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December 31, 2008

VIA TELEFACSIMILE &
FIRST CLASS MAIL

Joseph W. Phillips, Esq.
CONLIN MCKENNEY & PHILBRICK PC
350 S Main Street, Suite 400
Ann Arbor, MI 48104

Re: 6310 North Territorial Rd, Dexter/Berger v Keller Williams, et al.

Dear Mr. Phillips:

This letter is sent in response to your letter dated December 9, 2008. Without rebutting your letter point by point, it is clear that our view of your clients' liability for the fraud perpetrated upon the Bergers differs from yours.

Mr. Jordan's apparent defense is that he was never at the house, never saw any flooding, never heard about any flooding and if he did, he had his handyman fix it.

However, Mr. Jordan told the Bergers that he showed the house throughout the year and told another realtor that he had a second bidder ready to buy it without a contractor's inspection. And yet, he asserts that he was only at the house four times. I am certain that you have directed your client to preserve the records of Mr. Jordan's showings and Mr. Jordan to preserve all of his records regarding the home, where he served both as landlord and as real estate agent for close to a year.

It is interesting that Mr. Jordan told you he knew of no water problem at the same time he told you that "the property in front of the house was very marshy...." Either he knew of an issue or he didn't. My clients are prepared to testify that the front yard was not marshy in June and July when they were looking at the house and that there were just a few cattails growing near the house (not down near the main road where the actual driveway flooded). In fact, I am enclosing a photograph of the property taken by Mr. Berger in July which shows the property as quite dry. The driveway in question is visible to the right of the photograph.

There was no evidence of any marshy area with cattails growing in "abundance" anywhere on the property, except in the far rear of the property, away from the driveway which Mr. Jordan knew flooded. Mr. Berger has had a wetland expert at the property and he too can testify to that. The enclosed photo of the driveway shows there are no cattails anywhere. Further, Mr. Jordan is going to have a hard time arguing he was unaware of the water problems when he, himself, got stuck in the mud on the driveway earlier in 2008 – mud which was absent when my clients saw it in the summer of 2008.

The day before the closing, July 6th, Mr. Jordan went out to the house because the house was a mess and he came out to haul away debris "in the basement." At that time, Mr. Berger mentioned that some items were missing and he followed up with an e-mail later that day. Mr. Berger did raise a concern with a leaky window which was all that his contractors and inspectors had identified. It turned out that the source of the believed window problem was completely different, relating to poor roof drainage, running down into the house. Given that Mr. Jordan was the landlord for roughly a year and was managing the property, and based on information from the tenant that he dealt with, Mr. Jordan knew of these water problems and, his failure to disclose them constitutes actionable fraud. My client believes that Mr. Jordan's handyman had been caulking and cleaning in order to hide the water problems inside the house of which Mr. Jordan was well aware. Further, Mr. Jordan also was well aware of the exterior road flooding which he failed to disclose.

You cite two case, *McMullen v Joldersma* and *M&D v McConkey*. As you will see, both cases are distinguishable. In the *Joldersma* case, the plaintiffs, buyers of a commercial business alleged that the seller's realtor fraudulently concealed the fact that there was a State of Michigan plan to reroute traffic away from the business in question. In that case, the court held that the realtor owed no duty to disclose the State plans but the court noted the case of *USF&G v. Black*, 412 Mich 99 (1981), where liability does arise where subsequently acquired information renders prior misstatements untrue or misleading. In *Joldersma*, there was no such instance.

However, here, in 2007, Jordan was told by Seller, Vaught, that there was no water damage or flooding when Vaught gave him the Seller's Disclosure for Jordan to use as part of any deal. Because Jordan became aware of the flooding problems, under the doctrine of *USF&G v Black*, he was obligated to disclose that information to cure the misimpressions and his failure to do so leads to liability.

