street  
Address Salt Lake City, Utah 84111  
City & State

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DEED OF TRUST  
WITH ASSIGNMENT OF RENTS

This Deed of Trust, made this 5th day of January, 1990, between  
WAYNE TAKASHI SATSUDA and SEON SIL SATSUDA, his wife, as TRUSTOR,  
whose address is 1749 South State Street, Salt Lake City, Utah 84115  
(Street and number) (City) (State)  
ASSOCIATED TITLE CO., a Utah corporation, as TRUSTEE, and HASIN OH and MYUNG JA OH  
his wife, as joint tenants, as BENEFICIARY,

Witnesses: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described  
property, situated in Salt Lake County, State of Utah:

Beginning at a point 5 feet North of the Northwest Corner of  
Lot 28, Block 2, Dankowske Park, a Subdivision of Lot 10, Block  
5, Five Acre Plat "A", Big Field Survey, and running thence  
South 211.4 feet; thence East 121.5 feet; thence North 211.4  
feet; thence West 121.5 feet; to the point of beginning.

Subject to a right of way 50 feet wide for road and incidental  
purposes which lies within the bounds of Wilson Avenue.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements,  
hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT,  
HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits.

For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of \$ 102,100.00  
made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or re-  
newals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or ad-

vances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided

**To Protect The Security of This Deed of Trust, Trustor Agrees:**

1 To keep said property in good condition and repair, not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed damaged or destroyed thereon to comply with all laws covenants and restrictions affecting said property, not to commit or permit waste thereof not to commit suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary the specific enumerations herein not excluding the general, and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property Trustor further agrees

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder

2 To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary In the event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary, instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged In the event that the Trustor shall fail to provide satisfactory hazard insurance the Beneficiary may procure, on the Trustor's behalf, insurance in favor of the Beneficiary alone If insurance cannot be secured by the Trustor to provide the required coverage, this will constitute an act of default under the terms of this Deed of Trust

3 To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto

4 To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee, and should Beneficiary or Trustee elect to appear in or defend any such action or proceeding to pay all costs and expenses including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee

5 To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto to pay all costs fees, and expenses of this Trust

6 To pay to Beneficiary monthly, in advance, an amount, as estimated by Beneficiary in its discretion sufficient to pay all taxes and assessments affecting said property, and all premiums on insurance therefor, as and when the same shall become due

7 Should Trustor fail to make any payment or to do any act as herein provided then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees

8 To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of 10% per annum until paid, and the repayment thereof shall be secured hereby.

9 To pay to Beneficiary a "late charge" of not to exceed five cents (5¢) for each One Dollar (\$1.00) of each payment due hereunder or due pursuant to the aforesaid promissory note of even date hereof which is more than fifteen (15) days in arrears This payment shall be made to cover the extra expense involved in handling delinquent payments

**IT IS MUTUALLY AGREED THAT:**

10 Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage All such compensation, awards, damages rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require

11 At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed of Trust and the note for endorsement (in case of full reconveyance, for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby, and without releasing the interest of any party joining in this Deed of Trust, Trustee may (a) consent to the making of any map or plat of said property, (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Deed of Trust or the lien or charge thereof, (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof Trustor agrees to pay reasonable trustee's fees for all of the services mentioned in this paragraph

12 As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed of Trust and of any personal property located thereon Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed of Trust to any such tenancy, lease or option

13 Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine

14 The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice



15 The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default

16 Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby

17 After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee without demand on Trustor shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case notice of postponement shall be given by public declaration thereof by such person at the time and place first appointed for the sale; provided if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant of warranty express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 0% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee in its discretion may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place

18 Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor

19 Upon the occurrence of any default hereunder Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court

20 Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made in the manner provided by law

21 This Deed of Trust shall apply to, inure to the benefit of, and bind all parties hereto, their heirs legatees devisees, administrators executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

22 Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary or Trustee shall be a party, unless brought by Trustee.

