

1-26-2010

# Wakelam v. Hagood Clerk's Record v. 2 Dckt. 36940

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LAW CLERK

(VOLUME II)

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

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LAW CLERK

**JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
M&M RE Holdings,**

**Plaintiffs-Appellants,**

**-vs-**

**SEE AUGMENTATION RECORD**

**THOMAS A. HAGOOD, an unmarried man,**

**Defendant-Third Party Plaintiff-  
Respondent,**

**And**

**BULLOCK AND COMPANY REALTORS  
LLC., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and LARRY DOWNS,  
an individual,**

**Defendants-Third Party Defendants-  
Respondents.**

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Appealed from the District of the Third Judicial District  
for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

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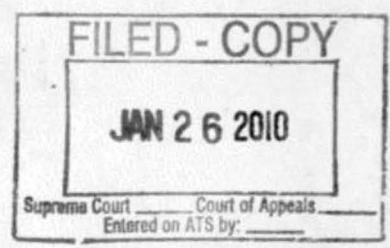
Thomas E. Dvorak & Angela M. Reed  
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Attorneys for Appellants

Jay Gustavsen & Alex P. McLaughlin  
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Boise, Idaho 83701

Attorneys for Respondent (Hagood)

---



36940

IN THE SUPREME COURT OF THE  
STATE OF IDAHO

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
M&M RE Holdings,

Plaintiffs-Appellants,

-vs-

THOMAS A. HAGOOD, an unmarried man,

Defendant-Third Party Plaintiff-  
Respondent,

And

BULLOCK AND COMPANY REALTORS LLC.,  
an Idaho limited liability company, SCOTT  
BULLOCK, an individual, BILL DOWNS  
AUCTION SERVICE INC., an Idaho  
corporation, and LARRY DOWNS, an  
individual,

Defendants-Third Party Defendants-  
Respondents.

Supreme Court No. 36940

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE RENAE J. HOFF, Presiding

Thomas E. Dvorak and Angela M. Reed, GIVENS PURSLEY LLP.,  
P. O. Box 2720, Boise, Idaho 83701-2720

Attorneys for Appellants

Jay Gustavsen and Alex P. McLaughlin, DAVISON COPPLE COPPLE & COPPLE,  
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*FW* FILED A.M. P.M.

NOV 12 2008

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Attorneys for Defendant  
 Thomas A. Hagood

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE )  
 RESSLER, an individual doing business as )  
 "M&M RE Holdings", )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 THOMAS A. HAGOOD, an unmarried man, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. CV 08-8465

**DEFENDANT'S OPPOSITION  
 TO PLAINTIFF'S MOTION  
 FOR SUMMARY JUDGMENT**

\*\*\*

COME NOW the Defendant Thomas A. Hagood, by and through his attorneys of record,  
 Davison, Copple, Copple & Cox of Boise, Idaho and hereby submits the foregoing Opposition to  
 Plaintiff's Motion for Summary Judgment filed on or about October 18, 2008.

### SUMMARY

Plaintiff is not entitled to Summary Judgment on the following grounds:

1. Plaintiff failed to establish that they are entitled to Judgment as a matter of law; and
2. The Statute of Frauds applies to auction sales pertaining to real property; and
3. Defendant is entitled to Partial Summary Judgment as a matter of law because the undisputed facts in this case show that the Statute of Frauds cannot be satisfied under I.C. § 9-505 (4).

### DISCUSSION

This Court should deny Plaintiff's Motion for Summary Judgment because the undisputed facts in this matter do not entitle the Plaintiff's a Judgment as a matter of law.

#### A. Standard of Review

##### **A. Standard of Review for Summary Judgment.**

Idaho Rule of Civil Procedure 56(c) provides that when a Motion for Summary Judgment is filed: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IDAHO R. CIV. P. 56(c).

The moving party bears the burden of showing the absence of a genuine issue of material fact. *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590, 887 P.2d 1094, 1097 (Ct. App. 1994). Facts on summary judgment must be liberally construed in favor of the party opposing the motion, and that party is to be accorded the benefit of all favorable inferences which might reasonably be

drawn from the evidence. *Sewell v. Neilsen, Monroe, Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1995). The Court must look to the “totality of the motions, affidavits, depositions, pleadings, and attached exhibits,” not merely to portions of the record in isolation. *Doe v. Durtschi*, 110 Idaho 466, 469-70, 716 P.2d 1238, 1241-42 (1986). If the record contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, then there is a genuine issue of material fact and summary judgment cannot be granted. *Hayward v. Jack's Pharmacy Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005). Circumstantial evidence can create a genuine issue of material fact. *Durtschi*, 110 Idaho at 469-70, 716 P.2d at 1241-42. All doubts are to be resolved against the moving party. *Id.* at 469-70.

**B. Statute of Frauds**

The Defendant in this case entered into an Exclusive Seller Representation Agreement with Bullock and Realtors wherein Bullock and/or Realtors agreed to attempt to sell three parcels of his property located at 4104 Garrity, 1010 North 39<sup>th</sup> and 1019 North 39<sup>th</sup> Street in Canyon County, Idaho.

Defendant never intended to sell his properties for less than two million dollars and he repeatedly made this intention clear to all of the Third Party Defendants. In addition, Defendant never wanted his properties to be sold with no reserve and he repeatedly made this intention clear to all of the Third Party Defendants. The Third Party Defendants ignored the wishes of the Defendant and persuaded him to list his properties with no reserve. The Third Party Defendants assured the Defendant that his properties would not sell for less than two million dollars.



Idaho Code 9-505 states: In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

The Statute of Frauds is applicable to this case. The seller in this matter is an elderly gentleman who was pressured into putting up his land for auction with a supposed "no reserve" clause without knowing the true ramifications of such actions. The Third Party Defendants all exerted pressure upon the Defendant to sell his land without reserve while at the same time assuring him that the property would sell for more than his desired price. The Defendant relied on these assurances and the expertise of these Third Party Defendants in thinking that his property would sell for no less than two million dollars.

In this instance there was an auction but there was no agreement to sell signed by the Defendant or an agent who had authority to execute.

Idaho has not squarely addressed whether or not the Statute of Frauds applies to auction sales of real property. That being said, the majority (if not overwhelming majority) rule is that auction sales of real property are within the provisions of the Statute of Frauds. See *Couture v. Lowery*, 168 A.2d 295, 300 (Vt. App. 1961) ("Present-day authorities universally agree that sales

by auction, unless expressly exempted, are within the provisions of the Statute of Frauds”); *See also Polka v. May*, 118 A.2d 154, 156 (Pa. 1955) (“Unfortunately for plaintiff, however, this does not afford him any relief, because it is universally held that sales by auction are within the provisions of the statute of frauds to the same extent as any other sale or contract of sale relating to land”); *See also Sachs v. Blewett*, 185 N.E. 856, 857 (Ind. 1933) (“Modern authorities universally agree that sales by auction are within the statute of frauds unless expressly exempted by the statute”); *See also Young v. Hefston*, 173 P.3d 671, 681 (Kan. App. 2007) (“A sale of land at auction is within the statute of frauds to the same extent as any other sale or contract of sale relating to land”); *See also Cunningham v. Lester*, 138 S.W.3d 877, 879 (Tenn. Ct. App. 2003) (We begin our analysis with the proposition that auction sales of real property are within the provisions of the statute of frauds); *See also Schwinn v. Griffith*, 303 N.W.2d 258, 261 (Minn. 1981) (Statute of frauds pertaining to contract of sell real estate applies to auction sale); *See also Benson v. Ruggles*, 303 N.W.2d 496, 500 (Neb. 1981) (Auction of real estate without reserve is within statute of frauds); *See also Shaffer v. Hines*, 573 S.W.2d 420, 422 (Mo. App. 1992); *See also Del Rio Land, Inc. v. Haumont*, 574 P.2d 469, 472 (Ariz. App. 1997) (“Here, the trial judge expressly found that ‘the Statute of Frauds applies to auctions of land such as the one here in question.’ This conclusion is undoubtedly correct”); *See also Pierce v. Rush*, 82 S.E.2d 649, 650 (Ga. 1955) (Sales of land by auctioneers are within statute of frauds); *See also Watkins v. Briggs*, 50 N.E.2d 64, 67 (“Doubtless the purchase by the petitioner at the auction sale was a contract within the statute of frauds”); *See also Am.Jur 2d Auctions and Auctioneers* § 37 (2007).

The cases *Benson v. Ruggles* and *Del Rio Land, Inc. v. Haumont* are directly on point; each

case provides instructive illustrations as to the applicability of the above rule; additionally, each case is factually similar to the instant matter.

In *Benson*, two (2) tracts of land were sold at public auction. *Benson*, 303 N.W.2d at 498. The owner of one of the tracks (Benson) was present at the auction. *Id.* After the auction, the purchasers filed a document for recording in the Deed's office. *Id.* at 499. Thereafter, Benson applied for a loan and the document was discovered in the real estate records. *Id.* He then sued the purchasers for quiet title to the real estate. *Id.* The purchasers counterclaimed, filing a suit for specific performance and damages. *Id.* Benson asserted a defense of Statute of Frauds. *Id.* In siding with Benson on the issue, the Court stated simply that: "There is no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds." *Id.* at 500.

In *Del Rio Land, Inc*, the Arizona Court of Appeals also addressed the issue of whether or not the Statute of Frauds applied to auctions for the sale of realty. *Del Rio Land, Inc. v. Haumont*, 574 P.2d at 471. The seller in *Del Rio Land, Inc* was a family corporation that decided to sell the real property and equipment of the corporation. The company chose to sell their property by auction. The auction was arranged and an agreement between the seller and the auctioneer provided that the land would be sold 'subject only to the existing mortgage. The seller contended that the original listing with the auctioneer was for a certain price per acre and at the discretion of the owners. The property was sold at auction for less than the price that the Seller's believed they were selling their property for and refused to sign the purchase and sale agreement; the buyers sued for specific performance and the sellers asserted a defense of Statute of Frauds. In siding with the

buyers, the Court stated the following: "The trial judge expressly found that 'the Statute of Frauds applies to auctions of land such as the one here in question.' This conclusion is undoubtedly correct." *Id.* at 472.

In the present case, there is little doubt that the sale of Mr. Hagood's property at auction falls under the ambit of the Statute of Frauds. The following reasons substantiate this contention.

*First*, the overwhelming majority of case law holds that auction sales of real property fall under the Statute of Frauds. The present litigation involves precisely a sale of real property at an auction. In light of the majority rule, the Statute of Frauds applies.

*Second*, the facts in the instant matter bear great similarity to the facts in *Benson* and *Del Rio Land, Inc*, wherein the courts found that the statute of frauds applied and was not satisfied. As in those cases, the present matter involves an auction, the subject matter of which is real property and purchasers attempting to sue for specific performance of that property. Inasmuch as the facts of those cases are similar to those in the instant case, the holdings therein should apply as well.

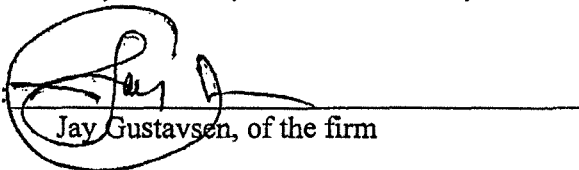
### CONCLUSION

The Defendant respectfully requests that this Court deny Plaintiff's Motion for Summary Judgment. The undisputed facts in this matter do not entitle the Plaintiff's a Judgment as a matter of law.

DATED this 11<sup>th</sup> day of November, 2008.

DAVISON, COPPLE, COPPLE & COX, LLP

By:

  
Jay Gustavsen, of the firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11<sup>th</sup> day of November, 2008, a true and correct copy of the foregoing was served upon the following by the method indicated below:

Tom Dvorack  
Givens Pursley, LLP  
601 W. Bannock St.  
P.O. Box 2720  
Boise, Idaho 83701

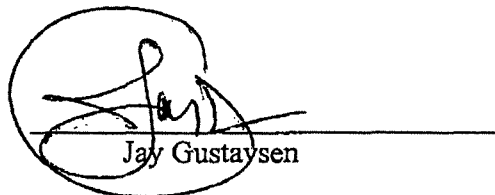
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**FILED**  
 8:40 A.M. 11:00 P.M.

NOV 12 2008

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOHN WAKELUM, an individual; and )  
 MIKE RESSLER, an individual doing )  
 Business as "M&M RE Holdings", )  
 )  
 Plaintiffs, )

Case No.: CV-08-08-8465

vs. )

THOMAS A. HAGOOD, an unmarried man,) )  
 )  
 Defendant. )

**AFFIDAVIT OF THOMAS A.  
 HAGOOD IN SUPPORT OF  
 DEFENDANT'S OPPOSITION TO  
 PLAINTIFF'S MOTION FOR  
 SUMMARY JUDGMENT**

THOMAS A. HAGOOD, an unmarried man,) )  
 )  
 Third Party Plaintiff, )

vs. )

BULLOCK AND COMPANY REALTORS )  
 L.L.C., an Idaho Limited Liability Company,) )  
 SCOTT BULLOCK, an individual, )

AFFIDAVIT OF THOMAS A. HAGOOD IN SUPPORT OF DEFENDANT'S  
 OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT -1

BILL DOWNS AUCTION SERVICE INC., )  
 An Idaho Corporation, and Scot Bullock, an )  
 Individual and LARRY DOWNS, )  
 an individual )  
 )  
 )  
 Third Party Defendants. )  
 \_\_\_\_\_ )

THOMAS A. HAGOOD, being first duly sworn upon oath, deposes and states:

1. I am the Defendant in the above entitled matter and make this affidavit in support the motion filed concurrently herewith.
2. I entered into an Exclusive Seller Representation Agreement with Bullock and Realtors wherein they agreed to attempt to sell three parcels of mine located at 4104 Garrity, 1010 North 39<sup>th</sup> and 1019 North 39<sup>th</sup> Street in Canyon County, Idaho.
3. I never intended to sell my properties for less than two million dollars.
4. On numerous occasions I expressed this reservation with my agent repeatedly and made this intention clear to all of the Third Party Defendants.
5. I am very unfamiliar with the auction process and the meaning of the various terms that were being relayed to me through my agent. I never wanted my properties to be sold with no reserve and I repeatedly made this intention clear to all of the Third Party Defendants. The Third Party Defendants assured me that my properties would not sell for less than two million dollars. They also expressed that if I put a reserve price on the sale that they would not sell for my desired price. I did not understand what the Third Party Defendants were talking about and I relied on their assurances and their expertise in the field of real estate and auctions that my properties would not sell for less than my desired price

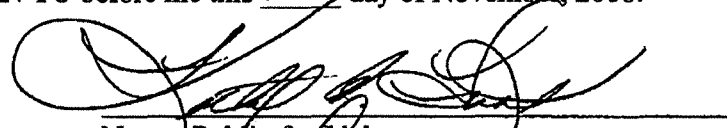
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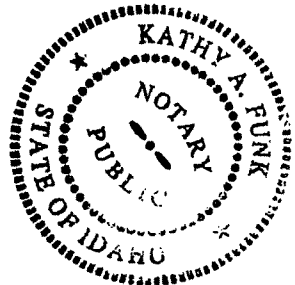
- 6. I attended the auction of my properties and the Third Party Defendants attempted to sell my properties for less than agreed upon minimum amount of two million dollars. I did not understand how this could have happened after they had assured me that they would sell for more than two million dollars. I was very upset and refused to sign a purchase and sale agreement for my properties because I never had any intention to sell them for less than two million dollars.
- 7. I have not signed any documents agreeing to sell the property to the Plaintiffs nor have I executed a Power of Attorney to any third person authorizing them to enter into such an agreement.

DATE this 10<sup>th</sup> day of November, 2008.

  
 THOMAS HAGOOD

SUBSCRIBED AND SWORN TO before me this 10<sup>th</sup> day of November, 2008.

  
 Notary Public for Idaho  
 Residing at Spencer Idaho  
 My Commission Expires 12/14/11





CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11<sup>th</sup> day of November, 2008, a true and correct copy of the foregoing was served upon the following by the method indicated below:

Tom Dvorack  
Givens Pursley, LLP  
601 W. Bannock St.  
P.O. Box 2720  
Boise, Idaho 83701

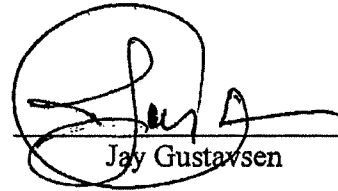
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**FILED**  
 A.M. P.M.

NOV 12 2008 ✓

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOHN WAKELUM, an individual; and )  
 MIKE RESSLER, an individual doing )  
 Business as "M&M RE Holdings", )  
 )  
 Plaintiffs, )

Case No.: CV 08-8465

vs. )

THOMAS A. HAGOOD, an unmarried man,) )  
 )  
 Defendant. )

**DEFENDANT'S MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

\_\_\_\_\_  
 THOMAS A. HAGOOD, an unmarried man,) )  
 )  
 Third Party Plaintiff, )

vs. )

BULLOCK AND COMPANY REALTORS )

L.L.C., an Idaho Limited Liability Company,)
 SCOTT BULLOCK, an individual, )
 BILL DOWNS AUCTION SERVICE INC.,)
 An Idaho Corporation, and Scot Bullock, an )
 Individual and LARRY DOWNS, )
 an individual )
 )
 )
 Third Party Defendants. )
 \_\_\_\_\_ )

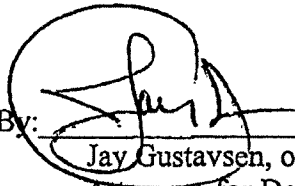
\*\*\*

COMES NOW, Defendant Thomas A. Hagood, by and through his attorneys of record, of the firm Davison, Copple, Copple & Cox of Boise, Idaho, and hereby moves the Court pursuant to Rule 56 of the Idaho Rules of Civil Procedure for partial summary judgment on the grounds that that there are no disputed facts in this case and as a matter of law the Plaintiff's claims are barred by the Statute of Frauds and Idaho Code 9-505(4).

This Motion is made and based on the records and files herein and the Affidavit of Thomas A. Hagood filed concurrently herewith.

DATED this 11<sup>th</sup> day of November, 2008.

DAVISON, COPPLE, COPPLE & COX, LLP

By:  \_\_\_\_\_  
 Jay Gustavsen, of the firm  
 Attorneys for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11<sup>th</sup> day of November, 2008, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack  
Givens Pursley, LLP  
601 W. Bannock St.  
P.O. Box 2720  
Boise, Idaho 83701

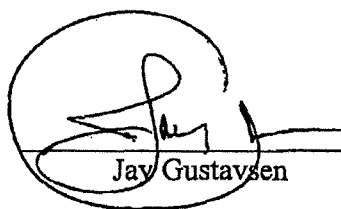
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Phillip J. Collaer  
Anderson, Julian & Hull, LLP  
PO Box 7426.  
Boise, Idaho 83707

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Terry Michaelson  
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PO Box 65  
Nampa, ID 83653-0065

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Jay Gustavsen

Thomas E. Dvorak (ID State Bar ID# 5043)  
Angela M. Reed (ID State Bar ID# 7221)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
S:\CLIENTS\10292\1\Aff AMR ISO Motion Summ J (reply memo) GP01.DOC

**FILED**  
A.M. 4:30 P.M.

MAR 12 2009

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**AFFIDAVIT OF ANGELA M. REED  
IN OPPOSITION TO DEFENDANT  
HAGOOD'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN REPLY  
TO HAGOOD'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

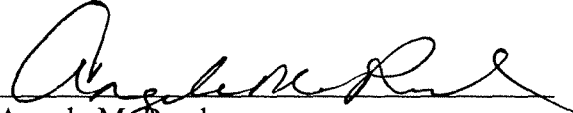
STATE OF IDAHO )  
  ) ss.  
County of Ada        )

COMES NOW, Angela M. Reed, your affiant, who being first duly sworn, deposes, states and avers as follows:

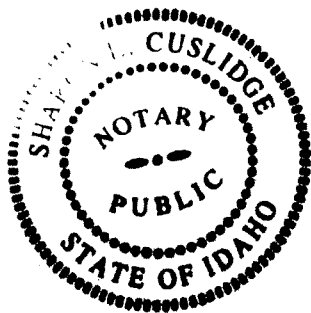
1. I am an attorney duly licensed to practice law in the state of Idaho. I am one of the attorneys representing Plaintiffs Jon Wakelum and Mike Ressler in this matter. I make this affidavit based upon my personal knowledge and to the best of my information and belief.


2. Attached hereto as Exhibit "A" is a true and correct copy of the transcript of Thomas Hagood's deposition, which was taken in this case on January 13, 2008.

FURTHER YOUR AFFIANT SAYETH NAUGHT:

  
Angela M. Reed

SUBSCRIBED AND SWORN TO before me this 12<sup>th</sup> day of March, 2009.



  
Notary Public for Idaho  
Residing at Meridian, Ada Co.  
My commission expires: 4/27/13

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
Davison, Copple, Copple & Cox  
Washington Mutual Capitol Plaza, Suite 600  
199 North Capitol Blvd.  
P.O. Box 1583  
Boise, Idaho 83701

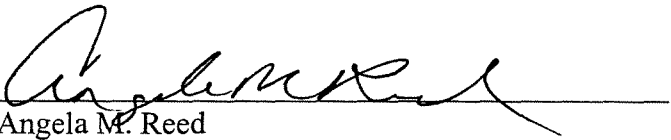
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Phillip J. Collaer  
Anderson, Julian & Hull, LLP  
P.O. Box 7426  
Boise, ID 83707-7426

U.S. Mail  
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Terry Michaelson  
Hamilton Michaelson & Hilty, LLP  
1303 12th Avenue Road  
P.O. Box 65  
Nampa, ID 83653-0065

U.S. Mail  
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Angela M. Reed

**EXHIBIT A**

**Transcript of Thomas Hagood's Deposition**



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and )  
MIKE RESSLER, an individual doing )  
business as "M&M RE Holdings", )  
Plaintiffs, ) Case No. CV 08-8465  
vs. )  
THOMAS A. HAGOOD, an unmarried )  
man, )  
Defendant. )

---

(Caption Continued.)

DEPOSITION OF THOMAS A. HAGOOD

JANUARY 13, 2008

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

Notary Public

1 (Caption Continued.)  
 2 THOMAS A. HAGOOD, an unmarried man, )  
 3 Third Party Plaintiffs, )  
 4 vs. )  
 5 BULLOCK AND COMPANY REALTORS L.L.C., )  
 6 an Idaho limited liability company; )  
 7 SCOTT BULLOCK, an individual; BILL )  
 8 DOWNS AUCTION SERVICE INC., an Idaho )  
 9 corporation; and Scott Bullock, an )  
 10 individual, and Larry Downs, an )  
 11 individual, )  
 12 Third-Party Defendants. )  
 13 \_\_\_\_\_ )  
 14 )

15 THE DEPOSITION OF THOMAS A. HAGOOD was  
 16 taken on behalf of the Plaintiffs at the offices  
 17 of Givens Pursley , 601 West Bannock Street,  
 18 Boise, Idaho, commencing at 9:34 A.M., on  
 19 Tuesday, January 13, 2008, before  
 20 Michael S. Lucero, Certified Shorthand Reporter  
 21 and Notary Public within and for the State of  
 22 Idaho, in the above-entitled matter.  
 23  
 24  
 25

1 APPEARANCES (Continued):  
 2 For Third-Party Defendant Downs Auction Service:  
 3 Hamilton Michaelson & Hilty, LLP  
 4 BY MR. TERRY M. MICHAELSON  
 5 1303 12th Avenue Road  
 6 P.O. Box 65  
 7 Nampa, Idaho 83653-0065  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 APPEARANCES:  
 2 For the Plaintiffs:  
 3 Givens Pursley LLP  
 4 BY MR. THOMAS E. DVORAK  
 5 MS. ANGELA M. REED  
 6 601 West Bannock Street  
 7 P.O. Box 2720  
 8 Boise, Idaho 83701-2720  
 9  
 10 For Defendant/Third-Party Plaintiff:  
 11 Davison, Copple, Copple & Cox  
 12 BY MR. JAY M. GUSTAVSEN  
 13 Washington Mutual Capitol Plaza, Suite 600  
 14 199 North Capitol Boulevard  
 15 P.O. Box 1583  
 16 Boise, Idaho 83701  
 17  
 18 For Third-Party Defendant Bullock & Company  
 19 Realtors, LLC:  
 20 Anderson, Julian & Hull, LLP  
 21 BY MR. PHILLIP J. COLLAER  
 22 250 South 5th Street, Suite 700  
 23 P.O. Box 7426  
 24 Boise, Idaho 83707-7426  
 25

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THOMAS A. HAGOOD,  
 first duly sworn to tell the truth relating to  
 said cause, testified as follows:  
 MR. DVORAK: Let the record reflect  
 this is the time and place set for the taking of  
 the deposition of Thomas Hagood, pursuant to the  
 Idaho Rules of Civil Procedure.

Could I have all counsel present please  
 identify themselves for the record.

MR. GUSTAVSEN: Jay Gustavsen for the  
 defendant, Mr. Hagood.

MR. MICHAELSON: Terry Michaelson for  
 third-party defendant Downs Auction Service.

MR. DVORAK: Phil Collaer, Anderson  
 Julian & Hull, for the defendant real estate.

MS. REED: Angela Reed for the  
 plaintiffs.

MR. DVORAK: Tom Dvorak for the  
 plaintiffs.

EXAMINATION

QUESTIONS BY MR. DVORAK:

Q. Just a couple of rules, Mr. Hagood.  
 I'm just trying to find out the facts here. I'm  
 not trying to trick you in any way. If I say  
 something you don't like or need me to rephrase,

would you please ask me to do so.

A. Yes.

Q. A written record is being made of these  
 proceedings -- it's essentially a book -- and  
 persons reading it will not be able to make sense  
 of it unless we speak clearly and you answer  
 "yes" or "no" to my questions. Shaking your head  
 or "uh-huh" and "uh-uh" does not register well.  
 If you understand my questions, will you answer  
 them?

A. Yes.

Q. And if you do not understand my  
 questions, will you tell me you don't understand  
 them?

A. Yes.

Q. Will you please state and spell your  
 full name for the record, sir.

A. Thomas A. Hagood. T-h-o-m-a-s; A.;  
 H-a-g-o-o-d.

Q. And what does the middle initial stand  
 for, sir?

A. Arnold.

Q. Okay. You understand you're the  
 defendant in this lawsuit and that's why you're  
 being deposed today; correct?

A. Yes.

Q. Okay. Have you ever had your  
 deposition taken previously, sir?

A. For this case?

Q. For any case.

A. Yes. Yes.

Q. Okay. Tell me about the circumstances  
 of that prior deposition?

A. I think -- well, it was for my mother's  
 estate I had a deposition taken.

Q. Okay. How long ago was that?

A. Three, four years ago. Three years  
 ago, four years ago.

Q. Were you the personal representative of  
 that estate?

A. Yes.

Q. So you had counsel in that proceeding?

A. Yes.

Q. Okay. Any other times you've had your  
 deposition taken?

A. I -- I can't remember. I think mostly  
 just for the estate.

Q. Okay. I certainly don't want to ask  
 you with this following question about any  
 conversations you've had with your counsel, but

1 what I do want to ask you is have you had an  
 2 opportunity to talk to your counsel, your  
 3 attorney, about what's happening today and do you  
 4 feel you understand the process today and are  
 5 ready to proceed?  
 6 A. Yes.  
 7 Q. Are you currently involved in any other  
 8 litigation or lawsuit besides this lawsuit?  
 9 A. No.  
 10 Q. Okay. Other than your mother's estate,  
 11 have you been involved with any litigation or a  
 12 lawsuit in the past?  
 13 A. Yeah. Yes.  
 14 Q. Okay. Tell me about the nature of  
 15 those proceedings.  
 16 A. Oh. It's 40 years ago. Automotive  
 17 type proceedings. It was a small claims court.  
 18 Q. Besides that, anything else?  
 19 A. I think I went -- well, actually I  
 20 think I went to a -- I had a wreck when I was a  
 21 teenager and I think I probably had a deposition  
 22 then, but I can't remember.  
 23 Q. And I don't want to age you, sir, but  
 24 that was also probably more than 40 years ago, I  
 25 take it?

1 Q. -- that would affect your ability to  
 2 testify truthfully today?  
 3 A. No.  
 4 Q. And we have to be careful to make sure  
 5 he can do his job right and we have a clean  
 6 record so that you let me finish a question  
 7 before you answer, and I'll try to let you finish  
 8 your answer before I ask another question.  
 9 What's the highest level of education  
 10 that you achieved, sir?  
 11 A. A couple of years of college.  
 12 Q. And where was that at? What college  
 13 did you attend?  
 14 A. Pacific Union and San Jose Junior  
 15 College.  
 16 Q. Those are two separate schools?  
 17 A. Mm-hmm.  
 18 Q. Where are they --  
 19 A. Yes.  
 20 Q. Where are they located at?  
 21 A. San Jose and Angwin, Pacific Union  
 22 College, Angwin.  
 23 Q. California?  
 24 A. California.  
 25 Q. So I take it then you have a high

1 A. Yeah.  
 2 Q. Okay. So besides that, nothing else  
 3 more recent?  
 4 A. No.  
 5 Q. Okay. And I know we talked a little  
 6 bit before the deposition today about a back  
 7 problem you have that prevents you from sitting  
 8 for long periods?  
 9 A. Yeah. I have a sciatic problem.  
 10 Q. Okay. If at any point in the  
 11 deposition today you need to stand up to answer  
 12 questions or you need to --  
 13 A. I will.  
 14 Q. -- take a break, just feel free to ask  
 15 me and, you know, within the rules I'm happy to  
 16 give you a break. But, you know, from my  
 17 perspective the rules are you can't use that to  
 18 avoid answering a question and go out in the hall  
 19 and talk to your attorney and come back in  
 20 here --  
 21 A. I'll just stand up. That's all.  
 22 Q. Okay. Okay. Besides your sciatic  
 23 nerve condition, is there any other condition or  
 24 any medication you're on or anything else --  
 25 A. No.

1 school diploma?  
 2 A. Yes.  
 3 Q. Okay. When did you attend Pacific  
 4 Union? From when to when?  
 5 A. I -- I can't -- it's somewhere in the  
 6 early '60s. '61, '62.  
 7 Q. And did you obtain a degree from --  
 8 A. No.  
 9 Q. Did you have any particular emphasis of  
 10 study at Pacific Union?  
 11 A. No.  
 12 Q. Okay. Now, the same question with  
 13 respect to the other college you attended?  
 14 A. No. No.  
 15 Q. Okay. No to all those questions?  
 16 A. Yeah.  
 17 Q. Okay. How would you describe your  
 18 current line of business, sir?  
 19 A. Well, I'm basically retired.  
 20 Q. Okay. Actually, I skipped over  
 21 something. I'll come back in a minute and ask  
 22 you about what you did before you retired, but I  
 23 wanted to ask you a little bit more about your  
 24 educational experience. We talked about formal  
 25 education in terms of high school and college.

'1 Is there anything else that either through  
 2 on-the-job training or specialized knowledge and  
 3 experience that you would have gained that,  
 4 outside of a formal college degree?  
 5 A. No.  
 6 Q. Let me ask that a different way. Do  
 7 you hold any specialized licenses or  
 8 certifications?  
 9 A. No.  
 10 Q. Okay. Have you ever held any  
 11 specialized licenses or certifications?  
 12 A. No.  
 13 Q. Okay. Did you ever attend a vo tech  
 14 school, vocational training?  
 15 A. No.  
 16 Q. Okay. Well, let me ask you about your  
 17 business. You say you retired. When did you  
 18 retire?  
 19 A. About '95. '94, '95.  
 20 Q. Okay. And at the time you retired,  
 21 what occupation or line of work were you in?  
 22 A. I was construction.  
 23 Q. Okay. Can you be more specific than  
 24 that when you say, "construction"? What type of  
 25 construction were you doing at that time?

1 immediately prior to your retirement, the two to  
 2 three years prior to your retirement, where was  
 3 that conducted at?  
 4 A. Same area.  
 5 Q. Okay. Prior to your work for 30 years  
 6 in the construction industry in Mountain View,  
 7 California, how were you employed or how did you  
 8 spend your time in business?  
 9 A. Well, that's the bulk of my life was in  
 10 construction.  
 11 Q. Okay.  
 12 A. I had a little office experience in the  
 13 office machine business.  
 14 Q. Tell me about that, if you would.  
 15 A. Well, it's just repairing office  
 16 machines.  
 17 Q. When was that?  
 18 A. Oh, I can't remember.  
 19 Q. More than 30 years ago?  
 20 A. Yeah.  
 21 Q. Okay. In the construction business,  
 22 did you have any involvement in buying and  
 23 selling real estate?  
 24 A. No.  
 25 Q. Okay. What experience in your life in

1 A. Remodeling.  
 2 Q. Residential? Commercial?  
 3 A. Residential and commercial.  
 4 Q. Did you have a business?  
 5 A. At the time I retired I didn't; no.  
 6 Q. Were you working for someone else?  
 7 A. Right.  
 8 Q. Okay. And prior to '94, '95 when you  
 9 retired, how long were you in this remodeling  
 10 residential, commercial construction business  
 11 line of work for someone else?  
 12 A. Oh, a few years. I don't know. A  
 13 couple of years. Two or three years.  
 14 Q. What did you do before that?  
 15 A. I just worked for myself.  
 16 Q. And what did you do for yourself?  
 17 A. Construction.  
 18 Q. Did you do that under a company name or  
 19 under your own name or --  
 20 A. My own name.  
 21 Q. Okay. And how long did you do that?  
 22 A. Thirty years. I don't know.  
 23 Q. And where was that at?  
 24 A. Mountain View, California.  
 25 Q. Okay. And the work that you did

1 buying or selling real estate have you had?  
 2 A. Not very much.  
 3 Q. Okay. Can you elaborate on that for  
 4 me? I mean, you obviously own the property at  
 5 issue in this litigation; correct?  
 6 A. Right.  
 7 Q. Do you own any other property?  
 8 A. Yes.  
 9 Q. We'll talk about that here in a minute.  
 10 (Exhibit No. 1 is marked.)  
 11 Q. (BY MR. DVORAK) Sir, I'm going to hand  
 12 you what's been marked for identification  
 13 purposes as Deposition Exhibit No. 1. I'll  
 14 represent for the record that that is the notice  
 15 of deposition duces tecum that was originally  
 16 served on your counsel in this proceeding  
 17 compelling your appearance here today. Take a  
 18 chance and look at that.  
 19 Have you seen that document before,  
 20 sir?  
 21 A. No. Not that I know of.  
 22 Q. And I'll further represent for the  
 23 record that this document was amended once, but  
 24 the only change to it was to change the location  
 25 of the deposition from Nampa, Idaho, to this

1 office here today, otherwise the amended -- it is  
 2 virtually identical to this notice of deposition  
 3 duces tecum.  
 4 A. I did read this part right here on it,  
 5 where it was originally.  
 6 Q. Okay. So if you read this before, I  
 7 take it you've seen this document before?  
 8 A. I just read the first part of it.  
 9 Q. Okay. But you had it in your  
 10 possession?  
 11 A. Yeah.  
 12 Q. Okay. This document I'll represent for  
 13 the record requires you to bring with you today a  
 14 variety of documents potentially relating to this  
 15 proceeding. Have you had a chance to review your  
 16 records in an attempt to find such documents?  
 17 A. That's it. That's all that I brought  
 18 you. That's all there is.  
 19 MR. DVORAK: Okay. Go ahead and mark  
 20 these now.  
 21 Let's go off the record for a second.  
 22 (Discussion held off the record.)  
 23 (Exhibit Nos. 2 through 8 are marked.)  
 24 Q. (BY MR. DVORAK) Just to sort of  
 25 facilitate things, I've taken the documents

1 Q. Oh. I thought the sale was on  
 2 August 6th.  
 3 A. Oh. Maybe it was August 6th; okay.  
 4 Q. Oh, okay. So about five weeks before  
 5 the date of the sale?  
 6 A. Yeah. Something like that, five to six  
 7 weeks.  
 8 Q. Okay. And I think one of these  
 9 documents in here may actually be a listing  
 10 agreement in this case for this sale.  
 11 A. Right.  
 12 Q. Did you obtain these documents at the  
 13 same time that you obtained a listing agreement?  
 14 A. That's right.  
 15 Q. Okay. I hand you what's been marked  
 16 for identification purposes as Deposition  
 17 Exhibit No. 2, sir. Can you tell me what that  
 18 document is?  
 19 A. Well, I don't know what you call it.  
 20 Absolute land auction. I never -- I never saw a  
 21 document like this.  
 22 Q. Well, that came from your records,  
 23 didn't it?  
 24 A. I guess so.  
 25 Q. Yeah. For the record, Exhibit 2 came

1 you've brought with you, sir, and had them marked  
 2 as Exhibits 2 through 8. I'm going to talk to  
 3 you about each document here in a second, but I  
 4 wanted to just talk to you about the documents in  
 5 general. Where do these documents come from?  
 6 Your records?  
 7 A. Right. Yeah.  
 8 Q. So these are things that you had within  
 9 your records?  
 10 A. Right.  
 11 Q. And you had all of these prior to the  
 12 instigation of this lawsuit?  
 13 A. Yes.  
 14 Q. Okay. Do you recall where you obtained  
 15 these documents? Did you obtain them in one  
 16 place or in different places?  
 17 A. All in one place. In the Realtor --  
 18 Bullock realty company.  
 19 Q. Do you recall when you obtained them?  
 20 A. I don't know the exact date, but it was  
 21 about six weeks before August 5, whatever that  
 22 comes out at.  
 23 Q. Okay. And you picked August 5. Is  
 24 there a reason you picked August 5?  
 25 A. They picked August 5.

1 from your file; correct?  
 2 A. Okay.  
 3 Q. So you did see it; correct?  
 4 A. (Nods).  
 5 MR. COLLAER: You have to answer  
 6 audibly.  
 7 THE WITNESS: Yes.  
 8 Q. (BY MR. DVORAK) Okay. But other than  
 9 the fact that it was in your file, you don't have  
 10 any other information about it?  
 11 A. I understand the terms of this so -- I  
 12 understood that.  
 13 Q. Okay. When you say you understood the  
 14 terms of that, okay, that would include the term  
 15 "absolute land auction" at the top?  
 16 A. Yes. But I -- okay. Yes.  
 17 Q. Okay. Let's clarify this for the  
 18 record. What understanding do you have of the  
 19 meaning of the phrase "absolute land auction"?  
 20 A. Well, it went for the -- you know  
 21 whatever it was bid for.  
 22 Q. Okay.  
 23 A. Bid to.  
 24 Q. Are you familiar with the phrase "a no  
 25 reserve auction"?

1 A. I wasn't too savvy to the reserve, but  
 2 I called it a -- you know, a stop -- stop action.  
 3 Q. Okay. When you say you called it a  
 4 stop auction --  
 5 A. Action.  
 6 Q. Action?  
 7 A. Yeah.  
 8 Q. What do you mean by that?  
 9 A. Well, I -- I tried to get them to stop  
 10 it and they wouldn't.  
 11 Q. Oh. During the actual sale later?  
 12 A. No. Before.  
 13 Q. Okay. Let's back up for a second. All  
 14 I'm asking you is just in general I'm trying to  
 15 understand if you have any idea of what a no  
 16 reserve auction means?  
 17 A. At the time I didn't.  
 18 Q. Okay. But since that time you've  
 19 gained an understanding?  
 20 A. Yes. Right. Right.  
 21 Q. Okay. How did you come to gain an  
 22 understanding of what a no reserve auction means?  
 23 A. Well, after, you know, we went through  
 24 this whole fiasco.  
 25 Q. By "fiasco" you're referring to what

1 you see that?  
 2 A. Right.  
 3 Q. And I believe that -- even though this  
 4 is a black and white figure and it's hard to see  
 5 it, on the lower left-hand corner there's sort of  
 6 a Lot 3. Do you see that?  
 7 A. Yeah.  
 8 Q. Okay. Is that part of the property  
 9 we're talking about here?  
 10 A. Yes.  
 11 Q. Okay. And I think there's some other  
 12 property immediately --  
 13 A. There's two up here (indicating).  
 14 Q. Yeah. Immediately to the right if  
 15 you're looking at this on the side of that Lot 3?  
 16 A. Yeah.  
 17 Q. Okay. Is that the property that's  
 18 commonly known as 4104 Garrity, 1010 North 39th,  
 19 and 1019 North 39th Street in Nampa, Idaho?  
 20 A. Yes.  
 21 Q. Okay. And are you the owner of that  
 22 property?  
 23 A. Yes.  
 24 Q. Okay. Hand you what's been marked for  
 25 identification purposes as Exhibit 4 and

1 happened on August 6 --  
 2 A. Right.  
 3 Q. -- 2008?  
 4 A. Right.  
 5 Q. And what understanding do you have  
 6 since that time of what a no reserve auction  
 7 means?  
 8 A. Explain to me what you mean by when you  
 9 say reserve or no reserve.  
 10 Q. No. I'm asking you for your  
 11 understanding of what a no reserve auction means.  
 12 If you don't understand what that means, then  
 13 that's the answer to the question.  
 14 A. You confused me when you say no reserve  
 15 and reserve.  
 16 MR. GUSTAVSEN: Then that would be your  
 17 answer.  
 18 MR. DVORAK: Okay.  
 19 Q. (BY MR. DVORAK) Handing you what's  
 20 been marked for identification purposes as  
 21 Exhibit No. 3, do you see that, sir?  
 22 A. Yes.  
 23 Q. And again that was among the documents  
 24 you brought with you. It describes certain  
 25 property on the right side of that exhibit. Do

1 Exhibit 5. Do you recognize those documents?  
 2 A. Yes.  
 3 Q. What are those documents?  
 4 A. 4 is the Garrity property, and the  
 5 North 39th.  
 6 Q. The property we've been talking about  
 7 here?  
 8 A. Yes.  
 9 Q. Hand you what's been marked for  
 10 identification purposes as Exhibit No. 6. Do you  
 11 recognize that document?  
 12 A. I never saw this document, but --  
 13 Q. Well, for the record, Exhibit No. 6 was  
 14 among the documents that you produced and you  
 15 said that were given to you by the Realtors.  
 16 A. Okay. Fine.  
 17 Q. So if you produced it and it was in  
 18 your records, you did see it, didn't you?  
 19 A. I must have.  
 20 Q. Okay. Well, let's go back to that in a  
 21 minute here. I hand you what's been marked for  
 22 identification purposes as Exhibit No. 7. Do you  
 23 see that?  
 24 A. Yes.  
 25 Q. And again this is a document from your

1 records; correct?  
 2 A. Right.  
 3 Q. Referring your attention to the last  
 4 page, page 5 of 5 of Exhibit No. 7, is that your  
 5 signature on that document?  
 6 A. Yes.  
 7 Q. Okay. And referring your attention to  
 8 each of the other four pages of that document,  
 9 there are initials at the bottom of each page.  
 10 Do you see those?  
 11 A. Right.  
 12 Q. Are those your initials?  
 13 A. Yes.  
 14 Q. Okay. And you were the person who  
 15 affixed those initials and that signature to this  
 16 document?  
 17 A. Yes.  
 18 Q. Okay. There's a date handwritten in  
 19 next to those initials and also below the  
 20 signature, do you see that, June 9, 2008?  
 21 A. Yes.  
 22 Q. Was that the date that you put your  
 23 initials and signature upon this document?  
 24 A. Yes.  
 25 Q. And since Exhibit 7 came from your

1 Q. What did you understand that to mean at  
 2 the time you signed this document?  
 3 A. Yeah. But there's other -- there's  
 4 other parts to this than this absolute sale.  
 5 Q. Okay. Well, let me point you to  
 6 another provision here. Can you go to page 4 of  
 7 the document, paragraph 26. Do you see that?  
 8 A. Yeah.  
 9 Q. And I'll just read it for the record so  
 10 we all know what we're talking about here.  
 11 A. Mm-hmm.  
 12 Q. "Other Terms and Conditions. This  
 13 property to be sold by auction August 6, 2008,  
 14 1:00 P.M. Absolute Sale. Owner to offer  
 15 financing terms. Seller to pay advertising fee  
 16 of \$5,000. Buyer to pay a buyer's premium fee of  
 17 5 percent. Houses included in sale - sold 'as is  
 18 where is.' Seller understands the risk  
 19 associated with an absolute sale."  
 20 Do you see that?  
 21 A. Yes. Yes.  
 22 Q. And I take it that information was in  
 23 the document at the time you initialed  
 24 immediately below it?  
 25 A. Yes.