The *McConkey* case is similarly distinguishable. In the *McConkey* case, the seller of a commercial property refused to sign a Seller's Disclosure and the buyers never asked about flooding (which was the subject of the litigation). Despite your claim that the various documents signed at or before closing preclude a fraud claim, the *McConkey* court stated the well recognized rule in Michigan that "the existence of an 'as is' clause does not preclude a purchaser in a real estate transaction from alleging fraud or misrepresentation." 573 NW2d 284. In *McConkey*, the court held

that there was no cause of action against the agents because there was no representation of fact to which the buyer could point as a fraudulent statement on which they could rely. Further, the court held that, as to a realtor, the duty to disclose material flaws found in Michigan case law did not apply. The court did not rule that there could be no silent fraud cause of action against a realtor. The court discussed at length the difference between mere silence and concealment by silence. The court stated that the buyers "offered no proof that they even asked [the agent] questions that might arguably have imposed ... the obligation to disclose the historical flooding ... or risk that plaintiffs might be misled..." *Id* at 287. Further, the court in *McConkey* also noted the negligence rule in *Christy* which gives rise to liability because the Bergers can prove that Jordan knew about the flooding; he failed to disclose it and the flooding involved an unreasonable danger. Given the extent of the flooding and the fact that flooding is known to lead to hazardous mold growths, the Bergers believe they can bring a *Christy* claim against Jordan and the agency.

Further, a 2005 case, *Huhtasarri v. Stockemer*, Case No. 256926 (Dec. 20, 2005), stated:

The recognized common-law rule in the sale of lands is caveat emptor, which provides that "a land vendor who surrenders, title, possession, and control of property shifts all responsibility for the land's condition to the purchaser." However, in *M & D, Inc v. McConkey*, this Court stated that while neither a land vendor nor their agent retains a general duty to disclose material defects in property to a potential buyer, *their silence may constitute fraud when there exists either a legal or equitable duty for disclosure*. But a plaintiff is required to establish more than just an awareness by the vendor of the existence of a hidden defect. To prove a silent fraud claim, "a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." Specifically, "a claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure.... [T]here must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud."

(Emphasis added). The Bergers meet this standard for two reasons: (1) the regulations governing Michigan realtors; and (2) the dialogue between Mr. Jordan and Mr. Berger.

Most importantly, Michigan Administrative Code R 339.22333(1), provides "A licensee shall not, directly or indirectly, misrepresent material facts." Neither of the cases you cite discuss this obligation to not indirectly misrepresent material facts. The rules define the term "indirectly" as "not resulting or occurring directly from obvious means or cause; remotely connected, concealed, or disguised." Based on Mr. Jordan's knowledge of the property's water problems and his awareness of the contents of the false Seller Disclosure which he delivered to the Bergers, he was under a duty not to misrepresent material facts and as noted in the cases you cited, he was obligated to correct the misinformation that he communicated. He clearly breached his legal duty by concealing information known to him. It is also believed that Mr. Jordan further disguised these issues by hiding repairs he had made or was aware of and by allowing certain debris to be placed to hide the water issues.

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You are correct that on July 6th, the Bergers did raise with Mr. Jordan via email a concern regarding water leaks around windows in the rear wall of the house and a host of items that were to go with the house that were missing. Mr. Jordan's response was something to the effect of "what will it take to close this deal?". He did not respond with information of his knowledge of the problem. As the *McConkey* court stated,

"Our Supreme Court has recognized a vendor's duty to disclose material facts when the vendor and purchaser have generally discussed the condition at issue – when the purchaser has expressed some particularized concern or made a direct inquiry.... [There is also] a duty to disclose subsequently acquired information which ... [renders] untrue, or misleading, previous representations which, when made, were true or believed to be true."

573 NW2d 286. Your client was under a legal duty not to hide the truth. When he came into knowledge that rendered untrue the disclosure that he delivered, he was under a duty to correct that incorrect understanding of the material facts. When the topic of water damage was raised, he was under a duty, as recognized by *McConkey*, to disclose the material facts known to him. He did not and this gives rise to liability for both him and his employers.

Further, we have spoken to Mrs. Vaught and she informs us that if Mr. Jordan was collecting rent, he was doing so for himself or for Keller Williams as they never received a penny from him. This fact would certainly alter your clients' status from mere real estate agents to something significantly more and would hold them to the higher standards articulated in the cases you cite.

As we have discussed, we would like to resolve this short of litigation if possible and are willing to arrange a meeting to discuss these matters fully. The Vaughts seem similarly willing although we may have to work around Mr. Vaught's schedule. Can you provide me a couple of weekend and evening dates when you and your clients would be available to meet?

Thank you for your cooperation. I await your prompt reply.

Very truly yours,

JAFFE, RAITT, HEUER & WEISS
Professional Corporation



Arthur H. Siegal

AHS/kas
Enclosure
cc (w/o): David Berger, via facsimile
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