

1997

# Zions First National Bank, a National Banking Association, and 4447 Associates, a Utah general partnership v. First Security Financial, a national corporation : Brief of Appellee

Utah Court of Appeals

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Jeffrey M. Jones; David L. Arrington; J. Mark Gibb; Durham, Evans, Jones and Pinegar; Attorneys for Plaintiff/Appellee.

Scott H. Clark; James S. Jardine; Brent D. Wride; Ray, Quinney and Nebeker; Attorneys for Defendant/Appellant.

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10644-CA

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IN THE UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK, a  
National Banking Association,  
and **4447 ASSOCIATES**, a Utah  
general partnership,

Plaintiff-Appellee,

v.

**FIRST SECURITY FINANCIAL**,  
a National corporation,

Defendant-Appellant.

No. 970644-CA

Argument Priority 15

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BRIEF OF APPELLEE

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Appeal from a Judgment of the Third Judicial District Court  
for Salt Lake County, Honorable Frank G. Noel, District Judge

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Scott H. Clark  
James S. Jardine  
Brent D. Wride  
RAY, QUINNEY & NEBEKER  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385  
Attorneys for Appellant-Defendant First  
Security Financial

Jeffrey M. Jones (1741)  
David L. Arrington (4267)  
J. Mark Gibb (5702)  
DURHAM, EVANS, JONES & PINEGAR  
50 South Main, Suite 850  
Salt Lake City, Utah 84144  
Attorneys for Appellee-  
Plaintiff 4447 Associates

FILED

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James S. Jardine  
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RAY, QUINNEY & NEBEKER  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385  
Attorneys for Appellant-Defendant First  
Security Financial

Jeffrey M. Jones (1741)  
David L. Arrington (4267)  
J. Mark Gibb (5702)  
DURHAM, EVANS, JONES & PINEGAR  
50 South Main, Suite 850  
Salt Lake City, Utah 84144  
Attorneys for Appellee-  
Plaintiff 4447 Associates

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**BRIEF OF APPELLEE**

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Appeal from a Judgment of the Third Judicial District Court  
for Salt Lake County, Honorable Frank G. Noel, District Judge

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**JURISDICTION**

This appeal is from findings of fact and conclusions of law and judgment of the Third Judicial District Court of Salt Lake County, State of Utah, entered July 1, 1997 against First Security Financial ("Bank") and in favor of 4447 Associates ("4447"). The Bank filed this appeal in the Utah Supreme Court (No. 970382), which had jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j) (1992). On November 5, 1997, the Utah Supreme Court poured



over this appeal to this Court for disposition (No. 970644-CA). This Court of Appeals thus has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (1992).

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Is the Bank precluded from asserting that Section 70A-9-318(2) should apply where the trial court twice found, assuming *arguendo* that the statute applied, that the Bank presented insufficient evidence to establish any defense under the statute and the Bank failed to appeal those findings. Entry of summary judgment is reviewed for correctness.<sup>1</sup> This issue is preserved at R.1783-1868,1896-1981. When challenging findings of fact entered by the trial court after trial on remand, an appellant must marshal all evidence supporting the finding in order to demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the finding.<sup>2</sup> This issue is preserved at R.2155-71.

2. Does this Court's prior, final decision applying Section 70A-9-318(1) to this case and rejecting application of Section 70A-9-318(3) preclude the Bank from attempting to assert defenses under Section 70A-9-318(3) on remand regardless of the Utah Supreme Court's decision interpreting Section 70A-9-318(3) prior to entry of judgment by the trial

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<sup>1</sup>*Reinbold v. Utah Fun Shares*, 850 P.2d 487 (Utah Ct. App.1993)(citing *Bountiful v. Riley*, 784 P.2d 1174, 1175 (Utah 1989)).

<sup>2</sup>*Reinbold v. Utah Fun Shares*, 850 P.2d 487, 489 (Utah Ct. App.1993))(citing *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989)).

court. The trial court's legal rulings are reviewed for correctness.<sup>3</sup> This issue is preserved at R. 1783-1868, 1896-1981, 2155-71.

3. Whether the trial court correctly awarded 4447 attorney fees and costs as the prevailing party under the Asset Purchase Agreement where appellant failed to make payments required by the Asset Purchase Agreement. This Court reviews the trial court's legal rulings for correctness.<sup>4</sup> This issue is preserved at R. 1908-12.

The Bank appeals questions of law. The Bank has failed to challenge factual findings made by the trial court. Therefore, those factual findings are not before this Court.

### **DETERMINATIVE PROVISIONS OF LAW**

This case was decided by the trial court sitting without a jury. On summary judgment, Rule 56, Utah Rules of Civil Procedure, is determinative. See Addendum A. As to questions regarding the assignment, Utah Code Annotated Section 70A-9-318 is determinative. See Addendum B.