1 records, I take it you got a copy of it at the  
 2 time that you signed it?  
 3 A. Yes.  
 4 Q. And I note for the record that it  
 5 refers in paragraph 2 on page 1, to the same  
 6 addresses for Nampa property that we identified  
 7 earlier in our discussion. Do you see that, the  
 8 first page, paragraph 2?  
 9 MR. GUSTAVSEN: First page, paragraph  
 10 2.  
 11 THE WITNESS: Oh. I was looking at  
 12 this number.  
 13 Q. (BY MR. DVORAK) Do you see those are  
 14 the same addresses we were discussing earlier for  
 15 this property?  
 16 A. The Garrity property. Yeah.  
 17 Q. So that's a yes?  
 18 A. Yes. All of them; yes.  
 19 Q. Okay. Under paragraph 4 where it says,  
 20 "Price," do you see that? The first page,  
 21 paragraph 4.  
 22 A. Yeah, I see it.  
 23 Q. It says, "Absolute Sale At Auction,"  
 24 does it not?  
 25 A. Yeah.

1 Q. Okay. Is that the other terms you were  
 2 referring to?  
 3 A. No.  
 4 Q. What were the other terms you were  
 5 referring to modify an absolute sale?  
 6 A. I tried twice to get this thing  
 7 stopped.  
 8 Q. Okay. When you say you tried twice to  
 9 get this thing stopped, tell me what you were  
 10 referring to.  
 11 A. I stopped -- well, two weeks before the  
 12 auction Larry Downs Auction and I tried to get  
 13 him to take the reserve -- the absolute off of  
 14 it. And he said, "Oh, no. No. You don't want  
 15 to do that because this, this, this, and this and  
 16 this," and so I left. But it -- it ties in  
 17 there. There's three ties to this thing. That  
 18 is at the first --  
 19 Is this all right to go through this?  
 20 Q. Keep proceeding answering the question,  
 21 sir.  
 22 A. At the first meeting we had between the  
 23 four of us, Larry said, you know, "You can -- you  
 24 can stop this auction any -- clear up to the  
 25 gavel time, you can stop this auction. No



1 problem. It's just" -- you know, "It's just  
 2 easy. You can do it," da-da-da-da. Yeah. So  
 3 then I got to thinking this is not good, so I  
 4 stopped -- this was the first time. Then I  
 5 stopped at his place probably a month after that  
 6 or three weeks to four weeks, and I told him I  
 7 wanted to stop it. I don't want to go ahead with  
 8 this absolute auction. And they give me this  
 9 song and dance. And so I said, "Well, I don't  
 10 know."

11 And he told me "Oh. Look at who's  
 12 coming. Mark Bottles. He's in on the deal. Big  
 13 bucks. They're coming in. 7 rivers is coming,"  
 14 all this stuff. And "We don't get -- most of our  
 15 people don't come in till a few days before," and  
 16 he wouldn't listen to me.

17 Then the next meeting, which was the  
 18 day before the auction --

19 Q. August 5th?

20 A. August 5th, that's where I got mixed  
 21 up, August 5th -- we went and had another, four  
 22 of us, my son and Greg and Larry and I, and I  
 23 said -- you know, I went in there in a specific  
 24 thing to -- to take off this absolute. And he  
 25 blew up. He says, "Oh." He says, "I put all

1 saw he was there and I stopped in.

2 Q. Okay.

3 A. That's when I tried to get this thing  
 4 stopped and he cowed me then. And then this next  
 5 time he -- he really went after -- went after me  
 6 and I -- after that I just thought man, this is  
 7 really weird, but he must know what he's talking  
 8 about, you know. And they gave me all these  
 9 things about how, oh, you know, we had a piece of  
 10 property out here in -- in Emmett. It -- it was  
 11 a \$40,000 reserve on it, but it sold for --  
 12 because they put no -- or it sold for 140,000  
 13 and -- you know, they pumped me every way they  
 14 could.

15 So anyhow, so I tried to get it stopped  
 16 on the 5th again. And I thought well, you know,  
 17 I guess he knows what he's doing. I had never  
 18 done this before. But then he came on the next  
 19 day and says, "Oh, look. Barger is in." Barger  
 20 never called. He was never in on the deal. They  
 21 played like they were talking to people on the  
 22 phone out there. They didn't have ten -- I asked  
 23 him -- I said I want ten people, ten bona fide  
 24 people, to be bidding on this. There wasn't.  
 25 There was like two or three people bidding.

1 this money in, all this time and all this and you  
 2 did this" and da-da-da-da.

3 And I says, "Wait a minute." I said,  
 4 "I thought you said," you know, "no problem."  
 5 You can -- you can -- so he cowed me down. Well,  
 6 he still wasn't satisfied with that, because --  
 7 well, that's the end of that. That's that part.

8 But he came on -- on the auction day,  
 9 in the morning he came and he still wasn't  
 10 satisfied that I wasn't going to stop the auction  
 11 and he -- I mean, I'm presuming this. And he  
 12 says, "Oh, Tom. Good news. Matt Barger --  
 13 Barger is coming in and he's -- he's not going to  
 14 let them steal this property.

15 And I said, "Oh. Well, good." And --  
 16 but he was trying to, you know, subdue me, stop  
 17 me from stopping the auction. Because at the  
 18 meeting with -- with Larry in his office, just  
 19 him and I and the secretary -- it made me lose my  
 20 train of thought. I'm sorry. I lost -- I lost  
 21 my train of thought on that.

22 Q. Was that the meeting on August 5th with  
 23 Larry Downs and --

24 A. No. No. No. This was just Larry  
 25 Downs and I over at his office. I stopped in. I

1 Q. Okay. If I remember right in your  
 2 discussion here, you said you came by a couple of  
 3 times and tried to stop the absolute auction.

4 A. Yes. Well, no, it was a meeting. That  
 5 first one I just stopped by.

6 Q. Okay.

7 A. The next one was on the 5th when the  
 8 four of us were there.

9 Q. Okay.

10 A. So my son can verify that, you know,  
 11 that that's what it was, but --

12 Q. So the first time I was just you and --

13 A. That I tried to stop it? It was just  
 14 me and Larry Downs --

15 Q. Okay.

16 A. -- and his secretary. She was there.

17 Q. Do you know her name?

18 A. I don't know her name.

19 Q. Okay. And approximately how long  
 20 before August 6th, did that first meeting occur?  
 21 A week?

22 A. The first meeting?

23 Q. The first time you came by and it was  
 24 just you and Larry Downs and his secretary.

25 A. Oh. It was approximately, I think, two

1 weeks before the -- I don't know exactly, but --  
 2 Q. And then you mentioned on August 5th,  
 3 that four people were present for the meeting.  
 4 You said your son?  
 5 A. My son.  
 6 Q. Is that Jeff Hagood?  
 7 A. That's right.  
 8 Q. Who else?  
 9 A. And Greg Bullock.  
 10 Q. Okay. There's three.  
 11 A. And Larry Downs.  
 12 Q. Four. Okay. Why was it so important  
 13 for you to stop the absolute auction?  
 14 A. Because it -- I had talked to other  
 15 people about it.  
 16 Q. Okay.  
 17 A. You know, they said don't do that.  
 18 Q. What was the risk if it went forward,  
 19 to your understanding?  
 20 A. Well, you might not get what you want  
 21 out of it.  
 22 Q. Because it could sell for any price?  
 23 A. Right.  
 24 Q. There was no reserve or restriction on  
 25 a minimum price it could sell for?

1 A. That's -- I have nothing against them.  
 2 Q. And I take it you've never had any  
 3 conversations at all with my clients; correct?  
 4 A. Oh, yeah. I know Jon.  
 5 Q. But have you ever talked to him about  
 6 this property?  
 7 A. No. No.  
 8 Q. Okay. And what about Mike Wakelum  
 9 [sic] --  
 10 A. No.  
 11 Q. -- have you ever talked to him?  
 12 A. No.  
 13 Q. Do you know him?  
 14 A. No.  
 15 Q. Did you ever take any steps to make  
 16 public your attempt to stop this auction? Did  
 17 you ever take out an ad in the newspaper?  
 18 A. No. I didn't even think of that, you  
 19 know.  
 20 Q. Did you ever put something in writing?  
 21 A. So you don't think they said this; is  
 22 that right?  
 23 Q. No. What I'm trying to figure out is  
 24 if there is any possible way that my clients  
 25 could have known prior to the time they came to

1 A. That's right.  
 2 Q. And that was the risk you were trying  
 3 avoid by these alleged conversations; correct?  
 4 A. That's right. Yes. Right.  
 5 Q. Okay.  
 6 A. They gave me -- they said it was worth  
 7 3 million. And -- that's what Greg said.  
 8 Q. But you understood that if these  
 9 prospective bidders didn't show up, if Mr. Barger  
 10 didn't show up, if Mark Rivers didn't show up, or  
 11 even if they showed up, if the price wasn't bid  
 12 up to 3 million, it would go at whatever price it  
 13 was going? That's an absolute auction; correct?  
 14 A. Yes. Right.  
 15 Q. Okay.  
 16 A. But he did that the morning that I got  
 17 there. And that was to keep me from, you know --  
 18 do you understand? It's psychology.  
 19 Q. No. I understand, but I want you to  
 20 understand, too. I'm representing the gentlemen  
 21 who were the high bidders at those sales. I'm  
 22 not representing their agents.  
 23 A. Oh. I'm not against the people that  
 24 tried to buy it.  
 25 Q. Okay.

1 the auction in reliance on the ads that were out  
 2 there in the newspaper and bid on this, that the  
 3 property was not going to be sold exactly as  
 4 represented?  
 5 A. Yeah. No. I -- I have no beef with  
 6 the client -- your clients.  
 7 Q. With all due respect, I don't think  
 8 you've answered my question. Is there any way  
 9 that my clients could have known from anything  
 10 you've done or from your personal knowledge prior  
 11 to the time they came to the sale on August 6th  
 12 and bid on that property, that it was not going  
 13 to be sold exactly as represented?  
 14 A. But I didn't know that.  
 15 Q. But you didn't take any steps to bring  
 16 that home to them to let any third-party know  
 17 other than --  
 18 A. Well, I didn't know who they were even.  
 19 How would I know who they are?  
 20 Q. Okay. So you just had these  
 21 conversations with your Realtors on this;  
 22 correct?  
 23 A. Right. And they're supposed to be  
 24 working on my behalf; right?  
 25 Q. Well, you -- okay. You're here to

'1 answer the questions, actually, sir.  
 2 Referring your attention back to  
 3 Exhibit 7, if I could, for a minute. Can you  
 4 look at Exhibit 7 in front of you? Will you turn  
 5 to paragraph 26, "Other Terms and Conditions," on  
 6 page 4.  
 7 A. Mm-hmm.  
 8 Q. There's a portion there on the third  
 9 line that says, "Seller to pay advertising fee of  
 10 \$5,000." Do you see that?  
 11 A. Where's it at? Oh, yeah. Here. Okay.  
 12 I see it.  
 13 Q. Okay. And I just wanted to ask you  
 14 about that. Did you pay an advertising fee of  
 15 \$5,000 at the time you signed this?  
 16 A. No.  
 17 Q. Did you ever pay an advertising fee of  
 18 \$5,000?  
 19 A. No, I don't think so.  
 20 Q. Okay. But you knew there was going to  
 21 be advertising on this property; correct?  
 22 A. Yes.  
 23 Q. Okay.  
 24 A. Of course.  
 25 Q. What did you know at the time -- and

1 Q. Okay. And do you know if they did in  
 2 fact make those terms public?  
 3 A. I guess they did. I don't know, other  
 4 than the signs that they put.  
 5 Q. So you saw the signs posted on the  
 6 property?  
 7 A. I saw them; yeah. Of course.  
 8 Q. Did you see any notices in the paper?  
 9 A. No.  
 10 Q. Okay. Did you ever get on the internet  
 11 and see anything on there?  
 12 A. No.  
 13 Q. Okay. But you knew they were going to  
 14 do that?  
 15 A. They said they did.  
 16 Q. Okay. Let me come back to that. I  
 17 want to just turn real quick to Exhibit 8 here,  
 18 which is the last of the documents I had marked  
 19 that you brought with you. That's a letter dated  
 20 September 11, 2008. Do you see that?  
 21 A. Mm-hmm. Yes.  
 22 Q. Okay. So obviously that wasn't among  
 23 the documents that you received from your  
 24 Realtors when you signed that document on June 9,  
 25 2008; correct?

1 I'm going back to June 9, 2008 -- what did you  
 2 understand was going to happen with respect to  
 3 advertising at the time you signed this contract?  
 4 A. Well, I understood if I stopped the  
 5 auction, that I would have to pay the 5,000.  
 6 Q. No. I'm asking at the time you signed  
 7 this before you were thinking about stopping the  
 8 auction, what was your understanding what  
 9 advertising was going to occur?  
 10 A. Oh. Like on the internet?  
 11 Q. Yeah. What was your understanding?  
 12 I'm just trying to find out.  
 13 A. Well, they said that, you know, it  
 14 would be on the internet and they advertised it  
 15 on the property, signs on the property.  
 16 Q. In the newspaper?  
 17 A. I don't know about the newspaper. It  
 18 probably was, but I'm not -- I'm not -- I never  
 19 saw it.  
 20 Q. So you understood when you signed this  
 21 on June 9, 2008, that it was the intent of the  
 22 parties you were contracting here, Bullock and  
 23 Company Realtors, to make public the terms of  
 24 this auction sale; correct?  
 25 A. Right.

1 A. Yes.  
 2 Q. That's something that you got later  
 3 from Mr. Downs?  
 4 A. No. I don't know. I don't know. I  
 5 don't know.  
 6 Q. Okay. What do you understand that  
 7 document marked as Exhibit 8 to be, sir?  
 8 A. Well, it's I guess on what they -- he  
 9 wants 4,000 on the 5,000. That's all I can gain  
 10 out of it.  
 11 Q. Oh. And when you say on the 5,000,  
 12 you're referring --  
 13 A. Well, what they -- yeah, they said it  
 14 was in the -- in the first place.  
 15 Q. Okay. I want to talk to you just a  
 16 little about this property in general. And by  
 17 "property," I'm referring to these three lots  
 18 we've been talking about, the subject of that  
 19 listing agreement and so forth. When did you  
 20 acquire this property? When did you come in  
 21 possession of it?  
 22 A. I don't remember exactly, because they  
 23 were bought separately over several years.  
 24 Q. Okay. Do you recall roughly when you  
 25 acquired the first such parcel?

'1 A. No.  
 2 Q. Okay.  
 3 A. The last parcel, I bought it in about  
 4 beginning of '06, end of '05, '06, I think.  
 5 That's the 14 acres. 1010 I bought first and  
 6 that was bought probably three or four years  
 7 before that, and in between that I bought 4104.  
 8 Q. Okay. Why did you acquire these  
 9 parcels?  
 10 A. We were thinking of developing them,  
 11 developing the land.  
 12 Q. Okay. When you say, "we," to whom are  
 13 you referring?  
 14 A. My son, Jeff.  
 15 Q. Okay. What sort of development were  
 16 you thinking of making it?  
 17 A. It was up in the air. Anything from RV  
 18 center to, you know, office complex.  
 19 Q. Why this location?  
 20 A. I don't know. That's where he lives.  
 21 He lived on 1010 North 39th.  
 22 Q. Jeff Hagood did?  
 23 A. Yeah. Yeah. He did at that time.  
 24 Q. Okay. I should have asked you this  
 25 before, but where do you reside, sir?

1 of these properties?  
 2 A. No.  
 3 Q. And I want to ask you a couple of  
 4 questions about these properties. Do you have  
 5 any impression or idea of what they're worth  
 6 today?  
 7 A. Well, Bullock put it around 3 million  
 8 for all of it.  
 9 Q. Do you have your own impression of what  
 10 they're worth?  
 11 A. I think that's about what it's worth.  
 12 Q. And you said --  
 13 A. They were -- they were evaluated at --  
 14 you know, when the heyday was going, at like 5  
 15 and a half.  
 16 Q. Do you have an appraisal for that  
 17 amount?  
 18 A. No.  
 19 Q. When you say, "evaluated" --  
 20 A. Well, people that are in the know, you  
 21 know.  
 22 Q. So you don't have anything written as  
 23 to that evaluation?  
 24 A. No, no, no.  
 25 Q. Okay. Do you have any impression as to

1 A. Nampa.  
 2 Q. What's your address?  
 3 A. 3649 South Ox Bow Drive.  
 4 Q. Okay. Do you recall how much you paid  
 5 for these parcels when you acquired them?  
 6 A. Yeah.  
 7 Q. Will you state that for the record,  
 8 sir?  
 9 A. I paid about 1.132 for the 14 acres of  
 10 1019. 1010 is about 171, and 4104 was -- I think  
 11 I had more than that, but it was around 340, but  
 12 I probably had more than that in it.  
 13 Q. Okay. And just so we're clear for the  
 14 records, when you said 171 and 340, that was  
 15 171,000 and 340,000?  
 16 A. Right. Right.  
 17 Q. And 1.132 was 1.132 million?  
 18 A. Yeah.  
 19 Q. Okay. Did you finance the purchase of  
 20 these properties or did you pay cash?  
 21 A. Cash.  
 22 Q. Was it cash you had saved or where did  
 23 you --  
 24 A. Yeah. It's mine.  
 25 Q. Okay. So you don't owe anything on any

1 any difference in value between today and, say,  
 2 August of 2008?  
 3 A. I don't know.  
 4 Q. Okay. Now, I take it you have the same  
 5 answer if I asked you between today and August of  
 6 2007, what it was worth back then?  
 7 A. I --  
 8 Q. No idea?  
 9 A. I don't know.  
 10 Q. Okay.  
 11 A. All I know is -- is people that are in  
 12 the business in, what, back in '06, said that it  
 13 was worth probably about 5 and a half.  
 14 Q. When you say people in the business, do  
 15 you have anyone specific? Can you give me a  
 16 name?  
 17 A. Well, yeah. It was my son, because  
 18 he's a -- he has a Realtor's license and he knows  
 19 people that, you know, understand the commercial.  
 20 Q. Okay. Well, let's talk about your son  
 21 just for a minute here. You said he has a  
 22 Realtor's license. How long has he had that  
 23 license?  
 24 A. Maybe two years. I don't know.  
 25 Q. Okay. How old is your son?

1 A. I don't know.  
 2 Q. Sorry to put you on the spot.  
 3 A. He's 40- -- 48, 49. I don't know.  
 4 Q. Okay.  
 5 A. Forty-six. I don't know.  
 6 Q. You mentioned he resided on the  
 7 property at one time. Where does he reside  
 8 currently?  
 9 A. I don't know the exact address. I  
 10 can't remember. He just moved --  
 11 Q. Okay.  
 12 A. -- so --  
 13 Q. Where did he move to?  
 14 A. Caldwell.  
 15 Q. When is the last time you spoke to him?  
 16 A. Yesterday.  
 17 Q. Did you talk to him about this case  
 18 yesterday?  
 19 A. Yes.  
 20 Q. Tell me about your conversation with  
 21 your son about this case yesterday.  
 22 A. We just talked about -- you know, I  
 23 wanted to make sure that -- because Don had asked  
 24 me, you know, what papers I had signed and I said  
 25 well, this only -- this one document. Well, I

1 No. But this is all the documents. I only  
 2 signed the documents that one day the first time.  
 3 That's the only time I ever signed anything --  
 4 Q. Okay.  
 5 A. -- in our first meeting. And this  
 6 is -- this is from that (indicating).  
 7 Q. Are you thinking there's another  
 8 document you signed?  
 9 A. No. No. No. No. I was just --  
 10 forgot that there was, you know, more documents  
 11 with this whole thing (indicating). That's all.  
 12 Q. All right. So let's continue talking  
 13 about Jeff Hagood. You said you called him  
 14 yesterday. So do you have his phone number?  
 15 A. Yes.  
 16 Q. Can you provide that phone number to  
 17 me?  
 18 A. It's 208-283-3124, I think. I never  
 19 use it so I --  
 20 Q. Can you check it? Do you have it in  
 21 your cell phone? Let's take a break for a minute  
 22 just to make sure you can verify that.  
 23 (A recess was held.)  
 24 Q. (BY MR. DVORAK) Okay. We can go back  
 25 on the record. Are you ready, sir?

1 guess you can consider this one document with  
 2 the -- with the initials on it. So I called him  
 3 and asked him was there any more papers, because  
 4 he had these, he had the papers for me. So he  
 5 got them out and he looked at them and he said,  
 6 well, this -- I was referring to the main page on  
 7 this document and then --  
 8 Q. And when you say, this document, I take  
 9 it you're referring to that listing agreement  
 10 we've been discussing, Exhibit 7?  
 11 A. Let's see. Not this one. The one  
 12 where I actually signed.  
 13 Q. Yeah. I think that's Exhibit 7, page  
 14 5?  
 15 MR. GUSTAVSEN: The last page.  
 16 THE WITNESS: That one and -- but where  
 17 is that -- that face document? There was another  
 18 one. I guess -- I don't know, because there was  
 19 one that had the writing on it.  
 20 Q. (BY MR. DVORAK) Okay. You think  
 21 you've signed another document. Can you describe  
 22 that document?  
 23 A. No. No. No. I hadn't signed any more  
 24 documents. Yeah. Yeah. I was -- but there was  
 25 another one. I thought there was another one.

1 A. Yes.  
 2 Q. Can you just confirm that number for  
 3 me? Did you have a chance to make sure it was  
 4 correct?  
 5 MR. GUSTAVSEN: I did confirm it with  
 6 the court reporter.  
 7 THE WITNESS: Yes, it was.  
 8 Q. (BY MR. DVORAK) 208-283-3124?  
 9 A. Right.  
 10 Q. Very good.  
 11 So you mentioned that your son helped  
 12 you acquire this property, is that correct,  
 13 originally?  
 14 A. Yeah. We -- you know, we did it  
 15 together.  
 16 Q. Did you form some kind of entity to  
 17 acquire this property?  
 18 A. No. No.  
 19 Q. There wasn't an entity Giddyup  
 20 Investments, LLC, involved?  
 21 A. No.  
 22 Q. Are you aware of what Giddyup  
 23 Investments is?  
 24 A. Yes.  
 25 Q. What is Giddyup Investments?

1 A. Well, it's an entity that my boy  
 2 started. Giddyup.  
 3 Q. Okay. Are you aware that the title to  
 4 this property or some portion of it was at one  
 5 time in Giddyup Investments?  
 6 A. Yes. But it was taken out.  
 7 Q. Okay. Why was the title originally  
 8 placed in Giddyup Investments?  
 9 A. Oh, I don't know exactly. My boy was  
 10 going to -- you know, he wanted to have Giddyup  
 11 Investments. I could not tell you how it works  
 12 or -- or anything much about it.  
 13 Q. You just gave him your money without  
 14 understanding why?  
 15 A. Yeah. That sounds absurd but -- oh.  
 16 It's quite a while back. I don't remember much  
 17 about how we got into Giddyup other than -- I'd  
 18 have to go back and think about it.  
 19 Q. Did you have a membership interest in  
 20 Giddyup?  
 21 A. I don't know.  
 22 Q. Okay. Your son had one, obviously.  
 23 A. Yes.  
 24 Q. Any other persons?  
 25 A. I don't think so.

1 it was over -- if it was -- she sued. She sued.  
 2 And I -- and I can't remember exactly the reasons  
 3 she sued. I guess she wanted her money back.  
 4 But she was always going to get her money back,  
 5 but --  
 6 Q. For the record, what was her name?  
 7 MR. MICHAELSON: Sherry Henry  
 8 [phonetic].  
 9 THE WITNESS: Yeah. Sherry Henry.  
 10 Q. (BY MR. DVORAK) Were you a defendant  
 11 in that lawsuit?  
 12 A. Probably. Probably was.  
 13 Q. Well, you didn't mention that earlier  
 14 when I asked about lawsuits.  
 15 A. Oh. I didn't remember that. That  
 16 didn't even cross my mind.  
 17 MR. DVORAK: Okay.  
 18 (Exhibit No. 9 is marked.)  
 19 Q. (BY MR. DVORAK) I'm going to hand you  
 20 what's been marked for identification purposes as  
 21 Exhibit No. 9. Do you have that in front of you,  
 22 sir?  
 23 A. Yes.  
 24 Q. And I take it those are your initials  
 25 in the bottom of every page of 9 and on the last

1 Q. Okay. There wasn't a woman who had an  
 2 interest in Giddyup Investments at any time?  
 3 A. I don't know. We had a dealing with a  
 4 woman, you know, at one time, and I don't know if  
 5 she got into any part of Giddyup, because we  
 6 borrowed some money from her. But other than  
 7 that --  
 8 Q. You said, "we borrowed some money."  
 9 You and your son?  
 10 A. Yeah, he did. He borrowed it.  
 11 Q. What did he borrow that money for?  
 12 A. I don't know. You have to ask him.  
 13 Q. Okay.  
 14 A. This -- I think -- no. I think -- it's  
 15 true. We got a loan from her to buy some of the  
 16 property.  
 17 Q. Okay.  
 18 A. Yeah. And it was paid back. That's  
 19 all been paid back.  
 20 Q. Is that why the property is no longer  
 21 in Giddyup Investments?  
 22 A. I can't tell you that. I don't know.  
 23 Q. Okay. Was there ever any kind of  
 24 lawsuit involving Giddyup Investments?  
 25 A. Oh, yeah. She -- well, I don't know if

1 page?  
 2 A. Yes.  
 3 Q. And you placed those initials on that  
 4 document, did you not, sir?  
 5 A. Yes.  
 6 Q. You placed them on there on the date  
 7 set forth next to there, September 23, 2007?  
 8 A. Say that again.  
 9 Q. Yeah. That date that's on that  
 10 document, September 23, 2007, is that the date  
 11 you placed your initials on this document?  
 12 A. I guess so.  
 13 Q. Well, I don't want you to guess.  
 14 A. Yes.  
 15 Q. And I'll represent for the record, this  
 16 appears to be an exclusive seller representation  
 17 agreement allowing Jeff Hagood of All Pro Realty  
 18 to list property for you. Do you know what  
 19 property this applies to?  
 20 A. It says 4104.  
 21 Q. Is that the 14-acre property?  
 22 A. No.  
 23 Q. Which property is that?  
 24 A. That's the 1.9.  
 25 Q. Okay. Which is one of the three

1 properties we've been talking about?  
 2 A. Yes. It's the Garrity property.  
 3 It's --  
 4 Q. And you allowed him to list this  
 5 property for a total of 1.1 million?  
 6 A. Right.  
 7 Q. Okay. And this was listed until -- the  
 8 term of this agreement was through September 22,  
 9 2008. Do you see that in paragraph 3?  
 10 A. Right.  
 11 Q. Were the other parcels listed on this  
 12 property, or not?  
 13 A. I don't know.  
 14 Q. Okay. Do you recall signing a listing  
 15 agreement for the other parcels besides the  
 16 4104 --  
 17 A. Yeah. I signed a lot of papers, so I  
 18 must have signed for all of them.  
 19 Q. Well, I'm asking you if you recall  
 20 signing for the others?  
 21 A. I signed a lot of papers.  
 22 Q. But you can't recall specifically  
 23 whether you signed for the others or not?  
 24 A. Well, that's what he told me I was  
 25 signing for.

1 Bullock & company Realtors, still representing  
 2 you as a sales agent or as a Realtor?  
 3 A. No. He was just -- he was actually  
 4 just going to take a finder's fee, not as a  
 5 Realtor.  
 6 Q. Okay. But he had --  
 7 A. And he delisted with the listing that I  
 8 had -- these listings here were delisted before  
 9 the auction.  
 10 Q. When you say, "delisted," what do you  
 11 understand that to mean?  
 12 A. That he wasn't representing me as a  
 13 Realtor.  
 14 Q. Okay. Well, I'll represent for the  
 15 record that delisted can also have and it  
 16 commonly has a meaning among Realtors or sales  
 17 agents of taking it off the Multiple Listing  
 18 Service, which is an advertising service that  
 19 Realtors use. But there's technically a  
 20 different way of canceling an exclusive seller  
 21 representation agreement. There's actually a  
 22 cancellation form that's signed. Are you aware  
 23 of any cancellation form that was signed by you  
 24 with respect to what's been marked as Exhibit 9,  
 25 the exclusive seller representation agreement?

1 Q. Oh. You recall your son, Jeff Hagood,  
 2 telling you that you were signing --  
 3 A. Right.  
 4 Q. -- for the others as well?  
 5 A. Right. Right.  
 6 (Exhibit No. 10 is marked.)  
 7 Q. (BY MR. DVORAK) I'll hand you what's  
 8 been marked as Exhibit No. 10. Have you ever  
 9 seen that document before?  
 10 A. I don't recollect I saw this.  
 11 Q. Okay. Well, I'm going to represent for  
 12 the record that that's a document that I obtained  
 13 from the records of Bullock and Company Realty  
 14 pursuant to discovery in this case, hence the  
 15 Bates number of Bullock 15 at the bottom. But  
 16 I'll represent for the record that it appears to  
 17 be a referral form and a commission-sharing  
 18 agreement signed by Bullock Realtors with the  
 19 referring agency being Jeff Hagood, All Pro  
 20 Realty. Were you aware that your son,  
 21 Mr. Hagood, was going to take a percentage of the  
 22 commission on the auction sale of this property?  
 23 A. Yes.  
 24 Q. Okay. So to your understanding was  
 25 your son, when you were dealing with

1 A. That's what he said. I -- I went down  
 2 there and I signed it all.  
 3 Q. Did you keep a copy of it?  
 4 A. No.  
 5 Q. Would his Realtor have a copy of it in  
 6 his file?  
 7 A. Yeah. Yeah.  
 8 Q. Okay. Well, I'll represent for the  
 9 record that I asked his Realtor to send me a copy  
 10 of his file and did not obtain any such documents  
 11 from him?  
 12 A. Well, what happened -- this realty  
 13 company has changed hands in the meantime, so I  
 14 don't know.  
 15 Q. So you as you sit here today have no  
 16 access to any document that actually cancels  
 17 Exhibit 9, the exclusive seller representation  
 18 agreement?  
 19 A. Not that I have ever seen.  
 20 Q. Okay.  
 21 A. I went down there -- I went down to the  
 22 realty place. He went in and brought this stuff  
 23 out. I signed the -- for the delisting.  
 24 (Exhibit Nos. 11 and 12 are marked.)  
 25 Q. (BY MR. DVORAK) Hand you what's been

1 marked form identification purposes as Exhibits  
 2 11 and 12. First with respect to Exhibit No. 11,  
 3 sir, is that your signature on the bottom of it?  
 4 A. Yes.  
 5 Q. Now, the same question with respect to  
 6 Exhibit No. 12, is that your signature on the  
 7 second page of that document?  
 8 A. Yes.  
 9 Q. Okay. And I take it that date next to  
 10 your signature on Exhibit 12, is the date you  
 11 signed that document; correct?  
 12 MR. GUSTAVSEN: Were you referring to  
 13 Exhibit 11 or 12?  
 14 MR. DVORAK: 12. Exhibit 12.  
 15 THE WITNESS: Yes. I was just confused  
 16 what year it was. That's what I was --  
 17 Q. (BY MR. DVORAK) Okay. And then with  
 18 respect to Exhibit No. 11, I'll represent for the  
 19 record that these are -- both Exhibit 11 and 12  
 20 are documents I obtained from All Pro Realty.  
 21 Exhibit 11 is what I understand to be the  
 22 delisting from the Multiple Listing Service  
 23 document. Is that the document you were just  
 24 referring to as having signed?  
 25 A. I guess so. Yes.

1 Q. Okay. And all the statements in here  
 2 are made under oath, duly sworn, accurate and  
 3 correct; is that the case?  
 4 A. Yes.  
 5 MR. GUSTAVSEN: Do you want a chance to  
 6 read through it?  
 7 THE WITNESS: Huh?  
 8 MR. GUSTAVSEN: Do you want a chance to  
 9 read through it?  
 10 THE WITNESS: No.  
 11 Q. (BY MR. DVORAK) Referring your  
 12 attention to paragraph 4 of that document, can  
 13 you read that paragraph for the record, please,  
 14 out loud.  
 15 A. "On numerous occasions I expressed this  
 16 reservation with my agent repeatedly and made  
 17 this intention clear to all" -- "to all of the  
 18 Third Party Defendants."  
 19 Q. Okay. And when you say, "the Third  
 20 Party Defendants," you're referring to Bullock  
 21 and Company Realtors, LLC, Scott Bullock, Bill  
 22 Downs Auction Service, Inc., and Larry Downs?  
 23 A. Right.  
 24 Q. And when you're referring to "my  
 25 agent," were you referring to Jeff Hagood?

1 Q. Well, I don't want you to guess. You  
 2 talked about a delisting document. This is the  
 3 only delisting document that I'm aware of. Is  
 4 there another one you think you've signed?  
 5 A. No. No. I only signed one.  
 6 Q. Okay. And that's your signature on  
 7 this document?  
 8 A. That's right.  
 9 Q. You filled out an affidavit in  
 10 connection with this lawsuit. Do you recall  
 11 doing that? "Yes" or "no"? Simple.  
 12 A. I don't know. I --  
 13 (Exhibit No. 13 is marked.)  
 14 Q. (BY MR. DVORAK) I hand you what's been  
 15 marked for identification purposes as Exhibit 13,  
 16 sir. Do you see that document in front of you?  
 17 A. Yeah.  
 18 Q. Referring your attention to page 3 of  
 19 that document, do you see that?  
 20 A. Oh, yes. Yes, I remember this. Yeah.  
 21 Q. Okay.  
 22 A. I did this.  
 23 Q. So this is a document that you signed  
 24 under oath in front of a notary; correct?  
 25 A. Right.

1 A. No.  
 2 Q. Who were you referring to as your  
 3 agent?  
 4 A. Well, the -- the agent would have been  
 5 Greg. What agent are you talking about? The  
 6 Realtor?  
 7 Q. No. I'm saying in this sentence which  
 8 you wrote you're talking about "my agent," and I  
 9 want to understand when you signed this who you  
 10 believed your agent to be.  
 11 A. Well, I had two agents, Larry and --  
 12 and Greg.  
 13 Q. Okay. Well, Greg is the only one who's  
 14 not listed there. But wasn't in fact your son,  
 15 Jeff Hagood, your agent at that time, too?  
 16 A. No.  
 17 Q. Because you signed the delisting  
 18 agreement you think?  
 19 A. Right.  
 20 Q. But he was getting a share of the  
 21 commission.  
 22 MR. GUSTAVSEN: Objection. He's  
 23 already answered that. I believe he said it was  
 24 a finder's fee.  
 25 THE WITNESS: Right. As a finder's



1 fee. They turned it into a finder's fee instead  
 2 of an agent.  
 3 Q. (BY MR. DVORAK) Was Jeff Hagood  
 4 present during any of your meetings with any of  
 5 the third-party defendants in this case?  
 6 A. You mean, Greg Bullock and Larry Downs?  
 7 Q. Yes.  
 8 A. Yes. He was in three meetings.  
 9 Q. And you mentioned one on August 5th?  
 10 A. Yeah. And then there was one like,  
 11 what, five or six weeks before that.  
 12 Q. Is that when you signed the --  
 13 A. That's when we signed. And then we had  
 14 one with just Larry Downs and Jeff and I at  
 15 Jeff's house when we first entertained this.  
 16 Q. So prior to June 9, 2008, prior to  
 17 signing that document?  
 18 A. Right. Right. We just went over a  
 19 rough --  
 20 Q. Did you, in the course of those  
 21 discussions or any other discussions during the  
 22 time period leading up to the sale, talk with  
 23 Jeff Hagood about what was going on in this sale  
 24 and any concerns you had about the sale?  
 25 A. Yeah.

1 Q. Okay. Did you talk to him outside of  
 2 that gentleman's presence about whether to go  
 3 forward with it or not or --  
 4 A. Yeah, we talked a little bit, but --  
 5 Q. What did he say and what did you say to  
 6 the best of your recollection at that time?  
 7 A. We could go with a reserve, but we'd  
 8 already gone through that.  
 9 Q. Okay. So on August 5th, you had a  
 10 discussion with Jeff Hagood about potentially  
 11 going with a reserve auction instead of a  
 12 no-reserve auction?  
 13 A. Yeah.  
 14 Q. What did he say, what did you say?  
 15 A. I didn't say much. I was -- I was  
 16 really confused after what they pulled on me.  
 17 Q. Well, did Jeff talk about setting a  
 18 specific number for a reserve on August 5, 2008?  
 19 A. No.  
 20 Q. Just talked about the concept of doing  
 21 a reserve auction?  
 22 A. Yeah. Yeah.  
 23 Q. Okay. But you decided not to go with  
 24 the reserve auction on August 5th, for whatever  
 25 reason? I mean, being pressured or whatever

1 Q. Tell me about those discussions.  
 2 A. We discussed it. You know, we'd do  
 3 this or that, which way, you know.  
 4 Q. Did Jeff Hagood express any  
 5 reservations to you about this absolute auction?  
 6 Did he say it was too risky, for instance?  
 7 A. Yeah, we talked about it; yeah.  
 8 Q. Okay. What were those discussions to  
 9 your recollection?  
 10 A. You know, you could do this, you could  
 11 do that, and you could stop it or whatever. But  
 12 the day that I went in there, they kind of -- it  
 13 just threw everything off kilter when this guy  
 14 went berserk on me.  
 15 Q. And you're referring to the discussion  
 16 in the morning of August 6th?  
 17 A. August 5th. August 5th, when he come  
 18 unglued because I was trying to take -- have a  
 19 stop on this if I wanted to.  
 20 Q. Well, your son, Jeff Hagood, was there  
 21 for that discussion?  
 22 A. That's right.  
 23 Q. Okay. What did Jeff do when this  
 24 gentleman came unglued, as you've described it?  
 25 A. He didn't do anything.

1 else, you decided not to go with it?  
 2 A. Yeah. I had -- I had to put it -- it  
 3 was up to me.  
 4 Q. Right. And you decided to stay with  
 5 the absolute auction that you had signed up for  
 6 on June 9?  
 7 A. Well, he pressured me to -- you know,  
 8 to do it.  
 9 Q. For whatever reason, whatever pressure,  
 10 that was still your decision at the end of the  
 11 day on August 5th?  
 12 A. Yes.  
 13 Q. You didn't do anything to stop the  
 14 auction on August 5th?  
 15 A. I did. I tried to get him to stop it.  
 16 Q. But they said that they wanted it to  
 17 proceed and convinced you --  
 18 A. Yeah. He said he spent so much time  
 19 and so much money and everything and -- and --  
 20 but that was a complete turnaround from when he  
 21 said that "Oh, no problem. You can stop the  
 22 auction any time you want to." Then he come  
 23 unglued when I tried to stop it. We went through  
 24 this before.  
 25 Q. Well, and after he came unglued, you

1 didn't take further steps. On August 5th, you  
 2 let it proceed.  
 3 A. I just -- I was kind of confused.  
 4 Q. Right. But you didn't for instance  
 5 call the police and say, "There's a gentleman who  
 6 is trying to auction my property. Stop him"?  
 7 A. No.  
 8 Q. Okay. You didn't put something in  
 9 writing saying, "I revoke any permission you have  
 10 to auction my property," did you?  
 11 A. No. We went through this. No.  
 12 Q. Okay. And so taking you forward -- and  
 13 I'm on August 5th now. Taking you forward to  
 14 August 6th, you had another discussion on the  
 15 morning of August 6th, before the auction?  
 16 A. Yeah. Yes.  
 17 Q. Okay. Did you take any of those steps  
 18 or measures to stop the auction at that time?  
 19 A. No. He came up to me and he said  
 20 Barger is in and he's not going to let anybody  
 21 steal the property.  
 22 Q. When you say he came up to you, was  
 23 this immediately before the auction at  
 24 1 o'clock --  
 25 A. Right.

