1975

First Security Bank v. Zions First National Bank : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FIRST SECURITY BANK OF UTAH, N.A.,
Plaintiff-Appellant,

vs.

ZIONS FIRST NATIONAL BANK, N.A.,
Defendant-Respondent.

Case No. 14010

BRIEF OF APPELLANT

Appeal from the Order and Judgment of the Third District Court for Salt Lake County
Honorable Stewart M. Hanson, Jr., Presiding

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NATURE OF THE CASE

This is a declaratory judgment action regarding the priority of security interests in merchandise, inventory, work in process, raw materials and other assets (hereinafter "transferred assets") transferred from Nuclear Controls and Electronics Corporation (hereinafter "Nuclear") to Summit International Corporation (hereinafter "Summit"). Plaintiff-Appellant First Security Bank of Utah, N.A. (hereinafter "First Security") and Defendant-Respondent Zions First National Bank (hereinafter "Zions") each claim a prior and superior security interest in the

transferred assets and in the cash and non-cash proceeds arising therefrom.

DISPOSITION IN THE LOWER COURT

On February 11, 1975, the Honorable Stewart M. Hanson, Jr., District Judge in the Third Judicial District in and for Salt Lake County, granted Zions' Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

First Security seeks reversal of the Order and Judgment of the Third District Court on the ground that there are material and genuine issues of fact which must be resolved at trial, on the ground that there is a possibility of new evidence in this case which would be favorable to First Security and on the ground that Zions is not entitled to judgment as a matter of law.

STATEMENT OF FACTS

There has been no determination made by a trier of fact as to what the actual facts of this case are. Although some additional discovery would be required prior to trial, the following sequence of events and related claims represent the facts as alleged by First Security and as supported by the Record now before the Court.

DECEMBER 5, 1972

Zions entered into an Inventory and Accounts Receivable Security Agreement with Summit (Record, pp. 21-22). At the time the above mentioned security agree-

ment was entered into, Summit's sole business was the marketing of calculators manufactured by Nuclear. Summit had no manufacturing activities (Record, p. 17).

DECEMBER 6, 1972

Zions filed its financing statement relating to the Summit security agreement with the Utah Secretary of State (Record, p. 23).

JULY 30, 1973

First Security entered into an Inventory Financing Security Agreement with Nuclear which covered all of Nuclear's inventory, including work in process, raw materials and stock in trade, without limitation, and all after-acquired inventory and any proceeds arising therefrom (Record, pp. 51-52). First Security and Nuclear also entered into a Security Agreement Covering Revolving Accounts Receivable and any proceeds arising therefrom (Record, pp. 53-54).

JULY 31, 1973

First Security filed its financing statement relating to the Nuclear security agreements with the Utah Secretary of State (Record, p. 55).

ON OR ABOUT JANUARY 1, 1974

Nuclear owed First Security $831,770.00, which amount remains unpaid (Record, p. 47). Without the knowledge or consent of First Security, Trans-Atlas Cor-

poration, the parent corporation of both Nuclear and Summit, caused an inter-company transfer of personnel and of all assets and inventory pertaining to the manufacture of hand calculators from Nuclear to Summit. The transferred assets were valued at $2,097,184.00 (Record, p. 48). There was no consideration for this transfer. The transfer did not entail the actual movement of physical asset but was a paper transaction only (Record, p. 17 and Deposition of Jerry W. Dearinger, p. 5). At all times prior to this transfer, Zions knew that Summit's inventory consisted solely of completed hand calculators (Record, p. 17). There was no work in process, component parts or assembly machinery included in Summit's inventory prior to the transfer by Nuclear to Summit on or about January 1, 1974 (Record, p. 17).

Zions was in control of the financial affairs of Summit, and Zions had prior notice or was informed very shortly thereafter of the transfer of inventory and other assets from Nuclear to Summit and of First Security's attached and perfected first priority security interest in the transferred assets (Record, pp. 17, 48, 49).

On or after January 1, 1974, Zions did not advance any additional funds to Summit (Record, p. 49).

