

1988

Lawrence C. Kay; Joy Kay; Robert L. Kay and Teresa Kay v. Summit Systems : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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CKET NO. 880234-CA IN THE SUPREME COURT OF THE STATE OF UTAH

LAWRENCE C. KAY; JOY KAY;
ROBERT L. KAY; and TERESA
KAY,

Plaintiffs-Appellants,

vs.

SUMMIT SYSTEMS, INC., et al.,

Defendants-Respondents.

Case No. 870121

88-0234-CA

RESPONDENTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT OF
UINTAH COUNTY, STATE OF UTAH
THE HONORABLE RICHARD D. DAVIDSON, PRESIDING

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FILED

NOV 18 1987

Clerk, Supreme Court

LAWRENCE C. KAY; JOY KAY;
ROBERT L. KAY; and TERESA
KAY,

VS.

Defendants-Respondents.

RESPONDENTS' BRIEF

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LIST OF PARTIES

The plaintiffs/appellants in this action are Lawrence C. Kay, Joy Kay, Robert L. Kay and Teresa Kay.

The defendants/respondents are Summit Systems, Inc., the original beneficiary of the subject Trust Deed; Val E. Southwick, president of Summit Systems, Inc.; and J. Scott Buehler.

The remaining defendants/respondents are all good faith purchasers of 100% of Summit Systems, Inc.'s interests in the subject Trust Deed and Trust Deed Note. Those defendants/appellants are: Jack M. Stevens and DeVon Johnson, Trustees of Bennett's Employees Pension Plan Trust; Dean F. Hammond, M.D., Trustee of Associates of Pathology Profit Sharing Trust; Donna J. Noll; Newell Linford, Trustee of Linford Brothers Employees Profit Sharing Trust; Katie Logan; Simplot Partnership, a Partnership; Myrtle Hutchison; Mary C. Young; Charles Smith; Karma Smith; Ross Hyland; Rita Hyland; Steven R. Pope, Trustee of Steven R. Pope Pension Profit Sharing Plan; Steven R. Pope, Trustee of Steven R. Pope Keogh; Steven R. Pope, Trustee of Steven R. Pope IRA; Frederick Montmorency, Trustee of Frederick Montmorency P.C. Employees Retirement Trust; Frederick Montmorency, Trustee of Frederick Montmorency P.C. Profit Sharing Plan; Brandon Bosworth; Brian Bosworth; Gary Bosworth, Guardian; Darin G. Bosworth; Richard C. Bosworth, Guardian; Richard D. Bosworth; R. Lamont Stevens, Trustee of A & B Plumbing Pension; Francis M. Hammond; W. Andrew Lyle, M.D., Trustee of W. Andrew Lyle, M.D., P.C. Defined Benefit Pension Plan; John R. Ream, Jr., M.D., Trustee of John R. Ream, Jr., M.D. P.C. Ream Defined Benefit Pension Plan; Gordon D. Bird; Marjorie Bird; Dean A. Beal; Joanne Beal; Zion's First National Bank, Custodian for L. Lamont Stevens Individual Retirement Account; Zions Bank, Trustee of Tanner Memorial Clinic Profit Sharing Plan; Paul R. Taylor, M.D.; Zions Bank, Trustee of Tanner Memorial Clinic Profit Sharing Plan; R. Thane Hales, Trustee of R. Thane Hales D.D.S. Prof. Corp. Defined Benefit Plan; R. Thane Hales, Trustee of R. Thane Hales D.D.S. Profit Sharing Account; Quinn H. Child, Trustee of Peerless Products and Co. Pension Plan and Trust; Ruth Ann Triggs; F. Clyde Null, M.D.; Roy E. McDonald, M.D.; Devon Johnson, Trustee of Devon and Ruth Johnson IRA (the "Investors").

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUES PRESENTED	2
NATURE OF THE PROCEEDINGS BELOW.	3
STATEMENT OF THE CASE.	4
STATEMENT OF FACTS	6
ARGUMENT	10
I. Summary of the Argument	10
II. The Kays May Not Cite And Rely Upon Evidence Which Was Never Presented To The Lower Court And Which Respondents Were Never Allowed To Address	12
III. The Kays Breached Their Contractual Obligations	13
IV. The Trust Deed And Trust Deed Note Are Not Unconscionable. Accordingly, The Lower Court Correctly Ruled That The Subject Agreements Are Valid And Enforceable.	14
A. As a Matter of Law, the Substantive Terms of the Agreements Are "Conscionable"	15
B. There Are No Procedural Considerations Rendering the Subject Transactions Unconscionable	19
C. The Kays May Not Reform The Contracts Because They Have Accepted The Benefits Of The Loan And Have Ratified It	21
D. The Trust Deed And Note Cannot Be Reformed Because They Are Held By Bona Fide Purchasers	22

V.	The Respondents Were Under No Obligation To Release Lots When The Kays Had Defaulted On The Repayment Obligations, And The Respondents Were Forced To Seek Payment From Additional Security.	22
VI.	Respondents Complied With Their Contractual And Statutory Obligations In Reconveying Lots To The Kays.	28
VII.	The Kays Stated No Claim For Tortious Breach Of Implied Covenant of Good Faith And Fair Dealing.	30
VIII.	The Lower Court Properly Ruled That A Dispute Had Arisen Regarding The Number Of Lots To Be Released; That The Kays Compromised Their Claim; And That There Was No Failure On The Part Of The Respondents With Respect To That Compromise, Modification And/Or Accord And Satisfaction.	31
CONCLUSION		35
ADDENDUM		

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases Cited:</u>	
<u>Beams v. Werth</u> , 200 Kan. 532, 438 P.2d 957 (1968).....	22
<u>Beck v. Farmers Insurance Exchange</u> , 701 P.2d 795 (Utah 1985).....	30
<u>Beehive Medical Electronics Inc. v. Industrial Commission</u> , 583 P.2d 53 (Utah 1978).....	29
<u>Bekins Bar V Ranch v. Huth</u> , 664 P.2d 455 (Utah 1983).....	15,16, 17,18,
<u>Briggs v. Liddell</u> , 699 P.2d 770 (Utah 1985).....	15
<u>Burley Newspapers, Inc. v. Mist. Publishing Co.</u> , 414 P.2d 460 (Idaho 1966).....	21
<u>Camp v. Deseret Mutual Benefit Ass'n</u> , 589 P.2d 780 (Utah 1979).....	27
<u>Carlson v. Hamilton</u> , 8 Utah 2d 272, 332 P.2d 989 (1958).....	15
<u>Cheney v. Rucker</u> , 14 Utah 2d 205, 381 P.2d 86 (1963)....	33,35
<u>Chouinard v. Chouinard</u> , 568 F.2d 430 (5th Cir. 1978).....	19
<u>Clearwater Constr. & Eng'r, Inc. v. Wickes Forest Indus.</u> , 108 Idaho 132, 697 P.2d 1146 (1985).....	19,21
<u>Continental Illinois National Bank & Trusts Co. of Chicago v. Stanley</u> , 606 F.Supp. 558 (N.D.Ill. 1985).....	19
<u>Cowan & Co. v. Atlas Stock Transfer Co.</u> , 695 P.2d 109 (Utah 1984).....	13
<u>Cunningham v. Cunningham</u> , 690 P.2d 549 (Utah 1984).....	15

<u>Ephraim Theatre Co. v. Hawk</u> , 7 Utah 2d 163, 321 P.2d 221 (1958).....	15
<u>Farmers' & Merchants' Bank v. Federal Reserve Bank</u> , 262 U.S. 649 (1923).....	29
<u>Franklin Financial v. New Empire Development Co.</u> , 659 P.2d 1040.....	13
<u>George v. Oren Limited and Associates</u> , 672 P.2d 732 (Utah 1983).....	29
<u>Hottinger v. Jensen</u> , 684 P.2d 1271 (Utah 1984).....	22
<u>Hubbard v. Geare</u> , 77 Ariz. 262, 269 P.2d 1064 (Ariz. 1954).....	21
<u>Jones v. Hinkle</u> , 611 P.2d 733, 735 (Utah 1980).....	25
<u>Larrabee v. Royal Dairy Products Co.</u> , 614 P.2d 160 (Utah 1980).....	25
<u>Lundstrom v. Radio Corporation of America</u> , 17 Utah 2d 114, 405 P.2d 339 (1965).....	15
<u>Quagliana v. Exquisite Home Builders, Inc.</u> , 538 P.2d 301 (Utah 1975).....	29
<u>Rainford v. Rytting</u> , 22 Utah 2d 252, 451 P.2d 769 (Utah 1969).....	13,27
<u>Rapp v. Mountain States Telephone & Telegraph Co.</u> , 606 P.2d 1189 (Utah 1980).....	33
<u>Resource Management Co. v. Weston Ranch and Livestock Co.</u> , 706 P.2d 1028 (Utah 1985).....	20
<u>Rio Algom Corp. v. Jimco Ltd.</u> , 618 P.2d 497 (Utah 1980).....	31
<u>Sheraton Hawaii Corp. v. Poston</u> , 454 P.2d 369 (Haw. 1969).....	19
<u>State v. Barlow</u> , 153 P.2d 647 (Utah 1944).....	21
<u>Steel v. Eagle</u> , 207 Kan. 146, 483 P.2d 1063 (1971).....	27
<u>Tooele City v. Settlement Canyon Irrigation Co.</u> , 4 Utah 2d 215, 291 P.2d 881 (1955).....	15

<u>Utah State Medical Ass'n v. Utah State Employees</u> <u>Credit Union</u> , 655 P.2d 643 (Utah 1982).....	25
<u>Wagner v. Wagner</u> , 621 P.2d 1279 (Wash. 1980).....	29

Statutes and Rules Cited:

Rule 56, Utah Rules of Civil Procedure	12
Rule 56(e), Utah Rules of Civil Procedure	12
Utah Code Annotated §57-1-33 (1953).	28,29, 37
Utah Code Annotated §78-2-2(3)(i).	1

LAWRENCE C. KAY; JOY KAY;
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SUMMIT SYSTEMS, INC., et al.,

Defendants-Respondents.