### **STATEMENT OF THE CASE**

#### **NATURE OF THE CASE**

The Complaint filed in this case on March 3, 1987, alleging that through a settlement agreement the Bank and Capitol Thrift & Loan ("Capitol") wrongfully attempted to extinguish the Bank's obligations to Capitol. By assignment, Zions became entitled to

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<sup>3</sup>*Hansen v. Hansen*, 958 P.2d 931, 933 (Utah 1998).

<sup>4</sup>*Hansen v. Hansen*, 958 P.2d 931, 933 (Utah 1998).

receive the payments and the Bank received notice of the assignment. However, the Bank failed to obtain permission from or give notice to 4447 regarding the settlement agreement which purported to extinguish the Bank's obligation. 4447 asked the trial court to order the Bank to pay the amount owing including attorney fees and costs. (R. 6-7.) The Bank answered the Complaint, denied liability saying it had not received notice of the assignment. (R. 42-46.)

#### **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

On May 24, 1990, the trial court granted the Bank's Motion for Partial Summary Judgment and determined that the principal amount owed to Capitol under the Purchase Agreements should be adjusted downward by \$1,000,000. (R. 398)

Following a bench trial on January 6-7, 1992, the trial court issued a Memorandum Decision on January 30, 1992, (R. 702-11), and a judgment on November 3, 1992, (R. 783-84), in the Bank's favor. This Court reversed the trial court on January 6, 1995 and remanded the case for entry of "an appropriate judgment" in favor of 4447. 889 P.2d 467, 476 (Utah Ct. App. 1995). The Bank unsuccessfully petitioned for certiorari. (R. 1687.)

On remand, the trial court granted 4447's motion for partial summary judgment and the Bank filed several motions assailing the judgment. After denying the Bank's remaining defenses, the trial court entered judgment in favor of 4447 and the Bank filed this appeal.

#### **STATEMENT OF FACTS**

The following facts are in the record from the trial court:

##### **THE PARTIES AND THE PURCHASE AGREEMENTS**

1. The Bank purchased certain assets of Capitol under the terms of an asset purchase agreement (the "Asset Purchase Agreement"). (R. 679.)

2. The Asset Purchase Agreement required the Bank to pay Capitol \$1,077,777.42 on December 13, 1985. (R. 679.) The Asset Purchase Agreement also required quarterly interest payments to Capitol of \$25,194.44. *Id.*

3. Paragraph 2 of the Asset Purchase Agreement permits the principal amount of the deferred portion of the purchase price to be adjusted downward not more than \$1,000,000, if the "actual and anticipated losses on the collection of the amount of the receivables as of the Closing Date exceed the reserve for losses as of the Closing Date". (R. 10.) Paragraph 1 of the Closing Agreement defines the Closing Date "for all purposes" of the Purchase Agreements as December 13, 1982. (R. 18.)

4. Richard A. Christenson ("Christenson") was president and chief executive officer of Capitol until the fall of 1982. (R. 679.) Christenson became the president, chief operating officer, and a director of the Bank at its inception in December 1982, and served in those positions until November 1984. *Id.*

5. On about September 28, 1984, Capitol and Zions entered into an Assignment and Security Agreement (the "Assignment"). The Assignment gave Zions a security interest in the receivable owed by Bank under the Asset Purchase Agreements. (R. 24-36)

6. In November 1984, shortly after the Assignment was executed and the underlying loan from Zions to Capitol was guaranteed by Christenson, the Bank terminated Christenson. (R. 972.)

7. Sometime between November 1984 and July 1985, Christenson was reappointed as chief executive officer of Capitol.<sup>5</sup>

8. On or about July 10, 1985, the Bank, Christenson, and Capitol entered into a settlement agreement (the "Settlement Agreement")<sup>6</sup> which purported to extinguish the Bank's obligation to Capitol under the Purchase Agreements even though the right to receive the payments was previously assigned. (R. 136-37.)

9. The Settlement Agreement required the parties not to disclose the existence and terms of the Settlement Agreement. (R. 140.)

10. As a condition of his agreement to execute the Settlement Agreement, Christenson was required to give the Bank an original signed personal financial statement and statement of Capitol's financial condition. (R. 135-36)

11. Prior to July 1985, Christenson delivered his personal financial statements which listed Capitol's receivable from the Bank under the Asset Purchase Agreements which, by footnote, revealed the following language:

This represents my portion of the ownership of Capitol Thrift & Loan based on the contract amount I have with First Security Financial. This receivable has been pledged to Zions First National Bank.

(R. 682-83)(Emphasis supplied.)

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<sup>5</sup>(R. 998 (lines 11-25) - 999 (line 1)); (R. 1004)(lines 22-25).

<sup>6</sup>(R. 974 (lines 22-25) to 975 (lines 1-10)).

12. The received a third financial statement with identical language to that referenced above from Christenson's attorney prior to July 1985. (R. 683).

13. Christenson testified at trial that no representative, personnel of or attorney for the Bank ever questioned him regarding his disclosure that the receivable evidenced by the Purchase Agreements was pledged to Zions. (R. 991.)

