

2006

John J. Bradley and Darby G. Bradley v. Douglas J. Markham and Andrea Markham: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JOHN J. BRADLEY and DARBY G.
BRADLEY,

Defendants/Appellants,

vs.

DOUGLAS J. MARKHAM and ANDREA
MARKHAM,

Plaintiffs/Appellees.

**BRIEF OF APPELLANTS JOHN
J. BRADLEY and DARBY G.
BRADLEY**

Appellate Case No. 20061022

Appeal from final judgment and order of the Fifth Judicial District Court for
Washington County, State of Utah.

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FILED
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JURISDICTION STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2).

STATEMENT OF THE ISSUES

- 1. Did the trial court apply the correct legal standard in determining whether the Bradleys breached the covenant of good faith and fair dealing?**

Standard of Review: The standard of review for determining whether the trial court applied the correct legal standard for a breach of covenant of good faith and fair dealing claims is the correction of error standard. In *State v. Pena*, 869 P.2d 932, the Utah Supreme Court determined that a standard of review question is not always black and white (or correctness vs. clearly erroneous). There is a continuum between the clearly erroneous and correctness of error standards. Questions of fact (involving events, actions, or conditions happening, existing, or taking place) are reviewed for clear error and questions of law (rules or principles uniformly applied to persons of similar qualities and status in similar circumstances) are reviewed for correctness. The issue of whether the trial court applied the correct legal standard in its good faith analysis is closer to a question of fact because the scope of the duty to act in good faith is defined by common-law principles, and the terms of an unambiguous contract—both questions of law. Subjective factual issues such as parties' intent and expectations could be involved in the question, but are not presented in the case at bar because the parties did not make any statements of intent regarding the amount of discretion a seller has when reviewing a buyers credit pursuant to the SFA.

Issue Preserved at: R. 399; TT 405:12 through 408:14.

- 2. Did the trial court err in failing to grant the Bradleys' motion for directed verdict at the close of Plaintiff's case?**

Standard of Review: The standard of review for a denial of a directed verdict is the same for the reviewing court as it is for the trial court. *Merino v. Albertsons, Inc.*, 975 P.2d 467, 468 (Utah 1999) (motion for directed verdict can be granted only when the moving party is entitled to judgment as a matter of law).

Issue Preserved at: R. 250:13 through 255:6

- 3. Did the trial court erroneously conclude that the Bradleys waived their right to strictly enforce the September 13 financial disclosure deadline?**

Standard of Review: Whether a trial court applied the correct legal standard in an analysis of "waiver" is a pure question of law. However, the actions or events allegedly supporting waiver are factual in nature, thus a reviewing court must grant "broadened discretion to the trial court's [factual] findings." *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 21, 140 P.3d 1200.

Issue Preserved at: R. 392-398; TT 405:1-4.

- 4. Did the trial court erroneously conclude that the Bradleys were estopped from strictly enforcing the September 13 deadline?**

Standard of Review: Estoppel is a highly fact-specific question that an appellate court reviews under an abuse of discretion standard. *State, Dept. of Human Services ex rel. Parker v. Irizarry*, 893 P.2d 1107, 1108-09. (Utah 1995).

Issue Preserved at: R. 392-398; TT 405:1-4.

5. Did the trial court err in ordering specific performance?

Standard of Review: Specific performance is a discretionary ruling that a reviewing court examines under an abuse of discretion standard. *Shields v. Harris*, 934 P.2d 653, 655 (Utah Ct. App. 1997).

Issue Preserved at: R. 395-397.

STATEMENT OF THE CASE

I. **Nature of the Case.** This case involves the enforcement of “specific performance” in relation to a Real Estate Purchase Contract between Defendants/Appellants John J. Bradley (“Mr. Bradley”) and Darby G. Bradley (“Mrs. Bradley”) and Plaintiffs/Appellees, Douglas J. Markham (“Mr. Markham”) and Andrea Markham aka Andrea Gasporra (“Mrs. Markham”).

The Bradleys were owners of on which the Bradleys had built a 3,000-square-foot log house-style home (the “Property”). The Bradleys listed their real property located in Dammeron Valley through Red Desert Realty in June 2003. Mrs. Bradley, a licensed real estate agent was the listing agent. Ms. Carolyn Norton (“Ms. Norton”), agent for the Markhams ultimately prepared a REPC after the Bradleys agreed to sell the Property at the price of Five Hundred and Fifty Thousand Dollars (\$550,000.00). Mr. Bradley insisted that any sale would be partially seller-financed to allow the Bradleys to utilize certain tax advantages. Along with the REPC, Mr. Bradley also received the Seller Financing Addendum (“SFA”) to the REPC. However, Ms. Norton did not present the Buyer Financial Information Sheet (as required by Section 8 of the SFA to the REPC) at that time.

On September 2, 2004, the Bradleys made a written counteroffer. The principal terms of the REPC ultimately included a purchase price of \$550,000.00 with a down

payment of \$285,000.00, earnest money to be increased to \$10,000.00. Pursuant to the SFA, the Bradleys were to finance \$265,000.00 at a rate of 5.5% per annum. Ms. Norton set up a time for the Markhams and other individuals to visit the Property on September 12, 2004 to discuss various outstanding matters and to present certain financial information that was to be delivered by September 13. Specifically, Section 8 of the SFA required the Markhams to present a credit report by the Seller Disclosure Deadline referred to in Section 24(b) of the REPC (September 13, 2004).

During the September 12, 2004 meeting, Mr. Bradley appeared agitated and tired. Although he allowed the parties to enter the home, Mr. Bradley indicated that he did not wish to discuss any of the financial issues or review the documents presented by the Markhams. Ms. Norton responded that the Markhams had certain financial information (presumably the information required by Section 7 of the SFA) to present. Mr. Bradley, responded that it was not a good time to discuss matters and did not review the documents. Although Mr. Bradley inquired whether the discussion could be had in a “couple of weeks,” Ms. Norton never affirmed this, nor did she prepare any writing to extend the relevant deadlines in the REPC and SFA.

Ms. Norton admitted at trial that her clients did not have a credit report to present on September 12, 2004. After leaving the Property, Ms. Norton called her assistant, who mistakenly told Ms. Norton that the Markhams had until *September 30, 2004* to submit the financial information.

On September 13, 2004, Mr. Bradley prepared and submitted to Ms. Norton by fax the Seller’s Property Disclosure information. After returning from Washington, Mrs. Bradley drafted a letter dated September 20, 2004 to Ms. Norton and informed her of their intent to

declare the REPC null and void due to the Markham's failure to timely provide their Credit Report, Buyer Financial Information Sheet, and supporting documentation. After several telephone calls and letters, the Bradleys finally received the Credit Report and financial information on September 27, 2004.

On or about September 30, 2004, Mr. Bradley received a fax from Ms. Norton's office forwarding a letter from Countrywide Home Loans indicating that the Markhams had qualified for third-party financing to complete the purchase of the home.

Despite the threats of litigation, the Bradleys agreed to receive and review the Markham's financial documents and Credit Report and discovered several items of concern related to the Markham's credit-worthiness. The financial documents revealed that there had been a bankruptcy and judgment in the Markhams' past. Furthermore, in reviewing the credit report, the Bradleys discovered several delinquencies on the accounts and the amount of credit currently being held, which gave rise to additional concerns about the Markhams' credit-worthiness. Despite the Markhams' claims of having all the necessary documentation with them at the meeting on September 12, 2004, the date on the Credit Report proves that the Markhams did not request the Credit Report until September 20, 2004—eight (8) days after the Markhams met with Mr. Bradley to provide the financial documentation as required by the REPC. Furthermore, the actual Personal Financial Statement that was going to be presented on September 12, 2004 was approximately one year old.

Following their review of the Markham's financial documents and Credit Report, the Bradleys, pursuant to Section 8.1 of the SFA, and on the advice of their attorney, Robert Jensen, canceled the REPC in a letter dated October 4, 2004. Shortly thereafter, this lawsuit was commenced with the Markhams seeking specific performance under the terms of the

REPC and asserting that the Bradleys breached the REPC as well as the implied covenant of good faith and fair dealing. The Bradleys defense was that the Markhams themselves were estopped from asserting breach of contract and breach of the covenant of good faith and fair dealing because the Markhams had failed to fully perform their obligations under the contract. The Bradleys also asserted that they acted in good faith and within the parameters of discretion in canceling the REPC based upon the unsatisfactory quality and content of the Markhams' credit report and financial information.

After a bench trial, the trial court ruled that the Bradleys had breached the REPC and the implied covenant of good faith and fair dealing. The trial court ordered specific performance of the terms in the REPC and forced the Bradleys to sell the Property. The Markahms were also awarded their attorney's fees and costs. The Bradleys filed post-trial motions including a Rule 62 and a Rule 52(b) motion, both of which were denied.

II. Course of Proceedings. A two-day bench trial was held on January 24 and 25, 2006. The trial court's Findings of Fact and Conclusions of Law [R. 267] were entered on March 14, 2006. The Final Judgment and Order was entered April 17, 2006 [R. 326]. The Bradleys filed a Rule 62 Motion on April 27, 2006 [R. 376], a Rule 59 Motion on May 1, 2006 [R.403], and a Rule 52(b) Motion on May, 1, 2006 [R. 415]. The trial court denied the Bradleys' post-trial motions in a Summary Ruling on Pending Motions on August 3, 2006 [R. 795]. On November 2, 2006, the Bradleys timely filed a Notice of Appeal. [R.866].

III. Disposition at trial court. The Markhams' principal claim as set forth in their complaint [R. 117] was for specific performance of the terms of the REPC based upon theories of breach of contract and breach of the implied covenant of good faith and fair dealing. In the Findings of Fact and Conclusions of Law, the trial court ruled that judgment

should be entered against the Bradleys and in favor of the Markhams for specific performance, and that the Markhams were to be awarded their attorneys' fees and costs as permitted by Section 17 of the REPC. [R. 294]. Finally, the trial court ordered that \$30,000.00 held in escrow out of the sales price of the Property to cover the cost of removing rock and dirt and restoring the Property to its original condition. [R. 283].

STATEMENT OF FACTS

1. The Markhams became interested in the Washington County area for a second home and possible early retirement area. [R. 268].
2. The Markhams hired real estate agents Ms. Norton and Mr. Stuart Shumway ("Shumway") to assist them in locating properties in Washington County. [R. 268].
3. On Friday, August 27, 2004, Ms. Ms. Norton took the Markhams out to show them the Washington area generally and, after viewing many properties, saw a "for sale" sign on the property located at 979 North Dammeron Valley Drive. [R. 269].
4. The Markhams immediately liked the Property and asked Ms. Norton to obtain more information about it. [R. 269].
5. By the next day (Saturday, August 28, 2004), Ms. Norton had pulled up the Multiple Listing Service ("MLS") information for the Property and saw that it was listed with an "owner/agent," Mrs. Bradley. [R. 269].
6. Ms. Norton called the number for Mrs. Bradley shown in the MLS printout, and Mr. Bradley, the co-owner, answered the phone. He stated that Mrs. Bradley was out of town, but that he could show the Property and home and agreed to show the home that Saturday morning. [R. 269].

7. On August 28, 2004, Ms. Norton and the Markhams went to the Property and met Mr. Bradley. [R. 269].
8. While doing the walk-through, Mr. Bradley told the Markhams and Ms. Norton that his wife was out of town and that all contact regarding the Property should be directed through him and that he would pass all information and required documents on to Mrs. Bradley. [R. 269].
9. Mr. Bradley escorted them through the house, showing them the improvements he was making, including some remodeling of the kitchen. He stated that he was a builder and did new home construction under the name of Pride Homes. [R. 269].
10. The Markhams spent well over an hour at the Property with Mr. Bradley. While there:
 - a. Ms. Norton asked the price, to which Mr. Bradley replied that it was listed at \$650,000.00, but they were willing to take \$550,000.00.
 - b. Mr. Bradley pulled out a map of the Property, and showed them the boundaries of the Property and that it was already sub-divided into three parcels.
 - c. Mr. Bradley also stated he was willing to sell some of the special-order furniture in the home.
 - d. The Markhams told Mr. Bradley that they were interested in building one or two more homes for Mr. Markham's retiring brother and to allow his mother to live close as well.
 - e. Mr. Bradley gave Mr. Markham his business card showing his business name and phone number. [R. 270].

11. While at the Property that day, the Markhams developed an appreciation for the Property and its unique characteristics. [R. 270].
12. After the first walk-through and after the Markhams returned to California. Mr. Markham then called Mr. Bradley on or about August 30, 2004 telling him that they wanted to buy the Property and asking what the Bradleys wanted for the Property. [R. 270].
13. The parties agreed that the Property would be sold for \$550,000.00 [R. 271].
14. Mr. Bradley also stated he needed \$265,000.00 down in order to buy out a partner, and that the Bradleys could carry the balance as seller financiers. [R. 271].
15. After their phone conversations, Mr. Markham called Ms. Norton to have her prepare a written offer in the form of a Real Estate Purchase Contract (“REPC”) [Attached hereto as Addendum “1”]¹ consistent with the terms Mr. Bradley and Mr. Markham had discussed. [R. 271].
16. As Mr. Markham and Ms. Norton discussed the terms of the REPC, they agreed to include a “no prepayment penalty” and an interest rate of 5.5% on the seller-financed amount. [R. 271].
17. The REPC prepared by Ms. Norton set forth a total purchase price of \$550,000.00, with \$265,000.00 cash due at closing, while permitting seller financing of \$285,000.00 at 5.5% interest on a 15-year term, requiring a \$100,000.00 balloon payment at the end of the first year, and utilizing the standard Seller Financing Addendum. It also provided for the

¹ All addenda provided in support of this brief are duplicates of documents that were submitted and accepted at trial. During trial, most of documents were submitted as “tab1,” “tab 2” (etc.) to Exhibit 1. Exhibit 1 ultimately included 19 documents whose admissibility was stipulated to. For ease of reference, addenda shall merely be designated and attached in numerical order (i.e. Addendum “1,” Addendum “2,” etc.). Also, Addendum “1” contains a duplicate copy of the REPC and SFA because the first copy is more legible, but the second copy is countersigned.

parties to meet in early September to discuss remodeling issues and finalize what furniture would stay with the house. [R. 272].

18. Ms. Norton and Shumway presented the written REPC offer to Mr. Bradley at one of his construction job sites. Ms. Norton asked how they could contact Mrs. Bradley to present the written REPC offer to her, and Mr. Bradley told Ms. Norton that Mrs. Bradley was in Bellingham, Washington. [R. 272].