Case No. 870121

RESPONDENTS' BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS

On January 26, 1987, the lower court granted the Respondents' Motion for Summary Judgment dismissing each of the counts of the Appellants' Complaint. On March 16, 1987, the lower court denied the Appellants' Motion for Order Vacating Ruling and Granting Oral Argument. Appellants are now only appealing certain portions of the Ruling dismissing the various causes of action in the Complaint.

This is an appeal as of right from that ruling. This Court has jurisdiction pursuant to Utah Code Annotated §78-2-2(3)(i).

ISSUES PRESENTED

1. Whether Appellants are bound by the factual record presented to the lower court or whether they may, on appeal, embellish that record by citing and misinterpreting testimony not previously presented to the lower court.

2. Whether a loan which was for the speculative development of raw land and which three other banks refused to make is unconscionable when it had an effective annual interest rate of less than 25% and when it was fully secured by a trust deed and letters of credit.

3. Whether Appellants can reform the contracts on the grounds of unconscionability when they accepted the benefits of it, governed themselves according to its provision for over eighteen months, and now bring suit to enforce it.

4. Whether Appellants can reform the contracts on the grounds of unconscionability when the contracts were subsequently transferred to good faith purchasers.

5. Whether Respondents were required to release security when forced to resort to other security to collect amounts due under the subject note.

6. Whether Respondents are obligated to forfeit their contractual rights and privileges in order to satisfy the unilateral demands of the Appellants which seek actions and concessions not required by the contracts.

7. Whether this State recognizes a cause of action for tortious breach of an alleged implied covenant of good faith and fair dealing.

8. Whether an implied covenant of good faith and fair dealing requires the Respondents to comply with additional terms and demands unilaterally dictated by the Appellants after the written contract has been executed and partially performed.

9. Whether the lower court may consider (a) the Appellants' own admissions that a dispute existed as to whether any of the subject lots should be released under a subject trust deed; (b) the additional record cited to the court; and (c) common sense to determine whether the doctrines of compromise, modification and/or of accord and satisfaction bar the Appellants' claims.

10. Whether Appellants can claim questions of fact existed on the issues of compromise, modification and/or of accord and satisfaction when they failed to cite any testimony to the lower court refuting such a contention despite the fact that the lower court specifically granted them an opportunity to do so.

NATURE OF THE PROCEEDINGS BELOW

Appellants (hereinafter "the Kays") filed their Complaint on or about February 12, 1986. (R.1 to 16.) On October 6, 1986, Respondents moved for summary judgment dismissing the Complaint and filed a supporting memorandum, an appendix containing the cited deposition testimony and the

affidavit of Val E. Southwick. (R.390 to 473.) On or about October 16, 1987, the Kays filed a responsive memorandum and the affidavits of Lawrence Kay (R.498 to 506) and Robert L. Kay (R.523 to 531.) On or about October 29, 1987, Respondents filed their Reply Memorandum in Support of the Motion for Summary Judgment (R.555 to 568.) On November 5, 1986, the lower court conducted a hearing on a discovery matter. During that hearing, the Kays' counsel requested an opportunity to submit an additional memorandum to the court regarding the Motion for Summary Judgment. The court granted that request. (See R.1009 to 1012.) No additional memorandum, affidavits or record citations were provided by the Kays or their counsel. On January 27, 1987, the Honorable Richard C. Davidson granted the Motion for Summary Judgment and dismissed the Complaint. On or about February 18, 1987, Appellants moved to vacate the judgment (R.977.) Because of Judge Davidson's assignment to the Utah Court of Appeals, that motion was heard by the Honorable Boyd Bunnell, who denied the Motion for Order Vacating Ruling and Granting Oral Argument on March 18, 1987. (R.1097.) Appellants filed a Notice of Appeal on March 24, 1987. (R.1101.)

STATEMENT OF THE CASE

This lawsuit is a result of the general decline of the oil and gas industry and the deleterious effects of that decline upon the economy of Vernal, Utah. If that economy had remained as robust as when the Kays began developing the Yellow

Hills subdivision (the property which is the subject of this lawsuit), then the lots in the subject subdivision may have sold, the obligations now owed to the respondent-assignees of the subject Trust Deed and Trust Deed Note ("the Investors") may have been paid according to the terms of the Trust Deed and Trust Deed Note, and this lawsuit would never have been filed.

Unfortunately, the Vernal economy did not thrive, the Kays did not sell lots, and they defaulted on their payment obligations under the Note. When the Investors began pursuing their contractual remedies, the Kays filed their Complaint to delay the foreclosure of the Yellow Hills subdivision.

The Kays were successful in maintaining possession of Yellow Hills without making any payments on the Note for over eighteen months. On or about January 27, 1987, however, the Honorable Richard C. Davidson granted the Respondents' Motion for Summary Judgment and dismissed each of the purported claims in the Complaint. He did so after carefully considering the memoranda of the parties and the record presented to him. At the Kays' counsel's request, Judge Davidson had even granted them the opportunity to submit further evidence to him after the normal briefing period, but they wholly failed to take advantage of that opportunity.

On or about March 18, 1987, the Honorable Boyd Bunnell rejected the Appellants' arguments that the decision should be reconsidered.

The Kays now come to this Court claiming that Judge Davidson and Judge Bunnell erred. In making these arguments, Appellants now rely upon testimony never presented to the lower court, and they rely upon testimony which is inherently illogical and refuted by their own testimony. Based upon the record before the lower court, and as a matter of law, the lower courts properly dismissed the Appellants' Complaint. They did so because the Kays defaulted on their contractual obligations; those contractual obligations were valid and enforceable; and the Respondents complied with all their contractual, statutory and common law duties. Accordingly, the decision of the lower court should be affirmed.

STATEMENT OF FACTS

Contrary to the narrative contained in the Kays' appellate brief, only the following facts were established before the lower court:

1. In January 1983, appellant Robert Kay purchased the property encompassing the Yellow Hills subdivision for \$350,000. (R.466.)
2. The Kays subsequently applied for loans from First Security Bank, First Interstate Bank and Zions Bank to develop Yellow Hills into an improved subdivision, but all three banks declined to loan funds to the Kays for that purpose. (R.429.)
3. In December 1983, the Kays applied for a development loan from respondent Summit Systems, Inc. ("Summit"). (R.429; R.460.) After negotiations, the Kays

executed a Trust Deed Note for \$806,000. (See Exhibit A to Complaint (R.1 to 16), and Exh. B to Appellants' Brief). To secure the Trust Deed Note, the Kays executed a Trust Deed on most of the Yellow Hills subdivision. (See Exhibit B to Complaint (R.1 to 16), and Exh. C to Appellants' Brief). Both the Trust Deed and Trust Deed Note were signed by each of the plaintiffs. (See R.438-439.)

4. At the closing, \$667,000 was actually disbursed to or for the benefit of the Kays. (R.498 and R.523; R.436; R.448; R.475.) If the Kays had made all payments required under the Note, they would have paid the equivalent of an annual percentage rate of approximately 23.13% to 24.28% on the funds disbursed. (R.476.)

5. Unlike typical loan transactions, Summit, as lender, paid for all title abstracts, title insurance premiums, recording fees, escrow closing fees, loan origination fees, "points," and "finders fees." The Kays were not required to obtain additional "out-of-pocket" funds to close the loan. (See R.476.)

6. From January to May 1984, and for valuable consideration, Summit assigned 100% of its interest in the Trust Deed and Trust Deed Note to the investors who are named as defendants in this lawsuit. (R.477.) The investors issued a power of attorney to Summit to direct the trustee to execute deeds of partial reconveyance as may be required pursuant to the terms of the Trust Deed. (R.477.)

7. The first quarterly payment under the Trust Deed Note was due June 1, 1984. On or about June 19, 1984, the Kays made a payment of \$48,737.72. (See R.452; R.478.)

