2003

Fairbourn Commerical, Inc. v. American housing Partners, Inc. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

FAIRBOURN COMMERCIAL, INC., a Utah corporation, Plaintiff and Appellee, v. AMERICAN HOUSING PARTNERS, INC., a Delaware corporation, Defendant and Appellant.	20030377-SC Case No. 20020060-SC Priority No. 15

APPEAL FROM THE OPINION OF THE UTAH COURT OF APPEALS, ENTERED APRIL 3, 2003

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

The Appellant has failed to comply with its obligation to adequately marshal all of the evidence supporting all of the trial court's decision in this case. This failure is particularly critical because the full summary of all evidence before the trial court demonstrates the circumstances and scope of the Appellant's breach and the Appellee's entitlement to its remedies. For these reasons, the Appellee recites and expands the relevant facts to demonstrate the correctness of the trial court's award in favor of the Appellee.

In September 1998, American Housing Partners, Inc. ("American Housing"), an experienced real estate developer, entered into a contract to purchase real property in West Jordan, Utah (the "Property") from a group of sellers (the "Coon Group"). (R. 231, 235; R. 408: Tr. 19; Ex. No. 30.) Armando Alvarez ("Alvarez"), a real estate broker licensed in Utah and California, handled all transactions for Appellant American Housing, which is owned by Alvarez's brother. (R. 408: Tr. 9-10.) American Housing's contract with the Coon Group required closing within 120 days. American Housing applied for a zoning change with the City of West Jordan (the "City), which was necessary for American Housing to be able to subdivide and develop the Property and to sell the lots for profit. (R. 408: Tr. 19-20.) Alvarez expected City approval to be obtained within the 120-day time period under the contract with the Coon Group. (R. 408: Tr. 46.)

Prior to August 1999, Alvarez and American Housing had prior dealings with Jim Fairbourn of Fairbourn Commercial, Inc. ("Fairbourn Commercial"), involving Jim Fairbourn's representation of sellers in several transactions. (R. 409: Tr. 303-304.) Starting about January 1999, Alvarez and Jim Fairbourn discussed the Property in general terms, with the discussions anticipating the possibility of Fairbourn Commercial listing the future sale of lots in the Property for American Housing. (R. 408: Tr. 52; R. 409: 305.)

Because of delay in obtaining City approval for a zoning change, the Coon Group, as seller, and American Housing, as buyer, signed an Addendum to their sales contract extending the closing date until April 15, 1999, and requiring American Housing to deposit an additional $10,000.00 with the escrow agent by March 15, 1999. (R. 408: Tr. 48; Ex. No. 32.) American Housing did not make that deposit and received notice from the Coon Group terminating the Coon Group contract because of American Housing's default. (Ex. No. 33.) Furthermore, the City denied the zoning application in April 1999. (Ex. No. 54.)

Frustrated with the difficulties in obtaining zoning approval and the current problems involving the status of the Coon Contract, Alvarez in June or July 1999, asked Jim Fairbourn if Jim Fairbourn could find a buyer for the entire Property. (R. 408: Tr. 53.) Those parties discussed various ways to sell, including Jim Fairbourn's suggestion that the Property could be sold as "paper lots," which Alvarez had not sold before (R. 408: Tr. 53, 54; R. 409: 307, 310; R. 406: 518.)

Marshall Larson ("Larson"), who became an agent for Fairbourn Commercial August 1st (R. 232, 234), obtained an interested buyer in Rochelle Properties, LC ("Rochelle"), an affiliate under common control with Liberty Homes, Inc., a large Utah homebuilder. (R. 233.) On August 6, 1999, David C. Clark ("Clark"), manager of Rochelle, signed a letter of intent to purchase the Property for $23,000.00 per lot. (R. 409: Tr. 261; Ex. No. 1.) Clark was very interested in purchasing the Property, expecting it to be the West Jordan inventory for Liberty Homes and being convenient to two existing model homes. (R. 408: Tr. 261.)

Fairbourn Commercial acted as American Housing's real estate agent in the transaction, and Larson represented Rochelle. (R. 409: Tr. 315; Ex. No. 2.) After receipt of the letter of intent, a meeting occurred in American Housing's office, consisting of Alvarez, Jim Fairbourn, Larson, Clark and Irv Gardner ("Gardner"), of Rochelle. (R. 233.) The parties discussed Rochelle's proposed purchase of the Property from American Housing, including what assurances American Housing requested to show Rochelle's ability to perform. (R. 408: Tr. 56-57, 60; R. 409: 261-264, 288-291, 397-401.) According to Clark, Gardner, Jim Fairbourn and Larson, Alvarez said that he wanted some evidence of Rochelle's ability to perform. (R. 233; R. 409: Tr. 264, 289, 312, 402.) These witnesses further stated that no mention was made of any line of credit, cash on hand or firm bank commitment, which Alvarez testified he insisted on. (R. 408: Tr. 60; 409: Tr. 264, 291, 314, 404.)

August 13, 1999, Jim Fairbourn delivered to Alvarez a Single Party Listing and Sale Agreement (the "Single Party Listing Agreement") and an offer from Rochelle, (R. 233), consisting of a standard form Real Estate Purchase Contract prepared by Larson, together with an Addendum No. 1 prepared by Gardner on behalf of Rochelle. (R. 409: Tr. 313; Ex. No. 3). The Single Party Listing Agreement provided for payment to Fairbourn Commercial of a commission of $1,500.00 per lot if the Property was sold to Rochelle for $2,277,000.00 for an estimated 99 lots. (R. 233; Ex. No. 2.)

Alvarez signed the Listing Agreement but subsequently rejected this first offer. (R. 408: Tr. 62.) Three days later, August 16th, Rochelle presented a second offer through its agent consisting of a form Real Estate Purchase Contract and an Addendum No. 1, prepared by Larson. (R. 233, 266-267, 408, 409; Tr. 63-64; Ex. No. 4.) Alvarez prepared a counteroffer to Rochelle's second offer. In preparing the counteroffer, Alvarez specifically and in detail set out a number of paragraphs detailing the arrangement, including insertion of definitional and clarifying language. (R. 408: Tr. 67-73; Ex. No. 4.) One of the paragraphs, entitled "financial capability," stated:

> Within Fourteen days after execution of this Agreement by both parties, Buyer shall supply to Seller with evidence of financial capability to close on the Property within the time frame referenced above. In the event Buyer is unable to provide said evidence, Seller shall at its sole option cancel this Agreement and neither party shall have any further obligation to the other.

(R. 233-234; Ex. No. 5.)

The counteroffer also provided, *inter alia,* for a 21 day due diligence period, acknowledged that American Housing had given only limited information to Rochelle, and required a $50,000 earnest money deposit[1], which, after a short due diligence period, would become non-refundable, the refund not being conditioned upon financing. (R. 406, 408, 531; Tr. 63-64; Ex. No. 4.) Additionally, upon lapse of the due diligence period, Rochelle was obligated to take title to the Property subject to all conditions affecting the Property, subject to the existence of any environmental problems, and subject to all risks arising from lack of City zoning approval. (Ex. No. 4.) Moreover, Rochelle was dependant upon American Housing's good faith in continuing to work with the City in getting final approval, with no meaningful remedy if American Housing did not comply with that obligation. (R. 406: Tr. 527.)

Thereafter, a meeting occurred in American Housing's office, involving Alvarez, Jim Fairbourn, Larson and Clark. Those individuals reviewed in detail the Agreement, including American Housing's counteroffer. Included in the discussions was the "financial capability" clause, which required compliance within only fourteen days from the contract signing. (R. 234.) Alvarez told Clark that he wanted a letter from a bank showing a willingness to lend to Rochelle. (R. 409: Tr. 270.)

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[1]Alvarez acknowledged that neither he nor American Housing had ever had as large as $50,000 earnest money deposit required in any prior transaction. (R. 408: Tr. 67, 68.)

By August 30th, only with initialed changes to a paragraph specifying time for closing, the Agreement, including American Housing's counteroffer, was signed by both the seller and buyer. (R. 409: Tr. 317; Ex. No. 4.) Rochelle deposited the $50,000.00 earnest money with the escrow agent and undertook the efforts and began paying money toward its formal due diligence. (R. 409: Tr. 319; Ex. No. 6; Ex. No. 7.) This executed agreement is referred to herein as the "Rochelle Contract."

By the date the Rochelle Contract was signed, American Housing had resolved its immediate time pressures regarding the Property. After the City had earlier rejected the zoning application, Alvarez and LaMar Coon had held a "closed door" meeting with some City councilmen. Alvarez received indication of the City's willingness to grant the zoning if Alvarez could include an additional five or six acres of property for the project. (R. 408: Tr. 161-162.) In June or July 1999, American Housing succeeded is obtaining rights to purchase that additional acreage. In addition, on August 23, 1999 (a week prior to the effective date of the Rochelle Contract), the LaMar Coon Contract was reinstated, extending its closing date to December 1, 1999. (Ex. No. 31.)

Pursuant to the "financial capability" clause in the Rochelle Contract, Rochelle arranged for a letter from Cy Simon ("Simon"), construction loan officer of First Security Bank, to be delivered to American Housing stating the Bank's willingness to make acquisition and development loans to Rochelle. (R. 235; R. 409: Tr. 234-235; Ex. No. 9.) Alvarez rejected that letter without explanation. Rochelle then arranged for a second letter

from the Bank, dated September 17, 2000, providing more detail as availability of credit lines, amounts of currents loans in place and painting a positive picture of the Bank's willingness to lend, with predictable, guarded bank rhetoric. (R. 236; R. 409: Tr. 235-238; Ex. No. 10.)

Alvarez never inquired of Simon or First Security Bank, never requested financial statements, and never requested any other information relating to Rochelle's financial status or ability to perform. September 21, 1999, Alvarez, by telephone, advised Jim Fairbourn that Alvarez was rejecting the letters and terminating the contract. Alvarez then sent a notice of termination to the title company, arranging for the title company to return the $50,000.00 earnest money payment to Rochelle. (Ex. No. 12.) The trial court found that the "financial capability" clause in the Rochelle Contract was ambiguous and that Alvarez should have been aware of the ambiguity after receipt of the first letter from the bank. Further, the trial court found that Alvarez, had an obligation to clarify the ambiguity, but that Alvarez never gave any explanation before he unilaterally gave his notice of rejection. (R. 237.) The sole reason Alvarez subsequently gave for the rejection was the failure to comply with the "financial capability" clause. At trial, he acknowledged his understanding that the commission to Fairbourn Commercial was fully payable if the Rochelle Contract closed. (R. 408; Tr. 90.)

