

2000

# W. Tustian, Trustee, Snowbird Trust v. Karen H. Schriever, Deere Credit Services, Brent Madsen, First District Court : Reply Brief

Utah Supreme Court

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Paul W. Werner; Mark E. Hindly; Stoel Rives; Alyson Draper; Nalder Stratford and Draper; Attorney for Appellee.

William D. Marsh; Attorney for Appellants.

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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W. TUSTIAN, TRUSTEE, SNOWBIRD TRUST	:	APPELLANT'S REPLY BRIEF
Plaintiff/Appellee	:	
vs.	:	
KAREN H. SCHRIEVER	:	Case No. 20000245-SC
Defendant/Appellant	:	District Ct. No. 980100263
	:	
DEERE CREDIT SERVICES, BRENT MADSEN, FIRST DISTRICT COURT	:	Argument Priority 15
Defendant/Appellees.	:	

---

APPEAL FROM FIRST DISTRICT COURT IN AND FOR BOX ELDER COUNTY  
JUDGE CLINT S. JUDKINS

---

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Attorney for Appellee Owen  
Tustian.

**FILED**

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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W. TUSTIAN, TRUSTEE, SNOWBIRD :  
TRUST : APPELLANT'S REPLY BRIEF  
Plaintiff/Appellee :

vs. :

KAREN H. SCHRIEVER : Case No. 20000245-SC  
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DEERE CREDIT SERVICES, BRENT :  
MADSEN, FIRST DISTRICT COURT : Argument Priority 15  
Defendant/Appellees. :

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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W. TUSTIAN, TRUSTEE, SNOWBIRD TRUST	:	APPELLANT'S REPLY BRIEF
Plaintiff/Appellee	:	
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APPEAL FROM FIRST DISTRICT COURT IN AND FOR BOX ELDER COUNTY  
JUDGE CLINT S. JUDKINS

---

Appellant Karen H. Schriever submits the following Reply Brief in response to Deere Credit Service's Appellee Brief.

## ARGUMENT

POINT 1. THE EXCESS PROCEEDS IN DISPUTE HEREIN WERE DERIVED FROM THE TRUSTEE'S SALE OF REAL ESTATE NOT A MODULAR HOME.

Deere's initial representation to this court as to the "Nature of the Case" is disingenuous and designed to mislead the court. In the first paragraph on page 2 of Deere's Appellee Brief Deere represents:

This case involves the priority of the parties' claims over approximately \$25,000 in excess proceeds derived from a trustee's sale of a Modular Home (the "Excess Proceeds").

At issue is ownership of excess proceeds from a trust deed foreclosure sale of legally described real property--Tax ID 05-081-

0045. Neither the Notice of Trustee Sale [Rec. 50], Trustee's Deed (Rec. 118), nor Trustee, Melvin E. Smith's letter to the First District Court Clerk depositing the excess proceeds with the Court Clerk (Rec. 120-122) make any reference, whatsoever, to a "Modular Home." Copies of Notice, Deed and Letter are herewith attached as Addendum 1.

The record is clear, the excess proceeds were not from the sale of a Modular Home.

POINT 2. AT THE TIME OF THE TRUSTEE'S SALE THE MANUFACTURED HOME WAS ON A FOUNDATION AND WAS PHYSICALLY ATTACHED TO THE REAL ESTATE.

Deere questions Schriever's Statement of Fact No. 6, stating Schriever cites to no evidence for the proposition that the "home was placed on a foundation" and further asserts "There is nothing in the record to suggest that the Modular Home was physically affixed to the property." Counsel's distortion of the record cannot go unchallenged.

The Court's attention is directed to Deere's "Notice Of Claim To Sale Proceeds" and its "First Amended Notice of Claim To Sale Proceeds" wherein Deere's own Attorney alleges in Paragraph 7 of each document:

7. Subsequently, Pinnacle/Outlook moved the Modular Home from its sales offices and attached it to the real property owned by Pinnacle/Outlook located at 10025 North 6800 West, Tremonton, Utah (the "Subject Property") (Emphasis added). [Rec. 233-238, ¶7 and Rec. 255-260, ¶7].

The court's attention is further directed to the affidavit of Owen Tustian [Rec. 528-530] wherein Pinnacle's agent states:

¶2. I integrated many hours of labor and services, along with costs incurred, into improving the real estate for affixture of the manufactured home. [Emphasis added].

