

2007

# McKay Dee Credit v. Mortgage : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MCKAY DEE CREDIT UNION,	)	
	)	
Appellant	)	
	)	Appellate Case No. 20070399-CA
v.	)	
	)	
FEDERAL HOME LOAN MORTGAGE)	)	
CORP., et al.,	)	
	)	
Appellees	)	

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REPLY BRIEF OF APPELLANT  
MCKAY DEE CREDIT UNION

APPEAL FROM THE DECISION AND ORDER  
OF THE SECOND JUDICIAL DISTRICT

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ORAL ARGUMENT REQUESTED

FILED  
UTAH APPELLATE COURTS  
FEB 06 2008

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None

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None

**I. THE CLAIM OF UNJUST ENRICHMENT IS BROADER THAN THAT WHICH HAS BEEN NARROWLY DEFINED BY APPELLEE.**

As an equitable remedy, unjust enrichment should not be narrowly construed. “[T]he doctrine of unjust enrichment was specifically developed to address situations that did not fit within a particular legal standard but which nonetheless merited judicial intervention.” Allen v. Hall, 148 P.3d 939, 945 (Utah 2006).

Unjust enrichment is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for the property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition, directly or indirectly, to public policy; unjust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.

27 A.L.R.5th 719 § 2(a). The above description of unjust enrichment is persuasive as it relates to this case because Freddie Mac (and GMAC) received a large windfall as a result of being unjustly enriched by circumstances that are directly attributable to McKay Dee Credit Union. Therefore, Freddie Mac should be required to return the benefit it received from McKay Dee Credit Union.

“To prove ... unjust enrichment, appellant must show, among other things, that appellees received a benefit “under circumstances that would make it unjust for the defendant to retain the benefit without paying for it.” See, Geothermal Co. v. Far West Capital, WL 463187 quoting Bailey-Allen Co. v. Kurzet, 945 P.2d 180, 189 (Utah Ct.App.1997)

In this case, the circumstances make it absolutely unjust for Freddie Mac to retain the windfall that it obtained from McKay Dee Credit Union. In reasonably

relying upon the information provided to them about the postponement of the trustee's sale McKay Dee was unable to defend its second trust deed position and the Appellees were able to purchase the Property as the only bidder for the amount of \$183,344.61. By their own admission the Appellees were able to then sell the Property for the approximate amount of \$269,900.00. See, Bench Trial Transcript, p. 8, lines 3-7. Therefore, the benefit conferred upon the Appellees was the profit of \$86,555.39 that Appellees received in selling the Property.

Because the fact patterns in unjust enrichment cases are generally complex and varying, the court is afforded broad discretion with respect to determination that a set of facts does or does not warrant conclusion that unjust enrichment has been shown. See, Restatement of Restitution, Intro. n. (1937). In fact, the court in Bailey-Allen Co. v. Kurzet, 945 P.2d 180 (Utah App. 1997) affirmed the trial court's award of one-half of the benefit received to be proper measure of damages in an unjust enrichment case. In other words, because unjust enrichment an equitable remedy, the court can apply equitable principles to make sure that an equitable result is obtained.

While the courts have established that there are three elements of unjust enrichment, these elements are to be construed in an equitable light and to be liberally construed. For example, in Allen v. Hall, 148 P.2d 939 (Utah 2006), the court stated, "The facts underlying unjust enrichment claims vary greatly from case to case, and the doctrine of unjust enrichment was specifically developed to address situations that did not fit with any particular legal standard but which

nonetheless merited judicial intervention.” Id. at. 945. This statement was given as guidance by the Utah Supreme Court to not construe narrowly the elements of unjust enrichment in order to achieve equity and justice.

Unjust enrichment is an equitable principle and takes special note of misleading acts of the parties involved.

The mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. There must be some misleading act, request for services, or the like, to support such an action.

See, Knight v. Post, 748 P.2d 1097, 1101 (Utah Ct.App.1988) quoting Commercial Fixtures and Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977).

A significantly misleading act is present in this case. In April of 2001, McKay Dee received a notice of trustee’s sale from the first lienholder that the Property would be sold at trustee’s sale on May 15, 2001. See Record, Plaintiffs Exhibit 12.