By the time of American Housing's cancellation of the Rochelle Contract, though, Alvarez was aware of opportunities for significantly greater profit if American Housing were now to develop and sell the Property itself as "paper lots." (R. 409; Tr. 219-22.) Alvarez had become familiar with the status of property development in the area of the Property, including American Housing's familiarity with Leon Peterson ("Peterson"), who was developing five acres of property adjacent to the Property and was seeking City application for approval at the same time as American Housing was seeking approval for its Property. (R. 408; Tr. 108-109.) Alvarez had also become familiar with other Peterson property transactions. October 13, 1999, less than a month after Alvarez sent the notice terminating the Rochelle Contract, American Housing received an offer from Peterson to purchase the Property. (R. 408; Tr. 127; Ex. No. 13.) October 26th, Alvarez presented a counteroffer, which, together with a letter of final modification created a final contract of sale to KFP Corporation (the "Peterson Contract"). (Ex. No. 14.)

Alvarez told Jim Fairbourn, subsequent to and despite the signing of the Peterson Contract, that American Housing intended to keep and develop the Property itself. (R. 409; Tr. 325-27.) Significantly, although neither Rochelle nor Fairbourn Commercial had, by that time, advised or threatened American Housing as to any claim or problem involving the language of the Rochelle Contract's "financial capability" language (R. 408; Tr. 129-130), American Housing, in its counteroffer to the Peterson Contract, had, itself, included a

"financial capability" paragraph similar to the Rochelle Contract language, but which added and expanded the "financial capability" language to read as follows:

> Within Fourteen days after execution of this Agreement by both parties, Buyer shall deliver to Seller evidence of financial capability to close on the Property within the time frame referenced above. In the event Buyer is unable to provide evidence acceptable to Seller in Seller's sole discretion, Seller shall at its sole option cancel this Agreement. Escrow Agent shall return the Deposit to Buyer and neither party shall have any further obligation to the other. (emphasis added)

Despite the language in the counteroffer in the Peterson Contract, Alvarez never sought any financial statements, never did any credit investigations, and did not initiate any inquiries of any nature to verify the financial ability of KFP or Leon Peterson to perform under the Peterson Contract. (R. 408; Tr. 138.) By accident, and not through any efforts by Alvarez to seek information, Alvarez received a telephone call from a loan broker for Peterson. (R. 408; Tr. 139.) During the call, discussion occurred about the credit circumstances and willingness to loan under the Peterson Contract. (R. 408; Tr. 139-140.) There followed a fax from the loan broker to Alvarez indicating no anticipated problems in obtaining a loan but emphasizing that the loan application had not been submitted nor approved and that the letter constituted no commitment to the borrower. (R. 408; Tr. 140-141; Ex. No. 17.)[2]

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[2]This Peterson lender "assurance" states:
Armando,
This is to confirm that KFP Corporation has requested a loan for the project

The zoning change approval for the Property was finally approved by West Jordan City in January 2000. The closing and settlement of the Peterson Contract occurred January 19, 2000, with American Housing having previously assigned its interest to Midas Creek Estates, LLC. (R. 408; Tr. 155-156.) The total purchase price was not paid in cash. Included with the closing was a note for $31,000.00 payable from KFP Corporation secured by a trust deed, instead of being entirely a cash closing. (Ex. Nos. 24-27.)

American Housing, by selling to Peterson for a higher purchase price and attempting to eliminate the commission to Fairbourn Commercial, netted a bottom-line profit of an additional $266,000.00. (R. 408; Tr. 153-154.)

SUMMARY OF THE ARGUMENT

1. American Housing has no basis, under any applicable principle of contract law, to avoid paying the commission through its breach of contract.

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known as West Jordan Meadows or Wood Creek 9 & 10. The loan will be for approximately $3,575,000 which will provide some funds towards the purchase of the land, lot improvements, and soft costs. This size loan is within [the lender's] informal limit to this borrower and within the borrower's financial capacity. The loan structure contemplated is within our underwriting guidelines and I do not foresee any problems during the approval process.

The loan is not yet approved and there is no commitment to the borrower. We anticipate submitting the loan for approval either the week of November 22nd or the week of November 29th.

Please call me if you have any questions.

(Ex. No. 17.)

a. Long-standing and uniform principles of contract law in all jurisdictions prevent American Housing from taking advantage, and avoiding the consequences, of its own breach of contract.

b. Long-settled Utah law provides that, absent language in the listing agreement to the contrary, a real estate commission is earned in appropriate circumstances when the contract is signed. This is applicable even in general cases which, unlike this instant case, has broader language involving "ready, willing and able" language. No evidence was presented at trial providing any foundation to consider reversal of this long-standing Utah law.

c. Since the contracts at issue in this case involve transactions for the sale of commercial property negotiated among sophisticated and knowledgeable parties, the authorities relied on by American Housing are inapplicable in this case. Regardless, even if this Court were to apply the holdings in those cases to the instant case, those cases still consistently provide that a breaching seller cannot avoid the payment of commission by preventing the closing of the sale.

2. Commission disputes arising under existing Utah law generally presuppose that closing failed to occur; yet in appropriate circumstances judgments are granted for commission earned absent closing. Therefore, unless well-settled Utah law were to be reconsidered, in reality there exists no "case of first impression" applicable to the issues in

this case. It follows that analysis of whether a closing is a condition precedent to the obligation to pay a commission is more relevant in the minority line of cases previously rejected by this Court. But even then, all of the cases cited by American Housing for its position hold that a seller cannot avoid payment of a commission when that seller wrongfully is the cause for the failure to close.

3. The trial court, as the finder of fact and determiner of the weight and credibility of the evidence and witnesses, correctly found that the "financial capability" clause requiring "evidence of financial capability to close" was ambiguous. The trial court correctly determined that the ambiguity should be interpreted against its drafter and further correctly determined that American Housing was unjustified in terminating the entire sales contract and refusing to close.

4. The Single Party Listing Agreement, negotiated for American Housing by its representative who was a sophisticated broker licensed in Utah and California, specifically identified the buyer and the terms of the sale and the commission. This contract was narrower and different from commonly-used listing agreements which provide for payment of a commission upon the seller's real estate agent finding an unspecified "ready, willing and able" buyer. For this reason, Appellant's arguments and its cited authorities involving issues of "ready, willing and able" buyers in the context of commonly-used listing agreements do not apply to the interpretation and application of this narrowly customized Single Party

Listing Agreement. Likewise, public policy principles upon which cases cited by Appellant are based, are inapplicable to the case at hand because this case does not involve the public policy issues behind those cases, such as differences in experience, sophistication and bargaining position between the seller and its agent.

5. The Rochelle Contract was negotiated among sophisticated and experienced realtors and developers with the substance of that contract represented by a counteroffer, including the "financial capability" clause at issue, being drafted in great detail by Alvarez, American Housing's representative. The agreement, being ambiguous, was appropriately interpreted against American Housing.

6. No evidence has been presented or heard at any time in this case which would relate to whether existing Utah law should be reconsidered or overturned. Indeed, no issues have previously been raised with respect to real estate listing agreements generally which, through this unrelated case, would justify a reexamination of public policy.

7. Inherent in the transactions with Fairbourn Commercial and Rochelle was American Housing's covenant of good faith and fair dealing, including circumstances in which a party claims discretionary rights under a contract. American Housing breached the Rochelle contract and the Listing Agreement with Fairbourn Commercial by canceling the Rochelle contract without cause.

ARGUMENT

I
AMERICAN HOUSING CANNOT AVOID ITS OBLIGATION TO PAY A COMMISSION BY BREACHING THE AGREEMENT AND ASSERTING THE RESULTS OF THAT INTERFERENCE AS A DEFENSE

American Housing, in this appeal, cavalierly dismisses, and seeks to avoid, the consequences of its own breaches of contract which the trial court identified. Both the trial court and the Court of Appeals found that Fairbourn Commercial had earned its commission, though each court grounded its decision upon a different principle of law for awarding judgment to Fairbourn Commercial. The trial court carefully examined three days of testimony and extensive evidence, focusing upon all of the circumstances surrounding the entry into the Rochelle Contract and American Housing's breach thereof. The Court of Appeals, on the other hand, focused solely upon the Single Party Listing Agreement and applied *Bushnell v. Nielson*, 672 P.2d 746 (Utah 1983), and related long-standing Utah law. *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2003 UT App 98, 68 P.3d 1038. Even Alvarez acknowledged that Fairbourn Commercial would have been entitled to payment of its commission upon closing of the contract. (R. 408; Tr. 90.) But American Housing contends that the listing agreement, providing for the earned commission to be "due and payable at closing"(Ex. No. 2), absolutely precludes payment thereof. The Court of Appeals dismissed American Housing's argument. In doing so, the Court of

Appeals stated that it is an issue of first impression as to whether the phrase "due and payable at closing" constitutes a condition precedent to payment or whether that phrase merely establishes the payment time. Determining that the terms of the listing agreement were dispositive of the issues, the Court of Appeals found it unnecessary to analyze the Rochelle Contract ambiguities. *Fairbourn*, 68 P.3d at 1040-41. The Court then held that the listing agreement language is not a condition precedent to payment of the commission. *Id.* at 1042.

American Housing continues to urge this Court that the commission being payable at closing was an absolute condition precedent to payment and that, since closing never occurred (albeit through American Housing's own breach), the commission therefore is not payable. In other words, American Housing's argument stands for the proposition that a seller can always avoid its contractual obligations by breaching the sale contract and precluding the occurrence of a condition precedent (*i.e.,* closing) to its commission obligation. Fairbourn Commercial respectfully suggests that American Housing's revolutionary approach to contract law would plow far more ground than the complained-of Court of Appeals' decision. If this position allowing "escape-by-breach" were adopted, Fairbourn Commercial suggests that no logical reason exists to limit that revolutionary theory to listing agreements alone and not to produce undesired results in other types of contract issues. It further rings hollow to argue that there is something *sui generis* about a real estate broker's contract because of compelling social concerns, such as bargaining power or the

need to create incentives for closing. Factual differences exist between parties in numerous transactions; and it ignores reality to suppose that analysis of a party's good faith and performance are not always legitimate areas of inquiry.

To bolster its position, American Housing further argues that the Court of Appeals either misread or inappropriately applied that court's cited cases and, therefore, the Court of Appeals holding in this case is automatically wrong and must be reversed.

