THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0467

AKWA VISTA, LLC

V.

NRT, INC. d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE and
FRANK C. SCHOENTHALER

RULE 7 MANDATORY APPEAL FROM THE
HILLSBOROUGH COUNTY NORTHERN DISTRICT SUPERIOR COURT

REPLY BRIEF
FOR THE DEFENDANTS/APPELLANTS
NRT, INC. d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE and
FRANK C. SCHOENTHALER

By: Peter G. Callaghan, Esq.,
NH Bar # 6811

Simon R. Brown, Esq.
NH Bar # 9279

PRETI, FLAHERTY,
BELIVEAU & PACHIOS,
PLLP
57 North Main Street
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

Oral Argument by
Peter G. Callaghan

TABLE OF CONTENTS

Table of Contents i

Table of Cases ii

Argument 1

A. The Exclusive Right to Sell Agreement can not, as a Matter of Law, be Interpreted as a $4 Million Guarantee 1

B. The Exclusive Right to Sell Agreement can not, as a Matter of Law, be Interpreted as a Promise to Produce Unconditional Buyers 2

C. The "Whereas" Clause did not Create a Binding Obligation 4

D. Coldwell Banker Complied by Producing Builders Willing to Buy 5

E. The Contract Claim Should have been Dismissed as Akwa Vista Elected to Proceed with the Contract 6

F. Akwa Vista Did Nothing More than Grant the Exclusive Listing in Reliance on Representations of Frank Schoenthaler 7

G. The Damages Award was Excessive and Should have been Remitted 9

H. Coldwell Banker Should have Prevailed in its Counterclaim 10

Conclusion 10

Certificate of Service 11

Oral Argument 11

Addendum 12

Counterclaim - pp. 123-129
Proposed Jury Instruction No. 8 - p. 130

TABLE OF CASES

	Page
Atlantic Mut. Ins. V. Metron Eng'g, F. 3d 897, 899 (7th Cir. 1996)	5
Green v. Sumner Properties, 152 N.H. 183 (2005)	6, 7
In Re: Liquidation, 157 N.H. 543, 546 (2008)	2
Olympic Chevrolet v. General Motors, 959 F. Supp. 918, 923 (N.D. Ill. 1997)	5
State v. Moran, 151 N.H. 450 (2004)	10

ARGUMENT

A. The Exclusive Right to Sell Agreement can not, as a Matter of Law, be Interpreted as a $4 Million Guarantee

As it argued at trial, Akwa Vista urges this Court to construe the Exclusive Right to Sell Agreement as a guarantee by Coldwell Banker of $4 Million in sales. (Appellee's Brief at 20 ("Coldwell Banker's breach...was its failure to produce $4 million dollars [sic] in sales.")). Akwa Vista offers no evidence to support this interpretation.

The contention that Coldwell Banker breached the agreement by failing to produce $4 Million in sales conflicts with the predominant characterization of the agreement in Akwa Vista's Brief. Appellee argues that Frank Schoenthaler "promise[d] to produce builders" and that there was thus a "contractual obligation to produce builders." (Brief at 9). The trial testimony presented by Akwa Vista refers to a promise to produce builders, not a promise of guaranteed sales. (Id.). Akwa Vista cites to trial testimony indicating Mr. Schoenthaler "had a 'pool of builders' he could bring to the table, 'day one'" and that he made a "promise of being able to deliver 4-6 builders willing to buy 26 lots for $4,000,000." (Brief at 2). That evidence falls far short of establishing a guarantee of $4 Million.

There was no reasonable basis for the jury to find that the Agreement imposed an obligation to produce $4 Million in actual sales. Such a finding defies the language of the Agreement, the circumstances surrounding its execution, the testimony, and sound reasoning. Coldwell Banker could not, and it did not, guarantee $4 Million in sales between builders and a developer it did not control.