14. Capitol did not default on its obligation to Zions secured by the Assignment until at least December 1985. (R. 682.) Thereafter, Zions questioned Christenson regarding the default. Only when Capitol failed to cure the default did Zions first learn of the Settlement Agreement.

15. Zions, as assignee, sued the Bank, alleging that the collateral was wrongfully extinguished. (R. 2-39.)

16. In June 1990, after the suit was filed, Zions assigned its rights to 4447. (R. 780.)

17. At trial, the trial court found that the Bank had not received adequate notice of the Assignment notwithstanding Christensen's written disclosures. (R. 709.)

18. 4447 appealed (the "First Appeal"). Overturning the trial court, this Court determined that the Bank received adequate notice of the Assignment through Christensen's written disclosures. 889 P.2d 467, 474-75 (Utah Ct. App. 1995).

19. This Court also ruled:

Thus, in the context of an assignment, section 9-318 distinguishes between claims and defenses arising from the contract and other unrelated claims and defenses. An account debtor can assert claims and defenses based

on the terms of the contract whether they arise before or after notification of an assignment. However, subsection (1)(b) limits assertion of unrelated claims and defenses to those "which accrue[ ] before the account debtor receives notification of the assignment." *Id.* § 70A-9-318(1)(b) (emphasis added). See also West One Bank v. Life Ins. Co., 887 P.2d 880, 885 n. 7 (Utah Ct. App.1994) (secured creditor need only give notice of its interest in order to have priority over later creditor's subsequent right of setoff). Subsection (1)(b) does not specify a particular form of notice, but simply precludes an account debtor from raising a claim or defense against an assignee after the account debtor is aware that the assignment exists.

The two-pronged notice requirement mandated by Utah Code Ann. § 70A-9-318(3) (1990) is not applicable to our analysis. . . . According to the terms of section 9-318(1)(b), First Security, as an account debtor, can only succeed if its claim or defense accrued before it received notice of the assignment's existence.

889 P.2d at 472, n.8 (emphasis added).

20. This Court concluded: "Accordingly, we reverse in part and affirm in part, and remand to the trial court for entry of an appropriate judgment in favor of 4447 Associates in accordance with this opinion." 889 P.2d at 476.

21. On March 20, 1995, the Bank petitioned for certiorari. (R. 1686.)

22. In its reply brief in support of its petition, the Bank raised for the first time defenses under Section 70A-9-318(2). See Addendum C, Reply Brief in Support of Petition for a Writ of Certiorari at 3-4.

23. On June 5, 1995, the Utah Supreme Court denied certiorari and this Court's decision in the First Appeal became final. (R.1687.)

24. Collaterally, on June 19, 1995, the Bank petitioned for certiorari in a separate case, America First Credit Union v. First Security Bank of Utah, N.A., Case No. 940483-CA.

There, the Bank argued that: “In a recent case before a different Court of Appeals panel, the Court of Appeals refused to interpret and apply Section 9-318(3), the controlling statute in this case, under circumstances that, combined with the results of this case, creates uncertainty in application of what is a clear and unambiguous statute. See Zions First Nat’l Bank v. First Security Financial, 255 Utah Adv. Rep. 69, \_\_\_\_ P.2d \_\_\_\_ (Utah Ct. App. 1995)(cert. denied (June 5, 1995). First Security respectfully requests that the issues be decided by the Utah Supreme Court so that there can exist more certainty in common commercial transactions involving collateral assignments of accounts.” (R. 2008.)

25. On September 21, 1995, the Utah Supreme Court granted certiorari in the America First case. 910 P.2d 425 (Utah 1995).

26. However, the Utah Supreme Court’s January 21, 1997 opinion neither overruled nor addressed this Court’s decision in the First Appeal in this case. 930 P.2d 1198, 1198-1202 (Utah 1997).

27. Following remand in this case, the trial court by minute entry granted 4447's motion for summary judgment and denied the Bank’s motion for a stay pending the Utah Supreme Court’s decision in America First. (R.2119-21.)

28. On February 29, 1996, the trial court entered its Order on Plaintiff’s Motion for Summary Judgment and Defendant’s Motion for Stay, ruling that:

1) First Security's indebtedness owed to 4447 Associates under the Asset Purchase Agreement, including principal and interest as of December 6, 1995, is \$266,757.25 as shown in detail below. From and after December 6, 1995, interest shall continue to at the per diem rate of \$33.51 in favor of 4447 Associates and against First Security.