But American Housing's arguments miss or avoid the most overriding consideration. As discussed in detail in this brief, regardless of any one or more of alternative principles of law which a court might consider applicable in this case, as well as under all of the authorities American Housing cites for its position, American Housing still would not be excused from paying the commission because of its own breach. Regardless of which path American Housing takes, American Housing still bumps into its own breach because:

1. Long-held and consistent general contract law precludes a party to a contract from excusing the performance of a condition when that party is the cause of failure of performance;

2. Settled Utah law under *Bushnell* and related cases provides that, absent conditional contract language to the contrary, a real estate commission is payable when the seller enters into the contract of purchase, regardless of the occurrence of closing; and

3. All authorities cited by American Housing stand for the proposition that a breaching seller cannot escape payment of commission because of a resulting failure to close.

No principle of contract law or line of cases stands for the proposition that a *breaching* seller can rely upon a "payable at closing" language to excuse the commission obligation. This is equally true in American Housing's own cited cases which, as in the so-called New Jersey line of cases, American Housing asks this Court to adopt. All cases still leave open the issue of the seller's own breach and refuse to provide an escape route to such a breaching seller.

A. WELL-ESTABLISHED CONTRACT LAW PRECLUDES AMERICAN HOUSING FROM AVOIDING PAYMENT OF THE COMMISSION

The law is well settled that a party cannot avoid its contract obligations through its breach of the contract. This has been the case in Utah, as well as other jurisdictions, and has continued for years before the *Bushnell* decision. It remains the law today. American Housing cannot simply point to the fact that closing did not occur to relieve itself of liability for failure to pay Fairbourn Commercial its entitled commission, when the sole reason closing did not occur was because of American Housing's own breach of the Rochelle Agreement. "But for" American Housing's breach, American Housing would have sold the property to Rochelle. "[A] party who commits the first breach of contract cannot maintain an action against the other for a subsequent failure to perform." *Lynch v. MacDonald*, 367 P.2d 464, 469 (Utah 1962) (Citations Omitted). *See, e.g., Fisher v. Taylor*,

572 P.2d 393, 395 (Utah 1977) (holding that defendant, having caused first breach, cannot complain of a subsequent breach or take advantage to avoid its own liability); *Driver v. Salt Lake & Ogden Gas & Elec. Light Co.*, 61 P. 733 (Utah 1900) (stating that a person cannot take advantage of his own wrong and exempt himself from liability under a contract); 17A AM JUR 2d Contracts §§ 717 and 718.

This principle specifically includes provisions which are conditions precedent to completing the contract. In *Cannon v. Stevens Sch. of Bus., Inc.*, 560 P.2d 1383, 1385 (1977), this Court stated: "Defendant would not be entitled to prevail even if its assertion of an implied condition precedent were accepted." That Court then addressed with approval the statement by Professor Williston, that "it is a principle of fundamental justice that if a promissor is himself the cause of the failure of performance of a condition upon which his liability depends, he cannot take advantage of that failure." *Id.* at 1385. *See 5 Williston on Contracts, 3rd Ed. –Jaeger*, § 677, pp. 224-233.

This universal principle of general contract law also specifically applies to payment of real estate commissions. This Court, setting out the law even prior to *Bushnell*, stated:

> This Court recognizes the principle of law that a party to a real estate listing agreement cannot prevent or interfere with the performance of the agreement and then assert the nonperformance as a defense. However, such is not the fact in this case.

The Boyer Co. v. Lignell, 567 P.2d 1112, 1114 (Utah 1977).

B. *BUSHNELL* ENTITLES FAIRBOURN COMMERCIAL TO RECEIVE ITS EARNED COMMISSION EVEN THOUGH CLOSING DID NOT OCCUR BECAUSE OF AMERICAN HOUSING'S BREACH

The general rule in Utah is that, without a contract provision that conditions the right to a commission upon the buyer's performance, an agent earns a commission upon procuring a buyer who is willing and able, and accepted by the seller. The Court of Appeals in this case relied principally upon *Bushnell* in which this Court stated:

> . . . Absent a contractual provision, which conditions the right to a commission on the performance of the buyer, the general rule accepted in Utah is that a broker has earned his commission upon the procuring of a buyer who is ready, willing and able, and who is accepted by the seller. The broker is not an insurer of the subsequent performance of the contract and is not deprived of his right to a commission by the failure or refusal of the buyer to perform. *See e.g., F.M.A. Financial Corp. v. Build, Inc.*, 404 P.2d 670 (Utah 1965). This is the rule followed in a majority of jurisdictions. The defendants cite *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843 (N.J. 1967), as authority for the proposition that notwithstanding the clarity of the documents in imposing an unconditional liability for broker's fees there should be an implied condition in the note setting up a waiver of fees if the buyer defaults before completion of the transaction. This is a minority rule contrary to the decision in *F.M.A. Financial Corp. v. Build, Inc.*, and is factually distinguishable in that the *Ellsworth Dobbs* decision involved inequality of bargaining power. In the instant case, the parties dealt voluntarily and in a commercial setting. . . .

672 P.2d at 751.

The *Bushnell* holding arose from the common types of listing agreements which involve criteria of a "ready, willing and able" buyer. Arguably, in cases construing those types of agreements, whether an offering buyer meets those criteria can raise factual inquiries

as to the nature and quality of the buyer. But, significantly, as the Court of Appeals correctly noted, those issues do not apply in this case because the Single Party Listing Agreement has no "ready, willing and able" language. *Fairbourn*, 2003 UT App at ¶ 14. Rather, this Single Party Listing Agreement specified from its outset a particular buyer, with particular terms of purchase. It should be noted that the *Bushnell* analysis focuses upon the breach by a buyer who is not a party to the seller's listing agreement. Fairbourn Commercial's claim in this case, though, is even stronger because it focuses upon the breach by American Housing, the seller itself, which signed the Single Party Listing Agreement.

American Housing, implying that the Court of Appeals' reliance on *Bushnell* caught everyone by surprise, states that both parties, their counsel and the trial court all interpreted the Single Party Listing Agreement to be contingent upon closing. (Brief of Appellant, p. 28.) Of course, the commission was to have been paid at closing if American Housing had permitted the closing. But that does not mean that everyone considered the closing to be an absolute precondition to payment. To the contrary, Fairbourn Commercial has consistently argued that *Bushnell* and its line of cases apply in this case. (*See* pp. 25-25 of Fairbourn Commercial's Court of Appeals Brief, attached as Exhibit "A.") The trial court chose not to base its decision on *Bushnell*, but, instead, focused upon the legitimate analysis of American Housing's breach of contract under the arrangement with Rochelle. Of course, this Court may affirm the trial court decision on any proper ground. *Buehner Block Co. v. UWC*

Assocs., 752 P.2d 892, 895 (Utah 1988). Fairbourn Commercial suggests that it would be correct to affirm the trial court decision solely on the *Bushnell* analysis, solely on the trial court's analysis, or both.

Utah's longstanding law, including *Bushnell*, is consistent with the majority of courts in the country. While American Housing claims reversal of *Bushnell* is not necessary to provide the remedy sought by American Housing, it argues vigorously that this Court should indeed overrule this long precedent to adopt the New Jersey rule articulated in *Ellsworth Dobbs* and its related line of minority cases which hold that closing is a condition precedent to payment of the commission. For reasons more fully analyzed in Section I(C) below, Fairbourn Commercial suggests that considering the wholesale reversal of *Bushnell* without any evidence or other proven, or even proffered, basis for this action would be untimely and unwise. Regardless, even if *Bushnell* were abandoned in favor of the *Ellsworth Dobbs* line of minority cases, presumably all principles in those cases would also appropriately be adopted, including the consistent holding in those cases (more fully detailed below) that a seller cannot escape payment of a commission when the seller's breach is the cause of the failure to close.

Significantly, *Bushnell* was decided after the *Ellsworth Dobbs* line of cases quoted by American Housing. This Court, therefore, has already specifically considered and rejected the reasoning in the *Ellsworth Dobbs* cases. American Housing acknowledges that *Ellsworth*

Dobbs represents a minority line of cases. (Petition for Certiorari, p. 10.) But American Housing then, in its Brief of Appellant before this Court mixes the *Ellsworth Dobbs* cases together with other cases, involving a plethora of facts and issues, to conclude that, *voilà*, the *Ellsworth Dobbs* position on payment of a commission is, after all, really the majority. Accordingly, it is argued Utah is really is in the minority on this issue and is somehow out of step with the rest of the country.

American Housing cites as authority a number of cases in the minority, which supposedly are uniform in holding that closing is a condition precedent to payment of the commission. In some cases, that is the settled minority law. However, American Housing incorrectly depicts the holdings in numerous cases as cited authority for its rationale. Instead, these cases cited by American Housing accept the general rule that a commission accrues upon obtaining a "ready, willing and able buyer," but distinguish the particular cases based upon independent factual situations, e.g., *Hodges v. Lewis*, 246 P.2d 676, 678 (Cal. Dist. Ct. App. 1952) (acknowledging a general rule that commission earned upon securing ready, willing and able buyer; but this present case was not an ordinary one); *Clark v. Provident Trust Co. of Philadelphia*, 198 A. 36, 38 (Pa. 1938) (stating this contract was outside the well-settled rule of a commission accruing upon a ready, willing and able buyer upon agreed terms); *O'Boyle v. DuBose-Killeen Properties, Inc.*, 430 S.W.2d 273, 277-78 (Tex. App. 1968) (holding that the writing which was relied on by broker was different from normal

ready, willing and able provisions); *Nicoud v. Boley*, 248 N.W. 452, 453 (Wis. 1933) (stating that a specific provision removed this case from the general rule that commission is owing upon ready, willing and able buyer at the requested price). *See also, Rogers v. Hendrix*, 438 P.2d 653, 656 (Id. 1968); *Home Federal Saving & Loan Assn. v. Illustrated Properties Realty*, 465 S.2d 1244, 1245 (Fla. Dist. Ct. App. 1984); *Berman v. Hall*, 340 A.2d 251, 252-53 (Md. 1975); *Silhouette Realty, Inc. v. Wilson*, 24 A.D.2d 212, 214 (N.Y. App. Div. 1965).

So even following the holdings of those cases, failure to close does not preclude examination or application of a seller's breach.