B. The Exclusive Right to Sell Agreement can not, as a Matter of Law, be Interpreted as a Promise to Produce Unconditional Buyers

Akwa Vista also contends the Agreement should be construed as a "promise to produce unconditional buyers." (Brief at 12) (emphasis added). Again, there is no support for this position and it ignores the evidence presented at trial. Akwa Vista is simply reading terms into the Agreement that do not exist.

There is no dispute that the Agreement is silent as to whether any builder offers would be conditional or unconditional. Akwa Vista claims, without citation to legal authority, "the lack of language concerning conditions compels a finding that the promise to produce buyers was a promise to produce them without conditions." (Id.) (emphasis in original). It strains common sense to suggest that such a finding is compelled by silence.

The appropriate analysis when interpreting this contract de novo is "to give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." In Re: Liquidation, 157 N.H. 543, 546 (2008) (citation omitted). The only reasonable interpretation of the "whereas" clause, considering the circumstances and the context, is that any builder offers would be conditional. To construe the Agreement in any other way would defy logic, common sense and good business practice.

It is important to the Court's analysis that Akwa Vista principals Mr. Mailloux and Ms. Bekar both conceded builders commonly buy with conditions, such as a financing contingency or that the developer make certain progress in completing the infrastructure. (Appellants' Brief at 18-19). It is also important that both Mr. Mailloux and Ms. Bekar acknowledged a number of critical issues were knowingly left to be

resolved between the builders and developer. As Mr. Mailloux admitted, the "integral issue" of who would pay the current use tax was "a matter of negotiation." (Tr. 1:99).

It was impossible to have an unconditional sale under the circumstances when there was no agreement on who would pay the 10% current use tax, when it was not known what lots (out of the 171 total lots) would be purchased, what price per lot would be acceptable to the developer (the lots bore different prices based on size and location), when the infrastructure would be completed, or what house styles the developer would approve for construction. It was impossible to have an unconditional sale when the payment terms, deposit amount, closing date or specific financing contingencies were not agreed to. Those conditions were to be worked out, as they always are, in the process of negotiation between buyer and seller. This was a massive project, years in the planning, with infrastructure completion at least a year away; every builder would have conditions.

The evidence supporting the claimed "unconditional promise" is non existent. Akwa Vista's self-serving testimony that Mr. Schoenthaler did not tell them of any conditions (Brief at 12-13) does not support the proposition and the factual assertion is plainly wrong. That Schoenthaler may not have advised of any specific conditions that would attach to builder offers hardly means all offers would be unconditional; it simply means that as of March 4 the conditions to be imposed by individual builders (which would likely be, and were, different for each builder) had not yet been discussed. The appropriate time to raise the conditions in detail would be when an offer was presented.

Moreover, the suggestion that conditions were not mentioned is directly contradicted by the record. Ms. Bekar testified about her meeting with Butler Bank, her phone conversation with Mr. Schoenthaler informing her of Butler Bank's financing

contingency (it would not finance Albert Ellis' purchase of 30 lots until there was "gravel on the roads"), the email communications where Schoenthaler explained that there would be options to purchase presented to Akwa Vista, and how Coldwell Banker denied the request of Akwa Vista's attorney to loan money against builder deposits. (Tr. 1:27-32). Frank Schoenthaler emailed Akwa Vista advising that the seller would have to pay the current use tax and Mr. Mailloux indicated he would work it out. (Tr. 2:312). The undisputed testimony was that builder conditions were discussed a number of times before the effective date of the Agreement.

As indicated by these circumstances and the context in which the Agreement was negotiated, common sense dictated that any builder offers were to be with conditions. The trial court wrongfully rejected the sole reasonable interpretation.

C. The "Whereas" Clause did not Create a Binding Obligation

Akwa Vista presents just one citation for its position that the prefatory language in the Agreement should be considered a binding contractual obligation. The one treatise actually supports Appellants' position, that recitals do not have the force of contractual stipulations and do not create rights beyond the operative terms of the document. Appellee's citation is merely in accord with what Appellants acknowledged in their Brief (Brief at 16) - that recitals can aid in the interpretation.