19. Mr. Bradley again affirmed that he would be handling the paperwork, as it was very difficult to contact Mrs. Bradley. However, Mr. Bradley would not give Shumway or Ms. Norton any contact information for Mrs. Bradley at that time. [R. 272].

20. Along with the REPC, Mr. Bradley also received the Seller Financing Addendum (“SFA”)² to the REPC. However, Ms. Norton did not present the Buyer Financial Information Sheet (required by Section 8 of the SFA to the REPC) at that time.

21. At the time Ms. Norton and Shumway presented the written REPC offer to Mr. Bradley, Ms. Norton discussed the SFA with Mr. Bradley and the fact that they did not have the Markhams’ financial information with the offer, but would be providing it later in whatever form the Bradleys wanted to designate. [R. 272].

22. Shortly after presenting the REPC to Mr. Bradley and after he had reviewed it with Mrs. Bradley, Mr. Bradley presented a written counteroffer back to Ms. Norton which the Bradleys had both signed requesting a \$10,000.00 earnest money payment, increasing the amount of down payment by another \$10,000.00, and reducing the amount of the seller financing to \$265,000.00. The sales price of \$550,000.00 and interest rate of 5.5%, as well as the standard terms of the Seller Financing Addendum, remained unchanged. [R. 273].

² The SFA is attached after the REPC.

23. The Markhams signed the counteroffer, and Ms. Norton called Mr. Bradley to let him know. After the REPC was fully accepted and executed, the Markhams sent a check for the \$10,000.00 earnest money deposit, which was deposited with Century 21 at the Rockies. [R. 274].

24. Ms. Norton delivered the fully signed REPC to Mr. Bradley around September 4, 2004. At this time, Ms. Norton scheduled a follow-up meeting with Mr. Bradley for September 12. [R. 274].

25. Ms. Norton set the date for September 12, 2004 because the following day, (September 13) was the deadline for producing financial information. Ms. Norton discussed the need and purposes for the meeting with the Markhams as well as with Mr. Bradley, the purposes being to go over the financial information and two of the other contingency items listed in the REPC regarding finishing the remodeling of the home and what furniture the Bradleys would want to sell along with the house, as well to go over house plans for the other two homes the Markhams wanted to build on the Property. [R. 274].

26. After presenting the REPC, Ms. Norton spoke with Mr. Bradley several times about the upcoming meeting as well as other matters. [R. 274].

27. In one of the conversations, Mr. Bradley told Ms. Norton that he wanted to extend the closing time by at least a month, as he was having trouble finishing the remodeling and would not be able to complete it in time, asking Ms. Norton to prepare an addendum for him to sign. [R. 274-275].

28. In response to Mr. Bradley's desire to extend the closing deadline, Ms. Norton received permission from the Markhams to extend the date and partially prepared an

addendum, telling Mr. Bradley that he would need to fill it out in full, sign it, and present it back to the Markhams, as it would be considered a counteroffer from the Bradleys. [R. 275].

29. During this time, prior to the September 12 meeting, there were other conversations in person and on the phone between Ms. Norton and Mr. Bradley which were cordial. [R. 275].

30. In preparing for the September 12 meeting, Ms. Norton told the Markhams to bring financial information with them. [R. 276].

31. When the Markhams arrived in St. George on September 12, they first met with Ms. Norton in her office. Mr. Markham had a briefcase from which he pulled a stack of papers with his financial information at the top of the stack. Ms. Norton saw the financial information, although she did not review it in detail at that time. [R. 276].

32. The Markhams' financial information included three months of bank statements, a blank financial statement from First California Bank, and a financial statement from September, 2003. [TT 30:22 through 31:7]. [A copy of the "Personal Financial Statement and September, 2003 financial statement that the Markhams had with them on September 12, 2004 is attached hereto as Addendum "2"].

33. During trial Ms. Norton acknowledged that Section 8 of the SFA required that the Markhams provide a current consumer credit report by the Seller Disclosure Deadline established in Section 24(b) of the REPC (i.e. September 13, 2004). [TT 188:3-21].

34. Although Ms. Norton had provided deposition testimony that the Markhams *had* a credit report with them on September 12, Ms. Norton subsequently altered her testimony and admitted she did not see a credit report during the Markhams visit on September 12. [TT 216:6 through 218:14].

35. Mr. Markham also confirmed that Ms. Norton did *not* instruct him to bring a credit report for the meeting on September 12. [TT 72:1-15].

36. Later in the afternoon, the Markhams then went to the Property with Ms. Norton, Shumway and Mr. Markham's brother, Dirk Markham, and his wife. [R. 276].

37. Arriving in the later afternoon, the Markhams found Mr. Bradley at the home in an apparently agitated mood. [R. 276].

38. Ms. Norton spoke to Mr. Bradley and while she was doing this, Shumway took the Markhams to walk around the outside of the Property. Ms. Norton reminded Mr. Bradley that they did have an appointment at this scheduled time and that it was important to go over the financial information, the house plans, the remodeling, and the furniture issues. [R. 276].

39. Ms. Norton reminded Mr. Bradley that the Markhams were not only buying the Property, but were looking to him as the most likely builder of the two additional homes they wanted to build on this eight-acre parcel and that he should get control of his emotions and proceed with the meeting they had planned. [R. 276-277].

40. Mr. Bradley acknowledged the appointment and the meeting and apologized to the Markhams. [R. 277].

41. Inside the home, Mr. Markham set his briefcase on a table. He opened it up and took out his stack of papers, including financial information at the top of the stack. [R. 277].

42. Mr. Markham had information and records with him at that time, including the following:

- a. A prior financial statement Mr. Markham had prepared and submitted to a bank regarding a financial transaction unrelated to this matter, which Mr.

Markham was going to use to transfer updated information to a financial statement form of the Bradleys' choice.

- b. A sample form from Mr. Markham's bank that could be completed with the Markhams' financial information if the Bradleys decided to adopt such a form. Additional bank records and statements from which the Markhams could obtain any needed account information.

43. Mr. Bradley indicated that it was not a good time to review any of the financial information and asked if the documents could be reviewed on a different day. [R. 277].

44. The group ended up leaving after approximately 30 minutes. [R. 278].

45. While driving away, Ms. Norton telephoned her assistant to confirm the date for the submission of the financial documents to the Bradleys. Ms. Norton's assistant told her that the deadline was *September 30*. [TT 186:10-18; 198:11-14].

46. Ms. Norton testified during trial that if she would have known the submission date was September 13, she would have "gone back in." [TT 186:13-14; 197:3-10; 198:17-21].

Ms. Norton believed that the Markhams had a "couple of weeks" to provide the Credit Report and other financial information. [TT 152:12].

47. Ms. Norton also said if she would have realized the correct deadline, she would have served Mr. Bradley with the necessary financial information. [TT 222:20-22].

48. The Markhams did not leave any of the financial information they had brought with Ms. Norton when they returned to California on September 13 because Ms. Norton believed they had until September 30 to submit the financial information [TT 219:16-20]; nor did the

Markhams request that Ms. Norton obtain a credit report and deliver the credit report to the Bradleys. [TT 87:10-25].

49. Mr. Markham did not instruct Ms. Norton to make any further attempt to deliver the financial documents after the September 12 meeting. [TT 97:22].

50. Ms. Norton did not verify whether the September 13 deadline was correct, *even though* she received the Seller Disclosures from the Bradleys on September 13. [TT 203:7-15; 204:14-17].

51. Between September 13 and September 20, Ms. Norton twice stopped by one of Mr. Bradley's construction sites and left a card, although Mr. Bradley was not present. [TT 156:2-9].

52. Later during that week, Ms. Norton also attempted to call Mr. Bradley "once or twice." [TT 156:11].

53. Mr. Markham did not receive any of the alleged calls from Ms. Norton. He had driven to Las Vegas to pick up Mrs. Bradley who had flown in on September 17. [TT 286:4-12].

54. Following Mrs. Bradley's return from Washington, the Bradleys discussed their concerns that they had not received a Credit Report or other financial documents from the Markhams. [TT 286:13 through 287:4; 341:9-16].

55. When the Bradleys returned to St. George on September 19, they had still not received any financial information from the Markhams. [TT 341:3-8].

56. On September 20, Mrs. Bradley drafted and faxed a letter indicating that the Bradleys were canceling the REPC because the Markhams had failed to provide the required financial

information by September 13. [R. 278]. [The September 20, 2004 letter is attached hereto as Addendum “3”].

57. On or about September 22, Ms. Norton called Mrs. Bradley (who had returned to Washington), and left a message. Mrs. Bradley returned the call the same day, at which time Ms. Norton asked her what she felt it would take to make the deal work. [R. 279]. [TT 343:14].

58. Ms. Norton asked Mrs. Bradley if the deal could be “saved” and admitted that she thought that the Markhams had until September 30 to “work it out.” Ms. Norton stated that she would “take the blame for that” and then stated that the Markhams “had everything” with them September 12 (although as indicated *supra*, the Markhams did *not* have the Credit Report ready to submit on September 12). [TT 158:13-24].

59. Mrs. Bradley stated that she did not want to sell the Property, and that she would only give the Markhams a right of first refusal. [TT 158:15-16].

60. Ms. Norton explained that she had obtained the Credit Report, the updated Personal Financial Statement and supporting documentation, and Mrs. Bradley asked Ms. Norton to fax them over for review. [343:9-14].

61. Ms. Norton also called Mr. Bradley. [R. 279]. The conversation was not confrontational, and Mr. Bradley simply said he could not help. [TT 159:10-14].

62. The Markhams refused to accept the Bradleys’ attempt to cancel the REPC. [R. 279].

63. After learning of the September 20 letter, the Markhams contacted Countrywide Home Loans (“Countrywide”). Countrywide printed a credit report and began processing a loan application for the Property in case it was needed. [R. 280].

64. Mr. Markham began updating the financial statement he had used for an earlier bank loan, but, because of the rush to get the information in as quickly as possible, he was unable to locate a blank form and had to use white-out to update the various figures on a previously used form in order to provide current information. [R. 280].

65. On September 24, Ms. Norton prepared and faxed a letter [attached hereto as Addendum “4”] to the Bradleys stating that the Markhams rejected the Bradleys’ attempt to cancel the REPC.

66. Ms. Norton also sent the Credit Report [attached hereto as Addendum “5”] and an updated “Personal Financial Statement [attached hereto as Addendum “6”] with the September 24 letter.

67. Among other things, the September 24 letter informed the Bradleys that the Markhams had been prequalified to fully pay the purchase price and were ready, willing, and able to close under the REPC. [R. 280].

68. Mr. Bradley did not receive the September 24 letter, Credit Report and updated “Personal Financial Statement until September 27. [TT 289:18-22]

69. Mr. Bradley took the letter and information with him when he flew to Washington on September 27 to pick Mrs. Bradley up. Mrs. Bradley reviewed the information at that time. [TT 344:9-11].

70. Ms. Norton (not realizing that the September 24 letter and accompanying information had not been received by Mr. Bradley until September 27) faxed another letter dated September 27, 2004 [attached hereto as Addendum “7”].

71. Mr. Bradley called Ms. Norton and left a message on September 30, 2004 that she should direct all further communications to their attorney, Robert M. Jensen. By September

30, the Markhams had received formal notification from Countrywide that they were approved for a loan on the Property. On September 30, Ms. Norton faxed a letter to the Bradleys and their attorney with a copy of this notification from Countrywide. [R. 280]. [The September 30, 2004 letter is attached hereto as Addendum “8”]. [The Countrywide notification is attached hereto as Addendum “9”].

72. The Bradleys received and reviewed all letters and the financial information. They then met with Mr. Jensen and instructed him to send another notice to cancel the REPC. [R. 281].

73. Mr. Jensen sent a letter dated October 4, 2004 [attached hereto as Addendum “10”] stating that his clients would not close on the REPC, claiming that the Bradleys were excused from doing so because they had not received the financial information by September 13. He also indicated that the financial information they received was difficult to read and of poor fax quality, the pages seemed out of order, and that the Bradleys were uncomfortable with a reference to a bankruptcy or judgment; therefore they were canceling the REPC. [R. 281].

74. The Credit Report sent to and received by the Bradleys shows a credit score of 689 for Mr. Markham and 705 for Mrs. Markham. It also shows references to full on-time payments with four instances of late payments, all four being 30 days late, two times in 2003 and two times in 2001. The reference to the bankruptcy or judgment was from reference to Mr. Markham’s filing bankruptcy approximately ten years earlier in relation to a business deal in a shared chiropractic office. [R. 281].

75. No expert witness was called to establish whether the Markhams’ credit scores were good or poor. [R. 282].

76. The REPC provides for the prevailing party to be awarded attorneys' fees and costs. [R. 282].

77. Testimony at trial also established that it would cost approximately \$30,000.00 to have the dirt, rock, and debris that had been stored by the Bradleys removed from the Property. Therefore, the trial court deemed it appropriate to hold \$30,000.00 in escrow out of the sales price of the Property to cover the cost of removing all of the rock and debris and restoring the Property to its original condition. [R. 283].

SUMMARY OF THE ARGUMENT

The trial court erred in holding that defendants breached the duty to act in good faith, waived and were estopped from asserting their right to rely on the September 13 deadline, and were entitled to specific performance.

The Bradleys did not breach the covenant of good faith and fair dealing because they were reasonable in refusing to loan \$265,000.00 to an individual with a prior bankruptcy. The Utah Supreme court has recently clarified its covenant of good faith jurisprudence to ensure that the covenant is closely tied to the expectations of the parties and the plain language of the contract from which the covenant arises. The covenant cannot create new rights or eliminate existing rights for the contracting parties. A court may not use to covenant of good faith to force a party to act against that party's detriment and for the benefit of the other party.

The plain language of the SFA specifically allowed the Bradley's to review the Markhams' financial information and cancel the REPC if they were dissatisfied in any way with contents of that information. This language indicates that the appropriate standard to determine whether the Bradleys acted in good faith is whether they were subjectively

dissatisfied with the Markhams' financial information. The trial court erred when it applied an objective reasonable standard to evaluate the Bradleys' conduct and equated the Bradleys' tolerance for risk with that of a professional third party lender.