McKay Dee prepared itself to defend its position by issuing a check in preparation to attend the trustee’s sale and bid on the Property. See Bench Trial Transcript page 40. When McKay Dee called the sales line provided for in the notice of trustee’s sale, to ascertain the status of the May 15, 2001 sale McKay Dee was advised that the sale had been postponed until May 18, 2001 to be held at the same time and same location. See Bench Trial Transcript page 41. Again, McKay Dee prepared itself to defend its position by issuing a check and attending the postponed sale on May 18, 2001. But nobody was at the sale. See Bench Trial Transcript pages 41-42. In reasonably relying upon the information provided to

them about the postponement of the trustee's sale McKay Dee was unable to defend its position and the property was sold to the beneficiary of the first deed of trust. Thus, Freddie Mac acquired property as the only bidder for the amount of \$183,344.61 (see Trustee's Deed p.2, Defendants Exhibit #1) when that property was worth at least \$269,900.00, the amount of Freddie Mac's sale to a third party. Therefore, the benefit conferred upon Freddie Mac was the profit of \$86,555.39 that Appellants received in eventually selling the property. See Bench Trial Transcript page 15, lines 13-14.

The trial court was concerned by the by the windfall received by Freddie Mac:

“THE COURT: Well, and the other things is, I mean apparently Freddie Mac's the only one that shows up, they buy the property for 183,000 and turn around and sell it for 269 and again, I mean that's a windfall for Freddie Mac, right, 80 something thousand dollars? And I get the impression that it's okay for us to get that benefit. But, you know if you really want to sue somebody it's not us. We're not involved. It's somebody else's fault and again I'm struggling with this concept that it's okay for Freddie Mac to reap the benefits of this windfall, but we're not responsible for anything I mean it just - ” See, Bench Trial Transcript page 14, lines 10-20.

Clearly the extra benefit received by Freddie Mac is bothersome to more than just the Appellant.

With regard to the three elements of unjust enrichment, such are clearly met in this case. These elements include 1) a benefit conferred on one person by another; 2) appreciation or knowledge by the conferee of the benefit; and, 3) the acceptance or retention by the conferee of the benefit under such circumstances as



to make it inequitable for the conferee to retain the benefit without payment of its value. In this situation McKay Dee Credit Union conferred a benefit upon Freddie Mac and GMAC because Freddie Mac and GMAC not only obtained the value of McKay Dee Credit Union's second trust deed position in the subject property, they also obtained a substantial profit above and beyond that. The Appellees clearly knew of the benefit conferred upon them by McKay Dee Credit Union because they knew that they had purchased the property for the amount of the original loan that did not include any amounts to a second lien holder. First lienholders are very conscious of whether or not second lien holders attend a sale. The fact that certain equity may be available to the foreclosing party is always a part of the analysis. Finally, Freddie Mac and/or GMAC retained the benefit without payment to McKay Dee Credit Union of the value of the benefit. See, Bench Trial Transcript page 15, lines 13-14. The facts and circumstances show that Appellees benefited from this situation and the amount in excess of \$86,000.00. That the benefit, upon Appellees by McKay Dee Credit Union's non-attendance at the actual sale which was induced by Appellants and their agent. Appellees received a benefit which directly results from McKay Dee's non-attendance at the sale and which was precipitated by the conduct of Appellees or its agent as to the misinformation of the postponed sale date.

As to a potential wrongful foreclosure claim, such an argument is irrelevant because the Trustee who may have conducted a wrongful foreclosure is an agent of the Appellees and did not receive any of the benefit which was conferred upon

the Appellees. McKay Dee chose to prosecute its claim against the party who received the monetary benefit from the misinformation as to the postponed sale date. Moreover, the Appellees are responsible for the conduct of their agent at the sale and therefore it is irrelevant. In addition, it is also irrelevant that McKay Dee obtained a separate judgment against the Calls. Had McKay Dee not sought a judgment from the Calls, there would be a failure to mitigate argument. McKay Dee's causes of action as they relate to Appellees are independent and separate from the claims of which they have as they relate to the Calls. Moreover, the damages available against the Calls were limited by the amount of the promissory note. The damages which McKay Dee suffered as a result of Appellants' unjust enrichment are of significantly greater value.

**II. APPELLANT HAS PROPERLY MARSHALED THE EVIDENCE**  
**RELATING TO THE CHALLENGED FINDING OF FACT.**

Appellee argues that McKay Dee must marshal the evidence regarding the trial court's finding of fact which is challenged. Finding of Fact number four states "it is not clear to this Court if Mr. Shirra wrote the wrong date for the sale down, or if GMAC provided the wrong date." See, Finding of Fact #4. The only evidence in the record which supports this conclusion is as follows:

Q: "But it's also possible that you wrote down the incorrect date, correct?"