1 format is the video in? Is it VHS? A little,  
 2 tiny tape?  
 3 A. Chip. Chip.  
 4 MR. DVORAK: Okay. I think we've  
 5 agreed and we can stipulate for the record,  
 6 counsel, we fairly asked for this in the notice  
 7 of deposition duces tecum, so you're going to  
 8 take steps to get that video, separate it from  
 9 his other video, personal family videos, and  
 10 produce it in this case as soon as possible?  
 11 MR. GUSTAVSEN: Yes.  
 12 MR. DVORAK: We've got summary judgment  
 13 scheduled for February 10th, so we'd like to have  
 14 that here in time to use it for February 10th.  
 15 Do you think that's doable?  
 16 MR. GUSTAVSEN: Yes.  
 17 Q. (BY MR. DVORAK) You just indicated  
 18 that you didn't think you caught all of it on the  
 19 video. Tell me why you made that statement.  
 20 What are you referring to?  
 21 A. Well, there was -- he -- they'd been  
 22 getting such low bids that he started saying,  
 23 "Hey, guys. Come on. We've got to get this  
 24 price up," something to that effect. I don't  
 25 know if I got that or not. He stopped and kind

1 Q. -- on August 6th?  
 2 A. Not just immediately but, you know,  
 3 within probably half an hour.  
 4 Q. Was this on the property itself?  
 5 A. On the property.  
 6 Q. Okay. Who was there with you at that  
 7 time?  
 8 A. I think Jeff was there.  
 9 Q. Okay. Did either of you bring a video  
 10 camera to that sale?  
 11 A. I did; yeah.  
 12 Q. Okay. And did you use that video  
 13 camera?  
 14 A. I did.  
 15 Q. How did you use that video camera?  
 16 A. I videoed most of it. I don't know if  
 17 I got all of it. I don't think I got all of it,  
 18 but most of it.  
 19 Q. Okay. Where is that video now?  
 20 A. In my car.  
 21 MR. DVORAK: Let's go off the record  
 22 for a second.  
 23 (Discussion held off the record.)  
 24 Q. (BY MR. DVORAK) We've just established  
 25 that the video of this is out in your car. What

1 of -- and then --  
 2 Q. How long --  
 3 A. But I don't know that I -- I don't know  
 4 that I have it on there.  
 5 Q. Well, as I understand it there were  
 6 effectively three auctions for three separate  
 7 parcels; correct?  
 8 A. That's right.  
 9 Q. Okay. Did the first auction start at  
 10 1:00?  
 11 A. Well, no, it didn't start right at  
 12 1:00, I don't think.  
 13 Q. How shortly after 1:00?  
 14 A. I don't know.  
 15 Q. Okay.  
 16 A. But I don't think it started exactly at  
 17 1:00.  
 18 Q. Okay. 1:30?  
 19 A. Yeah. By 1:30 it was started; yeah.  
 20 Q. Okay. When the first auction started,  
 21 were you videotaping?  
 22 A. Yeah. Yes.  
 23 Q. And you were the one holding the  
 24 camera?  
 25 A. Mm-hmm.

1 Q. Okay. When did you stop videotaping  
 2 after that point?  
 3 A. I don't -- I don't know. I don't --  
 4 Q. Did you videotape all the first  
 5 auction?  
 6 A. I -- I stopped it when there wasn't --  
 7 wasn't anything going on, I stopped. So I don't  
 8 know whether I got all -- I didn't get all of it.  
 9 Q. Okay. Then did you do anything during  
 10 the first auction to try to stop the first  
 11 auction?  
 12 A. No.  
 13 Q. Okay. What about the second auction?  
 14 A. No. And there's -- there's a reason  
 15 why.  
 16 Q. Well, let me ask you a third question.  
 17 What about the third auction, did you do anything  
 18 to stop that?  
 19 A. No. But there -- there was actually  
 20 more than three auctions, see.  
 21 Q. Okay. Please explain.  
 22 A. He says, "Oh, you know how we do.  
 23 We -- this is what we do. We get them to" -- I  
 24 said, "Well, how do you auction off three  
 25 properties?"

1 and then -- then the whole thing as -- as one  
 2 parcel -- or one bid for all of it, but it never  
 3 happened. But he told me, oh, how they did this,  
 4 how they screwed these people up. "They hate  
 5 this," you know. Da-da-da-da.  
 6 I said, "I don't know. I just wondered  
 7 how you'd do it."  
 8 Q. So I guess your testimony would be  
 9 there were several auctions at that time?  
 10 A. That's right. Yes.  
 11 Q. Okay.  
 12 A. Each one of them, and then they put --  
 13 I don't remember exactly which one was first. I  
 14 think it was the -- I don't remember what --  
 15 how -- the sequence of them.  
 16 Q. Okay. But you did nothing during any  
 17 of these auctions to try to stop the proceedings?  
 18 A. No. The reason why is because he says,  
 19 you know, we do this. I was thinking oh, this is  
 20 crazy. This is really nuts. But, you know, when  
 21 they put it all for one, you know, well, maybe  
 22 somebody wants the whole bit; right? And then  
 23 they come in and they bid that on up. Well, then  
 24 after that, it's too late; right? What are you  
 25 going do? That's -- so --

1 "Well, we get them to all bid on this  
 2 and then -- and then we -- and they don't like  
 3 this. They don't like the way we do this." And  
 4 then they get two -- they get those auctions off  
 5 and then they get two of them together, "How much  
 6 will you give us for these two," and then "How  
 7 much will you give us for all of it," and it  
 8 comes down, down, down, down, down, down. You  
 9 know, and they don't like that and this is --  
 10 this is the way they do it. Well, it never  
 11 happened that way. It just went like this and  
 12 that was the end of it (gesturing).  
 13 Q. When you say, "it went like this," you  
 14 sort of drew in the air --  
 15 A. Yeah. There was no -- it was just the  
 16 two pieces of property together and the other  
 17 one, and that was it. It was done. Nobody  
 18 would -- would bid on the whole thing.  
 19 Q. I see. So they attempted first to hold  
 20 an auction of the whole parcel?  
 21 A. No. Each one separately.  
 22 Q. They attempted to hold each parcel  
 23 separately?  
 24 A. And then bring in the next parcel in  
 25 with -- and try to auction those two off or --

1 Q. So again you did nothing to stop the  
 2 auctions while they were going on?  
 3 MR. GUSTAVSEN: Objection. He's  
 4 answered that like five times now.  
 5 MR. DVORAK: Are you instructing him  
 6 not to answer?  
 7 MR. GUSTAVSEN: He can answer one more  
 8 time.  
 9 THE WITNESS: No. I gave you the reason  
 10 why.  
 11 Q. (BY MR. DVORAK) Okay. And you  
 12 remained on the premises at the conclusion of  
 13 these auctions; correct?  
 14 A. Well, right after the last -- the last  
 15 one, I left right immediately.  
 16 Q. Well, let me ask you a question here.  
 17 My understanding is that at the conclusion of  
 18 these auctions you were asked to sign several  
 19 purchase and sale agreements. Do you recall  
 20 that?  
 21 A. I went to my car -- this is exactly how  
 22 it happened. I went to my car. Larry Downs was  
 23 there and he says, "Oh, Tom, I'm so sorry." And  
 24 right after that Scott Bullock walked up and  
 25 said, "These papers are dated today."

1 And I told -- I told Larry Downs  
 2 that "I tried to tell you yesterday and you  
 3 wouldn't listen to me." And I said, "I'm not  
 4 signing -- I'm not signing anything."  
 5 And he walked off and then it wasn't --  
 6 this was a very short time, and Greg -- I mean  
 7 Scott turned around and walked off, and as he was  
 8 walking off he said, "You better get a lawyer,"  
 9 and that was it. It was done.  
 10 Q. Did they actually hand those documents  
 11 to you?  
 12 A. No. Never touched them.  
 13 Q. But I take it you weren't about to sign  
 14 anything at that point?  
 15 A. That's right.  
 16 Q. Did you receive a copy of the complaint  
 17 that was filed in this case? It was served on  
 18 you; correct?  
 19 A. Yeah.  
 20 Q. Okay. Do you recall that there were  
 21 several purchase and sale agreements attached to  
 22 that complaint as exhibits?  
 23 A. I gave it all to Don Copple.  
 24 Q. Okay. So you haven't reviewed any of  
 25 those, you know, proposed purchase and sale

1 he's never touched those documents.  
 2 MR. DVORAK: Right.  
 3 THE WITNESS: I never touched them.  
 4 MR. DVORAK: But he's testifying that  
 5 he received a complaint in this matter which, for  
 6 the record, had those documents attached to it.  
 7 MR. GUSTAVSEN: Yes.  
 8 MR. DVORAK: And I'm trying to probe  
 9 his understanding if he is aware of any  
 10 inconsistency or intends to insert in this  
 11 lawsuit any inconsistency between the purchase  
 12 and sale agreements as written up, and any of the  
 13 terms upon which this sale was advertised,  
 14 whether those terms were authorized by the June 9  
 15 document --  
 16 THE WITNESS: I don't know.  
 17 MR. DVORAK: -- or otherwise.  
 18 THE WITNESS: No. I don't know.  
 19 Q. (BY MR. DVORAK) Okay. Are you  
 20 familiar with downsauction.com?  
 21 A. No.  
 22 (Exhibit No. 14 is marked.)  
 23 Q. (BY MR. DVORAK) Handing you what has  
 24 been marked for identification purposes as  
 25 Exhibit 14, have you ever seen that document

1 agreements?  
 2 A. (Nods).  
 3 Q. Okay. As you sit here today, are you  
 4 aware of any aspect of those proposed purchase  
 5 and sale agreements that doesn't fit with the  
 6 terms upon which this auction sale was  
 7 advertised?  
 8 A. Say that again.  
 9 Q. Yeah. Was the deal that was written up  
 10 and handed to you by Greg Bullock, to the best of  
 11 your knowledge consistent with the terms on which  
 12 this sale was advertised to the public?  
 13 A. I don't know.  
 14 MR. GUSTAVSEN: Objection.  
 15 Are you referring to the June 23d, or  
 16 are you referring to the agreements on August  
 17 6th?  
 18 MR. DVORAK: I'm referring to what he  
 19 just testified Greg Bullock handed to him on  
 20 August --  
 21 MR. COLLAER: Scott.  
 22 MR. MICHAELSON: Scott.  
 23 MR. DVORAK: -- Scott Bullock handed it  
 24 to on August 6th.  
 25 MR. GUSTAVSEN: And his testimony was

1 before?  
 2 A. Right.  
 3 Q. You have?  
 4 A. Yes.  
 5 Q. What is it?  
 6 A. It's approximate values of the 4104,  
 7 1019, and 1010.  
 8 Q. Okay. Do you recognize the handwriting  
 9 on that document?  
 10 A. Well, I think it's Greg -- I mean --  
 11 yeah, Greg Bullock.  
 12 Q. And you said you've seen this document  
 13 before. Where have you seen this document  
 14 before?  
 15 A. I saw that at one of the meetings that  
 16 we had.  
 17 Q. Okay. Do you recall which meeting?  
 18 Was it the June 9th meeting?  
 19 A. I think so. I don't know. I think it  
 20 was the first meeting we had with the four of us.  
 21 Q. Why was this document prepared?  
 22 A. I don't know. I didn't -- I didn't  
 23 have it prepared.  
 24 Q. Do you recall how this document was  
 25 used in the discussion when it was shown to you?

1 A. We were talking about what the value  
 2 was.  
 3 Q. Okay. But you don't recall anything  
 4 else about the discussions about this document?  
 5 A. No. Just -- we just -- this is about  
 6 what it -- what it is. We didn't really go, you  
 7 know, line by line on this.  
 8 Q. I want to talk to you a little about  
 9 relationships with some of the persons involved.  
 10 We talked about Giddyup Investments here. How  
 11 did you find Bullock and Company Realtors to  
 12 auction this property?  
 13 A. No. It was Downs.  
 14 Q. Okay. But how did you decide you  
 15 wanted to talk about auctioning this property?  
 16 How did you make that decision? What caused you  
 17 to get to that point?  
 18 A. I just thought maybe that was a good  
 19 way to do it. I wanted to sell the property.  
 20 Q. What led you to the doorstep of either  
 21 Downs or Bullock and Company Realtors?  
 22 A. Oh, my son and I talked about, you  
 23 know, doing it and who we'd get. We had  
 24 contacted another -- another one that --  
 25 another -- I forget what the guy's name was. And

1 Q. Okay. Does All Pro Realty Group ring a  
 2 bell with you at all? Does that name ring a  
 3 bell?  
 4 A. Yes.  
 5 Q. What do you know about All Pro Realty  
 6 Group?  
 7 A. I just know that my son was involved  
 8 with -- they were the -- his backup. He was --  
 9 he was -- worked under their brokerage license.  
 10 Q. Now, you understand that I attempted to  
 11 subpoena your son for his deposition today?  
 12 A. Yeah.  
 13 Q. Did you talk to your son about that  
 14 yesterday?  
 15 A. Yeah. Yes.  
 16 Q. Tell me about that conversation.  
 17 A. Well, we just -- he didn't know when --  
 18 he thought it was in Nampa, so I don't know.  
 19 Q. Okay. So he had gotten some kind of  
 20 notice of it?  
 21 A. Right. Is he supposed to be here now?  
 22 Q. Well, I'll leave that up to him.  
 23 Is your son making himself scarce to  
 24 avoid his deposition?  
 25 A. I don't know.

1 he never did get back to us, so we contacted  
 2 Downs. And then Downs works with Bullock when he  
 3 does this.  
 4 Q. Okay.  
 5 A. That's the Realtor he uses.  
 6 Q. How did your son come to know of Larry  
 7 Downs, do you know?  
 8 A. Well, it's -- we just asked him about  
 9 auctioning. That's all. That's how I came to  
 10 know Larry Downs.  
 11 Q. Okay. But you didn't know what kind of  
 12 previous relationship your son or you had with  
 13 Larry Downs? Was there any?  
 14 A. I don't think so.  
 15 Q. Okay. And so Greg and Scott Bullock,  
 16 you were introduced to them by Larry Downs?  
 17 A. That's right.  
 18 Q. Okay.  
 19 A. What I -- what I understood was because  
 20 of the brokerage. You had to have a broker.  
 21 Q. To sell real property?  
 22 A. Yeah.  
 23 Q. Do you know a Paul Severson Doughty at  
 24 all?  
 25 A. (Nods).

1 Q. Okay. Is your son aware that this  
 2 lawsuit may be changed to include him as a  
 3 defendant?  
 4 A. I don't know.  
 5 Q. You didn't discuss that with him?  
 6 A. No.  
 7 Q. Okay. Besides the videotape, is there  
 8 any other record of those auction proceedings  
 9 that you're aware of? By "record," I mean like a  
 10 tape-recording or a photograph or anything else  
 11 that might memorialize those auction proceedings?  
 12 A. No. I didn't have anything to do with  
 13 anybody there. I came, set up. I didn't talk  
 14 to -- oh, maybe I talked to one person that was  
 15 wandering around looking at the property. Other  
 16 than that, I had nothing to do with anybody.  
 17 Q. And your son was there with you at that  
 18 auction?  
 19 A. Yes, he was. And his friend.  
 20 Q. Okay. Who was his friend who was  
 21 there?  
 22 A. Tara.  
 23 Q. Do you know her last name?  
 24 A. No.  
 25 Q. T-a-r-a?

1 A. T-a-r-a? I think so.  
 2 Q. Okay. Then you said you talked to  
 3 someone on site too for a little while. Who was  
 4 that?  
 5 A. I talked to somebody on site? I talked  
 6 to -- I only talked to Larry, and then I talked  
 7 to -- when Greg came and introduced me to Scott,  
 8 and we talked -- it was just a -- "This is Scott.  
 9 He's going to help you."  
 10 Q. I thought you said you talked to a  
 11 buyer, one of the prospective buyers, for a  
 12 little bit of time.  
 13 A. I never talked to a buyer.  
 14 Q. Okay. Besides --  
 15 A. I had no idea who -- you know.  
 16 Q. Will you say that again?  
 17 A. I didn't -- I only knew one buyer  
 18 there.  
 19 Q. Okay.  
 20 A. But I didn't talk to him. I didn't  
 21 even say hi to him.  
 22 Q. How many buyers were there?  
 23 A. (Shrugs).  
 24 Q. Five? Six?  
 25 A. I don't know. They had a record book,

1 but I figured there was like maybe two or three  
 2 people that were actually bidding.  
 3 Q. And when you say you figured, I take it  
 4 you sort of had to cull out the actual bidders  
 5 from how many people were there? Is that what  
 6 you were going through when you used the word  
 7 "figured"?  
 8 A. No. There just wasn't hardly any  
 9 bidders.  
 10 Q. Okay. How many people were actually  
 11 there?  
 12 A. Well, we counted them and I can't  
 13 remember what it was. It was probably 20.  
 14 Q. Okay.  
 15 A. Somewhere around there, 20, 25.  
 16 Q. Do you recall what time it was when you  
 17 left on August 6 --  
 18 A. No.  
 19 Q. -- when you left the auction?  
 20 A. No. But I left directly after the  
 21 auction.  
 22 Q. But you don't recall what time that  
 23 was?  
 24 A. No.  
 25 Q. Besides persons that we mentioned in

1 today's deposition, are there any other persons  
 2 who you feel would have some knowledge about the  
 3 facts of the auction? What I'm trying to do is  
 4 figure out if there are any other witnesses out  
 5 there other than the ones we're talking about  
 6 today.  
 7 A. No.  
 8 Q. Okay. And I need to ask you this.  
 9 Have you ever been convicted of a felony?  
 10 A. No.  
 11 MR. DVORAK: Nothing further from me.  
 12 EXAMINATION  
 13 QUESTIONS BY MR. COLLAER:  
 14 Q. Mr. Hagood, my name is Phil Collaer,  
 15 and I represent Bullock and Company in this  
 16 matter. Just a little more background  
 17 information. Number of children. I know Jeff is  
 18 your son. Do you have any other kids?  
 19 A. I have five children.  
 20 Q. Five children. And what are their  
 21 names and ages?  
 22 A. Oh, I can't tell you their ages.  
 23 Q. Let's work on their names first. There  
 24 was Jeff and then who else?  
 25 A. There's Desiree and Jeff and Cherie and

1 Tommy and Suzanne.  
 2 Q. And of your children, other than Jeff,  
 3 who else -- is there any of them that live in  
 4 this area?  
 5 A. Desiree.  
 6 Q. Desiree. And the rest live where,  
 7 California?  
 8 A. The rest live in California; yes.  
 9 Q. Okay. And does Desiree live in Boise  
 10 or Caldwell or Nampa?  
 11 A. Excuse me. I'm going to stand up.  
 12 Q. If you need to take a break, we can.  
 13 A. No. I'm fine if I just stand up.  
 14 She lives in Nampa.  
 15 Q. Okay. Now, how long has Jeff lived in  
 16 Idaho?  
 17 A. I don't know. Ten, 12, 13 years.  
 18 Q. And did he move here before you, or  
 19 did --  
 20 A. Yeah. I've only lived here a little  
 21 over two years.  
 22 Q. Okay. So Jeff lived here for  
 23 approximately 10 to 15 years, in that range? And  
 24 I understand, that's why I say it's a range.  
 25 A. Actually, it's about 15 years, I think.

1 Q. Okay. So approximately 15 years. And  
 2 while Jeff has lived here in Idaho, what has been  
 3 his occupation? What has he done?  
 4 A. He's a plumber.  
 5 Q. Plumber. And he's had a real estate  
 6 license for how long?  
 7 A. I think a couple of years. Don't make  
 8 that solid, but it's somewhere around in there.  
 9 Q. Right. And is he still working as a  
 10 plumber?  
 11 A. Well, he hasn't been, but -- no, he  
 12 hasn't been, lately.  
 13 Q. All right. Is he still working as a  
 14 real estate agent?  
 15 A. I -- I guess sometimes. I don't know  
 16 how much he does with it.  
 17 Q. What's his occupation now, if you know?  
 18 A. Real estate agent, I guess. I don't  
 19 know.  
 20 Q. Okay. Is he still affiliated with All  
 21 Pro Realty?  
 22 A. I think he is. See. It changed hands  
 23 and it had a -- I don't know, but I think he is  
 24 still affiliated with All Pro.  
 25 Q. Okay.

1 A. Four.  
 2 Q. Okay. Why don't we describe them, one  
 3 through how ever many there are. Which ones are  
 4 they? One's your personal home.  
 5 A. Right.  
 6 Q. Where is that located?  
 7 A. 3649.  
 8 Q. Nampa?  
 9 A. South Ox Bow.  
 10 Q. Okay.  
 11 A. And the others --  
 12 Q. The second property --  
 13 A. -- are these three properties.  
 14 Q. The properties involved in this  
 15 property?  
 16 A. Right.  
 17 Q. When did you acquire your residence in  
 18 Nampa?  
 19 A. Oh, a little over two years ago.  
 20 Q. When you were acting as the buyer, were  
 21 you represented by your son as a real estate  
 22 agent in that process?  
 23 A. No.  
 24 Q. Did you have a Realtor to help you  
 25 purchase that property?

1 A. Or if it's called -- maybe it's not  
 2 called All Pro. I don't know if it's called All  
 3 Pro now or not.  
 4 Q. Do you know if he's changed brokers?  
 5 A. No.  
 6 Q. Okay. Tell me, since your -- I  
 7 understood you bought and sold some real estate  
 8 in your lifetime; correct?  
 9 A. Yeah.  
 10 Q. You've bought, owned personal  
 11 residences?  
 12 A. Sort of.  
 13 Q. You say, "sort of." What do you mean  
 14 by that?  
 15 A. Well, it was -- I had -- my -- it was  
 16 in a trust, my house, so --  
 17 Q. Was that through your mother's estate?  
 18 A. Yeah.  
 19 Q. Okay. Is that property in California?  
 20 A. Right.  
 21 Q. Do you own the home you live in now?  
 22 A. Yes.  
 23 Q. Let's focus on real estate here in  
 24 Idaho. How many properties have you purchased or  
 25 been involved with the purchase here in Idaho?

1 A. No, I don't think so.  
 2 Q. Was the seller represented by a real  
 3 estate agent?  
 4 A. You know, I don't remember if he was or  
 5 not --  
 6 Q. Okay.  
 7 A. -- because all I ever did was go to the  
 8 title company and signed.  
 9 Q. How did you learn that the property was  
 10 for sale?  
 11 A. My ex-wife.  
 12 Q. How was your ex-wife involved in this  
 13 property?  
 14 A. Well, it's -- she lives five doors down  
 15 from me --  
 16 Q. Okay.  
 17 A. -- so --  
 18 Q. Now, the three properties involved in  
 19 this case, your son, did he represent you as the  
 20 buyer's agent in those purchases?  
 21 A. In the three properties?  
 22 Q. Yes.  
 23 A. Did he represent me?  
 24 Q. Correct.  
 25 A. As a Realtor?

1 Q. Yes.  
 2 A. No.  
 3 Q. So you did not have --  
 4 A. No.  
 5 Q. Let me finish the questions. It's real  
 6 important that we both let each other finish or  
 7 else it doesn't make any sense to the court  
 8 reporter.  
 9 So when you acquired these three  
 10 commercial properties out by the Idaho Center,  
 11 you did not have what we've identified as a  
 12 representation agreement like Exhibit No. 7,  
 13 between yourself and your son, where it was a  
 14 buyer's, exclusive buyer's representation  
 15 agreement? Is that a correct statement?  
 16 A. Well, he couldn't, because he didn't  
 17 have a Realtor's license.  
 18 Q. He wasn't even licensed then, was he?  
 19 A. No.  
 20 Q. Okay. When you purchased these  
 21 properties, when you signed the contract as the  
 22 buyer, who was the buyer? You, individually, or  
 23 did you have partners, or explain that to me.  
 24 A. Well, I -- no, I had no partners.  
 25 Q. Okay. So you were the exclusive buyer?

1 A. Well, that's where I'm not -- I'm not  
 2 too clear, but it probably does and some of this  
 3 money will go to recipients of that.  
 4 Q. Okay. Are you the trustee of the  
 5 trust?  
 6 A. I'm the executor. Yes, I'm the  
 7 executor.  
 8 Q. And the beneficiaries are your  
 9 siblings?  
 10 A. That's right.  
 11 Q. And other than the -- was it the two  
 12 acres was the property that the trust may have an  
 13 interest in?  
 14 A. I have to go back and look, but I think  
 15 the four acres, which is the 1.9 and the 2. I  
 16 don't -- it may be in there. I don't know. I'd  
 17 have to go back and look in the files.  
 18 Q. Did the money you used to purchase  
 19 these properties come from the trust?  
 20 A. I think so at the time of -- it was in  
 21 a -- it was in a -- some of it was in an LP.  
 22 Q. A limited partnership?  
 23 A. Yes.  
 24 Q. Okay.  
 25 A. But I'd have to go back --

1 A. It's -- I was the exclusive -- well,  
 2 this thing is -- is with the trust, part of it,  
 3 but I -- I own it. I own it. I can do whatever  
 4 I want with it.  
 5 Q. You mentioned the trust.  
 6 A. Yeah.  
 7 Q. That dealt with your mother's estate.  
 8 A. I think erroneous to what I said  
 9 before, that part of it was in the trust, the  
 10 two, I think. Now, the 14 acres wasn't. That  
 11 was mine.  
 12 Q. Okay.  
 13 A. I -- I bought that outright.  
 14 Q. And the two acres involved the family  
 15 trust somehow?  
 16 A. Sort of; yeah. Sort of. It's very --  
 17 it's kind of convoluted the way --  
 18 Q. Okay.  
 19 A. -- the way the trust and what's gone  
 20 on.  
 21 Q. Does that trust still exist today?  
 22 A. Well, yes, it sort of does; yeah. Sort  
 23 of.  
 24 Q. Does it have any ownership interest in  
 25 either of these three parcels?

1 Q. What was the name?  
 2 A. I'd have to go back and look at the  
 3 paperwork. I can't tell you exactly.  
 4 Q. You don't know?  
 5 A. It's too -- it was too convoluted.  
 6 Q. Okay.  
 7 A. The whole thing is very -- very  
 8 ambiguous. Not ambiguous, but I mean it's --  
 9 Q. Okay. And at some point Giddyup  
 10 Investments held title to this property?  
 11 A. Yeah. That's right. The only reason  
 12 was for -- now, I remember. The only reason for  
 13 that was for a loan so --  
 14 Q. Now, a loan from this woman?  
 15 A. No. At one time we got a loan from  
 16 Hopkins Financial on the property.  
 17 Q. Okay. And has that loan been repaid?  
 18 A. Yes. Everything's been paid.  
 19 Q. And what were the source of the funds  
 20 to pay Hopkins?  
 21 A. It was probably the LP. I'm not  
 22 positive.  
 23 Q. Okay. Now, when you were looking for  
 24 these properties that are involved in this  
 25 lawsuit, as I understand what you testified



1 before, it was you wanted to -- you bought them  
 2 for investment purposes. You were going to work  
 3 them with your son, Jeff.  
 4 A. We thought of developing them.  
 5 Q. Okay. And Jeff was not a real estate  
 6 agent at the time these were acquired?  
 7 A. No.  
 8 Q. He was just interested in development?  
 9 A. Right. Right.  
 10 Q. He was still working as a plumber?  
 11 A. That's right.  
 12 Q. And how did you go about locating  
 13 properties for sale for development purposes?  
 14 A. Well, he found this one property and so  
 15 we bought it, and then he had his plumbing  
 16 business there.  
 17 Q. Okay. So correct me if I'm wrong. I'm  
 18 assuming that the research and the process of  
 19 finding property to purchase was done by Jeff?  
 20 A. Not all of it.  
 21 Q. Okay. How were you involved?  
 22 A. I paid for it.  
 23 Q. Were you involved in selecting property  
 24 to purchase at all?  
 25 A. On the first one, when we got to that

1 A. Yeah. And then we dickered with them  
 2 and bought the front property.  
 3 Q. Okay. In any of those sales were you  
 4 represented by a real estate agent?  
 5 A. No.  
 6 Q. Did you get legal advice to deal with  
 7 any of these purchases at all?  
 8 A. Well, just with the mortgage company or  
 9 the -- not the mortgage, but the title company.  
 10 Q. Okay. The title company gave you legal  
 11 advice?  
 12 A. No, I don't think so.  
 13 Q. Okay. That's what I'm interested in,  
 14 because as you're describing this to me, these  
 15 are pretty complicated transactions with the  
 16 trust and the LPs and all of that. What I'm  
 17 interested in is through all this process did you  
 18 consult with an attorney about what you were  
 19 doing or what you may or should or shouldn't --  
 20 A. Oh, yeah. An attorney did; yeah.  
 21 Q. And who was the attorney that you  
 22 consulted with?  
 23 A. Well, this Rick and Todd Bailey.  
 24 Q. And that was in connection with the  
 25 purchase of these properties?

1 one, I said that was -- that was the one. I was  
 2 the one that --  
 3 Q. When you say, "that was the one" --  
 4 A. That's the one --  
 5 Q. Let me finish. Did you go out to try  
 6 to find property and found something, or did  
 7 somebody locate this property and say, "Why don't  
 8 you take a look at this to see if you like it"?  
 9 A. No. He did.  
 10 Q. So Jeff did that?  
 11 A. That's right. The first one. 1010.  
 12 Q. Okay. So the research and all that to  
 13 find that property was done by Jeff?  
 14 A. Right.  
 15 Q. Not yourself?  
 16 A. Right.  
 17 Q. Now, the other two properties, who did  
 18 the research to go out and investigate to find  
 19 those properties to see if they were even  
 20 available or something you would be interested in  
 21 buying? Who did that work?  
 22 A. Well, it was for sale. The sign was  
 23 right there. We're right next-door.  
 24 Q. Okay. So you bought the first property  
 25 and saw these other signs and --

1 A. Well, on these properties -- but I  
 2 don't know how much they had to do with it. I  
 3 don't remember how much they had to do with it.  
 4 Q. Did you have an ongoing relationship  
 5 with Rick or Todd Bailey as attorneys?  
 6 A. Yes.  
 7 Q. Had you used them before?  
 8 A. Yeah.  
 9 Q. Tell me, through this whole process of  
 10 this auction process that you've discussed  
 11 earlier today, did you still have an ongoing  
 12 relationship with the Baileys as your attorneys?  
 13 A. No.  
 14 Q. And when had that relationship ended?  
 15 A. Oh, a little over a year ago, maybe.  
 16 Q. Prior --  
 17 A. Maybe a year, six months, three months.  
 18 Q. When in relation to this auction did  
 19 that relationship with Mr. Bailey end?  
 20 A. In relationship to the auction?  
 21 Q. Yeah.  
 22 A. It was at least a year or more, I  
 23 recollect.  
 24 Q. Tell me, through this auction process  
 25 when you were considering doing an auction and

1 everything leading up to it, did you consult with  
 2 an attorney at any time during that time frame?  
 3 A. No.  
 4 Q. Why not?  
 5 A. I don't know.  
 6 Q. You knew you could have if you wanted  
 7 to?  
 8 A. Well, sure.  
 9 Q. In fact you were encouraged to do that,  
 10 weren't you?  
 11 MR. GUSTAVSEN: Objection. Encouraged  
 12 by who?  
 13 Q. (BY MR. COLLAER) Doesn't the seller's  
 14 representation agreement encourage you to seek  
 15 the advice of an attorney or an accountant?  
 16 A. I never --  
 17 Q. Take a look at Exhibit No. 7.  
 18 A. Well, but I never --  
 19 Q. I want you to look at Exhibit No. 7.  
 20 I'll read it to you. It's right under the title  
 21 RE-16 Exclusive Seller Representation Agreement.  
 22 It reads "This is a legally binding contract.  
 23 Read the entire document including any  
 24 attachments. If you have any questions" and in  
 25 bold "consult your attorney and/or accountant

1 A. No.  
 2 Q. Tell me, had you ever purchased  
 3 commercial property before?  
 4 A. No.  
 5 Q. Had you ever purchased investment  
 6 property before?  
 7 A. No.  
 8 Q. Had you ever been involved in any kind  
 9 of development project before?  
 10 A. No.  
 11 Q. Tell me, you did list this property for  
 12 sale with your son prior to considering an  
 13 auction; correct?  
 14 A. That's right.  
 15 MR. COLLAER: What exhibit are we on?  
 16 I'm going to hand you what I'm going to mark as  
 17 Exhibit No. 15.  
 18 (Exhibit No. 15 is marked.)  
 19 Q. (BY MR. COLLAER) Take a look at  
 20 Exhibit No. 15. Have you ever seen this before?  
 21 A. I don't recollect I did. Maybe I --  
 22 Q. Your son never showed this to you?  
 23 A. Well, he probably did show it to me;  
 24 yes.  
 25 Q. Okay. He's identified as the seller's

1 before signing."  
 2 It says that, doesn't it?  
 3 A. I still don't know where you're reading  
 4 it.  
 5 Q. The first page, right underneath the  
 6 title RE-16 Exclusive Seller Representation  
 7 Agreement. The very top.  
 8 A. Yeah.  
 9 Q. So the document is encouraging you to  
 10 just talk to an attorney if you have any legal  
 11 questions, isn't it?  
 12 A. I still don't see it.  
 13 MR. GUSTAVSEN: What paragraph?  
 14 MR. DVORAK: It's right at the very  
 15 top. It's in the title.  
 16 MR. GUSTAVSEN: I just picked it up.  
 17 THE WITNESS: Oh.  
 18 (Witness is reviewing.)  
 19 THE WITNESS: Okay. That's what it  
 20 says.  
 21 Q. (BY MR. COLLAER) Okay. And you didn't  
 22 do it, did you?  
 23 A. No.  
 24 Q. Did anybody discourage you from talking  
 25 to an attorney?

1 agent, the listing agent, is he not?  
 2 A. Right.  
 3 Q. And if you look at Exhibit No. 9, this  
 4 is the same time frame that you signed the  
 5 seller's representation agreement retaining your  
 6 son as your agent, isn't it?  
 7 A. I don't know what we're looking for in  
 8 here between these two.  
 9 Q. Okay. Well, the date of the exclusive  
 10 seller's representation agreement, Exhibit No. 9,  
 11 is dated September 22, 2007. If you look at  
 12 No. 15, the listing date is September 24, 2007.  
 13 A. Okay.  
 14 Q. So Exhibit No. 15 is the MLS listing  
 15 relating to your hiring your son as your agent,  
 16 as your seller's agent; correct?  
 17 A. Okay. Now, I see what you're talking  
 18 about; okay.  
 19 Q. Now, focusing on No. 15, which property  
 20 does this involve?  
 21 A. This was 4104.  
 22 Q. How many acres was it?  
 23 A. It's approximately 1.9.  
 24 Q. And it was listed for nearly a year  
 25 prior to the time you hired Bullock and Company

1 as your selling agent; correct?  
 2 A. Right.  
 3 Q. During that year how many offers did  
 4 you get on this property?  
 5 A. I -- I don't know.  
 6 Q. Do you recall any?  
 7 A. No. But the -- I -- I don't recall. I  
 8 don't know if there was any -- I know that there  
 9 was action on it, but I don't know whether --  
 10 Q. When you say, "action," what do you  
 11 mean by that?  
 12 A. Well, people called on it and asked,  
 13 you know, about the property.  
 14 Q. Asked what it was worth -- what they  
 15 wanted for it, what the terms were?  
 16 A. Yeah. I didn't -- I didn't have  
 17 anything to do with it. He -- Jeff did it.  
 18 Q. Did you talk to any potential buyers  
 19 who called --  
 20 A. No.  
 21 Q. -- expressing --  
 22 A. No, I didn't talk to anybody.  
 23 Q. -- any questions about it?  
 24 A. No.  
 25 Q. What did your son tell you about any

1 A. No. 'Cause I really didn't have any --  
 2 Q. Tell me, did you ever meet your son's  
 3 broker at All Pro Realty during the time this  
 4 property was listed there?  
 5 A. No, I don't think so.  
 6 Q. Did you ever call him or talk to him at  
 7 all?  
 8 A. No.  
 9 Q. And I take it from that, you didn't  
 10 express any concerns about the manner in which  
 11 the property was being marketed?  
 12 A. Right.  
 13 Q. Tell me, what was your understanding of  
 14 the strength of the real estate market for  
 15 commercial property in Nampa during the 2007 to  
 16 2008 time frame when this property was listed  
 17 with your son through All Pro Realty?  
 18 A. Well, we knew it could come down, of  
 19 course.  
 20 Q. That's not my question. My question is  
 21 what was your understanding of the strength of  
 22 the market during that time for property like  
 23 this? Was it an aggressive buyer's market or a  
 24 seller's market? What was your understanding of  
 25 what was going on in the market?

1 calls he was getting about the property?  
 2 A. No. He just told me he had some calls  
 3 for the property.  
 4 Q. Okay.  
 5 A. I don't know.  
 6 Q. Do you recall anything he told you  
 7 about the details of those calls?  
 8 A. I don't know.  
 9 Q. And you don't recall receiving any  
 10 written offers --  
 11 A. No.  
 12 Q. -- during this year?  
 13 A. No.  
 14 Q. Tell me, did your son also advertise  
 15 this property during this year in the newspaper?  
 16 A. I don't think so.  
 17 Q. What was he doing other than listing it  
 18 in the MLS, what did he do to market the property  
 19 on your behalf?  
 20 A. I don't know what all he did.  
 21 Q. Did you feel that he was actively  
 22 trying to market the property for you?  
 23 A. Well, I guess so.  
 24 Q. Were you critical of the efforts he was  
 25 taking to market the property for you?

1 A. I just understood that the market was  
 2 down. I don't -- that's the only way I can say  
 3 it.  
 4 Q. Tell me, what is your understanding or  
 5 definition of what fair market value for property  
 6 is?  
 7 A. It was just looking at other properties  
 8 and what they sold for.  
 9 Q. Would it be consistent with what a  
 10 willing buyer would be willing to pay and what a  
 11 willing seller would be willing to accept?  
 12 A. I -- I don't know.  
 13 Q. Okay. Tell me, what -- I know you  
 14 listed this for \$1.1 million. Were you willing  
 15 to come down off of that price?  
 16 A. Yes.  
 17 Q. How much?  
 18 A. I don't know. That would be  
 19 negotiated. I don't -- I have no idea.  
 20 Q. Is that something you and your son  
 21 discussed about whether you would be willing to  
 22 negotiate and how much?  
 23 A. No. He -- no, we didn't -- we  
 24 didn't --  
 25 Q. Let me ask you this. If during an

1 entire year, that year, this property is  
2 advertised and actively marketed for  
3 \$1.1 million, what does that tell you about its  
4 value.

5 A. Well, come on. They -- they put  
6 property all the time up for -- and they keep it  
7 up for five years up for sale and it doesn't  
8 sell, and then maybe somebody comes along and  
9 gives them a good price for it all of a sudden,  
10 so you never know. How do you know?

11 Q. Is it consistent with the conclusion  
12 that during that time in that market, that  
13 property was not worth \$1.1 million because there  
14 was nobody that expressed any interest in it at  
15 that price?

16 A. So.

17 Q. Would you agree with that statement?

18 A. I'm not agreeing with anything. Who  
19 knows. You never know. Somebody comes along and  
20 wants that piece of property and they'll give you  
21 your price for it. Maybe they won't. It doesn't  
22 matter. It only takes one.

23 Q. Nobody in that time frame made any  
24 indication they were willing to pay that price  
25 for that property?

1 A. Yeah. That's right. I don't know that  
2 they did.

3 Q. Okay. Are you aware of any buyer now  
4 that is willing to pay or expressed any interest  
5 in paying \$1.1 million --

6 A. No.

7 Q. -- for this property presently?

8 A. No.

9 Q. During the entire time you've owned  
10 this property has anybody, any buyer --

11 A. No.

12 Q. -- made any offer on this property?

13 A. No. Not that I know of.

14 Q. Tell me, in light of the mortgage  
15 crisis that's happened in the past couple of  
16 months and what's happened to the real estate  
17 market in the past couple of years, would you  
18 expect property in Nampa, investment property  
19 such as this, to appreciate or depreciate during  
20 that time frame?

21 A. Probably depreciate.

22 Q. Okay. And focusing on the property  
23 that's the subject of Exhibit No. 15, what was  
24 your purchase price for that again?

25 MR. DVORAK: 4104 Garrity.

1 THE WITNESS: 4104? It was around 340.

2 Q. (BY MR. COLLAER) Okay.

3 A. I think I paid more than that though  
4 for it in the end.

5 Q. So approximately 340?

6 A. Yeah.

7 Q. And what was the date of the purchase  
8 for that?

9 A. I don't remember. It was between -- it  
10 would be about '04, probably. I don't know. I  
11 can't remember.

12 Q. Approximately 2000?

13 A. I don't know.

14 Q. And that's fine.

15 A. Don't hold me to that. I'd have to  
16 look it up. I'm not good. I can't remember any  
17 of my kids' birthdays or how old they are.

18 Q. And so when you listed this property in  
19 September of 2007, you'd owned it for  
20 approximately three years?

21 A. That's probably right.

22 Q. Okay. Has it ever been appraised?

23 A. I don't think so.

24 Q. What is it assessed for tax purposes?

25 A. What's that?

1 Q. What is its value that it's assessed  
2 for tax purposes?

3 A. I don't know. Taxes are like -- which  
4 one? 4104?

5 Q. Yes. 4104.

6 A. The taxes are something like 4,000 a  
7 year.

8 Q. Do you know what the assessed value is?

9 A. I don't know.

10 Q. Tell me, the listing agreement with  
11 your son, did you ever renew that or did it  
12 expire on its own?

13 A. No. We delist -- I delisted it.

14 Q. I understand taking it off the MLS  
15 system. I'm talking about -- you may have  
16 already answered this -- Exhibit No. 7, your  
17 contract, the seller representation agreement.

18 A. I delisted it.

19 Q. I understand that you canceled the MLS  
20 listing. We've talked about that. What I'm  
21 interested in is did you sign a form or do  
22 anything to say -- not in Exhibit No. 7, but your  
23 seller representation agreement, Exhibit No. 9,  
24 is canceled?

25 A. That's right. Yes.

1 Q. You did sign a form accomplishing that?  
 2 Was it signed by the broker of All Pro Realty?  
 3 A. I don't know.  
 4 Q. Was it signed by your son on behalf of  
 5 the broker?  
 6 A. I don't know.  
 7 Q. And you don't have a copy of that  
 8 cancellation for me in your records?  
 9 A. (Nods).  
 10 Q. Can you explain why --  
 11 A. Jeff has it. I would suppose he has  
 12 one.  
 13 Q. Can you explain why it would not be in  
 14 the records of the broker of All Pro Realty?  
 15 A. They don't have it?  
 16 Q. Evidently not, other than canceling the  
 17 MLS listing. That's all they've got.  
 18 A. I said that I went down to All Pro  
 19 Realty, he brought it out, I signed it in the car  
 20 to delist him as my real estate broker. That's  
 21 all I know.  
 22 Q. Do you know, was it explained to you  
 23 any reason why you needed to do that?  
 24 A. Because Bullock was representing me.  
 25 Q. Was that before or after you had signed

1 Exhibit No. 7.  
 2 A. Explain that again.  
 3 Q. As the seller who signed it, what  
 4 significance did you place on that representation  
 5 agreement?  
 6 A. Well, he was the Realtor that was  
 7 representing me. That's all.  
 8 Q. Okay. Did you understand Exhibit No. 7  
 9 to be a contract between yourself and Bullock and  
 10 Company?  
 11 A. Yes.  
 12 Q. Okay. Other than Exhibit No. 7, is  
 13 there any other written modifications or anything  
 14 that you contend is part of your written contract  
 15 with Bullock and Company?  
 16 A. Other than what we have here?  
 17 Q. Correct.  
 18 A. Not that I know of.  
 19 Q. All right.  
 20 A. We only signed one time.  
 21 Q. Well, that was my -- that was what I  
 22 was asking, but I'm going to make it real clear.  
 23 After Exhibit No. 7 was signed on June 9, 2008 --  
 24 A. Right. No, I signed nothing after  
 25 that.