The Bradleys did not waive their right to rely on the Markhams' failure to submit the required financial documents by the September 13 deadline as grounds to cancel the REPC. Waiver requires a party to intentionally relinquish a right. For a party to waive a right, the party must clearly and distinctly communicate waiver of that right to the other party.

The actions and testimony of the parties in the present case prove that neither party understood Mr. Bradley's actions on September 12 to waive the Bradleys' right to rely on the September 13 deadline. The Bradleys submitted the required Seller Disclosures on September 13, pursuant to the terms of the SFA, indicating that they did not intend to waive reliance on that date. The Markhams' agent, Ms. Norton, indicated that she would have fully performed on the September 13 deadline, but she mistakenly believed that the deadline was September 30 rather than September 13. Because the actions of both parties clearly demonstrates that neither believed that Mr. Bradley's conduct on September 12 waived the Bradleys right to rely on the September 13 deadline, Mr. Bradley could not have intentionally and clearly waived the right to strictly enforce the September 13 deadline.

The Bradleys should *not* be estopped from strictly enforcing the September 13 deadline for financial disclosures because the Markhams were not relying on Mr. Bradley's conduct when they failed to provide the required financial documents on September 13. An essential element of a claim for estoppel is reliance. The Markhams' agent, Ms. Norton, testified that the reason the Markhams failed to provide the required financial information by September 13 was because she erroneously believed the deadline was September 30.

Undisputed testimony establishes that the Markhams were relying on their mistaken understanding of the REPC rather than on Mr. Bradleys' conduct and the trial court erroneously concluded that the Bradleys should be estopped from relying on the September 13 deadline.

Finally, specific performance is not the appropriate remedy for this case because the Markhams had not fully performed their obligations under the REPC.

ARGUMENT

- I. **The Trial Court erred in applying an “objective reasonableness” legal standard for breach of the covenant of good faith and fair dealing because the plain language of the REPC permitted the Bradleys to be subjectively dissatisfied with the Markhams’ credit and because the Bradleys’ motivations for refusing to loan money to the Markhams is irrelevant to whether the Bradleys acted in good faith.**

The scope of the covenant of good faith and fair dealing is closely tied to the language of the contract and expectations of the contracting parties.³ In undertaking its analysis of the covenant of good faith the trial court in this case committed two reversible errors regarding the legal standard relating to the covenant of good faith. First, the trial court erroneously concluded that the appropriate legal standard for the REPC was objective reasonableness. The plain language of the REPC only required that the Bradley's be subjectively dissatisfied with the Markhams' credit in order to cancel the REPC. It was error to apply an objective reasonableness standard to the REPC. Second, the trial court improperly considered the Bradley's possible alternative motives for cancelling the contract. The Bradley's motivations for cancelling the contract were irrelevant to the question of

³ Appellants assert that this issue is a legal conclusion subject to a correction of error standard. However, if this Court determines that the issue is one of fact, Appellants have marshaled evidence related to this issue in Section II of this brief.

whether they were subjectively dissatisfied with the Markhams' financial information, thus, the trial court erred by introducing an irrelevant factor in its breach of good faith analysis.

A. The trial court applied the wrong legal standard to determine whether the Bradleys breached the covenant of good faith and fair dealing.

The scope of the covenant of good faith and fair dealing is limited by well-settled principles. *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226. Courts may not use the covenant to establish new, independent rights to which the parties did not agree at the time they made an agreement. *Id.* The covenant cannot create duties inconsistent with express contractual terms. *Id.* The covenant cannot force a party to exercise a right “to its own detriment for the purpose of benefiting another party to the contract.” *Id.* (internal quotations omitted). Finally, a court cannot use the covenant as a tool to achieve an outcome consistent its individual notions of fairness, but inconsistent with the express terms of the applicable contract. *Id.*

Generally, the covenant of good faith requires a party to refrain from acting in a way that injures the other party's contract benefits. *St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1991). Thus, to comply with the covenant of good faith a party must act in accordance with “the agreed common purpose and the justified expectations of the other party” *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876.

The case of *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, 104 P.3d 1226, illustrates that the terms of the contract and parties' course of conduct limit the scope of the covenant of good faith. *Oakwood Village* involved a lease between a developer and a different grocery store—Albertsons. *Oakwood Village*, 2004 UT at ¶ 3. An Albertson's store closed the store on the leased property and opened a store in a nearby location. *Id.* at ¶ 5. Albertsons

continued paying rent under the original lease. *Id.* at ¶ 6. The Albertson's lease did not contain a provision requiring Albertson's to continually operate a business on the property. *Id.* at ¶ 49. Instead of altering the business nature of the leased location, Albertsons permanently closed the grocery store on the leased property but continued to pay rent under the lease. Albertson's relocation and closure harmed the developer's property value by preventing the developer from finding a replacement grocery store to attract customers for other stores on the property. *Id.* at ¶ 42. The developer argued that Albertson's conduct, even if it did not violate the express terms of the lease, violated the covenant of good faith and fair dealing by denying the developer the opportunity to attract customers to its property. *Id.* The Utah Supreme Court, noting that the covenant of good faith is limited by the terms of the underlying contract, held as a matter of law that the developer failed to state a claim for breach of good faith because the lease did not did not require Albertsons to continuously operate a business on the property. *Id.* at ¶¶ 45, 53. The court concluded that the contract language was clear and that although Albertson's actions damaged the value and profitability of the developer's property, as a matter of law Albertson's had not breached the covenant of good faith. *Id.* at ¶ 53. See also *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445 (Utah App. 1994).

The principle established in *Oakwood Village* is that the scope of the duty to act in good faith is carefully tied to the terms of the contract underlying a dispute. Where there is no contractual provision requiring a duty, a court will not rewrite the contract in favor of the complaining party.

In the instant case, the trial court improperly expanded the covenant of good faith to eliminate the Bradley's contractual right to reject the Markham's credit. The court used the

covenant of good faith as a tool to achieve an outcome consistent with its own notions of fairness but inconsistent with the terms of the contract.

Section 8.1 of the seller finance addendum to the REPC grants the Bradleys wide latitude to review and reject the Markhams' credit:

If the content of the credit report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to either: (a) provide written objections to Buyer as provided [elsewhere in the contract]; or (b) immediately cancel the REPC by providing written notice to Buyer.... [Addendum "1"].

This provision of the SFA does not specify *any standard* by which the Seller may assess the Buyer's credit. To the contrary, it grants complete discretion to the Seller. Importantly, the provision does not require the credit information to satisfy a third party lender or a hypothetical, objective reasonableness standard. It requires only that the credit information satisfy the *Seller* (the Bradleys). The trial court ignored this broad discretion and imposed an exacting scrutiny on the Bradleys' decision to reject the Markhams' credit. The proper legal standard for the trial court was whether the Bradleys were subjectively satisfied with the Markham's credit, not whether a reasonable third party lender would have been satisfied with the Markham's credit.

The trial court noted that the Markhams qualified for a loan through a professional third party lending company (Countrywide). Based upon this qualification, the trial court concluded that it was objectively unreasonable for the Bradleys to cancel the REPC even though the Markhams' financial information included a prior bankruptcy judgment, a tax lien, numerous late payments, and was in sloppy condition. [R. 288-290]. The trial court did acknowledge that there was a bankruptcy judgment against the Markhams, but because Countrywide would have loaned money to the Markhams, it decided that the Bradleys

should have felt secure in financing \$265,000.00 to individuals who had previously filed for bankruptcy. By closely scrutinizing the Bradleys' decision to not loan money to the Markhams and comparing their decision to that of a third party lender, the trial court expanded the scope of the covenant of good faith beyond the terms of the SFA and the expectations of the parties.

The plain language of section 8.1 of the SFA allowed the Bradleys to use their own subjective judgment in determining whether to extend credit to the Markhams. Conversely, the trial court purported to hold the Bradleys to an "objective" standard, but based its ruling on its own subjective reasoning. It granted no deference to the Bradleys' legitimate reasons for refusing to extend credit to the Markhams and replaced their reasonable decision with its own. This violated the express provisions of the contract and the expectations of the parties.

The trial court compares the Bradleys—who had never previously financed a real estate transaction—to Countrywide—an established, experienced, professional lender. This unfairly pitted the Bradleys' tolerance for risk against that of a professional lender with years of experience. Countrywide has been in the financial industry since 1969 (nearly 40 years) and is a publicly traded company. The Bradleys, on the other hand, have comparatively little experience evaluating credit and its accompanying risk. Mr. Bradley testified that he has regularly reviewed his own credit report, but has no other experience reviewing credit reports. [TT 308:20-309:7]. At trial, he could recall the name of two out of the three major credit reporting companies. [TT 310:1-25]. He also did not clearly understand Mr. Markham's credit report. [TT 325:10-25 (testifying that he did not understand basic elements of Mr. Markham's credit report)]. Although purporting to evaluate the rationality of the Bradleys review of the Markhams' credit information under an objective reasonableness

standard, the court imposed a reasonable professional lender's experience as the standard.

The professional and corporate entity status of Countrywide makes its tolerance for risks and scrutiny when lending very different from the financial and emotional risks involved when an individual or family decides to lend money. The Bradleys risk their own personal wealth and livelihood by lending money unlike Countrywide which is structured to absorb such risks.

The plaintiffs do not deny the negative facts in their financial and credit information. The prior bankruptcy, tax lien, late payments, and sloppy condition of the Markhams' financial information are enough to justify the Bradleys' decision to not loan the Markhams \$265,000. The trial court ignored these facts and used the covenant of good faith to reach a result consistent with its own notions of fairness, but inconsistent with the terms of the contract.

The trial court also ruled that the Bradleys' concerns over the sloppiness and poor quality of the Markham's financial information elevated form over substance. This conclusion fails to consider that the Markhams' late, hastily assembled, sloppy, handwritten financial information indicates a pattern of disorganization that creates an emotional stress for the Bradley's. A professional third party lender such as Countrywide has employees who are trained and prepared to deal with late payments, non-standard reporting forms, and disorganized financials. The Bradleys could not reasonably hire an employee to handle such administrative challenges throughout the life of the loan and would be compelled to deal with the Markham's on a personal and intimate level on a monthly basis if they personally financed the home. Accordingly, the Bradleys were legitimately concerned these problems might continue or become worse through the life of the loan if they decided to proceed with

financing. Such emotional stress and conflict might be immaterial for Countrywide who expects and plans for such occurrences, but it was certainly a legitimate and justifiable concern for the Bradleys.

The trial court mistakenly relies on the Markhams' being "pre-qualified" for a loan through Countrywide. Pre-qualification for a loan does not ensure that the loan will be fully executed or that amount in the pre-qualification letter will become money in the bank. As such, neither the trial court nor the Bradleys should have relied on such preliminary information as a basis to evaluate the credit of the Markhams.

Further, the trial court's decision to specifically enforce the REPC forced the Bradleys to act against their best interests and assume the risk of loaning money to the Markhams act, contradicting the rule stated in *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226. The Markhams had a prior bankruptcy, less than perfect credit, a tax lien on record, and numerous and *recent* late payments reflected in their accounts. The court requires the Bradleys to risk loaning money to the Markhams, against their interest, for the benefit of the Markhams.

This case is similar to *Oakwood Village* where the court dismissed the claim for breach of good faith because Albertson's conduct was within the scope of appropriate action defined by the contract. Like Albertson's lease in *Oakwood Village* which contained no provision which indicated a broad duty to act in the leaseholder's best interest, there is no duty listed in the REPC or SFA, here, which would implicate a broad duty to overlook the negative aspects of the Markhams' credit to save the contract. Thus, as a matter of law, the scope of the Bradleys' duty to act in good faith did not require them to act in a manner consistent with that of a professional lender or to take on a credit risk when the REPC

allowed them discretion to review and reject the Markhams credit history.

Defendants had a right to exercise discretion and the trial court improperly replaced that right and discretion with its own judgment. This court should reverse the trial court's determination that an objective reasonableness standard was the appropriate legal standard to determine whether the Bradleys' breached the covenant of good faith.

B. The Bradleys' motivation for canceling the contract is irrelevant to whether they acted in good faith because dissatisfaction with the Markhams' credit information alone justified cancellation of the REPC.

In contract law, the requirement that a person exercise discretion in good faith generally does not refer to a person's motivations for acting, but to the rationality, reasonableness, fairness, or propriety of the person's actions under the terms of the contract and in light of the parties' expectations. *See* Restatement (Second) of Contracts § 205 cmt. a. If a party acts rationally and pursuant to the contract terms, the party's motivations for taking action are irrelevant. It is enough that the person acted according to the terms of the contract.

A hypothetical scenario illustrates the forgoing principle: a seller contracts to convey property to a buyer. The seller agrees to finance the transaction and includes a seller financing addendum to the contract with a seller review clause identical to the clause in the present case. The price of the land increases dramatically between the time the parties signed the sales contract and the financial disclosure deadline. The seller will have obvious motivation to cancel the contract and the buyer will have obvious motivation to enforce the contract. The buyer makes his financial disclosures and turns out to have the worst possible credit. Elated, the seller cancels the contract and provides written notice to the buyer pursuant to the contract.

In the hypothetical, the seller was partially motivated to cancel the contract for reasons other than the buyer's poor credit, but the seller did not exercise their discretion in bad faith. The buyer's poor credit was an independent and sufficient reason that justified canceling the contract regardless of the Seller's motivation to cancel. Thus, the rationality of the seller's decision to cancel should be the sole consideration in determining whether the seller breached the covenant of good faith and any alternative motivations for canceling the contract are irrelevant.

In the present case, the court found that the Bradleys cancelled the contract because they wanted to back out of the sale and used the Markham's credit as pretext to disguise a desire to renege on the REPC. As illustrated by the hypothetical above, the Bradleys' motivations for canceling the contract should not relate to the covenant of good faith. Rather, the sole consideration should be whether the negative elements of the Markhams' financial information justified the Bradleys' decision to cancel the contract. Even if the Bradleys were partially motivated to cancel the contract for reasons other than the Markham's credit, the contract gave them discretion to accept or reject the Markhams' credit information and if they acted rationally, they did not breach the covenant of good faith. The trial court's conclusion that the Bradleys used the Markhams' credit as pretext to cancel the contract is not sufficient to support its conclusion that the Bradleys acted in bad faith given the undisputed and material negative facts relating to the Markhams' credit.

II. The trial court erred by failing to grant the Bradleys' motion for a directed verdict and motion for a new trial.

A court should reverse the trial court's denial of a directed verdict if a reasonable person could not disagree on the issue. *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977).