A: "There is that possibility."

See, Bench Trial Transcript, page 54, lines 21 to 23.

The testimony which the trial court had to be weighed against the above evidence and which the trial court apparently ignored is as follows:

Mr. Shirra stated: “The sale date ended on this notice is May 15 of 2001, 11:30 a.m. on that date both John and I attended the sell prepared to bid on the sale and as instructed we had a \$5,000.00 certified check, to proceed with bidding on the sale.

Q: “And what happened when you arrived at the sale?”

A: “There was nobody there.”

Q: “When nobody was there, were you concerned?”

A: “Can’t say I was overly concerned. It happened several times before.”

Q: “What did you do after returning back to the office?”

A: “Came back to the office, contacted the sale hotline, which again is advertised in this document. I was given the date that the sale was rescheduled for 5/18, May the 18<sup>th</sup>, which is three days later.”

Q: “And did you write that information on the Notice of Trustee Sale?”

A: “I did. I have it noted here in my handwriting.”

Q: “Therefore, did you receive any notice of a sale to be held on May 18, 2001?”

A: “No, I didn’t.”

Q: “Did you attend the sale that –

A: “I attended the sale on May the 18<sup>th</sup> at 11:30 a.m.”

Q: “And was anybody there?”

A: “No”

See, Bench Trial Transcript, page 40, lines 15 to Page 41, line 25.

The fact that Mr. Shirra had later mentioned in the trial that it was “possible” that he wrote the wrong sale date down as a result of cross-examination is insufficient information for the court to conclude as it did. His explanation of a possibility was in terms of the context in which counsel put the question to him which was basically that anything is possible. However, it is clear from Mr. Shirra’s direct examination that his best recollection is that he wrote down what information he was told on the sale line.

Additional testimony contrary to findings of Fact #4 is as follows:

Q: “Looking at Plaintiff’s Exhibit 12 as well, there’s handwriting on that exhibit that indicates the sale date, or indicates the date of May 18, 2001, Correct?”

A: “Correct.”

Q: “And that’s your handwriting, Correct?”

A: “It is.”

Q: “Is it possible that you could have written down the incorrect date for the sale?”

A: “I wrote that down and so I got it from the sale line.”

See, Bench Trial Transcript, page 54, lines 5 through 15.

The trial court did not properly weigh the evidence based upon the “preponderance of the evidence” standard. Preponderance of the evidence means

whichever evidence is of the greater weight and which is most convincing and satisfactory. See, MUJI 2.18. When the evidence submitted by Mr. Shirra that he recalls hearing the sale line tell him that the date was May 18<sup>th</sup> is weighed against his statement upon cross-examination that it was merely possible that something else could have happened, the better conclusion is that which is contained in his direct examination. Because this is the only evidence weighing against Mr. Shirra's direct testimony, it should not carry the greatest weight. The evidence is the record does not show Mr. Shirra's prior testimony should be completely discounted by the court based merely upon a question presented on cross-examination which was not developed any further.

Because the only evidence which could possibly support the Court's Finding of Fact #4 is Mr. Shirra's testimony that it was possible he wrote the wrong date down rather than heard it wrong, Appellant has sufficiently marshaled the evidence. That statement which was mentioned in Appellant's Opening Brief satisfied McKay Dee's burden to marshal. See, West Valley City v. Majestic INV. CO. 818 P.2d 1311, 1315 (Utah App. 1991). That is the only scrap of evidence which purportedly supports Finding of Fact #4. When all of the evidence is concerned relating to this issue, it is clear that Mr. Shirra's best recollection was that he did hear the information from the sales line, not the remote possibility that he might have written down the wrong date. In any event, it is also very important to note that Appellees did not submit any evidence to the contrary relating to Mr. Shirra's testimony. There was no evidence that came in at the trial court to

contradict Mr. Shirra's best recollection regarding the information he received from the sale line.