1 a representation agreement with Bullock?  
 2 A. I think that was after, but before the  
 3 auction.  
 4 Q. After that. Okay. So you signed your  
 5 listing agreement with Bullock and then delisted  
 6 with your son?  
 7 A. I think that's -- I think that was the  
 8 way it was; yeah.  
 9 Q. Okay.  
 10 A. I think -- well, what I understood,  
 11 it -- it didn't -- it didn't matter because it  
 12 really didn't take effect until the auction.  
 13 Q. What did not take effect?  
 14 A. The representation. But I can see  
 15 there's a conflict there.  
 16 Q. Yeah. The contract has a start date on  
 17 it, doesn't it? Exhibit No. 7, your contract --  
 18 A. Right. Right.  
 19 Q. -- with Bullock.  
 20 A. Right.  
 21 Q. And tell me, as the seller of this  
 22 property, what importance or significance did you  
 23 place on that representation agreement?  
 24 A. On which representation agreement?  
 25 Q. Your representation with Bullock,

1 Q. Okay. No other written modifications  
 2 or --  
 3 A. No.  
 4 Q. -- any additions to it or addendums or  
 5 changes to it?  
 6 A. No.  
 7 Q. This is it? No. 7 is the contract?  
 8 A. I tried to get them to change it.  
 9 Q. Let me get the question out and listen  
 10 to the question. Other than there are no written  
 11 modifications or changes to the contract that  
 12 aren't attached and part of Exhibit No. 7; is  
 13 that correct?  
 14 A. Not that I know of.  
 15 Q. Okay. Is it your contention there are  
 16 any?  
 17 A. No.  
 18 Q. Okay. Was Exhibit No. 7 filled out in  
 19 your presence?  
 20 A. I think it was.  
 21 Q. And your son was with you while it was  
 22 being filled out; correct?  
 23 A. Right.  
 24 Q. It was being filled out by Scott  
 25 Bullock?

1 A. No.  
 2 Q. Who filled out --  
 3 A. Greg.  
 4 Q. Who is Greg Bullock?  
 5 A. He's the Realtor. He was the Realtor,  
 6 but he's not the broker.  
 7 Q. Okay. Well, my understanding -- okay.  
 8 So if I understand what you're telling me is you  
 9 get to their -- you meet with -- this meeting  
 10 happens. You're there, your son's there, Scott  
 11 Bullock is there, and Larry Downs is there?  
 12 A. No. Scott Bullock is not. Greg.  
 13 Q. Greg Bullock.  
 14 A. And Larry Downs.  
 15 Q. And Larry Downs.  
 16 A. Right.  
 17 Q. The four of you are there --  
 18 A. That's it.  
 19 Q. -- and one of the things that happens  
 20 is Exhibit No. 7 is filled out by Mr. Bullock in  
 21 your presence and you signed it.  
 22 A. Right.  
 23 Q. Okay. And prior to you signing it, did  
 24 they discuss the terms of the agreement and what  
 25 it meant?

1 think I'm restating what he said. I'm trying to  
 2 be clear about it.  
 3 MR. GUSTAVSEN: Okay.  
 4 Q. (BY MR. COLLAER) What I'm interested  
 5 in, Mr. Hagood, and I understand what you've said  
 6 about you wanted to change it or you wanted to  
 7 stop it. What I'm interested in is when you  
 8 signed Exhibit No. 7. And I understand events  
 9 developed after that. What I'm interested in is  
 10 at the time that your pen met the paper and you  
 11 signed it, what your understanding of what an  
 12 absolute sale at auction was. What was that?  
 13 A. Yeah. You had to sell it.  
 14 Q. Okay. And that was explained to you  
 15 before you signed?  
 16 A. Well, I suppose so.  
 17 Q. Okay. Before you signed, did they also  
 18 discuss or explain one option would be to have a  
 19 reserve where there's a minimum price that has to  
 20 be met before the property can be sold?  
 21 A. No, they didn't go into that much. No.  
 22 Q. Was it mentioned at all?  
 23 A. I don't know.  
 24 Q. You don't recall?  
 25 A. (Nods).

1 A. Well, yeah, they -- we discussed it.  
 2 Q. And that would also include -- and I  
 3 know you've talked about this before, paragraph  
 4 4, price, absolute sale and auction. That was  
 5 described to you and you understood what that  
 6 meant?  
 7 A. Yes.  
 8 Q. Okay. And you understood that to mean  
 9 with an absolute auction, with that term, once  
 10 the bidding is open, the highest bidder --  
 11 A. They told me --  
 12 Q. Let me get the question out.  
 13 As the absolute auction goes on, the  
 14 highest bidder gets the property and you as the  
 15 seller, you cannot refuse to -- you cannot reject  
 16 bids and you can't reject it because of a minimum  
 17 price; correct?  
 18 MR. GUSTAVSEN: Objection. He's  
 19 already explained what he believed an absolute  
 20 auction is and you're now putting words into his  
 21 mouth about what he feels it is. If you want to  
 22 read back to what he defined an absolute sale is,  
 23 that's fine, but you're now putting words into  
 24 his mouth.  
 25 MR. COLLAER: Oh, I don't think so. I

1 Q. Mr. Hagood, I want to ask you to focus  
 2 on what you actually remember. I mean, it's  
 3 important for you to deal with what you remember  
 4 because that's the truth. Don't try to  
 5 reconstruct things because you're guessing. So  
 6 just tell me if you don't remember something,  
 7 just tell me you don't remember. That's a  
 8 perfectly honest answer; okay?  
 9 A. (Nods).  
 10 Q. Tell me, this first meeting -- now, as  
 11 I understand this series of meetings you had when  
 12 you first met Larry Downs and the Bullocks. My  
 13 understanding, the first meeting happened was  
 14 yourself, Larry Downs, and your son. Was that at  
 15 your house?  
 16 A. That was at his house, Jeff's house.  
 17 Q. At Jeff's house. And you contacted  
 18 Mr. Downs about the possibility of being  
 19 interested in an auction?  
 20 A. Right.  
 21 Q. Okay. How long did that meeting last?  
 22 A. I don't know. Maybe 15, 20 minutes. I  
 23 don't know.  
 24 Q. Okay. Did the three of you go out and  
 25 look at the property?

1 A. No.  
 2 Q. What questions do you recall asking  
 3 Mr. Downs at that meeting?  
 4 A. I really don't recall much about that  
 5 meeting.  
 6 Q. All right. Do you recall your son  
 7 asking Mr. Downs anything during that meeting?  
 8 A. No.  
 9 Q. Do you have any recollection of what  
 10 Mr. Downs told you, again focusing during that  
 11 meeting?  
 12 A. No. I -- I really -- we were just kind  
 13 of going an outline of, you know, how it goes  
 14 and --  
 15 Q. You're talking how it goes, you're  
 16 talking about the auction process?  
 17 A. Yeah. Well, what -- I don't really  
 18 remember any specifics.  
 19 Q. All right. That's fine. Did Mr. Downs  
 20 leave you with any materials, documents, or  
 21 anything like that to look at?  
 22 A. I don't remember.  
 23 Q. Okay. How soon after -- well, let me  
 24 ask you this. After your meeting with Mr. Downs  
 25 ended that day, at that point had you made a

1 Q. Okay. Were you aware other properties  
 2 had been sold at auction, real estate?  
 3 A. No.  
 4 Q. Was your son aware of any properties  
 5 that had been sold at auction?  
 6 A. I don't think so. I don't know.  
 7 Q. Had your son had any interaction with  
 8 Larry Downs?  
 9 A. Before?  
 10 Q. Yes.  
 11 A. No. Not that I know of.  
 12 Q. Do you know if hit brokerage had any --  
 13 A. No.  
 14 Q. -- interaction with Larry Downs?  
 15 A. No.  
 16 Q. Tell me, what was your motivation to  
 17 sell this property to begin with? You were doing  
 18 development. Why were you selling it?  
 19 A. I decided I wasn't going to do  
 20 development.  
 21 Q. Okay. Did you have a need for the  
 22 money that you invested into it?  
 23 A. There were some things I wanted to pay  
 24 off.  
 25 Q. Such as --

1 decision that you want to try to sell the  
 2 property using an auction?  
 3 A. Well, it wasn't down pat. I mean, this  
 4 is just a precursory to the -- to the meeting  
 5 with the four of us.  
 6 Q. Well, that's what I'm assuming, because  
 7 at some point you had the property listed with  
 8 your son and he tried to market it through  
 9 traditional approaches for a year --  
 10 A. Right. Right.  
 11 Q. -- and got no offers at all.  
 12 A. So.  
 13 Q. So now you made a decision we're going  
 14 to maybe try something different.  
 15 A. Right.  
 16 Q. Maybe look at the possibility of an  
 17 auction?  
 18 A. Right.  
 19 Q. Who first broached the subject -- the  
 20 possibility of trying to sell it through an  
 21 auction?  
 22 A. I don't know.  
 23 Q. Was it you or --  
 24 A. We talked about it. We talked about it  
 25 mutually, you know, about an auction.

1 A. Through the -- the trust. I have  
 2 some -- but it wasn't mandatory.  
 3 Q. And how much money were you trying  
 4 raise to pay things off from the trust?  
 5 A. Oh. Maybe 300,000.  
 6 Q. Okay. Why didn't you just sell one  
 7 parcel and pay that off and hold the rest?  
 8 A. Well, because I was thinking  
 9 that beings you have the access, that it would  
 10 increase the value of the property behind it with  
 11 the access.  
 12 Q. Okay. Tell me, were you concerned that  
 13 in light of the fact you had marketed it for a  
 14 full year without any interest, that at  
 15 auction -- well, what I'm interested in is what  
 16 made you think people would be willing to pay  
 17 \$1.1 million for that 4104 property at an auction  
 18 when nobody made any offers of any kind for an  
 19 entire year?  
 20 A. But that wasn't -- with this, we  
 21 weren't expecting to get that kind of money out  
 22 of it.  
 23 Q. How much money -- what did you expect  
 24 that you would be able to get?  
 25 A. Well, we -- this is what they appraised

1 it at about. This is what Bullock appraised it  
 2 at.  
 3 Q. Well, that's not a regular appraisal.  
 4 It may be an idea of kind of a ballpark, but he's  
 5 not an appraiser, is he?  
 6 A. No. But he's in the real estate  
 7 business.  
 8 Q. He never suggested that he was an  
 9 appraiser?  
 10 A. No. No.  
 11 Q. You never passed him off as that way?  
 12 A. No.  
 13 Q. Okay. Tell me, when you were -- let's  
 14 focus now on the second meeting that happened  
 15 when Exhibit No. 7 was signed. Who all was  
 16 present at that meeting?  
 17 A. The four of us.  
 18 Q. The four people were there?  
 19 A. Yeah.  
 20 Q. And again how long did that meeting  
 21 last?  
 22 A. An hour. I don't know.  
 23 Q. And where did it take place?  
 24 A. At Bullock realty in Nampa.  
 25 Q. Other than the seller's representation

1 any of the terms of the agreement?  
 2 A. No. I thought it was, you know, pretty  
 3 straightforward.  
 4 Q. Okay. Do you recall if your son asked  
 5 any questions about the terms of the  
 6 representation agreement?  
 7 A. I don't know.  
 8 Q. You just have no recollection of it?  
 9 A. No.  
 10 Q. Okay. During this meeting what do you  
 11 recall Greg Bullock telling you or saying during  
 12 this meeting? And again, Mr. Hagood, if you  
 13 don't remember, I told you that's a perfectly  
 14 acceptable answer.  
 15 A. We went through the basics and -- there  
 16 was something else. You know, I just -- I can't  
 17 come up with the specifics, but --  
 18 Q. Do you recall anything in generality  
 19 that Mr. Bullock talked about?  
 20 A. Yeah. We went through this and we went  
 21 through --  
 22 Q. When you say, "this" --  
 23 A. You know, what the property was worth.  
 24 You know.  
 25 Q. When you said, "We went through this,"

1 agreement, were there any other documents you  
 2 signed during that meeting?  
 3 A. Well, I just signed this -- this  
 4 document that they had here.  
 5 Q. Did you sign anything dealing with the  
 6 MLS to allow the property to be advertised in the  
 7 MLS system for the auction?  
 8 A. I don't know.  
 9 Q. Okay. Is it possible you did?  
 10 A. Well, I guess they put it on the MLS.  
 11 Q. You were aware they did put it on the  
 12 MLS?  
 13 A. No.  
 14 Q. Nobody ever told you that?  
 15 A. I'm trying to think. I don't know. I  
 16 don't remember --  
 17 Q. All right.  
 18 A. -- whether they --  
 19 Q. We'll get to that in a minute. Let's  
 20 focus on the meeting. During this meeting how  
 21 much time was spent filling out and discussing  
 22 the representation agreement?  
 23 A. It wasn't hardly any time on the  
 24 agreement.  
 25 Q. Okay. Did you ask any questions about

1 what are you --  
 2 A. Well, through this contract here.  
 3 Q. The representation agreement?  
 4 A. Yeah. And what the property was -- you  
 5 know, what -- I don't remember if this piece of  
 6 paper was at that -- this other one that he had,  
 7 I don't know if that was at that one or whether  
 8 we talked about it and then he gave this at that  
 9 other -- that next time.  
 10 Q. Okay.  
 11 MR. GUSTAVSEN: You're referring to  
 12 Exhibit 14?  
 13 THE WITNESS: Right. Right.  
 14 Exhibit 14.  
 15 Q. (BY MR. COLLAER) Okay. Anything else  
 16 you recall about Mr. Bullock saying during this  
 17 meeting?  
 18 A. Sorry.  
 19 Q. That's fine. What about Larry Downs,  
 20 what do you recall him saying during this  
 21 meeting?  
 22 A. Oh, he went through it with Greg. And  
 23 then he said, you know, "Any time you want to  
 24 stop this, all you have to do is say it and we'll  
 25 stop it."



1 Q. Okay.  
 2 A. I tried -- I tried twice.  
 3 Q. Let's keep focusing on the meeting.  
 4 We'll get to the other stuff in a minute.  
 5 So other than what you just said about  
 6 Mr. Downs, what he said during this meeting,  
 7 anything else that you can recall?  
 8 A. Well, he said that, you know, this is  
 9 the way to go, the way we went, because --  
 10 Q. The absolute auction?  
 11 A. -- we will get all these people to come  
 12 out. This is every time he said this. You know,  
 13 "We'll get all these people. And the more people  
 14 you get there, the better it is. And this is the  
 15 way you want to go." Well he's representing me  
 16 so --  
 17 Q. Okay. When you refer to "people,"  
 18 you're talking about potential bidders?  
 19 A. Potential bidders.  
 20 Q. Okay. So tell me, would you expect  
 21 that everybody that shows to an auction is in  
 22 fact going to bid?  
 23 A. No.  
 24 Q. You expected that; correct?  
 25 A. Right.

1 and --  
 2 Q. You say, "the reserve." What are you  
 3 referring to?  
 4 A. You know, if we should go with that or  
 5 not.  
 6 Q. Okay. Because at this point you could  
 7 still decide to go with a reserve or --  
 8 A. Oh, at that time -- oh. That was the  
 9 first meeting.  
 10 Q. Right.  
 11 A. No. No. No. Delete that. Yeah, I  
 12 don't remember that.  
 13 Q. Okay. Because at that point you  
 14 understood that you could still go to a  
 15 reserve -- auction with a reserve versus and  
 16 absolute if you wanted to? That's your choice.  
 17 A. Yeah. He made it very plain. He said,  
 18 "No problem. Up to the gavel time, no problem."  
 19 Q. Okay. Now, the days after that first  
 20 meeting when the representation agreement is  
 21 signed, when was the next time that you had any  
 22 discussions with Greg Bullock?  
 23 A. I had a conversation over the phone  
 24 with Greg. About a couple of things, and I can't  
 25 remember what they were. There was two things,

1 Q. Okay. Anything else that you can  
 2 recall Mr. Downs saying?  
 3 A. That's it.  
 4 Q. Okay. How about your son, Jeff?  
 5 A. He didn't say very much so I -- I can't  
 6 remember what he said. I have no idea.  
 7 Q. At any time did the two of you speak  
 8 of -- you and your son, speak privately during  
 9 this meeting about what Mr. Downs or Mr. Bullock  
 10 was --  
 11 A. During the meeting? No.  
 12 Q. -- was talking to you?  
 13 A. No.  
 14 Q. Did you and your son travel --  
 15 A. No.  
 16 Q. -- to this meeting together?  
 17 A. I don't think so.  
 18 Q. Okay. After the meeting ended, what  
 19 did you and your son do for the rest of that day?  
 20 A. Just left.  
 21 Q. Okay. Did you talk about the meeting  
 22 between the two of you at all?  
 23 A. A little bit; yeah.  
 24 Q. What was discussed?  
 25 A. Oh. About the -- you know, the reserve

1 but I can't remember what it was.  
 2 Q. Do you recall how soon after the  
 3 initial meeting --  
 4 A. Oh. Maybe --  
 5 Q. -- where the seller representation  
 6 agreement was signed?  
 7 A. -- three weeks to four weeks, three  
 8 weeks. I don't know.  
 9 Q. Okay. Three to four weeks?  
 10 A. Yeah. And then I had a -- then I had a  
 11 meeting with -- with Greg, just him and I.  
 12 Q. Okay. When did that meeting happen?  
 13 A. Let's see. I don't remember the date,  
 14 but it was I think after the phone call. I was  
 15 trying to clear up a couple of things and I can't  
 16 remember what they were.  
 17 Q. Can you recall what was discussed  
 18 during this personal meeting with Greg?  
 19 A. No. There was two things I had in mind  
 20 and now I can't remember what they were --  
 21 Q. Okay. That's fine.  
 22 A. -- so I guess they weren't very  
 23 important. But at that meeting he told me he was  
 24 a minister. I remember that.  
 25 Q. Tell me, this personal meeting with

1 Greg, where did it take place?  
 2 A. At Bullock's office. At his office.  
 3 Q. And was the office secretary there?  
 4 Was there anybody there --  
 5 A. In the meeting with us?  
 6 Q. Yeah.  
 7 A. No.  
 8 Q. Did it take place in his personal  
 9 office or conference room or --  
 10 A. His conference room.  
 11 Q. Were there other people in the office  
 12 at the time?  
 13 A. Yes.  
 14 Q. Who?  
 15 A. I don't know. I guess a secretary.  
 16 Q. Tell me, after this meeting, whatever  
 17 these questions you had that you wanted to talk  
 18 to Greg about, do you recall leaving the meeting  
 19 satisfied whatever question you had, had been  
 20 answered?  
 21 A. No, I don't think he -- he couldn't  
 22 answer the questions.  
 23 Q. Do you recall what --  
 24 A. I can't recall.  
 25 Q. -- he told you to do to try to get your

1 there. Then I tried to take the -- this  
 2 obligation off.  
 3 Q. Okay. Let's get to that. Okay. You  
 4 stopped at his office. When did that happen in  
 5 relation to signing the seller's representation  
 6 agreement?  
 7 A. Well, that was like three weeks or four  
 8 weeks after.  
 9 Q. Was it how soon before the actual  
 10 auction?  
 11 A. It seems like it was a couple of weeks,  
 12 but don't hold me to it.  
 13 Q. I understand.  
 14 And at this meeting you expressed to  
 15 him some fear you had about doing the absolute  
 16 auction. As specifically as you can, what do you  
 17 recall telling him?  
 18 A. I told him that I had reservations  
 19 about it, the family had reservations about it.  
 20 And I thought we need to go some other way. And  
 21 he says, "Oh, no. Oh, no, no, no, no. You don't  
 22 want to do that. You want as many people as you  
 23 can get there and that's the only way you get  
 24 there is by doing it this way. And you'll get a  
 25 better price." And -- and then we talked

1 answers?  
 2 A. No. But he didn't answer -- he didn't  
 3 answer my questions.  
 4 Q. Do you recall what you did after that  
 5 to get answers?  
 6 A. No.  
 7 Q. Okay. Obviously these weren't  
 8 questions that you felt were so important that  
 9 you weren't going to go forward with the auction  
 10 until they're answered?  
 11 A. Yeah. I think it was some other  
 12 ancillary thing. Yeah. No. Yeah, you're right.  
 13 Yeah.  
 14 Q. Okay. Okay. After this personal  
 15 meeting with Greg that happened following the  
 16 phone call, any other contacts between you and  
 17 Greg Bullock?  
 18 A. No.  
 19 Q. Okay. Let's focus on Larry Downs from  
 20 the time after the seller's representation  
 21 agreement is signed until -- when was the next  
 22 time you talked to Larry?  
 23 A. That was at his office.  
 24 Q. So you met him at his office?  
 25 A. Oh, I just stopped in there. He was

1 about -- he talked -- told me about how the big  
 2 money was coming in. Seven Rivers and -- what's  
 3 the other one? How -- Bottles. Bottles. Big  
 4 money. Big money was coming. Bottles.  
 5 Q. Okay. Now, how long did you and Larry  
 6 talk?  
 7 A. Hmm. I don't know. Maybe 15 minutes  
 8 to half an hour. I don't know. Fifteen, 20  
 9 minutes, probably.  
 10 Q. After the meeting, at that point did  
 11 you feel more comfortable with going with the  
 12 absolute auction?  
 13 A. Well, I kind of tabled it at that time.  
 14 Q. Tell me, if what I'm understanding what  
 15 he's telling you, this discussion the two of you  
 16 are having, you tell him you want to consider  
 17 switching to what, perhaps a reserve, setting a  
 18 reserve with a minimum bid?  
 19 A. I told him I wanted a stop on it.  
 20 Q. When you say, "stop," what do you mean?  
 21 A. Well, I meant I could -- I had the  
 22 prerogative if I wanted to sell it or not. I  
 23 just called it a stop. I really didn't get the  
 24 reserve thing.  
 25 Q. Okay.

1 A. I told him I wanted a stop on this  
 2 thing. I didn't think it should go on.  
 3 Q. You didn't want to do any auction of  
 4 any kind?  
 5 A. No. I wanted a stop on it so that if I  
 6 didn't like the price, I didn't have to sell it.  
 7 Q. Okay. So you could reject?  
 8 A. Right. I could reject it.  
 9 Q. You could reject all bids at the end?  
 10 A. That's right.  
 11 Q. Okay. And he advised --  
 12 A. Oh, no.  
 13 Q. -- gave you his advice about why he  
 14 thought that would not be in your best interest?  
 15 A. That's right.  
 16 Q. And one of them was if you tell the  
 17 bidders that the seller has the option of  
 18 rejecting all bids --  
 19 A. Nobody will show up.  
 20 Q. -- nobody will show up. That's one  
 21 danger. And felt you'd get a better price if you  
 22 get more people there?  
 23 A. Right.  
 24 Q. Did that make sense to you?  
 25 A. That makes sense; yeah.

1 A. Yeah. If they put their money down,  
 2 but --  
 3 Q. Okay. Now, let's turn to the next time  
 4 you talked to Larry Downs after this meeting at  
 5 his office. When was the next time you talked to  
 6 Larry?  
 7 A. At the last meeting.  
 8 Q. The day before the auction?  
 9 A. Day before the auction.  
 10 Q. Okay. And was that a face-to-face  
 11 meeting?  
 12 A. Right.  
 13 Q. And where did it take place?  
 14 A. Bullock's realty.  
 15 Q. And who was present?  
 16 A. Me, Jeff, Greg, and Larry.  
 17 Q. And was this a prearranged meeting?  
 18 A. Yes. Yeah.  
 19 Q. Okay. Who called the meeting?  
 20 A. I don't know. Don't remember.  
 21 Q. Okay. How long did this meeting last?  
 22 A. Maybe a half an hour.  
 23 Q. Okay. Now, during this meeting I want  
 24 you to tell me everything you can recall Greg  
 25 Bullock saying.

1 Q. Okay. And he said he had gotten some  
 2 interest from people like Mark Bottles and some  
 3 other people with substantial --  
 4 A. Oh, yeah. Big money. A lot of deep  
 5 pockets. They got more money than they know what  
 6 to do with.  
 7 Q. Now, tell me, Mr. Hagood, do you have  
 8 any reason to believe that he had not received  
 9 some interest from those individuals?  
 10 A. Well, it's kind of doubtful whether --  
 11 Q. That's not my question. My question is  
 12 do you have any reason to believe he had not  
 13 spoken to or received some interest from those  
 14 individuals?  
 15 A. You mean solid evidence?  
 16 Q. Yes. Anything. Yeah.  
 17 A. Well, I don't have any solid evidence,  
 18 but --  
 19 Q. So if Larry Downs were to testify that  
 20 he had contacted these individuals or spoke with  
 21 these individuals and they had expressed interest  
 22 and indicated they were going to come to the  
 23 auction, you would have no way to refute that?  
 24 You'd have no reason to prove -- no ability to  
 25 prove that he's not telling the absolute truth?

1 A. He told me that he got very frustrated.  
 2 Told me he had spent all this money and all this  
 3 time and so he wanted to go as an absolute sale.  
 4 And I told him I had big reservations about it, I  
 5 didn't want it to go that way. But he got so  
 6 worked up over it, I kind of lost my focus.  
 7 Q. Did he tell you how much money he had  
 8 spent --  
 9 A. No.  
 10 Q. -- advertising and promoting this?  
 11 A. No.  
 12 Q. Okay. Anything else you recall  
 13 Mr. Bullock saying during this meeting?  
 14 A. I think we went over how we -- how they  
 15 were going to -- over again how he was going to  
 16 sell each piece of property and then combine  
 17 them. I think that's what he said. I think we  
 18 went over that. And --  
 19 Q. Anything else?  
 20 A. Well, that's what basically we were  
 21 there for. I was there to stop it and to -- put  
 22 a stop on it, and then -- and then he just  
 23 explained what they were going to do. And we  
 24 were going to clean up the place that day -- that  
 25 day, that night. He could send somebody over

1 there.  
2 Q. Tell me, was there any discussion about  
3 if you canceled the auction, that you would be  
4 responsible for the advertising costs that have  
5 been expended to date?

6 A. No.

7 Q. That's what your contract required you  
8 to do, didn't it?

9 A. Well, but I thought it was more than  
10 that so --

11 Q. Tell me --

12 A. -- so that wasn't -- that wasn't the  
13 overriding factor in that wouldn't be the --

14 Q. Okay. Let me ask you this. Let's  
15 focus on Larry Downs. During this meeting where  
16 the four of you were there, what did Larry say?

17 A. I have already told you what all I  
18 remember. After he went ballistic, the whole  
19 thing just kind of went, you know, downhill.

20 Q. Did you after Mr. Bullock expressed to  
21 you that he felt that the money that he -- he  
22 expressed his frustration?

23 A. No. This was Larry Downs.

24 Q. Okay. Larry is the one that --

25 A. Yes.

1 going to do it"?

2 A. No, I didn't say that.

3 Q. Okay. During this whole time, during  
4 this meeting, what did your son say?

5 A. I -- I don't know. He didn't say much  
6 at this meeting.

7 Q. Do you recall him saying anything?

8 A. No. Really not. I don't recall.

9 Q. And after this meeting did you and your  
10 son talk about what was going to happen at the  
11 auction the next day?

12 A. A little bit.

13 Q. What did you talk about?

14 A. I don't know. We talked about, you  
15 know, the reserve and -- you know, this guy is  
16 the guy that knows what's going on. You know, I  
17 mean, he's so and damn it [phonetic] about it  
18 that this is the way to do it.

19 Q. Okay. Did you and your son discuss  
20 after this meeting just sending them a written  
21 notice saying auction is off?

22 A. No.

23 Q. We're not doing it?

24 A. No.

25 Q. You never discussed that possibility?

1 Q. -- you say went ballistic?

2 A. Yes.

3 Q. And what specifically did Larry say?

4 A. He told me "I spent all this money and  
5 all this time and now you're going to pull this  
6 out from under me" and "that's crazy" and "that's  
7 not the way to go."

8 Q. Did he restate what the two of you had  
9 talked about weeks before about the advantage of  
10 the absolute versus the --

11 A. I told him --

12 Q. -- the stop?

13 A. -- I understood that I could cancel  
14 this agreement and he wouldn't hear of it.

15 Q. He talked you out of it?

16 A. Yes.

17 Q. Okay. So when you left this meeting  
18 you understood that this auction was going to go  
19 forward as an absolute auction the next day; does  
20 that sound correct?

21 A. Right. But I tried to stop the thing  
22 and he wouldn't stop it.

23 Q. Did you tell him "I don't care what  
24 you're telling me, I'm not going to sell my  
25 property in an absolute auction, period. I'm not

1 A. Didn't even -- didn't even -- just -- I  
2 was really pretty perturbed.

3 Q. And you didn't say that to the real  
4 estate agents during the meeting, saying I'm not  
5 going to sell the property?

6 A. No. I said, "This is ridiculous. You  
7 told me that I could stop this any time I wanted  
8 to and you're telling me I can't," or "I  
9 shouldn't," or "you're crazy," you know.

10 Q. Yes. Let's focus -- I think there's a  
11 difference between saying you can't do it versus  
12 it's a bad idea. Ultimately, it's your decision,  
13 correct, because it's your property?

14 A. He's supposed to be representing me.

15 Q. Would you agree that ultimately you  
16 knew all the time --

17 A. But he knows better than I do.

18 Q. Let me get the question out. It's your  
19 decision ultimately of whether you want to sell  
20 the property or not; correct?

21 A. Right.

22 Q. If somebody says this is the way to do  
23 it, this is a good idea, this is the best option  
24 you have at this time, and if you don't want to  
25 do it, you don't have to proceed, do you?

1 MR. GUSTAVSEN: Objection. He's never  
 2 said that --  
 3 THE WITNESS: He didn't give me an  
 4 option.  
 5 MR. GUSTAVSEN: The tail end of that  
 6 statement was not correct. He's never said that.  
 7 Q. (BY MR. COLLAER) Did you tell them  
 8 at -- I think you've answered this. At the end  
 9 of this meeting you did not say you are not  
 10 authorized to sell my property at the auction,  
 11 period?  
 12 A. No, I didn't say that; no.  
 13 Q. Okay. Now, the next day when the  
 14 auction happened, you're in there with your video  
 15 camera.  
 16 A. (Nods).  
 17 Q. At that time you met Scott Bullock?  
 18 A. Just shook his hand, that was it.  
 19 Q. Is that the first time you had ever met  
 20 him?  
 21 A. I think -- I think I met him over in  
 22 the realty office just in the hallway.  
 23 Q. Did he have any involvement in any of  
 24 these discussions that we've talked about before?  
 25 A. No.

1 Bullock and Company to market your property for  
 2 you?  
 3 A. It looks all right.  
 4 Q. Maybe I can restate the question  
 5 because it's been a little bit because you were  
 6 looking at the document. What I'm interested in  
 7 is looking at the document now, is there anything  
 8 in there that is inconsistent with the terms on  
 9 the representation agreement that you signed  
 10 authorizing Bullock and Company to market your  
 11 property?  
 12 A. I don't know. I'd have to sit down and  
 13 read -- look it over, but it looks -- it looks  
 14 right.  
 15 MR. COLLAER: Okay. I'm going to hand  
 16 you what I'm marking as Exhibit No. 17.  
 17 (Exhibit No. 17 is marked.)  
 18 Q. (BY MR. COLLAER) Could you identify  
 19 No. 17 for me, please.  
 20 A. Receipt acknowledged.  
 21 Q. Is that your signature?  
 22 A. Yeah.  
 23 Q. The upper portion of it talks about a  
 24 blue brochure, a brochure entitled Agency Law in  
 25 Idaho. Do you remember getting that when you

1 Q. Do you know if he had any involvement  
 2 in the marketing of this property of any kind?  
 3 A. I don't know.  
 4 MR. COLLAER: What exhibit are we on?  
 5 MR. MICHAELSON: 16.  
 6 MR. DVORAK: 16, I believe.  
 7 MR. COLLAER: 16?  
 8 (Exhibit No. 16 is marked.)  
 9 Q. (BY MR. COLLAER) Hand you what I'm  
 10 marking as Exhibit No. 16. Would you take a look  
 11 at No. 16 for me.  
 12 (Witness is reviewing.)  
 13 THE WITNESS: Okay.  
 14 Q. (BY MR. COLLAER) Have you ever seen  
 15 No. 16 before?  
 16 A. I don't think so. No.  
 17 Q. This is the MLS data sheet --  
 18 A. Yeah. No.  
 19 Q. -- relating to the auction.  
 20 A. No, I didn't see any of the MLS.  
 21 Q. Do you know if your son ever saw it?  
 22 A. I don't know.  
 23 Q. Looking at Exhibit No. 16, is there  
 24 anything inconsistent on this document with the  
 25 representation agreement you signed authorizing

1 signed this?  
 2 A. No.  
 3 Q. Is it your testimony you never got  
 4 anything?  
 5 A. I don't know.  
 6 Q. Okay. Is it possible that you did?  
 7 MR. GUSTAVSEN: You don't want him to  
 8 guess. Objection.  
 9 Q. (BY MR. COLLAER) If you signed a  
 10 receipt saying you received something, do you  
 11 have any reason to think that you didn't actually  
 12 receive what is stated there?  
 13 A. Well, who is this from?  
 14 Q. It's from Bullock.  
 15 MR. GUSTAVSEN: If you don't know, you  
 16 don't know.  
 17 THE WITNESS: I don't know. I don't  
 18 remember this at all.  
 19 MR. COLLAER: I'm going to hand you  
 20 what I'm going to mark as Exhibit No. 18.  
 21 (Exhibit No. 18 is marked.)  
 22 Q. (BY MR. COLLAER) I'll represent to you  
 23 this is one of the purchase and sale agreements  
 24 dealing with the property that were at auction.  
 25 It was attached to the complaint.

1 A. No, I never saw this.  
 2 Q. Okay. You've never looked at it when  
 3 it was attached to the complaint that was served  
 4 on you?  
 5 A. (Nods).  
 6 Q. Okay. Tell me --  
 7 MR. GUSTAVSEN: I know it's getting  
 8 late, but you have to say, "yes," or "no."  
 9 THE WITNESS: No.  
 10 Q. (BY MR. COLLAER) All right. Looking  
 11 at Exhibit No. 18, this is the two acres on  
 12 Garrity Boulevard? Is that what it represents?  
 13 It describes what property it is.  
 14 A. Where does it say the property?  
 15 MR. GUSTAVSEN: (Indicating).  
 16 THE WITNESS: Oh.  
 17 Yes.  
 18 Q. (BY MR. COLLAER) Okay. And what  
 19 parcel would that be? Before you were talking  
 20 about parcel 1, 2, and 3 -- well, strike that.  
 21 The ID number for this is LT 100 in the  
 22 upper left-hand corner. Do you see that?  
 23 A. Mm-hmm. Yes.  
 24 Q. Is this property the first property  
 25 that was auctioned at the auction, or do you

1 A. Well -- yes.  
 2 Q. Okay. Was that what you recall the  
 3 auction -- what it brought at auction?  
 4 A. I don't remember. I just remember  
 5 that -- I didn't -- it's got the two properties  
 6 sold together for 400 and something.  
 7 Q. Well, Mr. Hagood, what I'm interested  
 8 in is just looking at the -- it's described as  
 9 two acres on Garrity Boulevard and there's a  
 10 purchase price of 278,250, and this was the first  
 11 parcel that was auctioned. Is it your  
 12 understanding that this purchase price, 278,250,  
 13 is the price that was -- that it was the high bid  
 14 at auction?  
 15 A. No. No.  
 16 Q. Okay. What was your understanding of  
 17 what this two acres -- what the highest bid at  
 18 auction for this two-acre parcel was?  
 19 A. I only took the two acres together  
 20 after they were joined together to make four  
 21 acres and that came out at -- I think it was 425  
 22 or something like that.  
 23 MR. COLLAER: Okay. Let's look at  
 24 Exhibit No. 19.  
 25 (Exhibit No. 19 is marked.)

1 recall one way or the other?  
 2 A. I don't know. I don't know what --  
 3 Q. Do you have a recollection of which  
 4 parcel was --  
 5 A. I think they said they were starting  
 6 from the front and working to the back but -- so  
 7 that's probably the one.  
 8 Q. If that was how they proceeded, would  
 9 this be the one that would go on the auction  
 10 block first?  
 11 A. Yeah, this would be the first one.  
 12 Q. Okay. Working under that assumption, I  
 13 accept it from this standpoint, it's an  
 14 assumption as far as you can recall?  
 15 MR. DVORAK: Could I ask a question,  
 16 Phil?  
 17 MR. COLLAER: Sure.  
 18 MR. DVORAK: This indicates two acres  
 19 on Garrity Boulevard. Do any of the other  
 20 properties about Garrity Boulevard?  
 21 THE WITNESS: No.  
 22 Q. (BY MR. COLLAER) Mr. Hagood, focusing  
 23 on this property, this two acres that about  
 24 Garrity Boulevard, the price there is \$278,250.  
 25 Do you see that?

1 Q. (BY MR. COLLAER) Why don't you take a  
 2 look at No. 19. Just to help you along, at line  
 3 13 it describes it as approximately two acres at  
 4 39th. Does that help you out?  
 5 A. Yeah. Two acres on North 39th.  
 6 Q. Okay. Is that the two acres, making  
 7 four that you were just referring to?  
 8 A. Yes.  
 9 Q. Okay. So if you put these two  
 10 together, it's just over \$500,000. 241,500 plus  
 11 278,250 is just over \$500,000, isn't it?  
 12 A. Right.  
 13 Q. Okay. Is that what you understood the  
 14 high bid for these two parcels were at auction?  
 15 A. No, I didn't.  
 16 Q. Did you pay any attention to what the  
 17 high bids for either of these parcels were?  
 18 A. You know, I hardly paid attention to  
 19 the -- he had them written on the board, but I  
 20 was doing the video and it -- you know, and then  
 21 looking around.  
 22 Q. Okay. So if they're writing them on  
 23 the board, was there like a big white board or a  
 24 chalkboard behind you out there?  
 25 A. Yeah. A big chalkboard out there;

1 yeah.  
 2 Q. Detailing, documenting what the bids  
 3 were? Is that what the chalkboard was used for?  
 4 A. That's right. Yeah. He was coming --  
 5 starting up here and working down on it.  
 6 Q. Okay. So as an example, if the first  
 7 bid was \$50,000, he'd write \$50,000 there? If  
 8 the next bid was a hundred, he'd write a hundred,  
 9 and it kept progressing?  
 10 A. No. No, no, no, no, no.  
 11 Q. Describe to me how that happened.  
 12 A. He didn't do it that way. He just --  
 13 when the bid came in, at the end of the bid, he  
 14 wrote it down.  
 15 Q. Okay. So was he constantly writing  
 16 down the current bid?  
 17 A. No. Not to my recollection; no.  
 18 Q. Okay. But he wrote down the final bid?  
 19 A. Yeah. He wrote down the finals on  
 20 the -- he wrote down the finals on the single  
 21 properties and then he brought them into the --  
 22 hooking them up together and seeing what -- what  
 23 price they would bring.  
 24 Q. Okay. Tell me, focusing on  
 25 Exhibit No. 18, and just that two acres, that

1 Exhibit No. 18 and 19, other than the -- I  
 2 understand that you don't like the purchase  
 3 prices on those two. Or let me -- that's a bad  
 4 question.  
 5 A. I don't like the purchase price?  
 6 Q. Yeah. You don't agree. You think the  
 7 purchase price on Exhibit No. 18 and 19 is --  
 8 that's not to your satisfaction.  
 9 A. Well, I'd have to consider it. I don't  
 10 know.  
 11 Q. You don't know if it's acceptable to  
 12 you or not?  
 13 A. No. It should be more than that.  
 14 Q. How much more?  
 15 A. I don't know.  
 16 Q. Okay. Okay. Other than the purchase  
 17 price, is there any other terms on Exhibit 18 and  
 18 19 that are unacceptable to you?  
 19 MR. GUSTAVSEN: I'd object just to the  
 20 form. This is the first time to his testimony  
 21 that he's reviewed these documents. So he hasn't  
 22 reviewed these documents. He said they were  
 23 attached to the complaint. He said he didn't get  
 24 them handed to him -- or did not accept them on  
 25 August 6th. So this is the first time to my

1 two-acre parcel --  
 2 A. Yeah.  
 3 Q. -- what price did you want for that  
 4 property? What were you willing to sell to a  
 5 buyer?  
 6 A. I didn't -- I lumped it in -- I lumped  
 7 them all together, basically. I planned -- I  
 8 thought it would all sell together. That's what  
 9 I envisioned.  
 10 Q. Well, what I'm asking, Mr. Hagood, is  
 11 if this was not being done through an auction, it  
 12 was a buyer came to you and said, "I want to buy  
 13 those two acres on Garrity and I'd be willing to  
 14 pay X" --  
 15 A. No, I didn't go into that. No, I  
 16 didn't go into that; no.  
 17 Q. You had no thought about what your  
 18 purchase price was --  
 19 A. No. I know what the purchase price  
 20 was.  
 21 Q. I mean, that's a bad question. What an  
 22 acceptable price to you would be?  
 23 A. No. I went sort of on what Greg had  
 24 put down on the piece of paper.  
 25 Q. All right. Tell me, focusing on

1 knowledge and his testimony that he's actually  
 2 reviewing this. So if you want him to review the  
 3 entire document, I'd say we take a break.  
 4 MR. COLLAER: Let's take a break.  
 5 MR. GUSTAVSEN: Okay.  
 6 (A recess was held.)  
 7 (Mr. Michaelson is not present.)  
 8 (Record read back.)  
 9 MR. COLLAER: Back on the record. The  
 10 question was just read back to you. Could you  
 11 please answer it.  
 12 THE WITNESS: It was the price. Yeah.  
 13 Q. (BY MR. COLLAER) Other than the price,  
 14 everything else is fine?  
 15 A. Yeah.  
 16 Q. Okay. Tell me, focusing on  
 17 Exhibit No. 18, there's the selling agent, Hobie  
 18 Peterson. Do you see that?  
 19 A. Yes.  
 20 Q. Do you know who that is?  
 21 A. No, I don't.  
 22 Q. Have you ever met that individual?  
 23 A. Not that I know of.  
 24 Q. And then the buyer is M&M RE Holdings  
 25 and Assigns. Do you see that?

1 A. Right.  
 2 Q. Do you know that entity at all?  
 3 A. No.  
 4 Q. Do you know anything about them?  
 5 A. No.  
 6 (Mr. Michaelson is now present.)  
 7 MR. COLLAER: Go off the record for  
 8 just a second.  
 9 (Discussion held off the record.)  
 10 MR. COLLAER: Okay. We're back on the  
 11 record.  
 12 Q. (BY MR. COLLAER) I may have already  
 13 asked you this already so bear with me, but on  
 14 the price on Exhibit No. 18, what was the price  
 15 that you wanted for that parcel?  
 16 A. I really never looked -- I didn't look  
 17 at it that way. I looked at it as the overall.  
 18 Q. I understand. You've answered that  
 19 before.  
 20 A. Right.  
 21 Q. Tell me, during the auction, as I  
 22 understand, he auctioned one parcel, got the bid  
 23 for that, and then moved to the next parcel, then  
 24 the next parcel after that, and then you said he  
 25 tried to combine them?