Appellee's attempt to connect the termination paragraph with the "whereas" clause, to transform the recital into a binding obligation, is misplaced. The termination paragraph does not mention the "whereas" clause or producing builders, but establishes a standard of annual sales that the developer could use to terminate the listing agreement if Coldwell Banker failed to achieve (26 in year one and 30 in any subsequent year). The

Agreement contains two paragraphs of detailed "Obligations" imposed on Coldwell Banker neither of which contain any reference to producing builders. (App. 64-66). Without an explicit incorporation of the "whereas" clause in the operative provisions of the contract, the "whereas" clause can not be considered a binding obligation. Olympic Chevrolet v. General Motors, 959 F. Supp. 918, 923 (N.D. Ill. 1997) (quoting Atlantic Mut. Ins. v. Metron Eng'g, 83 F. 3d 897, 899 (7th Cir. 1996) ("introductory language or recitals are not binding obligations unless so referred to in the operative portion of the instrument."). As only the "whereas" clause was alleged to have been breached, the verdict on the contract claim should have been set aside.

D. Coldwell Banker Complied by Producing Builders Willing to Buy

If the contract is interpreted as imposing a binding obligation to produce builders willing to buy, then Coldwell Banker unquestionably complied with this obligation. Akwa Vista's factual assertions to the contrary are a mischaracterization of the record and a complete distortion of the testimony of Albert Ellis and Joseph Pelich.

Albert Ellis, the principal of OHC, conducted market research, visited the site, met with Coldwell Banker agents, and even met with Richard Mailloux. (Tr. 2:274-76). Following that meeting with Mr. Mailloux, Mr. Ellis "authorized Frank [Schoenthaler] to put together a term sheet" that would serve as "an outline of what we would be interested in" to purchase 30 lots for $150,000 per lot. (Tr. 2:277). Mr. Ellis instructed Mr. Schoenthaler to present the offer, testifying "I told Frank to go ahead and talk to Mr. Mailloux about it." (Tr. 2:278). As in most previous transactions, Mr. Schoenthaler was asked by Mr. Ellis "to structure the deal that hopefully worked out for both parties." (Tr. 2:278). Mr. Ellis identified the Option as "the offer letter that Frank had put together that

Frank had reviewed with me that were the terms that we were proposing for the first of the 30 lots." (Tr. 2:280). Mr. Mailloux acknowledged receiving the offer. (Tr. 1:67-68).

The undisputed evidence showed Mr. Ellis wanted to buy 30 lots for $150,000, an aggregate price of $4.5 million, he authorized Mr. Schoenthaler to present the Option to Purchase, and it was presented to Akwa Vista in April 2004. The scope, form and terms of the Option to Purchase were just as Mr. Schoenthaler had advised Ms. Bekar in March. Coldwell Banker even placed listings in the Multiple Listing Service for three models of homes approved by Akwa Vista, in April 2004, anticipating the OHC purchase. (App. 92-96). It is wrong to suggest the OHC offer was fabricated.

Another builder Coldwell Banker proffered, Joseph Pelich, was "very, very interested" in buying lots and he wrote the proposal to purchase 20 lots to begin the process of negotiation. (Tr. 2: 218, 220, 224). The response from Akwa Vista was that Mr. Mailloux wanted $750,000 released to him, which Mr. Pelich considered a "deal killer." (Tr. 2:228). It is unreasonable to fault Coldwell Banker when builders were produced but a sale was not consummated due to the demands of Akwa Vista and its refusal to negotiate the current use tax, deposit terms and other conditions. The trial court should have ruled Coldwell Banker complied with any obligation to produce builders if one was imposed by the Agreement.

E. The Contract Claim Should have been Dismissed as Akwa Vista Elected to Proceed with the Contract

Akwa Vista neglects to inform the Court that Coldwell Banker requested the trial court dismiss the breach of contract claim at the close of Akwa Vista's case, citing Green v. Sumner Properties, 152 N.H. 183 (2005), as Akwa Vista had elected to proceed under the Agreement rather than rescind. (Tr. 2: 263-264). The trial court took the motion

under advisement, but never rendered a ruling. (Tr. 2: 267). The trial court did not give Coldwell Banker's proposed jury instruction on the election issue. (Addendum at 130).