23 This Deed of Trust shall be construed according to the laws of the State of Utah

24. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth

Signature of Trustor

Wayne Takashi Satsuda  
WAYNE TAKASHI SATSUDA

Seon Sil Satsuda  
SEON SIL SATSUDA

STATE OF UTAH } ss  
County of Salt Lake

On the 5th day of January, A.D. 19 90 personally appeared before me Wayne Takashi Satsuda and Seon Sil Satsuda

the signers of the within instrument, who duly acknowledged to me that they executed the same

My Commission expires 8-19-91

May Anne Webb  
Notary Public, Residing at

STATE OF UTAH } ss  
County of \_\_\_\_\_

Salt Lake County, Utah

On the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_ personally appeared before me \_\_\_\_\_ and \_\_\_\_\_ who being by me duly sworn did say, each for himself that he the said \_\_\_\_\_ is the \_\_\_\_\_ President, and he, the said \_\_\_\_\_ is the \_\_\_\_\_ Secretary of \_\_\_\_\_ and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said \_\_\_\_\_ and \_\_\_\_\_ each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation

My Commission expires \_\_\_\_\_

\_\_\_\_\_  
Notary Public, Residing at \_\_\_\_\_

## Tab 2

WHEN RECORDED MAIL TO:

SPACE ABOVE THIS LINE FOR RECORDER

CAUTION: READ BEFORE YOU SIGN

- This is a legally binding contract, if you do not understand it, seek legal advice before you sign
- This contract is intended to be filled in by lawyers or by real estate brokers. All others seek professional advice
- To assure protection of certain priority rights in the property, it is recommended that this contract and any assignments or addenda, be recorded in the office of the applicable County Recorder.

UNIFORM REAL ESTATE CONTRACT

1. **Parties.** This contract, made and entered into this 1st day of May, 1987, is by and between Kee Hong Um and Shi Ja Um, husband and wife, as joint tenants (hereafter collectively called "Seller"), whose address is 1387 East Blossom Drive, Sandy, Utah 84092

and Hasin Oh and Myung Ja Oh, husband and wife, as joint tenants (hereafter collectively called "Buyer"), whose address is 1088 Fairhaven Circle, Murray, Utah 84123

2. **Property.** Seller agrees to sell and Buyer agrees to buy the real property (the "Property") located at 1749 South State Street

(street address), in the City of Salt Lake County of Salt Lake, State of Utah, described as Beginning at a point 5 feet North of the Northwest corner of Lot 28, Block 2, DANKOWSKE PARK, a subdivision of Lot 10, Block 5, Five Acre Plat "A", Big Field Survey, and running thence South 211.4 feet; thence East 121.5 feet; thence North 211.4 feet; thence West 121.5 feet to the point of beginning. Subject to a right of way 50 feet wide for road and incidental purposes which lies within the bounds of Wilson Avenue.

3. **Date of Possession.** Seller agrees to deliver possession and Buyer agrees to enter into possession of the Property on the 1st day of May, 1987.

4. **Price and Payment.**

A. Buyer agrees to pay for the Property the purchase price of Five Hundred Forty Thousand and no/100 Dollars (\$ 540,000.00) payable at Seller's address above given, or to Seller's order on the following terms Fifty Thousand and no/100 Dollars (\$ 50,000.00) down payment, receipt of which is hereby acknowledged, and the balance of Four Hundred Ninety Thousand and no/100 Dollars (\$ 490,000.00) to be paid as follows.

The sum of \$4,728.65, principal and interest, shall be paid to the sellers hereunder on or before the 1st day of June, 1987, with the sum of \$4,728.65, principal and interest, due to the sellers hereunder on or before the 1st day of each succeeding month thereafter, until the entire principal balance, together with accrued interest, has been paid in full.

In addition to the monthly payments as outlined hereunder, buyers will pay a balloon payment, in the amount of \$50,000.00, to be applied towards the outstanding principal balance, on or before May 1, 1991.

B. Payments shall include interest at the rate of TEN percent (10.0%) per annum on the unpaid principal balance from the date of May 1, 1987. Any payment not made within Fifteen (15) days of its due date shall subject Buyer to a late payment charge of Five percent (5.0%) of such overdue payment, which charge must be paid before receiving credit for the late payment. The foregoing payments include a reserve for payment of ☐ taxes ☐ insurance ☐ condo fees ☐ other (explain) (Buyer to pay taxes and hazard insurance premiums as the same become due and provide evidence of their payment to the seller hereunder.) Initially, the reserve amount per payment is .00. In the event reserve payments on underlying obligations for the Property change, Seller shall give Buyer thirty (30) days written notice of change, and reserve payments herein shall be adjusted accordingly.