8. The Kays defaulted on their next quarterly payment of \$42,659.37 due September 1, 1984. Accordingly, on or about October 2, 1984, the investors of the note called the letter of credit from First Security Bank for \$110,000.00. (R.478.) That letter of credit was drawn upon after discussions with Robert Kay. (R.457.) The amounts received from the First Security letter of credit were applied to outstanding interest, penalties and principal. (R.478.)

9. The Kays defaulted on their next payment of \$42,659.37 due December 1, 1984. Accordingly, on or about January 4, 1985, the holders drew upon the two letters of credit from First Interstate Bank in the amount of \$170,000.00. (R.478.) That amount was applied to outstanding interest, penalties and principal.

10. The next payment of \$42,659.37 was due March 1, 1985. The Kays made the required payment of \$44,792.34 (including late fees and interest) on or about March 28, 1985. Id. That amount was applied to outstanding interest, late payment penalty and principal. (R.478.)

11. The Kays defaulted on the payment due June 1, 1985 in the amount of \$42,659.37. (R.478.)

12. On or about June 2, 1985, the Kays wrote Summit requesting release of seven lots. (See R.440; R.449.)

13. On or about June 3, 1985, Clive Sprouse offered to repurchase Yellow Hills from the Kays. (See R.441; R.450.) The Sprouse offer was conditioned upon seven lots being released and other actions being accomplished by June 24, 1985. (R.441; R.450.) The June 24 date was proposed by the Kays. (R.464.)

14. In response to requests from the Kays to reconvey the seven lots, Mr. Southwick attempted to contact the trustee, J. Scott Buehler, to authorize him to reconvey the seven lots identified in the June 2, 1985 letter. Mr. Buehler, though, was out-of-town on vacation. (R.477; R.420.)

15. Mr. Southwick asked Vernal Abstract Company ("Vernal Abstract") to act as substitute trustee to accomplish the reconveyance, but Vernal Abstract declined to act as substitute trustee. (R.477.)

16. In late June 1985, Mr. Buehler returned from vacation, and on July 1, 1985, he executed the Deed of Reconveyance for the seven lots. (See R.478; R.489.)

17. The Kays failed to make the payment due June 1, 1985 and any further payments due under the Trust Deed Note. Accordingly, as of July 23, 1985, the Kays owed the holders of the note \$621,378.71 in principal and accrued interest. (R.478.) Interest continued and continues to accrue on that amount at the rate of \$277.36 per day. (R.478.)

18. On or about July 29, 1985, Mr. Buehler filed a Notice of Default with the County Recorder because of the Kays'

failure to make the payments due under the Trust Deed Note.
(R.422.)

19. The Kays filed their Complaint against the defendants on or about March 25, 1986.

ARGUMENT

I. Summary of the Argument

In January 1984, the Kays received \$667,000.00 from Summit Systems, Inc. which they used to pay off existing obligations on the Yellow Hills subdivision and to further develop that property into an improved subdivision. The Kays signed a Note secured by letters of credit and a trust deed in favor of Summit Systems, Inc.

For valuable consideration, Summit Systems, Inc. assigned 100% of its interests in the Note and Trust Deed to the Investors who were named as defendants in this lawsuit.

The Kays made the first quarterly payment due under the Note, acquiesced in the calling of the letters of credit for the second and third quarterly payment, made the fourth quarterly payment and defaulted on any subsequent payment. Thus, they clearly accepted the benefits of their loan transactions and ratified those contractual obligations. Only after the Kays encountered further financial difficulties did they attempt to avoid those obligations by characterizing them as "unconscionable."

As a matter of law, the Note and Trust Deed are not "unconscionable." The supposedly unconscionable substantive

terms to which the Kays object are substantially less onerous than other similar terms previously upheld by this Court. Similarly, as a matter of law, there is no basis for a claim of procedural unconscionability because no terms of the loan were buried in fine print, and Summit was not responsible for the Kays' perceived need to secure the loan.

Further, even if a claim for unconscionability could have been made, that claim cannot be asserted against the Investors who are bona fide purchasers/assignees of the Trust Deed and Trust Deed Note. Finally, the Kays have waived any claim of unconscionability by ratifying the subject agreements when they accepted the benefits of that loan, attempted to comply with the loan provisions, and now seek enforcement of that contract.

The Kays next contend that the Respondents failed to comply with certain release/reconveyance provisions of the Trust Deed. The Kays admit that they defaulted on making quarterly payments and that the Investors received payment by resorting to the letters of credit which had been provided as additional security for the loan obligations. The Kays contend, however, that the Investors were required not only to lose any further interests in the letters of credit, but also to voluntarily release their security interests in a significant number of lots which had also been provided as security. The Kays' argument ignores the very purpose of the Trust Deed and the letter of credit provisions in the Trust

Deed. That purpose was to provide Summit Systems, Inc. with the level of security and collateralization for the repayment of the loan which Summit Systems, Inc. deemed necessary to make the loan. The Kays ignore the clear language of the contract, seek to render other provisions of the Trust Deed meaningless, and ignore commercial reality.

As a matter of law, the Respondents met all (a) express, implied, compromised and/or modified contractual obligation; (b) all statutory obligations which, by law, were incorporated into the contracts; and (c) all common law duties. Accordingly, the decision of the lower court dismissing the Kays' Complaint should be affirmed.

II. The Kays May Not Cite And Rely Upon Evidence Which Was Never Presented To The Lower Court And Which Respondents Were Never Allowed To Address.

Pursuant to Rule 56, Utah Rules of Civil Procedure, Respondents moved for summary judgment to dismiss the claims in the plaintiffs' Complaint. The Motion was supported by numerous citations to deposition testimony and the affidavit of Val E. Southwick.

Pursuant to Rule 56(e), the Kays could not rest upon the mere allegations or denials of their pleading. They were required to present affidavits and/or citations to other testimony in the record which contained admissible evidence and which raised issues of material fact. If they did not so respond, summary judgment, if appropriate was properly entered

against them. See Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044-45 (Utah 1983) ("Franklin Financial"); Rainford v. Rytting, 22 Utah 2d 252, 451 P.2d 769, 770-71 (1969).

In their appellate brief, the Kays rely heavily upon deposition testimony of the Kays and others which was never presented to the lower court. Consequently, the Respondents were not allowed to cite additional deposition testimony or submit additional affidavits to address the Kays' new contentions.

In the court below, the Kays only relied upon (a) the affidavits of Robert L. Kay (R.523 to 531) and Lawrence C. Kay (R.498 to 506); and (b) the deposition testimony of Lawrence C. Kay at p.90, line 14 to p.91, line 23, and of Robert L. Kay p.35, line 9 to p. 37, line 10. This was done despite the fact Judge Davidson gave them an opportunity to present additional evidence. It is improper for the Kays to now attempt to embellish the record and present new evidence for the first time on appeal. See Cowan & Co. v. Atlas Stock Transfer Co., 695 P.2d 109, 113-14 (Utah 1984); Franklin Financial, 659 P.2d at 1045.

Accordingly, the Kays' contentions on appeal will be argued based upon the record before the lower court.

III. The Kays Breached Their Contractual Obligations.

Pursuant to the terms of the Note, commencing June 1, 1984, the Kays were obligated to make quarterly payments of at

least \$42,659.37. From their own funds, they only made the June 1984 and May 1985 payments. As a result of the Kays' failure to make the quarterly payments due September 1, 1984 and December 1, 1984, three letters of credit were drawn upon as provided in the Trust Deed. No payments have been made since May 1985. Thus, the Kays have clearly breached their contractual obligations.

The only question presented on this appeal is whether the Kays have a legal excuse for those breaches. As set forth below, the Kays have no valid grounds for avoiding their contractual obligations.

IV. The Trust Deed And Trust Deed Note Are Not Unconscionable. Accordingly, The Lower Court Correctly Ruled That The Subject Agreements Are Valid And Enforceable.

Count I of the Kays' Complaint sought reformation of the Trust Deed and Trust Deed Note to make them more "fair, reasonable, conscionable and enforceable." (R.10.) In answers to interrogatories (R.345-352) the Kays objected to the substantive terms of the agreements which provided for a "discount" of \$139,000.00 and required them to obtain letters of credit as additional security for repayment of the funds which they received. They also contend that the agreements were procedurally unconscionable because they were in financial distress and were thus forced to accept onerous terms which differed from those which they thought would be included.

A. As a Matter of Law, the Substantive Terms of the Agreements Are "Conscionable".

It is well-settled that in the absence of compelling considerations of policy to the contrary, it is the duty of the courts to give effect to the covenants to which the parties have agreed in their contracts. Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 405 P.2d 339, 341 (1965). "A court does not have carte blanche to reform any transaction to include terms that it believes are fair." Briggs v. Liddell, 699 P.2d 770, 772 (Utah 1985); Cunningham v. Cunningham, 690 P.2d 549, 550 (Utah 1984). See also Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983); Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989, 990-91 (Utah 1958); Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221, 223 (Utah 1958); Tooele City v. Settlement Canyon Irrigation Co., 4 Utah 2d 215, 291 P.2d 881, 883 (Utah 1955).

