2008

Max B. Graff v. Naterra West, LLC; Naterra West, LLC; Gateway Farms, LLC and Fusion Group, LLC v. Max B. Graff; Anita B. Graff; Curtis A. Graff; Carol A. Graff; Graff Ranches, LC; Don D. Gilbert : Reply Brief

Utah Court of Appeals

Mark L. Anderson; Law Office of Mark L. Anderson; Attorneys for Plaintiffs/Appellees; Donald D. Gilbert; Attorneys for Plaintiffs/Appellees. Graham H. Norris, Jr.; Attorney for Counterclaim Defendant/Appellee Don Gilbert.
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IN THE UTAH COURT OF APPEALS

MAX B. GRAFF, Plaintiff/Appellee, vs. NATERRA WEST, LLC Defendant/Appellant.	
NATERRA WEST, LLC; GATEWAY FARMS, LLC; and FUSION GROUP, LLC, Counterclaim Plaintiffs/Appellants, GATEWAY FARMS, LLC and FUSION GROUP, LLC, Intervening Plaintiffs/Appellants, vs. MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; DON D. GILBERT, Counterclaim Defendants/Appellees.	Case No. 20080075-CA

REPLY BRIEF OF APPELLANT

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

This Court should reverse the trial court's grant of summary judgment for the Appellees/Graffs and remand the matter to the trial court. Appellants/Developers properly preserved all of the issues appealed because the trial court had an opportunity to consider the merits of each issue appealed and to correct any error. Furthermore, Developers sufficiently pleaded facts to satisfy the partial performance exception to the statute of frauds. Also, the statute of frauds does not bar recovery under Developers' equitable claims. Finally, Developers have a good faith basis in both law and fact for this appeal and complied with the requirements of Rule 24 of the Utah Rules of Appellate Procedure.

I. THE TRIAL COURT HAD AN OPPORTUNITY TO CONSIDER THE MERITS OF EACH ISSUE APPEALED.

According to the Utah Supreme Court, "in order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. Presentation at the trial court level must put "the trial judge on notice of the asserted error and allow[] for correction at that time in the course of the proceeding." *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. An appellate court will deem that the trial court had an opportunity to correct the error if the issue was raised in a timely fashion, the issue was specifically raised, and the challenging party introduced supporting evidence or relevant legal authority. *Id.* (quoting *Brookside*, 2002 UT 48, ¶ 14).

In this case, Developers properly raised with the trial court all of the issues that are currently before this court. Developers raised their arguments against the application of the statute of frauds in the memorandum opposing summary judgment (R. at 1002-1012) and their arguments regarding the vitality of their equitable claims in their opposition to the motion for partial summary judgment (R. at 313-373) and in their opposition to the proposed order granting summary judgment (R. 1089-1097). In all of these instances, the issues now before this Court were fully briefed and the trial court had ample opportunity to consider both sides' arguments and make a decision. Therefore, all of the issues that Developers raised in this appeal were properly preserved at the trial court level and are correctly before this Court.

II. DEVELOPERS PLEADED SUFFICIENT FACTS TO SATISFY THE PARTIAL PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS.

Developers and Graffs both concede that the "standard for sufficient partial performance" is the four-prong test that the Utah Supreme Court promulgated in *Spears v. Warr*, 2002 UT 24, ¶ 24, 44 P.3d 742. This test is not new; the exact language in *Spears* was actually established over fifty years ago by the Utah Supreme Court in *Randall v. Tracy Collins Trust Co.*, 305 P.2d 480, 484 (1956). Also, the "doctrine of past performance, in the state of Utah, has not been reduced to a formula, as it has in some other states." *Ryan v. Earl*, 618 P.2d 54, 56 (Utah 1980) (quoting *Holmgren Brothers, Inc. v. Ballard*, 534 P.2d 611, 613-14 (Utah 1975)). In Utah, "decisions of this court do not stay the hand of equity in the equitable situations created by oral contracts for the transfer of an interest in land." *Id.* As for the statute of frauds, it "is preserved and

remains to serve its purpose—the prevention of fraud and injustice." *Id.* Therefore, in Utah, this partial performance exception exists to ensure that equity and justice are done, and the situations of each unique case should be considered by the trial court with equity, first and foremost, in mind.