The appellate court reviews the evidence, drawing all reasonable inferences in the light most favorable to the non-moving party. *Id.* When challenging a denial of a directed verdict, a party is required to “marshal the evidence” and demonstrate that the evidence is insufficient when viewed in a light most favorable to the verdict. When reviewing a motion for a new trial the reviewing court uses an abuse of discretion standard. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 804 (Utah 1991).

Drawing conclusions and inferences from the above-stated evidence in favor of the verdict, the evidence is nonetheless insufficient to support a verdict for a breach of the covenant of good faith. Thus, even if the trial court used the appropriate standard for evaluating the Bradleys’ decision to cancel the contract, reasonable minds could not disagree that the Bradleys breached the covenant of good faith.

Marshaled Evidence

“Whether the implied covenant of good faith performance was breached...is a fact-intensive inquiry, ordinarily left for the fact-finder.” *Pugh v. North American Warranty Services, Inc.*, 2000 UT App. 121, ¶ 23, 1 P.3d 570.

To successfully challenge a trial court’s findings of fact on appeal, “[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be “against the clear weight of the evidence.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (citations omitted) (alteration in original). See also *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991).

The trial court found that it “was unreasonable for the Bradleys to reject the Markhams” credit worthiness based on the documents presented to them. The Bradleys did

not rely on credit worthiness issues. Rather, their “evaluation” was a pretext to cancel the REPC because they had already changed their minds about selling. This was in breach of the implied covenant of good faith and fair dealing.” [R. 290]. The trial court relied upon six “fact” sets in determining that the Bradleys breached the covenant of good faith and fair dealing. [R. 288-289]. The findings of fact that the trial court relied on and the marshaled evidence supporting those findings are:

(1) *In rejecting Mr. Bradley testified that he expected the credit report to be from “Experian,” one of the three major credit reporting agencies, and not the “Landsafe” company shown on the front of the credit report, yet while on the witness stand, Mr. Bradley acknowledged that the credit report did show the Experian credit score on both of the Markhams and that the credit information was gathered from Experian.*

- Mr. Bradley testified in an earlier deposition that the credit report he received was from “Landsafe” (see Addendum “5”, hereto with the language “Landsafe Credit Merge Report” at the top) and not one of the three major credit reporting agencies (like Experian). While on the stand, it was pointed out that XPN, TUC and EXF were listed on the Credit Report. Mr. Bradley stated he did not know what those acronyms stood for when he initially reviewed the Credit Report. [TT 309:8 through 312:12].

(2) *The Markhams’ credit scores of 689 and 705 were sufficient for Countrywide to qualify the Markhams for a loan for twice the amount that the Bradleys agreed to finance. I conclude that it would not be objectively reasonable for the Bradleys to claim this as a ground to cancel the REPC.*

- See Addendum “5” (Credit Report) and Addendum 9 (Countrywide Letter).

(3) *The Bradleys both testified that one of the most important elements in their decision to reject the financial information was that it was handwritten on the form and looked sloppy and that they would not present such a sloppy form to anyone in seeking credit for themselves, yet they testified that they had no objection to the information on the report showing the Markhams' monthly income or their net worth or their credit scores. I conclude that this objection to the form or appearance of the Markhams' papers had nothing to do with the merits of the information provided to them, so that it was objectively unreasonable for the Bradleys to reject the Markhams' financial information on this basis.*

- Mr. Bradley testified that the poor quality of the Credit Report bothered him.
[TT 312:20 through 313:3].
- Mrs. Bradley testified that the poor quality of the Credit Report bothered her.
[TT 345:6-19].
- Mrs. Bradley specifically noted that the substantive contents of the Credit Report and the failure to timely deliver required documents *were* concerning.
[TT 344:22 through 345:19].

(4) *The Bradleys also testified that they had a concern as to whether the Markhams could meet a monthly payment obligation if they could not meet the REPC deadline to furnish the financial information, yet the Markhams had shown the Bradleys that the Bradleys would not need to carry the note for any extended period of time, as the Markhams had lined up Countrywide to immediately pay off the seller financing, completely eliminating that claimed concern.*

- See Addendum “5” (Credit Report) and Addendum “9” (Countrywide Letter).

- Mrs. Bradley expressed concern as to whether the Markhams would make monthly payments given the failure to timely submit essential documents. [TT 341:9-18; 345:1-19; 362:14-16].
 - Mr. Bradley expressed concern as to whether the Markhams would make monthly payments given the failure to timely submit essential documents. [TT 290:14-22; 292:2-11; 293:13-18].
- (5) *The credit report shows only four historical delinquencies, all being only 30-day delinquencies, and two of them showing the last delinquency date in 2003 and two of them showing the last delinquency date in 2001, which is a very small and insignificant number of delinquencies in comparison to the many timely payments.*
- See Addendum “5” (Credit Report).
- (6) *In the “Notice of Cancellation” from their attorney, the Bradleys’ only specific comment on the merits of the Markhams’ credit-worthiness was as to “the admission of bankruptcy or judgment.” The evidence established that Countrywide did not consider this ten or twelve-year old bankruptcy to disqualify the Markhams from a loan for twice the amount that the Bradleys agreed to finance. Furthermore, Mrs. Bradley’s broker testified that she never mentioned a bankruptcy to him until just before their depositions were taken. I conclude that it was not objectively reasonable for the Bradleys to claim this as a ground to cancel the REPC support of its finding of waiver.*
- See Addendum “10.” (October 4, 2004 letter from Mr. Jensen).
 - See Addendum “9.” (Countrywide Letter).
 - Mr. Roger Hamlin testified that Mrs. Bradley was initially concerned about the untimely delivery of the financial documents, and

subsequently raised her concern about the issue of bankruptcy. [TT 361:8 through 364:7].

The Trial Court's Conclusion was Against the Clear Weight of the Evidence.

There is no precise standard that defines the covenant of good faith and fair dealing (“covenant of good faith” or “covenant”). The covenant is a flexible concept that is has sometimes been used inconsistently. *See Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 40, 94 P.3d 193 (Nehring J. concurring). Recently, however, the Utah Supreme Court has consistently limited the scope of the covenant of good faith to the express terms of the contract and expectations of the parties. *Smith v. Grand Canyon Expeditions*, 2003 UT 57, ¶ 20, 84 P.3d 1154 (“the degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on contract terms.”). Section 205 of the Restatement of Contracts notes that “good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party,” and that a breach of good faith contradicts “community standards of decency, fairness, and reasonableness.”

Applying these legal principles to the marshaled facts, a reasonable person could not disagree that the Bradleys’ decision to cancel the REPC, based on legitimate concerns over the Markham’s financial information, was undertaken in good faith. The single fact that the Markhams had a bankruptcy on their credit justifies the Bradley’s decision to cancel the REPC. At trial, the Markhams testified that the bankruptcy was remote and unrelated to their present credit situation, but never testified that they communicated this information to the Bradleys. The Bradleys based their decision purely on the contents of the Markhams’

financial documents. It is obvious that a person who has gone through bankruptcy presents a significant credit risk. As previously noted, this risk implicated the Bradleys' own personal assets rather than those of a corporate entity. By lending money to the Markhams, the Bradleys risked their quality of life and financial solvency. Because the presence of a bankruptcy judgment alone on the Markhams credit justifies the Bradleys' decision to cancel the REPC, the court should have granted the Bradleys' motion for a directed verdict.

Additionally, the fact that the Bradleys obtained an objective opinion from a licensed attorney familiar with contractual duties and obligations prior to canceling the REPC demonstrates good faith action under the terms of the SFA. Advice of counsel also indicates that the Bradleys' actions were rational. An experienced, disinterested third party advised the Bradleys that the bankruptcy, tax lien, late payments, and other negative factual information in the Markhams' credit information justified their decision. The Bradleys relied on their attorney's expertise when deciding to cancel the contract. They were not acting from improper motivations when they canceled the REPC, they were relying on an experienced attorney's objective legal advice.

The fact that the Bradleys reviewed the Markham's credit information *even after* the Markhams' missed the required contract deadlines indicates the Bradleys' good faith action. Darby notified the Markhams of the Bradley's intent to cancel the REPC based on the Markhams' failure to provide the required financial disclosures at the appropriate deadlines. Upon receiving this notification, the Markhams attempted to contact Darby, and when she returned their call, she agreed to review the Markhams' credit information despite it being late. Mrs. Bradley was not required to review their credit, but nonetheless reviewed the Markhams' credit and paid an attorney to help the Bradleys evaluate the Markhams' credit.

The Bradleys' willingness to review the Markhams' financial information indicates good faith performance under the contract.

Apart from the bankruptcy, there are many other undisputed, negative elements of the Markhams' credit information that justified the Bradley's decision to not loan the Markhams \$265,000. There are various late payments reflected in the Markhams' financial information. Importantly, the late payments were quite recent, indicating possible problems with the Markham's current financial situation. There was also a tax lien on the report. Mr. Markham testified that he had the tax lien removed, but never mentioned this fact to the Bradleys. Although Mr. Markham was always very confident about his credit when speaking to the Bradleys and the Bradleys were careful to closely scrutinize the substance of the Markham's credit rather than taking Mr. Markhams' word at face value.

Finally, the late, disorganized, handwritten, and heavily revised condition of the financial information tends to confirm the Bradley's suspicion that the Markhams' presented a credit risk. The unofficial and untrustworthy nature of Mr. Markham's hand-written documents appeared to confirm the Bradleys' suspicions that the Markhams' were irresponsible with their credit. It would not be unreasonable to conclude that the whited-out and handwritten portions of the Markham's financial information were flat-out dishonest. If not dishonest, the informal aspect of the documents certainly supports the Bradleys' conclusion that the Markhams maintained a similarly informal attitude toward full and timely payments.

In sum, the undisputed evidence presented by the Markhams squarely supports the Bradley's reluctance to loan money to the Markhams. Although a person with a high tolerance for risk might agree to personally loan \$265,000.00 to a buyer with a prior

bankruptcy, tax lien, and recent late payments appearing on decidedly late and informal financial documents, it would certainly be more reasonable to seek a less risky opportunity for investment. The trial court expanded the covenant of good faith beyond its proper scope in this case because the Markhams' financial information was informally presented, contained a bankruptcy judgment, a tax lien, and evidence of recent late payments.

III. The Bradleys did not waive their right to strictly enforce the September 13 deadline.

To establish waiver, a party must show: (1) an existing right, (2) knowledge of its existence, and (3) intention to relinquish the right. *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). Each element of the test must be met in order for there to be an effective waiver. Whether a trial court applied the correct legal standard in an analysis of "waiver" is a pure question of law. However, the actions or events allegedly supporting waiver are factual in nature, thus a reviewing court must grant "broadened discretion to the trial court's [factual] findings." *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 21, 140 P.3d 1200.

When the element of intent is determinative, the appellants must marshal all evidence in support of that finding. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 23, 140 P.3d 1200. When challenging a trial court's findings of fact,

[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.' *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989).

The first two elements of waiver—the existence of a right and knowledge of its existence—are rarely controverted and easily understood. As long as the party actually had the right, and knew they possessed the right, the first two elements are met. *United Park City*

Mines Co. v. Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 23, 140 P.3d 1200 (Utah 2006).

Litigation most often arises in relation to the third element—intent to relinquish the right. When deciding whether a party intended to relinquish a right, the fact finder should “assess the totality of the circumstances to determine whether the relinquishment is clearly intended.” *Soter’s Inc. v. Deseret Fed. Sav. & Loan Ass’n*, 857 P.2d 935, 941 (Utah 1993). However, intent to relinquish must be distinct and “will not be implied from doubtful acts.” *Jensen v IHC Hospitals Inc.*, 2003 UT 51, ¶ 84, 82 P.3d 1076. The Utah Supreme Court has held that “any waiver must be distinctly made, although it may be express or implied.” *Soter’s Inc. v. Deseret Fed. Sav. & Loan Ass’n*, 857 P.2d 935, 940 (Utah 1993) (internal citations omitted). By requiring a distinct manifestation of intent the Utah Supreme Court “ensure[d] that waiver would not be found from any particular set of facts unless it was clearly intended.” *Soter’s Inc. v. Deseret Fed. Sav. & Loan Ass’n*, 857 P.2d 935, 940 (Utah 1993).

Marshalled Evidence

To successfully challenge a trial court’s findings of fact on appeal, “[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be “against the clear weight of the evidence.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (citations omitted) (alteration in original). See also *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991) (“[T]he challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.”). As already noted, the first two elements of waiver (the existence of a right and the knowledge of its existence) are not at issue. However, the third element of waiver, “intent to relinquish the right” is fact-sensitive and requires the challenging party to

marshal all evidence from the record in support of the trial court's finding of such "intent."

It is somewhat problematic that in its Findings of Fact and Conclusions of Law, the trial court does *not* specifically analyze and apply the three elements of waiver to the facts. The trial court only generally identifies underlying facts on which it found a waiver of the Bradley's rights to reply on the September 13 deadline, namely: (1) the Markhams, through Ms. Norton, set up a September 12 meeting with Mr. Bradley to discuss their financial information, (2) Mr. Bradley was aware of the meeting and its purpose and had lead the Markhams and Norton to believe that he was the only contact person for the sellers, (3) Mr. Bradley did meet briefly with the Markhams and Ms. Norton on September 12, but when Mr. Markham tried to present the financial paperwork, Mr. Bradley refused to take the documents and asked if the documents could be reviewed at a later time, and (4) despite being the listing agent, for Property, Mrs. Bradley had never made herself available to discuss anything about the REPC prior the deadline. [R. 285]

The trial court never explains how these facts are tantamount to a "relinquishment" of their right to strict enforce the September 13 deadline for production of the Credit Report (which was the only document required by the September 13 deadline—a document the Markhams admit they did not have on September 12). Notwithstanding this lack of clarity, the Bradleys have marshaled the evidence for each of the four enumerated facts cited by the trial court in support of its finding of waiver.

(1) *the Markhams, through their agent, set up a September 12 meeting with Mr. Bradley to discuss their financial information;*

- Mr. Markham testified that Ms. Norton set the meeting for September 12, in order to meet certain deadlines. [TT 28:22 through 29:1].