Green is clear that a party who claims it entered into a contract based on a misrepresentation must choose between proceeding under the contract or rescinding and suing for misrepresentation. In its effort to have it both ways, and to avoid the consequences of Green, Akwa Vista suggests that it believed after April that Mr. Schoenthaler would deliver the promised builders. This is completely at odds with its suggestion that the OHC offer presented in April was "fabricated" and "not real." This circular reasoning should be rejected. The trial court should have dismissed the contract claim at the close of Plaintiff's case and when ruling on the JNOV motion.

F. Akwa Vista Did Nothing More than Grant the Exclusive Listing in Reliance on Representations of Frank Schoenthaler

In order to sustain its misrepresentation claim and the damages award, Akwa Vista is intentionally vague and internally inconsistent as to its reliance on Mr. Schoenthaler's purported pre-March 4 representations. It now claims it closed on the purchase in reliance, but in its Writ of Summons, Akwa Vista alleged it "relied upon Schoenthaler's and Coldwell Banker's unqualified representations...in agreeing to execute the Agreement." (App. 58, ¶ 12). In pleading its misrepresentation claim, Akwa Vista alleged "[f]or the purpose of obtaining an exclusive listing agreement with the plaintiff, the defendants made unqualified affirmative misrepresentations of fact to the plaintiff" who "justifiably relied upon the defendants' misrepresentations of fact." (App. 60-61, ¶¶ 25 & 27).

The "whereas" clause provides "...the DEVELOPER, in recognition of COLDWELL BANKER NEW HOMES' efforts as herein described, has agreed to list the

sale exclusively with COLDWELL BANKER NEW HOMES, ..." (App. 064) (emphasis added). Ms. Bekar and Mr. Mailloux each acknowledged that the only thing Akwa Vista gave Coldwell Banker was the exclusive right to list the property. (Tr. 1:26; 131).

Though there is no evidence to support the contention that Akwa Vista did anything more than grant the exclusive listing in reliance on Mr. Schoenthaler, it claims damages for lost sales. There is no causal connection here as Akwa Vista was "always going to go through with this project, whether it was Coldwell Banker, Frank Roche or somebody else as the real estate agent." (Tr. 1:120).

Had Akwa Vista actually closed on the property in reliance on Mr. Schoenthaler's pre-March 4 statements, it would have informed Coldwell Banker of this, but it did not. The $4 Million in sales would have been referenced in the loan commitment, but it was not. There would have been evidence the construction costs, in April 2004, really were $5.5 Million. Yet, every time the cost was referenced, it was $4 Million, beginning well before any representation of Mr. Schoenthaler and continuing for the seven months leading up to the Agreement. The cost in the April 2, 2004 contract between Akwa Vista and Atom Contracting and the supporting schedule of values was $4.028 Million (Tr. 1:125-127), matching the cost the City of Laconia and Akwa Vista agreed to.

There was no evidence Akwa Vista counted on $4 Million in sales in order to be able to close and develop the subdivision. Mr. Mailloux admitted he did not advise Mr. Schoenthaler on the consequences of not delivering $4 Million. (Tr. 1:100). No one from Akwa Vista demanded the builder cash before April 2 or thereafter. Certainly by the end of April, after the OHC Option to Purchase was summarily rejected, if there was reliance in closing, there should have been some evidence of Akwa Vista seeking more

funding or telling Coldwell Banker it was in breach. There was no such evidence. Akwa Vista's attorney wrote two letters: one on April 30, 2004 requesting a list of builders who are "potential purchasers of lots" and the other on January 20, 2005 stating that as the infrastructure was nearing completion it was time to produce the builders. It was not until May 2005 that Akwa Vista sought additional funding after cost overruns and multiple lawsuits that cost $450,000 in attorney's fees to defend. (Tr. 2:165-168).