C. THE COURTS, INCLUDING THE JURISDICTIONS CITED BY AMERICAN HOUSING, UNIFORMLY HOLD THAT A PRINCIPAL CANNOT ESCAPE PAYING A COMMISSION WHEN THE FAILURE TO CLOSE IS THAT PRINCIPAL'S FAULT

American Housing cites numerous cases for the position that supposedly better-thinking courts hold that closing is always a condition precedent to payment of the commission. However, even assuming for argument that all of American Housing's cited cases stand for that asserted general proposition (without the actual case-by-case variation based upon the language of the respective listing agreements and the differences in factual circumstances), all cases in that line uniformly hold that a principal whose own wrongful actions precluded the closing cannot assert failure of that condition as a defense to not paying the commission. *Ellsworth Dobbs,* indeed, specifically notes this important exception from its general holding , saying "[I]f the failure of completion . . . results from the wrongful act

or interference of the seller, the broker's claim is valid and must be paid." *Ellsworth Dobbs, Inc.*, 236 A.2d at 855. All of the other cases cited by American Housing also take that same position. *See Hodges* (emphasizing that there was no evidence of seller's fault to close); *Setser v. Commonwealth, Inc.*, 47 P.2d 142, 147 (Or. 1970) (holding that the rule requiring closing is not applicable when the sale is aborted by seller's repudiation of the contract); *Tristram's Landing, Inc. v. Wait*, 327 N.E.2d 727, 731 (Mass. 1975) (stating broker's claim is valid if failure of completion is from the seller's wrongful act or interference); *McMurray Co. v. Wiesman*, 260 N.W.2d 196, 201 (Neb. 1977) (stating that broker has earned commission on unjustified failure or refusal of seller to perform); *Berman* at 252-53 (emphasizing no allegations that the purchaser was at fault indicating commission would otherwise have been payable); *Amies v. Wesnofske*, 174 N.E. 436, 438 (N.Y. 1931) (stating that promissor cannot take advantage of failed condition when he caused the failure); *Goetz v. Anderson*, 274 N.W.2d 175, 181 (N.D. 1978) (holding that commission is owing if seller's refusal to consummate the transaction is arbitrary, capricious, unreasonable or wrongful); *Silhouette*, 24 A.2d at 214 (holding there was insufficient evidence that failure of closing was seller's fault); *O'Boyle*, 430 S.W.2d at 280 (stating there were no facts on record that appellees failed to carry out agreement terms).

Accordingly, the failure of closing is not a self-operating event precluding examination of, and ignoring the consequences from, the seller's fault. Even under the

minority line of cases represented by *Ellsworth Dobbs*, American Housing's own breach would compel payment of the commission.

D. THE COURT OF APPEALS' DISCUSSION OF A "CASE OF FIRST IMPRESSION" IS NOT APPLICABLE TO *BUSHNELL* BUT, RATHER, RELATES TO THE MINORITY CASES

The Court of Appeals affirmed the trial court's judgment in favor of Fairbourn Commercial. Determining that *Bushnell* is dispositive, the Court of Appeals held it unnecessary to consider the trial court's analysis of American Housing's breach of the Rochelle Contract. *Fairbourn*, 2003 UT App at ¶ 14. Further holding that the execution of the Rochelle Contract completed the analysis requiring payment of a commission, the Court of Appeals then focused on that Court's depiction of a "case of first impression" as to whether the language "due and payable at closing" conditioned payment of the commission upon closing or whether it was a statement as to when the payment was due. The Court of Appeals held that such language was a statement of *when* payment was due, not *if* payment was due.

American Housing jumped on the "case of first impression" language for the proposition that the Court of Appeals incorrectly cited or applied the cases it cited in support of its holding and that, thereby, the decision should be overturned. But American Housing does not connect all of the dots. Whether or not a "case of first impression" applies to the case at hand, American Housing still cannot ultimately avoid the analysis and application of its own breach.

Fairbourn Commercial suggests that the Court of Appeals, in raising and discussing this issue in a "case of first impression" context, may have caused possible confusion as to the applicable law. For this reason, it makes a difference whether a court follows *Bushnell* or *Ellsworth Dobbs*. As discussed below, it is respectively suggested that, the Court of Appeals' statement notwithstanding, whether closing is a condition precedent to payment of the commission is not an issue of first impression under *Bushnell*. Otherwise *Bushnell* makes no sense and provides no practical remedy for its holding. It is a "case of first impression" only if this Court were to adopt the *Ellsworth Dobbs* line of cases.

This instant case does not involve a listing agreement granting a commission upon finding a "ready, willing and able" buyer. Rather, Fairbourn Commercial was required under its "one party" narrow listing agreement, to obtain a contract from the pre-identified buyer for the pre-identified price. Hence, *Bushnell* governs this case just as it also applies to broader factual situations in dictating that a brokerage commission is earned "upon the procuring of a buyer who is ready, willing and able, and who is accepted by the seller." 672 P.2d at 751. The disputes in those types of cases arise *because of* the failure to close; and, regardless, judgment is granted for the commission. *Bushnell* specifically addresses the issue when it is the buyer, rather than the seller, who fails to close, saying that "[t] broker is not deprived of his right to a commission by the failure or refusal of the buyer to perform."

672 P.2d at 751. *A fortiori*, it could not reasonably be argued that the *Bushnell* holding would not be applicable in this case of a *seller preventing* closing.

But, regardless, the sale contract in the *Bushnell* case did not close. So the awarding of judgment for the commission is inherent in the *Bushnell* ruling itself. And it is suggested that this is why no string of Utah cases exist agonizing about whether failure to close thereby prevents payment of the commission. Otherwise, *Bushnell* would be nonsensical, awarding the commission but providing no ultimate remedy through its judgment because closing did not occur.

Although *Bushnell* expressly rejected the *Ellsworth Dobbs* minority line of cases, the Court of Appeals' conclusion that there is a "case of first impression" concerning timing of the payment would only make logical application if this Court were to reject *Bushnell* and consider the adoption of the *Ellsworth Dobbs* line of holdings in which those cases condition payment of a commission to the occurrence of closing. But the *Bushnell* Court had carefully considered the *Ellsworth Dobbs* arguments and was aware of the concerns and policies behind that line of minority decision. This Court, therefore, far from being asleep at the switch, specifically noted that the *Ellsworth Dobbs* case was "factually distinguishable in that the *Ellsworth Dobbs* decision involved inequality of bargaining power." 672 P.2d at 751.

But most important–which American Housing continues conveniently to ignore–is that even the *Ellsworth Dobbs* cases do not preclude the scrutiny of a seller's conduct and

breach of contract. As analyzed in detail in Section I(C) above, all of the cases upon which American Housing relies and which condition the commission payment to closing, assume the seller's performance. No case lets a seller off the hook when the seller has wrongfully prevented the closing.

E. RECONSIDERATION OF THE *BUSHNELL* LINE OF CASES, WITHOUT DEVELOPING THE ISSUES AND EVIDENCE, WOULD BE UNNECESSARY, UNTIMELY AND UNWISE

American Housing asks that *Bushnell* be overturned. Accordingly, this issue should be addressed generally to demonstrate the inappropriateness of this request by American Housing. Of course, upon the showing that there exist issues of great public interest or societal impact, this Court may grant standing to consider the merit of the claim and make appropriate decisions. But any reconsideration of law should be based upon compelling and convincing evidence for this Court to undertake such examination. No evidence or argument was provided, or even proffered, in the trial court which relates to whether or not *Bushnell* should be reconsidered or whether any circumstances or public policy considerations exist which should compel a reexamination of settled Utah law. It is inappropriate for American Housing to seek the reversal of well-reasoned and well-settled law as a subterfuge to excuse American Housing's breach in a single, unique case. Absent a litigating party having a personal stake in the outcome of such a ruling, any examination based on imagined fears is not good policy.

It is further respectfully suggested that simply setting out the holding of separately factually-distinguishable cases, most of them having previously been examined and rejected by this Court, is not sufficient to compel a re-visitation of longstanding Utah law. This Court stated in *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983):

> Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring "cases" and "controversies," since no similar requirement exists in the Utah Constitution. We previously have held that "this Court may grant standing where matters of great public interest and societal impact are concerned." However, the requirement that the plaintiff have a personal stake in the outcome of a legal dispute is rooted in the historical and constitutional role of the judiciary in Utah.
>
> . . .
>
> Inherent in the tripartite allocation of governmental powers is the historical and pragmatic conviction that particular disputes are most amenable to resolution in particular forums. The requirement that a plaintiff have a personal stake in the outcome of a dispute is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process. The courts are most competent in the exercise of their function when they have a "concrete factual context conductive to a realistic appreciation of the consequences of judicial action." A plaintiff with a direct and personal stake in the outcome of a dispute will aid the court in its deliberations by fully developing all the material factual and legal issues in an effort to convince the court that the relief requested will redress the claimed injury. (Citations omitted)

Except for seeking redress for its own breach, American Housing cites no legitimate reason, or indeed proffers any specific arguments, urgencies or problems (other than its

academic analysis through citing cases from other jurisdictions), requiring such a massive overhaul and reversal of law. In determining whether an issue in this case is "of great public interest or societal impact," it is relevant that no recent "enlightened" line of cases exist which counter the *Bushnell* result. *Goetz*, the most recent of this line of minority cases holding that (absent seller's fault) commission payment is conditioned on closing, is twenty-five years old. American Housing does not point to any existing rush and urgency among courts to change their longstanding majority position, nor does American Housing identify anything in the system that is broken and must be fixed. Equally significant is the fact that no evidence, indeed no proffer of evidence, before the trial court even attempted to examine circumstances, business practices or existence or lack of existence of circumstances in the real estate industry that somehow compel a reexamination after all these years of *Bushnell*.

Absent any evidence to the contrary, it is at least as reasonable to conclude that the courts, within the context of *Bushnell* in Utah, as well as the other majority cases nationwide, deal with these issues in pragmatic and normal methods of contract interpretation. Moreover, it is also reasonable to conclude that major abuse is not a problem. Given the paucity of information generated by American Housing in this case, it is just as reasonable to conclude that: there exist various degrees of the regulation and codes of ethics of realtors which preclude the feared flood of problems; most problems are precluded by effects of the marketplace; sellers may not be as unsophisticated as some assume; the real estate profession

is not unprofessional as curmudgeons assume; and courts do a good job of protecting parties on a case-by-case basis. American Housing presents nothing new, but merely presents conjecture and old reasoning from cases largely preceding *Bushnell*.

Equally important, as much as American Housing would like to redefine the parties' relationship to encourage this Court to overturn long-settled precedent, this case is significantly distinguished from the *Ellsworth Dobbs* line of cases which involve listing agreements providing the seller to pay a commission when a broker finds a "ready, willing, and able purchaser" who is unidentified. The public policy concerns articulated by *Ellsworth Dobbs* and by the commentators cited by American Housing include the perceived difference in bargaining position, differences in knowledge, respective abilities to evaluate the buyer, disincentives for broker to push a contract to closing, expectations of the parties to the listing agreement and the like. *See, e.g., Ellsworth Dobbs, Inc.*, 236 A.2d at 853-56; Milliken, *When Does the Seller Owe the Broker a Commission? A Discussion of the Law and What it Teaches About Listing Agreements*, 132 MIL. L. REV. 265 (1991); *Note, Arguing for the Minority Rule: An Efficient Approach to Real Estate Brokerage Contracts*, 82 B.U. L.REV. 195 (2002).