¶4. I brought in a water line from the side of the county road, under the canal, and to the house. Then I had to have the foundation backfilled after the connection. [Emphasis added].

¶5. I paid contractors to use a pumping truck to blow in 60 tons of crushed rock through portals under the house. This was necessary because the foundation had been incorrectly installed by others...[Emphasis Added].

There was no issue of fact presented to the trial court as to whether or not the manufactured home was physically affixed to the subject real estate. It was obvious from the pleadings that the manufactured home had been attached to a foundation by Pinnacle or its agent Tustian. Deere's frantic effort to make it an issue on appeal is disingenuous. The record establishes the manufactured home was permanently attached to the subject real property.

The question as to whether or not it was "legally affixed" to the trust real estate is a two-edged sword.

POINT 3. DEERE'S ASSERTION THAT THE MANUFACTURED HOME WAS NOT LEGALLY AFFIXED TO THE SUBJECT REAL ESTATE REFUTES ITS CLAIM TO ANY OF THE EXCESS PROCEEDS FROM THE SALE OF TRUST REAL ESTATE.

Deere does not gain rights in realty when all it perfected was a security interest in personalty. Deere argues to this court that "no legal affixture" of the manufactured home was made to the subject property and admits that no "fixture filing" occurred.

Deere's "no affixture" argument is meant to support its proffer that its claimed security interest was perfected by means of an unrecorded "Inventory Security Agreement And Power of



Attorney Manufactured Housing" (Agreement) [Rec. 415-422] and a "UCC-1 Financing Statement" filed only with the State of Utah. [Rec. 424]. Deere made no filings of its claimed interest in Box Elder County where the property was located.

In his letter to the First District Court depositing the excess funds, Trustee, Melvin Wilson describes the trust deed foreclosure sale to be of "land therein situated in Box Elder County, Utah." [Rec. 164]. The sale covered real property, not personal property.

The "Inventory Security Agreement" defines "inventory" as "All inventory of goods of whatever description held for sale, rent, or lease by the Debtor..." [Inventory Security Agreement, at 1.1. Rec. 416]. "Goods" are not defined in its agreements with Pinnacle, or in law, as "real property."

If no legal affixture occurred as Deere contends, then Deere remains seized of its interest in Pinnacle's inventory--the manufactured home. Deere's remedy for Pinnacle's default is provided in sections 11 and 12 of the "Inventory Security Agreement and Power of Attorney", [Rec. 419,420].

Deere does not gain rights in realty when all it perfected was a security interest in personalty. Since Deere only had an interest in personalty it must be precluded from making any claim to the excess proceeds from the sale of trust real estate.

The trial court erred in its conclusion that as a matter of law an "Affidavit of Affixture" is required to "legally affix" a manufactured home to a building lot and the absence of such excused

Deere from making a fixture filing to perfect a security interest in the trust real estate to which the home was physically affixed.

POINT 4. DEERE'S FILING OF A UCC-1 FINANCING STATEMENT DOES NOT CREATE A SECURED INTEREST IN THE TRUST REAL ESTATE.

Deere's assertion that under Utah Code Ann. §70A-9-313(4)(d), no fixture filing was required to maintain Deere's perfected PMSI in the modular home because Deere had already perfected its interest by its UCC-1 filing, is neither accurate nor relevant to this litigation.

The issue before the court is whether a PMSI created by a UCC-1 filing creates a secured interest in proceeds from a trust deed foreclosure sale.

Deere, in citing, Utah Code Ann. § 70A-9-313(4)(d), incorrectly states;

This statute is clear: a security interest in a good which is perfected "by any method" will have priority over any subsequent legal or equitable lien even though the good later becomes physically affixed to land without having to file a fixture filing.

Deere's assertion is patently false. Utah Code Annotated § 70A-9-313(4)(d) merely provides:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where: [Emphasis added]

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter.

The wording and meaning of § 70A-9-313(4)(d) is clear and not open to Deere's interpretation. There must be a perfected security interest in the fixture, perfected by a method permitted

by the chapter. Deere had no perfected security interest in the fixture. Filing a UCC-1 financing statement, which makes no specific reference to the subject manufactured home or the debtor's real estate is not a method permitted by this chapter for perfecting a security interest in real estate.