The case *Fisher v Fisher* is instructive on how the Utah Court of Appeals analyzed the partial performance exception within the context of the exception's fundamental goal to ensure that equity and justice prevail. 907 P.2d 1172 (Utah App. 1995). In *Fisher*, the Utah Court of Appeals applied the partial performance exception to oral modifications of an escrow agreement that called for annual payments of $10,000. *Id.* at 1175. In that case, the grantor of the land continually told the grantee that, for tax purposes, he did not want to accept the escrow payment. *Id.* The grantor did not establish a new definite timeframe for repayment, but rather indicated that the grantees did not have to pay him according to the strict terms of the contract. *Id.* Based upon those assurances, the grantees invested a great deal of money and resources in the land. *Id.* Several years later, however, the trust that possessed the note against the grantee attempted to terminate the prior escrow agreement based upon nonpayment. *Id.* The court found that the partial performance doctrine applied in that case, even though the only actual oral change to the written contract was an indefinite indication that payments could be made at some future date. *Id.* at 1777. Additionally, the court held that a narrow meeting of the minds—to delay repayment—was sufficiently clear and definite to constitute an agreement upon which partial performance would overcome the statute of frauds and validate the oral modification. *Id.*

Like *Fisher*, Developers relied upon Max Graff's implied modification: that the closing deadline would be waived to accommodate eventual full performance of the contract. Although every detail of that modification was not definite, the modification itself was. When David Robinson requested the extension from Max Graff, Graff indicated that he agreed to the modification and that Robinson simply needed to contact Don Gilbert, Graff's attorney (who was also the closing agent for the parties), to memorialize the modification. (R. at 322.) After Robinson and others made several unsuccessful attempts to reach Gilbert, Robinson again contacted Graff, who again indicated that Gilbert was the one to memorialize the modification. (R. at 322-23.) There were no missing essential terms to this oral agreement, because the modification was, like in *Fisher*, the essential term.

Further, Developers' affirmative decision to forego hard money lenders and allow the closing deadline to expire was sufficiently definite to satisfy the partial performance exception. Most importantly, however, the inequitable result of Developers' reasonable reliance upon Graff's modification compels the application of the partial performance exception to the statute of frauds. Like the grantees in *Fisher*, Developers have invested hundreds of thousands of dollars into the property, and a rigid application of the statute of frauds would allow Graffs to unjustly benefit from Developers exhaustive efforts.

Further, Max Graff's modification was not an unenforceable agreement to agree on another extension, but, was, as all of Graff's other extension communications, a modification to allow the parties to fulfill the contract. Graffs' point to *David Early Group, Inc. v. BFS Retail & Commercial Operations*, 2008 U.S. Dist. LEXIS 5694 (D.

Utah 2008), as authority supporting their assertion that Max Graff's modification was solely an agreement to agree. But, in *David Early*, the agreement was between the parties' two negotiators that the parties themselves would, at an undetermined future date, confer and agree regarding which party would pay for selected repair expenses even though the contract between the parties specifically identified who was responsible for the repair costs.

In contrast, in this case, the two parties themselves spoke face to face, reached an apparent understanding, and knew and understood the immediate and direct consequences of Graff's modification and instruction for Mr. Robinson to contact Mr. Gilbert to memorialize the details of the extension. For these reasons, as well as the reasons in Developers' original brief, this Court should reverse the trial court's refusal to apply the partial performance exception to the statute of frauds. At a minimum, there is a question of material fact whether Mr. Graff implicitly or explicitly agreed to an extension; if such a question exists, summary judgment is not appropriate.

III. THE STATUTE OF FRAUDS DOES NOT BAR RECOVERY UNDER DEVELOPERS' EQUITABLE CLAIMS.

Developers' claims for unjust enrichment and detrimental reliance both survive the trial court's finding that the statute of frauds applied to the oral modification of the closing deadline. These are equitable claims that exist for the very reason that Developers asserted them in the first place—to compensate Developers for their efforts made wholly in reasonable reliance upon the promises made by Graffs. *See Am. Towers Owners' Ass'n v. CCI Mech.*, 930 P.2d 1182, 1193 (Utah 1996) (stating that the unjust enrichment

doctrine "is designed to provide an equitable remedy where one does not exist at law"); *Andreason v. Aetna Casualty & Sur. Co.*, 848 P.2d 171, 174 (Utah App. 1993) (considering promissory estoppel/detrimental reliance and stating that "equity recognizes the unfairness of permitting withdrawal of [a] promise and will enforce it").