This case differs from the public policy cases cited by American Housing, because it involves: a narrowly-focused Single Party Listing Agreement negotiated between two experienced brokers; a purchase contract negotiated between two experienced realtors and

developers; equality in bargaining power existing (indeed, possibly a larger bargaining position on the part of American Housing itself, who had rejected an initial agreement and insisted on its own language for the final agreement); a customized Single-Party Listing Agreement identifying the specific buyer and the specific terms of seller, not just a general unidentified potential buyer; and the trial court finding that the failure to close was American Housing's fault.

It is, therefore, unjustified to attempt to overlay with this Court the supposed *Ellsworth Dobbs* policy considerations in a circumstance in which *Ellsworth Dobbs* is not even relevant or applicable.

II.
THE TRIAL COURT CORRECTLY DETERMINED THAT AMERICAN HOUSING BREACHED ITS AGREEMENT

A. AMERICAN HOUSING CANNOT OVERCOME THE TRIAL COURT'S ANALYSIS OF THE EVIDENCE AND THE CREDIBILITY OF WITNESSES

Because of the trial court's advantaged position, the trial court's fact determinations deserve a "fair degree of deference" since the trial judge observed the evidence, including the "witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected" in the appellate record. *Department of Human Servs. ex rel Parker v. Irizarry*, 945 P.2d 676, 681 (Utah 1997) (citations omitted). As such, the trial court's findings of fact are upheld unless the evidence supporting them is sufficiently lacking

and the findings are clearly erroneous. *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998), *cert. denied*, 526 U.S. 1130 (1990).

A principal issue for the trial court's finding was the nature and interpretation of a "financial capability" clause in the contract in dispute. Challenging the trial court's finding that this clause drafted by American Housing was ambiguous, American Housing seeks this court's imprimatur on American Housing's own chosen contract interpretation, which the trial court rejected. In challenging these factual findings, though, American Housing picks and chooses, and puts its own spin on, the supposed facts supporting its position. Regarding the disputed contract language alone, it is insufficient for American Housing simply to assert what American Housing says it expected as "evidence" of Rochelle's ability to perform. Moreover, it is not sufficient simply to restate what is in the trial court's Memorandum Decision and omit all other evidence which was submitted to the trial court and which supports the trial court's decision. *See, Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶ 15, 48 P.3d 888.

Following a three-day trial during which the trial court heard testimony, determined the credibility of witnesses, and reviewed all of the evidence, the court ruled in favor of Fairbourn Commercial with respect to the issues on appeal. This analysis included the resolution of testimony involving the parties' conversations and interpretations regarding the "financial capability" clause and the context in which it was negotiated and applied.

The trial court, among its other findings, expressly rejected the testimony of Alvarez as to what he supposedly said at the meetings. (R. 235.) Rather, the trial court gave credibility to Fairbourn Commercial's witnesses concerning these conversations and the parties' interpretation of the applicable language. (R. 234-235.) In short, the trial court had ample and credible evidence to support its findings and rulings.

B. CREDIBLE EVIDENCE EXISTS TO SUPPORT THE TRIAL COURT'S DECISION THAT THE FINANCIAL CAPABILITY CLAUSE DID NOT EXCUSE AMERICAN HOUSING'S PERFORMANCE

The language of the "financial capability" clause at issue, drafted by Alvarez, required Rochelle to supply "evidence of financial ability to close on the property within the time frame referenced above [14 days]." American Housing claims that this clause, absent more specific language, unambiguously required a binding loan commitment, letter of credit, or availability of cash. American Housing further urges that American Housing had the unilateral right to terminate the contract if Rochelle did not provide evidence of one of those unspecified requirements. In support of American Housing's interpretation, Alvarez testified that he specified these requirements at two separate meetings with other witnesses discussing the contract requirements. (R. 408: Tr. 56-60, 89, 102.)

The trial court's rejection of such arguments is supported by credible evidence. As the trial court pointed out: "The language of the clause gives no guidance to either the quantity or quality of evidence which Rochelle must produce to demonstrate financial

capability." (R. 236.) The trial court expressly rejected Alvarez's testimony on this point and accepted the contrary testimony, expressly finding that Alvarez made no such explanation. (R. 235.) The other witnesses, particularly Clark, whose credibility the Court specifically noted, testified that Alvarez, in two separate meetings in which that language was discussed, asked only for "a letter from a lender that states that more than likely you'll be creditworthy. . . ." (R. 409: Tr. 270.) Indeed, the Court specifically found the following:

> . . . I do not find that Mr. Alvarez expressed to anyone at anytime his intention that only a binding loan commitment or letter of credit would satisfy his definition of adequate financial capability. The participants in this transaction shared considerable experience and sophistication in real estate development and financing. I credit the observation made by David Clark, the owner of Liberty Homes who negotiated on behalf of Rochelle, that he would have taken note of a demand that the evidence be in the form of proof of available cash, a loan commitment, or letter or credit because none of this evidence could have been obtained from a bank within the 14 days allotted for its production. The letter, which Mr. Simon prepared for American on behalf of Rochelle, stated, "I would not expect having difficulty making acquisition and development loans [to Rochelle] in the future, barring something unforeseen in the economy.

(R. 235.)

The Court described this clause, in the context of "shared . . . experience and sophistication" of the parties, as referencing "credit lines held by Liberty and Rochelle and, while making allowance for predictable guarded banker rhetoric, painted a positive picture of Rochelle's financial strength." The Court also stated:

> The extrinsic evidence relating to the Financial Capability clause yields the conclusion that Rochelle reasonably interpreted the clause in a manner consistent with paragraph 7.2 of the Purchase Contract to the extent that it required evidence that First Security Bank make a commitment to loan Rochelle money "subject only to changes of conditions in the Buyer's credit worthiness and to normal loan closing procedures."

(R. 236.)

The Court further found that, not only did Alvarez not communicate to Jim Fairbourn or to Rochelle any details of his expectation of the language's meaning, he had "ample opportunity" to know how Rochelle interpreted it and could have remedied any misapprehension. But "[h]e nevertheless declined to provide any meaningful clarification of his interpretation for the benefit of Rochelle." (R. 235.) American Housing did not clarify its demands, seek further verification from the bank, or otherwise attempt to close a deal with Rochelle, which clearly had the ability to provide the full payment at closing. (R. 235.)

A second problem American Housing faces is its consistent urging that Alvarez did in fact specify the nature of what "evidence" he wanted, including cash on hand, letter of credit or firm bank commitment. In relying on Alvarez's testimony as to what the clause meant, American Housing tacitly acknowledges that the "financial capability" clause is not clear without explanation and does not otherwise support American Housing's interpretation which Alvarez said was "crystal clear." (R. 406: Tr. 535.) American Housing attempts to dodge the issue by urging that Fairbourn Commercial has some affirmative obligation to

make its own alternative interpretation of the clause. But the testimony at trial already specified American Housing's own interpretation, which the other parties to the transaction accepted, that the clause sought some evidence of Rochelle's ability to perform, (R. 233; R. 409: Tr. 264, 289, 312, 402), and a letter from a bank showing a willingness to lend. (R. 409: Tr. 270.)

Without evidence to support its position, American Housing, acknowledging that the trial court rejected American Housing's contract interpretation, fearlessly plunges ahead by urging that the so-called unambiguous phrase of "evidence of financial capability" should naturally be interpreted as "cash, letter of credit, or firm commitment." (Appellant's Brief at pp. 43-44). Appellant then further tries to demonstrate how crystal clear that language is by spending over 30 pages in its Brief of Appellant wrestling to justify its "clear" interpretation.

Any interpretation of this contract provision contrary to its express language depends upon credibility of testimony of the parties attending the meetings, including non-parties to this action. In making this determination, the trial court did not, and cannot be expected to, suspend reality and to ignore common sense. In context of the undisputed testimony in this case, the trial court found Alvarez's position as not being credible. Given the importance Clark placed on getting these lots for Liberty Homes' Spring inventory, (R. 408: Tr. 261), the trial court found it not credible to expect that Rochelle would have jeopardized the

contract by ignoring what Alvarez alleged was, from the beginning, a clearly understood and presented requirement of a letter of credit or other binding ability to close. Rochelle was under a short time period for due diligence, was expending money for that purpose, and was trying vigorously to comply with the contract obligations. The court found no credibility to the assumption that Rochelle, under the 14-day time restraints, would take lightly such a requirement allegedly so strongly emphasized by Alvarez. Further, the trial court found it not credible that the Rochelle people, highly experienced in property development and bank lending, would have accepted language requiring an impossible condition of letters of credit or other "enforceable commitment," because the banking business is not done that way. (R. 235.) Even Alvarez had no recollection that either he or American Housing had ever had a bank make that type of commitment on a yet-unsubdivided property. (R. 408: Tr. 99.) It is more credible that American Housing, aware of significantly greater profit opportunities, sought a convenient way out.

The language in question, written by Alvarez, is not the product of an incapable or incompetent draftsman. It is illustrative to compare the language and precision of the "financial capability" clause with the language of American Housing's counteroffer, all drafted by Alvarez at the same time. Scrutiny of the counteroffer, paragraph by paragraph, shows Alvarez carefully and specifically crafted the language of each paragraph to avoid ambiguity, including careful insertion of definitional terms. (R. 408: Tr. 67-73; Ex. No. 4.)

Given the specificity of that language, and the evidence of Alvarez's clear drafting ability, if Alvarez had intended to require a letter of credit, current cash on hand or a bank's binding commitment, he not only could, but would, have said so.

The trial court found that "financial capability" clause ambiguous because it gives "no guidance to either the quantity or quality of evidence" required. The trial court, in obvious reference to Mr. Alvarez's drafting ability, pointed out that this clause lacked the precision of "absolute assurance" language in paragraph 7.2 of the Purchase Contract, for which Alvarez insisted he was preparing a substitute. (R. 236.)