C. All payments made by Buyer shall be applied first to payment of late charges, next to Seller's payments under Section 12, next to interest as provided therein, next to the payment of reserves if any, next to the payment of interest, and then to the reduction of principal. But may, at Buyer's option, pay amounts in excess of the periodic payments herein provided, and such excess shall be applied to unpaid principal unless Buyer elects in writing at the time of such payment that it shall be applied as prepayment of future installments. In the event of prepayment by Buyer, Buyer shall assume and pay all penalties incurred by Seller in making accelerated payments on any underlying obligations.

D. When the unpaid principal balance owing under this contract is equal to or less than the total balance outstanding on underlying obligation(s) shown in Section 8 below, then:

(1) Upon (i) assumption by Buyer of the underlying obligation(s) and (ii) release of Seller from all liabilities and obligations thereunder, Buyer may request and Seller shall execute and deliver a Warranty Deed subject to the then existing underlying obligation(s) shown in Section 8 below; or

(2) Provided there is no "due-on-sale" provision contained in any underlying obligation(s) shown in Section 8 below, Seller may execute and deliver to Buyer a Warranty Deed subject to the then existing underlying obligation(s) shown in Section 8 below, which Buyer agrees to assume and pay; or

(3) In the event neither Buyer nor Seller exercises the options provided in (1) and (2) of this sub-section, and this contract therefore remains in effect, then the payments and interest rate shown in this Section, to the extent they differ from the underlying obligation, shall immediately and automatically be adjusted to equal the payments and interest rate then required under the underlying obligations, and Buyer, in addition to such adjusted payments, shall also pay a monthly servicing fee to Seller in the amount of \$ .00.

5. **No Waiver.** If Seller accepts payments from Buyer on this contract in an amount less than or at a time later than herein provided such acceptance will not constitute a modification of this contract or a waiver of Seller's rights to full and timely performance by Buyer.

6. **Risk of Loss.** All risk of loss and destruction of the Property shall be borne by Seller until the agreed date of possession.

7. **Evidence of Title.** Buyer has received a Commitment for Title Insurance (Commitment) on the Property at the time of or prior to execution of this contract. Seller shall, at his expense, furnish Buyer evidence of marketable title in the form of an Owner's Title Insurance Policy (Title Policy) insuring Buyer's interest in the Property under this contract for the amount of the purchase price. The Title Policy will be based on Commitment No. A65706 issued by: Associated Title Co.. The Title Policy issued to Buyer will contain the following numbered exceptions shown on the Commitment: 1 through and including 14.

8. **Underlying Obligations.**

A. Seller warrants that the only underlying obligations against the Property are:

(1) Obligation in favor of C. Vernon Langlois and Ruth C. Langlois and Mary Stamolulis

with an unpaid principal balance of Twenty-one Thousand Four Hundred Forty-three and 34/100---- Dollars (\$21,443.34) as of April 30, 1987 with monthly payments of \$ 800.00, with interest at five & one percent (5.5%) per annum and balloon payments as follows: none.

(2) Obligation in favor of Vernon L. Peterson and LaVie Peterson

with an unpaid principal balance of Sixty-eight Thousand Seven Hundred Fifty-one and 35/100---- Dollars (\$68,751.35) as of April 30, 1987 with monthly payments of \$ 1,145.00, with interest at Seven percent (7.0%) per annum and balloon payments as follows: none.

(3) Obligation in favor of Babcock and Company, Louis W. Babcock, President

with an unpaid principal balance of One Hundred Nineteen Thousand Two Hundred Fifty-four and 82/100 Dollars (\$119,254.82) as of April 30, 1987 with monthly payments of \$ 1,420.09, with interest at Ten percent (10.0%) per annum and balloon payments as follows: none.

B. COPIES OF SUCH UNDERLYING OBLIGATIONS ☒ HAVE ☐ HAVE NOT BEEN DELIVERED TO BUYER AT OR PRIOR TO CLOSING. SUCH UNDERLYING OBLIGATIONS ☐ CONTAIN ☒ DO NOT CONTAIN DUE ON SALE OR DUE ON ENCUMBRANCE PROVISIONS.