The case of Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983) ("Bekins Bar") is directly on point and demonstrates, as a matter of law, that the Kays' agreement with Summit is not unconscionable. In that case, the plaintiff, Bekins Bar V Ranch, was in desperate financial condition. To meet its financial obligations, the Ranch's president and his wife ("the Fains") borrowed \$120,000.00 from the defendant Huths. 664 P.2d at 457. They agreed to repay \$200,000.00 in annual installments of \$100,000.00, \$50,000.00, and \$50,000.00. Id. That was the equivalent of an annual interest rate of 36.3 per cent. Id. The Fains later took out a second

loan for \$80,000.00 from the Huths and agreed to repay \$100,000.00 within six months -- an effective annual interest rate of 58 percent! Id. The loans to the Fains were secured by a second and third trust deed on the Fains' ranch, a security interest in farm equipment, three years of hay crops, and other personal property. Id.

When the Fains defaulted on the payment of the loans, the Huths began foreclosure proceedings. The Fains sought preliminary injunctive relief, and, as have the Kays, claimed that they were not in default, that the notice of default had been improperly filed, and that the loans were "unconscionable."

The trial court agreed with the Fains and attempted to substantially modify the terms of the agreement. See 664 P.2d at 458-459.

The Utah Supreme Court reversed the trial court and found that the trial court's attempts to make the agreements more "fair" were improper. It also ordered that the loan agreements be enforced as written. In doing so, the court made a number of observations which are pertinent to this case. First, the determination of whether a contract is unconscionable is to be made with respect to the conditions which existed at the time the contract was made. See 664 P.2d at 461.

Second, the court noted that:

The availability of high risk capital is essential to the functioning of our economic system. New enterprises with untested products often require high cost capital, as

do ventures whose viability is uncertain for whatever reason. Bekins argues that the finance charges on the loans, amounting to 36.3 percent on the \$200,000 loan and 58 percent on the \$100,000 loan, and the security taken for the loans, were excessive. Although the finance charges are high by some standards, we do not think they were unconscionable Huths' subsequent loans to Bekins, which proved necessary because of obvious underfinancing of the ranch operation, were clearly high risk. Acquisition of high risk capital almost always requires the payment of a premium. It is not sound legal policy to establish rules so strict as to unnecessarily dampen legitimate and desirable business activity.

664 P.2d at 463.

There is no doubt that the Kays agreed to pay a relatively high rate of interest for the money they obtained from Summit. The undisputed evidence demonstrated, however, that the Kays received a loan of \$667,000.00 for a venture for which three different banks were unwilling to provide funds. They were able to obtain their high-risk venture loan with a longer repayment schedule than the banks would normally allow. They were not required to come up with loan origination fees, title reports, title insurance, or other out-of-pocket costs to obtain the loan.

The Kays agreed to pay back their loan at an equivalent effective annual interest rate of approximately 24.28%. That interest rate was much lower rate than the 36.3% and 58% interest rates held to be proper and enforceable in the two "discounted" loans in Bekins Bar. Thus, under Utah law, under circumstances analogous to the case at bar, the amount of

the "discount" to the plaintiffs and their agreement to repay the funded amounts with an annual effective interest rate less than 25% is not unconscionable.

The Kays also claim it was unconscionable for Summit Systems to require them to provide letters of credit as security.¹ Not surprisingly, plaintiffs cite no authority for the novel contention that it is unconscionable for a lender to seek additional collateral for its loan. Indeed, in Bekins Bar the lender obtained security interests in hay crops, the debtors' properties, and several other items. In light of (a) the Kays' failure to make the September 1, 1984, December 1, 1984, and June 1, 1985 payments, (b) the generally depressed state of the Vernal economy, and (c) the inherent risk associated with developing raw land into improved subdivision lots, Summit Systems was more than justified in seeking such additional security.

¹The primary basis of this claim is that the loan was already fully collateralized since the property itself had an appraised value of \$1,518,000.00. This perfectly illustrates how Respondents are prejudiced by Appellants' delinquent citation to deposition testimony never presented to the lower court. In fact, the appraisal which the Kays relied upon estimated the market value of fully improved lots. On its face, it did not reflect the value of the property at the time the loan was made to the Kays and the property was undeveloped.

Similar arguments could be made regarding each of the Kays new factual assertions, e.g., they contend that Summit delayed the loan closing for several months, but the loan documents on their face, show that the letters of credit were not provided until less than two weeks before the closing.

B. There Are No Procedural Considerations
Rendering the Subject Transactions
Unconscionable.

The Kays contend that the subject loan transaction was procedurally unconscionable because by the time the loan was closed, the Kays were in such desperate financial straits that they were forced to accept the unconscionable substantive terms. As a matter of law, this claim is without merit.

To sustain a claim of "duress" or "compulsion," it must be proven that the Respondents wrongfully created the economic circumstances forcing the Kays to borrow funds from Summit. When a contract is otherwise entered into under stress of pecuniary necessity, it is not "compulsion." See Clearwater Constr. & Eng'r, Inc. v. Wickes Forest Indus., 108 Idaho 132, 697 P.2d 1146, 1148-49 (1985) ("Clearwater"); Continental Illinois National Bank & Trusts Co. of Chicago v. Stanley, 606 F.Supp. 558, 562 (N.D.Ill. 1985); Sheraton Hawaii Corp. v. Poston, 454 P.2d 369, 372 (Haw. 1969); Chouinard v. Chouinard, 568 F.2d 430, 433-34 (5th Cir. 1978).

The Kays found themselves in their alleged economic predicament from their own actions. The Respondents did not require the Kays to purchase and develop Yellow Hills. The Respondents did not force the three banks to turn down the Kays' loan requests. The Respondents did not prevent the Kays from negotiating with other lenders about obtaining development

loans at the same time they were negotiating with Summit Systems, Inc. The Respondents did not force the Kays to take \$667,000.00. The Respondents did not prevent the Kays from seeking refinancing at more favorable terms at any time from another lender after the loan was entered into. As a matter of law, therefore, the supposed fact that the Kays were required to accept the financing because of their own economic situation is not grounds for reforming the contract on the grounds of unconscionability.

Similarly, there are no other grounds for claiming "procedural" unconscionability. Usually, such a claim is based upon onerous terms being buried in "fine print." See Resource Management Co. v. Weston Ranch and Livestock Company, Inc., 706 P.2d 1028, 1042 (Utah 1985). In this case, the terms objected to were not buried. They were specifically set out in a separate typewritten documents -- Schedule A to the Trust Deed and a closing statement showing the amount of the discount. It is undisputed that the Kays reviewed the loan documents at closing, and although they now claim those terms differed from alleged prior oral negotiations, they signed those loan documents knowing the amount they would be obligated to repay. Further, it is undisputed that no one prevented the Kays from seeking the advice of counsel or delaying the closing for a short period if they felt that was necessary.

Based upon the foregoing, the subject agreements were not procedurally or substantively unconscionable, and, thus, Count I of the Complaint was properly dismissed.

C. The Kays May Not Reform The Contracts Because They Have Accepted The Benefits Of The Loan And Have Ratified It.

Even assuming arguendo that the subject loan transaction was "unconscionable," such would make the contract "voidable," not void. See Clearwater, 697 P.2d at 1149; Hubbard v. Geare, 77 Ariz. 262, 269 P.2d 1064, 1065-66 (1954); State v. Barlow, 153 P.2d 647, 654 (Utah 1944). Such contracts can be adopted and ratified. An unconscionable contract is ratified when the party accepts the benefits of that contract and/or complies with its provisions. Id.

The Kays accepted the benefits of the loan, i.e., they received \$667,000.00. The Kays made at least two of four quarterly payments before defaulting or failing to make any further payments. They were consulted with and cooperated in the calling of the letters of credit as provided in the Trust Deed. They are now seeking enforcement of certain provisions of the Trust Deed which they claim the Respondents breached. They may not both seek to reform the contract and seek damages for its alleged breach. See Burley Newspapers, Inc. v. Mist. Publishing Co., 414 P.2d 460, 462-63 (Idaho 1966). Thus, the Kays have adopted the contract and ratified it. They are no longer entitled to reformation of the Trust Deed and Note on the grounds of unconscionability.

D. The Trust Deed And Note Cannot Be Reformed Because They Are Held By Bona Fide Purchasers.

Even assuming arguendo that the Kays were entitled to reformation and that they had not ratified the contract, the Kays may not seek reformation against the Investors who collectively now hold 100% of the Trust Deed and Note. Contracts may not be reformed against good faith purchasers. See, e.g., Beams v. Werth, 200 Kan. 532, 438 P.2d 957, 967 (1968), cited with approval in Hottinger v. Jensen, 684 P.2d 1271, 1273 (Utah 1984). It is undisputed that the Investors are bona fide, good faith purchasers who paid valuable consideration to acquire their interests in the Trust Deed and Note.