1 couldn't you?  
 2 A. But I didn't know that. In other  
 3 words, you're saying that till the gavel started  
 4 on the next parcel? But see, I didn't know that.  
 5 It just comes to me now.  
 6 Q. Okay.  
 7 A. I was thinking of the whole auction  
 8 when it starts.  
 9 Q. Okay.  
 10 A. That's the way I always thought of it.  
 11 But now that you're saying it, yeah, I would have  
 12 stopped it.  
 13 Q. Tell me, you were there at the auction  
 14 during the auction of all three parcels?  
 15 A. Right.  
 16 Q. And so you watched the process where it  
 17 went through and how the auctioneer conducted it;  
 18 correct?  
 19 A. But let's remember, I was videoing  
 20 it --  
 21 Q. I understand that.  
 22 A. -- and it takes away your concentration  
 23 from what's really going on.  
 24 Q. Here's my question with that  
 25 understanding is did the auction in any way it

1 A. Yeah. I --  
 2 Q. Okay.  
 3 A. I couldn't even keep up with him on it.  
 4 Q. And I know that the videotape will  
 5 reflect what actually happened.  
 6 A. I don't know.  
 7 Q. I understand that.  
 8 A. I don't know. But, yeah, they take  
 9 each one separately and then they put two  
 10 together and try to auction that off, and then  
 11 they put three together, you know, and keep on  
 12 upping it.  
 13 Q. Okay. Here's what I'm interested in.  
 14 When the first parcel went through the auction  
 15 and you got the highest bid and he wrote it on  
 16 the chalkboard behind him, at that point did you  
 17 feel that the price that was obtained for that  
 18 parcel was lower than what you wanted?  
 19 A. Oh, yes.  
 20 Q. Okay. At that point did you approach  
 21 the auctioneer or anybody and say, "Don't auction  
 22 any more of the parcels"?  
 23 A. I see what you're driving at. No. But  
 24 I didn't -- I didn't think of that at that time.  
 25 Q. Okay. You could have if you wanted to,

1 was conducted, deviate from the terms, the  
 2 written terms and conditions, of the seller's  
 3 representation agreement that you signed?  
 4 A. I don't know.  
 5 Q. Would it help you to look at the  
 6 seller's representation agreement?  
 7 A. Give me an example.  
 8 Q. I really can't. What I'm interested  
 9 in --  
 10 A. Then I can't give you an answer.  
 11 Q. Exhibit No. 7, why don't you take a  
 12 look at that.  
 13 A. The what?  
 14 Q. Exhibit No. 7, the representation  
 15 agreement. This is the representation agreement  
 16 with Bullock and Realtors and it authorizes them  
 17 to market and sell your property for you.  
 18 A. Right.  
 19 Q. We've talked about that before.  
 20 A. Right. Right.  
 21 Q. What I'm interested in is, is there any  
 22 term on Exhibit No. 7 that deals with how they're  
 23 supposed to be marketing or selling your property  
 24 for you, anything that was done at the auction  
 25 that is inconsistent with the written terms of



1 Exhibit No. 7?  
 2 A. I don't know.  
 3 Q. You can't think of any as you sit  
 4 there?  
 5 A. No. I don't know. I just don't know.  
 6 Q. Okay. During the auction, going from  
 7 parcel to parcel, was your son sitting right next  
 8 to you?  
 9 A. Yeah. He was -- he was there.  
 10 Q. Did he ever say, "Stop? Don't auction  
 11 the next parcel"?  
 12 A. No. But I think he was under the same  
 13 assumption.  
 14 Q. He didn't do it, did he?  
 15 A. No.  
 16 Q. After the auctions were done and Scott  
 17 Bullock indicated they've got -- you said he had  
 18 documents in his hand for signature that he said  
 19 were dated that day. I'm just paraphrasing your  
 20 prior testimony. Is that what you recall  
 21 happened? Okay. I can tell from the look in  
 22 your eye it's a problem like.  
 23 A. No. I'm losing it.  
 24 Q. Okay.  
 25 A. You know, I've had so many -- just ask

1 documents were filled out and ready for your  
 2 signature?  
 3 A. I don't know. All I know is he said  
 4 they're dated for today.  
 5 Q. And those would be the purchase and  
 6 sale agreements?  
 7 A. I guess. He didn't say.  
 8 Q. 18 and 19, the purchase and sale  
 9 agreements?  
 10 A. Don't know.  
 11 Q. Okay.  
 12 A. The exchange was only like 15 seconds  
 13 to 30 seconds, you know.  
 14 Q. Sure.  
 15 A. That was it.  
 16 MR. COLLAER: I think I'm just about  
 17 done, if you can believe that.  
 18 MR. DVORAK: Let's go off the record  
 19 for a second, if we could, Phil.  
 20 MR. COLLAER: Sure.  
 21 (Discussion held off the record.)  
 22 MR. DVORAK: I know we've had a prior  
 23 discussion about this, but in the original  
 24 complaint and I think the amended complaint as  
 25 pleaded -- we may fix it by trying to amend the

1 the question again and I'll get it this time.  
 2 Q. Sure. At the end of the auction --  
 3 A. Right.  
 4 Q. -- and I remember you went to your car,  
 5 Larry Downs spoke to you briefly there, and you  
 6 indicated that Scott Bullock walked up and he had  
 7 documents in his hand that needed to be signed.  
 8 Do you remember that?  
 9 A. I don't remember seeing the documents.  
 10 All he said was that it's dated for today.  
 11 Q. Okay. Okay.  
 12 A. And then I said I wasn't signing and he  
 13 walked off. He said you better get an attorney.  
 14 Q. Okay. Did he have the documents in his  
 15 hand when he talked to you?  
 16 A. You know, I -- he didn't offer them to  
 17 me, if he did --  
 18 Q. Okay.  
 19 A. -- so I -- I don't remember.  
 20 Q. Did he say the documents were already  
 21 prepared and ready for signature?  
 22 A. Well, he said that they were dated  
 23 today; right? In other words, you need to come  
 24 and sign them.  
 25 Q. Okay. So was it your understanding the

1 complaint -- we describe LT 100 and LT 300, but  
 2 we attach LT 100, LT 200, and LT 300, so all  
 3 three of those are at issue in the complaint.  
 4 And I think we agreed that that was the case,  
 5 even though the language of the complaint may  
 6 inartfully say that.  
 7 MR. GUSTAVSEN: Yes. "Inartfully," I  
 8 like that.  
 9 MR. COLLAER: Why don't we mark this as  
 10 Exhibit No. 20.  
 11 (Exhibit No. 20 is marked.)  
 12 Q. (BY MR. COLLAER) Mr. Hagood, if you  
 13 could just set Exhibit No. 20 next to 19 and 18.  
 14 I think No. 18 is L 100. Do you see that?  
 15 A. Yes.  
 16 Q. No. 19 is L 200.  
 17 A. Right.  
 18 Q. And now what I have got in front of  
 19 you, Exhibit No. 20, is L 300.  
 20 A. Right.  
 21 Q. Now, those three contracts together, do  
 22 those describe all the property that was part of  
 23 the auction?  
 24 A. Yes.  
 25 Q. Okay. And again as with

1 Exhibit No. 20, other than the purchase price  
 2 that's there, are the other terms of  
 3 Exhibit No. 20 acceptable to you?  
 4 A. I guess that they're the same as 19 and  
 5 18.  
 6 Q. And I believe they are. I mean, I  
 7 believe they are.  
 8 A. They're all identical.  
 9 Q. They're all pretty much the same. I  
 10 think there is a slight difference on one of  
 11 them, but it's a small thing. I think the only  
 12 difference -- on Exhibit No. 20, why don't you  
 13 look at page 5. It deals with the agency  
 14 disclosure. It says, "The brokerage working with  
 15 the buyer is acting as a nonagent for the buyer,"  
 16 and that's a little bit different from the  
 17 others.  
 18 A. "The brokerage working." I guess.  
 19 Q. All it's saying is the broker, Larry  
 20 and Greg, they're helping the buyer some but  
 21 they're not representing him. They're  
 22 representing you.  
 23 A. Oh. I see. Okay.  
 24 Q. Okay. Is that consistent with what you  
 25 understood the situation was?

1 investing in Idaho real estate?  
 2 A. Yeah.  
 3 Q. Okay. And you say, "He wanted a  
 4 place." Can you elaborate? Was that a place to  
 5 live? A place for his business? A place for  
 6 both, or what?  
 7 A. Yeah. We were looking for some  
 8 commercial property that would -- or would be  
 9 turned into commercial property.  
 10 Q. Okay. Now, when you say, "We were  
 11 looking for some commercial property," were you  
 12 looking in Idaho only or in California as well,  
 13 or other potential locations?  
 14 A. No. He looked for a couple of years  
 15 and found this place.  
 16 Q. Okay. So he'd been a plumber for a  
 17 number of years in Canyon County, Idaho, before  
 18 he came to you with the idea of investing in  
 19 Idaho real estate?  
 20 A. Right.  
 21 Q. Can you tell me as closely as you can  
 22 recall what he told you the first time he  
 23 discussed with you the idea of investing in Idaho  
 24 real estate?  
 25 A. No.

1 A. They were working with me.  
 2 Q. Correct. They were representing you.  
 3 They were not representing the buyer.  
 4 A. That's -- that's true.  
 5 MR. COLLAER: Okay. I have nothing  
 6 further.  
 7 EXAMINATION  
 8 QUESTIONS BY MR. MICHAELSON:  
 9 Q. Mr. Hagood, I know it's been a long day  
 10 and you've been at it for close to four hours now  
 11 so I'll try and be brief. Fortunately,  
 12 Mr. Dvorak and Mr. Collaer have covered about all  
 13 of the areas that I had, but there are a few  
 14 things that I'd kind of like to touch upon.  
 15 Going back to the first time you ever  
 16 bought any property, real property in Idaho, who  
 17 initiated that idea? Was it you or your son?  
 18 A. Well, it was kind of a joint, you know,  
 19 venture.  
 20 Q. Okay. Well, do you recall whether you  
 21 went to him and said, "Jeff" --  
 22 A. No. He wanted this.  
 23 Q. Okay.  
 24 A. He wanted a place.  
 25 Q. So Jeff came to you about the idea of

1 Q. Okay. Well, did he tell you he felt  
 2 that there was an opportunity to make a lot of  
 3 money in real estate investment?  
 4 A. Well -- well, you know, you could make  
 5 some money in it, but it was -- a lot of it  
 6 hinged on his business, a place for his business.  
 7 Q. Okay.  
 8 A. And the right place, you know, a good  
 9 place --  
 10 Q. Did he --  
 11 A. -- at the right price.  
 12 Q. Did he also lead you to believe that  
 13 you could make a lot of money in real estate  
 14 investment in Idaho?  
 15 A. Well, yeah. Well, yeah. Well, what's  
 16 a lot of money? You never know.  
 17 Q. Sure, you know. In any event he came  
 18 to you with the idea of investing in real estate  
 19 in Idaho. And after he did that, you decided to  
 20 invest money in real estate in Idaho; correct?  
 21 A. Right.  
 22 Q. Let's take the properties in the order  
 23 in which they were acquired. The first parcel  
 24 was at 1010 North 39th; correct?  
 25 A. Right.

1 Q. And that's the property that he lived  
 2 in; correct?  
 3 A. Right. Right.  
 4 Q. And did he also run his business out of  
 5 that?  
 6 A. Right. Right.  
 7 Q. And that was Mr. Plumber?  
 8 A. Right.  
 9 Q. And he's the one that found that  
 10 property, isn't he?  
 11 A. That's right.  
 12 Q. And you testified earlier that that  
 13 property was purchased for approximately  
 14 \$171,000; correct?  
 15 A. Right.  
 16 Q. So that parcel actually fetched more at  
 17 the eventual auction than what you'd paid for it;  
 18 correct?  
 19 A. Yes.  
 20 Q. Okay. Prior to the time that that  
 21 property was purchased, had you ever seen it?  
 22 A. No. He -- he faxed me some pictures of  
 23 it.  
 24 Q. So basically you bought 1010 North 39th  
 25 Avenue in Nampa, site unseen, wholly relying upon

1 A. It's right next-door located, you know.  
 2 It was for sale.  
 3 Q. Okay.  
 4 A. I saw it was for sale. We talked about  
 5 buying it.  
 6 Q. How long was it on the market, if you  
 7 recall?  
 8 A. I don't know. It was on --  
 9 Q. How many times did you and he talk  
 10 about buying it before the purchase was  
 11 consummated?  
 12 A. Well, we talked about it quite a while  
 13 before we bought it.  
 14 Q. There was quite a differential in the  
 15 purchase price. You paid approximately twice for  
 16 the 4104 Garrity property what you had purchased  
 17 the 1110 -- or rather 1010 39th Avenue property  
 18 for. Can you explain to me what factors you  
 19 considered in your decision to pay \$340,000 for  
 20 that parcel?  
 21 A. Well, it was -- you know, the  
 22 development was coming, you know, with the Idaho  
 23 Center deal over there and we wanted access onto  
 24 Garrity 'cause -- 'cause if it had access onto  
 25 Garrity, then you can use that whole piece with

1 your son and the information he supplied to you;  
 2 correct?  
 3 A. Yeah. It sounded -- it was a  
 4 reasonable price and it was -- and there were  
 5 several things that were into it. It wasn't just  
 6 one thing.  
 7 Q. Prior to the acquisition of the 1010  
 8 North 39th Avenue property, when was the last  
 9 time prior to that that you had visited Nampa,  
 10 Idaho, if at all?  
 11 A. Oh, a lot of times.  
 12 Q. Okay. Had it been one year, five  
 13 years, ten years?  
 14 A. Oh, no. I come up periodically, you  
 15 know.  
 16 Q. Okay. Does that mean every year or  
 17 every couple of years?  
 18 A. Oh, yeah. Oh, no. Several times,  
 19 usually.  
 20 Q. All right. Let's go to parcel No. 2,  
 21 which we'll refer to as the 4104 Garrity  
 22 property; okay?  
 23 A. (Nods).  
 24 Q. Again, was that a property that Jeff  
 25 located?

1 that access, you know --  
 2 Q. Okay.  
 3 A. -- on Garrity. That the four acres  
 4 will be worth more if you had the access on  
 5 Garrity.  
 6 Q. Okay. Tell me what you did -- apart  
 7 from what Jeff told you, what did you personally  
 8 do to investigate the purchase of the Garrity  
 9 property prior to the decision to go ahead and  
 10 buy it?  
 11 A. Well, we had a contamination report  
 12 done --  
 13 Q. Okay.  
 14 A. -- because of the gas station  
 15 next-door -- Chevron was next-door -- to see if  
 16 we had any problems with pollutants.  
 17 Q. Okay. You had an environmental impact  
 18 report or --  
 19 A. Yeah. Well, no. To see whether we  
 20 were -- had any contamination on our property.  
 21 Q. But that was done as a condition of  
 22 purchasing the property after you had made the  
 23 offer on it but before it had closed; correct?  
 24 A. I don't remember.  
 25 Q. Okay. Did you talk to any Realtor

1 before you purchased the Garrity property?  
 2 A. No. I don't think so.  
 3 Q. Did you talk to any appraiser or engage  
 4 the services of any appraiser prior to purchasing  
 5 the Garrity property?  
 6 A. No. We just -- we just took what land  
 7 was selling for around there per square foot.  
 8 Q. When you say we just took that, did you  
 9 undertake any investigation to identify  
 10 comparable properties and sales prices and  
 11 activity in the market, or did Jeff do that?  
 12 A. Well, Jeff was the one that had his ear  
 13 to the ground about what the prices were selling  
 14 for, because I wasn't living here -- I wasn't  
 15 living here then.  
 16 Q. Sure.  
 17 A. Yeah. I was in California.  
 18 Q. In fact you were in California when  
 19 Jeff contacted you and let you know that the  
 20 Garrity Street property was on the market;  
 21 correct?  
 22 A. Yeah. But it was on the market quite a  
 23 while. It wasn't just -- this wasn't a snap  
 24 decision on the -- on that -- on the Garrity  
 25 property.

1 Q. Okay. Let me ask you this. At the  
 2 time the Garrity property was purchased, Jeff was  
 3 still in the plumbing business at that time,  
 4 wasn't he?  
 5 A. Right. Right.  
 6 Q. At the time you purchased the 14 acres,  
 7 1019 North 39th Avenue, Jeff was still in the  
 8 plumbing business, wasn't he?  
 9 A. That's right.  
 10 Q. So at the time you acquired all three  
 11 of these properties, you did so at the suggestion  
 12 of your son and in reliance upon information  
 13 supplied by your son; correct?  
 14 A. No.  
 15 Q. Okay. What information was supplied by  
 16 any source other than your son in deciding to  
 17 purchase any one of these properties?  
 18 A. Me. I can make a decision. He didn't  
 19 have anything to do with the 14 acres. That was  
 20 my -- that was my deal.  
 21 Q. Okay.  
 22 A. Completely. I mean --  
 23 Q. Well, tell me about that. The 14  
 24 acres, how did you learn that that property was  
 25 for sale?

1 Q. Okay.  
 2 A. It had been for sale for quite a while.  
 3 Q. In any event, the purchase of the  
 4 Garrity property, or the idea of that, initiated  
 5 with Jeff, not with you; correct?  
 6 A. Well, so what?  
 7 Q. Is that a yes?  
 8 A. Yeah, I guess so.  
 9 Q. Okay.  
 10 A. But does it make any difference?  
 11 Q. All right. When did you purchase the  
 12 Garrity property either in terms of approximate  
 13 date or in terms of lapse of time after you  
 14 purchased the 1010 North 39th property?  
 15 A. It was several years after the 1010  
 16 property.  
 17 Q. Okay. I think you testified that to  
 18 the best of your recollection the 1010 property  
 19 was purchased in '04, '05, somewhere in there;  
 20 correct?  
 21 A. Don't hold me to anything I say when it  
 22 comes to dates --  
 23 Q. Okay.  
 24 A. -- so yeah. I'd have to go back and  
 25 look and see.

1 A. It was right across the street. It's  
 2 for sale.  
 3 Q. So you were here in Idaho and you saw  
 4 the sign?  
 5 A. That's right.  
 6 Q. Okay. Did you talk with Jeff about  
 7 buying it?  
 8 A. Sure.  
 9 Q. Was he already aware that it was for  
 10 sale?  
 11 A. I -- yeah. The sign is right across  
 12 the street from his house. He must have been  
 13 aware --  
 14 Q. Okay.  
 15 A. -- but he never -- he never suggested  
 16 buying it.  
 17 Q. Okay. You looked and you saw the sign  
 18 and realized it was for sale. What did you do  
 19 next?  
 20 A. We -- we checked it out.  
 21 Q. Did the two of you together?  
 22 A. Well, yeah. We -- you know, we checked  
 23 what the prices were and it seemed like a good  
 24 price.  
 25 Q. Okay. And explain that process for me.

'1 How did you check out the prices without the  
 2 assistance of a Realtor or an appraiser?  
 3 A. Well, can't I look at the properties  
 4 around it and what it's selling for and how much  
 5 it -- how much it was?  
 6 Q. Well, certainly you can. But my  
 7 question is how did you do that? In other words,  
 8 I can see a sign for sale and then I see a sign  
 9 that says sold, but unless I'm the Realtor or I'm  
 10 the closing agent or I've done something, I mean,  
 11 my question is how did you find out about details  
 12 on other properties being sold?  
 13 A. Well, we knew what was being sold  
 14 next-door. We knew what the square -- you  
 15 know --  
 16 Q. "Next-door" being which --  
 17 A. Yeah. In the business park next-door.  
 18 Q. Okay. How did you know that  
 19 information?  
 20 A. 'Cause we talked to the people that ran  
 21 that. Newby. Mr. Newby. He ran that  
 22 development park which is just about mirrored to  
 23 mine on the other side, on the east side, and how  
 24 much the -- you know, they were going for a  
 25 square foot.

1 A. No. I had money coming.  
 2 Q. From what source?  
 3 A. I had some other property I was  
 4 selling.  
 5 Q. Okay. You told me you didn't have the  
 6 money to buy the 14 acres. How much of the 1.132  
 7 million purchase price did you have?  
 8 A. All of it.  
 9 Q. Then why was it necessary to borrow  
 10 from Hopkins?  
 11 A. You said Garrity.  
 12 Q. Okay. I stand corrected then. We're  
 13 talking about the 14 acres.  
 14 A. Yeah. But you were talking about  
 15 Garrity.  
 16 Q. Okay.  
 17 A. The 14 acres is on 39th -- or faces  
 18 North 39th.  
 19 Q. Let's back up then so I have a clear  
 20 understanding. On the 1010 North 39th Avenue  
 21 property that you purchased for 171 --  
 22 A. Right.  
 23 Q. -- did you pay cash for that?  
 24 A. Yes.  
 25 Q. The property on Garrity that you paid

1 Q. Now, the 1019 39th 14-acre parcel, you  
 2 paid what, \$1.132 million for that?  
 3 A. Right.  
 4 Q. And you did that without any appraisal;  
 5 correct?  
 6 A. Yeah.  
 7 Q. And you did that without the assistance  
 8 of any Realtor; correct?  
 9 A. On my side? Yeah.  
 10 Q. Okay. So the seller had a Realtor, but  
 11 you as the buyer did not have a Realtor; correct?  
 12 A. Right.  
 13 Q. You made reference in your testimony  
 14 this morning to a loan from Hopkins.  
 15 A. That was a bridge loan.  
 16 Q. Okay. Tell me what you mean by the  
 17 term "a bridge loan."  
 18 A. It was just -- I didn't have the money  
 19 to buy it and so the -- the Garrity property, so  
 20 we just had a bridge loan till I sold some other  
 21 property.  
 22 Q. Okay. So you were buying the property  
 23 on speculation with the thought of reselling it  
 24 and making money and then paying off Hopkins from  
 25 the proceeds of the resale?

1 340- for, did you have the cash for that?  
 2 A. No, I didn't. That's why I got into  
 3 this convoluted thing and finally we -- I took  
 4 out a loan with Hopkins Financial, and I guess  
 5 that's what -- that's what triggered the test  
 6 probably from the Chevron, and -- and then I sold  
 7 this other property. I paid them all off, paid  
 8 Sherry off, paid Hopkins off. That was it.  
 9 Q. When you purchased the 14 acres, how  
 10 much of a lapse in time occurred between the time  
 11 that you agreed to buy Garrity and the time you  
 12 agreed to buy the 14 acres?  
 13 A. I don't know. I'd have to go back and  
 14 look.  
 15 Q. Was it within two weeks?  
 16 A. Oh, no.  
 17 Q. Six months?  
 18 A. I don't know. I don't know. I  
 19 bought -- I think 1019 was bought in the first of  
 20 '06. I think that's what it was. I -- don't  
 21 hold me positively. Somewhere around -- I think  
 22 it finalized in January of '06, I think.  
 23 Q. Okay. And you did not have the cash to  
 24 purchase that 14 acres, did you?  
 25 A. Yeah. Sure, I had the cash. How did I

1 buy it?  
 2 Q. All right.  
 3 A. It's clear.  
 4 Q. What was the -- okay. How much did you  
 5 borrow from Hopkins?  
 6 A. I don't know.  
 7 Q. What did the Hopkins loan proceeds go  
 8 for?  
 9 A. Say that another way. What do you mean  
 10 the proceeds of Hopkins? They went for Garrity.  
 11 Garrity.  
 12 Q. Okay.  
 13 A. 4104.  
 14 Q. Well, so you borrowed from Hopkins  
 15 before you had acquired the 14 acres?  
 16 A. That's right.  
 17 Q. And you borrowed approximately how much  
 18 from Hopkins?  
 19 A. I don't know. 300,000. I don't know.  
 20 Something like that.  
 21 Q. What was the security given to secure  
 22 repayment for the Hopkins loan?  
 23 A. I don't know if it was just that or the  
 24 1010 too on it. I don't know. I don't remember.  
 25 Q. Okay. Did you ever go in and negotiate

1 of fuzzy when he left. I don't know whether  
 2 Giddyup got in -- he got in on Giddyup or whether  
 3 it was Todd that initiated it.  
 4 Q. Do you know what an LLP is?  
 5 A. Yeah.  
 6 Q. Do you know what an LLC is?  
 7 A. Yeah.  
 8 Q. Do you know what a corporation is?  
 9 A. Yeah.  
 10 Q. Do you recall the type of entity  
 11 Giddyup Investments was?  
 12 A. I don't know whether it was an LLP. I  
 13 don't know if it was an LLP or an LLC. I think  
 14 it was an LLC, but don't quote me.  
 15 Q. Did you do anything with respect to  
 16 forming Giddyup Investments other than review or  
 17 sign some paperwork?  
 18 A. No.  
 19 Q. Jeff handled all that?  
 20 A. Yeah. With -- with the lawyer.  
 21 Q. And then after Giddyup Investments was  
 22 formed, you were able to close on the Hopkins  
 23 loan; correct?  
 24 A. What do you mean by "close on the  
 25 Hopkins loan"?

1 any of the terms of the Hopkins loan?  
 2 A. No.  
 3 Q. Did Jeff do that?  
 4 A. Yeah.  
 5 Q. And at some point Jeff told you that  
 6 the only way Hopkins would loan was to do  
 7 something with respect to title; correct?  
 8 A. Of course.  
 9 Q. Okay. And what did Jeff do in response  
 10 to that information, if you know?  
 11 A. I can't tell you the -- the  
 12 particulars.  
 13 Q. Did he form Giddyup Investments?  
 14 A. Yeah, he formed Giddyup Investments.  
 15 And somehow I guess it was in there, some way,  
 16 somehow.  
 17 Q. In any event, to your knowledge was any  
 18 lawyer involved in the formation of the entity  
 19 that we've referred to as Giddyup Investments?  
 20 A. Yeah.  
 21 Q. Okay. Who was the lawyer?  
 22 A. I think it was Todd Bailey.  
 23 Q. Okay.  
 24 A. Maybe it was Rich. I don't know. Rich  
 25 left the company, so I kind of got -- it's kind

1 Q. If I understood your testimony you said  
 2 that the reason for forming Giddyup Investments  
 3 and taking title in the name of that entity was  
 4 to comply with some condition of the Hopkins --  
 5 A. I think so. I think that's the way it  
 6 is, but I can't be held positive on it.  
 7 Q. And that's because you deferred to Jeff  
 8 to handle all those details, didn't you?  
 9 A. Right. Right.  
 10 Q. Now, Sherry Henry's name has come up.  
 11 She was at one time the fiancee of Jeff, wasn't  
 12 she?  
 13 A. Right.  
 14 Q. And she sold her home in California,  
 15 and Jeff ended up with about \$350,000 of the  
 16 money from the proceeds of the sale of  
 17 Ms. Henry's home, didn't he?  
 18 A. Yeah. At one time.  
 19 Q. Right. An that money went into the  
 20 purchase of the 14 acres, didn't it?  
 21 A. No.  
 22 Q. Okay.  
 23 A. I told you I paid cash for the 14  
 24 acres.  
 25 Q. Okay. Explain to me then how you did

1 not have the cash to finance a \$340,000 purchase  
2 of the Garrity property but you did have the cash  
3 to pay for a \$1.132 million purchase on the 14  
4 acres?

5 A. I had properties I was selling. I  
6 didn't sell one at the -- I didn't have the money  
7 to buy the one, I hadn't sold the property yet.  
8 The other one, I sold the property and bought the  
9 other one.

10 Q. Okay.

11 A. It's a no-brainer.

12 Q. At what point in time, Mr. Hagood, did  
13 you make the decision that you were not going to  
14 go through with the sale of your property unless  
15 some bid satisfactory to you materialized?

16 MR. GUSTAVSEN: I'll object to the form  
17 of the question. You're asking specifically  
18 regarding the price?

19 Q. (BY MR. MICHAELSON) My question is at  
20 what point in time did you decide you were not  
21 going through with the sale of your property  
22 unless a price satisfactory to you materialized?  
23 When did you make take decision?

24 A. The end of the auction.

25 Q. Okay. So it wasn't until after all the

1 Q. (BY MR. MICHAELSON) Did Mr. Downs at  
2 any point in time tell you it is too late, you  
3 cannot change, you have to sell your property?  
4 Did he ever tell you that?

5 A. I don't remember anything; no.

6 Q. Did Greg Bullock ever tell you that?

7 A. Not that I know of.

8 Q. Did Scott Bullock ever tell you that?

9 A. I never talked to Scott so -- Scott  
10 didn't enter into this really.

11 Q. You've testified that the very first  
12 meeting you had at Bullock's office with Downs,  
13 you, Greg Bullock and Jeff, you were told at that  
14 time you could call off this sale any time you  
15 wanted; correct?

16 A. Yeah. It was all smiles.

17 Q. All right. And --

18 A. "Any time you want to call it off."

19 Q. And nobody at any point thereafter told  
20 you that you can't call it off, it's too late;  
21 correct?

22 A. No. Yeah, I guess you're right, I  
23 guess.

24 Q. Okay.

25 A. Yeah.

1 bids were in that you decided for the first time  
2 that you weren't going to convey the property?

3 A. Let's go through this again. They told  
4 me that you can do this at the gavel. Now I --  
5 they never told me that I could stop it at the  
6 end of the first one. They never said anything  
7 about that. I understood that when the gavel  
8 comes down and they start auctioning, I had no --  
9 I had no authority to do anything. But I did.

10 Q. Okay. Then let's --

11 A. But that just came out now. But they  
12 never told me that. They never said that you  
13 could have stopped it after -- after the first  
14 one was done. I would have stopped it. Sure, I  
15 would have stopped it. I thought my word, you  
16 know. But he knows what he's doing. He's got  
17 this thing. He comes down here and he does this  
18 and this and this. And then when they get done,  
19 they don't like that and then they bid the thing  
20 up and all this crap.

21 Q. Okay. Are you finished?

22 A. Yeah.

23 Q. Al right.

24 MR. COLLAER: Move to strike as  
25 nonresponsive.

1 Q. Now, the first time you ever spoke with  
2 Larry Downs, Jeff had already been to see him;  
3 correct?

4 A. No.

5 Q. Okay. Who selected Mr. Downs, you or  
6 Jeff?

7 A. We just did it mutually.

8 Q. Okay.

9 A. No. We had to -- we had another  
10 auction.

11 Q. Sure. You had contacted Corbett  
12 Auction; correct?

13 A. No. It's another auction. Not  
14 Corbett.

15 Q. Okay. Who was it?

16 A. Musick, I think.

17 Q. Okay. And you had also contacted  
18 another Realtor before Bullocks; correct? Mark  
19 Bottles?

20 A. No.

21 Q. No?

22 A. Why would I -- why would I -- no.

23 Q. Well, it was your testimony this  
24 morning that you had been in touch with another  
25 auctioneer but they hadn't gotten back to you and

1 that's what prompted you to contact Downs;  
 2 correct?  
 3 A. Right. It was Musick.  
 4 Q. Okay. Did you contact Musick or did  
 5 Jeff?  
 6 A. Jeff contacted Musick.  
 7 Q. Okay. And --  
 8 A. We had one meeting with him.  
 9 Q. "We," being you and Jeff?  
 10 A. Jeff and I and Musick.  
 11 Q. Okay. And when did that meeting occur?  
 12 A. Oh. It was before -- before the Downs.  
 13 It was like a month or -- probably at least a  
 14 month or month before the Downs meeting.  
 15 Q. Okay. So approximately a month or more  
 16 Jeff suggests Musick, and the two of you go to  
 17 see Musick; correct?  
 18 A. No. He came to see us.  
 19 Q. All right. He came to see you. Did he  
 20 go out and look at the property?  
 21 A. No. Not that I know of. Well, I don't  
 22 know.  
 23 Q. Where did the meeting take place?  
 24 A. What's that?  
 25 Jeff's house.

1 the 1010 North 39th property with any real estate  
 2 agent?  
 3 A. 1010 North 39th? No.  
 4 Q. Okay. Did you at any point in time  
 5 list the 1019 39th Avenue property, the 14-acre  
 6 parcel, with any real estate agent?  
 7 A. No. Well, except for my son.  
 8 Q. Okay.  
 9 A. I listed it with him, but nobody else.  
 10 All of them.  
 11 Q. Okay. So all three parcels were listed  
 12 with your son?  
 13 A. Yeah. Yes.  
 14 Q. More than once or just one listing  
 15 agreement?  
 16 A. Well, I guess we had three listing  
 17 agreements.  
 18 MR. MICHAELSON: Let's go off the  
 19 record for a second.  
 20 (Discussion held off the record.)  
 21 Q. (BY MR. MICHAELSON) We've taken a  
 22 brief recess. Mr. Hagood, have you had a chance  
 23 to consult with your counsel and to review  
 24 documents that have been offered as exhibits here  
 25 today? Not offered, but identified?

1 Q. Okay. So if the meeting was at Jeff's  
 2 house, he was right there on site where all three  
 3 parcels were?  
 4 A. No. He didn't live on that property  
 5 then. He moved.  
 6 Q. Oh, Jeff. Oh. All right. Okay.  
 7 A. He didn't live there.  
 8 Q. All right. What did Musick tell you?  
 9 A. I don't remember, but he would never --  
 10 we contacted him and contacted him and he would  
 11 never show up, so I don't know what -- I don't  
 12 know what was with him. I mean, we gave him  
 13 plenty of time to, you know -- we gave him a lot  
 14 of time, in fact.  
 15 Q. Did you tell him what price you wanted  
 16 for it?  
 17 A. I don't know anything -- the details of  
 18 the meeting. It was just like that first  
 19 meeting, you know, and I have -- we just talked  
 20 about basic things.  
 21 Q. The exhibits indicate that 4104 Garrity  
 22 was listed through All Pro Realty. And you'll  
 23 have to forgive me. I haven't been privy to some  
 24 of the discovery that has gone on in terms of the  
 25 Realtors' files, but did you at any point list

1 A. Yes.  
 2 Q. Okay. Prior to taking a break you  
 3 indicated to me that it was your understanding  
 4 that all three parcels had been listed for sale.  
 5 After consulting with your counsel and reviewing  
 6 the document, do you wish to correct that  
 7 statement?  
 8 A. Well, as it is, it seems like that --  
 9 that is true. I --  
 10 Q. That being that all three parcels were  
 11 listed, or that only the 4104 Garrity parcel was  
 12 listed?  
 13 A. Only the 4104 it looks like was listed.  
 14 Q. Okay. Was there any reason why you  
 15 never listed the 1010 North 39th Avenue parcel  
 16 for sale before auctioning it?  
 17 A. I thought it was listed with him.  
 18 Q. Okay.  
 19 A. I'm sorry. I --  
 20 Q. Are you aware of any -- so was the same  
 21 true with respect to the 14-acre parcel that --  
 22 A. That's what I understood. And so I --  
 23 you can correct me. I -- that's what I  
 24 understood.  
 25 Q. And was that your understanding based



1 upon information Jeff provided?  
 2 A. Right.  
 3 Q. This morning or perhaps this  
 4 afternoon -- we all lose track of time, I  
 5 guess -- you testified that no offers to your  
 6 knowledge were ever relayed to you on the 4104  
 7 Garrity parcel. Is the same true with respect to  
 8 the two 39th Avenue parcels, 1010 and 1019?  
 9 A. Please say it again.  
 10 Q. Okay.  
 11 A. I'm getting tired. My brain is  
 12 wandering.  
 13 Q. Okay. Did Jeff or anyone else at any  
 14 point in time come to you with an offer for the  
 15 purchase of 1010 North 39th Avenue, the two-acre  
 16 parcel?  
 17 A. I -- I'm not -- I'm not positive. The  
 18 man across the street may have made an offer on  
 19 it, but I'm not sure.  
 20 Q. Do you know his name?  
 21 A. I don't know his name. It's the --  
 22 they are developers. They're concrete men  
 23 that -- you know, they put in sewers and stuff.  
 24 Q. Okay. Do you recall ever seeing any  
 25 written proposal from --

1 Q. Yes.  
 2 A. Yes.  
 3 Q. Okay. Tell me who that was.  
 4 A. I don't know. It was a Scott.  
 5 Q. Okay. And was that information relayed  
 6 to you by Jeff?  
 7 A. No.  
 8 Q. Who was that information relayed to you  
 9 by?  
 10 A. Oh, my ex.  
 11 Q. Okay. And what's her name?  
 12 A. Gail Hopkins.  
 13 Q. Okay. And is Ms. Hopkins retired like  
 14 you are, or is she employed?  
 15 A. No. She's retired.  
 16 Q. And what did she tell you about a  
 17 prospective offer on the 14 acres?  
 18 A. She had to remind me of this so this is  
 19 hearsay --  
 20 Q. That's fine.  
 21 A. -- because at that time I wasn't here.  
 22 I was still in California --  
 23 Q. Okay.  
 24 A. -- I think at that time. But they had  
 25 an offer of like \$6 a square foot.

1 A. No.  
 2 Q. -- them?  
 3 A. No.  
 4 Q. Okay. Is it your recollection that if  
 5 such an offer was made, that it was just verbal?  
 6 A. I think Jeff had -- well, he tried --  
 7 we tried to make some property switches with him  
 8 and giving him another --  
 9 Q. Exchanges?  
 10 A. Exchanges --  
 11 Q. Uh-huh.  
 12 A. -- and giving him part of our other  
 13 property so --  
 14 Q. Did those negotiations materialize in  
 15 any way?  
 16 A. No, they never materialized, but -- so  
 17 in all those negotiations that could have come  
 18 up. I wasn't there. I don't know.  
 19 Q. Okay. The same question on the 14  
 20 acres, 1019 North 39th Avenue, do you have any  
 21 knowledge of any offer that was ever made to  
 22 purchase that parcel between the time you  
 23 acquired it and the time that it was auctioned by  
 24 the defendants, the third-party defendants?  
 25 A. Had anybody tried to buy it?

1 Q. Who is "they"?  
 2 A. Oh. I mean, she said that they  
 3 offered -- this Scott, whoever this Scott was,  
 4 had offered \$6 a square foot. And of course we  
 5 had all these tentacles around trying to do  
 6 something with these properties and we didn't  
 7 think that that was enough money at that time  
 8 so --  
 9 Q. Okay. "We" being you and Jeff?  
 10 A. Yeah.  
 11 Q. Okay. Did you ever speak directly with  
 12 Scott or whoever it was that was interested in  
 13 buying for 6 bucks a square foot?  
 14 A. I -- I don't know if I ever talked to  
 15 him on the phone. I never met him or anything.  
 16 I don't know if I -- I don't think I did. I  
 17 could have, but I have no recollection of it.  
 18 Gail -- Gail was in on that one so --  
 19 Q. Okay. So Gail told you that Scott was  
 20 interested in buying the 14 acres at 6 bucks a  
 21 square foot; correct?  
 22 A. Right. Right.  
 23 Q. And you then spoke with Jeff about  
 24 that; correct?  
 25 A. Yeah, we talked -- well, we thought,

1 you know -- we thought it was worth more. That's  
2 all.

3 Q. All right. And then you spoke with  
4 Gail who then communicated with Scott that the \$6  
5 wasn't acceptable?

6 A. Yeah. I never -- I never negotiated  
7 with them at all. Or I was supposed to get back  
8 with them and I never did. Anyway, it never went  
9 anywhere. It was a moot point.

10 Q. Other than the \$6 per square foot  
11 possible offer that Gail Hopkins, your ex-wife  
12 relayed to you, are you aware of any other offer  
13 to purchase any one of the three parcels from the  
14 time you acquired them until they were sold at  
15 auction?

16 A. I'm not positive, but I don't think so.

17 Q. Okay. Are you aware of any reason why  
18 the 4104 Garrity parcel would be listed for sale  
19 with All Pro, but the two 39th Avenue parcels  
20 would not be listed for sale?

21 A. Well, that's where I -- I -- I don't  
22 know what happened, because I signed the papers  
23 and it was a ton of papers.

24 Q. When you say you signed the papers,  
25 what are you referring to?

1 defendants.

2 Did you see that before you signed  
3 it -- or before it was filed?

4 A. Yeah. Well, I don't know how to answer  
5 that question.

6 Q. Well, the question was did you read  
7 that before it was filed?

8 A. Yes.

9 Q. You did? Okay.

10 You've been questioned exhaustively by  
11 both Mr. Dvorak and Mr. Collaer here, and they've  
12 taken you step by step through each and every  
13 communication with Mr. Downs and with Mr. Bullock  
14 and so forth, and you've been asked to relate  
15 what you can recall about those conversations.  
16 And unless I missed it, you never one time  
17 mentioned a specific figure much less than  
18 \$2 million that you expected to receive for your  
19 property.

20 A. That other piece of paper.

21 Q. Say it again.

22 A. The \$3 million paper, this one, where  
23 they -- this is what I expected (indicating). So  
24 that's less than what I expected.

25 Q. Okay. The first meeting that you had

1 A. The -- the -- to let Jeff handle it.

2 Q. Okay. Are you aware of any documents  
3 you signed to let Jeff handle it, other than the  
4 documents that have been produced this morning  
5 during your deposition?

6 A. No. No. And I didn't realize that --  
7 that he didn't have one on each one of the other  
8 properties so --

9 Q. You have not to your knowledge ever  
10 executed a power of attorney in favor of Jeff to  
11 allow him to act on your behalf?

12 A. No. The only thing would have been  
13 the -- this LLC or the -- what did you -- what do  
14 you call it?

15 MR. DVORAK: Giddyup Investments?

16 THE WITNESS: Yes. Yes, I think he did  
17 have power of attorney, because he had to have or  
18 he couldn't have done that --

19 Q. (BY MR. MICHAELSON) Okay.

20 A. -- with the Hopkins thing.

21 Q. In your third-party complaint here,  
22 specifically paragraph 8, you allege that you  
23 quote never intended to sell these properties for  
24 less than \$2 million and repeatedly made this  
25 intention clear to all of the third-party

1 with Downs, where did that take place?

2 A. At Jeff's house.

3 Q. At Jeff's house; okay.

4 Was it your understanding at that point  
5 in time that Jeff and Larry had already gone out  
6 to the property to look at it?

7 A. Well, they could have. I don't know.  
8 I don't know that.

9 Q. In any event, \$2 million or any other  
10 figure was not mentioned in that initial  
11 conversation with Downs, was it?

12 A. No. I guess not. I don't know.

13 Q. In fact -- yeah. In fact the reason he  
14 wanted to bring Greg Bullock into the loop was  
15 because Greg had greater level of expertise in  
16 terms of commercial property and development and  
17 so forth. Didn't he tell you that?