C. IN THE EVENT THE HOLDER OF ANY UNDERLYING OBLIGATION(S) REFERRED TO IN SUB-SECTION A. CAUSES TO BE ISSUED A WRITTEN NOTICE OF ITS INTENT TO EXERCISE ANY OF THE DUE ON SALE REMEDIES, THEN BUYER AGREES TO EITHER PAY, ASSUME OR REFINANCE SUCH UNDERLYING OBLIGATION(S) IN THE MANNER PROVIDED BELOW, AND BUYER AGREES TO PAY ALL COSTS, FEES AND CHARGES INCURRED IN CONNECTION WITH SUCH PAYMENT, ASSUMPTION OR REFINANCING (INCLUDING, BUT NOT LIMITED TO, PREPAYMENT PENALTIES, LOAN POINTS, INCREASED INTEREST RATE, APPRAISAL AND CREDIT REPORT FEES, ESCROW AND TITLE CHARGES, TITLE INSURANCE PREMIUMS, AND RECORDING FEES). BUYER'S INABILITY OR FAILURE TO PAY, ASSUME, OR REFINANCE SUCH UNDERLYING OBLIGATION(S) WITHIN FORTY-FIVE (45) DAYS FROM THE DATE OF NOTICE TO BUYER OF SUCH WRITTEN NOTICE FROM THE HOLDER, SHALL CONSTITUTE A DEFAULT BY BUYER UNDER THIS CONTRACT.

(1) **Assumption.** In the event buyer elects to assume such underlying obligation(s), Buyer shall be entitled to the delivery of a Warranty Deed executed by the Seller wherein the Buyer is the Grantee upon the satisfaction of the following conditions precedent: (i) Buyer is not then in default under the terms of this contract; (ii) Buyer has deposited with Seller written evidence from the holder of the underlying obligation(s) being assumed that such holder has approved Buyer's assumption; and (iii) if any portion of the Seller's equity under this contract remains unpaid, Buyer shall execute and deliver to Seller, Buyer's Trust Deed Note in a principal amount equal to the unpaid balance of Seller's equity under this contract, which shall include any accrued unpaid interest. Said note shall bear interest from the date thereof at the same rate at which interest accrues on the Seller's equity under this contract. Installments shall be made over the term then remaining and at the same time as provided for in this contract with the exact amount of the installments being calculated by re-amortizing the aforesaid.

amount of the Trust Deed Note utilizing the interest rate at which interest accrues on Seller's equity under this contract, the schedule of payments, and term specified herein. Such note shall be secured by a Deed of Trust encumbering the property which shall be subordinate only to the Deed or Deeds of Trust securing the underlying obligation(s) and any obligations refinanced as provided in sub-section C.(2).

(2) **Refinancing/Pay-Out.** In the event Buyer pays or obtains a new loan refinancing one or more of the underlying obligations, then buyer shall be entitled to the delivery of a Warranty Deed executed by the Seller wherein the Buyer is Grantee; provided, however, if any portion of the seller's equity remains unpaid, then the following conditions precedent shall have been satisfied: (i) Buyer is not then in default under any of the terms of this Contract; (ii) the principal amount of the new loan may exceed the unpaid balance of the underlying obligation(s) being refinanced only if all loan proceeds which exceed the unpaid balance of the underlying obligation(s) are paid to the Seller as a credit against the unpaid balance of Seller's equity in this Contract; and (iii) Buyer shall have executed and delivered to Seller, Buyer's Trust Deed Note in the form, the amount, and with the terms of the Trust Deed Note described in Section C(1)(iii). Such note shall be subordinate only to the Deed(s) of Trust securing the new loan(s) and any remaining Deed(s) of Trust securing the underlying obligation(s) which have not been reconveyed.

9. **Taxes and Assessments.** Buyer agrees to pay all taxes and assessments of every kind which become due on the Property during the life of this contract. Seller covenants that there are no taxes, assessments, or liens against the Property not mentioned in Section 8 except: General Property Taxes for the year 1987 and thereafter.

which will be paid by: [ ] Seller [x] Buyer [ ] Other (explain) Credit for sellers portion of 1987 General Property Taxes was given to the buyer hereunder at the time of closing and buyer hereunder is responsible for full payment of 1987 General Property Taxes and all years thereafter.

10. **Covenant Against Liens.** Except for the liens and encumbrances listed in Sections 8 and 9, Seller covenants to keep the Property free and clear of all liens and encumbrances resulting from acts of Seller. So long as Buyer is current hereunder, Seller agrees to keep current the payments on all obligations to which Buyer's interest is subordinate. Should Seller default on the foregoing covenants on any one or more occasions, Buyer may, at Buyer's option, in whole or in part, make good Seller's default to Seller's obligee and deduct all expenditures so paid from future payments to Seller and Seller shall credit all Buyer's sums so expended to the indebtedness herein created just as if payment had been made directly to Seller under provisions of Section 4 above.