Deere's interpretation of § 70A-9-313(4)(d) is squarely in conflict with the intent of rest of the section. Where there has been no fixture filing U.C.A. 70A-9-313(7) provides that a security interest in fixtures "is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor." [Emphasis added]

Also Utah Code Ann. 70A-9-314(3) provides that a security interest in goods which attaches before they are installed in or affixed to other goods does not take priority over:

- (a) a subsequent purchaser for value of any interest in the whole; or
- (b) a creditor with a lien on the whole subsequently obtained by judicial proceedings.

Deere cites In Re Lucero, 203 B.R. 322 (10th Cir. BAP 1996) and In Re Allen, 221 B.R. 232 (S.D.Ill, 1998) as authority for its contention that its UCC-1 filing "exempts" Deere from having to file a fixture filing. Neither case supports Deere's position.

Both Lucero and Allen deal with mobile homes wherein a lender has noted its secured interest on the certificate of title of the mobile home. In each instance the debtor purportedly affixed the mobile home to real estate and the lender did not made a fixture filing. The issue the courts determined was whether the lender's security interest was subject to avoidance by a trustee in

bankruptcy under a trustee's strong arm powers. Bankr. Code, 11 U.S.C.A. § 544.

In each case the courts correctly decided that a trustee in bankruptcy has no more right to avoid the lender's lien than the debtor has. A fixture filing by the lender was not necessary where the lender's interest was noted on the Certificate of Title and a trustee could not avoid the lender's interest in exercise of his strong-arm powers.

Deere did not note its security interest on a Certificate of Title and Deere filed nothing with the State or Box Elder County indicating its interest in this specific manufactured home or the subject real estate. Deere's agreement with Pinnacle is essentially a flooring plan for Deere to finance the manufactured homes shown on Pinnacle's sales lot in Weber County. Pursuant to the Agreement, Pinnacle granted Deere a security interest in Pinnacle's inventory and assets which are defined as "Collateral" in the Agreement. The Agreement defines Collateral as:

1.1 Inventory. All inventory of goods of whatever description held for sale, rent or lease by the Debtor [Pinnacle], wherever located, together with all attachments, accessories, additions and substitutions, including all returns and repossessions (hereinafter called "Inventory"); [Emphasis added].

The trial court erred in its conclusion that as a matter of law the filing of a UCC-1 financing statement by Deere Credit created a perfected security interest in proceeds from a trust deed foreclosure sale of a residential lot to which the collateral was affixed.

POINT 5. DEERE FAILED TO PERFECT A SECURED INTEREST IN THE REALTY BY FAILING TO MAKE A FIXTURE FILING AND THEREFORE HAS NO CLAIM TO ANY EXCESS PROCEEDS FROM THE SALE OF TRUST REAL ESTATE.

Utah Code Annotated 70A-9-313 establishes the priority of security interests in fixtures. It outlines the proper procedure for converting a PMSI to a perfected interest in fixtures. The procedure requires a "fixture filing". In 70A-9-313(1)(b) a "fixture filing" is described as follows:

(b) a "fixture filing" is the filing in the office of the county recorder in each county in this state in which any mortgage on the real estate would be recorded of a financing statement covering goods which are to become fixtures and conforming to the requirements of Subsection 70A-9-402(5);

Subsection 70A-9-402(5) provides that a financing statement filed as a fixture filing under Section 70A-9-313;

...must show that it covers this type of collateral, must recite that it is to be recorded in the real estate records of the county recorder and the financing statement...must contain a legal description of the real estate and must specify the name of the record owner.

Deere had no perfected security interest in the subject real estate and the description of its collateral in its UCC-1 filing makes no claim on Pinnacle's real estate. Furthermore, real estate is not collateral in which a security interest may be perfected by filing in the office or offices of the state Department of Corporations. The only place where one can perfect a security interest in real estate is the office of the County Recorder in the county where the real estate is located.

Utah Code Annotated 70A-9-313(4) provides for priority of a PMSI over a judgment lien only where there has been a fixture

filing creating a "perfected security interest" in a fixture as provided in that section. As previously shown, Deere had made no "fixture filing" and had no perfected security interest in the fixture.

Where there has been no fixture filing U.C.A. 70A-9-313(7) provides that a security interest in fixtures "is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor." [Emphasis added]

Utah's Accessions statute is fully in accord with 70A-9-313(7). Utah Code Ann. 70A-9-314(3) provides that a security interest in goods which attaches before they are installed in or affixed to other goods does not take priority over:

- (a) a subsequent purchaser for value of any interest in the whole; or
- (b) a creditor with a lien on the whole subsequently obtained by judicial proceedings.