V. The Respondents Were Under No Obligation To Release Lots When The Kays Had Defaulted On The Repayment Obligations, And The Respondents Were Forced To Seek Payment From Additional Security.

The Kays' second major contention is that the Respondents breached an express and implied contractual duty to reconvey lots from the Trust Deed when the principal amount of the loan was reduced by calling the letters of credit. This contention is without merit.

The Kays agreed to repay \$806,000, plus interest over the three year period of the loan. They agreed to fully collateralize that loan. To secure the loan, the Kays executed a Trust Deed on the Yellow Hills property. As additional security, the Kays provided three letters of credit in the

aggregate amount of \$280,000 which could be called pursuant to the terms of paragraph 23 of the Trust Deed:

23. Letter(s) of Credit. As additional security for the indebtedness the Trustor has delivered or shall deliver to the beneficiary the following irrevocable and unconditional letter(s) of credit drawn for the Trustor's account.

Bank: First Security Bank of Utah, N.A.
("The first bank")

Letter of Credit Number: 062-060-8980-50005

Amount: \$110,000.00

Expiration Date: July 10th 1985

Bank: First Interstate Bank
("The second bank")

Letter of Credit Number: 2003 and 2004

Amount: \$130,000.00 (#2003) & \$40,000.00 (#2004)

Expiration Date: Both July 10th 1985

The beneficiary shall have the right to draw upon the letter(s) of credit or any renewal or extension thereof, in whole or in part, upon the occurrence of any one or more of the following events:

(A)1. the occurrence of any event of default under this mortgage;

(B) Proceeds of any draw upon the letter(s) of credit may be applied by the beneficiary to be a payment of accrued interest (including any accrued interest the payment of which was otherwise deferred), late charges, principal (including any pre-payment charge occasioned by a principal payment), or any other obligation arising out of the Trustor's obligation to the beneficiary under this Deed of Trust or the Trust Deed Note, in such manner as the beneficiary, in its sole discretion, deems appropriate.

(C) Provided there is no default . . . the beneficiary shall release its rights in the letter(s) of credit and surrender the letter(s) of credit to the first and second bank upon the principal reduction of the Trust Deed Note as secured by this Deed of

Trust in the amount of Two Hundred Eighty Thousand (\$280,000.00) Dollars.

(Emphasis added.)

Paragraph 23(C) expresses the parties' intent that security for the loan would be released when the principal balance had been reduced by \$280,000.00. At that point, the \$280,000.00 of letters of credit would be released as security, and the Investors would look solely to the property for security for remaining amounts due under the Note.

The Kays' contention that the Investors were obligated to release their security interests in twelve lots when the Kays defaulted and the letters of credit drawn upon is purportedly based upon paragraph 22 of the Trust Deed.

Paragraph 22 of the Trust Deed authorized partial releases of the Trust Deed if and when the Kays met their contractual obligations by making the required quarterly payments:

22. Partial Releases. Upon receipt of the written request of the Trustor, and upon receipt of the principal payments hereinafter set forth, the beneficiary shall instruct the Trustee to deliver to the Trustor Deeds of Partial Reconveyance as follows:

- (a) Plat "A": Lots 1 through 27 excluding Lots 10, 20, 28, 29, 30, 31, 32, 33, and 34 upon receipt of \$15,000.00 for each lot to be so reconveyed.
- (b) Plat "A": Lots 35 through 95 upon receipt of \$13,000.00 principal for each lot to be so reconveyed.
- (c) Plat "B": Lots 1 through 51 upon receipt of \$5,000.00 principal for each lot to be so reconveyed.

(Emphasis added.)

It is axiomatic that when interpreting a contract, the court must consider each of its provisions in connection with the others and with a view towards the circumstances, nature and purpose of the transaction. Effect is to be given the entire agreement without ignoring any part thereof. See Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980); Utah State Medical Ass'n v. Utah State Employees Credit Union, 655 P.2d 643, 646 (Utah 1982); Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163 (Utah 1980). Accordingly, paragraphs 22 and 23 must be read together in light of the nature of the transaction and the purpose of the Trust Deed and letters of credit which was to provide security for the loan.

The Kays' contention that they were entitled to lot releases when the letters of credit were drawn is clearly contrary to the intents and purposes of the Trust Deed provisions and is inherently illogical. The following hypothetical example illustrates this point:

Borrower desires to develop 50 lots into an improved subdivision. He needs to borrow \$100,000 to do so. The current appraised value of the lots are \$1,000 each, \$50,000 total. Lender is willing to make a \$100,000 loan provided that Borrower secures the loan with the property as well as two letters of credit, one for \$30,000 and one for \$20,000. Thus, the \$100,000 loan will be fully collateralized. Lender also agrees to release one lot for each \$2,000 principal received. By the time Borrower pays \$100,000, all the lots will be released. This is a typical loan arrangement.

Borrower fails to make the first payment due on the loan so that the \$30,000 letter of credit is drawn upon. Under the Kays' theory, the \$30,000 should be credited to

principal leaving a balance of \$70,000. They also contend that 15 lots should be released because the principal balance has been reduced. Thus, the remaining collateral would be 35 lots at \$1,000 each and one \$20,000 letter of credit. Instead of being fully collateralized, Lender is now owed \$70,000, but now only has \$55,000 worth of security (i.e., the \$20,000 letter of credit and \$35,000 in property).

If Borrower missed the next payment so that the second \$20,000 letter of credit was drawn upon, under the Kays' theory, an additional 10 lots should be released. Lender would now be owed \$50,000, yet would only have a security interest in 25 lots for \$25,000. This contention is inherently untenable and contrary to sound lending practices.

While the Kay/Summit transaction is more complex than the illustration above, the principal is the same. The release provisions in the subject trust deed, read together with the letter of credit provisions establish that the parties intended that lots would be released when principal payments were received in the normal course, not when received by resorting to other collateral. This is the only interpretation which makes commercial sense. Indeed, under the Kays' theory, the letters of credit would not be "additional security," but would be a principal source of payment. Under the Kays' theory paragraph 23(C) of the Trust Deed would be rendered meaningless, because security would be released before the Kays had reduced the principal balance of the loan by \$280,000.00.

The Kays argue that ambiguous contract provisions should be construed against the drafter. While that proposition of law is generally true, simply because parties

interpret language differently does not mean the contract is ambiguous. See Camp v. Deseret Mutual Benefit Ass'n, 589 P.2d 780, 782 (Utah 1979). Where, as here, the provisions of the contract can be reconciled to give effect to all those provisions, there is no ambiguity. See Camp v. Deseret Mutual Benefit Ass'n, 589 P.2d 780, 782 (Utah 1979); Steel v. Eagle, 207 Kan. 146, 483 P.2d 1063, 1066 (1971). As demonstrated above, paragraphs 22 and 23 can only be harmonized if interpreted to require lot releases if the principal balance was reduced by payments on the loan itself, not by collection of funds from additional security.

The Kays cite deposition testimony wherein they contend Summit Systems, Inc. had agreed to release lots if letters of credit were drawn upon. That deposition testimony is inherently equivocal, and even if it were not, it would be inadmissible parol evidence which seeks to alter the terms of the written contract. See Rainford v. Rytting, 22 Utah 2d 252, 451 P.2d 769, 771 (1969); Steel v. Eagle, 207 Kan. 146, 483 P.2d 1063, 1066 (1971).

Based upon the foregoing, a construction of the agreement as a whole, in light of its purposes, and in order to give effect to all its provisions, indicates that the Kays were not entitled to any lot releases when the letters of credit were drawn upon. It would be error for this Court to rule otherwise.

VI. Respondents Complied With Their Contractual
And Statutory Obligations In Reconveying Lots
To The Kays.

Although the Kays were not entitled to any lot releases under the Trust Deed when the letters of credit were called, Summit later agreed to release seven lots in order to facilitate the sale of the entire Yellow Hills subdivision to a third party. Indeed, such a sale would have been highly advantageous to Respondents because it would have triggered the due-on-sale clause of the Trust Deed (§14a) and provided for repayment of the loan.

The Kays' contention that the Respondents were obligated to reconvey the seven lots by June 24, 1985, however, is wholly without merit.

On June 2, 1985, the Kays wrote Summit requesting the release of seven lots. Once such written notice was received, the Investors were required, by law, to advise the trustee to reconvey the property within thirty days after they received the written request from the Kays. See Utah Code Annotated §57-1-33 (1953).

That statutory requirement was incorporated, by law, into the Trust Deed:

It is the general rule that parties are presumed to contract with reference to existing statutes (citations omitted) and a statute which affects the subject matter of a contract is incorporated into and becomes a part thereof. (Citation omitted.) If the parties to the contract wish to provide for other legal principles to govern their contractual relationship, they must be expressly set forth in the contract. Absent

a clear intent to the contrary disclosed by the contract, the general law will govern. (Citations omitted.)