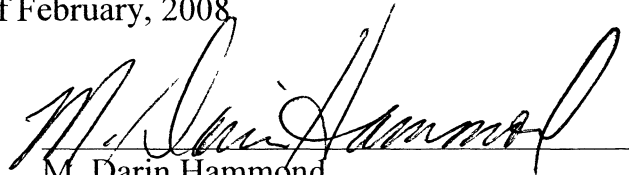
In addition, there is no contrary evidence that was submitted by Defendants at the trial to contradict the testimony of Mr. Shirra as to his best recollection of having written down that information upon being told by the sale line. Appellees assert that the Trustee actually came to the sale location and postponed the sale on May 15, 2001. See, Appellees' Brief page 3. However, the Appellees did not submit any evidence which supports the assertion that the Trustee actually did attend the sale to postpone it. Appellants burden at trial was to show by a preponderance of the evidence the validity of the facts supporting their claims. Clearly the statement that it was a "possibility" fits within the scope of the preponderance of the evidence standard. Mr. Shirra's statement of a possibility does not reduce the fact that the McKay Dee Credit Union had met its burden to show that it was more likely than not that the wrong sale date was given by the sale telephone line.

### **CONCLUSION**

In conclusion, unjust enrichment is an equitable theory which should be applied in a flexible manner. The Appellees received a substantial benefit from McKay Dee Credit Union as a result of McKay Dee Credit Union's non-attendance at the sale which was precipitated by the wrong information set forth by Appellees' agent. Appellant respectfully requests that the court apply equitable

principles in this matter to remand this case to the trial court to reverse the findings of the trial court to conform to the evidence and to apply properly the unjust enrichment case law.

DATED this 5 day of February, 2008.


A handwritten signature in black ink, appearing to read "M. Darin Hammond", written over a horizontal line.

M. Darin Hammond  
*Attorneys for Appellant.*

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed by first-class mail with postage fully prepaid this 10th day of February, 2008, to each of the following:

Scott Lundberg  
Lundberg & Associates  
3269 S. Main Street, Suite 100  
Salt Lake City, UT 84115

  
\_\_\_\_\_  
Legal Assistant



**ADDENDUM**

<b>BENCH TRIAL TRANSCRIPT EXCERPTS .....</b>	<b>A</b>
<b>APPELLEE’S BRIEF EXCERPT.....</b>	<b>B</b>
<b>FINDING OF FACT EXCERPT.....</b>	<b>C</b>
<b>TRUSTEE’S DEED P. 2.....</b>	<b>D</b>
<b>PLAINTIFF’S EXHIBIT 12 .....</b>	<b>E</b>

1 Memorandum in Opposition that this profit is the benefit  
2 conferred upon the defendants - that the benefit conferred  
3 upon the Defendants was \$86,000. But the key for the, for  
4 our summary judgment motion purposes is plaintiff did not pay  
5 this amount to the defendants and this is admitted in its  
6 Memorandum in Opposition. This amount, this \$86,000, if this  
7 is the benefit, because I really don't understand what the  
8 benefit is, this amount was paid by a third party purchaser,  
9 not the plaintiff. Based on that, Plaintiff can't argue that  
10 it conferred a benefit upon the defendants and again, the  
11 summary judgment should be issued.

12 Further, pursuant to Rule 56 and as stated earlier,  
13 we began by looking at the pleadings. Now we can look at the  
14 depositions and Affidavits of Plaintiff to show that no  
15 benefit was conferred by the plaintiff upon the defendants.  
16 Plaintiff in this Motion for Summary Judgment has failed to  
17 show any evidence or support in its Memorandum in Opposition  
18 that plaintiff conferred a benefit upon the defendants. In  
19 our Motion for Summary Judgment defendants filed Affidavits  
20 by Freddie Mac and GMAC supporting the fact that plaintiff  
21 did not confer a benefit upon them. However, we look at the  
22 Affidavit of Mr. Cameron Shirra, the Affidavit filed by  
23 Plaintiff in Support of its Motion for Opposition, nowhere is  
24 it mentioned or asserted in this Affidavit that plaintiff  
25 conferred a benefit upon the defendants. It says nothing to

1 admissions they've, they've only alleged one cause of action  
2 against GMAC and Freddie Mac. They've alleged a separate  
3 cause of action against First American Title Insurance  
4 Agency, the Trustee, but they have not been served.

5 If they need to dismiss this case and file a  
6 separate action, maybe that's what they need to do. But by  
7 their own admissions they've only alleged one cause of action  
8 against GMAC and Freddie Mac. They haven't, and like I said  
9 they haven't served First American Title Insurance Agency.