18 A. No. I was told that we had to have a  
19 broker.

20 Q. Okay. All right.

21 A. That's why -- well, they're together.  
22 You know, they do stuff together all the time.

23 Q. Okay.

24 A. Bullock and Downs.

25 Q. In any event, do you recall any

1 specific discussion with Downs where you told him  
2 "I do not intend to sell my property for less  
3 than \$2 million"?

4 A. What would that have any bearing on it?

5 Q. Well, sir, you filed a complaint in  
6 here that says you never intended to sell your  
7 properties for less than \$2 million.

8 A. This is what they showed me  
9 (indicating).

10 Q. Okay. Let me finish. And what your  
11 complaint says, third-party complaint says, is  
12 that you repeatedly made that intention clear to  
13 all of the third-party defendants. Do you recall  
14 any --

15 A. No.

16 Q. -- specific --

17 A. No. No. No. I referred to this --  
18 this here (indicating).

19 Q. So the document marked as Deposition  
20 Exhibit 14, bearing the Bates stamp Bullock 57,  
21 is the total and complete basis that you have to  
22 support the allegations contained in paragraph 8?

23 A. Right.

24 Q. You allege in paragraph 9 that you  
25 never wanted your property to be sold with no

1 MR. COLLAER: I'm going to object to  
2 the speaking objection.

3 MR. GUSTAVSEN: So --

4 Q. (BY MR. MICHAELSON) Are you able to  
5 answer the question?

6 A. What's the question again?

7 Q. Okay.

8 A. Sorry. I'm tired.

9 Q. That's all right. That's all right.

10 A. I can't help it. I can't keep my train  
11 of thought going.

12 Q. Okay. Well, let me try to simplify it.  
13 You say defendant never wanted his properties to  
14 be sold with no reserve and he repeatedly made  
15 this intention clear to all of the third-party  
16 defendants.

17 When was the first time that you made  
18 that desire known?

19 A. This is -- go back. I tried to change  
20 it from that to a stop order. I tried to change  
21 it twice. And over at Downs place -- don't go to  
22 that. Just -- I've told you this before. I  
23 tried to get Downs to change it. He says, "Oh,  
24 no, no, no. You don't do that." And went to the  
25 meeting on the day before the auction and he went

1 reserve and you repeatedly made this intention  
2 clear to all of the third-party defendants. And  
3 you state the approximate dates, times, and  
4 places where you made it clear to all third-party  
5 defendants that you did not want your property  
6 sold with no reserve.

7 A. Third-party. Now, when you're talking  
8 about third-party --

9 Q. I'm talking about the Realtors and  
10 Downs. Downs, Downs Auction, Bullock, and  
11 Bullock and Company Realtors?

12 A. Read it again. I'm losing it.

13 Q. Okay. Paragraph 9 of your third-party  
14 complaint alleges defendant never wanted his  
15 properties to be sold with no reserve and he  
16 repeatedly --

17 A. No.

18 Q. -- made this intention clear to all of  
19 the third-party defendants?

20 MR. GUSTAVSEN: I'm going to object.  
21 It's been asked and answered. He referenced the  
22 first meeting where this Exhibit 14 shows  
23 \$3 million. He referenced the last meeting the  
24 day before where he felt in his words that he was  
25 talked down.

1 through the roof. And he was all sweetie pie  
2 when he told me "Any time before the gavel goes  
3 down you would -- no problem. You can get out of  
4 it."

5 Q. Okay.

6 MR. COLLAER: Object. I'd like to  
7 object. It's unresponsive. Move to strike.

8 MR. GUSTAVSEN: And I'll object. He's  
9 answered the question three different ways from  
10 three different people. So it's the same  
11 response that he's given to each question in a  
12 different version.

13 MR. MICHAELSON: I disagree with that  
14 assessment but we'll see.

15 MR. GUSTAVSEN: Make your objection.

16 Q. (BY MR. MICHAELSON) All right. As  
17 support for your allegations that you never  
18 wanted the properties to be sold with no reserve  
19 and that you repeatedly made that intention clear  
20 to all of the third-party defendants --

21 A. No, I didn't.

22 Q. Okay. You did not want it sold with no  
23 reserve, or you did not make it clear to the  
24 defendants?

25 A. Talk to him.

1 Q. Well, if you let me finish the  
 2 question, perhaps it might clarify -- you know,  
 3 that's part of the problem when you jump in and  
 4 answer a question before it's finished,  
 5 especially a compound question, so --  
 6 If I understand your position  
 7 correctly, in support of your allegations that A,  
 8 you never wanted your properties to be sold with  
 9 no reserve and B, you repeatedly made that  
 10 intention clear to all of the third-party  
 11 defendants, you're referencing one, the meeting  
 12 that you had attended only by Larry Downs and  
 13 Larry Downs' secretary and you, and the later  
 14 meeting, the day before the auction, attended by  
 15 you, Jeff, Downs, and Greg Bullock; correct?

16 A. Right.

17 Q. So at least with respect to Greg  
 18 Bullock, you couldn't have repeatedly made that  
 19 known if the one and only time he was even  
 20 present was at the August 5th meeting; correct?

21 A. I guess.

22 Q. Is it your contention that Larry Downs  
 23 made any statement at any point in time to you  
 24 that was not true?

25 MR. GUSTAVSEN: Objection. Vague. Are

1 Q. What property was that?

2 A. My house.

3 Q. Where was that house located?

4 A. Mountain View, California.

5 Q. Okay. Was there another property that  
 6 you sold to acquire the other property that's --

7 A. Yes.

8 Q. -- on 39th Street?

9 What property was that?

10 A. It was an apartment house.

11 Q. And where was that located?

12 A. Mountain View, California.

13 Q. And you owned that apartment house?

14 A. It was in a trust.

15 Q. Okay. Whose trust was it?

16 A. My mother's.

17 Q. Did you manage that apartment house?

18 A. Yes.

19 Q. How many apartments were in that  
 20 apartment house?

21 A. Eight.

22 Q. How long did you manage it?

23 A. Oh, I don't know. Ten years.

24 Q. Okay. From when to when,  
 25 approximately?

1 you talking about one specific instance in  
 2 general?

3 Q. (BY MR. MICHAELSON) I'm talking about  
 4 any time, any place, any location, is it your  
 5 contention that Downs made any statement to you  
 6 that was not true?

7 A. No. I don't know. I don't know. And  
 8 I'd have to go back to the records, their  
 9 records, and find out whether he made any  
 10 statements to me that weren't true.

11 MR. MICHAELSON: Okay. I think that  
 12 I'm done.

13 MR. DVORAK: I just have a couple of  
 14 questions for you, and those are famous last  
 15 words going at this point. Do you want to take a  
 16 break here for a second or --

17 THE WITNESS: No. Let's get it done.

18 FURTHER EXAMINATION

19 QUESTIONS BY MR. DVORAK:

20 Q. Okay. You were talking about financing  
 21 the purchase of the 14 acres originally for, you  
 22 know, I think 1.13 million, and you indicated  
 23 that you had sold another property at that time  
 24 and used those proceeds?

25 A. Right.

1 A. Oh, starting in '95, '-4, '-5', '-6,  
 2 somewhere in there.

3 Q. Did you participate in the purchase of  
 4 that apartment house for the trust?

5 A. No.

6 Q. Okay. When you were answering  
 7 Mr. Michaelson's questions before, I heard you  
 8 use the phrase "stop order" when you were talking  
 9 about what you wanted to turn the auction into.  
 10 Did I understand you correctly?

11 A. Yeah. I just called it a stop. You  
 12 know, I've had the -- I could -- had the ability  
 13 to stand up, not take that price.

14 Q. Okay. So when you say, "stop order,"  
 15 you meant that you wanted to change the terms of  
 16 the auction to where you could stop it at any  
 17 point --

18 A. Right.

19 Q. -- even after bids were closed?

20 A. Well, I hadn't thought through that  
 21 far.

22 Q. Okay. Let me ask --

23 A. When it closed, I mean, I hadn't  
 24 thought that way at all.

25 Q. Okay. You hadn't thought about it?

1 A. No.  
 2 Q. Okay. But there was something you were  
 3 changing to from getting the ability to have a  
 4 stop order; correct?  
 5 A. Right. I kept on trying to get it  
 6 done.  
 7 Q. And what you were changing from was the  
 8 fact that it would sell to the highest bidder;  
 9 correct?  
 10 A. No. That I didn't have to take any of  
 11 the bids.  
 12 Q. Okay. So the way that you understand  
 13 that it was going forward, you would have to take  
 14 the bid of the highest bidder, unless you changed  
 15 something, which is why you were having these  
 16 discussions?  
 17 A. That's why I was trying to get it  
 18 changed.  
 19 MR. DVORAK: Right.  
 20 Mark a couple of documents here.  
 21 (Exhibit Nos. 21 through 25 marked.)  
 22 Q. (BY MR. DVORAK) Before I give those to  
 23 you, in your prior testimony when you were  
 24 answering Mr. Michaelson's questions, did I  
 25 understand you to indicate that you felt when

1 this auction was actually proceeding, that you  
 2 couldn't step forward and stop it?  
 3 A. Yes.  
 4 Q. And I think you mentioned something  
 5 about after the gavel fell. Did you say that?  
 6 A. He told me the first time we met, all  
 7 four of us together, that before the gavel fell,  
 8 if I wanted to change the terms, no problem. But  
 9 then when I tried to change them, there was a  
 10 problem. He didn't want to do it.  
 11 Q. And when he said before the gavel fell,  
 12 what was he talking about? What did you  
 13 understand him to be talking about, when the  
 14 gavel fell?  
 15 A. Yeah. Before the auction.  
 16 Q. Okay.  
 17 A. You know, when you start the auction.  
 18 But as I learn now, what I wasn't told, is I  
 19 could have stopped it any time.  
 20 Q. Okay. Do you understand that when most  
 21 people talk about the gavel falling at an  
 22 auction, that they're referring to the actual  
 23 closing of the auction? That the gavel falling  
 24 to accept the last bid; do you understand that?  
 25 A. No.

1 Q. Okay. Could that have been what  
 2 Mr. Downs meant when he said to you?  
 3 A. I don't know. I understood it was --  
 4 when the gavel falls, I thought that's when he  
 5 started the auction.  
 6 Q. Okay. Did he actually -- you know what  
 7 a gavel is?  
 8 A. Yes. But I didn't -- I see what you're  
 9 talking about.  
 10 Q. Did he --  
 11 A. But I didn't -- I had no conception of  
 12 that.  
 13 Q. Did he bring a gavel to the auction?  
 14 A. No. But he said, "gavel."  
 15 Q. Okay. He said when the gavel falls?  
 16 A. Yeah. After that, you can't change.  
 17 Q. And you assumed that meant at the start  
 18 of the auction?  
 19 A. That's right.  
 20 Q. But you didn't ask him what it meant?  
 21 You just assumed that?  
 22 A. Yeah. I thought that was the starting  
 23 of the auction. You got to stop it before it  
 24 starts --  
 25 Q. Okay.

1 A. -- if the terms are going to be  
 2 altered.  
 3 Q. Okay. I'm going to hand you a couple  
 4 of documents here, and I'm really going to deal  
 5 with them all in one big stack here, so I'll just  
 6 pass them around as I do. They're just numbered  
 7 consecutively as we go.  
 8 Okay. I'm going to hand you what's  
 9 been marked for identification purposes as  
 10 Exhibits No. 21 through 25 there, sir. And I'll  
 11 represent for the record that those are  
 12 advertisements that were found and read by my  
 13 clients, the plaintiffs, in this matter?  
 14 A. Yeah. I never saw them. That's all.  
 15 Q. Take a second to look at those and make  
 16 sure.  
 17 A. Yeah. I see them. I see them. I  
 18 never saw them. That's all. I said I didn't  
 19 know.  
 20 Q. Okay.  
 21 A. I'm not saying that he didn't advertise  
 22 it. I never insinuated that.  
 23 Q. Okay.  
 24 A. I just never saw them. That's all.  
 25 Q. When you said that you never saw them,

1 I assume you're referring to prior to the sale.  
 2 A. I never seen them till now.  
 3 Q. Okay. There were a number of documents  
 4 you brought with you today though, were there  
 5 not?  
 6 A. Yeah. But there wasn't -- these  
 7 weren't in those.  
 8 Q. Well, for the record --  
 9 A. Were they?  
 10 Q. -- I'd refer your attention to Exhibit  
 11 No. 6. It wasn't blue back, but it was the same  
 12 document that you indicated earlier you had  
 13 received prior to the sale.  
 14 A. Okay.  
 15 Q. Okay. So you at least had what's been  
 16 marked as Document 21 or a version of it, maybe  
 17 not blue back, but a version of it prior to the  
 18 sale; correct?  
 19 A. Probably. But I never saw these.  
 20 Q. The others besides that?  
 21 A. I never saw this one either  
 22 (indicating). I never accused him of not  
 23 advertising.  
 24 Q. Okay. And you had what was No. 21,  
 25 because you brought a copy of it, Exhibit 6, with

1 you.  
 2 A. But I never accused him of any of that.  
 3 Q. Okay. And as you sit here today,  
 4 you're not aware of anything within those  
 5 documents that's inconsistent with the terms that  
 6 you agreed to hold a sale on, in the June 9,  
 7 2008 --  
 8 A. No. No. This was brought out a lot  
 9 today.  
 10 Q. Okay. But you're not aware of anything  
 11 within those advertisements that's inconsistent  
 12 with that June 9, 2008, agreement?  
 13 A. I would have to go through these. I  
 14 don't know. I just never saw them. That's all.  
 15 MR. DVORAK: Okay. I'll withdraw the  
 16 question.  
 17 THE WITNESS: It's a moot point.  
 18 MR. DVORAK: I'll withdraw the  
 19 question.  
 20 THE WITNESS: I never saw them.  
 21 MR. DVORAK: Okay. I'm done.  
 22 MR. COLLAER: No questions.  
 23 MR. MICHAELSON: Nothing more.  
 24 (Deposition concluded at 2:26 P.M.)  
 25 (Signature requested.)

Thomas E. Dvorak (ID State Bar ID# 5043)  
Angela M. Reed (ID State Bar ID# 7221)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
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S:\CLIENTS\10292\1\Reply Memo ISO Motion Amend GP04.DOC

**F I L E D**  
A.M. 10:30 P.M.

MAR 12 2009

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

---

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTION TO AMEND  
COMPLAINT**

Plaintiffs Jon Wakelum (“Wakelum”) and Mike Ressler (“Ressler”), by and through their attorneys of record, Givens Pursley LLP, submit this Reply Memorandum in Support of their Motion to their Amend Complaint to add a claim under the Idaho Consumer Protection Act (“ICPA”), I.C. § 48-601 *et seq.*, against Defendant Thomas Hagood (“Hagood”) and the Third-Party Defendants.

## I. ARGUMENT

### A. **Granting Plaintiffs’ Motion to Amend Will Not Run Afoul of *Haskin v. Glass* Because, According To Auction Law Principles, A Contract of Sale Between Plaintiffs and Hagood Was Consummated In the Instant Case.**

Defendant Thomas Hagood (“Hagood”) contends that Plaintiffs’ Motion to Amend to add a claim under the ICPA should be denied pursuant to the Idaho Court of Appeals’ decision in *Haskin v. Glass*, 640 P.2d 1186 (1982) because no contract between Hagood and Plaintiffs “ever came into existence.” (Def.’s Br. 4 ¶ 1). In effect, Hagood contends that Plaintiffs cannot allege a claim under the ICPA because Section 48-608(1) of the ICPA, as interpreted by *Haskin*, requires the contract of sale upon which an ICPA claim is based to be in writing. (*Id.*). This argument, however, should be rejected because it misconstrues the *Haskin* court’s holding and completely ignores the unique contract formation principles at play in absolute auctions.

In *Haskin*, the issue, as framed by the Idaho Supreme Court, was whether the “Idaho Consumer Protection Act appli[es] to a **prospective** real estate transaction where no contract of sale was **consummated**?” 640 P.2d at 1187 (emphasis added). In *Haskin*, the plaintiff-landowner executed an earnest money agreement to sell the property being leased by the defendant-tenant to the tenant. *Id.* at 1188. The tenant executed a separate earnest money agreement to buy the property. The parties, however, due to a lot-line dispute, never executed a definitive purchase and sale agreement for the property. *Id.* The plaintiffs brought an unlawful



detainer action against the tenants after the tenants remained in possession of the property but failed to pay rent. The tenants filed several counterclaims against the plaintiffs, including, *inter alia*, a claim under the ICPA. The trial court denied the tenants' motion to amend to add an ICPA claim on the ground that no sale contract existed between the parties. *Id.* During trial, the tenants again moved to add a claim under the ICPA based on the existence of an oral agreement for the sale of the property. The trial court also denied this motion, concluding that the parties "had, at most, an oral 'agreement to agree,' but not a meeting of the minds." *Id.* The trial court further found that a "purchase had not been completed" and that the tenants could not state a claim under the ICPA. *Id.* at 1189.

On appeal, the tenants argued that the trial court erred in holding that a "completed transaction" is essential to state a claim under Section 48-608(1) of the ICPA. In clarifying the record below and the scope of its review on this issue, the Idaho Court of Appeals noted:

The lack of **any** sale contract, **oral or written**, is the context in which the trial court considered the renters' other motion to amend their counterclaim by adding a claim under the ICPA. The court found that a 'purchase had not been completed' in this case and concluded that no claim under the ICPA could be made.

*Id.* (emphasis added). After clarifying that there was no oral or written contract between the parties, the Court of Appeals went on to hold:

We do not construe this language [Section 48-608(1)] to require that a purchase or lease be 'completed' in order for an action to be brought . . . . We find no authority for applying the ICPA to a merely contemplated transaction, where there was no contract. We hold, as we believe the trial court intended, that a claim under the ICPA must be based upon **a contract**. The trial court correctly denied leave to amend the counterclaim because the renters did not enter into a contract with the owners to purchase the property.

*Id.* (emphasis added).

Notably, contrary to Hagood's argument, the *Haskin* court did not state that a claim under the ICPA must be based on a **written** contract. Rather, the court, cognizant of the statute of frauds issues present in real estate transactions, merely held that a claim under the ICPA must be based on a contract. If the Idaho Court of Appeals intended to render Section 48-608(1) applicable only in cases where there was a written contract, it could have done so, but it didn't. To read a written contract requirement into Section 48-608(1) would allow a defendant to avoid any deceptive advertising or similar ICPA claim by asserting the statute of fraud as a defense. Thus, under Hagood's analysis of *Haskin*, a seller who admittedly engaged in deceptive advertising could never be in violation of the ICPA if no written contract of sale exists. Such a result would encourage sellers to engage in deceptive advertising if the sale under a given set of circumstances would not culminate in a written contract.

It is evident from a plain and thorough reading of *Haskin* that the court was focused on whether any contract was consummated. This "consummation" requirement was satisfied in the present case. Consistent with the law applicable to absolute or "without reserve" auctions, a contract of sale was consummated between Plaintiffs and Hagood. Hagood made an offer to sell his property by advertising the sale and the Plaintiffs accepted the offer by bidding on the property. *See 7 Am. Jur. 2d Auctions and Auctioneers* § 36 (2007) ("a seller makes an offer to sell when the seller advertises the sale and . . . a contract is formed with each bid . . . . The seller may not withdraw the property once any legitimate bid has been submitted, but is absolutely committed to the sale once the bid has been entered.").

**B. The Statute of Frauds Is Not Relevant In Determining Whether Plaintiffs Should Be Allowed to Amend Their Complaint to Assert A Claim Under Section 48-608(1) of the ICPA.**

Alternatively, in the event the court finds that a contract was consummated under *Haskin*, Hagood contends that Plaintiffs' Motion to Amend should nevertheless be denied because the parties' oral contract is unenforceable under the statute of frauds. (Def.'s Br. 4 ¶ 2). This argument likewise lacks merit. Hagood's statute of frauds argument in the context of the ICPA is irrelevant because, for reasons explained *supra*, Haskin merely requires a contract, oral or written, to have been consummated. This "consummation" requirement is undeniably satisfied in the present case. Furthermore, Haskin is clearly subject to liability under the ICPA. *See White v. Mock*, 104 P.3d 356, 364-365 (Idaho 2004) (holding that individuals selling real property for investment are subject to the ICPA, even if they are not engaged in the business of selling real property.). From a public policy perspective, an interpretation of the ICPA in a manner that would allow a party to advertise and hold an absolute auction sale, but then use the statute of frauds as an excuse to avoid doing what was advertised, would be to countenance a manifestly deceptive trade practice. Accordingly, Plaintiffs should be allowed to amend their Complaint to add a claim under the ICPA against Hagood and the Third-Party Defendants.

DATED this 12<sup>th</sup> day of March, 2009.

GIVENS PURSLEY LLP



Angela M. Reed  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
Davison, Copple, Copple & Cox  
Washington Mutual Capitol Plaza, Suite 600  
199 North Capitol Blvd.  
P.O. Box 1583  
Boise, Idaho 83701

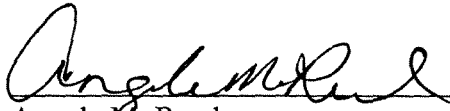
U.S. Mail  
 Overnight Mail  
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 Fax

Phillip J. Collaer  
Anderson, Julian & Hull, LLP  
P.O. Box 7426  
Boise, ID 83707-7426

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 Fax

Terry Michaelson  
Hamilton Michaelson & Hilty, LLP  
1303 12th Avenue Road  
P.O. Box 65  
Nampa, ID 83653-0065

U.S. Mail  
 Overnight Mail  
 Hand Delivery  
 Fax

  
\_\_\_\_\_  
Angela M. Reed

Thomas E. Dvorak (ID State Bar ID# 5043)  
Angela M. Reed (ID State Bar ID# 7221)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
S:\CLIENTS\102921\Aff. Mike Ressler IOT Def.DOC

**FILED**  
A.M. 4:50 P.M.

MAR 12 2009

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**AFFIDAVIT OF MIKE RESSLER IN  
OPPOSITION TO DEFENDANT  
HAGOOD'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN REPLY  
TO HAGOOD'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

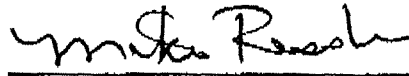
STATE OF IDAHO )  
                          ) ss.  
County of Ada     )

COMES NOW, Mike Ressler, your affiant, who being first duly sworn, deposes, states and avers as follows:

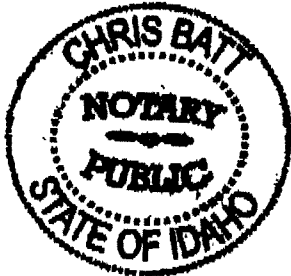
1. I make this affidavit based upon my personal knowledge and to the best of my information and belief.

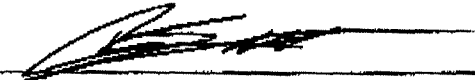
2. Attached hereto as Exhibit "A" is a true and correct copy of the \$50,000.00 earnest money check I tendered to my broker, Treasure Valley Properties, immediately following the auction of Defendant Thomas Hagood's real property, which represented the combined earnest money that was due for the parcels that I purchased at the auction.

FURTHER YOUR AFFIANT SAYETH NAUGHT:

  
\_\_\_\_\_  
Mike Ressler

SUBSCRIBED AND SWORN TO before me this 11 day of March, 2009.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Boise  
My commission expires: 5/19/2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
Davison, Copple, Copple & Cox  
Washington Mutual Capitol Plaza, Suite 600  
199 North Capitol Blvd.  
P.O. Box 1583  
Boise, Idaho 83701

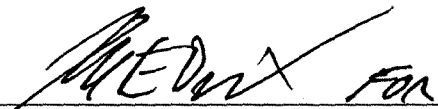
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Anderson, Julian & Hull, LLP  
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Terry Michaelson  
Hamilton Michaelson & Hilty, LLP  
1303 12th Avenue Road  
P.O. Box 65  
Nampa, ID 83653-0065

U.S. Mail  
 Overnight Mail  
 Hand Delivery  
 Fax

  
\_\_\_\_\_  
Angela M. Reed

**EXHIBIT A**

**Earnest Money Check**

**RECEIPT ACKNOWLEDGED**

Your signature below indicates a real estate licensee gave you a copy of the Idaho Real Estate Commission's "Agency Disclosure Brochure."  
Signing this document does not create an agency relationship or a contractual relationship of any kind.

Signature *Mike Ressler*

Date 8/6/08

Signature \_\_\_\_\_

Date \_\_\_\_\_

16356

NORTH AMERICAN RECYCLING, INC.  
P.O. BOX 1041  
16158 ANDRUSIDE ROAD  
NANPA, IDAHO 83653-1041  
(208) 461-5996

92-373-1231

8/6/2008

BY \_\_\_\_\_  
TO THE ORDER OF TREASURE VALLEY PROPERTIES

\$ 50,000.00

Fifty Thousand and 00/100 DOLLARS

TREASURE VALLEY PROPERTIES

MEMO EARNEST MONEY FOR HAGOOD PROPERTY

*Mike Ressler*  
AUTHORIZED SIGNATURE

Security Features. Details on back.

⑆016356⑆ ⑆123103732⑆ 0600029088⑆



Thomas E. Dvorak (ID State Bar ID# 5043)  
 Angela M. Reed (ID State Bar ID# 7221)  
 GIVENS PURSLEY LLP  
 601 West Bannock Street  
 Post Office Box 2720  
 Boise, Idaho 83701-2720  
 Telephone: 208-388-1200  
 Facsimile: 208-388-1300  
 S:\CLIENTS\10292\1\Aff of Kevin Seward ISO Motion Summ J.DOC

**FILED**  
 A.M. 4:50 P.M.  
 MAR 12 2009  
 CANYON COUNTY CLERK  
 T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
 RESSLER, an individual doing business as  
 "M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

Case No. CV 08-8465

**AFFIDAVIT OF KEVIN SEWARD  
 IN SUPPORT OF PLAINTIFFS'  
 MOTION FOR SUMMARY  
 JUDGMENT**

STATE OF IDAHO )  
 ) ss.  
 County of Ada )

COMES NOW, Kevin Seward, your affiant, who being first duly sworn, deposes, states and avers as follows:

1. I am over the age of twenty-one (21) years and am competent to testify as to the matters contained in this affidavit. I make this affidavit based upon my personal knowledge and to the best of my information and belief.

2. I am currently employed by third-party Defendant Downs Auction Service, Inc., an Idaho corporation ("Downs Auction"). My responsibilities at Downs Auction include assisting the auctioneer conduct auction sales.

3. On August 6, 2008, I assisted the auctioneer in conducting an "absolute" auction sale of three parcels of property owned by the Plaintiff Thomas A. Hagood ("Hagood"). The parcels of property that were up for sale at the auction are located in Canyon County, Idaho, and are commonly known as 4104 Garrity, consisting of approximately 1.9 acres ("Parcel 1"), 1010 North 39th Street, consisting of approximately two acres ("Parcel 2"), and 1019 North 39th Street, consisting of approximately fourteen acres ("Parcel 3"). Parcel 1, Parcel 2, and Parcel 3 may be referred to herein individually as a "Parcel" or collectively as the "Parcels."


4. During the sale of Mr. Hagood's property, I was responsible for creating a "bid receipt log" for each Parcel. A true and correct copy of the bid receipt log I generated for each Parcel is attached hereto as Exhibit "A" and incorporated herein by this reference. The bid receipt log for each Parcel shows the history of the bids for each Parcel. The final bid that was accepted by the auctioneer is circled on each bid receipt log.

5. According to the bid receipt log, Parcel 1 sold for \$278,250.00, Parcel 2 sold for \$241,500.00, and Parcel 3 sold for \$453,285.00.

6. Plaintiff Mike Ressler, an individual doing business as "M&M RE Holdings," with his agent Hobie Peterson bidding on his behalf, was the highest bidder on Parcel 1 and Parcel 2 and his bids for those respective Parcels were accepted by the auctioneer as the highest bid.

7. Plaintiff Jon Wakelum was the highest bidder on Parcel 3 and his bid was accepted by the auctioneer as the highest bid.

FURTHER YOUR AFFIANT SAYETH NAUGHT:



Kevin Seward

SUBSCRIBED AND SWORN TO before me this 9<sup>th</sup> day of March, 2009.



Brenda Seeger  
Notary Public for Idaho  
Residing at Tampa, FL  
My commission expires: 11/29/2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
Davison, Copple, Copple & Cox  
Washington Mutual Capitol Plaza, Suite 600  
199 North Capitol Blvd.  
P.O. Box 1583  
Boise, Idaho 83701

\_\_\_\_ U.S. Mail  
\_\_\_\_ Overnight Mail  
 Hand Delivery  
\_\_\_\_ Fax

Phillip J. Collaer  
Anderson, Julian & Hull, LLP  
P.O. Box 7426  
Boise, ID 83707-7426

\_\_\_\_ U.S. Mail  
\_\_\_\_ Overnight Mail  
 Hand Delivery  
\_\_\_\_ Fax

Terry Michaelson  
Hamilton Michaelson & Hilty, LLP  
1303 12th Avenue Road  
P.O. Box 65  
Nampa, ID 83653-0065

U.S. Mail  
\_\_\_\_ Overnight Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Fax

  
\_\_\_\_\_  
For Angela M. Reed

**EXHIBIT A**

**BID RECEIPT LOG**

5% BP  
 Parcel 1 - 25,000  
 2 - 25,000  
 3 - 50,000

Garity Blvd. Parcel 1, 2, 3

8/6/08  
 20 people

Parcel 1 1.9 Acres

195,000	205,000	200,000	205,000	215, 2'
220,000	225,000	230,000	245, 255	
260,000	265,000	270,000	X	_____
	13,250	3,250	X	_____
	278,250			

Parcel 2 2 Acres

195	200	205	210	215	220	225
		16,250		10,750		11,250
		215,250		225,750		236,250
230,000	235,000		X			
11,500	11,750					
241,500	246,750					

Parcel 2  
 \$275,000  
 Sec'd Place

466-817 861-3003

Parcel 14.39

~~35,000~~  
x 14.39  
-----  
503,650

32,500  
x 14.39  
-----  
467,675  
23,353  
-----  
492,038

~~30,000~~  
926,700  
935,000  
~~46,750~~  
-----  
981,750

30,000  
14.39  
-----  
431,700 = R4  
21,585 = SD  
-----  
453,285 = Sales

265  
13,250  
-----  
278,250

230  
115  
-----  
345

453

Thomas E. Dvorak (ID State Bar ID# 5043)  
Angela M. Reed (ID State Bar ID# 7221)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
S:\CLIENTS\10292\1\Affidavit of Jon Wakelum IOT Def. Mot.DOC

**F I L E D**  
A.M. 4:30 P.M.

MAR 12 2009

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

---

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**AFFIDAVIT OF JON WAKELUM IN  
OPPOSITION TO DEFENDANT  
HAGOOD'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN REPLY  
TO HAGOOD'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**



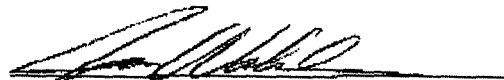
STATE OF IDAHO )  
 ) ss.  
County of Ada )

COMES NOW, Jon Wakelum, your affiant, who being first duly sworn, deposes, states and avers as follows:

1. I make this affidavit based upon my personal knowledge and to the best of my information and belief.


2. Attached hereto as Exhibit "A" is a true and correct copy of the \$50,000.00 earnest money check I tendered to Bullock & Co. Realty, immediately following the auction of Defendant Thomas Hagood's real property, which represented the earnest money that was due for the parcel that I purchased at the auction.

FURTHER YOUR AFFIANT SAYETH NAUGHT:

  
Jon Wakelum

SUBSCRIBED AND SWORN TO before me this 12<sup>th</sup> day of March, 2009.

CASEY M. MYERS  
Notary Public  
State of Idaho

  
Notary Public for Idaho  
Residing at Boise, ID  
My commission expires: August 26, 2009  
NOTARY PUBLIC STATE OF IDAHO

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
Davison, Copple, Copple & Cox  
Washington Mutual Capitol Plaza, Suite 600  
199 North Capitol Blvd.  
P.O. Box 1583  
Boise, Idaho 83701

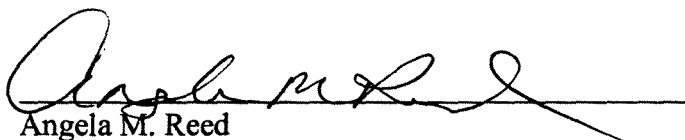
U.S. Mail  
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Anderson, Julian & Hull, LLP  
P.O. Box 7426  
Boise, ID 83707-7426

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Terry Michaelson  
Hamilton Michaelson & Hilty, LLP  
1303 12th Avenue Road  
P.O. Box 65  
Nampa, ID 83653-0065

U.S. Mail  
 Overnight Mail  
 Hand Delivery  
 Fax

  
Angela M. Reed

**EXHIBIT A**

**Earnest Money Check**

QUALTREE INC.  
3514 GARRITY BLVD. SUITE 200-67-6175  
NANMOU, ID 83887

8624  
98-8007282 H

PAY TO THE ORDER OF Bollock & Co. Realty DATE 8/6/08

Bill Howard & Assoc \$ 59,000 DOLLARS

FOR Dep on Prop

⑈008524⑈ ⑈123208024⑈ 5101610601⑈

STATE OF THE CASCADES

*[Signature]*

*[Signature]*

CASEY M. MATTERS  
Notary Public  
State of Idaho

NOTARY PUBLIC SERVICES  
1000 N. 10th St.  
Boise, ID 83725

Notary Seal Expires 07/31/2011

Thomas E. Dvorak (ID State Bar ID# 5043)  
Angela M. Reed (ID State Bar ID# 7221)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
S:\CLIENTS\10292\1\Reply Memo ISO Motion Summary Judgment GP01.DOC

3-26-H  
FILED  
A.M. 4:00 P.M.

MAR 12 2009  
CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
HAGOOD'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN REPLY  
TO HAGOOD'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

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## I. INTRODUCTION

Plaintiffs Jon Wakelum (“Wakelum”) and Mike Ressler (“Ressler”), by and through their attorneys of record, Givens Pursley LLP, submit this Memorandum in Opposition to Defendant Thomas Hagood’s (“Hagood”) Motion for Partial Summary Judgment and In Reply to Hagood’s Opposition to Plaintiffs’ Motion for Summary Judgment.

Plaintiffs filed a motion for summary judgment on August 14, 2008, seeking a decree enforcing the absolute auction sale as advertised and ordering Hagood to execute the necessary documents to memorialize the sale. Hagood filed a motion for partial summary judgment on November 11, 2008, alleging that Plaintiffs’ claims for declaratory relief and specific performance are barred by the statute of frauds. For the reasons set forth herein, Plaintiffs’ Motion for Summary Judgment should be granted because:

- (a) Hagood is barred as matter of equity from raising the statute of frauds as a defense to effectively withdraw his property from sale; and,
- (b) alternatively, because the writings between Hagood, the Third-Party Defendants, and the Plaintiffs satisfy the statute of frauds.

## II. SUPPLEMENTAL FACTUAL BACKGROUND<sup>1</sup>

Hagood is the record owner of three parcels of real property located in Nampa, Idaho commonly known as 4104 Garrity, consisting of approximately 1.9 acres (“Parcel 1”), 1010 North 39th Street, consisting of approximately two acres (“Parcel 2”), and 1019 North 39th Street, consisting of approximately fourteen acres (“Parcel 3”). Parcel 1, Parcel 2, and Parcel 3 may be referred to herein individually as a “Parcel” or collectively as the “Parcels.”<sup>2</sup>

---

<sup>1</sup> Plaintiffs have included this supplemental factual background in their Reply Memorandum to inform the court of additional facts that came to light as the result of Defendant Thomas Hagood’s deposition, which was held after Plaintiffs’ filed their Motion for Summary Judgment.

<sup>2</sup> See Plaintiffs’ Memorandum In Support of Their Motion for Summary Judgment (“Plf.’s Memo”) at n.1 and n.2.

Hagood and Third-Party Defendant Bullock and Company Realtors, LLC, an Idaho limited liability company (“Bullock and Company”), executed an “Exclusive Seller Representation Agreement” effective June 9, 2008 (the “Representation Agreement”), under the terms of which Hagood listed the Parcels for sale at public auction.<sup>3</sup> The Representation Agreement contained the following paragraphs:

4. **PRICE.** SELLER agrees to sell the property for a total price of \$ABSOLUTE SALE @ AUCTION”
5. **FINANCING.** SELLER will carry contract and accept a minimum down payment of \$20% and an acceptable secured note for the balance to be paid as follows: 8% inst. w/ int. only payments. Due in full 2 yrs.
- ....
26. **OTHER TERMS AND CONTITIONS:** This property to be sold by Auction Aug. 6, 2008 1:00 p.m. Absolute Sale. Owner to offer financing terms. Seller to pay advertising fee of \$5,000.00. Buyer to pay a Buyer’s Premium Fee of 5%. Houses included in sale—sold “as is where is”. Seller understands the risk associated with an absolute sale.<sup>4</sup>

During his deposition, Hagood testified that Bullock and Company discussed the meaning of paragraphs 4 and 26 with him and that he understood what those paragraphs meant at the time he signed the Representation Agreement.<sup>5</sup> Specifically, Hagood testified that he understood that the term “absolute auction” as used in the Representation Agreement to mean that he was committed to sell the Parcels:

Q (BY MR. COLLAER). Okay. And prior to you signing it, did they discuss the terms of the agreement and what it meant?

A. Well, yeah, they -- we discussed it.

---

<sup>3</sup> See Plf.’s Memo at n. 2.

<sup>4</sup> Plf.’s Memo at n.1 and n.2.

<sup>5</sup> Deposition of Thomas A. Hagood dated January 13, 2008 (“Hagood Depo”) at 108:16-25, attached as Exhibit A to the Affidavit of Angela M. Reed In Opposition to Defendant Hagood’s Motion for Partial Summary Judgment and In Reply to Hagood’s Opposition to Plaintiff’s Motion for Summary Judgment.



Q. And that would also include -- and I know you've talked about this before, paragraph 4, price, absolute sale and auction. That was described to you and you understood what that meant?

A. Yes.

Q. Okay. And you understood that to mean with an absolute auction, with that term, once the bidding is open, the highest bidder --

A. They told me --

Q. Let me get the question out. As the absolute auction goes on, the highest bidder gets the property and you as the seller, you cannot refuse to -- you cannot reject bids and you can't reject it because of a minimum price; correct?

MR. GUSTAVSEN: Objection. He's already explained what he believed an absolute auction is and you're now putting words into his mouth about what he feels it is. If you want to read back to what he defined an absolute sale is, that's fine, but you're now putting words into his mouth.

MR. COLLAER: Oh, I don't think so. I think I'm restating what he said. I'm trying to be clear about it.

MR. GUSTAVSEN: Okay.

Q. (BY MR. COLLAER) What I'm interested in, Mr. Hagood, and I understand what you've said about you wanted to change it or you wanted to stop it. What I'm interested in is when you signed Exhibit No. 7. And I understand events developed after that. What I'm interested in is at the time that your pen met the paper and you signed it, what your understanding of what an absolute sale at auction was. What was that?

A. Yeah. You had to sell it.

Q. Okay. And that was explained to you before you signed?

A. Well, I suppose so.<sup>6</sup>

---

<sup>6</sup> Hagood Depo at. 114:23-25; 115: 1-25; 116:1-16.

Hagood further admitted to initialing each of the pages of the Representation Agreement, which included initialing directly below Section 26 quoted above.<sup>7</sup>

Subsequent to execution of the Representation Agreement, Bullock and Company posted signs on the Parcels and also circulated advertisements advertising the auction. These advertisements included words to the effect “ABSOLUTE AUCTION (SELLS TO THE HIGHEST BIDDER – NO RESERVE”.<sup>8</sup> During his deposition, Hagood admitted seeing the signs posted on the Parcels and further admitted to seeing at least one of the advertisements for the auction. In fact, Hagood produced one such advertisement as part of his file.<sup>9</sup> This advertisement, which is entitled “ABSOLUTE LAND AUCTION – NAMPA, IDAHO” contains the following relevant provisions:

1. Financing Terms: Owner Finance  
Owner to carry with 20% down, interest only payments at 8% due in full 2 years from closing.
2. Earnest Money day of auction: \$25,000 down on Lots 1 & 2; \$50,000 down on lot 3. Held in trust for 45 days due diligence, then released non-refundable, to seller. Earnest money applied to purchase price at closing.<sup>10</sup>

When questioned regarding his understanding of the term “Absolute Auction” in the advertisement he produced, Hagood testified as follows:

Q (BY MR. DVORAK) Well, that came from your records, didn't it?

A. I guess so.

Q. Yeah. For the record, Exhibit 2 came from your file correct?

A. Okay.

---

<sup>7</sup> Hagood Depo at 27:7-24

<sup>8</sup> See paragraph 6 of Defendant's Answer wherein Defendant admits paragraphs 8, 9 and 10 of the Complaint.

<sup>9</sup> Hagood Depo at 17:12-25; 18:1-25; 19:1-25; 20:1-25; 21:1-4.

<sup>10</sup> Hagood Depo Exhibit 2.

Q. So you did see it; correct?

A. (Nods).

MR. COLLAER: You have to answer audibly.

THE WITNESS: Yes.

Q. (BY MR. DVORAK) Okay. But other than the fact that it s in your file, you don't have any other information about it?

A. I understand the terms of this so – I understood that.

Q. Okay. When you say you understood the terms of that, okay, that would include the term "absolute land auction" at the top?

A. Yes. But I -- okay. Yes.

Q. Okay. Let's clarify this for the record. What understanding do you have of the meaning of the phrase "absolute land auction"?

A. Well, **it went for** the -- you know **whatever it was bid for**.<sup>11</sup>

Approximately two weeks prior to the auction, Hagood met with Defendant Larry Downs to discuss the auction.<sup>12</sup> During this meeting, Hagood expressed some reservations with the absolute auction and informed Mr. Downs that he wanted to restructure the auction so he had the option to reject all bids in the event he didn't like the price.<sup>13</sup> According to Hagood, Larry Downs informed him that going with an absolute auction was in Hagood's best interests.<sup>14</sup> Hagood chose to proceed forward with the absolute auction.<sup>15</sup>

On August 5, 2008, the day before the auction, Hagood met with Larry Downs again to discuss the auction. Greg Bullock and Hagood's son, Jeff Hagood, who is a licensed real estate

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<sup>11</sup> Hagood Depo at 20:22-25; 21: 1-21 (emphasis added).

<sup>12</sup> Hagood Depo. 131:19-25; 132:1-25; 133: 1-25; 134:1-10.

<sup>13</sup> Hagood Depo. 132:1-25; 133: 1-25; 134:1-10.

<sup>14</sup> Hagood Depo. 134:13-25.