Wagner v. Wagner, 621 P.2d 1279, 1282 (Wash. 1980). See Farmers' & Merchants' Bank v. Federal Reserve Bank, 262 U.S. 649, 660 (1923) ("Laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.") This Court has consistently followed that general rule. See, e.g., George v. Oren Limited and Associates, 672 P.2d 732, 737 (Utah 1983); Beehive Medical Electronics Inc. v. Industrial Commission, 583 P.2d 53, 60 (Utah 1978); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 308 (Utah 1975).

In this case, Utah Code Ann. § 57-1-33 (1953) was a statute in existence at the time the parties entered into the Trust Deed and specifically governs the imposition of liability upon a beneficiary under a trust deed for failure to request a timely release from the trustee.

The undisputed facts clearly show that the Respondents complied with those statutory and contractual requirements. Within thirty days of the date Summit allegedly received the June 2, 1985 letter from the Kays, Mr. Southwick, on behalf of the Investors, requested the trustee, Mr. Buehler, to reconvey the seven lots. In fact, Mr. Buehler reconveyed the seven lots

on the thirtieth day (i.e., July 1, 1985), and the reconveyance was recorded July 3, 1985.

Because the Respondents requested the trustee to reconvey the seven lots within thirty days of receipt of written request as required by statute, they satisfied all contractual and statutory obligations.

VII. The Kays Stated No Claim For Tortious Breach Of Implied Covenant of Good Faith And Fair Dealing.

Count IV of the Kays' Complaint sought recovery for "a tortious breach of [the Respondents'] implied covenants and duties of good faith and fair dealing." See paragraph 28 of the Complaint. (R.12 to 13.) (Emphasis added.) In Beck v. Farmers Insurance Exchange, 701 P.2d 795, 798-799 (Utah 1985), this Court rejected the contention that breach of an implied covenant of good faith and fair dealing gives rise to an independent tort action. The lower court, therefore, properly dismissed Count IV.

On appeal, however, the Kays have apparently dropped their earlier contentions and now argue that the Respondents breached their implied contractual duties to release lots by June 24, 1985. This argument is without merit.

The Kays are asking this Court to rule that the implied covenants of good faith and fair dealing obligate parties to a contract to alter the express terms of the contract and the statutes which are incorporated therein in order to benefit one party. There is no such duty. In fact,

this Court has expressly recognized that where there are express terms concerning a specific contract right, there can be no claim for breach of an implied covenant of a different or contradictory nature. See Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

Finally, even if an implied covenant required the Respondents to act in good faith to aid the Kays in having seven lots available to Mr. Sprouse by June 24, 1985, then that obligation was clearly met. Summit Systems, Inc. made several good faith efforts to accomplish that reconveyance. It attempted to have the lots reconveyed by June 24, 1985, but was unable to do so because the trustee was out-of-town on vacation. It attempted to convince a title company to act as a substitute trustee to effect the reconveyance, but was unsuccessful. As soon as the trustee returned from vacation, the reconveyance was made. All of this was done within thirty days of the June 2, 1985 request for reconveyance. There is simply no legal or factual basis for the contention that the Respondents failed to act in good faith.

VIII. The Lower Court Properly Ruled That A Dispute Had Arisen Regarding The Number Of Lots To Be Released; That The Kays Compromised Their Claim; And That There Was No Failure On The Part Of The Respondents With Respect To That Compromise, Modification And/Or Accord And Satisfaction.

Faced with the realization that they have no cause of action for the Respondents' alleged failure to convey lots by

June 24, 1985, the Kays now argue that lots should have been released in response to a demand for the release of twelve lots allegedly made on January 10, 1985.

As demonstrated in preceding sections, Respondents had no contractual or other duty to release any lots as a result of the calling of letters of credit. Thus, the Kays' argument is fatally flawed from its beginning.

The lower court set forth other grounds for dismissing the Kays' claim that lots should have been released in response to the January 10, 1985 letter:

Plaintiffs' claim . . . is based upon a letter dated January 10, 1985. Defendants claim the matter was compromised and a new letter was sent on June 2, 1985 demanding the release of seven (7) lots. There is no dispute that the seven (7) lots were released within thirty (30) days of that demand.

The facts as admitted by both sides show the Plaintiffs making payments late or failing to make payments with the result that the "additional security" was utilized. There was a dispute whether lots could be released. The June 2, 1985 letter is an abandonment of the earlier and greater claim for releases and does constitute a compromise and the subsequent release constitutes an accord and satisfaction. The Court does not find a failure on the part of the Defendants

The lower court rendered that decision based upon the following record:

- (1) The Kays demanded that twelve lots be released;
- (2) The Kays admitted Summit maintained that they were not entitled to any lot releases. Indeed, Respondents

have consistently maintained that position in correspondence between the parties, (see L. Kay depo. Exh. 18, R.452-454); in the litigation below, and on appeal.

- (3) In the Spring of 1986, the parties compromised and the Respondents agreed to release and the Kays agreed to accept seven lots.

Parties to a contract are free to modify all or any portion of the terms of that contract, and any pre-modification contractual rights which conflict with the modified contracts are deemed waived or excused. See Rapp v. Mountain States Telephone & Telegraph Co., 606 P.2d 1189, 1191 (Utah 1980); Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 89 (1963). Parties are free to compromise disputes. Parties are free to agree to substituted performance to constitute an accord and satisfaction. Whatever the name given to this principle, the fact is that the Kays agreed to accept seven lots without any change in any other contractual provision.

Contrary to the Kays' arguments before this Court, there was clearly a dispute as to whether any lots should be released when the letters of credit were drawn. To resolve that dispute, in the Spring of 1985, the parties agreed to compromise on that single issue and release seven lots. The record presented to the lower court further indicates that not one additional term of the parties' obligations was altered by the parties. In fact, the June 2, 1985 letter indicated on its face that Mr. Southwick was insisting upon the Kays' compliance

with the contract terms by insisting that the request for release of lots be in writing. Accordingly, pursuant to their contractual and statutory obligations, the Investors were required to instruct the trustee to release those lots within thirty days of receipt of the Kays' June 2, 1985 written request. It is undisputed that they did so.

The Kays strenuously objected to the presentation of the compromise/modification/accord and satisfaction argument on the grounds it had not been plead as an affirmative defense. Respondents were not barred from raising that theory.

Prior to their Memorandum in Opposition to the Motion for Summary Judgment, the Kays had never indicated that they were relying upon the January 10, 1985 letter as a basis of a claim against Respondents. The Complaint never mentioned it, nor did it appear in any other pleading.

When presented with this new theory, Respondents raised the new defense, but it was a new defense in name only. Respondents had previously plead as affirmative defenses that the Kays had waived their claims and that the Respondents had met all their obligations under the agreements and understandings of the parties. (R.267.) If the Kays agreed to accept seven lots, such would constitute a waiver of their claim for twelve lots. If the parties agreed that Respondents were only to convey seven lots, then the Respondents had complied with that obligation. While the "magic words" --

accord and satisfaction -- had not been plead, the Kays were put on notice of the Respondents' contentions. That is all that is required by the pleading requirements.² See Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 91 (1963).

Finally, this argument is a red-herring because the Kays were not prejudiced by the accord and satisfaction defense. The lower court specifically granted the Kays an opportunity to respond to the accord and satisfaction argument by submitting an additional memorandum and additional evidence. (R.1009-1012.) The Kays then failed to so respond.

Based upon the undisputed facts before it, the lower court properly ruled that the parties had reached a compromise, had modified the contract, and/or had reached an accord and satisfaction which barred any claim that Respondents improperly failed to release lots in response to the January 10, 1985 letter.

CONCLUSION

This is not a difficult or convoluted case. The Kays are attempting to avoid the consequences of their failure to make the Trust Deed Note payments. With this lawsuit, the Kays

²Summit Systems, Inc. has maintained that it never received the alleged January 10, 1985 letter. (See R.564.) For the purposes of the motion for summary judgment, however, it argued as though that letter had been received. It would be anomalous to require Respondents to raise an affirmative defense based on correspondence which they never received.

have attempted to deny or delay the Investors the opportunity to recover the funds they invested on the basis of the Trust Deed and Trust Deed Note which the Kays freely executed.

The arguments presented by the Kays regarding "unconscionability" and the Respondents' alleged breach of contract are without merit.

With respect to the claim of unconscionability, the terms of the Trust Deed which are now in question were set forth in a separate typewritten sheet and were discussed at closing. Under Utah law, the terms which are now contested by the Kays are not unconscionable. The Respondents were not responsible for the Kays' perceived need to execute the loan contracts. The Kays subsequently ratified that contract. Finally, it is too late to "reform" the contract terms against the Respondent-Investors.