- Ms. Norton testified that she arranged for the September 12 meeting to present financial information. [TT 137:3-16; 139:4-25; 142:2-9; TT 189:20].
 - Mr. Bradley testified that a meeting was set up for September 12. [TT 281:11].
- (2) *Mr. Bradley was aware of the meeting and its purpose and had lead the Markhams and Norton to believe that he was the only contact person for the sellers;*
- See preceding cites.
 - Ms. Norton testified that Mr. Bradley was the contact person for sellers and that Mr. Bradley notified Ms. Norton that Mrs. Bradley was out of the state and that he would be handling the transfer of relevant documents. [TT 116:12 through 119:10; 144:15-24; TT 185:14].
 - Mr. Bradley testified that he was the contact person for sellers and that Mrs. Bradley was out of the state and that he would be handling the transfer of relevant documents. [TT 281:13-18].
- (3) *Mr. Bradley did meet briefly with the Markhams and Ms. Norton on September 12, but when Mr. Markham tried to present the financial paperwork, Mr. Bradley refused to take the documents and asked if the documents could be reviewed at a later time;*
- Mr. Markham testified that the meeting was held on September 12 and that Mr. Bradley refused to take the documents and asked to review the documents later. [TT 35:16 through 40:25].
 - Ms. Norton testified that the meeting was held on September 12 and that Mr. Bradley refused to take the documents and asked to review the documents later. [TT 148:22 through 152:7; 192:10 through 193:4; 196:17-19].

- Mr. Bradley testified that the meeting was held on September 12 and that he refused to take the documents and asked to review the documents later. [TT 282:12 through 285:7].
- (4) *despite being the listing agent, for Property, Mrs. Bradley had never made herself available to discuss anything about the REPC prior to the deadline.*
- Mrs. Bradley testified that she was in Washington prior to the September 13 deadline and that Mr. Bradley was directly handling the transaction, although communicating with her. [TT 332:14 through 335:12; 336:3 through 337:11; 339:12 through 340:17].
 - Ms. Norton testified that prior to the September 13 deadline, she was unable to contact Mrs. Bradley and worked directly with Mr. Bradley pursuant to his instructions. [TT 115:15 through 119:10; 123:5-19; 144:15 through 145:22].
 - Mr. Bradley testified that he was the contact person for sellers and that Mrs. Bradley was out of the state and that he would be handling the transfer of relevant documents. [TT 281:13-18].

Additionally, the trial court noted that because Mr. Bradley was angry and because he wanted additional time to review the documents, it was “appropriate and reasonable for the Markhams not to provide any financial information, including a credit report, until such time as the new meeting was set.” [R. 286]. According to the trial court, it would have been “futile” for the Markhams or Ms. Norton to try and present their financial information on Monday, September 13. The trial court also noted that “the Bradleys had accepted the REPC and [SFA] without a Buyer Financial Information Sheet, thereby waiving the right to

receive financial information in that particular form.” [R. 286]

(5) *Mr. Bradley was angry and wanted additional time to review the documents;*

- Ms. Norton testified that Mr. Bradley was initially upset when they arrived on September 12. [R. 148:10 through 149:12].
- Mr. Bradley testified that he was agitated when the Markhams and Ms. Norton arrived on September 12. [R. 283:3; 284:9; 285:1]
- Mr. Markham testified that Mr. Bradley was initially upset when they arrived on September 12. [R. 36:12 through 37:16; 78:18-24].
- Ms. Norton testified that Mr. Bradley asked to review the documents at a later time. [R. 150:19-21; 152:6-16].

(6) *the Bradleys had accepted the REPC and SFA without a Buyer Financial Information Sheet;*

- Ms. Norton testified that Mr. Bradley accepted the REPC and SFA without a Buyer Financial Information Sheet. [R. 134:11 through 135:21].

Applying these principles to the present case, it is clear that Mr. Bradley did not waive his right to enforce the September 13 deadline when he requested the parties meet at a later date. The Bradleys do not dispute that they knew they had a right to enforce the September 13 deadline for the Credit Report. [*See* Addendum “1”]. The Bradleys both signed the REPC and knew its contents. However, the trial court incorrectly found that they had intentionally waived their right to strictly enforce the deadline. [R.285]. Undisputed facts establish that both parties performed on the contract as if there was not waiver.

The Bradleys did not believe the Mr. Bradley’s actions waived their right to rely on the September 13 deadline. After the September 12 meeting, the Bradleys were acting under

the assumption that the deadline was still in effect because they faxed the Section 7 Sellers Disclosures to the Markhams on September 13. [*See* Addendum “14”]. If the Bradleys had waived the deadline, it is unlikely that they would have been concerned about delivering the required disclosures to the Markhams by the September 13 deadline.

The trial court also ignored the *statute of frauds* [*see* Utah Code Ann. 25-5-1 *et seq.* (1953)] and the fact that Section 14 of the REPC specifically **prohibits oral modification of its terms** in finding that Mr. Bradley *orally* waived the timely presentation of the Buyer Financial Information Sheet (which should have been submitted concurrently with the SFA).

Furthermore, Ms. Norton did not understand Mr. Bradley’s actions to waive his right to rely on the September 13 deadline. At trial she insisted that she would have returned to the house to leave the financials with Mr. Bradley if she would have known the deadline was September 13. However, Ms. Norton’s assistant mistakenly informed her that the deadline for the credit report was September 30. The Markhams failed to deliver the required Credit Report not because of Mr. Bradley’s actions, but because of Ms. Norton’s own mistake.

Mr. Bradley performed his part of the contract by sending out the Seller Disclosure Documents on September 13. Ms. Norton testified that she would have left the financial disclosure information with the Mr. Bradley if her assistant had not made the error. As a matter of law there could be no distinct, intentional waiver when uncontested evidence shows that neither party behaved in a manner consistent with waiver.

- IV. The Bradleys are not estopped from strictly enforcing the Seller Disclosure Deadline as a result of Mr. Bradley's actions because there was no reasonable reliance by the Markhams.

The trial court abused its discretion in concluding that the Bradleys were estopped from strictly enforcing the September 13 deadline.

Estoppel is a highly fact-specific question that an appellate court reviews under an abuse of discretion standard. *State, Dept. of Human Services ex rel. Parker v. Irizarry*, 893 P.2d 1107, 1108-09. (Utah 1995).

There are three elements to a claim for Estoppel:

“(1) a statement, admission, act, or failure to act by one party inconsistent with a later-asserted claim; (2) the other party's reasonable action or inaction based upon the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate its statement, admission, act, or failure to act.” *Brixen v. Elton*, 777 P.2d 1039, 1043-44 (Ut. App. 1989).

To meet the first element of an equitable estoppel claim, the party seeking to establish estoppel must show that the other party “made a statement or admission, or that it acted in a manner inconsistent with its right to enforce the forfeiture provision of the parties' written lease agreement.” *IHC Health Services, Inc. v. D & K Management, Inc.*, 2003 UT 5 ¶11, 73 P.3d 320. The second element of estoppel is reasonable reliance. When relying on the statement of a party “it is not enough that the person who heard [the representations] deemed that he was warranted in acting as he did; the language used ought of itself to furnish the warrant.” *Farmers & Merchants Bank v. Universal C.I.T. Credit Corp.*, 4 Utah 2d 155, 159, 289 P.2d 1045 (1955) (internal citations omitted). The third element of estoppel is whether the relying party would be harmed if the first party retracted its statement or act. *Irizarry*, 893 P.2d at 1108-09.

Marshaled Evidence

To successfully challenge a trial court's findings of fact on appeal, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence." *Valcarve v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (citations omitted) (alteration in original). See also *West Valley City v. Majestic Inn. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991) ("[T]he challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."). Although there is not a strict marshalling requirement in appealing a finding of estoppel, the Bradleys have marshaled the evidence in challenging the finding of estoppel because estoppel is "highly fact specific" question.

As with its analysis of the "waiver" doctrine, the trial court does *not* analyze and apply the three elements of estoppel in its Findings of Fact and Conclusions of Law. If anything, the trial court says even less about estoppel, only briefly noting that "[d]ue to Mr. Bradley's refusal to talk about the issue and Mrs. Bradley's refusal to make herself available, the Bradleys are estopped to rely on the September 13 deadline...." [R.285]. This brief mention of estoppel is apparently conflated with the more broad discussion of waiver. Accordingly, the Bradleys respectfully direct this Court to the marshaled evidence presented in the preceding Argument section of this brief relating to "waiver."

The trial court's estoppel analysis is incorrect for two reasons. First under the plain language of the contract, the Markhams failed to present their financial information at the time they executed the SFA. Second, Mr. Bradley's statement was not inconsistent with his later actions and even if it was, undisputed testimony establishes that neither the Markhams

nor their agent, Ms. Norton, relied on Mr. Bradley's statements. They explicitly stated that they failed to meet the September 13 deadline because they were relying on Ms. Norton's mistaken belief that the deadline was September 30.

The trial court held that "the Bradleys are estopped to rely on the September 13 deadline; it would be inequitable to allow the Bradleys to take advantage of their own obstructive and misleading conduct." [R.285]. The Bradleys should not have been estopped from holding the Markhams to the Seller Disclosure Deadline because Mr. Bradley's statements and behavior on the September 12 meeting were not inconsistent with his later behavior and Ms. Norton was not relying on his actions when she failed to produce the financial documents.

The elements of estoppel are clearly defined but the trial court did not apply *any* test let alone analyze the appropriate elements or correctly apply the three factor test. The trial court relied on a misconception that the Bradleys made themselves totally unavailable which, in turn, made it impossible for the Markhams to comply with the deadline. [R. 285]. Mr. Bradley's statement that he did not want to review the financial information on the September 12 did not relate to or refer to the deadline on September 13 because he still faxed to Ms. Norton his Seller Disclosure Documents as required by the REPC. [*See* Addendum "14"].

Even if, under the first element, Mr. Bradley's conduct on September 12 was inconsistent with his later acts, the trial court erred because the Markhams and Ms. Norton undisputedly did not rely on his behavior. Ms. Norton admits in her testimony that she called her assistant who told her that the Seller Disclosure Deadline was not until September 30. Ms. Norton further testified that if she would have known the deadline was on

September 13, she would have returned to the house and left the financial documents with Mr. Bradley on the 12th. [TT 197:4 through 198:25]. Neither Ms. Norton nor the Markhams relied on his conduct. They relied on their own mistaken information. [*Id.*; TT 64:3-8 (Douglas Markham testifying that he understood that the 13th was the deadline for the financial disclosures)].

The Markhams would not be harmed by allowing Mr. Bradley to repudiate his statement or act because there is no inconsistency with his later actions. However, if Mr. Bradleys' actions were inconsistent and the Markhams relied on such inconsistency (which they did not), the Markhams only injury would be two trips to St. George. They would still have had the opportunity to find new property as it had only been twenty-three days (August 28 to September 20) since they first saw the Bradleys' property. [R. 269; 278]. The Bradleys should not be estopped from enforcing the Seller Disclosure Deadline as the facts do not show a statement in conflict with later actions, no reliance on the Bradleys' allegedly inconsistent conduct, and no injury to the Markhams as a result of Mr. Bradleys' actions.

V. The trial court erred in ordering specific performance on the sale of the property.

Specific performance is a remedy for breach of a legal or contractual obligation. Black's Law Dictionary 1407 (7th ed.1999). To warrant specific performance "the aggrieved party must make an *unconditional* tender of the performance required by the agreement." *Collard v. Nagle*, 2002 UT App 306, ¶ 19, 57 P.3d 603 (emphasis added) (quoting *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1243 (Utah 1992)). To tender performance, the "Buyer must have fully tendered, or stood ready to fully tender, her own performance under the contract." *Id.*

The ability to immediately fulfill one's responsibility under the contract is requisite for claiming specific performance. *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1240 (Utah 1992). When a contract is clear as to the terms, parole evidence is not allowed, and the terms must be followed strictly. *Lee v. Barnes*, 1999 UT App 126, ¶9, 977 P.2d 550.

The Bradleys should not have been required to sell their home to the Markhams under the doctrine of specific performance. In order for the Markhams to satisfy the specific performance tender requirement, on September 12th the Markhams should have stood ready to perform. The Markhams did not present several required documents in order to fully perform.

The SFA specifically required the Buyer Financial Information Sheet to be submitted concurrent with the SFA. Ms. Norton testified that the Markhams did not provide her with the required information. The SFA also required the Markhams to submit a current credit report by the Seller Disclosure Deadline, which was September 13. The Markhams admitted at trial that they did not have a credit report with them when they met with Mr. Bradley on September 13 and they did not fax or send a credit report to the Bradleys by the September 13 deadline. The trial court found that Mr. Markham had sufficient financial information because he had "a prior financial statement" from 2003 and a "sample form . . . if the Bradleys decided to adopt such a form." [R. 277]. Mr. Markham testifies that he had to whiteout and rewrite over the financial form before faxing it to Ms. Norton. [R. 280]. On September 12th the Markhams did not have a copy of their Credit Report as required by Section 8 of the SFA.

Even if the trial court was correct in finding that the Markhams were ready to perform on September 12, their performance was not complete and they could not provide

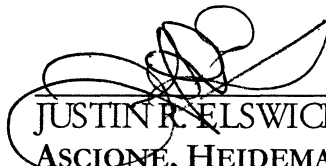
the Credit Report. The Markhams lacked the Credit Report as required by the Section 8 of the SFA. [*See* Addendum “1”].

Because the Markhams failed to provide the required Buyer Financial Information Sheet concurrent with the SFA and because they failed to provide the Bradleys with a credit report as required by section 8.1 of the SFA, it is clear that the Markhams had not fully performed under the contract and were not entitled to the remedy of specific performance.

CONCLUSION

This Court should reverse the trial court’s decision below and enter judgment as a matter of law in favor of the Bradleys.

Respectfully submitted this 11 day of June, 2007.


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Attorneys for Attorneys for Defendants/ Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2007, I served two copies of the foregoing **BRIEF OF APPELLANTS JOHN J. BRADLEY and DARBY G. BRADLEY** by the following method on the persons listed below:

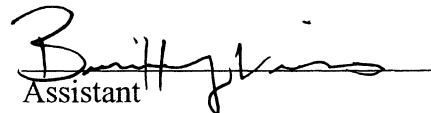
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____ US Mail, postage prepaid

____ Facsimile

____ Hand-delivery

Telephone Number (435) 628-1627
Fax Number (435) 628-1610


Assistant

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JOHN J. BRADLEY and DARBY G.
BRADLEY,

Defendants/ Appellants,

vs.

DOUGLAS J. MARKHAM and ANDREA
MARKHAM,

Plaintiffs/ Appellees.