FEBRUARY 12, 1974

After discovering the transfer of Nuclear's assets to Summit, First Security entered into an Inventory Financing Security Agreement and a Security Agreement Covering Revolving Accounts Receivable with Summit (Rec-

ord, pp. 56-59). These security agreements contained language drafted by Jerry Dearinger, Summit's attorney, concerning Zion's security interest in Summit's *presently held accounts receivable.*

FEBRUARY 22, 1974

First Security filed with the Utah Secretary of State its financing statement relating to the Summit Security Agreements (Record, p. 60).

TO DATE

Zions has managed and maintained control of all accounts receivable of Summit during 1972, 1973, 1974 and 1975 to date (Record, p. 17). All monies collected by Summit have been required to be deposited with Zions where daily balances could be ascertained at all times (Record, p. 17).

At all relevant times hereto Zions was aware of the claimed security interests of First Security and was in a position to protect the security interest of First Security in the transferred assets as well as its own security interest in certain accounts receivable of Summit (Record, p. 49).

Zions made no effort to refute First Security's claim of first priority on the transferred assets until several months after Zions became aware of said claim and the assets of Summit had been dissipated (Record, p. 50).

The proceeds from the transferred assets in which First Security claims a prior security interest can be

traced and separated from the assets of Summit in which Zions has a security interest (Record, p. 50).

ARGUMENT

POINT I.

THERE REMAIN GENUINE ISSUES OF FACT AND THE POSSIBILITY OF NEW EVIDENCE IN THIS CASE WHICH WOULD BE FAVORABLE TO FIRST SECURITY.

This Court in *Bullock* v. *Deseret Dodge Truck Center, Inc.*, 11 U. 2d 1, 354 P. 2d 559 (1960) stated:

> A summary judgment must be supported by evidence, admissions, and inferences which when viewed in the light most favorable to the loser shows 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." *Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. Id.* at 4-5. [Emphasis added.]

In *Thompson* v. *Ford Motor Co.*, 16 U. 2d 30, 395 P. 2d 62 (1964), the Utah Supreme Court ruled that:

> On summary judgment the adversed party is entitled to have the court survey the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to him. *Id.* at 31-32.

This Court held in *Reliable Furniture Co.* v. *Fidelity*

& Guaranty Insurance Underwriters, Inc., 16 U. 2d 211, 398 P. 2d 685 (1965), that the adverse party's:

> . . . contentions as to the facts should be considered in the light most favorable to him, and *only if it clearly appears that he could not establish a right to recovery under the law should such action be taken; and any doubts which exist should be resolved in favor of affording him the privilege of a trial. Id.* at 216-217. [Emphasis added.]

The specific areas where facts are either in dispute or further discovery is required are pointed out in the Arguments that follow and are summarized in the Conclusion of this brief.

POINT II.

FIRST SECURITY HAS AN ATTACHED AND PERFECTED SECURITY INTEREST IN THE TRANSFERRED ASSETS AND IN ALL CASH AND NON-CASH PROCEEDS ARISING THEREFROM.

A. First Security Has An Attached And Perfected Security Interest In The Transferred Assets.

First Security has a valid security interest in the transferred assets arising from security agreements between First Security and Nuclear which were executed on July 30, 1973. The financing statement pertaining to the transferred assets was filed with the Utah Secre-

tary of State on July 31, 1973. As stated in Section 70A-9-306(2) U. C. A., 1953, a security interest continues in collateral after a transfer:

> (2) Except where this chapter otherwise provides, *a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor* unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. [Emphasis added.]

In *Inter Mountain Association of Credit Men* v. *The Villager, Inc.*, ... U. 2d ....., 527 P. 2d 664 (1974), this Court held that a security interest continues in collateral notwithstanding its transfer.

> Section 70A-9-306(2) provides that a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds, including collections received by the debtor. *Since the financing statement was properly filed, plaintiff's assignor had notice of defendant's security interest in the collateral and proceeds,* as well as the provision in the security agreement that provided that the collateral, inventory, whenever acquired would secure the obligation covered, Section 70A-9-204(3) U. C. A., 1953, as amended 1965. *Id.* at 670-671. [Emphasis added.]

There appears to be no dispute between First Secur-

ity and Zions that First Security had a prior and superior security interest in the transferred assets and in any proceeds arising therefrom up to February 12, 1974.

B. First Security Was Not Required To File Additional Financing Statements To Protect Its Security Interest In The Transferred Assets.