Developers' unjust enrichment claim is based upon the fact that Graffs unjustly retained tangible financial benefits without any payment for their value. The Graffs received much more than simply an increase in the value of their land. The Graffs personally benefited because they did not have to pay for or individually seek out any of the time or efforts spent by Developers in their myriad interactions with appraisers, city officials, engineers, surveyors, and others that were vital to the preparation of the land for the planned community. (R. at 40; 226; 378-79; 382.) Furthermore, the Graffs did not have to spend any of the hundreds of thousands of dollars required in acquisition costs, interests, fees, and other expenses. *Id.* The Graffs knew of these benefits, (R. at 40; 226; 376-77), and Max Graff indicated to Dave Robinson that he prayed for the contract to fail (which, for purposes of the standard of review in this appeal, justifies the reasonable and favorable inference that Max Graff hoped to sell the property for a higher price per acre to a new suitor who did not have to undertake all of the efforts and costs that Developers had undertaken). (R. at 381.) Allowing the Graffs to retain these benefits without payment of their value would be inequitable.

The Graffs attempt to frame the benefit that they received solely as "the increased property value." (Graffs' Br. at 25.) Further, the Graffs attempt to compare this case to *McKay Dee Credit Union v. Federal Home Loan Mortg. Corp.*, in which the Utah Court

of Appeals did not allow the credit union to recover for the "profit FHLM realized on the later sale of the property." 2008 WL 1970944, *1. The two cases are not comparable. In *McKay*, the credit union failed to appear at a foreclosure sale, which enabled the high bidder for the property (FHLM) to acquire the property and resell the property for a profit. The credit union attempted to claim that their failure to appear, and FHLM's subsequent sale of the property, constituted unjust enrichment. *Id.* The credit union had done nothing to enhance the value of the property; it simply did not show up to bid. As the court correctly held in that case, the benefit of the profit that FHLM realized on the eventual resale of the property was conferred "by the purchasing party," not the credit union. *Id.*

In this case, however, Developers spent innumerable hours, paid hundreds of thousands of dollars, and applied their expertise all solely to create a planned community, of which the Graffs' land was a part. (R. at 318-19.) Developers increased the value of the Graffs' land immensely, and saved the Graffs from having to spend a great deal of money and resources to prepare their land for development. Prior to Developers' involvement with the Graffs' land, it was not ready for development. After Developers' efforts, the land was ready for development. This is a tangible benefit that Graffs should not be permitted to keep without paying just compensation to Developers.

It is for the above reasons that courts apply equitable principles to override rules like the statute of frauds when inequity would result. Further, Developers have no other remedy at law to recover if the statute of frauds applies to the oral modification of the

closing deadline. Therefore, Developers' claim for unjust enrichment survives the trial court's order for summary judgment.

Developers' detrimental reliance claim also survives. It is based upon the fact that Max Graff's modification was a promise upon which Developers reasonably relied to their detriment. Despite Graffs' contention that Developers missed their opportunity to call for a closing (because they did not do so by June 20, 2006), the record demonstrates that Developers consistently informed Max Graff, before June 20, 2006, that they would be able to secure financing through hard money lenders to close by June 30, 2006. (R. at 320-21; 378-79.) It is important to note that the parties were in constant communication, were seemingly cooperating and working towards the same goal—the approval of the property for development and its sale to Graffs. (R. at 375-379.) Developers specifically did not call for a closing by June 30, 2006 because of the communication with Max Graff regarding financing options. Without Max Graff's modification of the closing date, Developers would have closed by that date. (R. at 321; 378.)

Developers' reliance is exactly the type of reliance that the promissory estoppel/ detrimental reliance cause of action is meant to rectify, and they have no other remedy at law through which to find relief. Therefore, for these reasons. as well as those in Developers' original brief. this Court should reverse the trial court's grant of summary judgment. because the statute of frauds does not preclude Developers' equitable claims.

IV. DEVELOPERS HAVE A GOOD FAITH BASIS IN BOTH LAW AND FACT FOR THEIR APPEAL AND COMPLIED WITH ALL OF THE RELEVANT RULES OF APPELLATE PROCEDURE.