**BRIEF OF APPELLANTS JOHN
J. BRADLEY and DARBY G.
BRADLEY**

Appellate Case No. 20061022

Appeal from final judgment and order of the Fifth Judicial District Court for
Washington County, State of Utah.

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ADDENDA

1. Real Estate Purchase Contract
2. Markham Financial Statement (September 12, 2004)
3. Bradley Letter (September 20, 2004)
4. Norton Letter to Bradleys (September 24, 2004)
5. Markham Credit Report received with September 24, 2004 Letter
6. Markham Financial Statement received with September 24, 2004 Letter
7. Norton Letter to Bradleys (September 27, 2007)
8. Norton Letter to Bradleys (September 30, 2007)
9. Countrywide Letter enclosed with September 30, 2007 Letter
10. Robert Jensen Letter to Norton (October 4, 2004)

ADDENDUM 1

REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Doug and Drea Markham offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$1,000.00 in the form of personal check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Century 21 At The Rockies/St.George Phone Number 435-673-9090

OFFER TO PURCHASE

1. PROPERTY: 979 Dammeron Valley Drive

also described as: Pinlon Hills subdivision

City of St. George, County of Washington, State of Utah, Zip 84783 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: _____

1.2 Excluded Items. The following items are excluded from this sale: _____

1.3 Water Rights. The following water rights are included in this sale: three shares with property and any other currently used on property

2. PURCHASE PRICE. The Purchase Price for the Property is \$550,000.00

2.1 Method of Payment. The Purchase Price will be paid as follows:

\$ 1,000.00 (a) **Earnest Money Deposit.** Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ _____ (b) **New Loan.** Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☐ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) **Loan Assumption Addendum** (See attached Assumption Addendum if applicable)

\$ 285,000.00 (d) **Seller Financing** (see attached Seller Financing Addendum if applicable)

\$ _____ (e) **Other (specify)** _____

\$ 265,000.00 (f) **Balance of Purchase Price in Cash at Settlement**

\$ 550,000.00 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs **only** when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the Initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure If Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) If the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) If the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) If the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) If the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when **all** of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when **all** of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: ☐ _____ hours ☐ _____ days after Closing;
☒ Other (specify) funding and recording

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract:

☐ Seller's Initials ☐ Buyer's Initials

The Listing Agent, Darby Bradley, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;

The Listing Broker, Red Desert Realty, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;

The Selling Agent, Carolyn Norton/Stewart Shumway, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
as a Limited Agent;
The Selling Broker, Century 21 / Russ Gwilliam, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller
as a Limited Agent;

6. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. SELLER DISCLOSURES. No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addendum No. 1

☒ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum ☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law) ☐ Other (specify): _____

10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes): A one-year Home Warranty Plan ☒ WILL ☐ WILL NOT be included in this transaction. If Included, the Home Warranty Plan shall be ordered by ☐ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$350 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies

available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

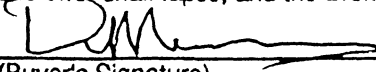
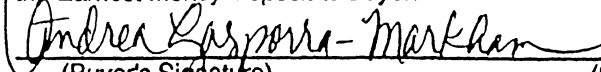
22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Loan Application & Fee Deadline	<u>September 6, 2004</u>	(Date)
(b) Seller Disclosure Deadline	<u>September 13, 2004</u>	(Date)
(c) Evaluations & Inspections Deadline	<u>October 4, 2004</u>	(Date)
(d) Loan Denial Deadline	<u>September 30, 2004</u>	(Date)
(e) Appraisal Deadline	<u>September 30, 2004</u>	(Date)
(f) Settlement Deadline	<u>October 29, 2004</u>	(Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 ☐ AM ☒ PM Mountain Time on September 7, 2004 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

	<u>9-1-04</u>		<u>9-1-04</u>
(Buyer's Signature)	(Offer Date)	(Buyer's Signature)	(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

Doug and Drea Markham			
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Zip Code)	(Phone)

Page 5 of 6 pages Seller's Initials _____ Date _____ Buyer's Initials D.M. Date 9-1-04



MADE 000021

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ **REJECTION:** Seller Rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

(Buyer's Signature) (Date) (Buyer's Signature) (Date)
Doug Markham Drea Markham

(Seller's Signature) (Date) (Seller's Signature) (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on _____ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.
Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL,
EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

**SELLER FINANCING ADDENDUM
TO
REAL ESTATE PURCHASE CONTRACT**

THIS SELLER FINANCING ADDENDUM is made a part of that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 31, 2004, between Doug and Drea Markham as Buyer, and Jay and Darby Bradley as Seller, regarding the Property located at 979 Dammeron Valley Drive. The terms of this ADDENDUM are hereby incorporated as part of the REPC.

1. **CREDIT DOCUMENTS.** Seller's extension of credit to Buyer shall be evidenced by: ☒ **Note and Deed of Trust**
☐ **Note and All-Inclusive Deed of Trust** ☐ **Other:** _____

2. **CREDIT TERMS.** The terms of the credit documents referred to in Section 1 above are as follows:
\$285000 principal amount of the note (the "Note"); interest at 5.5 % per annum; payable at approximately
\$2328.69 per month. The entire unpaid balance of principal plus accrued interest is due in 180 months
from date of the Note. First payment due December 1, '04. Additional principal payments, balloon payments or other
terms as follows: \$100,000 due on December 1, 2005, after balloon payment, monthly payment will be
reduced to \$1,511.60

The credit documents referenced in Section 1 of this ADDENDUM will contain a due-on-sale clause in favor of Seller. Seller agrees to provide to Buyer at Settlement: (a) an amortization schedule based on the above terms; (b) a written disclosure of the total interest Buyer will pay to maturity of the Note; and (c) the annual percentage rate on the Note based on loan closing costs.

3. **TAXES AND ASSESSMENTS.** In addition to the payments referenced in Section 2 above, Buyer shall also be responsible for: (a) property taxes; (b) homeowners association dues; (c) special assessments; and (d) hazard insurance premiums on the Property. These obligations will be paid: ☐ directly to Seller/Escrow Agent on a monthly basis ☒ directly to the applicable county treasurer, association, and insurance company as required by those entities.

4. **PAYMENT.** Buyer's payments under Sections 2 and 3 above will be made to: ☒ **Seller** ☐ **an Escrow Agent**. If an Escrow Agent, _____ will act as Escrow Agent and will be responsible for disbursing payments on any underlying mortgage or deed of trust (the "underlying mortgage") and to the Seller. Cost of setting up the escrow account shall be paid by: ☐ Buyer ☐ Seller ☐ split evenly between the parties.

5. **LATE PAYMENT/PREPAYMENT.** Any payment not made within 15 days after it is due is subject to a late charge of \$25 or _____ % of the installment due, whichever is greater. Amounts in default shall bear interest at a rate of 5.5 % per annum. All or part of the principal balance on the Note may be paid prior to maturity without penalty.

6. **DUE-ON-SALE.** As part of the Seller Disclosures referenced in Section 7 of the REPC, Seller shall provide to Buyer a copy of the underlying mortgage, the note secured thereby, and the amortization schedule. Buyer's obligation to purchase under this Contract is conditioned upon Buyer's approval of the content of those documents, in accordance with Section 8 of the REPC. If the holder of the underlying mortgage calls the loan due as a result of this transaction, Buyer agrees to discharge the underlying loan as required by the mortgage lender. In such event, Seller's remaining equity shall be paid as provided in the credit documents.

7. **BUYER DISCLOSURES.** Buyer has provided to Seller, as a required part of this ADDENDUM, the attached Buyer Financial Information Sheet. Buyer may use the Buyer Financial Information Sheet approved by the Real Estate Commission and the Attorney General's Office, or may provide comparable written information in a different format, together with such additional information as Seller may reasonably require. Buyer ☐ **WILL** ☒ **WILL NOT** provide Seller with copies of IRS returns for the two preceding tax years. Buyer acknowledges that Seller may contact Buyer's current employer for verification of employment as represented by Buyer in the Buyer Financial Information Sheet.

8. **SELLER APPROVAL.** By the Seller Disclosure Deadline referenced in Section 24(b) of the REPC, Buyer shall provide to Seller, at Buyer's expense, a current credit report on Buyer from a consumer credit reporting agency. Seller may use the credit report and the information referenced in Section 7 of this Addendum ("Buyer Disclosures") to evaluate the credit-worthiness of Buyer.

8.1 Seller Review. By the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, Seller shall review the credit report and the Buyer Disclosures to determine if the content of the credit report and the Buyer Disclosures is acceptable. If the content of the credit report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to either: (a) provide written objections to Buyer as provided in Section 8.2 of this ADDENDUM; or (b) immediately cancel the REPC by providing written notice to Buyer by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.2 Seller Objections. If Seller does not immediately cancel the REPC as provided above, Seller may, by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, provide Buyer with written objections. Buyer and Seller shall have seven calendar days after Buyer's receipt of the objections (the "Response Period") in which to agree in writing upon the manner of resolving Seller's objections. Buyer may, but shall not be required to, resolve Seller's objections. If Seller and Buyer have not agreed in writing upon the manner of resolving Seller's objections, Seller may cancel the REPC by providing written notice to Buyer no later than three calendar days after expiration of the Response Period. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.3 Failure to Object. If Seller does not deliver a written objection to Buyer regarding the credit report or a Buyer Disclosure by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC or cancel the REPC as provided in Sections 8.1 or 8.2 of this ADDENDUM, the credit report and Buyer Disclosures will be deemed approved by Seller.

9. TITLE INSURANCE. Buyer ☐ SHALL ☐ SHALL NOT provide to Seller a lender's policy of title insurance in the amount of the indebtedness to the Seller, and shall pay for such policy at Settlement.

10. DISCLOSURE OF TAX IDENTIFICATION NUMBERS. By no later than Settlement, Buyer and Seller shall disclose to each other their respective Social Security Numbers or other applicable tax identification numbers so that they may comply with federal laws on reporting mortgage interest in filings with the Internal Revenue Service.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on September 1, 2004 (Date), to accept the terms of this SELLER FINANCING ADDENDUM in accordance with Section 23 of the REPC. Unless so accepted, the offer as set forth in this SELLER FINANCING ADDENDUM shall lapse.

☐ Buyer ☐ Seller Signature (Date) (Time) Social Security Number

☐ Buyer ☐ Seller Signature (Date) (Time) Social Security Number

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts these terms.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms set forth on the attached ADDENDUM NO.

(Signature) [Signature] (Date) (Time) 9-1-04 (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing SELLER FINANCING ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

**ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 31, 2004, including all prior addenda and counteroffers, between Doug and Drea Markham as Buyer, and Jay and Darby Bradley as Seller, regarding the Property located at 979 Dammeron Valley Drive. The following terms are hereby incorporated as part of the REPC:

1) Seller agrees to complete construction of home.

2) Buyer and Seller to list expectations of completion upon next trip to St. George in mid September.

3) Furniture to be included. (seller to attach list of included items)

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on August 31, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 9-1-04
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ **ACCEPTANCE:** ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ **COUNTEROFFER:** ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

D.M.

EXHIBIT "D"

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ADDENDUM NO. 3
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☐ ADDENDUM ☒ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 2, 2004, including all prior addenda and counteroffers, between Doug and Drea Markham as Buyer, and Jay and Darby Bradley as Seller, regarding the Property located at 979 Deshaun Valley Drive, St. George, UT. The following terms are hereby incorporated as part of the REPC:

1) Down payment to be increased to \$285,000.

2) Particular to be negotiated by buyer and seller.

3) EARNEST MONEY to BE INCREASED to \$10,000.00

BUYER AND SELLER AGREE THAT THE CONTRACT DOCUMENTS REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☒ ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall here until 5:00 ☐ AM ☒ PM Mountain Time on September 4, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☐ Buyer ☒ Seller Signature [Signature] 9-2-04 (Date) (Time)

☐ Buyer ☒ Seller Signature [Signature] 9-2-04 (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE

☒ ACCEPTANCE: ☐ Seller ☒ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 4

(Signature)

(Date)

(Time)

(Signature)

(Date)

(Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature)

(Date)

(Time)

(Signature)

(Date)

(Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 4, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

D.M. 9-3-04
AB 09/03/04

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REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Doug and Drea Markham offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$1,000.00 in the form of personal check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Century 21 At The Rockies/St. George Phone Number 435-673-9090

OFFER TO PURCHASE

1. PROPERTY: 979 Dammeron Valley Drive

also described as: Pinion Hills subdivision

City of St. George, County of Washington, State of Utah, Zip 84783 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: _____

1.2 Excluded Items. The following items are excluded from this sale: _____

1.3 Water Rights. The following water rights are included in this sale: three shares with property and any other currently used on property

2. PURCHASE PRICE. The Purchase Price for the Property is \$550,000.00

2.1 Method of Payment. The Purchase Price will be paid as follows:

\$ 1,000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ _____ (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☐ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)

\$ 285,000.00 (d) Seller Financing (see attached Seller Financing Addendum if applicable)

\$ _____ (e) Other (specify) _____

\$ 264,000.00 (f) Balance of Purchase Price in Cash at Settlement

\$ 550,000.00 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

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2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. **POSSESSION.** Seller shall deliver physical possession to Buyer within: ☐ hours ☐ days after Closing;
☒ Other (specify) funding and recording

5. **CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this Contract:

☒ Seller's Initials ☐ Buyer's Initials

The Listing Agent, Darby Bradley, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
The Listing Broker, Red Desert Realty, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;

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The Selling Agent, Carolyn Norton/Stewart Shumway, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;
 The Selling Broker, Century 21 / Russ Gwilliam, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller as a Limited Agent;

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 **Evaluations & Inspections Deadline.** No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 **Failure to Respond.** If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 **Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☐ X ☐ Addendum No. 1

☒ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum ☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law) ☐ Other (specify): _____

(AG)

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10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes): A one-year Home Warranty Plan ☒ WILL ☐ WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☐ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$350 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies

(AB)

available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Loan Application & Fee Deadline	<u>September 6, 2004</u>	(Date)
(b) Seller Disclosure Deadline	<u>September 13, 2004</u>	(Date)
(c) Evaluations & Inspections Deadline	<u>October 4, 2004</u>	(Date)
(d) Loan Denial Deadline	<u>September 30, 2004</u>	(Date)
(e) Appraisal Deadline	<u>September 30, 2004</u>	(Date)
(f) Settlement Deadline	<u>October 29, 2004</u>	(Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 ☐ AM ☒ PM Mountain Time on September 7, 2004 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

<u>[Signature]</u>	<u>9-1-04</u>	<u>Andrea Gasparra-Markham</u>	<u>9-1-04</u>
(Buyer's Signature)	(Offer Date)	(Buyer's Signature)	(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

<u>Doug and Drea Markham</u>			
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Zip Code)	(Phone)

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ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☒ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

(Seller's Signature) _____ (Date) (Time) _____ (Seller's Signature) _____ (Date) (Time) _____

(Sellers' Names) (PLEASE PRINT) _____ (Notice Address) _____ (Zip Code) _____ (Phone) _____

☐ REJECTION: Seller Rejects the foregoing offer.