Appellant Schriever was both. She was a subsequent purchaser for value of the real property. She bought the whole at the trustee's sale. She was also a creditor with a judgment lien on the real property.

Accordingly, any security interest Deere had was subordinate to Schriever's judgment lien.

The Trial Court erred in its conclusion that as a matter of law Deere's claimed purchase money security interest has priority over Schriever's judgment lien.

#### CONCLUSION

The trial court disbursed the funds to appellee Deere Credit

pursuant to erroneous Conclusions Of Law which include the following:

5. After the trustee's sale, Deere's perfected PMSI continued in the proceeds of the sale of the Modular Home under Utah Code Ann. §70A-9-306(3)(b) because Deere's UCC-1 covered the original collateral and the proceeds, which are held by this Court, are identifiable cash proceeds. Accordingly, Deere's perfected PMSI in the Excess Proceeds has priority over Schriever's and Tustian's claims. (Rec. 546)

7. Alternatively, even assuming the Modular Home were physically affixed to the property, Deere was not obligated to file a fixture filing because the home was not legally affixed to the Property. Under Utah Code Ann. §59-2-602(1), an affidavit of affixture must be filed for a mobile or manufactured home to be considered legally affixed. Because no affidavit of affixture for the Modular Home has been filed by any party, it was not legally affixed and therefore no fixture filing was necessary to maintain Deere's perfected PMSI in the proceeds of the sale of the Modular Home. (Rec. 547)

8. Accordingly, Deere has priority to Excess Proceeds over all other potential claimants. (Rec. 547)

RELIEF REQUESTED

Appellant Schriever asks that the trial court's Order setting priorities to the excess proceeds together with the Judgment disbursing the excess proceeds from the trustee's sale to Deere be reversed and set aside and the matter be remanded to the First District Court with instructions for disbursing the funds to Appellant.

Respectfully submitted this \_\_\_\_ day of November, 2000.

  
\_\_\_\_\_  
William D. Marsh,  
Attorney for Appellant Schriever

CERTIFICATE OF SERVICE

I hereby certify that on November ~~2nd~~ 2000, I caused two true and correct copies of APPELLANT'S BRIEF to be served upon Paul W. Werner and Mark E. Hindley counsel for Deere Credit Services Inc. and two copies upon Alyson Draper counsel for W. Tustian, Trustee, Snowbird Trust. Appellees in this matter, by mailing two copies to each of them, by first class mail with sufficient postage prepaid and addressed as follows:

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Mark E. Hindley  
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Salt Lake City, UT 84111-4904

Alyson Draper,  
NALDER STRATFORD & DRAPER LC  
2404 Washington Blvd. Suite 1020  
Ogden, UT 84401

  
William D. Marsh



## Addendum 1

MELVIN Smith

(EXHIBIT: A)

Phone 476-0303

FAX. 476-0399.

## NOTICE OF TRUSTEE'S SALE

The following described property will be sold at public auction to the highest bidder payable in lawful money of the United States at the time of sale, at the Box Elder County Courthouse, 43 North Main Street, Brigham City, Utah, on April 1, 1998, at 10:00 a.m., by MELVEN E. SMITH, Successor Trustee, under the Deed of Trust with Assignment of Rents executed by OUTLOOK HOMES, Trustor, to AVIS AND ARCHIBALD TITLE INSURANCE AGENCY, as Trustee, and SODBERRY, LTD BY DUANE D. JOHNSON GENERAL PARTNER, AKA SODERBY, LTD BY DUANE D. JOHNSON GENERAL PARTNER as Beneficiary, covering real property purportedly located at 10025 North 6800 West, Tremonton, Utah, 84337, in Box Elder County, Utah, and more particularly described as follows:

BEGINNING ON THE WEST RIGHT-OF-WAY LINE OF 6800 WEST STREET (IOWA STRING) AT A POINT 41.00 FEET NORTH ALONG THE SECTION LINE AND 33.00 FEET WEST FROM THE EAST QUARTER CORNER OF SECTION 16, TOWNSHIP 11 NORTH, RANGE 3 WEST, SLB&M, AND RUNNING THENCE WEST 236.62 FEET; THENCE NORTH 00°31'13" WEST 187.46 FEET; THENCE EAST 238.32 FEET TO SAID RIGHT-OF-WAY LINE; THENCE SOUTH 187.45 FEET ALONG SAID RIGHT-OF-WAY LINE TO THE POINT OF BEGINNING.