10 THE COURT: Well, and the other thing is, I mean  
11 apparently Freddie Mac's the only one that shows up, they buy  
12 the property for 183,000 and turn around and sell it for 269  
13 and again, I mean that's a windfall for Freddie Mac, right,  
14 80 something thousand dollars? And I get the impression that  
15 it's okay for us to get that benefit. But, you know if you  
16 really want to sue somebody it's not us. We're not involved.  
17 It's somebody else's fault and again I'm struggling with this  
18 concept that it's okay for Freddie Mac to reap the benefits  
19 of this windfall, but we're not responsible for anything. I  
20 mean it just -

21 MR. DEHAAN: It is a windfall. It is a benefit. I  
22 think under the foreclosure rules that's allowed. They  
23 follow every statutory -

24 THE COURT: [inaudible] but Mr. Hammond's going to  
25 tell us, you know, if we got it right, if we'd known when the

1 day of the sale is we'd have been there to bid on that  
2 property too, and I don't know maybe they would have outbid  
3 Freddie Mac. I don't know.

4 MR. DEHAAN: Yeah, that's what their argument is.

5 THE COURT: Shouldn't they have been given the  
6 opportunity to be there?

7 MR. DEHAAN: That's what their argument is. But  
8 like I said, there's no finding for wrongful foreclosure  
9 filed against GMAC Mortgage or Freddie Mac by plaintiff's own  
10 admissions.

11 In addition, even if we were to go there the  
12 windfall, I'm confused as to what benefit plaintiffs  
13 conferred upon the defendants. The windfall, the \$86,000  
14 profit, wasn't paid by the plaintiff. It was paid by a third  
15 party purchaser. I don't see how they can come in and say  
16 because you received this profit we, although we didn't pay  
17 it, you should pay us for, for the loss that we have, despite  
18 the fact that we've already got a judgment against the  
19 borrower's for \$25,000. The Supreme Court under an unjust  
20 enrichment claim says, you know, it's an equitable remedy,  
21 unjust enrichment. It's when no other remedies sort of fit  
22 the fact matter.

23 Here there's a breach of contract claim already  
24 been filed and entered in favor of the plaintiff and they've  
25 collected probably close to \$20,000 on this.

1 attended?

2 A Yes.

3 Q Did you do anything else to identify whether or not  
4 the sale had been conducted, other than contact the  
5 telephone, that telephone number?

6 A Well, as I indicated, I think I was informed that  
7 we would be notified when it was rescheduled so we just  
8 received payments and continued on with the loan.

9 Q Okay, would you now take a look at Exhibit 12? Can  
10 you identify that document for the record?

11 A It is another Notice of Trustee Sale. It's dated  
12 April 12th, of 2001.

13 Q And what did you do when you received that Notice  
14 of Sale?

15 A The sale date ended on this Notice is May 15th of  
16 2001, 11:30 a.m. On that date both John and I attended the  
17 sale prepared to bid on the sale and as instructed we had a  
18 \$5,000 check, certified check, to proceed with bidding on the  
19 sale.

20 Q And what happened when you arrived at the sale?

21 A There was nobody there.

22 Q When nobody was there, were you concerned?

23 A Can't say I was overly concerned. It had happened  
24 several times before.

25 Q What did you do after returning back to the office?

1           A     Came back to the office, contacted the sale  
2 hotline, which again is advertised in this document. I was  
3 given the date that the sale was rescheduled for 5/18, May  
4 the 18th, which is three days later.

5           Q     And did you write that information on the Notice of  
6 Trustee's Sale?

7           A     I did. I have it noted here in my handwriting.

8           Q     So the date 5/15 of '01 has been circled?

9           A     5/15/01 has been circled. I'd drawn a line out to  
10 the side and written the date 5/18/01.

11          Q     Did you write the - any new time down?

12          A     No, I didn't write a time down on it.

13          Q     Why not?

14          A     I just, at the time assumed I would be prepared and  
15 go to the sale on 5/18 at the same time.

16          Q     Did the hotline tell you that it would be held at  
17 the same time of day?

18          A     It must have.

19          Q     Therefore, did you receive any written notice of a  
20 sale to be held on May 18th, 2001?

21          A     No, I didn't.

22          Q     Did you attend the sale that -

23          A     I attended that sale on May the 18th at 11:30 a.m.

24          Q     And was anybody there?

25          A     No.

1 Q What did you do when nobody was there at that sale?

2 A I returned to the credit union. I don't have the  
3 notes that I contacted the sale line or anything, however,  
4 the Call's had been making payments to the loan. I had  
5 received two payments to the loan that date. I assumed that  
6 it had been worked out with the Call's again and the loan was  
7 proceeding forth as before.