## I. UNPAID INTEREST PAYMENTS

<u>Due Date of Interest Payment</u>	<u>Unpaid Amount</u>	<u>Accrued Interest to December 6, 1995</u>
12/13/84	\$21,536.07	\$23,660.18
3/13/85	24,849.31	26,687.48
6/13/85	25,401.51	26,640.27
9/13/85	25,401.51	26,000.01
12/13/85	<u>25,125.41</u>	<u>25,717.41</u>
Subtotal	122,313.81	128,705.35

## II. UNPAID CONTRACT BALANCE

12/13/85	7,777.42	7,960.67
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(After \$1,000,000 Downward Adjustment on 12/13/85)

TOTAL (I & II)	\$266,757.25
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2) 4447 Associates' request for an award of attorney fees under the Asset Purchase Agreement is GRANTED in an amount to be determined at a later evidentiary hearing; however, 4447 Associates is not entitled to an award of attorney fees regarding First Security's Motion for Partial Summary Judgment which was granted by the court on May 24, 1990 and affirmed on appeal.

3) First Security's defense under Section 70A-9-318(2) is DENIED as the Settlement Agreement dated July 10, 1985 was more than a modification of the contract within the meaning of Section 70A-9-318(2); instead, the Settlement Agreement improperly attempted to terminate and discharge obligations owed under the Asset Purchase Agreement as found by the appellate court.

(R. 2150-52)(emphasis added).

29. After reviewing further extensive memoranda and oral argument, the trial court denied the Bank's remaining challenges to the judgment, findings of fact and conclusions of law on July 1, 1997. R. 2348-2359. Among other things, the trial court found that the Bank's defenses were inapplicable and were insufficient because the evidence was ambiguous:

1. There is insufficient evidence in the record to support defendant's defenses to entry of judgment in favor of plaintiff. The inferences which defendant requests the Court to draw from the ambiguous evidence admitted at trial and now argued by defendant are insufficient to establish defendant's defenses. Specifically:

a. Defendant's defenses regarding its breach of warranty defenses and claims against Capitol Thrift and Richard Christenson are not supported by the evidence in the record.

b. Defendant's defenses pursuant to Utah Code Annotated Section 70A-9-318, are not supported by the decision of the Court of Appeals and are not supported by the evidence in the record.

c. Defendant's remaining defenses whereby it alleges that it is not obligated to pay plaintiff the payments owed under the Asset Purchase Agreement are likewise not supported by the evidence in the record.

(R. 2352)(emphasis added).

30. The trial court also found the following facts regarding the award of attorney fees, which were also stipulated to by the parties:

2. Prior to hearing argument on attorney fees and costs, the parties stipulated that plaintiff incurred reasonable attorney fees and costs through February 28, 1997 in its prosecution of this action in the amount of

\$103,358.40 and that defendant incurred reasonable attorney fees and costs in defense of this action in the amount of \$107,824.60. The parties further stipulated that if plaintiff were entitled to attorney fees and costs the amount of attorney fees and costs awarded to plaintiff should be reduced in an amount equal to 10% of the total fees and costs of plaintiff for fees and costs incurred regarding defendant's motion for partial summary judgment and in an amount equal to 10% of the total attorney fees and costs of defendant for fees incurred in bringing the motion for partial summary judgment. The parties agreed not to challenge their respective attorney fees and costs except as to entitlement under the Asset Purchase Agreement.

3. The Court finds the parties' stipulation regarding attorney fees and costs to be reasonable under applicable Utah law. Specifically, plaintiff incurred reasonable attorney fees and costs through February 28, 1997 in its prosecution of this action in the amount of \$103,358.40 and that defendant incurred reasonable attorney fees and costs in defense of this action in the amount of \$107,824.60. Further, it is reasonable that attorney fees and costs the amount of attorney fees and costs awarded to plaintiff should be reduced in an amount equal to 10% of the total fees and costs of plaintiff for fees and costs incurred regarding defendant's motion for partial summary judgment and in an amount equal to 10% of the total attorney fees and costs of defendant for fees and costs incurred in bringing the motion for partial summary judgment.

4. The Court further finds pursuant to the stipulation of the parties that the work described in the affidavits of counsel for plaintiff were actually performed, that the work performed was reasonably necessary to adequately prosecute the matter, and that the attorneys' and other paralegal's billing rates were consistent with the rates customarily charged in the locality for similar services. The Court has further considered all other circumstances which require consideration of additional factors pursuant to Utah law, including those listed in the Code of Professional Responsibility, and finds that fees and costs of \$82,240.12 were reasonably and necessarily incurred by plaintiff in enforcing the terms of the Asset Purchase Agreement. These fees and costs incurred are awardable as they were incurred and arose under paragraph 22 of the Asset Purchase Agreement.

5. Accordingly, the Court finds that plaintiff is entitled to an award of fees and costs of \$82,240.12.

R. 2352-2354 (emphasis added).

31. On July 29, 1997, the Bank filed its notice of appeal. R.2369-70.

### **SUMMARY OF THE ARGUMENT**

This Court held in the First Appeal that Section 70A-9-318(1) applied to the facts of this case, not Section 70A-9-318(3). 4447 Associates v. First Security Financial, 889 P.2d 467, 472 (Utah Ct. App. 1995). The Court then remanded the case for “entry of an appropriate judgment in favor of 4447 Associates in accordance with this opinion.” 889 P.2d at 476. Further, the Court defined the “appropriate judgment”; the Court found that the Bank’s failure to give notice “entitles 4447 to an award of damages resulting therefrom, presumably the amount due on the account, as properly reduced in accordance with the terms of the asset purchase agreement as discussed above.” 889 P.2d at 475 (emphasis added).