11. **Insurance.** On and after the agreed date of possession, Buyer shall maintain at Buyer's expense, the following insurance policies naming the Seller as an additional insured and with a certificate of insurance provided to Seller that includes a ten (10) day notice of cancellation in favor of Seller: (i) insurance against loss by fire and other risks customarily covered by "All Risk" insurance on insurable buildings and improvements at 80% of replacement value; and (ii) general liability insurance having coverage of not less than \$ 490,000.00. All such insurance policies shall be in companies which are duly licensed by the State of Utah and are acceptable to Seller. Acceptance of such companies by Seller may not be unreasonably withheld.

12. **Seller's Option To Discharge Obligations.** In the event Buyer shall default in the payment of taxes, assessments, insurance premiums or other expenses of the Property, Seller may, at Seller's option, pay said taxes, assessments, insurance premiums or other expenses, and if Seller elects so to do, 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 one (1%) or one percent (1.0%) per month until paid, and when the principal sum provided in this contract is paid, if Buyer fails to also repay Seller such advances, Seller may refuse to convey title to the Property until such repayment is made.

13. **Conveyance of Title.** Seller on receiving the payments herein reserved to be paid at the time and in the manner specified herein, agrees to execute and deliver to Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except those which have accrued by or through the acts or neglect of Buyer and those which Buyer has specifically agreed to pay or assume under the terms of this contract, and subject to the following numbered exceptions to title that are contained in the commitment for title insurance described in Section 7 hereof: 1 through and including 8, 12, 13, 14

14. **No Waste.** Buyer agrees that Buyer will neither commit nor suffer to be committed any waste, spoil or destruction in or upon the Property which would impair Seller's security, and that Buyer will maintain the Property in good condition.

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.

16. **Buyer's Default.** Should buyer fail to comply with any of the terms hereof, Seller may, in addition to any other remedies afforded the Seller in this contract or by law, elect any of the following remedies:

A. Seller shall give Buyer written notice specifically stating: (1) The Buyer's default(s); (2) that buyer shall have thirty (30) days from his receipt of such written notice within which to cure the default(s), which cure shall include payment of Seller's costs and reasonable attorney's fees; and (3) Seller's intent to elect this remedy if the Buyer does not cure the default(s) within the thirty (30) days. Should Buyer fail to cure such default(s) within the thirty (30) days, then Seller shall give to Buyer another written notice informing Buyer of his failure to cure the default(s) and of Seller's election of this remedy. Immediately upon Buyer's receipt of this second written notice, Seller shall be released from all obligations at law and equity to convey the Property to Buyer, and Buyer shall become at once a tenant-at-will of Seller. All payments which have been made by Buyer prior thereto under this contract shall, subject to then existing law and equity, be retained by Seller as liquidated and agreed damages for breach of this contract; or

B. Seller may bring suit and recover judgment for all delinquent installments and all reasonable costs and attorneys' fees, and the use of this remedy on one or more occasions shall not prevent Seller, at Seller's option, from resorting to this or any other available remedy in the case of subsequent default; or

C. Seller shall give Buyer written notice specifically stating: (1) The Buyer's default(s); (2) that Buyer shall have thirty (30) days from his receipt of such written notice within which to cure the default(s), which cure shall include payment of Seller's costs and reasonable attorney's fees; and (3) Seller's intent to elect this remedy if the Buyer does not cure the default(s) with the thirty (30) days. Should Buyer fail to

cure such default(s) within the thirty (30) days, then Seller shall give to Buyer another written notice informing Buyer of his failure to cure the default(s), Seller's election of this remedy, and that the entire unpaid balance hereunder is at once due and payable. Hereupon, Seller may treat this contract as a note and mortgage, pass or tender title to Buyer subject thereto, and proceed immediately with a mortgage foreclosure in accordance with the laws of the State of Utah. Upon filing the foreclosure complaint in court, Seller shall be entitled to the immediate appointment of a receiver. The receiver may take possession of the premises, collect the rents, issue and profits therefrom and apply them to the payment of the obligation hereunder, or hold them pursuant to the order of the court. Upon entry of a judgment of foreclosure Seller shall be entitled to possession of the premises during the period of redemption.