Nor is there any basis for the Kays' claims that Respondents breached the agreements by failing to timely release lots. The June 2, 1985 letter is the written communication upon which the Kays must base their claim. It is clear that the Respondents complied with any contractual and statutory duties with respect to lot releases after that letter was received. It is unfortunate that the trustee was on vacation prior to June 24, 1985, when the Kays wanted the lots released. The fact that Respondents were unable to reconvey the lots sooner than the contract and statute required, however, does not give rise to a breach of contract claim,

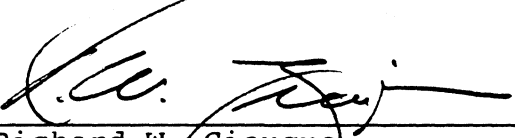
particularly when the Respondents were not only able to request the trustee to reconvey the lots within thirty days of the written request as required by U.C.A. §57-1-33 (1953), but more importantly, were actually able to reconvey the lots on the thirtieth day.

Based upon the foregoing, the summary judgment of the lower court should be affirmed in all respects.

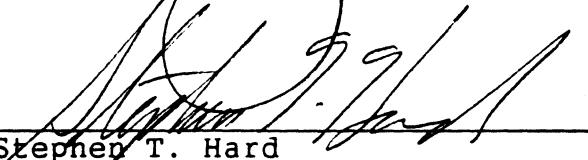
DATED this 18th day of November, 1987.

GIAUQUE, WILLIAMS,
WILCOX & BENDINGER
500 Kearns Bldg.
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

BY


Richard W. Giaque

BY

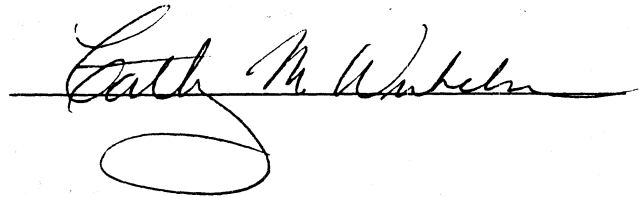

Stephen T. Hard
Attorneys for
Defendants-Respondents

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of
RESPONDENTS' BRIEF were mailed, first-class postage prepaid,
this 18th day of November, 1987, to the following:

Leslie W. Slauch
Howard, Lewis & Petersen
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603

4299m

A handwritten signature in cursive script, reading "Cathy M. Winkler", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the end.

ADDENDUM

- Exhibit A - Ruling
- Exhibit B - Trust Deed Note
- Exhibit C - Trust Deed
- Exhibit D - Utah Code Annotated §57-1-33

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

LAWRENCE C. KAY, JOY KAY,)	
ROBERT L. KAY, and TERESA KAY,)	
)	
Plaintiffs,)	R U L I N G
)	
vs.)	
)	
SUMMIT SYSTEMS, INC., a)	
corporation, et al.,)	
)	
Defendants.)	Civil No. 86-CV-48U

The parties willingly entered into negotiations over the loan. The final terms were well understood by all and were specifically agreed to by Plaintiffs. Count I is hereby dismissed with prejudice.

The Court is not persuaded that a beneficiary of an agreement owes any fiduciary duty to the Trustor. Plaintiff has cited no authority to the contrary. Count III is hereby dismissed with prejudice.

This Court will not recognize a cause of action for tortious breach of implied covenant and fair dealing. Court IV is dismissed with prejudice.

The Court having dismissed Counts III and IV finds nothing to sustain Plaintiffs' Claim for punitive damages. Count VIII is dismissed with prejudice.

EXHIBIT A

1/28/87

The remaining Counts, II, V, VI and VII, are dependant upon Plaintiffs' claim of wrongful refusal to release lots. Plaintiffs' claim this is based upon a letter dated January 10, 1985. Defendants claim the matter was compromised and a new letter was sent on June 2, 1985 demanding the release of seven (7) lots. There is no dispute that the seven (7) lots were released within thirty (30) days of that demand.

The facts as admitted by both sides show the Plaintiffs making payments late or failing to make payments with the result that the "additional security" was utilized. There was a dispute whether lots could be released. The June 2, 1985 letter is an abandonment of the earlier and greater claim for releases and does constitute a compromise and the subsequent release constitutes an accord and satisfaction. The Court does not find a failure on the part of the Defendants. Counts II, V, VI and VII are also dismissed with prejudice.

DATED this 26 day of January, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Richard W. Giaugue", written over a horizontal line.

cc: Richard W. Giaugue
Ray G. Martineau
Robert M. Anderson

TRUST DEED NOTE

\$806,000.00

January 23rd, 1984

For value received, we, or any of us, promise to pay to SUM SYSTEMS, INC. or order, at its above office in Utah, the principal Eight Hundred Six Thousand Dollars (\$806,000.00) with interest therefrom January 23rd, 1984 until paid at the rate of SEVENTEEN (17%) per annum, both principal and interest payable only in lawful money of the United States of America.

This Note evidences a loan made or to be made by SUMMIT SYSTEMS, INC. to Borrower in the principal amount hereof and is secured by Trust Deed or even date herewith. This note is calculated on a daily interest basis.

It is understood and agreed, that the first installment of accrued interest shall be due on the 1st day of June, 1984. Then, subsequent installments in the amount of (\$42,659.37) Forty Two Thousand Six Hundred Fifty Nine and 37/100's dollars, including interest, shall be due on the 1st day of September 1984, and one of said installments to be paid on the 1st day of each and every quarter thereafter until the 1st of December, 1987, at which time the whole of the unpaid principal together with accrued interest, shall be due; each of said quarterly installments to be applied first to the payment of accrued interest on the unpaid balance, and the balance thereof to be credited on said principal.

And in case default be made in the payment of any of said installments of principal or interest at the times and in the manner aforesaid, then such installment or payment, installments, or payments, so in default shall be added to and become a part of the principal sum, and from the date when each installment should have been paid until it is paid shall bear twenty one percent rate of interest as the principal debt or in the performance of any agreement, covenant or condition in the Trust Deed securing this note, the holder thereof, at its option, without notice or demand, may declare the entire principal balance and accrued interest due and payable.

In the event any installment of principal and interest shall remain unpaid for a period of 15 days after due, the undersigned, at the option of the holder hereof and upon demand, agree to pay as a late charge a sum equivalent to FIVE (5%) percent of the principal amount of said installment. Default is defined as 15 days late on any payment.

If this note be placed for collection, either with or without suit by the undersigned jointly and severally agree to pay all costs and expenses thereof, including a reasonable attorney's fee.

The makers, guarantors and endorsers hereby severally ^{affix block} waive presentment for payment, demand, notice of dishonor, protest and of non-payment of this note, and all defenses on the ground of any extension of time of payment that may be given by the holder to them or any of them; and also agree that further payments of principal or interest in renewal thereof shall not release them as makers, guarantors or endorsers.

In the event the undersigned is unable to pay off the outstanding principal and interest due on 12-1-87 due solely to external financial conditions affecting this and like property generally, then and only then will the lender extend the term for two more years with the following conditions strictly met; (1) A 4% modification fee of the outstanding balance paid at the time of modification; (2) The quarterly payments will increase so as to amortize fully the outstanding balance due 12-1-87 over the two year period ending 12-1-89 at the same rate of interest set forth in the note secured hereby; (3) To verify the existence of the above mentioned external financial conditions and market conditions the Borrower will submit to the Lender written verification that the Borrower has been denied re-financing by three commercial banks solely because of adverse financial conditions and market conditions generally affecting this and like other property.

X Lawrence Kay
Lawrence Kay

X Joy Kay
Joy Kay

X Robert L. Kay
Robert L. Kay

X Teresa Kay
Teresa Kay

WHEN RECORDED, MAIL TO:

Summit Systems Inc. No. 528-87 Recorded at request of Verne Abstract Fee Paid 22.50
4590 Harrison Blvd. Garrett 1984 at 5.00 M Sale Anderson Utah County, Plt. 349 Page 301
Ogden, Utah 84403 Space Above This Line For Recorder's Use

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 23rd day of January, 1984,
between Lawrence C. Kay and Joy Kay,
Robert L. Kay and Teresa Kay, as TRUSTOR,
whose address is 1940 East 2500 South Naples Utah 84078
(Street and number) (City) (State)
J. Scott Buehler, as TRUSTEE,* and
Summit Systems Inc., as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,
WITH POWER OF SALE, the following described property, situated in Uintah
County, State of Utah:

✓ Lots 1 through 95 inclusive of Plat "A" YELLOW HILL ESTATES
SUBDIVISION, excluding Lots 10, 20 & 28-34. Lots 1 through
51 inclusive of Plat "B" YELLOW HILL ESTATES SUBDIVISION,
being located in the West half of Section 18, Township 4 South,
Range 21 East, Salt Lake meridian.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 806,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

EXHIBIT C

P1000052

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed damaged or destroyed thereon, to comply with all laws, covenants and restrictions affecting said property, not to commit or permit waste thereof, not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general, and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustor; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property, to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto, and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

14a Due on Sale. The loan evidenced by the note secured hereby was made in reliance upon Trustor's credit and financial capacity and property management expertise. Accordingly, in the event the Trustor or successors in interest shall either sell, convey or alienate the herein described property or any part thereof interest therein without the written permission of lender or be divested of title in any manner, whether voluntary or involuntarily, then the full principal of the Note secured hereby together with full and all other amounts

under said note, this Deed of Trust at the option of the holder, without demand and notice, shall immediately become due and payable. Beneficiary's written consent shall not be unreasonably withheld.