8 Q Did the Call's tell you that the loan had been  
9 worked out?

10 A I remember a conversation with David in which he  
11 said that he had worked out an agreement with them.

12 Q Would you take a look at Exhibit 13, please?

13 A Yes.

14 Q Can you identify that document for the Court?

15 A It is a check issued by the credit union and  
16 stamped as a certified check. It is dated 5/15/01. It is  
17 the check that I prepared to go to the sale on that date of  
18 5/15/01.

19 Q And -

20 A It's in the amount of \$5,000.

21 Q Did you use that check?

22 A When the sale did not take place I did not use the  
23 check. On the endorsement of the check I have written a  
24 notation "not used for purposes intended" and I would just  
25 re-process the check through our system to show that it was

1           A     On those dates and times, yes.

2           Q     And then you testified earlier that you attended  
3 the sale, when in fact you have no recollection of actually  
4 attending the sale on May 15th, 2001; is that your testimony?

5           A     That is, that is what I said.

6           Q     Looking at Plaintiff's Exhibit 12 as well, there's  
7 handwriting on that exhibit that indicates the sale date, or  
8 indicates the date of May 18<sup>th</sup>, 2001, correct?

9           A     Correct.

10          Q     And that's your handwriting, correct?

11          A     It is.

12          Q     Is it possible that you could have written down the  
13 incorrect date for the sale?

14          A     I wrote that down and so I got it from the sale  
15 line.

16          Q     I understand where you got it. Is it possible you  
17 wrote down an incorrect date?

18          A     I would say that there, any possibility. The same  
19 as the possibility of them having the wrong date.

20          Q     That's right, it's possible that that's the correct  
21 date. But it's also possible that you wrote down the  
22 incorrect date, correct?

23          A     There is that possibility.

24          Q     And that date is handwritten by you, correct?

25          A     That's right, uh-huh (affirmative).



The testimony of McKay Dee's primary witness, Mr. Shirra, was inconsistent and contradictory. For example, under direct examination Mr. Shirra stated that he attended the foreclosure sale on May 15, 2001. R. 303, Bench Trial Transcript p. 40. However, in his deposition and under cross examination, Mr. Shirra admitted that he could not say whether he went to the sale on that date. R. 303, Bench Trial Transcript pp. 52-53. In fact, in view of his testimony that he called the foreclosure trustee's bid line on that date, it is unlikely that he attended the sale. If he had, he would have heard the Trustee postponing the sale and known that the sale was to be held on May 17, 2001. He would not have had to call the hotline if he had heard the postponement of the sale on May 15, 2001.

This inability to accurately remember dates is important because it bolsters the admission Mr. Shirra made on cross examination. His testimony at trial under direct examination was that, when he called the sale hotline on May 15, 2001, he was given the date of May 18, 2001 as the new date for the foreclosure sale. R. 303, Bench Trial Transcript p. 41. However, when cross examined, Mr. Shirra admitted that he may have written down the wrong date. R. 303, Bench Trial Transcript p. 54. McKay Dee failed to mention this inconsistency and explain its importance to Mr. Shirra's admission on cross examination. Since this was important evidence bearing on the question of whether the trial court's finding was in error, and it was not marshaled by McKay Dee, McKay Dee failed in its duty to comprehensively present every scrap of evidence introduced at trial that supported the trial court's findings.

### **FINDINGS OF FACT**

1. The mortgage foreclosure sale was originally set for May 15, 2001. McKay Dee Credit Union personnel believed the date of sale was moved to May 18, 2001. Mr. Shirra, Vice-President of McKay Dee Credit Union, called the sale telephone line and wrote down the date of May 18, 2001 on the Notice of Trustee's Sale.
2. Mr. Shirra testified that he thought the date of the foreclosure sale was May 18, 2001, but admitted on cross-examination that it was possible he wrote the wrong sale date down.
3. The foreclosure sale was actually held on May 17, 2001.
4. It is not clear to this Court if Mr. Shirra wrote the wrong date for the sale down, or if GMAC provided the wrong date.
5. The Court finds the Plaintiff conferred no benefit on Defendants.
6. Plaintiff did not pay money or provide any benefit directly to Defendants. Plaintiff paid nothing to the Defendants.
7. Any benefit received by Defendants was conferred by Defendant's own effort in completing the foreclosure sale.
8. The Court finds that it is speculation on the part of Plaintiff that it would have received any excess proceeds.
9. There is no way to determine if Plaintiff would have prevailed at the foreclosure sale in any event, and no way to determine if Plaintiff would have been the successful