<sup>15</sup> Hagood Depo. 133:10-13.

agent, were also present at this meeting.<sup>16</sup> Hagood testified that he told Larry Downs, who is a licensed real estate agent, and Greg that he still had reservations about the absolute auction and that he wanted the ability to reject all bids.<sup>17</sup> Hagood further testified that he understood that he had the right to cancel the Representation Agreement, but claims that Larry Downs talked him out of it.<sup>18</sup> Although Hagood apparently had some concerns with going forward with the auction, he admits that never revoked Bullock and Company's or Down's Auction Service's authority to conduct an absolute auction:

Q. (BY MR. DVORAK) Okay. So when you left this meeting you understood that this auction was going to go forward as an absolute auction the next day; does that sound correct?

A. Right. But I tried to stop the thing and he wouldn't stop it.

Q. Did you tell him "I don't care what you're telling me, I'm not going to sell my property in an absolute auction, period. I'm not going to do it"?

A. No, I didn't say that.

Q. Okay. During this whole time, during this meeting, what did your son say?

A. I -- I don't know. He didn't say much at this meeting.

Q. Do you recall him saying anything?

A. No. Really not. I don't recall.

Q. And after this meeting did you and your son talk about what was going to happen at the auction the next day?

A. A little bit.

Q. What did you talk about?

---

<sup>16</sup> Hagood Depo. 55:11-22; 136:3-16.

<sup>17</sup> Hagood Depo. 137:1-6.

<sup>18</sup> Hagood Depo. 139:8-16.

A. I don't know. We talked about, you know, the reserve and -- you know, this guy is the guy that knows what's going on. You know, I mean, he's so and damn it [phonetic] about it that this is the way to do it.

Q. Okay. Did you and your son discuss after this meeting just sending them a written notice saying auction is off?

A. No.

Q. We're not doing it?

A. No.

Q. You never discussed that possibility?

A. Didn't even -- didn't even -- just -- I was really pretty perturbed.

Q. And you didn't say that to the real estate agents during the meeting, saying I'm not going to sell the property?

A. No. I said, "This is ridiculous. You told me that I could stop this any time I wanted to and you're telling me I can't," or "I shouldn't," or "you're crazy," you know.

Q. Yes. Let's focus -- I think there's a difference between saying you can't do it versus it's a bad idea. Ultimately, it's your decision, correct, because it's your property?

A. He's supposed to be representing me.

Q. Would you agree that ultimately you knew all the time --

A. But he knows better than I do.

Q. Let me get the question out. It's your decision ultimately of whether you want to sell the property or not; correct?

A. Right.

Q. If somebody says this is the way to do it, this is a good idea, this is the best option you have at this time, and if you don't want to do it, you don't have to proceed, do you?

MR. GUSTAVSEN: Objection. He's never said that --

THE WITNESS: He didn't give me an option.

MR. GUSTAVSEN: The tail end of that statement was not correct. He's never said that.

Q. (BY MR. COLLAER) Did you tell them at -- I think you've answered this. At the end of this meeting you did not say you are not authorized to sell my property at the auction, period?

A. No, I didn't say that; no.<sup>19</sup>

On August 6, 2008, Hagood attended and videotaped the auction.<sup>20</sup> According to Hagood's testimony, Downs Auction Service wrote the bids for each respective parcel on a white board.<sup>21</sup> Despite being displeased with the bids, Hagood never made any effort to stop the auction:

Q. (BY MR. COLLAER) Okay. Here's what I'm interested in. When the first parcel went through the auction and you got the highest bid and he wrote it on the chalkboard behind him, at that point did you feel that the price that was obtained for that parcel was lower than what you wanted?

A. (BY HAGOOD) Oh, yes.

Q. Okay. At that point did you approach the auctioneer or anybody and say, "Don't auction any more of the parcels"?

A. I see what you're driving at. No. But I didn't -- I didn't think of that at that time.

Q. Okay. You could have if you wanted to, couldn't you?

A. But I didn't know that. In other words, you're saying that till the gavel started on the next parcel? But see, I didn't know that. It just comes to me now.

Q. Okay.<sup>22</sup>

During the auction, Kevin Seward, a Downs Auction Service employee, wrote down the bids for each Parcel in a bid receipt log.<sup>23</sup> Mr. Seward circled the highest bid for each Parcel in the bid

---

<sup>19</sup> Hagood Depo at 139:17-25; 140:1-25; 141:1-25; 142:1-12

<sup>20</sup> Hagood Depo. 142: 12-16.

<sup>21</sup> Hagood Depo. 149:18-25; 150: 1-23.

<sup>22</sup> Hagood Depo at 155:13-25; 156:1-6.

receipt log.<sup>24</sup> According to the bid receipt log, Parcel 1 sold for \$278,250.00, Parcel 2 sold for \$241,500.00, and Parcel 3 sold for \$453,285.00.<sup>25</sup> At the auction, Plaintiff Mike Ressler wrote a \$50,000.00 earnest money check to his broker for Parcels 1 and 2, which the memo line of the check designates as "earnest money for Hagood Property."<sup>26</sup> Plaintiff John Wakelum also tendered a \$50,000.00 earnest money check to Bullock & Co. Realty, which also designates in the memo line that the check is a deposit on property.<sup>27</sup>

Following the auction, Scott Bullock presented Hagood with purchase and sale agreements for each Parcel dated August 6, 2008 (the "Purchase and Sale Agreements"), which had been signed by the Plaintiffs.<sup>28</sup> During his deposition, Hagood testified that the terms in the Purchase and Sale Agreements were acceptable to him, except the price:

Q. (BY MR. COLLAER) All right. Tell me, focusing on Exhibit No. 18 and 19 [the purchase and sale agreements], other than the -- I understand that you don't like the purchase prices on those two. Or let me -- that's a bad question.

A. (BY HAGOOD) I don't like the purchase price?

Q. Yeah. You don't agree. You think the purchase price on Exhibit No. 18 and 19 is -- that's not to your satisfaction.

A. Well, I'd have to consider it. I don't know.

Q. You don't know if it's acceptable to you or not?

A. No. It should be more than that.

Q. How much more?

A. I don't know.

---

<sup>23</sup> Affidavit of Kevin Seward in Support of Plaintiffs' Motion for Summary Judgment ("Seward Aff.") at ¶¶ 2,4.

<sup>24</sup> Seward Aff. at ¶ 4.

<sup>25</sup> Seward Aff. at ¶ 5.

<sup>26</sup> Affidavit of Mike Ressler In Opposition to Defendant Hagood's Motion for Partial Summary Judgment and In Reply to Hagood's Opposition to Plaintiff's Motion for Summary Judgment ("Ressler Aff.") at Exhibit A.

<sup>27</sup> Affidavit of Jon Wakelum In Opposition to Defendant Hagood's Motion for Partial Summary Judgment and In Reply to Hagood's Opposition to Plaintiff's Motion for Summary Judgment ("Wakelum Aff.") at Exhibit A.

<sup>28</sup> Hagood Depo. 73:16-25; 74: 1-9.

Q. Okay. Okay. Other than the purchase price, is there any other terms on Exhibit 18 and 19 that are unacceptable to you?

MR. GUSTAVSEN: I'd object just to the form. This is the first time to his testimony that he's reviewed these documents. So he hasn't reviewed these documents. He said they were attached to the complaint. He said he didn't get them handed to him -- or did not accept them on August 6th. So this is the first time to my knowledge and his testimony that he's actually reviewing this. So if you want him to review the entire document, I'd say we take a break.

MR. COLLAER: Let's take a break.

MR. GUSTAVSEN: Okay.

(A recess was held.)

(Mr. Michaelson is not present.)

(Record read back.)

MR. COLLAER: Back on the record. The question was just read back to you. Could you please answer it.

THE WITNESS: It was the price. Yeah.

Q. (BY MR. COLLAER) Other than the price, everything else is fine?

A. Yeah.<sup>29</sup>

Hagood further testified that the three Purchase and Sale Agreements described the Parcels that were up for auction.<sup>30</sup>

---

<sup>29</sup> Hagood Depo at 151:25; 152:1-25; 153:1-15.

<sup>30</sup> Hagood Depo. 161: 12-25; 162: 1-8.



### III. DISCUSSION

**A. Hagood Should Be Barred As A Matter of Equity from Using the Statute of Frauds As A Mechanism to Effectively Withdraw His Property From Sale Where It Is Undisputed Hagood Understood the Nature and Risk Associated With An Absolute Auction, Never Revoked the Auctioneer's Authority To Conduct the Auction, and Attended The Auction and Never Attempted to Stop the Sale.**

Hagood contends that Plaintiffs claims for specific performance and declaratory relief are barred by the statute of frauds because Hagood did not sign the Purchase and Sale Agreements memorializing the terms of the oral contracts that were formed between Hagood and Plaintiffs upon the acceptance of Plaintiffs' bids. Specifically, Hagood asks the court, based on a litany of parenthetically cited cases, to conclude the statute of frauds bars enforcement of an oral contract for the sale of real property that was formed at an absolute or "without reserve" auction.

Plaintiffs, however, do not believe that the court need decide that issue in the present case because a number of courts, including several of the courts cited by Hagood, have, as a matter of equity, barred sellers of real property from raising the statute of frauds as a defense in absolute auction cases with facts nearly identical to those in the instant case. For example, in *Zuhak v. Rose*, 58 N.W.2d 693, 694 (Wis. 1953), the defendant-seller retained an auctioneer to conduct an auction of the seller's real and personal property. The auctioneer prepared an advertisement for the auction stating that the property was to be sold "without reserve." *Id.* Plaintiff-buyer was the highest bidder on the real property. After plaintiff made his bid, the seller, who attended the auction, ordered the auctioneer to stop the auction, which the auctioneer did. The auctioneer thereafter prepared a memorandum of sale that he later delivered to the plaintiff's attorney. After the defendant refused to convey the property, Plaintiff filed suit seeking specific performance and, in the alternative, damages. The trial court ordered the seller to tender a warranty deed to the plaintiff upon plaintiff's payment of the purchase price and furthered allowed plaintiff to

apply for a judicial conveyance in the event the seller refused to tender the warranty deeds. *Id.* at 695.

On appeal, the seller contended that specific performance was inappropriate because there was no contract between him and the plaintiff. The Wisconsin Supreme Court rejected this argument, concluding that the seller could not withdraw the property from sale after a bid has been made in an absolute auction. Specifically, the court held:

The words 'without reserve' as used in auctions are words of art, assuring prospective bidders that the property will actually go to the bidder offering the highest price. The seller may not nullify this purpose by bidding through himself or through an agent, nor by withdrawing the property from sale if he is not pleased with the bids. Thus, the seller may not refuse to accept a bid where the auction is without reserve; the bid itself establishes a right in the bidder to have the property unless someone else by raising his bid succeeds to his right.

*Id.* at 696. The seller further argued that the memorandum of sale that was delivered to the plaintiff's attorney was insufficient to satisfy the statute of frauds. *Id.* at 697. The court also rejected this argument, concluding that the sufficiency of the memorandum was immaterial because the defendant, by discharging the auctioneer and revoking his authority to give any memorandum, "cannot complain that plaintiff has no memorandum." *Id.*

A Maryland court reached a similar result in *Pyles v. Goller*, 674 A.2d 35 (Md. Ct. Spec. App. 1996). In *Pyles*, the sellers contracted with an auctioneer to sell certain real property at public auction. *Id.* at 37. The advertisement for the auction stated that the auction would be an "Absolute Auction" and there would be "No Minimums" and contained a description of the property and the terms of sale. *Id.* The plaintiff-buyer was the highest bidder on one of the parcels. The defendant-sellers were the highest bidders on two of the other parcels. *Id.* at 38. At the end of the auction, the sellers rejected the defendant's bid because the bid did not equal what

was owed on the lot. The plaintiff filed suit for specific performance and fraud and the trial court ultimately ordered the sellers to convey the property to the plaintiff. *Id.* On appeal, the sellers argued, *inter alia*, that the trial court erred in ordering specific performance because the plaintiff's suit was barred by the statute of frauds. *Id.* at 42. The court rejected this argument, holding:

The statute of frauds argument advanced by Pyles and Reed [the sellers] ignores the contractual significance of an auction held 'without reserve.' As discussed *supra*, in an auction held 'without reserve,' mutual assents are achieved in succession as each next high bid is made, and final mutual assent and a final enforceable contract comes into existence when the last high bid is made. Once final mutual assent is achieved, the statute of frauds merely requires that the parties sign a memorandum encompassing all the elements of a contract.

In this case, Goller [the buyer] never had an opportunity to sign a memorandum because Pyles and Reed [the sellers] rejected his bid. **It would fly in the face of common sense to hold that Goller is precluded from specific performance of the sale of lot No. 7 because of Pyles's and Reed's unlawful rejection of his bid.**

.....

'Equity regards that as done which ought to be done.' Pursuant to the circuit court's order and general principles of equity, Pyles and Reed must sign a memorandum conveying title to Goller in exchange for \$25,000. If they refuse to comply with this order, the circuit court may appoint a trustee to sign the contract on behalf of Pyles and Reed so as to certify the conveyance.

*Id.* (internal citations omitted) (emphasis added).

A Pennsylvania court also reached a similar result in *Pillsbury v. McNabb*, 1965 WL 8189 (Pa. Ct. Common Pleas 1965). In *Pillsbury*, the defendant-seller, retained an auctioneer to sell his real property at public auction. *Id.* at \*2. The sale was advertised via newspaper as an "absolute auction." Plaintiff was the highest bidder with a bid of \$20,000, but the seller never conveyed the property to him. The seller subsequently sold the property to a third-party who

was not present at the auction for \$27,000. Plaintiff sued the seller for damages. The seller argued, in response, that plaintiff's cause of action for damages was barred by the statute of frauds. *Id.* at \*3. The court rejected this argument, concluding that the sellers were guilty of sharp dealing or fraud. *Id.* at \*4. Specifically, the court held:

The laudable purpose of this guardian of truth [the statute of frauds] is to prevent frauds and perjuries. Occasionally, however, an embattled property owner . . . summons the statute to enforce a condition which does not seem to coincide with principles of honesty and fair dealing. In such cases the courts should study the situation involved to make certain that the statute is not being used to perpetrate fraud and perjuries rather than prevent them.

Plaintiff's cause of action is not based upon an oral contract for the sale of real estate. It is based, instead, upon defendants' violation of his duty, whether imposed by rule of law or by collateral agreement, to permit the auction to be completed by sale to the highest bona fide bidder and to refrain from withdrawing the property before such had been done. **If such an action is to be barred by the statute of frauds, the effect of an auction without reserve will be nullified for all practical purposes whenever the property being offered for sale is the subject of a statute of frauds. We do not believe, therefore, that the statute of frauds was intended to bar an action based on facts such as those which have been alleged in this complaint.**

*Id.* (emphasis added).

Like the defendant-sellers in *Zuhak*, *Pyles*, and *Pillsbury*, Hagood has asserted the statute of frauds as a mechanism to effectively withdraw his property from sale because he is unhappy with the purchase price the Parcels sold for at auction. It is clear, however, in the context of an absolute auction that, once the Plaintiffs' bids were entered, Hagood lost the right to withdraw the property from sale and became absolutely committed to the sale. *See 7 Am. Jur. 2d Auctions and Auctioneers* § 36 (2007) ("When an auction is without reserve or absolute, a seller makes an offer to sell when the seller advertises the sale and it is up to the bidder to accept; a contract is formed with each bid, and the seller may not withdraw the property once any legitimate bid has

been submitted, but is absolutely committed to the sale once the bid has been entered.”). Notably, in his summary judgment memorandum, Hagood does not deny that an oral contract for the sale of the Parcels was formed upon the acceptance of the Plaintiffs’ bids. Nor does Hagood dispute the terms in the Purchase and Sale Agreements that were presented to him for his signature, which matched advertised terms. Rather, like the sellers in *Zuhak, Pyles*, and *Pillsbury*, Hagood is attempting to use the statute of frauds to nullify the deal because he is unhappy with the purchase price the Parcels sold for at auction.

While Idaho courts have yet to address equity as removing a case from the operation of the statute under facts similar to those in the instant case, the Idaho Supreme Court’s opinion in *Anselmo v. Beardmore*, 219 P.2d 946 (1950) is instructive. In *Anselmo*, the plaintiff-buyer brought an action against the defendant-seller to compel specific performance of an oral contract to convey a 4-acre parcel of real estate. *Id.* at 947. After the location of the land was determined, but not yet surveyed, the plaintiff gave the defendant a check for half of the purchase price and the defendant gave the plaintiff a receipt for the payment. *Id.* After the land was surveyed, plaintiff’s attorney discovered that a road easement ran through the property and requested that the title be cleared. *Id.* at 948. Defendant refused to remove the easement and Plaintiff thereafter purchased the easement’s dominant estate. Following Plaintiff’s purchase of the dominant estate, defendant still refused to deliver good and marketable title to the 4-acre parcel. The trial court entered judgment in favor of the Plaintiff, compelling specific performance of the contract. *Id.* at 949.

On appeal, the defendant contended that the contract was unenforceable under the statute of frauds. In addressing this argument, the Idaho Supreme Court noted,

Equity will not hesitate to enforce an oral contract falling within the provision of the statute of frauds where the circumstances are

such that the refusal to execute it would amount to a fraud and equity will not permit the statute to be used as an instrument or means of effecting that which it was designed to prevent.

Where one party to an oral contract has in reliance thereon so far performed his part of the agreement that it would be perpetrating a fraud upon him to allow the other party to repudiate the contract and set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute and will enforce the contract by decreeing specific performance.

*Id.* at 949. The court went on to hold that the contract was enforceable, concluding

[T]he description of the land intended and the price to be paid were certain and definite, and the contract was complete in every detail. The balance of the purchase price was to be paid when a deed was delivered and an abstract showing title furnished. **The fact that the abstract was not delivered and deed tendered for more than a year after the agreement was made, was not the fault of the plaintiff and would be insufficient for an avoidance of the contract on the part of the grantor.**

*Id.* at 950 (emphasis added). The court further found that there was mutuality of contract because the plaintiff took possession of the property and made improvements thereon with the defendant's consent. *Id.*

Consistent with *Anselmo* court's rationale, and the rationales in *Zuhak*, *Pyles*, and *Pillsbury*, equity should enforce the oral contract that was formed between Hagood and the Plaintiffs. The circumstances of this case warrant enforcement. And allowing Hagood to repudiate the contract would amount to an improper use of the statute. According to his own testimony, Hagood understood the nature and risk associated with an absolute auction, and, at a minimum, knew that he could have modified the auction at any time prior to the sale. Hagood, however, chose not to change the terms of sale prior to the auction or stop the auction for that matter, thereby assuming the risk that if the Parcels sold for less than Hagood believed they should sell for. Furthermore, as in *Anselmo*, the contract terms are certain and definite and the

contract is complete in every detail. It is not the Plaintiffs' fault that Hagood refused to adhere to his absolute commitment to sell the Parcels by executing the Purchase and Sale Agreements. If the Court allows Hagood to rely on the statute of frauds under the facts of this case, the Court, in essence, will be concluding that absolute auction land sales are not specifically enforceable anytime the seller is dissatisfied with the final bid purchase price. This precedent would be inconsistent with the purpose underlying Idaho's statute of frauds and would allow seller's to use the statute to perpetrate a fraud on those buying real property at absolute auctions.

**B. Alternatively, Plaintiffs' Motion for Summary Judgment Should Be Granted Because The Writings Exchanged Between Hagood, the Third-Party Defendants, and Plaintiffs Satisfy The Statute of Frauds.**

Alternatively, even if the court finds that Hagood did not waive his right to assert the statute of frauds as a defense, Hagood's statute of frauds argument nonetheless fails because the separate writings in this case, when construed together, constitute a sufficient written memorandum to satisfy the statute. An agreement for the sale of real property must be in writing and subscribed to by the party to be charged. I.C. § 9-505(5). Although no particular instrument is necessary to constitute a note or memorandum required by the statute of frauds, the essential terms of the oral contract must be contained in the writing or writings. *Hoffman v. S V Co., Inc.*, 628 P.2d 218, 221 (Idaho 1981). The writing or writings must state the parties to the contract, the subject matter, the price or consideration, a description of the property and the essential terms and conditions of the agreement. *Id.* An unsigned writing containing terms of the agreement will be considered part of the memorandum only where express reference to it is made in the signed writing. *Id.*

In this case, the Representation Agreement between Bullock & Company and Hagood legally describes the Parcels to be sold at the auction and is signed by Hagood. The Agreement

specifies that the property is “to be sold by auction Aug. 6th 2008 1:00 p.m. Absolute Sale,” that the price for the property will be that price brought by “absolute sale @auction,” and that the buyer will be responsible for paying a 5% buyer’s premium. The Agreement further specifies that the owner will offer financing terms, that a minimum down payment of 20% will be required, that the balance will be payable at 8% interest with interest only payments and that the balance will be due in full two years from the sale. The Agreement further contemplates that Hagood will pay Bullock & Company an advertising fee of \$5,000.00.

The advertisements that were generated by Bullock & Company for the sale, which prominently display Bullock & Company’s logo on the advertisements, reiterate the same terms identified above and further instruct interested parties to contact Bullock & Company for the terms of the owner-carried financing, including the date of the auction. The “Real Estate Terms & Conditions” (the “Term Sheet”) Bullock generated specifically for this sale stated that the Property was being sold at absolute auction – no reserve on August 6th at 1:00 p.m. The Term Sheet provided that \$25,000.00 in earnest money for each of lots 1 and 2 and \$50,000.00 in earnest money for lot 3 was due on the day of the auction and that buyer would be given a 45-day due diligence period. The term sheet further reiterated that the successful bidder will be required to enter into a purchase agreement at the auction site immediately following the auction and that the owner will carry the financing with 20% down, interest only payments at 8% with the balance due in full two years from closing.

Immediately following the auction, Bullock & Company prepared three purchase and sale agreements, one for each Parcel, which are commonly described in the agreements as “App. 2 Acres Garrity Blvd.,” “App. 2 acres N. 39th,” and “App. 14 Acres N. 39th.” Consistent with the Term sheet, each of the purchase and sale agreements denote Bullock & Company as the selling



agency and further recite the amount of earnest money due and give Plaintiffs a 45-day due diligence period. The purchase prices designated in the purchase and sale agreements match the purchase prices that were recorded on the bid receipt log Downs Auction Service created during the auction of each Parcel. Furthermore, as required in the Term Sheet, Plaintiff Mike Ressler, who was the highest bidder on Parcels 1 and 2, tendered a \$50,000.00 earnest money check to his broker following the auction. The memo line in Mr. Ressler's check designates that the check is for earnest money for the Hagood property. Plaintiff Jon Wakelum also tendered a \$50,000.00 earnest money check payable to Bullock Co. & Realty. Mr. Wakelum's also designated in his check that the check was for a deposit on property.

The Exclusive Seller Representation Agreement, the advertisements, the Real Estate Terms & Conditions, the purchase and sale agreements, and the auctioneer's receipt log, when construed together, satisfy the statute of frauds. These writings identify the parties to the contract, the subject matter, the price or consideration, a description of the property and the essential terms and conditions of the agreement. The Representation Agreement, which was signed by Hagood, legally describes each Parcel, expressly identifies that the purchase price for each Parcel will be the bid price brought at the "absolute sale @auction" of each Parcel, and also expressly identifies that the auction is to be held on August 6, 2008. The documents that were prepared by Bullock & Company and the auctioneer in conjunction with the auction that was indeed held on August 6, 2008, show the highest bid for each Parcel; the highest bids for each Parcel were, in turn, designated as the purchase price for each respective Parcel in the purchase and sale agreements. Furthermore, the earnest money provisions and financing terms in the purchase and sale agreements are consistent with those terms in the advertisements which Bullock & Company prepared and which the Representation Agreement contemplated that

Bullock & Company would prepare. Lastly, the highest bidders on the Parcels, Jon Wakelum and Mike Ressler, and Hagood are designated as the parties to the purchase and sale agreements.

Other jurisdictions have found writings prepared in the context of auctions that are similar to the writings in the instant case sufficient to satisfy the statute of frauds. For example, in *Johnson v. Haynes*, 532 S.W.2d 561 (1975), the plaintiffs-buyers sued for specific performance of land they purchased at auction. *Id.* at 563. The defendant-seller argued that the contract was unenforceable under the statute of frauds. In addressing the sufficiency of the memorandum of sale, the court looked at three documents: (1) a written contract between the seller and the auction, which was signed by the seller, providing that the property was to be sold by the auctioneer at the highest bid price when put up at auction by the auctioneer; (2) printed posters prepared by the auctioneer advertising the date of the sale, the location and size of the property, the name of the auctioneer, and that the terms would be announced at the sale; and (3) the auctioneer's bid sheet. *Id.* at 563, 565. The Tennessee Court of Appeals' held that these writings, when construed together, satisfied the statute of frauds. The court concluded that the property was adequately described in the printed poster, that the statement in the posters identifying the auctioneer related back to the written contract between the owner and the auctioneer, which was signed by the owner, and that the bid sheet showed the highest, best, and last bid on the land sold as advertised by the auctioneer. *Id.* at 566.

Similarly, in *Young v. Hefton*, 173 P.3d 671 (Kan. Ct. App. 2007), the buyer-plaintiff brought suit for specific performance of an oral contract for the purchase of a tract of property that was formed upon the acceptance of the buyer's highest bid at an auction. *Id.* at 677-678. The defendant-seller moved for summary judgment, arguing that the buyer's claim for specific

performance was barred by the statute of frauds. *Id.* at 678. The trial court denied the defendant's motion for summary judgment, reasoning:

Here, Plaintiff has proffered four documents that he claims are sufficient to satisfy the statute of frauds in this matter: the listing agreement between the Defendants and the auctioneer, the internet sale bill, and bid sheets for the two tracts so land at issue herein. The Court finds that the parties to the contract are adequately identified by the listing agreement identifying the sellers and signed by Edward Hefton [the seller], and the bid receipts identifying Michael Young [the buyer] by his signature. The internet advertising materials, which Plaintiff claims to have possessed at the time of the auction, adequately describes the lands to be sold, by picture and legal description, and the terms of sale, including estimated closing dates, possession dates, and earnest money requirements, among other [sic]. Finally, the Court finds that the price term is adequately reflected in the bid receipts for the tracts of land at issue.

*Id.* The Kansas Supreme Court affirmed the district court's ruling on appeal. *Id.* at 679.

A Florida court also reached a similar result in *Rohlfing v. Tomorrow Realty & Auction Co., Inc.*, 528 So.2d 463 (Fl. Dist. Ct. App. 1988). In *Rohlfing*, the plaintiff-seller sued the defendant-buyer for breach of contract after the defendant failed to consummate the transaction following an auction sale. *Id.* The defendant-buyer argued that plaintiff's suit was barred by the statute of frauds. In analyzing the sufficiency of the memorandum of sale, the court examined the following documents: (1) an "Auction Agreement," between the seller and the auctioneer for the auctioneer to sale land at public auction; (2) a "Buyer's Guide," which was a custom-printed writing for the auction containing all of the essential terms and conditions of sale; (3) a "Real Estate Terms of Sale," which was signed by the buyer pre-auction and which refers to the Buyer's Guide; and (4) a "Memorandum of Sale at Public Auction," which the buyer acknowledged signing, but had been misplaced and was not offered into evidence. The court held that the written "Real Estate Terms of Sale," together with the written "Buyer's Guide" which the Real Estate Terms of Sale referred to, the written "Memorandum of Sale at Public

Auction,” and the buyer’s deposit check, which contained unidentified notations regarding the sale constituted a sufficient note or memorandum signed by the party to be charged to satisfy the statute of frauds.


Alternatively, even if the Court finds that the writings do not satisfy the statute of frauds, Plaintiffs are nevertheless entitled to the property as third-party beneficiaries of the Representation Agreement. The Representation Agreement provides that the Parcels will be sold via absolute auction. As the highest bidders at the absolute auction, Plaintiffs are third-party beneficiaries of the Representation Agreement and are entitled to the Parcels upon the terms and conditions set forth in the Representation Agreement and the advertisements that were prepared pursuant to the Representation Agreement.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ Motion for Summary Judgment, deny Defendant Hagood’s Motion for Summary Judgment, and order Hagood to convey the Parcels to the Plaintiffs, upon the terms identified in the purchase and sale agreements.

DATED this 12<sup>th</sup> day of March, 2009.

GIVENS PURSLEY LLP

  
Angela M. Reed  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen  
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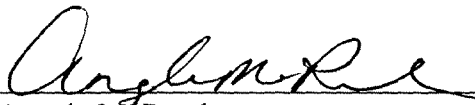
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Angela M. Reed

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE )  
RESSLER, an individual doing business as )  
"M&M RE Holdings", )  
 )  
Plaintiffs, )  
vs. )  
 )  
THOMAS A. HAGOOD, an unmarried man, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CV 08-8465

**REPLY TO PLAINTIFFS'  
MEMORANDUM IN  
OPPOSITION TO  
DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT SET FOR  
HEARING ON MARCH 26, 2009**

\*\*\*

**ORIGINAL**

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits the following Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment.

I. INTRODUCTION

THIS REPLY is in response to Plaintiffs' Memorandum in Opposition of Defendant's Motion for Partial Summary Judgment. Defendant previously filed a Motion for Summary Judgment on the grounds that as a matter of law the Statute of Frauds applies to auctions and therefore renders unenforceable any alleged contract and/or agreement for the purchase and sale of real estate in which the Plaintiffs and Defendant allegedly entered.

In response, Plaintiffs submitted a memorandum, stating that, notwithstanding application of the Statute of Frauds to the transaction at bar, the Defendant should be equitably estopped from asserting the defense. Plaintiffs also assert that even if the Defendant is not estopped from asserting the Statute of Frauds, Plaintiffs have complied therewith.

In support of their position, Plaintiffs reference three cases.

The primary case relied upon by Plaintiffs is *Zuhak v. Rose*, a case subject to harsh criticism by other Courts that have explicitly declined to follow its holding. Courts declining to adhere to *Zuhak* specifically reference the Court's failure to cite any authority in support of its conclusion that the vendor therein was estopped from asserting the Statute of Frauds; those Courts also admonished *Zuhak* because of its reliance on state statute in lieu of common law.

Given the criticism levied on *Zuhak*, that Court's decision should not control the disposition of the instant matter.

The two other cases cited by Plaintiffs, *Pyles v. Goller* and *Pillsbury v. McNabb*, rely

heavily if not exclusively on the *Zuhak* decision. Additionally, the facts in those cases manifest palpable fraud on the part of the vendors therein; in light of the egregiousness of the vendors' conduct, the Courts in *Pyles* and *Pillsbury* had little difficulty in estopping them from asserting the Statute of Frauds as a defense to Specific Performance.

Given the fact that the malfeasance exhibited by the vendors in *Pyles* and *Pillsbury* is not present in the instant matter and that no accusation of fraud has been levied against Mr. Hagood, the facts of those cases are readily distinguishable; consequently, *Pyles* and *Pillsbury* also do not control the disposition of the instant matter.

## II. ARGUMENT

Defendant's position is three-fold:

1. The Statute of Frauds applies to the instant matter because it is almost universally held that sales by auction are within the provisions of the Statute of Frauds to the same extent as any other sale or contract of sale relating to land.
2. The Defendant is not estopped from asserting the Statute of Frauds as a defense to contract enforcement because: 1.) The Plaintiff has failed to prove, allege, or even mention the elements necessary to make out an estoppel claim; 2.) The *Zuhak* decision relied heavily on Wisconsin a statute; 3.) *Zuhak* has been the subject of criticism by other Courts; 4.) The same criticism of *Zuhak* can be levied on *Pyles* and *Pillsbury*; 5.) The facts in *Pyles* and *Pillsbury* manifest conduct by vendors that is palpably more egregious than that exhibited by Mr. Hagood; 6.) The case of *Benson v. Ruggles* is factually on point, involved an auction without reserve, and the Court declined to estop the vendor from asserting the Statute of Frauds as a defense; and 7.) The nature of an auction "without reserve" does not as a practical matter operate to negate the legal effect of the Statute of Frauds.
3. Plaintiffs have failed to satisfy the Statute of Frauds because Idaho Courts rigorously enforce the Statute, Plaintiffs' description of the real property at issue is wholly inadequate under established Idaho case law, and Plaintiffs have failed to procure a signed writing evidencing an agreement.

In consideration of the foregoing, Defendant respectfully requests that his Motion for Partial Summary Judgment be GRANTED.



### III. ANALYSIS

1. The Statute of Frauds applies to the instant matter because it is almost universally held that sales by auction are within the provisions of the Statute of Frauds to the same extent as any other sale or contract of sale relating to land.

As stated in prior memorandum, it is well established that sales of real estate by auction are subject to the Statute of Frauds. As such, where there is no signed writing evidencing a purchase and sale of real property, the "sale" is unenforceable as a matter of law.

The facts of the present case provide the exact scenario elucidated above. Thus, in accordance with the near universal rule in the United States, because the instant matter involved a purported sale of real property by auction, the Statute of Frauds applies and renders the alleged sale and/or contract unenforceable.

2. The Defendant is not estopped from asserting the Statute of Frauds as a defense to contract enforcement because: 1.) The Plaintiff has failed to prove, allege, or even mention the elements necessary to make out an estoppel claim; 2.) The *Zuhak* decision relied heavily on Wisconsin a statute; 3.) *Zuhak* has been the subject of criticism by other Courts; 4.) The same criticism of *Zuhak* can be levied on *Pyles* and *Pillsbury*; 5.) The facts in *Pyles* and *Pillsbury* manifest conduct by vendors that is palpably more egregious than that exhibited by Mr. Hagood; 6.) The case of *Benson v. Ruggles* is factually on point, involved an auction without reserve, and the Court declined to estop the vendor from asserting the Statute of Frauds as a defense; and 7.) The nature of an auction "without reserve" does not as a practical matter operate to negate the legal effect of the Statute of Frauds.

In their brief, Plaintiffs contend that the Defendant should be estopped from asserting the Statute of Frauds as a defense to Specific Performance. Plaintiffs' argument is that the Defendant understood the risk and nature of absolute auctions, never revoked the auctioneer's authority, and attended the auction and never stopped the sale.

Plaintiffs' claims are without merit for the following reasons.

*First*, Plaintiffs have failed to prove, allege, or even mention the elements necessary to make out a claim for equitable estoppel. The elements of equitable estoppel are: (1) a false

representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. *City of McCall v. Buxton*, --- P.3d ----, 2009 WL 198305 1, 8 (citations omitted). Nowhere are any of these elements alluded to in Plaintiffs' brief. Plaintiffs thus appear to be asserting estoppel without attempting to prove estoppel.

*Second*, the primary case relied upon by the Plaintiffs and indeed, the language used by Plaintiffs therefrom, is essentially derived from statute. In their brief, Plaintiffs reference an excerpt from *Zuhak*. What Plaintiffs fail to note is that the very next sentence after that excerpt is a quote from the Wisconsin Uniform Sales Act, 121.21(2), essentially re-stating the prior sentence. *Zuhak, supra*, 264 Wis. at 292. Therefore, it would appear that the Court in *Zuhak* only reached its conclusion because of its reliance on the Wisconsin Legislature. The Idaho legislature has not broached the issue presented in this case. Defendant's position is thus the same as that taken by the Court in *Benson v. Ruggles*, 208 Neb. 330, 336, 303 N.W.2d 496, 500 (1981): "If the Legislature wishes to make a similar provision for auctions of real estate, it may do so." Accordingly, until Idaho lawmakers do the same, it is not this Court's place to adhere to the judgment of the Wisconsin Legislature.

*Third*, *Zuhak* has been subject to harsh criticism. In *Benson, supra*, the Court explicitly declined to follow *Zuhak*, stating that:

"In that case, [*Zuhak*] specific performance was decreed for the high bidder at a public auction of real estate advertised as being without reserve. The court stated that under the circumstances the owner could not complain that the buyer could not complain that the buyer had no memorandum of sale sufficient under the

statute of frauds. It cited no authority in support of that holding ... We decline to follow *Zuhak*.” *Id.*

*Del Rio Land, Inc., v. Haumont*, 118 Ariz. 1, 574 P.2d 469 (Ct. App. 1978) levied the same criticism against *Zuhak* as the Court in *Benson*; the *Del Rio* Court even went so far as to state that [*Zuhak's*] position appeared to be in direct conflict with subsection two (2) of the Restatement of Contracts, § 212. *Del Rio Land, Inc., v. Haumont*, 118 Ariz. 1, 7, 574 P.2d 469, 475 (Ct. App. 1978).

*Fourth*, the same criticism of *Zuhak* can be levied on *Pyles v. Goller*, 109 Md. App. 71, 674 A.2d 35 (1996) and *Pillsbury v. McNabb*, 1965 WL 8189. In Plaintiffs’ brief, he emphasizes a quote taken from *Pyles* referencing “common sense” as providing the proper basis for allowing a claim of estoppel to prevent the vendors therein from asserting the Statute of Frauds. However, the *Pyles* Court was likewise unable to cite any actual law in support of its position. Consequently, as in *Zuhak*, the Court in *Pyles* also “cited no authority in support of its holding.” *Benson*, 208 Neb. at 336, 303 N.W.2d at 500. As to the decision in *Pillsbury*, the Court’s decision therein was also based in part on the criticized *Zuhak* decision. *See Pillsbury v. McNabb*, 1965 WL 8189, 1, 4.

*Fifth*, the facts in *Pyles* and *Pillsbury* are readily distinguishable from those in the instant matter. The conduct of the vendors therein was deplorable and fraudulent. The same cannot be stated of nor has been alleged against the Defendant.

In *Pyles*, the vendors actually participated in the auction and bid on their own property. In admonishment, the Court stated: “[U]nauthorized bidding by owners promotes fraud and opportunism. This fraud and opportunism manifest themselves in the form of owners bidding at auction with no other purpose than to increase the price.” *Pyles*, 109 Md. App. at 87. No doubt the egregiousness of the conduct of the vendors in that case informed the Court’s decision to

estop the vendors from asserting the Statute of Frauds as a defense to specific performance.

In *Pillsbury*, the conduct of the vendors was also far more malicious than the conduct in the instant matter.

In *Pillsbury*, after the auction began, the auctioneer announced, without any intervening bid, that he had a bid of \$20,000.00. *Pillsbury*, 1965 WL 8189, 1, 2. According to the Court, “This bid was not bona fide, but was either nonexistent or made by an agent of the auctioneer, or defendants, or both, and the real estate was never conveyed to anyone as a result of the auction.” *Id.* (emphasis added). After the auction, the vendor then sold the property to a third party not present at the auction and on whose behalf no bid was made, for a sum of \$27,000.00. *Id.* In essence, the vendor perpetrated a fraud. *See Id.* at 3 (“[I]t is clear that the defendants are guilty of sharp dealing, if not fraud”). As in *Pyles*, the Court in *Pillsbury* estopped the vendor from asserting the Statute of Frauds as a defense. However, in its conclusion, the Court made it a point to limit its holding to the facts before it, stating “We do not believe, therefore, that the statute of frauds was intended to bar an action based on facts such as those which have been alleged in this complaint.” *Id.* (emphasis added).

In the instant matter, the malfeasance that was present in *Pyles* and *Pillsbury* did not remotely exist; nor has any such conduct been alleged. There was simply no fraud present in the instant matter. Thus, to the degree that this Court is persuaded by *Pyles* or *Pillsbury*, those cases are distinguishable on the basis that while perhaps naïve, Mr. Hagood in no way acted with the same malice nor with unclean hands. Simply put, the degree to which the conduct of the vendors in *Pyles* and *Pillsbury* can be classified as, at worst, scandalous, and at best, fraudulent, renders the facts therein distinguishable and the holdings therein inapplicable.

*Sixth, Benson v. Ruggles*, 208 Neb. 330, 303 N.W.2d 496 (1981), is directly on point. In

*Benson*, the Supreme Court of Nebraska held that a vendor was not equitably estopped from asserting title to land purportedly sold at an auction that was without reserve. *Benson*, 208 Neb. at 336, 303 N.W.2d at 500 (emphasis added).

As in the present case, in *Benson* the vendee asserted that: 1.) They were entitled to specific performance of the agreement to sell real estate, the terms of which were the advertisement that the auction was without reserve; 2.) They were the high bidders at the auction; 3.) The auctioneer announced that the property was sold to them; and 4.) They made the down-payment required by the advertisement. *Id.* at 335-36, 499.

On appeal, the Court sided with the vendor and stated that the Statute of Frauds applied to the “transaction” and that the Statute had not been satisfied because “[t]here [was] no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds.” *Id.*

*Seventh*, Plaintiffs misunderstand the effect of a sale “without reserve.” In their brief, Plaintiffs cite a passage from American Jurisprudence which we will briefly revisit: “When an auction is without reserve or absolute, a seller makes an offer to sell when the seller advertises the sale and it is up to the bidder to accept; a contract is formed with each bid, and the seller may not withdraw the property once any legitimate bid has been submitted, but is absolutely committed to the sale once the bid has been entered.” Setting aside the issue that the case cited to by the above referenced passage was a case from Colorado that involved an auction that was not without reserve, this passage neglects a crucial aspect of contract law analysis.

A contract is formed where there is an offer, acceptance, and consideration. Of course, just because there is a valid contract does not mean that the contract will be enforced. For example, if the contract was the product of misrepresentation or fraud, the law would not declare

that there was no contract, but would declare that the contract is unenforceable. The distinction is subtle, but significant because the Statute of Frauds is first and foremost a doctrine of contract enforcement. The legislature has stated that there are certain types of contract which require additional specificities before they may be enforced, to wit, a writing signed by the person against whom enforcement is charged. However, the legislature has not stated that it is “undoing” these contracts, but only that it will monitor the enforcement thereof. Thus, it is immaterial that in an auction without reserve, “a contract is formed with each bid” or that Mr. Hagood admitted to an oral contract; the Statute of Fraud still applies to the transaction and if the subject contract is not in the form required under I.C. § 9-505, that contract is unenforceable.

In light of the above analysis, the Defendant is not estopped from asserting the Statute of Frauds as a defense to Specific Performance.

3. Plaintiffs have failed to satisfy the Statute of Frauds because Idaho Courts rigorously enforce the Statute, Plaintiffs’ legal description is wholly inadequate under established Idaho case law, and Plaintiffs have failed to procure a signed writing evidencing an agreement.

I.C. § 9-505 states: “In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged.” One of the agreements to which the above applies is the sale of real property. *See Ray v. Frasure*, 200 P.3d 1174 (Idaho 2009) (Agreements for the sale of real property that fail to comply with the statute of frauds are unenforceable in a suit in equity for specific performance). Because the present matter presents a purported sale of real property, I.C. § 9-505 applies.