On remand, the trial court properly rejected the Bank’s requests to apply the America First decision and disregard this Court’s mandate. The trial court also properly denied the Bank’s defenses which were rejected in the First Appeal or which the Bank failed to raise at trial. The trial court was required to follow the mandate of this Court’s decision in the First Appeal. Utah Copper Co v. Dist. Court., 64 P.2d 241, 250 (Utah 1937); accord Dreyer v. Bd. of Trustees, 666 P.2d 1214, 1215 (Mont. 1983)(a trial court cannot refuse to carry out the mandate of the appellate court). Accordingly, the trial court correctly entered judgment for 4447 for all amounts due under the Asset Purchase Agreement. R. 2150-52, 2357-58.

It is time that the Bank’s endless assertion of defenses to judgment are terminated. The Bank failed to assert defenses under Section 9-318(2) until after this Court’s decision in the First Appeal. The Bank cannot retry the case on remand after the mandate is issued

to the trial court to enter judgment in favor of 4447. Further, the Bank may not assert its Section 9-318(3) defense on remand or in this appeal, as it was rejected in the First Appeal. Finally, notwithstanding the Bank's attempt to characterize it otherwise, the parties' dispute arises under the terms of the Asset Purchase Agreement because 4447 was seeking recovery of amounts due thereunder.

4447 respectfully requests that this Court affirm the trial court's judgment and grant its attorney fees and costs incurred on appeal under the Asset Purchase Agreement.

## **ARGUMENT**

- I. THE BANK MAY NOT ASSERT DEFENSES UNDER SECTION 70A-9-318(2) IN THIS APPEAL BECAUSE THE TRIAL COURT FOUND THAT, THE BANK'S EVIDENCE OF ITS SECTION 9-318(2) DEFENSE WAS "INSUFFICIENT" AND THE BANK HAS NOT APPEALED THAT FINDING OR MARSHALED EVIDENCE IN SUPPORT OF THAT FINDING IN ITS INITIAL BRIEF.**
  - A. THE TRIAL COURT CORRECTLY FOUND THAT EVIDENCE PRESENTED BY THE BANK DID NOT PRECLUDE SUMMARY JUDGMENT AND THE BANK HAS NOT APPEALED THAT RULING.**

The Bank argues that the trial court erred in holding that the Bank and Capitol were not entitled to modify the Asset Purchase Agreement under Section 70A-9-318(2) by the Settlement Agreement. (Bank Brief at 16-18.)<sup>7</sup> The Bank raised this defense on remand

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<sup>7</sup>The Bank presented this defense for the first time in its reply brief in support of its petition for writ of certiorari, see Addendum C, which was rejected by the Utah Supreme Court. The Bank failed to preserve this issue for appeal in the First Appeal and it cannot be raised on remand thereafter for the first time. See infra, Section I. D.; ("Furthermore, if a party fails to raise an issue and present evidence regarding the same, it has waived the right to do so." Hilton Hotel v. Industrial Comm. of Utah, 897 P.2d 352, 356 (Utah Ct.

after entry of this Court's prior decision in opposition to 4447's motion for summary judgment and failed to present evidence supporting its claims in opposition to 4447's motion for summary judgment. (R. 1871-78.)<sup>8</sup> Because the Bank raised after entry of this Court's decision in the First Appeal, this issue was not properly before the trial court and is not preserved for this appeal.

Section 70A-9-318(2) requires that "the assignee acquires corresponding rights under the modified or substituted contract."<sup>9</sup> While the Bank alleges that the Settlement Agreement modified or was in substitution of the obligations under the Asset Purchase Agreement under Section 70A-9-318(2), 4447 received no "corresponding rights under the modified or substituted contract." Instead, the Bank wrongfully sought to terminate 4447's rights, leaving 4447 with nothing. This Court observed:

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App. 1995)(quoting Chevron U.S.A., Inc. v. State Tax Comm'n, 847 P.2d 418, 420 (Utah Ct. App.1993); Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984)(citations omitted)(emphasis added)).

<sup>8</sup>The Bank further failed to respond to 4447's Undisputed Material Facts as required by Rule 4-501(2), Utah Code of Judicial Administration. R.1869-71,1896-1897.

<sup>9</sup>Section 70A-9-318(2) provides:

So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

[A]ctual knowledge of the assignment's existence precludes substantial interference with the assignee's rights. Legal commentators have noted that under the UCC, an assignee's rights may be adversely affected by contract modifications made by the account debtor and the assignor, but such actions are 'unwarranted' if the assignee's rights are jeopardized by termination of the contract or similar unilateral action.