This appeal is based upon Developers' good faith belief that genuine issues of material fact exist, that the partial performance exception to the statute of Fraud applies in this case, and that that statute of frauds does not bar recovery under Developers' equitable causes of action. Also, Developers' original brief substantially complied with relevant procedural and format-based requirements. Therefore, any request that Developers' arguments be stricken or for sanctions is not justified.[1]

A. Developers supported all of their arguments with facts from the trial record and with relevant case law.

Differences in interpretation of case law, statutes, and factual implications of evidence within a case do not constitute frivolity or unreasonableness. Justifiably, both Developers and Graffs advance different interpretations of the implications of the pleaded facts and the relevant law in this case. Neither party should begrudge the other for doing so. Developers welcome and expect vigorous debate regarding the scope of the statute of frauds, the partial performance exception, and the survival of Developers' equitable claims. Both parties have advanced good faith, law-based arguments that are by no means unreasonable or frivolous.

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[1] Graffs also requested punitive damages in their summary of the argument (Graffs' Br. at 12), but did not do so in the body of their argument. Developers assume that this was simply a typo, as punitive damages are generally awarded by juries in tort cases upon finding that the defendant's conduct was willful, malicious, intentionally fraudulent, or a reckless disregard of the rights of others, and not by appellate courts for briefs that do not comport with the Utah Rules of Appellate Procedure. U.C.A. §78B-8-201(1)(a).

Developers have based all of their arguments on justifiable interpretations of existing Utah law. Developers have not cited cases or principles that have been overruled. Furthermore, Developers' Statement of Facts is comprised of facts and justifiable inferences based upon those facts that are reflected in the appellate record, which is exactly what appellate review of a trial court's summary judgment order requires. *See Bowen v Riverton City*, 656 P.2d 434. 436 (Utah 1982) (stating that "the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment").

The thrust of this appeal centers on a few basic issues. The first issue is whether or not genuine issues of material fact exist. This is a quintessential question for an appellate court, and Developers have made the best case that they can as to why genuine issues of material fact still exist. The second issue is whether or not the partial performance doctrine was satisfied in this case. Developers believe that it was, and Graffs argue that the trial court was correct in ruling that it did not. There is no authoritative case law that states, without question, that the facts of this case require that one or the other conclusion be reached. The third issue, whether or not the equitable claims survived the trial court's ruling as to the REPC, is similar to the second, in that no overarching case law or statute exists that requires a singular outcome. These issues are genuine, and Developers legitimately presented them to this Court.

B. Developers' original brief complied with the requirements of the Utah Rules of Appellate Procedure.

Graffs criticize the organization of Developers' original brief as "illogical." (Graffs' Br. At 33.) Graffs also accuse Developers of failing to cite to the Record as paginated. (*Id.*) Finally, Graffs complain about the lack a transcript of the summary judgment hearing. However, these accusations and complaints actually amount to nothing more than one inadvertent typo in the body of the argument section.[2]

As to the brief's organization, Developers first set forth the standard of review for this appeal under its "Statement of the Issues" section on the second page of its brief. Developers cited *Poteet v. White*, 2006 UT 63, 147 P.3d 439, as the basis for its statement of the standard of review. Developers then decided that a more complete examination of the summary judgment standard was appropriate, and placed that examination at the very beginning of the argument section of the brief. Developers fail to see how doing this was illogical or illegitimate. Also, Developers concede that the argument section of the brief contained two headings numbered "II." rather than separate sections numbered "II" and "III." Developers regret the error.

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[2] Throughout their brief, Graffs have failed to follow Utah Supreme Court Standing Order No. 4, which requires that "any brief ... filed in the Utah Supreme Court or the Utah Court of Appeals" include in the citation of any published opinion of the Utah Supreme Court or the Utah Court of Appeals issued on or after January 1, 1999 "the case name, the year the opinion was issued, identification of the court that issued the opinion ... and the sequential number assigned to the opinion by the respective court." Developers only emphasize this to highlight that numerous requirements for appellate briefs exist and that both parties may overlook some. Further, Developers suggest that both parties to any appeal should focus their efforts on responding to the substance of the other party's arguments rather than identifying minor technical deficiencies that do not affect the substance of the argument.

As to Graffs' accusation that Developers failed to cite to the record as paginated, Developers believe that they followed the exact requirements of rule 24(e).[3] Developers are unaware of any errors, and certainly do not believe that they included "in excess of 100 erroneous citations to the Record," as Graffs charged. (Graffs' Br. at 33.)