Even if Akwa Vista did close in reliance on Mr. Schoenthaler's pre-March 4 representations, such reliance was not justified. There was not a shred of evidence that before the April 2 closing any cash sales were forthcoming. The only evidence was that there would be significant contingencies on builder offers.

The absence of justifiable reliance beyond granting the exclusive listing, and the lack of any causal connection between the alleged breach and misrepresentation and any claimed damages, required dismissal of the misrepresentation claim and should have precluded the damages awarded on both claims.

G. The Damages Award was Excessive and Should have been Remitted

Akwa Vista's effort to support the jury award must fail. Money damages are not appropriate, as there was no sales guarantee and Coldwell Banker was not the cause of any failure of Akwa Vista to consummate a sale with a builder. Damages for misrepresentation during the execution of the listing agreement are not appropriate, as Akwa Vista gave up nothing more than the right to sell. There was no reason to foresee, and Akwa Vista suggests none, that Akwa Vista was unable to pay the carrying costs and thus counting on $4 Million in sales. Mailloux admitted he did not tell Coldwell Banker of this or suggest that he would be underfunded if no sales occurred.

Even if some damages were reasonable, it was unreasonable and excessive to allow damages after Coldwell Banker was forced off the project by Mr. Mailloux's April 2005 demand of $60,000 per month. (Tr. 2:171). The $223,000 (2005-2006), $223,000 (2006-2007) and $74,000 (2007) (totaling $520,000) should have been remitted. The $126,000 on private loan interest for construction costs should have been remitted as Mailloux admitted that when the costs were incurred over $1 Million remained available on the construction loan; there was no legitimate reason for the private loans.

H. Coldwell Banker Should have Prevailed in its Counterclaim

Akwa Vista was advised by Coldwell Banker in early 2003 of the importance of adequate financing to complete the infrastructure (Tr. 1:106) and it assured Coldwell Banker it had the financing in place. (Tr. 3:363, 393-394). Yet Akwa Vista claimed at trial it was underfunded by $1.5 Million and admitted it concealed this from Coldwell Banker. Akwa Vista thus committed unfair and deceptive acts in violation of RSA 358-A, State v. Moran, 151 N.H. 450 (2004), breached its contractual duties and committed both an intentional and negligent misrepresentation. This caused Coldwell Banker to spend $140,484 and countless hours of dedicated personnel for the project. Had it known the truth, Coldwell Banker would not have taken the listing or incurred these expenses. The trial court should have entered judgment for Coldwell Banker on its Counterclaim for the $140,484 it incurred paying Akwa Vista's mortgage interest on the lake house and marketing the project. The Counterclaim is attached. (Addendum at 123-129).

CONCLUSION

Appellants respectfully request the Court grant the relief requested in their Brief.

Respectfully submitted,

NRT, INC. d/b/a COLDWELL
BANKER RESIDENTIAL
BROKERAGE and
FRANK C. SCHOENTHALER

By their attorneys,

PRETI, FLAHERTY, BELIVEAU
& PACHIOS, PLLP

Dated: February 3, 2010

By: _____
Peter G. Callaghan, NH Bar #6811
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Reply Brief have been forwarded via first-class mail to William B. Pribis, Esquire, and that this Reply Brief conforms to the requirements of Supreme Court Rule 16.

_____
Peter G. Callaghan

ORAL ARGUMENT

Attorney Peter G. Callaghan will present the oral argument for Appellants. 15 minutes is requested.

_____
Peter G. Callaghan

1645058.1

ADDENDUM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 07-C-0139

Akwa Vista, LLC

v.

NRT, Inc., d/b/a Coldwell Banker Residential Brokerage and
Frank C. Schoenthaler

COUNTERCLAIM

Defendant NRT, Inc. d/b/a Coldwell Banker Residential Brokerage, New Homes Division, by its attorneys, Preti, Flaherty, Beliveau & Pachios, PLLP, respectfully submits the within Counterclaim.