Idaho Courts have expounded on I.C. § 9-505 and added extra requirements. Thus, in addition to a signed writing, the writing must also state the parties to the contract, the subject matter, the price, an adequate description of the property, and the essential terms of the agreement. *See Hoffman v. S.V. Co., Inc.*, 628 P.2d 218, 221 (Idaho 1981).

Idaho Courts rigorously enforce I.C. § 9-505 with regard to the sale of real property. *See Ray*, 200 P.3d at 1178. In its most recent occasion to comment on the Statute of Frauds, the Idaho Supreme Court stated not only that the writing in question must describe the property, but that it must describe the property “so that it is possible for someone to identify ‘exactly’ what property the seller is conveying. *Id.* (citations omitted) (emphasis added). In other words, “[A] contract for the sale of real property must speak for itself.” *Kurdy v. Rogers*, 10 Idaho 416, 423, 79 P. 195, 196 (1904). Thus, a description of real property that is only reasonably certain is insufficient. *Garner v. Bartschi*, 139 Idaho 430, 435-36, 80 P.3d 1031, 1036-37 (2003).

In *Ray*, the Court discussed several older cases instructive on the current discussion.

In *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003), the Court stated that the following description was inadequate to satisfy the Statute of Frauds: “Bartschi Property, City \_\_\_\_\_, 83252, legally described as approx. 500 acres of mountain property.” An addendum to the contract further described the property as: “Acreage: As deemed by Bear River County Platt and Tax Notices to be 512 Acres.”

In *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909), the Court stated that the following description was also inadequate: “Lots 11, 12, and 13, in block 13, Lemp’s addition ... Lot 27, Syringa Park addition, consisting of 5 acres.” The Court sided with the vendor on the basis that omitted from the foregoing was a description of the city, county, state or political subdivision or district in which any of the property was located.

In *City of Kellog v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 244, 16 P.3d 915, 920 (2000), the Court stated: “A description in a deed will be sufficient so long as the quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers.”

Finally, in *Ray* itself, the Court stated:

“In the instant case, the contract described Frasure’s real property by reference to the street address and the city, county, state and zip code in which the property was located. The physical address is not a sufficient description of the property for purposes of the statute of frauds. It is impossible to determine exactly what property Frasure intended to convey to Respondents relying solely on the physical address in the contract. The physical address gives no indication of the quantity, identity, or boundaries of the real property. *Ray*, 200 P.3d at 1179.

The *Ray* decision serves to underscore how strict Idaho Courts construe the Statute of Frauds. In *Ray* the description of the property was the exact physical address: “The contract described the property as follows: “‘PREMISES’ COMMONLY KNOWN AS 2275 W. HUBBARD RD City KUNA County ADA ID, Zip 83634.” *Id.*, fn 4. However, the Court found that this was insufficient to satisfy the Statute of Frauds.

In addition to the foregoing analysis, the Nebraska case of *Benson v. Ruggles, supra*, is directly on point factually.

By way of recall, in *Benson*, as in the present case, the alleged vendees of real estate at an auction asserted that: 1.) They were entitled to specific performance of the agreement to sell real estate, the terms of which were the advertisement that the auction was without reserve; 2.) They were the high bidders at the auction; 3.) The auctioneer announced that the property was sold to them; and 4.) They made the down-payment required by the advertisement. *Id.* at 335-36, 499.

On appeal, the Court stated that the Statute of Frauds applied to the “transaction” and that the Statute had not been satisfied because “[t]here [was] no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds.” *Id.*

In the present case, the Statute of Frauds has not been satisfied for the following reasons.

*First*, the description of the property is wholly inadequate when juxtaposed against Idaho case law interpreting the adequacy of descriptions of real property. By way of recall, in *Ray*, the



memoranda gave the exact physical address of the property; yet the Court deemed that to be an inadequate description of the property. By comparison, in the present case, the property is described to an even lesser extent than in *Ray*. In our case, the property is simply described as: “App. 2 Acres Garrity Blvd.,” “App. 2 acres N. 39<sup>th</sup>,” and “App. 14 Acres N. 39<sup>th</sup>.” If an exact physical address is inadequate to satisfy the Statute of Frauds, under *Ray*, the foregoing is wholly insufficient.

*Second*, the description of the land in the present case is much like that in *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909). In *Allen*, the property was described as “Lots 11, 12, and 13, in block 13, Lemp’s addition ... Lot 27, Syringa Park addition, consisting of 5 acres.” As stated, in the present case the property is described as: “App. 2 Acres Garrity Blvd.,” “App. 2 acres N. 39<sup>th</sup>,” and “App. 14 Acres N. 39<sup>th</sup>.” In *Allen*, the Court found the description insufficient to satisfy the Statute of Frauds. Given the similarity between the description in *Allen* and that in the present case, the description in the present case is also inadequate.

*Third*, as in *Benson*, “[t]here [is] no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds.” *Id.* There is no written agreement to sell the property to the Plaintiffs; there is no signed written agreement to sell the property to the Plaintiffs; there is no note to sell the property to the Defendant; there is no signed note to sell the property to the Plaintiffs; there is no memorandum of an agreement to sell the property to the Plaintiffs; and there is no signed memorandum of an agreement to sell the property to the Plaintiffs ... The Defendant has signed one document – the Representation Agreement. However, that document in no way purports to sell real estate to the Plaintiffs; nor were the Plaintiffs in privity to that Agreement.

In light of the above analysis, Plaintiffs have failed to satisfy the Statute of Frauds.

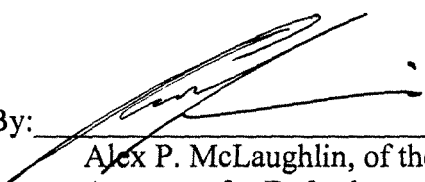
Therefore, the parties' alleged agreement is unenforceable there-under.

**3. CONCLUSION**

Defendant respectfully requests that this Court grant its Motion for Partial Summary Judgment.

DATED this 19<sup>th</sup> day of March, 2008.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:   
\_\_\_\_\_  
Alex P. McLaughlin, of the firm  
Attorneys for Defendant

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 19<sup>th</sup> day of March, 2008, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack  
Givens Pursley, LLP  
601 W. Bannock St.  
P.O. Box 2720  
Boise, Idaho 83701


U.S. MAIL  
 Hand Delivery  
 Facsimile Transmission

Phillip J. Collaer  
Anderson, Julian & Hull, LLP  
PO Box 7426.  
Boise, Idaho 83707

U.S. MAIL  
 Hand Delivery  
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Terry Michaelson  
Hamilton, Michaelson & Hilty, LLP  
1303 12<sup>th</sup> Avenue Road  
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Nampa, ID 83653-0065

U.S. MAIL  
 Hand Delivery  
 Facsimile Transmission

  
\_\_\_\_\_  
Alex P. McLaughlin

5-21 Hoff  
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A.M. 3:40 P.M.

**MAY 07 2009**

CANYON COUNTY CLERK  
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Attorneys for Defendant  
Thomas A. Hagood

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE )  
RESSLER, an individual doing business as )  
"M&M RE Holdings", )  
 )  
Plaintiffs, )  
vs. )  
 )  
THOMAS A. HAGOOD, an unmarried man, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CV 08-8465

**SUPPLEMENTAL  
MEMORANDUM IN SUPPORT  
OF DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

\*\*\*

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits the following Supplemental Memorandum in Support of Defendant's Motion for Partial Summary Judgment.

### I. INTRODUCTION

The memorandum at bar stems from an invitation from the Court for additional briefing on the issue of whether or not the Statute of Frauds applies in the instant matter and whether it has been satisfied. Having addressed much of the crucial matters in prior memoranda, this brief will merely provide supplementation thereto, adding a few additional points for clarification.

### II. ARGUMENT

The Defendant's position is four-fold:

1. The Statute of Frauds applies to the instant matter because the policies underlying its application are highly relevant given the facts of this case.
2. The Statute of Frauds applies to the instant matter because the provision codifying the foregoing rule represents a clear directive by the Idaho Legislature which in the absence of amendment binds this Court.
3. The Statute of Frauds applies to the instant matter because Idaho rigorously enforces and applies the Statute of Frauds.
4. The Statute of Frauds has not been satisfied because: 1.) The property description is inadequate, and 2.) Plaintiffs have failed to meet the requirements necessary in order to allow the Court to incorporate multiple writings so as to satisfy I.C. § 9-505.

### III. ANALYSIS

1. The Statute of Frauds applies to the instant matter because the policies underlying its application are highly relevant given the facts of this case.

The purpose of the Statute of Frauds is to prevent false or fraudulent contract claims. *McKoon v. Hathaway*, 146 Idaho 106, 190 P.3d 925 (Ct. App. 2008). The Statute effectuates this policy by forbidding disputed assertions of certain types of contracts without any written memorandum of the agreement. *Id.*

Application of the Statute of Frauds to the instant matter is perfectly consistent with the foregoing policy because the facts of the present case show an alleged agreement bearing the risk of a false or fraudulent claim of contract, i.e., the precise type of claim of which the Statute of Frauds was intended to prevent enforcement. The following reasons substantiate this contention.

*First*, the Representation Agreement contains a wholly incorrect description of Mr. Hagood's property. The very first page of the Representation Agreement states that the property at issue is located in Nampa and bears the following zip code: "836." Notwithstanding the fact that the foregoing description does not mention the State in which the property is located, the zip code provided is completely erroneous. Defendant is not aware of any location in Idaho, or otherwise, that bears a three digit zip code: "836."

*Second*, the Representation Agreement contains three different and thus conflicting descriptions of the property at issue. As stated, the front page of the Representation Agreement provides an address for the property that is as follows: "4104 Garrity 1010 N.39<sup>th</sup> 1019 N. 39<sup>th</sup>, Canyon County, Nampa, 836." The shortcomings of this description are stated above. Infusing additional confusion, however, is the fact that on the next page of the Representation Agreement the following address is provided: "Garrity N. 39<sup>th</sup>." Omitted therefrom is any mention of a street address, zip code, State or City. Thus, on top of having a description of the property that is wrong, the Representation Agreement also bears a description that is inconsistent with the other addresses thereon and which is also painfully vague. The third and fourth pages of the Representation Agreement contain the same description as the second, to wit, "Garrity N. 39<sup>th</sup>" and thus suffer from the same infirmities listed above.

Adding to the confusion is the fact that the Representation Agreement bears a third description of the subject property. Attached to the Representation Agreement is an alleged legal

description of Mr. Hagood's land. This brings the total number of descriptions and/or addresses contained in the Representation Agreement to three, all of which are in conflict. This is hardly a situation which the Statute of Frauds is of dubious relevance. In light of: 1.) The incorrect descriptions; 2.) The inadequate descriptions; and 3.) The conflicting descriptions, the facts of the instant matter present the exact scenario to which the Statute of Frauds was designed to apply.

*Third*, the facts surrounding Mr. Hagood's decision to put his property up for auction raise suspicions of fraud. For one, Mr. Hagood was repeatedly assured that the sale of his property would garner \$2,000,000.00 at a minimum. In reliance on these assurances, Mr. Hagood opted to sell the property at auction. These assurances proved completely incorrect as the property sold for a figure not even remotely close to \$2,000,000.00. Additionally, the Defendant's deposition evidences a stark amount of confusion with regard to the auction process. In his deposition, Mr. Hagood specifically stated that he was unaware that he allegedly possessed the ability to stop the auction at any time. This means that one of two things happened: either Mr. Hagood was told about the auction process and forgot or he was never told. Meanwhile, his property sold for a mere fraction of the price of which he was explicitly assured it would be sold. While the Defendant has not yet alleged fraud against the Plaintiffs, given the puzzling issues regarding the addresses stated on the Representation Agreement, the assurances that the property would sell for at least \$2,000,000.00, the facts surrounding the auction itself, and the fact that the property sold for a pittance, the specter of fraud is raised to a degree quite sufficient to invoke I.C. § 9-505. Adding additional validity to the Defendant's contention that I.C. § 9-505 applies to the instant matter is the fact that the Statute of Frauds is no longer a mere doctrine of common law, but a specific directive from the Legislature as well as the fact that Idaho is one of the

strictest enforcers of the Statute of Frauds (These issues will be more comprehensively addressed below).

In light of the above analysis, I.C. § 9-505 applies to the present case. Because it has not been satisfied, it prevents specific performance of the purported agreement between the parties.

2. The Statute of Frauds applies to the instant matter because the provision codifying the foregoing rule represents a clear directive by the Idaho Legislature which in the absence of amendment binds this Court.

Even without its policy underpinnings, the Statute of Frauds' application to the instant matter is clear as I.C. § 9-505 is an explicit directive from the Idaho Legislature to the Court.

I.C. § 9-505 applies to contracts for the purchase and sale of real property. The facts of the instant matter involve a contract for the purchase and sale of real property. This Court is not free to simply not apply the statute on the basis that the facts of this case, while involving a purchase and sale of real property, do not appear to be those with which the legislature had in mind when passing the law.<sup>1</sup> As such, this Court must defer to the Legislature's judgment as embodied in the clear tenets of I.C. § 9-505 and apply the Statute as written.

3. The Statute of Frauds applies to the instant matter because Idaho rigorously enforces and applies the Statute of Frauds.

Idaho is not a state that takes the Statute of Frauds lightly; to the contrary, Idaho Courts rigorously enforce the Statute of Frauds. *See e.g. Hoffman v. S.V. Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981); *See also Hemingway v. Gruener*, 106 Idaho 422, 679 P.2d 1140 (1984); *See also Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174 (2009). The degree of

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<sup>1</sup> *See e.g. Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 718 P.2d 1129 (1986) ("We are bound to respect the reasonable exercise by the legislature of powers expressly delegated to it by the constitution of this state, and in the absence of other constitutional offense cannot interfere with it"); *See also* ID Const. Art. II, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted"); *See also State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 79 P.3d 707 (2003) ("[I]n the absence of a legislative invasion of constitutionally-protected rights, the judicial branch of government must respect and defer to the legislature's exclusive policy decisions") (citations omitted).

enforcement provides strong indication as to the breadth of its application.

In *Hoffman, supra*, the Idaho Supreme Court expounded on the requirements that must be satisfied before a "writing" will be deemed sufficient to satisfy I.C. § 9-505. Juxtaposition of the language contained in I.C. § 9-505 with the Court's interpretation thereof highlights the stark degree to which Courts enforce the Statute of Frauds.

I.C. § 9-505 "provides that an agreement for the sale of land is invalid unless the agreement or some note or memorandum thereof be in writing and subscribed by the party charged ..." I.C. § 9-505. In contrast, *Hoffman* states that to satisfy the foregoing requirements, the writing must also: 1.) Plainly set forth the parties to the contract; 2.) State the subject matter thereof; 3.) State the price or consideration; 4.) Contain a description of the property; 5.) State all the essential terms and conditions of the agreement; and 6.) Contain both parties' signatures if the agreement is a bilateral contract. *Hoffman*, 102 Idaho at 190, 628 P.2d at 221 (emphasis added). Sheer detail notwithstanding, it is also worth noting that the last requirement is in contradiction with the majority rule in the United States which requires only one signature - the party against whom enforcement is sought. *Id.*

In *Hemingway, supra*, the Idaho Supreme Court addressed the issue of whether multiple documents can be analyzed in conjunction in order to satisfy the statute. Again, the Court's ruling shows the strict manner with which the Court enforces the Statute of Frauds. In *Hemingway*, the Court stated: "There appear to be three doctrines under which various jurisdictions allow unsigned writings to be read together with a signed writing: express reference in a signed writing to an unsigned writing, implied reference between a signed and unsigned writing and the physical connection of an unsigned writing to a signed one ... Idaho follows the doctrine that an unsigned writing may be considered as part of the memorandum only where



express reference to it is made in a signed writing.” *Hemingway*, 106 Idaho at 424-25, 679 P.2d (emphasis added). Thus, when faced with three doctrinal prerequisites for incorporation, Idaho chose the strictest.

In *Ray, supra*, the Court expounded on the amount of detail it would require of a writing as pertains to the description the property in question. In *Ray*, the Court stated not only that the writing at issue must describe the property, but that it must describe the property “so that it is possible for someone to identify ‘exactly’ what property the seller is conveying.” *Ray*, 200 P.3d at 1178 (citations omitted) (emphasis added). In contrast, 71 Am.Jur.2d Specific Performance § 138 states the majority rule: “[R]easonable certainty is all that is required, and if the description of land is sufficiently certain to enable the land to be located and examined, it is sufficient to justify specific performance of the contract.” The foregoing statement is not the law in Idaho, having been explicitly rejected in *Ray*, the Court’s most recent decision on the Statute of Frauds.<sup>2</sup>

In light of the above analysis, it is clear that the Courts in Idaho enforce the Statute of Frauds with astonishing stringency. Insomuch as this provides insight into the scope of the rule’s application, there is little doubt that the breadth thereof is sufficiently expansive such that the alleged agreement between Plaintiffs and Mr. Hagood would fall under its ambit.

4. The Statute of Frauds has not been satisfied because: 1.) The property description is inadequate, and 2.) The Plaintiffs have failed to meet the requirements necessary in order to allow the Court to incorporate multiple writings so as to satisfy the Statute of Frauds.

#### A. Property Description

One of the requirements to satisfy I.C. § 9-505 is that the writing describes the real

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<sup>2</sup> See *Id.* at 1178-79 (“The court deciding *In re Miller* did not have the benefit of this Court’s opinion in *Lexington Heights* wherein we reiterated our adherence to the rule expressed in *Allen*. Additionally, this Court has not adopted the language from *Haney* stating that a property description need only designate real property with ‘reasonable certainty.’ Instead, we have required that a property description designate “exactly” what property the seller is conveying to the buyer”).

property in question. A description is inadequate if it does so with mere reasonable certainty; rather, the description must be sufficiently detailed so that it is possible for someone to identify exactly what property the seller is conveying. *Ray, supra*. This requirement has not been met in this case. The facts herein contain inadequate descriptions of the property, incorrect descriptions of the property, but more importantly, descriptions of the property that are wholly in conflict with one another. Defendant submits that in light of the varying descriptions, it is impossible to identify "exactly what property the seller is conveying." *Id.* Considering the fact that the foregoing quote is the precise standard by which the adequacy of a legal description is assessed under the Statute of Frauds, the Plaintiffs have failed to satisfy I.C. § 9-505.

*B. Multiple Writings*

No one writing in this case satisfies the Statute of Frauds. Plaintiffs have attempted to overcome this hurdle by asserting that when read in conjunction, the writings herein satisfy I.C. § 9-505. Plaintiffs, however, have failed to note that Courts do not take multiple writings in conjunction as a matter of course. Rather, as in this case, where there are multiple writings, some signed and others not, an unsigned writing may be read in conjunction with the signed writing only where express reference is made to it in the signed writing. *Hemingway, supra*.

In *Hemingway*, Plaintiff and Defendant entered into discussion for the purchase and sale of a 2.2 acre parcel of property. Thereafter, Plaintiff delivered a check (signed by both parties) to the Defendant for \$7,500.00 in consideration for the property; the Defendant promptly cashed the check. Thereafter, the Plaintiff contacted the Defendant's attorney to prepare the deed and to do so including additional land for access. The deed was drawn up and executed on September 3, 1976. However, Defendant's attorney held onto the deed as the parties could not agree on a price for the additional acreage. *Id.* at 424, *Id.* at 1142. A letter was then sent to Plaintiff by the

Defendant's attorney, stating that the increase in price should be proportional to the price paid for the 2.2 acres. *Id.* The Defendant then executed a warranty deed on the property in favor of a third party. *Id.* Plaintiff then sued for specific performance.

On appeal, the Court ruled that the agreement was barred by the Statute of Frauds because there was no reference in the signed check to the unsigned letter or warranty deed:

"Hemingway contends that that the warranty deed when read with the check contains all the essential elements of the contract and that the warranty deed, since it is specifically referred to in the letter by Kneeland, should be considered as 'part of the memorandum.' Neither the Kneeland letter nor the warranty deed were referred to in the check which, as noted above, was the only writing signed by both parties to the transaction." *Id.* at 425, *Id.* at 1143.

In the present case, Plaintiffs have failed to satisfy the "express reference" rule. The only writing signed by the Defendant is the Representation Agreement; the Purchase and Sale Agreement remains unsigned by the Defendant. Additionally, the Representation Agreement does not reference the Purchase and Sale Agreement, expressly or otherwise. In fact, in light of the fact that the Purchase and Sale Agreement was not even in existence at the time of Mr. Hagood signed the Representation Agreement, it would be impossible for the latter to reference the former. As such, Plaintiffs have failed to satisfy the pre-requisite necessary in order to allow the Court to consider multiple writings in assessing whether I.C. § 9-505 has been satisfied.<sup>3</sup>

In light of the above analysis, because the property description is inadequate and the Representation Agreement does not and cannot reference the Purchase and Sale Agreement, the Statute of Frauds has not been satisfied.

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<sup>3</sup> Note: Because the Purchase and Sale Agreement contains the purported terms of sale, supplying the signature necessary to complete the memorandum and render it enforceable would require resort to the Representation Agreement which is a prior agreement and thus parol evidence. This is prohibited under *Erb v. Kohnke*, 121 Idaho 328, 333, 824 P.2d 903, 908 (Ct. App. 1992).

**IV. CONCLUSION**

Defendant respectfully requests that this Court grant his Motion for Partial Summary Judgment, previously filed.

DATED this 7<sup>th</sup> day of May, 2009.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: for   
Alex P. McLaughlin, of the firm  
Attorneys for Defendant

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 7<sup>th</sup> day of May, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

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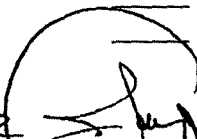
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Attorneys for John Wakelum and Mike Ressler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE  
RESSLER, an individual doing business as  
"M&M RE Holdings",

Plaintiffs

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS  
L.L.C., an Idaho limited liability company,  
SCOTT BULLOCK, an individual, BILL  
DOWNS AUCTION SERVICE INC., an Idaho  
corporation, and Scott Bullock, an individual  
and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT AND IN OPPOSITION TO  
DEFENDANT HAGOOD'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

5-21 Hoff  
**FILED**  
A.M. 10:15 P.M.

MAY 08 2009

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

## I. INTRODUCTION

Plaintiffs Jon Wakelum ("Wakelum") and Mike Ressler ("Ressler"), by and through their attorneys of record, Givens Pursley LLP, submit this Supplemental Memorandum in support of Plaintiffs' Motion for Summary Judgment and in opposition to Defendant Thomas Hagood's ("Hagood") Motion for Partial Summary Judgment. The additional authoritative and persuasive authority cited herein, together with the Plaintiffs' prior summary judgment memoranda, support a finding (1) that the statute of frauds does not bar enforcement of the oral contracts that were formed between Plaintiffs and Hagood at the auction sale; and (2) that Plaintiffs, therefore, are entitled to specific performance.

## II. DISCUSSION

**A. Hagood Should Be Barred As A Matter of Equity from Asserting the Statute of Frauds as A Defense Because Hagood Has Not Disputed The Terms Of The Oral Contracts And Because It Is Apparent From The Facts and Circumstances Of This Case That Hagood Is Merely Using The Statute As An Instrument to Circumvent His Obligation to Convey the Property And Escape An Unfavorable Contract.**

Hagood contends that Plaintiffs' claims for specific performance and declaratory relief are barred by the statute of frauds because Hagood did not sign the purchase and sale Agreements memorializing the terms of the oral contracts that were formed between Hagood and Plaintiffs upon the acceptance of Plaintiffs' bids. Notably, Hagood has not alleged that the statute of frauds should apply because the oral contracts were never formed or because the oral contracts do not contain all the material terms or even because Plaintiffs' behavior during the sale was fraudulent. Rather, Hagood is simply asking the Court to find as a matter of law that the statute of frauds applies in this case based solely on the fact that, through no fault of the Plaintiffs, there are allegedly no signed writings memorializing the terms of sale. In other words, Hagood is advocating for a mechanical application of the statute of frauds that disregards the specific facts and circumstances at issue in this case. In order to accept Hagood's argument as

the rule of law, however, the Court would be required to ignore Idaho Supreme Court precedent and well-established persuasive authority, which direct the Court to implement the policies underlying the statute of frauds in light of the “totality of the circumstances” presented in a given case.

The following passage from *American Jurisprudence* summarizes the policies underlying the statute of frauds and the discretion courts generally have to implement the statute:

The purpose and intent of the statute of frauds is to **prevent fraud and not aid in its perpetration, and the courts, particularly courts of equity, will, so far as possible, refuse to allow it to be used a shield or cloak to protect fraud, or as an instrument whereby to perpetrate a fraud or wrong or to work an injustice. On the contrary, courts will endeavor in every proper way to prevent the use of the statute of frauds as an instrument of fraud or as a shield for a dishonest and unscrupulous person; what a court of equity would do, law courts, under proper allegations will no doubt also do. The courts do not tolerate the use of the statute of frauds to enable one to take advantage of a person’s own wrong, and it ought not to be used as a means to allow persons who have made a promise to circumvent their obligations. Likewise, equity can prevent the statute of frauds from becoming a vehicle by which one can escape from an unfortunate contract.**

73 Am. Jur. 2d *Statute of Frauds* § 468 (emphasis added).

The Idaho Supreme Court has relied on similar pronouncements in applying the statute of frauds. For example, in *M.G. Roundy v. Waner*, 570 P.2d 862 (Idaho 1977), the Idaho Supreme Court held that court of equity had discretion to grant specific performance where it was apparent from the circumstances that the statute of frauds was being used to perpetrate, as opposed to prevent, fraud. In *Waner*, the plaintiffs had conveyed real property to the defendants, who were the plaintiffs’ daughter and son-in-law, for refinancing purposes. *Id.* at 863. Approximately five years after the conveyance, the parties had a falling out and the plaintiffs demanded reconveyance of the property. The defendants argued that the plaintiffs had asked

them to purchase the property in 1968 with the consideration for the purchase being the defendants' kindness, assumption of the outstanding note, and their promise to repair the property. *Id.* at 864. The plaintiffs disputed the existence of the oral agreement and argued that the sale was invalid because it did not comply with the statute of frauds. In response, defendants contended that the transaction fell under the partial performance exception to the statute of frauds. *Id.* In addressing the court's power to compel specific performance, the court noted:

[A] trial judge is clothed with wide discretion in according or withholding specific performance. This necessarily follows, **as the judgment must depend on the impression made by the particular circumstances of the case upon his sense of justice and equity.**

*Id.* (emphasis added) (internal quotations marks omitted). The court went on to hold that the partial performance exception applied based on the fact that the defendants were in possession of, and had made valuable improvements to, the property. *Id.* at 866. Significantly, in reaching this conclusion, the court noted:

The familiar maxim invoked in considering such factors is that **a court of equity will not permit the Statute of Frauds itself to become an agent of fraud.** A defendant who is induced to reply on an oral agreement and who changes position to his own detriment cannot be defrauded by a plaintiff who interposes the Statute of Frauds to declare the agreement invalid.

*Id.* at 865 (emphasis added); *see also Nelson v. Boone*, 890 P.2d 313, 318 (Hawaii 1995) (noting "there is considerable discretion for the court to implement the true policy behind the Statute of Frauds, which is to prevent fraud or any other type of unconscionable injury.").

The Idaho Court of Appeals has also recited similar principles in declining to apply the statute of frauds where a contract is mutually acknowledged to exist. *Kelly v. Hodges*, 811 P.2d 48 (Id. Ct. App. 1991). In *Kelly*, the plaintiff-seller filed an action to enforce a written purchase agreement for the sale of real estate that seller claimed was modified by an alleged oral



agreement to extend the closing date. *Id.* at 49. The defendant-buyer denied that she agreed to an extension and asserted that any oral modification extending the closing date was barred under the statute of frauds. *Id.* The district court, *sua sponte*, concluded that the underlying purchase and sale agreement was unenforceable under the statute of frauds because the buyer and seller had not both signed the sale agreement. *Id.* at 49-50. The Idaho Court of Appeals reversed, noting:

the object of the statute of frauds is to **prevent potential fraud** by forbidding disputed assertions of enumerated kinds of contracts without any written basis. This purpose is fully satisfied when the parties themselves accept the contract and mutually perform it. For the same reason, the statute of frauds is inapplicable when a contract, although not fully performed by both sides, is mutually acknowledged to exist.

*Id.* at 50; *see also Glockner v. Town*, 42 Haw. 485 (1958) (noting the “[p]urpose of the Statute [of Frauds] is to prevent perpetration of frauds by securing the enforcement of contracts that were never in fact made; *it is not to prevent performance of oral contracts that have in fact been made.*”).

The Idaho Supreme Court further expounded on the policies underlying the statute of frauds in *Bliss v. Bliss*, 898 P.2d 1081, 1085 (Idaho 1995), wherein the court, in a case involving an attack on a warranty deed, recited:

As we understand the statute of frauds above quoted, it was intended to prevent just such a class of proof and to preclude the possibility of titles becoming subject to the capricious memories of interested witnesses. **The statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened.** Experience had convinced both jurists and lawmakers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor.

*Id.* at 1086 (emphasis added); *see also Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 177 P.3d 955 (Idaho 2008) (noting that the primary purpose of the statute of frauds regarding real estate commissions is to prevent fraudulent or unfounded claims of brokers).

Based on the foregoing cases, it appears that there are four controlling principles underlying application of Idaho's statute of frauds: (1) that the primary purpose of the statute is to prevent fraud and perjury caused by the capricious memory of interested witnesses; (2) that a court of equity has considerable discretion in applying the statute; (3) that the statute should not be used as an instrument to perpetrate a fraud; and (4) that contracts that are mutually acknowledged to exist are not subject to the statute of frauds. Additionally, Idaho courts have also held that the statute of frauds should be narrowly construed. *See Frantz v. Parke*, 729 P.2d 1068, 1071 (Id. Ct. App. 1986) (noting that Idaho courts construe the statute of frauds narrowly).

Application of each of the principles to the facts of this case compels a finding that the statute of frauds does not bar specific performance of the purchase and sale agreements. First, contrary to Hagood's suggestion, Idaho precedent simply does not support a mechanical application of the statute. Instead, the precedent shows that the court has wide discretion to examine the facts of each case and render judgment based on the particular circumstances of the case based and the court's sense of justice and equity.

Second, Hagood's use of the statute is not aligned with the statute's purpose of preventing fraud and perjury caused by the capricious memory of interested witnesses. As noted above, Hagood has not argued that the statute should apply because he disputes the terms of the purchase and sale agreements or because oral contracts were not actually formed at the auction between the parties. While Hagood has argued that he is dissatisfied with the purchase price for the parcels, the purchase price was dictated by the highest bid at the absolute auction.

Furthermore, Hagood admitted during his deposition that he understood what an absolute auction was and that he attended the auction and never attempted to stop the sale. In other words, the enforcement of the oral contracts in this case do not hinge on disputed issues of fact or the capricious memories of witnesses to establish its terms.

Third, because Hagood does not dispute the terms of the contracts and indisputably understood what an absolute auction was at the time he put his property up for auction sale, the only conclusion that can be reached is that Hagood is using the statute as an instrument to circumvent his obligation to convey the property and otherwise escape what Hagood views as an unfortunate contract. If the parcels had sold for what Hagood believed they were worth, Hagood, because he has not expressed dissatisfaction over any terms other than the purchase price, would have likely signed the purchase and sale agreements at the conclusion of the sale and conveyed the properties to the Plaintiffs. Hagood, however, having understood what an absolute auction was, having attended the auction, and having never attempted to stop the auction, should not be allowed to invoke the statute of frauds and claim there is no signed writing because Hagood refused to sign the purchase and sale agreements.

Fourth, Hagood by not denying any of the terms of the contract (other than being dissatisfied with the purchase price), has at least implicitly acknowledged that the contracts exist. Because the parties appear to agree on the terms of the contract (other than the purchase price which was dictated by absolute auction principles), the contract does not fall within the statute of frauds.

Furthermore, this result comports with absolute auction law principles. In an absolute or "without reserve" auction, the seller may not withdraw the property from sale once any legitimate bid has been submitted and is absolutely committed to the sale once the bid has been

entered. *See 7 Am. Jur. 2d Auctions and Auctioneers § 36 (2007)*. If the Court allows sellers of real property, like Hagood, to invoke the statute of frauds as a defense to the enforceability of oral contracts that are formed at absolute auctions where the seller refused to sign a memorandum memorializing the sale because the seller is dissatisfied with the purchase price, the Court will effectively be abolishing absolute auctions because the seller can invoke the statute of frauds to void the transaction. This impact of this result is poignantly articulated in the following passage from the Presiding Judge's dissent in *Del Rio Land, Inc. v. Haumont*, 574 P.2d 469, 476 (Az. Ct. App. Div. 1 1977):

The essence of the majority opinion, whether fully articulated or not, is that there cannot be a specifically enforceable auction sale of land without reserve if the seller is not 100% Happy with the price obtained immediately after the fall of the auctioneer's gavel. Although the majority of courts may sanction such a result by allowing the revocation of the auctioneer's authority "between the fall of the hammer and the signing of the memorandum" . . . I do not believe such a result is consonant with the intent of the Statute of Frauds, nor required thereby in the typical auction situation.

...

The statute of frauds is merely a rule of evidence, and not one governing the making of the contract, and its purpose is to prevent a party from being compelled, by oral or perhaps false testimony, to be held responsible for the conditions of a contract he claimed he never agreed to. But, if that party has offered in writing to make the very contract with which it is sought to charge him, he has over his own signature admitted his willingness to be held thereby, and cannot justly complain because the acceptance of the other party who seeks to hold him is oral.

### III. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' prior summary judgment memoranda, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment, deny Defendant Hagood's Motion for Summary Judgment, and order Hagood to

convey the Parcels to the Plaintiffs, upon the terms identified in the purchase and sale agreements.

DATED this 2<sup>nd</sup> day of May, 2009.

GIVENS PURSLEY LLP



---

Thomas E. Dvorak  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of May, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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**FILED**  
 8:20 A.M. P.M.

MAY 15 2009 ✓

CANYON COUNTY CLERK  
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Attorneys for Defendant  
 Thomas A. Hagood

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE )  
 RESSLER, an individual doing business as )  
 "M&M RE Holdings", )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 THOMAS A. HAGOOD, an unmarried man, )  
 )  
 Defendant. )

Case No. CV 08-8465

**DEFENDANT'S RESPONSE  
 TO PLAINTIFFS'  
 SUPPLEMENTAL  
 MEMORANDUM**

\*\*\*

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits this Response to Plaintiffs' Supplemental Memorandum.

**I. INTRODUCTION**

The memorandum at bar will address the points brought up in Plaintiffs' Supplemental Memorandum, offering a brief rebuttal thereto. However, before doing so Defendant will take this final occasion to lay out the crux of his position with the Court in as clear a manner as possible.

## II. ANALYSIS

There is no dispute between the Defendant and Plaintiffs as to the purpose of the Statute of Frauds and the general law thereof. As stated in Plaintiffs' brief, I.C. § 9-505 is intended to "prevent potential fraud." *Kelly v. Hodges*, 119 Idaho 872, 874, 811 P.2d 48, 50 (Ct. App. 1991). By its very language, to fall in line with the policy underpinnings elucidated in *Kelly*, a litigant need not assert a complete and comprehensive factual basis for proving actual fraud; rather, a litigant simply must proffer facts which raise the potential for fraud, a facile standard to be sure.

As this Court has already stated that its key concern is the strength of the nexus between the facts of this case and the policies underlying the Statute of Frauds, the crucial and sole question for the Court is simply whether the facts herein are sufficient to give rise to "potential fraud." *Id.* The record leaves little doubt that this standard has been met for the following reasons:

- 1.) I.C. § 9-505 requires that purported contracts for real property be in writing and comply with the further strictures contained in *Hoffman v. S.V. Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981);
  - 2.) The facts of the instant matter involve a purported contract for real property and thus fall under the ambit of I.C. § 9-505;
  - 3.) The fact that the purported contract was at auction is immaterial as the universal rule is that auctions for real property are subject to the Statute of Frauds;
  - 4.) The purpose of the Statute of Frauds is to prevent 'potential' fraud;
  - 5.) Idaho is one of the strictest enforcers of the Statute of Frauds;
  - 6.) The facts of the instant matter raise the 'potential' that fraud was exacted against the Defendant; therefore, the policy underpinnings of the Statute of Frauds find perfect application to the facts of the present case; and
  - 7.) The facts which raise the 'potential' for fraud are as follows: A.) The Representation Agreement contains a totally incorrect property description; B.) The Representation Agreement contains three inadequate and vague property descriptions which conflict with the incorrect property
- DEFENDANT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM - 2



description; C.) The Representation Agreement contains a legal description which conflicts with every other property description thereon, bringing the total number of different property descriptions contained in the Representation Agreement to three, most of which are inadequate and all of which are in conflict; D.) Plaintiffs explicitly assured the Defendant that his property would sell at auction for at least \$2,000,000.00; E.) Defendant specifically relied upon these assurances in electing to put the property up for auction; F.) Defendant relied on these assurances to his detriment as the property sold for less than half of the price for which he was assured it would be sold; and G.) The Defendant is quite elderly and the record evidences that there was a stark amount of confusion on his part at the auction as to the general processes and the authority he had to stop the auction.

### III. REBUTTAL

Plaintiffs' points and why they fail are briefly as follows:

- 1.) Defendant has failed to allege that the Statute of Frauds should apply on the basis that an oral contract was never formed, but instead because a signed writing memorializing the agreement was never procured.

Plaintiffs admonish the Defendant for advocating application of the Statute of Frauds in the precise manner in which it is to be applied. It is true that the Defendant has not asserted the Statute of Frauds as a defense to the fact that an oral agreement was never formed.<sup>1</sup> The reason for this is simple – I.C. § 9-505 is not a defense to contract formation. It would make no sense for the Defendant to assert that the Statute of Frauds invalidates the alleged agreement between Plaintiffs and the Defendant because an oral contract was never formed. Therefore, Defendant is guilty only of correct application of the law.

---

<sup>1</sup> Defendant's brief states that our failure to object to contract formation is a tacit admission of contract formation. This is not the case. Defendant has simply moved the Court for partial summary judgment on an issue of law, i.e., the Statute of Frauds. Whether a contract exists will involve disputed questions of fact, thereby rendering inappropriate a motion for summary judgment on the basis that no contract existed. In light of this fact, Defendant should not be forced into tacit admission of the existence of a contract simply because Defendant has chosen a less contentious though equally dispositive avenue with which to proceed with this litigation.

2.) Defendant is advocating a mechanical approach to the Statute of Frauds over a "totality of the circumstances" approach.

To be sure, there are some jurisdictions which apply the Statute of Frauds in a more liberal fashion. However, Idaho is not one of these jurisdictions. To state that Idaho adopts a "totality of the circumstances" analysis and that the Defendant has ignored Idaho Supreme Court precedent stating the same, is a gross misstatement of law and fact. Perhaps this is why the foregoing quotation, which appears on page three (3) of Plaintiffs' brief, goes without citation to any authority. In contrast, Defendant's prior memorandum shows the stark rigidity with which the Court enforces and polices the Statute of Frauds – a far cry from the liberality asserted by Plaintiffs. *See e.g. Watson v. Watson*, 144 Idaho 214, 217, 159 P.3d 851, 855 (2007) ("[T]he doctrine of part performance is a well-established exception to the strict application of the Statute of Frauds"). Therefore, it would appear that Plaintiffs have again levied the innocuous criticism of correct application of the law.

3.) Defendant has ignored Idaho Supreme Court precedent, namely, *M.G. Roundy v. Waner*, 98 Idaho 625, 570 P.2d 862 (1977).

Plaintiffs' reliance on *M.G. Roundy* is without merit for the following reasons.

*First*, the facts and law contained in *M.G. Roundy* are completely irrelevant to the instant matter. *M.G. Roundy* is a part performance and equitable estoppel case. This is evidenced by reference to certain language omitted from the excerpt of the case that Plaintiffs quote in their brief; the omitted verbiage offers elucidation as to the case's strict application to the "part performance/equitable estoppel" context. The following is the portion of the decision directly following the quoted excerpt contained in Plaintiffs' brief:

" ... In weighing the factors which constitute part performance and which therefore raise an equitable estoppel against any plaintiff who attempts to raise the Statute of Frauds, this Court has long held: The most important acts which constitute part performance are actual possession, permanent and valuable improvements and these two combined" *M.G. Roundy*, 98 Idaho 628-29, 570 P.2d at 865-66.

The problem for Plaintiffs is clear - *M.G. Roundy* is a part performance/equitable estoppel case and the facts of the instant matter have nothing to do with either of the foregoing doctrines. In fact, opposing counsel has eschewed the notion that Plaintiffs are in any way asserting an equitable estoppel claim. As such, *M.G. Roundy* is irrelevant and has no bearing on the disposition of the instant matter.

*Second*, the Defendant questions Plaintiffs' assertion that the Court possesses a general equitable grant of authority to remove a contract from the Statute of Frauds. Substantiating the position that such power does exist is Plaintiffs' interpretation of the ruling in *M.G. Roundy*. However, omitted from Plaintiffs' brief is the fact that in *M.G. Roundy*, the equitable power wielded by the Court was pursuant to statute under I.C. § 9-504. I.C. § 9-504 simply reserves to the Court the limited authority to compel specific performance "in case of part performance."<sup>2</sup> As stated previously, the facts of the instant matter have nothing to do with part performance. Therefore, I.C. § 9-504 is inapplicable.

*Third*, even if the Court were to accept the argument that it has general equitable power to not apply the Statute of Frauds in order that it not be used to perpetuate fraud or serve as an agent thereof, the Court would have no occasion to exercise this authority in this case for the reason that in three (3) comprehensive briefs on this subject, the Plaintiffs themselves have failed to allege or assert any fraudulent conduct (e.g., *scienter*, material misrepresentation, etc.) by the Defendant. Plaintiffs' position would seem to be the following maxim: "The Court, under its equitable authority to order specific performance so as to prevent being used as an agent of fraud, should order specific performance in this case in order to avoid the fraud that Plaintiffs have not alleged or asserted."

#### IV. CONCLUSION

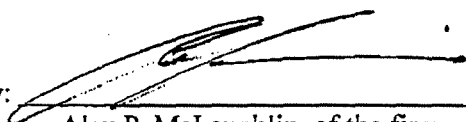
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<sup>2</sup>I.C. § 9-504 states: "The preceding section must not be construed ... to abridge the power of any court to compel the specific performance of an agreement, in case of part performance."

Defendant respectfully requests that this Court GRANT Defendant's Motion for Partial Summary Judgment.

DATED this 14<sup>th</sup> of May, 2009

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:   
Alex P. McLaughlin, of the firm  
Attorneys for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14<sup>th</sup> day of May, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

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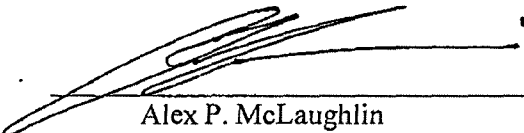
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