889 P.2d at 475 (emphases added). Accordingly, the Asset Purchase Agreement was not properly modified under Section 70A-9-318(2) as 4447 received no corresponding rights in the Settlement Agreement.

The trial court on remand rejected the Bank's defense under Section 9-318(2). In its order granting partial summary judgment, the trial court on remand found that the Settlement Agreement did not extinguish the Bank's obligation to 4447: "First Security's defense under Section 70A-9-318(2) is denied as the Settlement Agreement dated July 10, 1985 was more than a modification of the contract within the meaning of Section 70A-9-318(2); instead, the Settlement Agreement improperly attempted to terminate and discharge obligations owed under the Asset Purchase Agreement as found by the appellate court." R. 2152 (emphasis added). Significantly, the Bank has not cited or attached this Order, (R. 2150-54), and has not questioned the trial court's reasoning. Further, on summary judgment the Bank failed to properly controvert 4447's undisputed facts as required under Rule 4-501(2), Utah Code of Judicial Admin. (R. 1869-71, 1896-97). Accordingly, because the Bank has failed to properly cite the order at issue, it has failed to preserve its Section 9-318(2) defense on appeal and the trial court's ruling is unassailable.

**B. THE TRIAL COURT FOUND THAT THE BANK'S EVIDENCE OF A SECTION 9-318(2) DEFENSE WAS INSUFFICIENT PRIOR TO ENTRY OF JUDGMENT.**

The trial court again rejected the Bank's Section 9-318(2) argument prior to entry of judgment when the Bank again reargued that the Settlement Agreement modified and extinguished the indebtedness owed under the Asset Purchase Agreement, including interest payments. (R. 2125-26, 2179-80.) The Bank alleged that certain defenses had accrued which entitled the Bank to offset amounts owed to 4447 and to modify the obligations owed under the Asset Purchase Agreement because of the Settlement Agreement. (R. 2125-26, 2179-80.) Following careful review of the Bank's "evidence" concerning modification of the Asset Purchase Agreement, the trial court found the Bank's evidence was insufficient:

There is insufficient evidence in the record to support defendant's defenses to entry of judgment in favor of plaintiff. The inferences which defendant requests the Court to draw from the ambiguous evidence admitted at trial and now argued by defendant are insufficient to establish defendant's defenses.

(R. 2352(emphasis added).)

The Bank has not appealed this finding. It is not before this Court. See Bank Brief at 1-2. Accordingly, even if the Bank could assert defenses under Section 70A-9-318(2)(and it cannot), the unappealed trial court finding of insufficient evidence of that defense is fatal to the Bank's Section 9-318(2) challenge.

**C. THE BANK HAS WAIVED ANY SECTION 70A-9-318(2) DEFENSE BECAUSE IT WAS NOT PRESERVED AT TRIAL.**

Even if a Section 9-318(2) defense were applicable and supported by evidence (and it is not), the Bank waived it. The Bank argued on remand that Section 70A-9-318(2)



entitled the Bank and Capitol to modify the Asset Purchase Agreement and extinguish 4447's interest. (R. 1871-78.) However, the Bank may not argue new legal or factual positions on remand that were not addressed at trial:

Raising an issue not addressed by the parties is inappropriate and outside of the discretion given the governing tribunal because it encroaches upon the advocate responsibility conferred upon counsel. Furthermore, if a party fails to raise an issue and present evidence regarding the same, it has waived the right to do so.

Hilton Hotel v. Industrial Comm. of Utah, 897 P.2d 352, 356 (Utah Ct. App. 1995)(quoting Chevron U.S.A., Inc. v. State Tax Comm'n, 847 P.2d 418, 420 (Utah Ct. App.1993); Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984)(citations omitted)(emphasis added). By failing to assert its Section 70A-9-318(2) “defense” at trial, the Bank waived the argument or, alternatively, is now barred from asserting it on remand. See also Pretrial Order (omitting Section 70A-9-318(2) as a defense). (R. 675-94.)

## **II. THE BANK MAY NOT REARGUE THE SECTION 70A-9-318(3) DEFENSE PREVIOUSLY REJECTED BY THIS COURT**

### **A. THE TRIAL COURT CORRECTLY CONCLUDED THAT THIS COURT’S PRIOR, FINAL DECISION APPLYING SECTION 70A-9-318(1) PRECLUDES THE BANK’S SECTION 70A-9-318(3) ON REMAND.**

The Bank next incorrectly challenges the trial court’s decision to preclude the Bank’s alleged Section 70A-9-318(3) defense. (Bank Brief at 8-15.) This Court already addressed and rejected this very argument, holding that Section 70A-9-318(1) applied here. 889 P.2d at 472, n.8. The Court put it this way:

The two-pronged notice requirement mandated by Utah Code Ann. § 70A-9-318(3) (1990) is not applicable to our analysis. Section 9-318(3) sets forth the notice requirements for an assignee to receive payments directly from the account debtor. In the instant case, the question of whether Zions was entitled to receive payments from First Security as they came due does not merit consideration.