At the time the transfer became known to First Security, security agreements were entered into between First Security and Summit to give further public notice that First Security claimed a security interest in the inventory and other assets transferred by Nuclear to Summit. Another financing statement was duly filed with the Utah Secretary of State on February 12, 1974. As to Zions, First Security had no duty to file this new financing statement.

The Utah Supreme Court in *Inter Mountain Association of Credit Men* v. *The Villager, Inc., supra,* cites with approval *In Re Posco Sales Co., Inc.,* 77 Misc. 724, 354 N. Y. S. 2d 402 (1974), to illustrate the principle that the filing provision of the Code is to give notice and start investigation.

> Although the purpose of the filing provisions of the Code is to afford protection to a creditor by furnishing notice to interested parties, these provisions are intended merely as "*a starting point* for investigation which will result in fair warning concerning the transaction contemplated." [Emphasis added.] [Citation] It was not intended, therefore, that the interested par-

> ties be completely absolved from any inquiry as to the past history of the debtor. (See, e.g., Uniform Commercial Code, Section 9-401(3).) *Id.* at 671.

The Utah Supreme Court then concludes:

> A debtor cannot destroy the perfected security interest of a secured party by merely changing its name or corporate structure, particularly when there is no evidence to indicate that the secured party had any knowledge thereof. *Id.* at 671.

The record shows that Zions was aware of the transfer of assets from Nuclear to Summit before or shortly after it occurred. Inasmuch as the security agreements and financing statement of First Security pertaining to the assets of Nuclear were matters of public record at the time of the transfer, Zions had constructive notice of First Security's prior security interest in the transferred assets. Further, First Security alleges the facts will show that Zions had actual knowledge of First Security's prior security interest in the transferred assets at or near the time of transfer.

Therefore, the filing by First Security of the Summit security agreements and financing statement was not necessary to notify Zions, but the filing was done for the purpose of giving the public additional notice of First Security's interest in the transferred assets.

C. The Language Contained In First Security's Agreements With Summit And The Financing Statement Relating Thereto Does Not

Affect First Security's Prior Security Interest In The Transferred Assets.

The language inserted into the security agreements between Summit and First Security merely indicates that First Security was not attempting to claim a superior position in the assets of Summit "*presently* subject to security interest of Zions First National Bank" (language taken from financing statement). [Emphasis added.] In other words, First Security was not claiming a first priority security interest in those assets of Summit which were *NOT* transferred from Nuclear.

The principle of preserving a lien solely in transferred assets was reiterated by this Court in *Inter Mountain Association of Credit Men* v. *The Villager, Inc., supra*:

> Section 16-10-71(e) U. C. A., 1953, as amended 1961, does not extend the lien upon the property of a constituent corporation to the property of the other constituents or the survivor but merely prohibits the impairment of the lien upon the property of the constituent by the merger. *The statute indicates an intent that property acquired solely in connection with the business of a particular predecessor be treated as though acquired by the predecessor, and be subject to the lien of that predecessor's mortgage to the same extent as if it were continuing.* If the lien upon the property of the constituent corporation were extended as urged by defendant, the rights of the creditors of the other constituent corporations would be impaired as a result of the merger in violation of the express provisions of the statute. *Id.* at 672. [Emphasis added.]

Thus, First Security *could not* and did not claim an interest in the accounts receivable held by Summit *prior* to the transfer.

[It should be noted that discovery may show the so-called "transfer" was a constructive merger in which case the provisions of Section 16-10-71(e) U. C. A., 1953, as amended 1961, would be directly applicable.]

D. First Security Has A Security Interest In Any Cash And Non-Cash Proceeds Arising Out Of The Sale Of The Transferred Assets.

Not only does First Security have a security interest in those assets transferred from Nuclear to Summit, but First Security also has a continuing security interest in the proceeds arising from the sale of such assets. As stated in 70A-9-306(2) U. C. A., 1953:

> (2) Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and *also continues in any identifiable proceeds including collections received by the debtor.* [Emphasis added.]

First Security's security agreements with Nuclear and the financing statement relating thereto covered all proceeds from Nuclear's inventory or accounts receivable. Neither Nuclear nor First Security has received any proceeds from the sale of the transferred assets. These proceeds have all been appropriated by Zions.