Although Developers do not know the specific reasons behind Graffs' protestations, it is likely that the two parties are simply looking to two different sources of the same information within the record. For example, Developers cite numerous times to evidence originally found in an affidavit submitted by Dave Robinson. However, rather than citing to the original affidavit, Developers cite to memoranda and other pleadings that incorporated the affidavit into both the fact and arguments sections.[4] Developers are unaware of any rule that requires a citation to an affidavit over a filed pleading when both documents proffer the same evidence. If such a rule exists, either in law or simply in common practice, Developers regret the confusion. However, citation to a portion of the record that states what the brief purports it to state does not violate rule 24(e), and therefore Developers believe that they are in full compliance with the requirements of the rule.

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[3] This portion of the rule states: "[r]eferences in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to 11(b)." Utah R. App. P. 24(e).

[4] For example, Developers frequently cited to the pages of the record containing a memorandum in response to a motion for partial summary judgment, found at pages R. 313-337. Most of the assertions within that memorandum were based upon the Affidavit of David Robinson, found at pages R. 374-382. An analysis of Graffs' brief demonstrates that they cited to the pages of the affidavit, rather than to the corresponding pages of the memorandum. This also occurred in connection with another memorandum that was based upon a separate affidavit submitted by Dave Robinson. The memorandum is found at pages R. 1002-1012, and the affidavit is found at pages R. 1015-1023.

Finally, Developers did not include the transcript of the hearing on the motion for summary judgment because the trial court specifically ordered that Developers were not required to include the transcript. (*See* Ruling re: Motion to Compel, **attached as Addendum A**).[5] Developers' contention that the summary judgment order should not have included the equitable claims rests upon several valid contentions, only one of which is that these claims were not argued during the hearing. Also, both parties submitted arguments after the hearing regarding inclusion of the equitable claims in the trial court's order granting summary judgment. (*See* R. 1101-1127, 1129-1140.) Neither of these arguments referred to anything stated or argued during the hearing. Finally, Graffs have not identified, in their original motion to compel inclusion of the transcript or in their brief to this Court, any substantive reason that the transcript should be included in the record to be cited by either party in the appeal, except simply to confirm what both parties already know and the relevant pleadings more than sufficiently demonstrate—that the hearing did not include arguments regarding the equitable claims.

C. Developers did not mischaracterize the record.

Most of Graffs' examples of purported mischaracterization of the record are simply differences in interpretation of the implications of the evidence within the record. As stated above, disagreements between parties regarding the implications of material facts generally constitute the heart of any litigation, and the same is true in this case.

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[5] This order is not included in the Judgment Roll and Index, because the issue was decided after the Notice of Appeal was filed. Developers attach it now only for the tangential purpose of responding to Graffs' accusations, and not as substantive evidence of any actual issue to be considered in this appeal.

Developers will rest upon this explanation for most of the alleged "mischaracterizations" that Appellee highlights. However, brief specific treatment of three of Graffs' accusations is in order.

First, Appellee asserts that "page 1007 does not contain anything like" the statement that "Max wanted Naterra to go out of contract because Max felt that Graffs could sell the property for ***more money due to the improvements*** *that Developers made on the property.*" (Appellees' Br. at 37 (quoting Appellants', Br. at 17) (emphasis in Appellees' brief).) However, paragraph 20 of page 1007 of the record (which cites a portion of an affidavit which can be found on page 1022 of the record), states the following: "[a]fter the parties went out of contract Max Graff informed Dave Robinson that [Max] had been praying that the sale would go into default so he could get more money." That Graff wanted Developers to go out of contract so that he could sell the property for more money (which would be a direct result of the improvements made on the property by Developers) is a reasonable inference to draw from page 1007 of the record, and Developers simply expressed that reasonable inference in their argument.