889 P.2d at 472, n.8 (emphasis added). This Court also stated:

The parties also debate the question of whether First Security ever received, beyond mere notice of the assignment, notice to make payment directly to Zions as contemplated in Utah Code Ann. § 70A-9- 318(3) (1990). It clearly did not, and we decline to address the issue further. See, e.g., State v. Carter, 776 P.2d 886, 888-89 (Utah 1989) (declining to consider issues without merit); State v. Vigil, 840 P.2d 788, 795 (Utah Ct. App.1992) (same), cert. denied, 857 P.2d 948 (Utah 1993).

*Id.* at 470, n.5. Construing section 9-318, the Court found that, in the context of an assignment, section 9-318 distinguishes between claims and defenses arising from the contract and other unrelated claims and defenses. 889 P.2d at 472. An account debtor can assert claims and defenses based on the terms of the contract whether they arise before or after notification of an assignment. *Id.* This Court then stated:

However, subsection (1)(b) limits assertion of unrelated claims and defenses to those "which accrue[ ] before the account debtor receives notification of the assignment." *Id.* § 70A-9-318(1)(b) (emphasis added). See also West One Bank v. Life Ins. Co., 887 P.2d 880, 885 n. 7 (Utah Ct. App.1994) (secured creditor need only give notice of its interest in order to have priority over later creditor's subsequent right of setoff). Subsection (1)(b) does not specify a particular form of notice, but simply precludes an account debtor from raising a claim or defense against an assignee after the account debtor is aware that the assignment exists.

...

According to the terms of section 9-318(1)(b), First Security, as an account debtor, can only succeed if its claim or defense accrued before it received notice of the assignment's existence.

889 P.2d at 472. On remand, the trial court followed this Court’s decision in the First Appeal and found, “Defendant’s defenses pursuant to Utah Code Annotated Section 70A-9-318(3) are not supported by the decision of the Court of Appeals . . .” (R. 2352 (emphasis added)). Accordingly, the trial court properly precluded the Bank from asserting defenses under Section 70A-9-318(3) pursuant to this Court’s prior decision.

**B. THE TRIAL COURT PROPERLY REJECTED THE BANK’S ARGUMENT UNDER AMERICA FIRST.**

The Utah Supreme Court decided America First, interpreting Section 70A-9-318(3), while this case was on remand but prior to entry of judgment. The Bank incorrectly suggests that America First governs and required the trial court to apply Section 70A-9-318(3). (Bank’s Brief at 9-15.) America First does not assist here because this Court’s ruling in the First Appeal did not involve application of Section 70A-9-318(3). 4447 Associates, 889 P.2d at 472, n.8. This Court held that Section 70A-9-318(1) applied, not Section 70A-9-318(3). 868 P.2d at 472, n.8. Construing Section 70A-9-318, the Court held that the subsections “distinguish[] between claims and defenses arising from the contract and other unrelated claims and defenses.” 889 P.2d at 472. This holding was not reversed (nor even questioned) by the America First Court; despite the Bank’s request that the Supreme Court in America First overturn this Court’s decision in the First Appeal. (R. 2007-08.) See America First, 930 P.2d at 1198-1202.

Thus, the trial court correctly ruled that America First did not apply on remand:

This Court has the authority to consider and apply the Utah Supreme Court’s decision in America First Credit Union v. First Security of Utah, No. 95074

(Utah January 21, 1997); however, the America First decision is not applicable to this action as the Court's decision interprets Utah Code Annotated Section 70A-9-318(3), not Section 70A-9-318(1).

(R. 2355 (emphasis added).) Which subsection of Section 70A-9-318 to apply here was decided in the First Appeal and is now final as law of the case and is *res judicata*.

The Bank also filed a petition for writ of certiorari to the Utah Supreme Court in the First Appeal and argued that Section 70A-9-318(3) applied to this case, not Section 9-318(1). See Addendum C at 1-4. Under law of the case principles, issues decided or which could have been decided if properly raised, cannot be raised after remand. Cf. Baker v. Lane Co., 586 P.2d 114 (Or. App. 1978); Adamson v. Traylor, 402 P.2d 384, 386 (Utah 1985); C&I Industries, Inc. v. Bailey, 669 P.2d 855, 856 (Utah 1983)("the express ruling by this Court on all issues raised by prior appeal becomes the law of the case and is binding upon the parties, the trial court, and this court."); Prudential Federal Savings & Loan Ass'n v. St. Paul Ins. Companies, 448 P.2d 724 (Utah 1968). Accordingly, under *res judicata* and law of the case doctrines, the Bank cannot again raise its Section 70A-9-318(3) defense, previously rejected by this Court. 889 P.2d at 472, n.8.