The proceeds from the transferred assets in which First Security has a first priority position are identifiable and can be traced by the trier of fact. Tracing in this matter would be no more difficult than in other cases where funds have been traced through bank deposits. In *Brown & Williamson Tobacco Corp.* v. *First National Bank of Blue Island*, 504 F. 2d 998, (7th Cir. 1974), the the court, when faced with a similar tracing problem, stated:

> Blue Island [Bank] urges us to follow a statement by Professor Grant Gilmore that proceeds cease to be identifiable when deposited in a bank account, so that the security interest is lost when such commingling occurs . . . Nevertheless, examining the language of the Code, in the light of its purpose, *we conclude that the more reasonable implication is that the proceeds may be identifiable, and the security interest therein survive, even though commingled. Id* at 1002. [Emphasis added.]

In *Universal C. I. T. Credit Corp.* v. *Farmers Bank of Portageville*, 358 F. Supp. 317 (E. D. Mo., 1973), the court upheld a security interest in cash arising out of the sale of automobiles and deposited in the automobile dealer's bank account. The court held:

> The mere fact that the proceeds from the sales of the six automobiles were commingled with other funds and subsequent withdrawals were made from the commingled account does not render the proceeds unidentifiable . . . *Id.* at 324.

In *Howarth* v. *Universal C. I. T. Credit Corporation*, 203 F. Supp. 279 (W. D. Pa., 1962), the court assumed that if proceeds of collateral could be traced into a bank account, such proceeds are deemed to be identifiable and subject to a continuing security interest.

The traceability of the proceeds of the transferred assets is a factual question which must be decided by a trial court.

POINT III.

ZIONS DOES NOT HAVE TO THIS DATE AN ATTACHED AND PERFECTED SECURITY INTEREST IN THE TRANSFERRED ASSETS OR IN THE CASH AND NON-CASH PROCEEDS ARISING THEREFROM.

To be valid, a security interest must attach to the collateral. Section 70A-9-204(1) U. C. A., 1953, provides that a security interest attaches where: 1. the debtor has rights in the collateral; 2. value is given; and 3. there is an agreement that it attach. Zions' claimed security interest fails on all three counts.

1. The extent of Summit's rights in the transferred assets is a genuine issue of fact. There is much uncertainty as to what exactly happened on or about January 1, 1974, when over $2,000,000.00 worth of assets were transferred from Nuclear to Summit without any apparent physical movement of goods or without any apparent

consideration paid. This entire matter must be explored through additional discovery.

2. Zions' security interest did not attach to the transferred assets and/or any proceeds arising therefrom because Zions gave no value in exchange for a security interest in these assets.

The record shows that Zions made its loan (gave value) to Summit in December 1972. It is undisputed in the record that after the transfer of January 1, 1974, Zions advanced no new funds to Summit in reliance upon these transferred assets or otherwise.

Zions argued in the lower court that its security interest contained an after-acquired property clause and the original loan given in 1972 was in consideration not only for Summit's existing inventory and accounts receivable but also for any after-acquired inventory. However, this after-acquired property clause cannot apply to the transferred assets because *these assets were not acquired by Summit in the ordinary course of its business.* Even though the security agreement contains an after-acquired property clause, unless the after-acquired property is acquired in the debtor's ordinary course of business, a security interest will not attach. 70A-9-108 U. C. A., 1953, states:

> *When After-Acquired Collateral Not Security for Antecedent Debt.*—Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security

> interest in *the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in the collateral either in the ordinary course of his business* or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. [Emphasis added.]

In the case at bar, Zions made an advance and gave value which was to be secured in part by after-acquired property. Under 70A-9-108 U. C. A., 1953, Zions' security agreement in the after-acquired property can only be deemed to be taken for new value if Summit acquired its rights in such collateral in the ordinary course of its business. The record shows that the transfer was not in the ordinary course of business. A book transfer of $2,097,184.00 worth of inventory consisting mostly of raw materials, work in process and assembly machinery, made in conjunction with a shift of Summit's business from a marketing entity to a manufacturing entity was obviously not in Summit's ordinary course of business. Therefore, Zions gave no value for its claimed security interest in the transferred assets.

3. Zions' security interest did not attach to the transferred assets and/or any proceeds arising therefrom because Summit and Zions neither agreed nor intended that Zions' security interest attach to assets which were not acquired in Summit's ordinary course of business.