(Seller's Signature) _____ (Date) (Time) _____ (Seller's Signature) _____ (Date) (Time) _____

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

(Buyer's Signature) _____ (Date) _____ (Buyer's Signature) _____ (Date) _____
Doug Markham Drea Markham

(Seller's Signature) _____ (Date) _____ (Seller's Signature) _____ (Date) _____

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on _____ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.
Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

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**SELLER FINANCING ADDENDUM
TO
REAL ESTATE PURCHASE CONTRACT**

THIS SELLER FINANCING ADDENDUM is made a part of that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 31, 2004, between Doug and Drea Markham as Buyer, and Jay and Darby Bradley as Seller, regarding the Property located at 979 Dammeron Valley Drive. The terms of this ADDENDUM are hereby incorporated as part of the REPC.

1. CREDIT DOCUMENTS. Seller's extension of credit to Buyer shall be evidenced by: ☒ Note and Deed of Trust
☐ Note and All-Inclusive Deed of Trust ☐ Other: _____

2. CREDIT TERMS. The terms of the credit documents referred to in Section 1 above are as follows:
\$285,000 principal amount of the note (the "Note"); interest at 5.5 % per annum; payable at approximately
\$2328.89 per month. The entire unpaid balance of principal plus accrued interest is due in 180 months
from date of the Note. First payment due December 1, '04. Additional principal payments, balloon payments or other
terms as follows: \$100,000 due on December 1, 2005, after balloon payment, monthly payment will be
reduced to \$1,511.60

The credit documents referenced in Section 1 of this ADDENDUM will contain a due-on-sale clause in favor of Seller. Seller agrees to provide to Buyer at Settlement: (a) an amortization schedule based on the above terms; (b) a written disclosure of the total interest Buyer will pay to maturity of the Note; and (c) the annual percentage rate on the Note based on loan closing costs.

3. TAXES AND ASSESSMENTS. In addition to the payments referenced in Section 2 above, Buyer shall also be responsible for: (a) property taxes; (b) homeowners association dues; (c) special assessments; and (d) hazard insurance premiums on the Property. These obligations will be paid: ☐ directly to Seller/Escrow Agent on a monthly basis ☒ directly to the applicable county treasurer, association, and insurance company as required by those entities.

4. PAYMENT. Buyer's payments under Sections 2 and 3 above will be made to: ☒ Seller ☐ an Escrow Agent. If an Escrow Agent, _____ will act as Escrow Agent and will be responsible for disbursing payments on any underlying mortgage or deed of trust (the "underlying mortgage") and to the Seller. Cost of setting up the escrow account shall be paid by: ☐ Buyer ☐ Seller ☐ split evenly between the parties.

5. LATE PAYMENT/PREPAYMENT. Any payment not made within 15 days after it is due is subject to a late charge of \$25 or _____ % of the installment due, whichever is greater. Amounts in default shall bear interest at a rate of 5.5 % per annum. All or part of the principal balance on the Note may be paid prior to maturity without penalty.

6. DUE-ON-SALE. As part of the Seller Disclosures referenced in Section 7 of the REPC, Seller shall provide to Buyer a copy of the underlying mortgage, the note secured thereby, and the amortization schedule. Buyer's obligation to purchase under this Contract is conditioned upon Buyer's approval of the content of those documents, in accordance with Section 8 of the REPC. If the holder of the underlying mortgage calls the loan due as a result of this transaction, Buyer agrees to discharge the underlying loan as required by the mortgage lender. In such event, Seller's remaining equity shall be paid as provided in the credit documents.

7. BUYER DISCLOSURES. Buyer has provided to Seller, as a required part of this ADDENDUM, the attached Buyer Financial Information Sheet. Buyer may use the Buyer Financial Information Sheet approved by the Real Estate Commission and the Attorney General's Office, or may provide comparable written information in a different format, together with such additional information as Seller may reasonably require. Buyer ☐ WILL ☒ WILL NOT provide Seller with copies of IRS returns for the two preceding tax years. Buyer acknowledges that Seller may contact Buyer's current employer for verification of employment as represented by Buyer in the Buyer Financial Information Sheet.

8. SELLER APPROVAL. By the Seller Disclosure Deadline referenced in Section 24(b) of the REPC, Buyer shall provide to Seller, at Buyer's expense, a current credit report on Buyer from a consumer credit reporting agency. Seller may use the credit report and the information referenced in Section 7 of this Addendum ("Buyer Disclosures") to evaluate the credit-worthiness of Buyer.

(AB)

FROM : Andrea Gasporra, DDS

09/03/2004 17:35

143565246720

FAX NO. : 805 557-0503
CENTURY ATR

Sep. 03 2004 05:07PM P3
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8.1 Seller Review. By the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, Seller shall review the credit report and the Buyer Disclosures to determine if the content of the credit report and the Buyer Disclosures is acceptable. If the content of the credit report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to either: (a) provide written objections to Buyer as provided in Section 8.2 of this ADDENDUM; or (b) immediately cancel the REPC by providing written notice to Buyer by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.2 Seller Objections. If Seller does not immediately cancel the REPC as provided above, Seller may, by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, provide Buyer with written objections. Buyer and Seller shall have seven calendar days after Buyer's receipt of the objections (the "Response Period") in which to agree in writing upon the manner of resolving Seller's objections. Buyer may, but shall not be required to, resolve Seller's objections. If Seller and Buyer have not agreed in writing upon the manner of resolving Seller's objections, Seller may cancel the REPC by providing written notice to Buyer no later than three calendar days after expiration of the Response Period. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.3 Failure to Object. If Seller does not deliver a written objection to Buyer regarding the credit report or a Buyer Disclosure by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC or cancel the REPC as provided in Sections 8.1 or 8.2 of this ADDENDUM, the credit report and Buyer Disclosures will be deemed approved by Seller.

9. TITLE INSURANCE. Buyer ☐ SHALL ☒ SHALL NOT provide to Seller a lender's policy of title insurance in the amount of the indebtedness to the Seller, and shall pay for such policy at Settlement.

10. DISCLOSURE OF TAX IDENTIFICATION NUMBERS. By no later than Settlement, Buyer and Seller shall disclose to each other their respective Social Security Numbers or other applicable tax identification numbers so that they may comply with federal laws on reporting mortgage interest in filings with the Internal Revenue Service.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, those terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on September 4, 2004 (Date), to accept the terms of this SELLER FINANCING ADDENDUM in accordance with Section 22 of the REPC. Unless so accepted, the offer as set forth in this SELLER FINANCING ADDENDUM shall lapse.

9-2-04
[] Buyer ☒ Seller Signature

(Date) (Time)

Social Security Number

[] Buyer ☐ Seller Signature

(Date) (Time)

Social Security Number

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE: ☐ Seller ☒ Buyer hereby accepts these terms.

☒ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms set forth on the attached ADDENDUM

NO

D.M.
(Signature)

9-3-04
(Date) (Time)

Andrea K. Gasporra
(Signature)

09/03/04
(Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing SELLER FINANCING ADDENDUM.

(Signature)

(Date) (Time)

(Signature)

(Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 2000. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Page 2 of 2 pages

Seller's Initials AG

Date 9-2-04

Buyer's Initials D.M.

Date 9-3-04

AG

09/03/04

9 of 11

8.1 Seller Review. By the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, Seller shall review the credit report and the Buyer Disclosures to determine if the content of the credit report and the Buyer Disclosures, is acceptable. If the content of the credit report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to either: (a) provide written objections to Buyer as provided in Section 8.2 of this ADDENDUM; or (b) immediately cancel the REPC by providing written notice to Buyer by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.2 Seller Objections. If Seller does not immediately cancel the REPC as provided above, Seller may, by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC, provide Buyer with written objections. Buyer and Seller shall have seven calendar days after Buyer's receipt of the objections (the "Response Period") in which to agree in writing upon the manner of resolving Seller's objections. Buyer may, but shall not be required to, resolve Seller's objections. If Seller and Buyer have not agreed in writing upon the manner of resolving Seller's objections, Seller may cancel the REPC by providing written notice to Buyer no later than three calendar days after expiration of the Response Period. The Brokerage, upon receipt of a copy of Seller's written notice of cancellation, shall return to Buyer the Earnest Money Deposit.

8.3 Failure to Object. If Seller does not deliver a written objection to Buyer regarding the credit report or a Buyer Disclosure by the Evaluations & Inspections Deadline referenced in Section 24(c) of the REPC or cancel the REPC as provided in Sections 8.1 or 8.2 of this ADDENDUM, the credit report and Buyer Disclosures will be deemed approved by Seller.

9. TITLE INSURANCE. Buyer ☐ SHALL ☐ SHALL NOT provide to Seller a lender's policy of title insurance in the amount of the indebtedness to the Seller, and shall pay for such policy at Settlement.

10. DISCLOSURE OF TAX IDENTIFICATION NUMBERS. By no later than Settlement, Buyer and Seller shall disclose to each other their respective Social Security Numbers or other applicable tax identification numbers so that they may comply with federal laws on reporting mortgage interest in filings with the Internal Revenue Service.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on September 1, 2004 (Date), to accept the terms of this SELLER FINANCING ADDENDUM in accordance with Section 23 of the REPC. Unless so accepted, the offer as set forth in this SELLER FINANCING ADDENDUM shall lapse.

<input type="checkbox"/> Buyer <input type="checkbox"/> Seller Signature	(Date) (Time)	Social Security Number
<input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller Signature	(Date) (Time)	Social Security Number

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts these terms.

☒ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms set forth on the attached ADDENDUM NO.

<u>[Signature]</u>	<u>9-1-04</u>	(Date) (Time)	(Signature)	(Date) (Time)
--------------------	---------------	---------------	-------------	---------------

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing SELLER FINANCING ADDENDUM.

(Signature)	(Date) (Time)	(Signature)	(Date) (Time)
-------------	---------------	-------------	---------------

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1998. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

**ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 31, 2004, including all prior addenda and counteroffers, between Doug and Drea Markham as Buyer, and Jay and Darby Bradley as Seller, regarding the Property located at 979 Dammeron Valley Drive. The following terms are hereby incorporated as part of the REPC:

- 1) Seller agrees to complete construction of home.
- 2) Buyer and Seller to list expectations of completion upon next trip to St. George in mid September.
- 3) Furniture to be included. (seller to attach list of included items)

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on August 31, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 9-1-04
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ **ACCEPTANCE:** ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☒ **COUNTEROFFER:** ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

[Signature] 9-2-04
 (Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

D.M.

11 of 11

Page 1 of 1

**ADDENDUM NO. 3
TO
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☐ ADDENDUM ☒ COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT (the REPC) with an Offer Reference Date of September 2, 2004, including all prior addenda and counteroffers, between Dave and Dore Markham as Buyer and Ray and Doris Bradley as Seller, regarding the Property located at 2727 Limestone Valley Drive, St. George, UT. The following terms are hereby incorporated as part of the REPC:

1) Down payment to be increased to \$225,000.

2) Earnest money to be negotiated by buyer and seller.

3) Earnest money to be increased to \$10,000.

BUYER AND SELLER AGREE THAT THE CONTRACT GUIDELINE REFERENCED IN SECTION 26 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAINS UNCHANGED ☐ ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on September 4, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 26 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☐ Buyer ☒ Seller Signature

(Date)

(Time)

☐ Buyer ☒ Seller Signature

(Date)

(Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE

☒ ACCEPTANCE: ☐ Seller ☒ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 4.

(Signature)

(Date)

(Time)

(Signature)

(Date)

(Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature)

(Date)

(Time)

(Signature)

(Date)

(Time)

THIS FORM APPROVED BY THE NATIONAL BOARD OF REALTORS AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, DIVISION OF CONSUMER AFFAIRS, IS REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

D.M. 9-3-04
AB 09/03/04

TOTAL HEALTH CARE PARTNERS, INC.

800-891-5165
3835-R THOUSAND OAKS BLVD., #130
WESTLAKE VILLAGE, CA 91362-3637

1466

90-3730/1222

DATE 9-3-04

PAY
TO THE
ORDER OF

CENTURY 21 TRUST

\$10,000.00

TEN THOUSAND AND 00/100

DOLLARS ☒ ☐



32111 Agoura Road, Westlake Village, California 91361

DAVE & DEEA MARKHAM

FOR REAL ESTATE PURCHASE DEPOSIT (979 DAMMERON VALLEY DRIVE) U.S.

⑈001466⑈ ⑆122237308⑆ 002⑈017717⑈

ADDENDUM 2

(SEALED)

ADDENDUM 3

Red Desert Realty, LC
140 North Tuacahn Dr. #49
Ivins, Utah 84738

The undersigned Buyers and Sellers who are parties to the Real Estate Purchase Contract dated August 31, 2004 relative to the property as : 979 Dammeron Valley Dr.

Hereby declare said agreement to be null and void, by reason of : " Buyers failure to provide the seller with a Financial Information Sheet and a current Credit Report by the deadline stated in Section 8 of the Sellers Financing Addendum that refers to the date in the Real Estate Purchase Contract in section 24.(b) Contract Deadlines.

Seller has elected to cancel this Contract at this time."

And mutually release the parties from any and all obligations there under with no further due force or effect. To said parties.