Loan #010621662

TS# UT-52410-C

WHEREAS. the successor Trustee did, at the time and place of sale, then and there sell, at public auction to Grantee above named, being the highest bidder thereof, the property described, for the sum of \$183,344.61

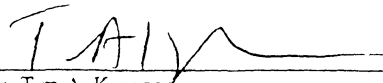
NOW, THEREFORE, the successor Trustee, in consideration of the premises recited and of the sum above mentioned bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority in him, by said Trust Deed, GRANT AND CONVEY unto Grantee above named, but without any covenant or warranty, express or implied, all that certain property situate in WEBER County, State of Utah, described as follows:

**ALL OF LOT 37, HIGHLANDS BLUFF ESTATES SUBDIVISION. PHASE 4, WEBER COUNTY, UTAH, ACCORDING TO THE OFFICIAL PLAT THEREOF.  
07-398-0001**

Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property

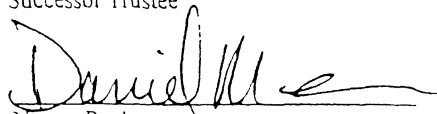
Date: May 22, 2001

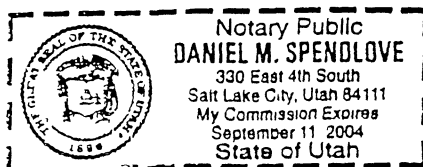
First American Title Insurance Agency, Inc  
Successor Trustee

  
By Tim A. Krueger  
Its Director of Foreclosure, REO

State of Utah            )  
County of Salt Lake    )

On the May 22, 2001, personally appeared before me, Tim A. Krueger who being duly sworn did say, that he, the said Tim A. Krueger, is the Director of Foreclosure/REO of First American Title Insurance Agency, Inc, the corporation that executed the foregoing instrument as Successor Trustee, by authority of a resolution of its Board of Directors, and said Tim A. Krueger duly acknowledged to me that said corporation executed the same as Successor Trustee

  
Notary Public



EXECUTIVE TRUSTEE SERVICES, INC.  
15455 SAN FERNANDO MISSION BLVD  
SUITE #208  
MISSION HILLS, CA 91345

T.S.# UT-52410-C  
Loan # 010621662  
Title Order # 563538

5-18-01

NOTICE OF TRUSTEE'S SALE

The following described real property will be sold at public auction to the highest bidder payable in lawful money of the United States AT THE ENTRANCE TO THE COURTHOUSE LOCATED AT 2525 GRANT AVE., OGDEN, UT 84401, on 5/15/2001 at 11:30 AM for the purpose of foreclosing a Trust Deed dated 1/31/96 and executed by DAVID R. CALL AND JULIE S. CALL HUSBAND AND WIFE in favor of BANK OF UTAH, covering the following real property located in WEBER County:

ALL OF LOT 37, HIGHLANDS BLUFF ESTATES SUBDIVISION. PHASE 4, WEBER COUNTY, UTAH, ACCORDING TO THE OFFICIAL PLAT THEREOF.  
A.P.N. 07-398-0001

Together with all the improvements now or hereafter erected on the property and all easements, appurtenances and fixtures now and hereafter a part of the property

The address of the property is purported to be 2058 EAST 6225 SOUTH SOUTH OGDEN, UTAH 84403. The undersigned disclaims liability for any error in the address. The present owners reported to be DAVID R. CALL and JULIE S. CALL.

Bidders must be prepared to tender to the trustee \$5,000.00 at the sale and the balance of the purchase price by 12:00 noon the day following the sale. Both payments must be in the form of a cashier's check or certified funds. Cash is not acceptable.

Sale Line: (818) 361-6998

Dated. April 12, 2001

FIRST AMERICAN TITLE INSURANCE  
AGENCY, INC.

  
\_\_\_\_\_  
Tim Krueger, Director-Foreclosure & REO

THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT, AND  
ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

P000001