A. FACTS

1. Coldwell Banker Residential Brokerage, New Homes Division ("Coldwell Banker") entered into an Exclusive Right to Sell Agreement with Akwa Vista, LLC dated March 4, 2004.

2. Coldwell Banker agreed to serve as the exclusive listing agent for the development.

3. Akwa Vista, LLC agreed to be the developer.

4. The Exclusive Right to Sell Agreement specified "THE DEVELOPER agrees to use its reasonable best efforts to develop the Premises as a subdivision with 171 building Lots thereon; "best efforts" shall mean that DEVELOPER shall take such prompt action as may be required to obtain all licenses and permits necessary for the development of the premises as a subdivision consistent with sound financial practice."

5. Among the necessary actions the developer was required to take was obtaining water and sewer permits, installing water and sewer in the development and installing roads.

6. The Plaintiff failed to obtain water and sewer permits and install water and sewer in the development in a timely manner and failed to install roads in a timely manner.

7. The Plaintiff and its agents violated state and local permits which caused the issuance of cease and desist orders that halted development until compliance was obtained.

8. The cease and desist orders, among other things, generated negative publicity which adversely affected sales activity.

9. When builders were brought to the Plaintiff, the Plaintiff made unrealistic demands for non-refundable deposits and imposed other conditions, which prevented the builders from buying the lots.

10. The Plaintiff rented Coldwell Banker a cottage at the marina for sales use, but then moved Plaintiff's family into the cottage for the summer, depriving Coldwell Banker of its use.

B. CLAIMS FOR RELIEF

COUNT I
BREACH OF CONTRACT

11. All allegations set forth in this Counterclaim are incorporated herein as if more fully re-alleged herein.

12. Akwa Vista and Coldwell Banker entered into a contract for a three year period, under which Coldwell Banker had the opportunity to earn commissions on the sale of real estate.

13. The contract required Akwa Vista to use its best efforts to develop the premises, obtain all licenses and permits, to take all prompt action as required, and to otherwise meet its obligations to allow Coldwell Banker to sell property.

14. Akwa Vista breached its duties and obligations under the contract by failing to use its best efforts, by engaging in actions that generated negative publicity, that created animosity with city and state officials, that delayed the issuance of permits and licenses, that caused the issuance of cease and desist orders and otherwise failed to act in a commercially reasonable manner in moving the project forward.

15. Akwa Vista also breached the contract by terminating Coldwell Banker's performance prior to the expiration of the three year term.

16. As the direct, proximate and foreseeable result of Akwa Vista's breaches, Coldwell Banker has suffered damages, including the costs and expenses it incurred that it was unable to recoup, lost commissions and other losses all within the jurisdictional limits of this Honorable Court.

COUNT II
BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

18. All allegations set forth in this Counterclaim are incorporated herein as if more fully re-alleged herein.

19. The contract between Akwa Vista and Coldwell Banker contained the implied obligation of Akwa Vista to act in good faith and to deal fairly with Coldwell Banker.

20. Akwa Vista breached its duty to act in good faith and to deal fairly with Coldwell Banker in that it failed to act in a commercially reasonable manner, it failed to use best efforts, it imposed unreasonable demands that made performance impossible and it engaged in other actions which delayed the project, created negative publicity and otherwise denied Coldwell Banker the ability to perform.

21. As the direct, proximate and foreseeable result of Akwa Vista's bad faith and unfair dealing, Coldwell Banker has suffered damages as set forth herein, all within the jurisdictional limits of this Honorable Court.

COUNT III
UNFAIR AND DECEPTIVE BUSINESS PRACTICES (RSA 358-A)

22. All allegations set forth in this Counterclaim are incorporated herein as if more fully re-alleged herein.

23. Akwa Vista, in the course of engaging in trade or commerce within the State of New Hampshire, committed unfair and deceptive acts and practices.