Zions and Summit signed a security agreement in which they agreed that Zions' security interest should

attach to inventory and accounts receivable, including certain after-acquired property. However, there was no agreement or intent that the term "after-acquired property" encompass the transferred assets and any proceeds arising therefrom. Parties to a security agreement must intend that the security agreement attach to particular after-acquired property. The intent of the parties is crucial in giving meaning to after-acquired property clauses.

2 Gilmore, *Security Interest in Personal Property*, Section 35.5, page 931-932 (1965), discusses the circumstances under which future transactions may be secured under an earlier made agreement. After acknowledging that U. C. C. 9-204(5) makes after-acquired property clauses valid under some circumstances, Gilmore goes on to state:

> However, "covered by the security agreement" is to be read, Section 9-204(5) should certainly not be taken to overrule the so-called "dragnet" cases under the pre-Code law. Legitimate future advance arrangements are validated under the Code, as indeed they generally were under pre-Code law. This useful device can, however, be abused; *it is abused when a lender, relying on a broadly drafted clause, seeks to bring within the shelter of his security arrangements claims against the debtor which are unrelated to the course of financing that was contemplated by the parties.* In the "dragnet" cases, the courts have regularly curbed such abuses. No matter how the clause is drafted, the future advances, to be covered, must "be of the same class as the primary obligation . . . and so related to it that

> the consent of the debtor to its inclusion may be inferred." The same test of "similarity" and "relatedness," vague but useful, should be applied to Section 9-204(5). [Emphasis added.]

An analagous case to the present situation is *John Miller Supply Company, Inc.* v. *Western State Bank,* 199 N. W. 2d 161 (Wis., 1972), which involved a dispute between two secured creditors over the interpretation of an after-acquired property clause (floating lien). The court ruled that the intent and contemplation of the parties was important in interpreting after-acquired property clauses:

> A "floating lien" security agreement will be effective according to its own terms, but only if those terms or the course of dealing of the parties evidence that the real intent of the parties was that their subsequent transactions be covered by the terms of the security agreement. In the instant case, *there is nothing to show that the parties ever intended that their security agreement would apply to future contingent liability on executory contracts* between the parties and which were not similar and not related directly to the transaction set forth in the original security agreements. *Id.* at 165. [Emphasis added.]

Even though Zions' security agreement contains small print boiler plate language which defined inventory as, among other things, ". . . raw materials, work in process . . . ," an examination of the real intent of the parties disclosed something quite different. Zions did not intend to rely on Summit's acquisition of Nuclear's transferred

inventory and other assets or the resulting accounts receivable when Zions made the loan in 1972. At the time Zions made its loan, Summit was not an affiliate of Nuclear and was solely engaged in *marketing* hand calculators. Manufacturing activities by Summit were never contemplated by either Summit or Zions. Summit's only inventory consisted of a small supply of finished goods. It had no work in process, component parts, raw materials or assembly machinery. As Zions could not anticipate the fact that Summit would acquire the transferred assets, Zions was not relying on that transfer when its loan was made. The Record shows that Zions looked only to accounts receivable and gave no collateral value to Summit's inventory.

POINT IV.

THE BULK TRANSFER LAW IS NOT APPLICABLE TO THIS CASE WHICH CONCERNS PRIORITIES OF SECURITY INTERESTS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE.

Zions asserted in the lower court that First Security's remedy in this situation was under the Bulk Transfer Law and that First Security's decision not to exercise any remedy it may have had under that section of the Commercial Code (Article 6) estopped any further action. However, whatever remedies First Security has or might have had under the Bulk Transfer Law are irrelevant and

immaterial to this case. A dispute between two secured creditors is governed by the provisions of Article 9 of the Uniform Commercial Code which deals with secured transactions (70A-9-101 et seq. U. C. A., 1953).

The limitation of actions section of the Bulk Transfer Law, 70A-6-111 U. C. A., 1953, specifically states:

> *Limitation of Actions and Levies.*—No action *under this chapter* shall be brought nor levy prior to judgment made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery. [Emphasis added.]

Since the present action is being brought under Article 9 and not Article 6, the Bulk Transfer Law has no force or effect. Official Comment 2 of 70A-6-103 U. C. A., 1953, states regarding the Bulk Transfer Law:

> In this code, security interests of all kinds are regulated by Article 9, Secured Transactions. Subsection (1) of this Section therefore excludes all transfers for security from the operation of this Article.