17. **Time of Essence.** It is expressly agreed that time is of the essence in this contract.

18. **Warranties of Physical Condition.** With respect to the physical condition of the Property, Seller warrants the following: Buyer has inspected the subject premises and accepts the subject property "as is".

19. **Other Provisions.** none.

20. **Captions.** Section captions shall not in any way limit, modify, or alter the provisions in the Section.

21. **Notices.** Except as otherwise provided herein, all notices required under this contract will be effective when (a) personally delivered or, (b) mailed certified or registered, addressed to the applicable party at the address shown in Section 1, or at such other address as may be hereinafter designated by such party by written notice to the other party.

22. **Binding Effect.** This contract is binding on the heirs, personal representatives, successors and assigns of the respective parties hereto.

23. **Entire Agreement.** This contract contains the entire agreement between the parties hereto. Any provisions hereof not enforceable under the laws of the State of Utah shall not affect the validity of any other provisions hereof. No supplement, modification or amendment of this contract shall be binding on the parties hereto unless signed in writing by both parties hereto.

IN WITNESS WHEREOF, the parties have set their signatures on the day and year first above written.

BUYER:

Hasin Oh  
Myung Ja Oh

SELLER

Kee Hong Um  
Shi Ja Um

STATE OF UTAH

COUNTY OF DAVIS ss.

On the 1st day of May, 19 87, personally appeared before me Kee Hong Um and Shi Ja Um, husband and wife, Seller and signer of the above instrument, who duly acknowledged to me that they executed the same.

Maileigh H. Carr  
NOTARY PUBLIC

My Commission Expires:  
8-8-88

Residing at: West Bountiful, Utah

STATE OF UTAH

COUNTY OF DAVIS ss.

On the 1st day of May, 19 87, personally appeared before me Hasin Oh and Myung Ja Oh, husband and wife Buyer and signer of the above instrument, who duly acknowledged to me that they executed the same.

Maileigh H. Carr  
NOTARY PUBLIC

My Commission Expires:  
8-8-88

Residing at: West Bountiful, Utah

Tab 3

### ASSIGNMENT OF CONTRACT

THIS AGREEMENT, made in the City of Salt Lake, State of Utah on the 5th day of January, 1990, by and between HASIN OH and MYUNG JA OH hereinafter referred to as the assignors, and WAYNE TAKASHI SATSUDA and SEON SIL SATSUDA hereinafter referred to as the assignees, his wife, as joint tenants

#### WITNESSETH:

WHEREAS, under date of May 1, 1987, KEE HONG UM and SHI JA UM husband and wife, as sellers, entered into a Uniform Real Estate Contract with HASIN OH and MYUNG JA OH his wife as buyers, of Salt Lake City, Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Salt Lake, State of Utah, and more particularly described as follows:

Beginning at a point 5 feet North of the Northwest Corner of Lot 28, Block 2, Dankowske Park, a Subdivision of Lot 10, Block 5, Five Acre Plat "A", Big Field Survey, and running thence South 211.4 feet; thence East 121.5 feet; thence North 211.4 feet; thence West 121.5 feet; to the point of beginning.

Subject to a right of way 50 feet wide for road and incidental purposes which lies within the bounds of Wilson Avenue.

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in and to the said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to the aforesaid Uniform Real Estate Contract of May 1, 1987, concerning the above described property.
2. That to induce the assignees to pay the said sum of money and to accept the said contract, the assignors hereby represent to the assignees as follows:
  - a. That the assignors have duly performed all the conditions of the said contract.
  - b. That the contract is now in full force and effect and that the unpaid balance of said contract is \$417,902.79, with interest paid to the 1st day of December, 1989.
  - c. That said contract is assignable.
3. 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.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.

Wayne Takashi Satsuda  
WAYNE TAKASHI SATSUDA  
Seon Sil Satsuda  
SEON SIL ASSIGNEE SATSUDA

Hasin Oh  
HASIN OH  
Myung Ja  
MYUNG JA ASSIGNOR OH

STATE OF UTAH,  
County of Salt Lake } ss:

On the 5th day of January, 1990, personally appeared before me Satsuda, Wayne Takashi & Seon Sil and Oh, Hasin & Myung Ja \* the signer of the within instrument, who duly acknowledged to me that he y executed the same.

My Commission Expires 8-19-91

Residing at:

Notary Public  
Salt Lake County Utah