Second, Appellee states that "[t]here is no evidence in the Record to support any assertion that Developers indicated *to Graffs* that they had any ability to close on June 30, 2006 using 'hard money' lenders or any other alternative." (Appellees' Br. at 38. (emphasis in Appellees' brief).) However, paragraph 18 on page 321 of the record (citing R. at 378, ¶ 18) states the following: "[o]n more than one occasion. prior to the June 30, 2006 closing deadline, Robinson informed Max Graff that if Naterra could not obtain financing from the preferred bank loan by the closing deadline, Naterra would be able to

close on the purchase of the property through these various investors or 'hard money lenders." Developers cited this exact paragraph on page 9 of its brief to support its contention that Developers were prepared to close on June 30 if Max Graff did not want to offer further extensions. In fact, pages 320-22 of the record are replete with references to Developers' ability to close by the deadline through hard money lending, but its preference for traditional bank financing.

Third, Developers utilized the position that Graffs did not dispute the existence of an oral agreement and reliance upon that agreement for the exact same purpose that it was utilized in the trial court setting—to determine whether or not, as a matter of law, Graffs would be entitled to judgment under the statute of frauds. (*See* Appellants' Br. at 18-22). Graffs conceded, solely for the purpose of the summary judgment motion, that both were undisputed. (Appellees' Br. at 39.) Developers were simply arguing from that same analytical standpoint. Developers' brief was not internally inconsistent; rather, it simply advanced arguments in the appropriate context, for a party moving for summary judgment must establish both that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c).

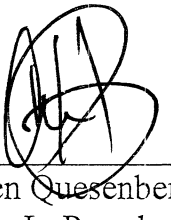
In sum, Developers have a good faith basis, both in law and based upon the facts of this case, for this appeal. Furthermore, Developers followed the Utah Rules of Appellate Procedure. For these reasons, Graffs' requests—that this Court strike Developers' arguments, dismiss its brief, and order Developers to pay attorney's fees and punitive damages—are wholly unjustified.

CONCLUSION

Developers properly preserved all of the issues presented in this appeal at the trial court level. Also, the partial performance exception to the statute of frauds applies in this case. Furthermore, Developers' equitable claims survive imposition of the Statute of frauds. Finally, Developers' appeal has a good faith basis in both law and fact, and Developers complied with the requirements of the Utah Rules of Appellate Procedure. Therefore, this Court should reverse the trial court's grant of summary judgment and remand the matter back to the trial court.

RESPECTFULLY SUBMITTED this 21st day of November 2008.

HILL, JOHNSON & SCHMUTZ, L.C.



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November 2008, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed, first class, postage prepaid, to the following:

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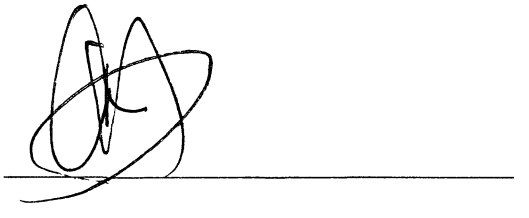

ADDENDUM A

ADDENDUM A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MAX B. GRAFF, ANITA B. GRAFF, CURTIS A. GRAFF, CAROL A. GRAFF, and GRAFF RANCHES, L.C., Plaintiffs, vs. NATERRA WEST, L.L.C., Defendant.	**RULING RE: MOTION TO COMPEL COUNTERCLAIMANTS TO REQUEST THE ENTIRE TRANSCRIPT OF THE PROCEEDINGS BE INCLUDED IN THE RECORD FOR APPEAL**
NATERRA WEST, L.L.C., Counterclaimant; GATEWAY FARMS, L.L.C.; and FUSION GROUP, L.L.C.; Intervening Plaintiffs; vs. MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, L.C.; and DON D. GILBERT; Counterclaim Defendants.	Case # 060402272 Judge Fred D. Howard Division 5

The above-entitled matter came before the Court pursuant to Plaintiffs' *Motion to Compel Counterclaimants to Request the Entire Transcript of the Proceedings Be Included in the Record for Appeal*, filed February 29, 2008. The motion was opposed by Defendant and Counterclaimants who filed their *Opposition to Motion to Compel* on March 11, 2008; followed by a *Request to Submit for Decision* dated April 2, 2008.

Noting the filings of the parties in this matter, the Court observes that given the standards of

review for grant of summary judgment, no transcript is necessary for review upon appeal Plaintiff's motion, therefore, is respectfully denied Counsel for Counterclaimants is directed to prepare an order consistent with this *Ruling*

Dated this 8 day of April, 2008

JUDGE FRED D HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were mailed, postage prepaid, on the 8 day of April, 2008 to the following to the addresses indicated or in the manner indicated, to wit:

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