SUBJECT TO A 10 FOOT WIDE IRRIGATION EASEMENT LYING ALONG THE WEST SIDE OF THE EAST BOUNDARY OF SAID LOT.

THE BASIS OF BEARING OF THE ABOVE DESCRIBED PROPERTY IS THE EAST BOUNDARY OF SECTION 16, WHICH IS ASSUMED AS BEARING "NORTH".

SERIAL NO. 05-081-0045

DATED: February 27, 1998.

Snow Bird First  
Notice March 2nd/98  
when Foreend Taped to  
Door.  
Jim

  
MELVEN E. SMITH  
Successor Trustee

BRIGHAM DISTRICT

98 JUL 21 PM 1:18

When recorded return to:

MELVEN E. SMITH  
SMITH, ANDERSON, KNOWLES,  
HAMILTON & MANSFIELD, P.C.  
4723 Harrison Boulevard, Suite 200  
Ogden, Utah 84403  
Attorneys for SODERBY, LTD.

109614 Bk 0674 Pg 1044  
LuAnn Adams, Box Elder County Recorder  
04/06/1998 4:30pm FEE: 12.00 Dep: S  
Rec'd For: MELVEN E. SMITH

TRUSTEE'S DEED UPON SALE

THIS INDENTURE made April 1, 1998, between MELVEN E. SMITH, as Successor Trustee (hereinafter referred to as "Trustee") under the hereinafter described Deed of Trust with Assignment of Rents and KAREN H. SCHRIEVER, (hereinafter referred to as "Grantee");

WHEREAS, OUTLOOK HOMES as "Trustor", by Deed of Trust with Assignment of Rents (hereinafter "Trust Deed") dated January 30, 1997, to secure certain obligations in favor of SODBERRY, LTD BY DUANE D. JOHNSON GENERAL PARTNER, AKA SODERBY, LTD BY DUANE D. JOHNSON GENERAL PARTNER, as Beneficiary, and in which AVIS AND ARCHIBALD TITLE INSURANCE AGENCY is named as Trustee, which Trust Deed was recorded February 14, 1997, as Entry No. 095593, in Book 642, at Page 242 of the Official Records of Box Elder County, State of Utah, did grant and convey the real property described therein to secure, among other obligations, payment of a Note and interest, according to the terms thereof, other sums and money advanced, and interest on the amounts; and

WHEREAS, there was a breach and default under the terms of the Trust Deed as set forth in the referenced Notice of Default; and

WHEREAS, a Substitution of Trustee appointing MELVEN E. SMITH as Successor Trustee, dated November 26, 1997, was recorded on November 26, 1997 as Entry No. 104698, in Book 0663, at Page 0556 of the Official Records of Box Elder County, State of Utah; and a copy thereof was sent in the manner and to the persons to whom a copy of the Notice of Default would be required to be mailed by Utah Code Ann. § 57-1-26, as provided for in Utah Code Ann. § 57-1-22 (1953 as amended); and

WHEREAS, SODBERRY, LTD BY DUANE D. JOHNSON GENERAL PARTNER, AKA SODERBY, LTD BY DUANE D. JOHNSON GENERAL PARTNER, the Beneficiary and holder of the Note, made a declaration of default and demand for sale upon the Trustee, and the Trustee filed for record on November 26, 1997, in the office of the County Recorder of Box Elder County, a Notice of Default under Deed of Trust with Assignment of Rents to cause the Trustee to sell the real property to satisfy the obligations secured by the Deed of Trust with Assignment of Rents, which Notice of Default was duly recorded on November 26, 1997, as Entry No. 104699 in Book 0663, at Page 0558 of the official records in Box Elder County; and

WHEREAS, Trustee in consequence of the declaration of default, election, and demand for sale, and in compliance with the terms of the Trust Deed, by virtue of the authority in him vested, gave notice of the sale at auction to the highest bidder for cash, in lawful money of the United States, the real property particularly described therein and herein, the property located in Box Elder County, State of Utah, and fixing the time and place of the sale as April 1, 1998 at the hour of 10:00 a.m., at the front steps of the Box Elder County Courthouse, 43 North Main Street, Brigham City, Utah, and caused four copies of the Notice to be posted for not less than twenty (20) days before the date of sale as provided for under Utah Code Ann. § 57-1-25 (1953 as amended), and the Trustee caused a copy of the Notice to be published for three consecutive weeks in a newspaper having general circulation in the county in which the real property is situated, the last publication being more than ten days, but not more than thirty days prior to the sale; and