C. AMERICAN HOUSING'S SUBSEQUENT ACTIONS COUNTER AMERICAN HOUSING'S ASSERTED INTERPRETATION OF THE "FINANCIAL CAPABILITY CLAUSE"

Sufficient evidence was presented to the trial court as to why Alvarez would have no interest in clarifying such interpretation to permit closing of the Rochelle Contract. American Housing, prior to and during negotiation of the Rochelle Contract, had been faced with both the City's rejection of the property zoning and the termination of the Coon Group Contract. By the end of the 14-day period specified in the "financial capability" clause, American Housing had brought under contract an additional five acre parcel which, according to the "closed door" meeting with City council members, provided a comfort level of City approval, which indeed was finalized the following January. (R. 408: Tr. 161-162.) Moreover, the Coon Group Contract had been reinstated, with a closing date extended to December 1st. (Ex. No. 31.) Finally, with the pressure lightened, opportunity existed for

significantly greater profits if American Housing were now to develop and sell the lots. (R. 409: Tr. 219-222.) While the trial court did not find evidence of a preconceived deal with Leon Peterson before American Housing terminated the Rochelle Contract, Alvarez had developed additional familiarity with Leon Peterson, his adjacent development and the market generally. It was to American Housing's financial advantage to rid itself of the Rochelle Contract and either to develop and sell the paper lots itself or to enter into a new contract. Indeed, after all costs and fees, sale under the Peterson contract netted American Housing $266,000 more than the Rochelle Contract would have. (R. 408: Tr. 153-154.)

American Housing's further actions support the trial court's decision. It helps to examine Alvarez's own interpretation of the disputed language by seeing how he later applied similar "financial capability" language in the Peterson Contract. As found by the trial court, the Rochelle Contract contained no language granting American Housing the unfettered right to determine what is satisfactory "evidence" of Rochelle's financial capability. Shortly after the "termination" of the Rochelle Contract, American Housing inserted a "financial capability" clause in the Peterson Contract similar to the Rochelle Contract language but adding discretionary language as follows: "In the event Buyer is unable to provide evidence *acceptable to Seller in Seller's sole discretion*, Seller shall at its sole option cancel this Agreement." (Emphasis Supplied.) (Ex. No. 14.) Without American Housing facing any threats or pressure from Rochelle or Fairbourn Commercial, and while

this added language is not a model of specificity, this addition, drafted by Alvarez, tacitly acknowledged the ambiguity in the Rochelle Contract and recognized that the Rochelle Contract lacked even discretionary language to make American Housing the sole determiner of the sufficiency of the financial evidence.

As further support for the trial court's ruling, showing the nature of American Housing's intent as to evidence of a buyer's ability to perform, even after inserting discretionary language in the Peterson Contract, it is significant that Alvarez did not even bother to check Peterson's or KFP's credit. Instead, Alvarez was supposedly satisfied with a conditional letter, not precipitated by Peterson or American Housing, being far weaker and more conditional than the letters Rochelle had previously provided from First Security Bank. (Ex. No. 17.) Indeed, even with expressed discretion, Alvarez clearly intended and interpreted the contract language not to require more—or as much—evidence as Rochelle provided. American Housing's breach of the Rochelle Contract was not precipitated from concerns about Rochelle's financial ability but, rather, from an opportunity to net substantial profits through the Rochelle Contract "termination."

D. CONTRARY TO AMERICAN HOUSING'S ARGUMENT, FEW COURTS REQUIRE A BUYER TO HAVE CASH ON HAND TO PROVE ITS ABILITY TO PURCHASE

American Housing next attempts to argue that Rochelle was not an "able" buyer. Neither the Single Party Listing Agreement nor the Rochelle Contract reference a "ready, willing and able" buyer. But that fails to deter American Housing from continuing to cling

to its attempt to force the transaction into a "ready, willing and able" context on the assumption that this somehow will allow American Housing to avoid its judgment. But, nevertheless, American Housing further argues that, regardless of the letters from First Security Bank and the trial court's recognition of the commercial reasonableness of Rochelle's interpretation of the transaction between "experienced developers" (R. 237), Rochelle was not "able" to purchase in part because it did not show it had on hand the amount of cash for the purchase price or its equivalent.

American Housing cites *Winkelman v. Allen*, 519 P.2d 1377 (Kan. 1974), and *Shell Oil Co. v. Kapler*, 50 N.W.2d 707 (Minn. 1951), for the proposition that "the purchaser cannot show ability by depending upon third persons in no way bound to furnish the funds." However, *Shell*, cited with approval by *Winkelman*, states:

> Rules for testing a purchaser's financial ability to buy are not to be reduced to any unyielding formula, but must be flexible enough to accomplish their purpose according to the particular facts of each case. In ascertaining the rules reflected by an endless variety of cases, it is particularly important to bear in mind that no decision is authoritative beyond the scope of its controlling facts. Difficulty in both stating and applying the rules stems principally from a failure to keep in mind that their purpose—the protection of good-faith sellers as well as of bona fide purchasers, brokers and other persons similarly situated—is to establish a purchaser's financial ability to buy with reasonable certainty. A purchaser may not have the necessary cash in hand, but that alone, it is recognized, does not disqualify him if he is otherwise so situated that he is reasonably able to command the requisite cash at the required time. On the other hand, the seller is not required to part with his property to a purchaser whose financial ability rests upon nothing more than shoestring speculation or upon attractive

> probabilities which fall short of reasonable certainty. In short, the rules are designed to protect the seller by binding him to a sale only where there is a reasonable certainty of the purchaser's financial ability to pay and, on the other hand, to protect the purchaser—and persons similarly situated—from a technical, insubstantial, or sharp-dealing disqualification.

50 N.W.2d at 712.

Shell clearly is not a sterling case for American Housing's reliance, not only because of the above-quoted language, but because *Shell* involved a purchaser who had only $100 and no other assets and clearly was not "ready" or "able" to purchase. *Id.* at 713.

Winkelman might give stronger support to American Housing's argument–if the Court were looking only at the contract language and not at the other testimony and evidence which the trial court accepted in interpreting the meaning of the "financial capability" language. But, even at best, the court's position in *Winkelman* is clearly the minority position.

> Only a few courts have taken the position that a purchaser of real property is required to have the cash in hand to make the purchase in order to be considered financially able. Most of the courts have taken the contrary position, although several courts have recognized that possession of funds sufficient for the purchase of the property necessarily establishes financial ability to buy the property. In addition, the courts espousing the latter view have found that financial ability is indicated by possession of assets which will permit the purchase to take place. However, one court has stated that such possession is insufficient if a cash purchaser is required and the duration of time it will take to convert the assets into cash is uncertain.

Randy R. Koenderg, Annotation, *What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing, and Able Purchaser of Real Property*, 87 A.L.R. 4th 21 (1991) (citations omitted).

Generally, the courts, including *Shell*, relied on by American Housing, hold that resolution of the meaning of the term "financial ability" in individual cases depends upon the facts of those cases. In the context of a broker claiming a commission when a contract did not close, the majority of courts have held that where the purchaser had the ability to obtain a loan for the requisite amount, even though the loan was not obtained, the purchaser was still able to complete the purchase and the broker was entitled to a commission. *See, e.g., Sticht v. Shull*, 543 So.2d 395 (Fla. Dist. Ct. App. 1989); *Telander v. Posejpal*, 418 N.E.2d 444 (Ill. App. Ct. 1981); *Scott v. Cravaack*, 372 N.E.2d 1375 (Ohio Ct. App. 1977); *Record Realty, Inc. v. Hull*, 552 P.2d 191 (Wash. Ct. App. 1976); *Peter M. Chalik & Assoc. v. Hermes*, 201 N.W.2d 514 (Wis. 1972).

The trial court in this case resolved the factual issues through its examination of the evidence and the determination of witness credibility. The simple conclusion is that the Court determined that Rochelle complied with the Rochelle Contract, but American Housing did not.

E. THE TRIAL COURT, FINDING THAT THE "FINANCIAL CAPABILITY" CLAUSE WAS AMBIGUOUS, CORRECTLY INTERPRETED THE LANGUAGE MOST STRONGLY AGAINST AMERICAN HOUSING, THE DRAFTER OF THE AMBIGUOUS PROVISION

In the trial court proceeding, Alvarez argued that the Court should construe the clear language of the "financial capability" clause he drafted to include arbitrary and discretionary authority for American Housing to determine compliance with that section. The trial court rejected the argument, determining that because the language was ambiguous, "the general rule of contract interpretation [is] that ambiguous language is to be construed against the drafter." *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah 1996). The rule of construction should be applied where the contractual language is unclear and susceptible to more than one interpretation. *Bryant v. Deseret News Pub. Co.*, 233 P.2d 355, 356 (Utah 1951). The Court applied this rule of construction—that doubtful, ambiguous contractual terms should be interpreted against the drafter—to determine the parties' intent.

This Court has consistently held that ambiguities in contracts are construed against the drafter where there is genuine ambiguity or uncertainty in the language "upon which reasonable minds may differ as to the meaning." *Camp v. Deseret Mut. Benefit Ass'n*, 589 P.2d 780, 782 (Utah 1979) (citing *Auto Lease Co. v. Central Mut. Ins. Co.*, 7 Utah 2d 336, 325 P.2d 264 (1958)). The *Camp* Court said:

> That requirement is not satisfied because a party may get a different meaning by placing a force or strained construction on it in accordance

> with his interest. The test to be applied is: would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy. If so, the special rule of construction is obviously unnecessary.

Id.; United States Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 523 (Utah 1993).

The trial court, therefore, applied the applicable law by first finding that the contract language was ambiguous and susceptible to more than one meaning and then, in the interpretation, construing the language against the drafter.

F. AMERICAN HOUSING CANNOT, ON APPEAL, FOR THE FIRST TIME RAISE THE ARGUMENT THAT THE LISTING AGREEMENT WAS AMBIGUOUS

Further attempting to avoid the findings and judgment, American Housing now seeks to throw in a new issue, *i.e.,* that it is, says American Housing, the Single Party Listing Agreement that really was ambiguous and should therefore be construed against Fairbourn Commercial. This argument can readily be dispensed of:

1. American Housing never raised this issue in either the trial court or Court of Appeals. (*See, i.e.,* American Housing's Trial Brief, attached as Exhibit "B".) Accordingly, this may not now be raised by the first time. *See State v. Smith*, 866 P.2d 532, 533 (Utah 1993).

2. Even if the Single Party Listing Agreement were ambiguous, that agreement clearly provides that an earned commission was to be paid sometime, and certainly in no

event after closing. So American Housing's argument is nonsensical because American Housing made the issue moot by wrongfully preventing closing; and, as discussed thoroughly in Section I(A) above, American Housing cannot excuse and take advantage of its first breach even by complaining of a subsequent breach–let alone by trying find ambiguity in an agreement American Housing scorned.