15. After the lapse of such time as may then be required by law following the recording of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale, provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) 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; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

21a. Personal Liability. Trustor and its constituent partners shall personally liable for all amounts due under the loan secured hereby. In the event of a default due hereunder or the Note or related Security Instruments, Beneficiary shall have the right to proceed directly and immediately against Trustor and/or its constituent partners without first proceeding against the property through foreclosure or otherwise and such proceeding is not to be deemed an irrevocable election of remedies.

21b. Due on Encumbrance. Trustor covenants during the term hereof not to encumber, mortgage, pledge or hypothecate the property as security for additional junior debt without written consent of the beneficiary and a breach of this covenant shall entitle lender, at its sole option, to declare the entire outstanding principal and interest due and payable in full with out demand or notice.

22623 (See Schedule a) SIGNATURE OF TRUSTOR

x Lawrence C. Kay
Lawrence C. Kay

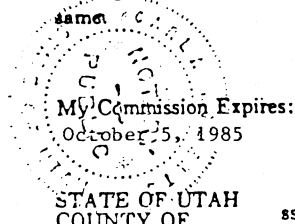
x Joy Kay
Joy Kay

x Robert L. Kay
Robert L. Kay
x Teresa Kay
Teresa Kay
(If Trustor an Individual)

STATE OF UTAH
COUNTY OF UTAH ss.

On the 23rd day of January, A.D. 1984, personally

appeared before me Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay, the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.



Garen Roberts
Notary Public residing at:

Vernal, Utah

(If Trustor a Corporation)

STATE OF UTAH
COUNTY OF ss.

On the day of , A.D. 19, personally

appeared before me , who being by me duly sworn,

says that he is the of the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said acknowledged to me that said corporation executed the same.

Notary Public residing at:

My Commission Expires:

P1000054

22. Partial Releases. Upon receipt of the written request of the Trustor, and upon receipt of the principal payments hereinafter set forth, the beneficiary shall instruct the Trustee to deliver to the Trustor Deeds of Partial Reconveyance as follows:

(a) Plat "A": Lots 1 through 27 excluding Lots 10, 20, 28, 29, 30, 31, 32, 33, and 34 upon receipt of \$15,000.00 for each lot to be so reconveyed.

(b) Plat "A": Lots 35 through 95 upon receipt of \$13,000.00 principal for each lot to be so reconveyed.

(c) Plat "B": Lots 1 through 51 upon receipt of \$5,000.00 principal for each lot to be so reconveyed.

23. Letter (s) of Credit. As additional security for the indebtedness the Trustor has delivered or shall deliver to the beneficiary the following irrevocable and unconditional letter(s) of credit drawn for the Trustor's account:

Bank: First Security Bank of Utah N.A.
 ("The first bank")
 Letter of Credit Number: 062-060-8980-50005
 Amount: \$110,000.00
 Expiration Date: July 10th 1985

Bank: First Interstate Bank
 ("The second bank")
 Letter of Credit Number: 2003 and 2004
 Amount: \$130,000.00 (#2003) & \$40,000.00 (#2004)
 Expiration Date: Both July 10th 1985

The beneficiary shall have the right to draw upon the letter(s) of credit or any renewal or extension thereof, in whole or in part, upon the occurrence of any one or more of the following events:

(A)

1. the occurrence of any event of default under this mortgage; or

2. The Trustor's failure to deliver to the beneficiary, no less than thirty (30) days prior to the expiration date of the letter(s) of credit or any renewal or extension thereof, a renewal or extension of the letter(s) of credit for a term of not less than one year; or

3. Any action by the Trustor or the first or second bank which, in the beneficiary's discretion, reasonably exercised, may jeopardize its rights to draw on the letter(s) of credit;

(B) Proceeds of any draw upon the letter(s) of credit may be applied by the beneficiary to be a payment of accrued interest (including any accrued interest the payment of which was otherwise deferred), late charges, principal (including any pre-payment charge occasioned by a principal payment), or any other obligation arising out of the Trustor's obligation to the beneficiary under this Deed of Trust or the Trust Deed Note, in such manner as the beneficiary, in its sole discretion, deems appropriate.

(C) Provided there is no default or condition which but for the furnishing of notice or the passage of time would constitute an event of default under this Trust Deed, the beneficiary shall release its rights in the letter(s) of credit and surrender the letter(s) of credit to the first and second bank upon the principal reduction of the Trust Deed Note as secured by this Deed of Trust in the amount of Two Hundred Eighty Thousand (\$280,000.00) Dollars.

balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section. 1985

57-1-33. Satisfaction of obligation secured by trust deed - Reconveyance of trust property.

When the obligation secured by any trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property. The reconveyance may designate the grantee therein as "the person or persons entitled thereto." The beneficiary under such trust deed shall deliver to the trustor or his successor in interest the trust deed and the note or other evidence of the obligation so satisfied. Any beneficiary under such trust deed who refuses to request a reconveyance from the trustee for a period of thirty days after written demand therefor is made by the trustor or his successor in interest shall be liable to the trustor or his successor in interest, as the case may be, for double damages resulting from such refusal, or such trustor or his successor in interest may bring an action against the beneficiary and trustee to compel a reconveyance of the trust property and in such action the judgment of the court shall be that the trustee reconvey the trust property and that the beneficiary pay to the trustor, or his successor in interest, as the case may be, the costs of suit including a reasonable attorney's fee and all damages resulting from the refusal of the beneficiary to request a reconveyance as hereinabove provided. 1961

57-1-34. Sale of trust property by trustee - Foreclosure of trust deed - Limitation of actions.

The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed. 1961

57-1-35. Trust deeds - Transfer of debts secured by - Transfer of security.

The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor. 1961

57-1-36. Trust deeds - Instruments entitled to be recorded - Assignment of a beneficial interest.

Any trust deed, substitution of trustee, assignment of a beneficial interest under a trust deed, notice of default, trustee's deed, reconveyance of the trust property and any instrument by which any trust deed is subordinated or waived as to priority, when acknowledged as provided by law, shall be entitled to be recorded, and shall, from the time of filing the same with the recorder for record, impart notice of the contents thereof to all persons, including subsequent purchasers and encumbrancers for value, except that the recording of an assignment of a

beneficial interest in the trust deed shall not in itself be deemed notice of such assignment to the trustor, his heirs or personal representatives, so as to invalidate any payment made by them, or any of them, to the person holding the note, bond or other instrument evidencing the obligation by the trust deed. 1961

Chapter 2. Acknowledgements

57-2-1. Manner of acknowledging or proving conveyances.

57-2-2. Who authorized to take acknowledgments.

57-2-3. Acknowledgment by deputy.

57-2-4. Taking acknowledgments of persons with United States armed forces.

57-2-5. Certificate of acknowledgment.

57-2-6. Party must be known or identified.

57-2-7. Form of certificate of acknowledgment.

57-2-8. When grantor unknown to officer.

57-2-9. When executed by attorney in fact.

57-2-10. Proof of execution - How made.

57-2-11. Witness must be known or identified.

57-2-12. What must be proven.

57-2-13. Form of certificate.

57-2-14. When subscribing witness dead - Proof of handwriting.

57-2-15. What evidence required.

57-2-16. Subpoena to subscribing witness.

57-2-17. Disobedience - Contempt - Proof aliunde.

57-2-1. Manner of acknowledging or proving conveyances.

Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided. 1953

57-2-2. Who authorized to take acknowledgments.

The proof or acknowledgment of every conveyance whereby any real estate is conveyed or may be affected shall be taken by one of the following officers:

(1) if acknowledged or proved within this state, by (a) a judge or clerk of a court having a seal, (b) a notary public, or (c) a county clerk or county recorder;

(2) if acknowledged or proved outside of this state and within any state or territory of the United States, by (a) a judge or clerk of any court of the United States, or of any state or territory, having a seal, (b) a notary public, or (c) a commissioner appointed by the governor of this state for that purpose;

(3) if acknowledged or proved outside of the United States, by (a) a judge or clerk of any court of any state, kingdom, or empire having a seal, (b) any notary public of that state, kingdom, or empire, or (c) any ambassador, minister, commissioner, consul, vice-consul, or consular agent of the United States appointed to reside in that state, kingdom, or empire. 1987

57-2-3. Acknowledgment by deputy.

When any of the officers above mentioned are authorized by law to appoint a deputy, such acknowledgment or proof may be taken by any such deputy in the name of his principal. 1953

57-2-4. Taking acknowledgments of persons with United States armed forces.

In addition to the acknowledgment of instruments in the manner and form and as otherwise authorized by this chapter, any person serving in or with the armed forces of the United States may acknowledge the same wherever located before any commissioned