In its treatment of the Bulk Transfer Law, White & Summers' treatise, *Uniform Commercial Code*, West Publishing Company, 1972, states on page 656:

> Any remedies that secured creditors of the trans-

feror may have under Article 9 (or other law) against assets transferred are not affected by Article 6.

Therefore, any reliance by Zions on the Bulk Transfer Law in this case is misplaced.

CONCLUSION

I. THE LOWER COURT'S GRANTING OF ZION'S MOTION FOR SUMMARY JUDGMENT IS REVERSIBLE ERROR IN THAT THERE ARE GENUINE AND MATERIAL ISSUES OF FACT AND IN THAT THERE ARE AREAS WHERE ADDITIONAL DISCOVERY IS REQUIRED, I.E.:

A) What was the true nature of the "transfer" from Nuclear to Summit?

B) What role, if any, did Zions play in engineering the transfer?

C) What was the intent of the security agreement between Zions and Summit?

D) What did Zions know about First Security's security interest in the transferred assets at the time of transfer?

E) When did Zions learn about First Security's security interest in the transferred assets?

F) Why did Zions refuse to lend Summit any ad-

ditional money after the transfer when Summit's assets had nearly doubled?

G) When and how did Zions become aware of the First Security-Summit security agreement and the financing statement pertaining thereto which was filed on February 22, 1974?

H) Are the proceeds from the transferred assets identifiable and traceable?

I) Why did Zions allow the assets of Summit to be dissipated?

II. FIRST SECURITY HAS A FIRST PRIORITY POSITION IN THE TRANSFERRED ASSETS AND IN ANY CASH OR NON-CASH PROCEEDS ARISING THEREFROM AS A MATTER OF LAW.

A) Prior to the transfer of assets from Nuclear to Summit on or about January 1, 1974, it is uncontested that First Security had a first priority attached and perfected security interest in the transferred assets and in any proceeds arising therefrom.

B) First Security's security interest in the transferred assets and in any proceeds arising therefrom continued after the transfer from Nuclear to Summit.

C) Language in the Summit financing statement excepting "assets *presently* subject to security interest of Zions First National Bank" does not reduce or change

First Security's security interest in the transferred assets because the transferred assets were not presently subject to Zions' security interest.

D) The transferred assets were not subject to Zions' security interest for the following two reasons:

1. The transferred assets were subject to a pre-existing security interest of First Security through Nuclear; and

2. Zions did not have an attached and perfected security interest in the transferred assets.

E) Zions did not have an attached and perfected security interest in the transferred assets or any proceeds arising therefrom for the following three reasons:

1. Summit's rights in the transferred assets were and are uncertain;

2. Zions gave no value as required by law when after-acquired property is not acquired in the ordinary course of business; and

3. There was no agreement between Zions and Summit regarding a security interest in the transferred assets.

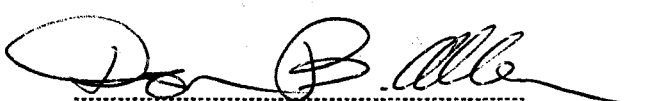
F) The proceeds from the assets of Summit existing at the time of the transfer and the proceeds from the transferred assets can be traced and identified by a trier of fact.

III. THE BULK TRANSFER LAW DOES NOT APPLY TO THIS CASE AND FIRST SECURITY IS NOT BARRED BY THE LIMITATION OF ACTIONS SECTION THEREOF.

DATED this 23rd day of April, 1975.

Respectfully submitted,

RAY, QUINNEY & NEBEKER



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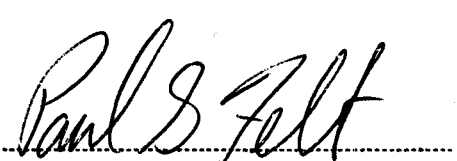

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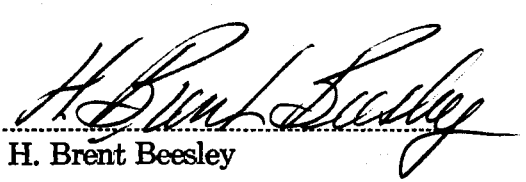

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