G. AMERICAN HOUSING BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING INHERENT IN THE BOTH THE ROCHELLE CONTRACT AND, THEREFORE, IN THE LISTING AGREEMENT

The trial court in its findings recognized and resolved the reasonable expectations of the parties under the Rochelle Contract and in the context of "shared experience and sophistication in real estate development and financing." (R. at 235.) Inherent in the Rochelle transaction, as well as the listing agreement, is the requirement that American Housing deal fairly and in good faith. Inherent, also, in the trial court's ruling is that American Housing, by not clarifying what it meant in the "financial capability" clause, even after receiving the first bank letter, was not dealing in good faith (R. 237). Utah law recognizes the covenant of good faith and fair dealing implied in every contract. *See Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55-56 (Utah 1991); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985). "Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *St. Benedict's*

Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991) (citing *Bastian v. Cedar Hills Inv. & Land Co.*, 632 P.2d 818, 821 (Utah 1981)). To comply with the covenant of good faith and fair dealing, "a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party." *Id.* at 200 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). To comply with the covenant of good faith and fair dealing, a party's actions "must be consistent with the agreed common purpose and the justified expectations of the other party." *Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 2001 Utah App 128, ¶ 22, 26 P.3d 872 (citations omitted). In analyzing compliance, the contract language and the course of dealings between the parties should be considered to determine the parties' purpose, intentions, and expectations. *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876.

American Housing argues that its alleged discretion under the "financial capability" clause trumps such considerations. But a party's possession of discretionary rights itself creates an obligation and justifies scrutiny, under good faith and fair dealing principles, as to the manner of the exercise of the discretion. In *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 450 (Utah Ct. App. 1994), *cert denied*, 899 P.2d 1231 (Utah 1995) the Utah Court of Appeals held that parties who retain express power of discretion under a contract may exercise that power in such a way to breach the covenant of good faith and fair dealing. Since parties cannot reduce every understanding to

an express contractual term, the Court recognized that circumstances arise where one party may exercise its contractual discretion in a way that denies the other party the reasonably expected benefit of the bargain. Indeed a party to a contract may exercise a retained contractual power in bad faith. *Id.* at 450, 451 (citing *Resource Management Co. v. Weston Ranch & Livestock Co.,* 706 P.2d 1028, 1037 (Utah 1985)); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 311 (Utah 1982); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 138-39 (Utah Ct. App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1992). Clearly, even if the "financial capability" clause contained express discretion, as is American Housing's position, American Housing cannot ignore the covenant of good faith and fair dealing through its exercise of such discretion. American Housing breached the covenant of good faith and fair dealing by canceling the Rochelle Contract without good cause and selling the property to another party for considerably more profit and, in turn, attempting to avoid the legitimate claims of Fairbourn Commercial.

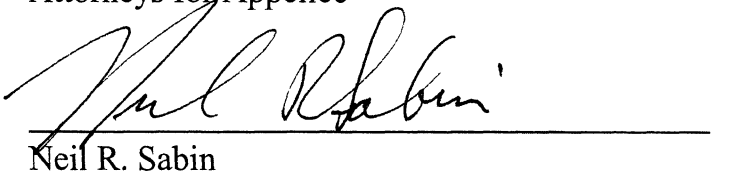
CONCLUSION

The Court of Appeals decision was correct in applying the *Bushnell* case. It is also correct, and a legitimate alternative to affirmance, that this Court give deference to the trial court's hearing of testimony, determining credibility of witnesses, and applying appropriate legal and ethical considerations, and affirm that American Housing breached its agreements

and should not be entitled to profit thereby. The Court of Appeals decision should be affirmed.

Respectfully submitted this 16th day of September, 2003.

NIELSEN & SENIOR, P.C.
Attorneys for Appellee



Neil R. Sabin

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the Brief of Appellee were mailed via first-class mail, postage prepaid, on the 16th day of September, 2003, addressed as follows:

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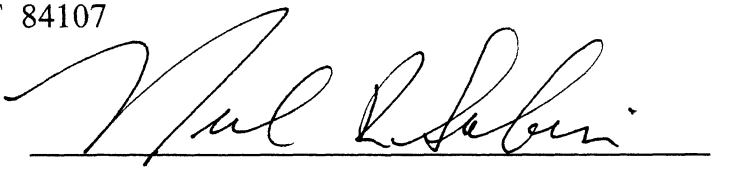

Tab A

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

FAIRBOURN COMMERCIAL, INC , a Utah corporation, Plaintiff and Appellee, v. AMERICAN HOUSING PARTNERS, INC., a Delaware corporation, Defendant and Appellant.	**BRIEF OF APPELLEE** Case No. 20020060-CA Priority No. 15

APPEAL FROM THE JUDGMENT OF THE HONORABLE RONALD E. NEHRING, THIRD DISTRICT COURT, ENTERED NOVEMBER 28, 2001

APPELLEE'S OPPOSITION TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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The trial court, therefore, applied the applicable law by first finding that the contract language was ambiguous and susceptible to more than one meaning and then, in the interpretation, construing the language against the drafter.

C. WHEN BOTH PARTIES SIGNED THE ROCHELLE CONTRACT, FAIRBOURN HAD SATISFIED THE CONDITIONS TO EARN ITS COMMISSION

No issue exists that upon the closing of the Rochelle Contract, which the Court found American had wrongfully terminated, Fairbourn Commercial would have been entitled to payment of its commission. (R. 408; Tr. 90.) Indeed, the Appellant acknowledges that. The Appellant, though, sets forth the imaginative argument that, since the Listing Agreement provides for payment of the commission at closing, American somehow defeated the commission claim when it terminated the Rochelle Contract and prevented the closing thereof.

Even if Rochelle had not complied with the provisions of the "financial capability" clause of the contract (which, of course, Rochelle complied with), Fairbourn still would be entitled to a commission from American. The general rule in Utah is that, without a contract provision that conditions the right to a commission upon the buyer's performance, an agent earns a commission upon procuring a buyer who is willing and able, and accepted by the seller. In *Bushnell Real Estate v. Nielson*, 672 P.2d 746, 751 (Utah 1983), the Court stated:

> . . . Absent a contractual provision, which conditions the right to a commission on the performance of the buyer, the general rule accepted in Utah is that a broker has earned his commission upon the procuring

> of a buyer who is ready, willing and able, and who is accepted by the seller. The broker is not an insurer of the subsequent performance of the contract and is not deprived of his right to a commission by the failure or refusal of the buyer to perform. *See e.g., F.M.A. Financial Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670 (1965). This is the rule followed in a majority of jurisdictions. The defendants cite *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843 (N.J. 1967), as authority for the proposition that notwithstanding the clarity of the documents in imposing an unconditional liability for broker's fees there should be an implied condition in the note setting up a waiver of fees if the buyer defaults before completion of the transaction. This is a minority rule contrary to the decision in *F.M.A. Financial Corp. v. Build, Inc.*, and is factually distinguishable in that the *Ellsworth Dobbs* decision involved inequality of bargaining power. In the instant case, the parties dealt voluntarily and in a commercial setting. . . .

American claims that it does not owe Fairbourn a commission because American did not proceed to close on the purchase contract. However, the sole reason the closing did not occur was because American's breach of both its Listing Agreement with Fairbourn and its Real Estate Purchase Contract with Rochelle. "[A] party who commits the first breach of contract cannot maintain an action against the other for a subsequent failure to perform." *Lynch v. MacDonald*, 12 Utah 2d 427, 367 P.2d 464, 469 (1962). American cannot point to the fact that closing did not occur in order to relieve itself of liability for failing to pay Fairbourn its entitled commission when the sole reason closing did not occur was because of American's own breach of the Rochelle Agreement. But for American's breach, American would have sold the property to Rochelle.

Tab B

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

FAIRBOURN COMMERCIAL, INC., a Utah corporation, Plaintiff, vs. AMERICAN HOUSING PARTNERS, INC., a Delaware corporation, and ARMANDO J. ALVAREZ, an individual, Defendants.	**TRIAL BRIEF** CIVIL NO. 000902534 JUDGE RONALD E. NEHRING
RTS PROPERTIES, INC., a Utah corporation, Plaintiff, vs. FAIRBOURN COMMERCIAL, INC., a Utah corporation, Defendant.	Civil No. 000906546

Defendants American Housing Partners, Inc. ("American") and Armando J. Alvarez ("Mr. Alvarez") (together "Defendants"), by and through their attorney, respectfully submit

this Trial Brief in support of their defenses against the claims of Plaintiff Fairbourn Commercial, Inc. ("Fairbourn").

FACTS

1. On September 9, 1998, American entered into a Real Estate Purchase Agreement with the then owners (the "Owners") of the subject property which included numerous contingencies regarding the closing of the purchasing including modification of the zoning of the subject property for development (the "American Agreement").

2. American negotiated extensions of the closing date on the American Agreement numerous times with the Owners in order to allow American time to obtain zoning and subdivision approval for the subject property.

3. On July 27, 1999, the Owners notified American in writing of the termination of the American Agreement due to American's failure to satisfy the contingencies.

4. On July 31, 1999, the Owners demanded release of American's earnest money deposit under the American Agreement because of American's failure to perform under the American Agreement.

5. On or about August 13, 1999, Fairbourn and American entered into a Single Party Listing and Sale Agreement (the "Listing Agreement") whereby Fairbourn was to procure and present an offer from Rochelle Properties, LC ("Rochelle") to purchase the subject property contingent, among other matters, upon obtaining final subdivision plat approval.

6. The Listing Agreement states that the Rochelle offer was to include the term "Cash at Closing."

7. The Listing Agreement further states that American's payment of commission to Fairbourn is conditioned on the offer of Rochelle being "at the price and upon the terms and conditions set forth herein, or at any other price or upon any other terms or conditions acceptable to" American due when the sale is "consummated".

8. The Listing Agreement also states that in the case of Fairbourn's employment of an attorney to enforce the terms of the Listing Agreement, American agrees "to pay a reasonable attorneys's fee and all costs of collection."

9. On or about August 13, 1999, Fairbourn presented an offer from Rochelle Properties, L.C., to purchase the property within 60 days after subdivision approval and contingent upon other considerations. Financing was not a contingency.

10. American rejected the offer without counteroffer.

11. On August 23, 1999, American negotiated a new extension of the American Agreement with the Owners requiring that the sale close on or before December 1, 1999.

12. On August 16, 1999, Fairbourn presented another offer by Rochelle to purchase the property. On or about August 30, 1999, American and Rochelle entered into an enforceable sales contract for the subject property consisting of the form Real Estate Purchase Contract and a Counteroffer/Addendum prepared by Armando Alvarez (together the "Purchase Agreement").