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WHEREAS, copies of the recorded Notice of Default and the Notice of Sale were mailed in accordance with Utah Code Ann. § 57-1-26 (1953 as amended), to all those who were entitled to special notice to be given; and

WHEREAS, Trustee did at the time and place of sale according to the Notice, then and there sell at public auction to Grantee, KAREN H. SCHRIEVER being the highest bidder, for the property described, for the sum of \$70,000.00 which was applied toward the costs and expenses of exercising the power of sale and then the amounts secured by the Trust Deed.

NOW THEREFORE, Trustee, in consideration of the premises recited and of the sum bid and paid by Grantee, the receipt of which is hereby acknowledged, and by virtue of the authority vested in it by the Trust Deed, does GRANT AND CONVEY to Grantee, but without any covenant or warranty, express or implied, all of the property situated in Box Elder County, State of Utah, described as follows:

BEGINNING ON THE WEST RIGHT-OF-WAY LINE OF 6800 WEST STREET (IOWA STRING) AT A POINT 41.00 FEET NORTH ALONG THE SECTION LINE AND 33.00 FEET WEST FROM THE EAST QUARTER CORNER OF SECTION 16, TOWNSHIP 11 NORTH, RANGE 3 WEST, SLB&M, AND RUNNING THENCE WEST 236.62 FEET; THENCE NORTH 00°31'13" WEST 187.46 FEET; THENCE EAST 238.32 FEET TO SAID RIGHT-OF-WAY LINE; THENCE SOUTH 187.45 FEET ALONG SAID RIGHT-OF-WAY LINE TO THE POINT OF BEGINNING.

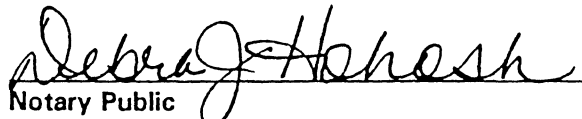


MELVEN E. SMITH  
Successor Trustee

#### ACKNOWLEDGEMENT

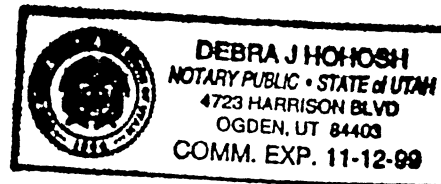
STATE OF UTAH                     )  
  : ss.  
COUNTY OF WEBER             )

On April 6 1998 personally appeared before me MELVEN E. SMITH, who being by me duly sworn, did say that he is the Successor Trustee and the signer of the foregoing instrument and who duly acknowledged to me that he executed the same.

  
Notary Public

My Commission Expires:

Residing at: 11-12-99



J. E. SMITH  
EGAN ANDERSON  
D L. KNOWLES\*  
AND R. HAMILTON  
ROBERT E. MANSFIELD  
ROBERT KARIYA  
STANFORD A. GRAHAM  
GARY R. WILLIAMS  
STEPHEN F. NOEL

LAW OFFICES OF  
SMITH ANDERSON KNOWLES  
HAMILTON & MANSFIELD

A PROFESSIONAL CORPORATION  
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PRIGHAM DISTRICT

98 JUL 21 11 14 AM  
SALT LAKE CITY OFFICE:  
60 EAST SOUTH TEMPLE, SUITE 1270  
SALT LAKE CITY, UTAH 84111  
PHONE. (801) 320-1414  
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OF COUNSEL:  
FREDRICK "BUCK" FROERER III

\*ALSO MEMBER CALIFORNIA BAR  
AND WYOMING BAR

PLEASE RESPOND TO OGDEN OFFICE

April 6, 1998

First District Court Clerk  
P.O. Box 873  
43 North Main  
Brigham City, Utah 84302

RE: *Excess proceeds of sale - Trust Deed foreclosure*  
*\$25,155.56*

Dear Mr. Derring:

I am the Successor Trustee under that certain Trust Deed dated January 30, 1997, and executed by Outlook Homes, Trustor, in favor of Sodberry Ltd. by Duane D. Johnson General Partner, as Beneficiary, which Trust Deed was recorded February 14, 1997, as Entry No. 095593, in Book 0642, at Page 0242, in the Official Records of Box Elder County, Utah, describing land therein situated in Box Elder County, Utah, and more particularly described as:

BEGINNING ON THE WEST RIGHT-OF-WAY LINE OF 6800 WEST STREET (IOWA STRING) AT A POINT 41.00 FEET NORTH ALONG THE SECTION LINE AND 33.00 FEET WEST FROM THE EAST QUARTER CORNER OF SECTION 16, TOWNSHIP 11 NORTH, RANGE 3 WEST, SLB&M, AND RUNNING THENCE WEST 236.62 FEET; THENCE NORTH 00°31'13" WEST 187.46 FEET; THENCE EAST 238.32 FEET TO SAID RIGHT-OF-WAY LINE; THENCE SOUTH 187.45 FEET ALONG SAID RIGHT-OF-WAY LINE TO THE POINT OF BEGINNING.

SUBJECT TO A 10 FOOT WIDE IRRIGATION EASEMENT LYING ALONG THE WEST SIDE OF THE EAST BOUNDARY OF SAID LOT.

THE BASIS OF BEARING OF THE ABOVE DESCRIBED PROPERTY IS THE EAST BOUNDARY OF SECTION 16, WHICH IS ASSUMED AS BEARING "NORTH".

SERIAL NO. 05-081-0045

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On April 1, 1998, at the hour of 10:00 a.m., I sold at public auction the property described above and located at 10025 North 6800 West, Tremonton, Utah, 84337. This was a non-judicial Trust Deed foreclosure sale. I have enclosed a copy of the Notice of Trustee's Sale for your record.

I have enclosed herewith a check in the amount of \$25,155.56, payable to the First District Court Clerk, pursuant to *Utah Code Annotated* §57-1-29, which states:

57-1-29 Proceeds of trustee's sale - Disposition. The trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's and attorney's fees actually incurred not to exceed the amount which may be provided for in the trust deed, second, to payment of the obligation secured by the trust deed, and the balance, if any, to the person or persons legally entitled thereto, or the trustee, in his discretion, may deposit the balance of the proceeds with the clerk of the district court of the county in which the sale took place. Upon depositing the balance, the trustee shall be discharged from all further responsibility and the clerk shall deposit the proceeds with the state treasurer subject to the order of the district court.

The following individuals may claim some equity or ownership in the proceeds:

Owen Tustian/Snowbird Trust may claim some interest in the proceeds pursuant to a Quit Claim Deed recorded in the county recorder's office of Box Elder on February 10, 1998 as Entry No. 107176, in Book 0669, at Page 0215. In addition, Owen Tustian/Snowbird Trust may claim some interest in the proceeds pursuant to a mechanic's lien filed against the property.

Brent Madsen may claim some interest in the proceeds pursuant to various mechanic's liens filed against the property. I was told by Owen Tustian that Brent Madsen had been paid.

Karen H. Schriever, through her attorney, William D. Marsh, may claim an interest in the proceeds pursuant to an Abstract of Judgment filed with the clerk on January 8, 1998, and a Writ of Attachment.

John Deere and Company, through its attorney, Paul W. Werner, may claim some interest in the excess proceeds as a secured creditor with a security interest in personalty located on the property.

There may be others who claim an interest in the property which are unknown to me and are therefore not listed herein.

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Having made this deposit with the district court clerk pursuant to statute, I am, as the trustee, discharged from all further responsibility for these excess proceeds, pursuant to the statute quoted above.

Sincerely,

SMITH ANDERSON KNOWLES  
HAMILTON & MANSFIELD, P.C.

A handwritten signature in black ink, appearing to read 'Melven E. Smith', written over the typed name.

Melven E. Smith

cc: Owen Tustian/Snowbird Trust  
159 North Tremont Street  
Tremonton, Utah 84337

Karen H. Schriever  
c/o William D. Marsh  
1 Utah Center, Suite 900  
201 South Main  
Salt Lake City, Utah 84111

John Deere and Company  
c/o Paul W. Werner  
VAN COTT BAGLEY  
60 South Main Street, Suite 1600  
Salt Lake City, Utah 84144-0450

Brent Madsen  
2176 McPherson Canyon Road  
Grace, ID 83241