24. Akwa Vista represented that it had the ability to, and intended to, bring water and sewer to the property, to obtain all necessary permits and licenses, and to develop the property in a commercially reasonable manner.

25. Akwa Vista deceived Coldwell Banker and acted unfairly by making misrepresentations as to its abilities and intent, by making unreasonable demands upon builders, by self dealing, by violating state and city regulations, and engaging in actions that precluded Coldwell Banker from performing under the contract.

26. As the direct, proximate and foreseeable result of Akwa Vista's unfair and deceptive acts and practices, Coldwell Banker has suffered damages as set forth herein, all within the jurisdictional limits of this Honorable Court.

27. As Akwa Vista's violations of RSA 358-A were knowing or willful, Coldwell Banker is entitled to an award of not less than two but not more than three times its damages, plus attorney's fees and costs.

COUNT IV
FRAUDULENT MISREPRESENTATION

28. All allegations set forth in this Counterclaim are incorporated herein as if more fully re-alleged herein.

29. The Plaintiff misrepresented material facts to Defendants specifically including that it would bring water and sewer to the development, that it would use its reasonable best efforts to develop the property, that it would deal fairly and reasonably with buyers, and that it would act in good faith. Those representations were false.

30. The Plaintiff made said misrepresentations with fraudulent intent to induce Coldwell Banker to incur substantial sums to market the property.

31. Coldwell Banker believed Plaintiff's representations that it would bring water and sewer to the property and timely develop the property and would deal fairly and reasonably with buyers, and justifiably relied upon Plaintiff's statements.

32. As the direct, proximate and foreseeable result of Defendant's reliance upon

Plaintiff's misrepresentations Coldwell Banker suffered damages as set forth herewith all within the jurisdictional limits of this Honorable Court.

COUNT V
NEGLIGENT MISREPRESENTATION

33. All allegations set forth in this Counterclaim are incorporated herein as if more fully re-alleged herein.

34. The Plaintiff negligently misrepresented its abilities and intentions to bring water and sewer and to use its reasonable best efforts to develop the property, and to deal reasonably and fairly with buyers and to otherwise act in good faith.

35. The misrepresentations were made for the purpose of inducing Coldwell Banker to begin marketing the property and to incur substantial sums in the process.

36. The misrepresentations were material to the transaction and the misrepresentations were not true.

37. Defendants justifiably relied on the misrepresentations.

38. As the direct, proximate and foreseeable result of Akwa Vista's misrepresentations Coldwell Banker suffered damages all within the jurisdictional limits of this Honorable Court.

ENHANCED COMPENSATORY DAMAGES

39. Coldwell Banker seeks enhanced compensatory damages for the malicious and oppressive nature of Akwa Vista's conduct.

Respectfully submitted,

NRT, INC. d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE, NEW HOMES DIVISION

By its attorneys,

PRETI, FLAHERTY, BELIVEAU & PACHIOS, PLLP

Date: May 11, 2007

By: _____

Peter G. Callaghan
57 North Main Street
PO Box 1318

1216241.1

Concord, NH 03302-1318
(603) 410-1500

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2007 I forwarded a copy of the foregoing *Counterclaim* to William B. Pribis, Esquire, counsel for the Plaintiff.

Peter G. Callaghan

1216241.1

Jury Instruction No. 8

(FRAUD)
(MISREPRESENTATION AND BREACH OF CONTRACT)

A party entering into an agreement in reliance upon a misrepresentation of a material fact has two choices. He may elect to rescind or disaffirm the agreement and refuse to proceed further with the transaction, or he may elect to affirm the contract, keep its benefits, perform his obligations thereunder, and sue for damages for misrepresentation. If you find that plaintiff Akwa Vista LLC did not elect to rescind or disaffirm the agreement in this matter and did not refuse to proceed further with the transaction, plaintiff cannot, as a matter of law, prevail on the breach of contract count. If you so find, you may only consider whether or not defendant committed the tort of misrepresentation.

Source: Green v. Sumner Properties, 152 N.H. 183 (2005).