13. The Purchase Agreement was for a cash purchase of the subject property and $2,272,000 payable "in cash at closing" and no contingency for Rochelle to obtain acceptable financing.

14. Paragraph 3 of the Addendum to the Purchase Agreement states:

> Within Fourteen days after execution of this Agreement by both parties, [Rochelle] shall supply [American] with evidence of financial capability to

> close on the Property within the time frame referenced above [14 days from final site plan approval]. In the event [Rochelle] is unable to provide said evidence, [American] shall at its sole option cancel this Agreement and neither party shall have any further obligation to the other.

15. American required a cash purchase of the subject property due to the rapidly approaching closing deadline of the American Agreement.

16. On or about September 10, 1999, Rochelle provided American with a letter from First Security Bank which stated that First Security Bank "would not expect having difficulty making acquisition and development loans in the future" to Rochelle but noting that "[a]n acquisition and development loan would be subject to committee approval."

17. When American indicated that the First Security Bank letter was not sufficient evidence of financial capability of a cash closing, on or about September 17, 1999, Rochelle provided American a second letter from First Security Bank which again stated that such a loan to Rochelle "would be contingent upon the acquisition and development loan receiving committee approval."

18. Finding the second First Security Bank letter unacceptable as evidence of financial capability of a cash closing due to the contingency of committee approval, American canceled the Purchase Agreement with Rochelle by letter dated September 21, 1999.

19. Rochelle requested and received a return of its earnest money on September 23, 1999.

20. On October 29, 1999, American entered into a Real Estate Purchase Agreement with Leon Peterson ("Mr. Peterson") regarding the subject property (the "Peterson Agreement"), based upon an offer first made on October 13, 1999.

21. American had no negotiations regarding the subject property with Mr. Peterson prior to American's termination of the Purchase Agreement with Rochelle.

22. Because American's negotiations with Mr. Peterson occurred after and independently of its negotiations with Rochelle, the terms of the Peterson Agreement were substantively different than the Purchase Agreement.

23. On November 30, 1999, American negotiated another extension of the closing date of the subject property with the Owners.

24. Beginning January 10, 2000, American commenced closing with the Owners and finally closed on January 21, 2000.

25. On March 28, 2000, Fairbourn filed the Complaint against Defendants in this action claiming breach of contract by Defendants and breach of broker standards(including treble damages) and tortious interference with economic relations by Mr. Alvarez.

26. Rochelle has brought no action against neither American nor Mr. Alvarez seeking specific performance of the Purchase Agreement or any other remedy.

ARGUMENT

I. THE PURCHASE AGREEMENT IS UNAMBIGUOUS AND RIGHTFULLY TERMINATED BY AMERICAN.

The Purchase Agreement language is unambiguous and American rightfully terminated the same. Fairbourn's argues that because the Purchase Agreement between American and Rochelle contained the language that Rochelle was to provide "evidence of financial capability to close" on the Property within fourteen days of the date of the Purchase Agreement without precisely defining what would suffice as such evidence, that such language is ambiguous and should be construed against American as drafter of the Purchase Agreement. However, when Paragraph 3 of the Addendum is read in

conjunction with the language of Paragraph 2 of the body of the Purchase Agreement, which does not make the Purchase Agreement contingent upon Rochelle obtaining financing, it is clear that the a cash purchase is intended rather than a purchase contingent upon approved financing. Furthermore, "a contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does [, t]o demonstrate ambiguity, the contrary positions of the parties must each be tenable." R & R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1074 (Utah 1997) (citation omitted).

Rochelle attempted to provide evidence of its financial capability to close on the Property with two letters from First Security Bank that both stated that any purchase and development loans to Rochelle were contingent upon "receiving committee approval" and other considerations. (Complaint ¶¶ 21 and 22; Exhibits "D" and "E" of Complaint.) American did not accept the letters as sufficient evidence of Rochelle's financial capability to close on the Property because such representations were contingent upon factors outside Rochelle's control (bank committee approval). Such a decision was consistent with the plain language of the Purchase Agreement that was not contingent upon Rochelle obtaining financing and Rochelle's failure to show its ability to close within fourteen days of final site approval.

II. AMERICAN TERMINATED THE PURCHASE AGREEMENT IN GOOD FAITH.

American was well within its contractual rights to determine that the letters from First Security Bank were not sufficient evidence of Rochelle's financial ability to close on the purchase of the subject property. As indicated in the Listing Agreement with Fairbourn, the contemplated purchase was to be paid in cash and the sale was subject to terms that met

with American's approval. The Purchase Agreement was terminated pursuant to its terms, the sale for which Fairbourn was to receive commission under the Listing Agreement was not consummated, and Fairbourn does not have a basis for relief against American for breach of the Listing Agreement.

The only act of bad faith of Defendants that Fairbourn claims in this action is that American terminated the Purchase Agreement not because Rochelle failed to provide evidence of financial ability of closing but because American had located a new buyer, Mr. Peterson, that would pay more for the subject property. However, evidence at trial will clearly show that American and Mr. Peterson did not commence negotiations until after American had terminated the Purchase Agreement. Absent a buyer offering more money for the subject property, the only incentive for American to terminate the Purchase Agreement was that Rochelle failed to provide evidence that it could close a cash sale.

III. IF THE PURCHASE AGREEMENT IS AMBIGUOUS, PAROL EVIDENCE SHOWS THAT THE INTENT OF THE PARTIES WAS A CASH PURCHASE.

Should this Court rule that the Purchase Agreement is ambiguous, then parol evidence regarding the meaning of the subject language shows that American and Rochelle intended to negotiate a Purchase Agreement which requires that the buyer have the current ability to perform without a need for new financing. American was under pressure from the Owners to satisfy the contingencies of the American Agreement and close the sale of the subject property. When American entered into the Listing Agreement with Fairbourn, the Listing Agreement expressly stated that the sale to Rochelle would be paid "Cash at Closing." "Evidence of financial ability to close" was to be current evidence of cash or ability to perform and not of a loan contingent on lender approval outside the control of Rochelle.

IV. MR. ALVAREZ IS NOT LIABLE TO FAIRBOURN UNDER SECTION 61-2-17 OF THE UTAH CODE ANNOTATED.

Mr. Alvarez is not liable to Fairbourn under Section 61-2-17 of the Utah Code Annotated as claimed by Fairbourn. Said section provides for recovery by aggrieved persons of commission or profit obtained by licensed brokers or agents in in violation of the Utah statute and rules regulating real estate brokers and agents. Though Mr. Alvarez was a licensed broker, he was not acting as a broker regarding any of the contracts in this matter and received no commissions. Fairbourn's claims are based on the false premise that American and Mr. Alvarez are interchangeable parties and any benefit to American should be deemed a benefit to Mr. Alvarez personally. However, Mr. Alvarez is an employee of American and was fulfilling his duties as such in the negotiation of the Purchase Agreement and Listing Agreement. Plaintiff's witness acknowledges that Mr. Alvarez was not acting as a broker in this transaction. Mr. Alvarez does own a minority interest in American, but in light of the numerous properties owned and developed by American, the claimed benefit to Mr. Alvarez by American entering into the Peterson Agreement is nominal.

Furthermore, the only substantive rules or statutes that Fairbourn argues that Mr. Alvarez violated are Rules 162-6.1.6 and 162-6.1.8 of the Utah Administrative Code. Rule 162-6.1.6 states:

> In order to avoid subjecting the seller to paying double commissions, licensees must not sell listed properties other than through the listing broker. A licensee shall not subject a principal to paying a double commission without the principal's informed consent.

This Rule specifies that it is for the protection of his principal, not a complaining broker. As noted above, Mr. Alvarez was acting as an employee and not a broker in this

matter. By definition the "principal," American, had informed consent from Mr. Alvarez in terminating the Purchase Agreement and entering into the Peterson Agreement regarding the subject property. Furthermore, the Listing Agreement with Fairbourn was limited to Rochelle--no other purchaser of the subject property would entitle Fairbourn to commission.

Rule 162-6.1.8 of the Utah Administrative Code states:

> No licensee shall engage in any of the practices described in Section 61-2-2, et seq., whether acting as agent or on his own account, in a manner which fails to conform with accepted standards of the real estate sale, leasing or management industries and which could jeopardize the public health, safety, or welfare and includes the violation of any provision of Section 61-2-2, et seq. or the rules of his chapter.

Fairbourn must show that in addition to a violation of the accepted standard of real estate sales, Mr. Alvarez's conduct could have jeopardized the public health, safety, or welfare. Fairbourn's claim that Mr. Alvarez's conduct rises to this level must fail given that his greatest offense would be the misinterpretation of a contract provision, which Fairbourn itself argues is ambiguous. Evidence at trial will show that Mr. Alvarez's actions in this matter were in good faith and without the fraud, deceit, or public endangerment that would allow Fairbourn recovery under Section 61-2-17 of the Utah Code Annotated. Furthermore, evidence at trial will show that Fairbourn's sole basis for its claim of bad faith, that Defendants had found a higher offer to purchase the subject property, is baseless. American did not commence negotiations with Mr. Peterson until after it had terminated the Purchase Agreement.

V. PLAINTIFF'S CLAIM OF INTENTIONAL INTERFERENCE IS WITHOUT MERIT

Plaintiff claims that Armando Alvarez, as an individual, by canceling the contract between American and Rochelle in his role as agent for American, intentionally interfered with the contract between American and Rochelle. It is obvious that Mr. Alvarez neither preformed any acts independent of American or that he acted with improper notice or by improper means. Leigh Furniture v. Isom, 657 P.2d 293, 304 (Utah 1982).

VI. DEFENDANTS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS IN DEFENDING AGAINST THIS ACTION

Though the Listing Agreement provides that only Fairbourn is entitled to attorney's fees and costs in enforcing the Listing Agreement, pursuant to Utah Code Annotated Section 78-27-56.5, a court may award costs and attorney's fees to either party that prevails in a civil action when the provisions of the contract allow at least one party to recover attorney's fees. Defendants request that this Court award them their attorney's fees and costs in defending against Fairbourn's claims in this matter.

CONCLUSION

For the foregoing reasons, Fairbourn has failed in the every theory to establish a claim against Defendants. Both factually and as a matter of law, Defendants are entitled to the judgment of this Court that American rightfully terminated the Purchase Agreement and that Defendants be awarded their attorney's fees and costs in defending against Fairbourn's claims in this matter.

DATED this 6 day of August, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **TRIAL BRIEF** in Civil No. 000902534 PI was hand delivered in court on the 6 day of August, 2001, to the following:

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