Deposits in the amount of \$ 10,000.00 are being held by Century 21 At The Rockies/ St.George, in a non-interest bearing trust account. Century 21 At The Rockies/St.George is hereby authorized and directed to promptly disburse said deposits in the following

manner : \$ 10,000.00 to Doug and Andrea Mackham

[Signature] 9-20-04
Seller Date

Purchaser Date

[Signature] 9-20-04
Seller Date

Purchaser Date

[Signature]
Sellers Real Estate Agent

Purchasers Real Estate Agent

Disbursement made this _____ day of _____, 2004

Check # _____

By: _____

MARK - 000028

ADDENDUM 4



EXHIBIT 6

At The Rockies

665 E. St George Blvd
St George, Utah 84770
Business (435) 673-9090
Fax (435) 628-1997
Toll Free (800) 828-0354

Attention: Jay and Darby Bradley,

September 24, 2004

As per your cancellation of the Real Estate Contract dated August 31, 2004 relative to the property located at 979 Dammeron Valley Dr., the buyers, the Markham's, are going forward with the contract. The \$10,000 earnest monies you required are still held in the Century 21 trust account. Included is a copy of their credit report and financial statements for your review. If you choose not to accept seller financing, the Markham's have in place financing with Country Wide Mortgage for the purchase price of this property.

As discussed on the 12 of September 2004, when the buyer had flown in from California to go over these referenced items, financials (item 8 seller financing addendum), list of expected completion (item 2 addendum 1), furniture negotiation (item 2 addendum 3), both buyer and seller agreed to go over these at a later date, as this time was not good for you, the seller.

The Markham's are going forward with this contract. We would like to exercise Real Estate Purchase Contract line item 15 on or before September 30, 2004. We require a written response by 5:00pm September 25, 2004.

Carolyn Norton

Agent

Century 21 At The Rockies

ADDENDUM 5

(SEALED)

ADDENDUM 6

(SEALED)

ADDENDUM 7



At The Rockies

665 E. St. George Blvd
St. George, Utah 84770
Business (435) 673-9090
Fax (435) 628-1997
Toll Free (800) 828-0354

EXHIBIT "I"

Jay and Darby Bradley,

September 27, 2004

Jay, I did receive your phone call today, I was showing property in outlying areas and my cell service was sketchy at best. We have only Darby's cell phone number, which goes straight to voice mail. We sent a package to her office, which the server said was undeliverable. Today I sent a package certified mail to her office it is the only address we have for her.

By Friday October 1, 2004, the Markham's, want a date set for mediation so they can schedule the time to come out here for the mediation. Their intent is to still close on this property, if we can not mediate, they will sue for specific performance. Their attorney stated that they will file a Lis Pendens and will sue for fraud and punitive damages.

I believe that mediation is in everyone's best interest, please call so we can arrange a time. You can reach me at 435-467-5454, my partner Stewart Shumway at 435-632-4064.

Carolyn Norton
Agent
Century 21 At The Rockies

ADDENDUM 8



At The Rockies

665 E. St. George Blvd
St. George, Utah 84770
Business (435) 673-9090
Fax (435) 628-1997
Toll Free (800) 828-0354

EXHIBIT "J"

9-30-04

Jay Bradley,

To memorialize our conversation from today, 9-30-04 at approximately 9:30 am, you are refusing mediation and do not intend to go forward with the contract for the purchase of the property at 979 Dammeron Valley Dr. We are to contact your attorney Robert Jensen with any further communication.

The buyers are notifying you that any contract deadlines from this point on are waived. The attorneys will communicate from this point forward.

Carolyn Norton
Agent
Century 21

ADDENDUM 9

Stewart Shumway
Cell (435) 632-4064



Carolyn Norton
Cell (435) 467-5454

At The Rockies

665 E. St. George Blvd.
St. George, UT 84770
(435) 673-9090 - (800) 828-0354
Fax (435) 628-1997

DATE: 9-30-04

FAX NUMBER: 574-2683

TO: Jay & Darby Bradley

COMPANY: _____

FROM: Carolyn Norton

PAGES (INC. COVER): 4

SUBJECT:

cc Robert Jensen / 674-9006

If you have any questions, or did not receive all of the pages, please call (435) 673-9090

The materials contained in this facsimile transmission are private and confidential and are the property of the sender. The information contained in the material is privileged and is intended only for the use of the individual(s) named above. If you have received this facsimile in error, please immediately notify us by telephone to arrange for return of the forwarded documents to us. Thank you!

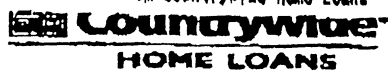
SEP-30-04

US:100w From-Countrywide Home Loans

972-781-4118

SEP. 30 2004 04:13PM P2

T-100 P.001/003 F-060



Easy. Really.™

6400 Legacy Dr., PTX 255
Plano, TX 75024

TO: Doug Markham

DATE: 9/30/04

FAX: 805-557-0503

PHONE:

Pages Including Cover: 3

FROM: Steve Prescott
PHONE: 866-800-3222, x1392
FAX: 888-854-0647

Congratulations!!

Thank you for allowing Countrywide the opportunity to do your official mortgage prequalification. Please present this letter to Realtors during your buying/looking process. If you have questions or need help please call me.

Again, thank you for applying with Countrywide Home loans and happy house hunting!

Sincerely,

Steve Prescott

Interstate Lending Group

866-800-3222 x1392

If you have received this fax transmission in error, or if you would otherwise prefer to stop receiving fax transmissions related to your home loan application, please call Countrywide Home Loans at 1-800-449-4049 extension 2288



Countrywide

HOME LOANS

7100 Corporate Drive
P.O. Box 7100
Brea, CA 92621-4497

September 30, 2004

Doug Markham
2231 Kelmiscott Ct
Westlake Village, CA 91361

Dear Doug Markham:

Congratulations! The enclosed certificate officially names you as a Pre-Qualified Countrywide Home Buyer*.

You are now among a select group of smart buyers who have chosen Countrywide Home Loans to make the home buying process easy and affordable. For over 30 years, Countrywide has been a leader and an innovator in making home ownership possible for more people.

You are all set to negotiate with the home seller from a position of strength and control with the enclosed certificate in hand. Up-front pre-qualification from a major lender puts you in the best possible position to complete the home sale process quickly and easily, saving you both time and money.

If you need any assistance or have any questions, please feel free to call me at (866) 800-3222, ext. 1392.

Sincerely,

Stephen Prescott
Home Loan Consultant, Interstate Lending
(866) 800-3222 ext. 1392
(888) 854-0647 Fax
stephen_prescott@countrywide.com

*Please see enclosed certificate for details. Approval is subject to satisfactory review of property, financial documents, program requirements and verification of information provided by borrower.



Equal Housing Lender © 1993 Countrywide Home Loans, Inc. Trade service marks are the property of Countrywide Home Loans, Inc. and its subsidiaries. Some products are not available in all areas. Licensed by the Department of Consumer Affairs under the California Residential Mortgage Lending Act.



Certificate Number: 2086361296

Issued to: Doug Markham
2231 Kelmiscott Ct
Westlake Village, CA 91361

It is our great pleasure to pass along the news that you are approved* for a Countrywide Home Loan.

Purchase Power:	\$	550,000.00
1st Mortgage Loan Amount:	\$	440,000.00
Secondary Financing Loan Amount*:	\$	55,000.00
Down Payment:	\$	55,000.00
Finance Type:	Pay option ARM	
Loan Program:	0	
Interest Rate / APR**:	1.750 %	1.772 %
Origination / Discount Points:	0.000 %	0.000 %
Term:	360 Months	
Occupancy / Property Type:	2nd home SFR	
Date of Issue:	8/30/2004	

* Please note that satisfactory review of property, financial documents, and program requirements are needed to issue final loan approval.

Congratulations!!

Now you can shop for your dream home with more confidence. As recognized leaders and innovators in home loans, we give you our promise to make doing business with us as easy and affordable as possible.

Stephen Prescott
Home Lending Consultant, Interstate Lending
(800) 800-3222 x 1392
(888) 854-0847 Fax
stephen_prescott@countrywide.com

* Secondary Financing loan details are not represented.

** APR is an estimate and may be more or less with any changes in loan amount, down payment or other terms. Any rate increase may lower your approved loan amount.

HOME LOANS
Easy. Really."

EXHIBIT "H"

6400 Legacy Dr., PTX 255
Plano, TX 75024

TO: Doug Markham

DATE: 9/30/04

FAX: 805-557-0503

PHONE:

Pages Including Cover: 3

FROM: Steve Prescott

PHONE: 866-800-3222, x.1392

FAX: 888-854-0647

Congratulations!!

Thank you for allowing Countrywide the opportunity to do your official mortgage prequalification. Please present this letter to Realtors during your buying/looking process. If you have questions or need help please call me.

Again, thank you for applying with Countrywide Home loans and happy house hunting!

Sincerely,

Steve Prescott

Interstate Lending Group

866-800-3222 x1392

If you have received this fax transmission in error, or if you would otherwise prefer to stop receiving fax transmissions related to your home loan application, please call Countrywide Home Loans at 1-800-449-4049 extension 2288

MARK - 00030



Countrywide®

HOME LOANS

7105 Corporate Drive
Plano, Texas 75024
(800) 641-4487

September 30, 2004

Doug Markham
2231 Kelmscott Ct
Westlake Village, CA 91361

Dear Doug Markham:

Congratulations! The enclosed certificate officially names you as a Pre-Qualified Countrywide Home Buyer®.

You are now among a select group of smart buyers who have chosen Countrywide Home Loans to make the home buying process easy and affordable. For over 30 years, Countrywide has been a leader and an innovator in making home ownership possible for more people.

You are all set to negotiate with the home seller from a position of strength and control with the enclosed certificate in hand. Up-front pre-qualification from a major lender puts you in the best possible position to complete the home sale process quickly and easily, saving you both time and money.

If you need any assistance or have any questions, please feel free to call me at (866) 800-3222, ext. 1392.

Sincerely,

Stephen Prescott
Home Loan Consultant, Interstate Lending
(866) 800-3222 ext. 1392
(888) 854-0847 Fax
stephen_prescott@countrywide.com

*Please see enclosed certificate for details. Approval is subject to satisfactory review of property, financial documents, program requirements and verification of information provided by borrower.



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MARK - 00031



Countrywide[®]

HOME LOANS

Certificate Number: 2086361296

Issued to: Doug Markham
2231 Kelmscott Ct
Westlake Village, CA 91361

It is our great pleasure to pass along the news that you are approved* for a Countrywide Home Loan.

Purchase Power:	\$ 550,000.00
1st Mortgage Loan Amount:	\$ 440,000.00
Secondary Financing Loan Amount*:	\$ 55,000.00
Down Payment:	\$ 55,000.00
Finance Type:	Pay option ARM
Loan Program:	0
Interest Rate / APR**:	1.750 % 1.772 %
Origination / Discount Points:	0.000 % 0.000 %
Term:	360 Months
Occupancy / Property Type:	2nd home SFR
Date of Issue:	9/30/2004

** Please note that satisfactory review of property, financial documents, and program requirements are needed to issue final loan approval.*

Congratulations!!

Now you can shop for your dream home with more confidence. As recognized leaders and innovators in home loans, we give you our promise to make doing business with us as easy and affordable as possible.

Stephen Prescott
Home Loan Consultant, Interstate Lending
(866) 800-3222 x 1392
(888) 854-0647 Fax
stephen_prescott@countrywide.com

* Secondary Financing loan details are not represented.

** APR is an estimate and may be more or less with any changes in loan amount, down payment or other terms. Any rate increase may lower your approved loan amount.

MARK - 00032

ADDENDUM 10

Jenkins Jensen & Bayles, LLP

Attorneys & Counselors at Law

Bruce C. Jenkins, P.C.
Robert M. Jensen, P.C.
Thomas J. Bayles, P.C.

1240 East 100 South, Suite 9
St. George, UT 84790
Tel (435) 674-9718
Fax (435) 674-9006

bjenkins@jjblaw.net
rjensen@jjblaw.net
tbayles@jjblaw.net

October 4, 2004

*HAND DELIVERY
VIA FACSIMILE 435-628-1997
and U.S. MAIL*

CENTURY 21 AT THE ROCKIES
Attn: Carolyn Norton
665 E. St. George Blvd.
St. George, UT 84770

Re: NOTICE OF CANCELLATION
REPC dated 9-1-04
Buyer - Doug and Drea Markham
Seller - Jay and Darby Bradley

Dear Ms. Norton:

This letter is written to reconfirm the Cancellation Notice delivered by Sellers to you on September 20, 2004. That initial Notice of Cancellation is based upon the parties' "Seller and Financing Addendum," paragraph 8, which requires: "By the Seller Disclosure Deadline, referenced in Section 24(b) of the REPC, Buyer shall provide to Seller at Buyer's expense, a current credit report on Buyer from a Consumer Credit Reporting Agency." This requirement corresponds with the obligations and responsibilities imposed by the "Evaluation and Inspection" deadlines set forth in paragraph 8 of the REPC. Based upon that September 20, 2004 Notice of Cancellation from Seller, without more, this REPC is properly cancelled.

Additional Notice of Cancellation is hereby given to the Buyer, pursuant to the "Seller Financing Addendum," paragraph 8.1(b) which provides "by the Evaluation and Inspection's deadline referenced in Section 24(c) of the REPC, Seller shall review the credit report and the Buyer Disclosures to determine if the content of the Credit Report and the Buyer Disclosures is acceptable. If the content of the Credit Report or the Buyer Disclosures is not acceptable to Seller, Seller may elect to . . . (b) immediately cancel the REPC by providing written notice to Buyer by the evaluations

JR.L:\Century21.S-30-04.wpd

EXHIBIT # 5 DATE 8-25-05
CAROLE A. YELTON
NORTON DEPOSITION

EXHIBIT I

CENTURY 21 AT THE ROCKIES

Attn: Carolyn Norton

October 4, 2004

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and inspection deadline referenced in Section 24(c) of the REPC." Notice is hereby given, that Sellers do hereby immediately cancel the REPC based on the content of the Credit Report and the Buyer Disclosures. Specifically, these documents are poor fax copies, are sloppy and in many instances are illegible, the attached schedules are not completed with detailed information requested in the forms; Sellers are concerned with the admission of bankruptcy or judgment; Sellers are concerned with the sheer length of the Consumer Credit Report, as well as the fact that the package was out of order, appears to be presented with missing pages and potential amounts of the report being cut off or improperly copied.

The financial information was received on September 27, 2004, and the remaining portions of Buyers Disclosures were not received until September 30, 2004, being a substantial period of time after such documents were due and in a contract wherein time was of the essence.

Accordingly, this REPC was first cancelled for untimely disclosure, and separately cancelled for rejection of the content of the disclosures, subsequently and untimely received.

Sincerely,

JENKINS, JENSEN & BAYLES, LLP



Robert M. Jensen

Attorney and Agent for Sellers

RMI/rc

cc: Jay and Darby Bradley