### **III. THE TRIAL COURT CORRECTLY AWARDED 4447 ATTORNEY FEES AND COSTS AS THE PREVAILING PARTY UNDER THE ASSET PURCHASE AGREEMENT.**

With the Bank's liability fixed, the trial court correctly found that 4447 prevailed on disputes "arising under" the Asset Purchase Agreement, and properly awarded attorney's fees consistent with this Court's decision in the First Appeal. 889 P.2d 467, 476 (Utah Ct. App. 1995). Ignoring the foundation for this issue (the Asset Purchase Agreement), the Bank

assails the attorneys' fees award by casting the dispute with 4447 as one not "aris[ing] under" the Asset Purchase Agreement. (Bank Brief at 19.) The Bank, instead, says the dispute centers on whether the Bank "received notice of a subsequent assignment of the Asset Purchase Agreement." *Id.* Characterization, it seems, means everything.

This dispute is simply said: Was 4447 entitled to interest payments, the remaining principal and attorney fees and costs due under the Asset Purchase Agreement. On remand, the trial court found that 4447 was so entitled. (R.2150-52.) This Court recognized in the First Appeal that the Asset Purchase Agreement enabled 4447 to recover amounts owed under the Asset Purchase Agreement. 868 P.2d at 475 ("[The Bank's] failure to . . . [notify plaintiff] entitles 4447 Associates to an award of damages resulting therefrom, presumably the amount due on the account, as properly reduced in accordance with the terms of the asset purchase agreement as discussed above.")(Emphasis added). In sum, the Bank's view that the dispute with 4447 did not arise under the Asset Purchase Agreement is mystical at best. The trial court also found that the fees awarded were "reasonably and necessarily incurred by plaintiff [4447] in enforcing the terms of the Asset Purchase Agreement. These fees and costs incurred are awardable as they were incurred and arose under paragraph 22 of the Asset Purchase Agreement." (R. 2354.) Again, the Bank does not appeal this finding and failed to marshal evidence supporting it.<sup>10</sup> Thus, whether the fees were reasonably and necessarily

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<sup>10</sup>*Reinbold v. Utah Fun Shares*, 850 P.2d 487, 489 (Utah Ct. App.1993))(citing *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

incurred in enforcing the Asset Purchase Agreement is not before this Court. The trial court correctly awarded attorneys' fees to 4447 under the Asset Purchase Agreement.

**IV. 4447 IS ENTITLED TO ATTORNEYS' FEES AND COSTS ON APPEAL.**

Drawn again into further proceedings on appeal, it is reasonable and proper for this Court to award 4447 additional attorneys' fees and costs incurred defending the present appeal. The Bank challenges 4447's entitlement to prevail under the Asset Purchase Agreement. 4447 has established in the trial court and here that it prevails under the Asset Purchase Agreement. Regardless of how the Bank characterizes things, the continuing "dispute" arises under the Asset Purchase Agreement. 4447 is entitled to an award of reasonable and necessary attorneys' fees and costs incurred in this appeal.

**CONCLUSION**

For the reasons show above, 4447 respectfully requests that this Court affirm the trial court's judgment and grant its attorney fees and costs incurred on appeal under the Asset Purchase Agreement.

DATED this 13th day of August, 1998.

Respectfully submitted,

DURHAM, EVANS, JONES & PINEGAR



Jeffrey M. Jones


J. Mark Gibb

Attorneys for 4447 Associates

CERTIFICATE OF SERVICE

I certify that I caused two true and correct copies of the foregoing to be sent in the U.S. Mail,  
first class, postage prepaid, to the following this 13th day of August, 1998:

James S. Jardine  
Brent D. Wride  
RAY, QUINNEY & NEBEKER  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385



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## ADDENDUM

Rule 56, Utah Rules of Civil Procedure .....	Addendum A
Utah Code Annotated Section 70A-9-318 .....	Addendum B
[First Security's] Reply Brief in Support of Petition for Writ of Certiorari .....	Addendum C
Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Stay .....	Addendum D
Rule 4-501, Utah Code of Judicial Administration .....	Addendum E
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Tab A

**\*119 Utah Rules of Civil Procedure, Rule 56**

**WEST'S UTAH COURT RULES  
UTAH RULES OF CIVIL  
PROCEDURE  
PART VII. JUDGMENT**

*Current with amendments received through  
11-15-97*

**RULE 56. SUMMARY JUDGMENT**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It

shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**\*120** (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effective November 1, 1997.]

Tab B

**Utah Code § 70A-9-318**

**WEST'S UTAH CODE  
TITLE 70A. UNIFORM  
COMMERCIAL CODE  
CHAPTER 9. SECURED  
TRANSACTIONS--SALES OF  
ACCOUNTS, CONTRACT RIGHTS  
AND CHATTEL PAPER  
PART 3. RIGHTS OF THIRD  
PARTIES--PERFECTED AND  
UNPERFECTED SECURITY  
INTERESTS--RULES OF PRIORITY**

*Current through End of 1997 General and 1st and  
2nd Sp. Sess.*

**§ 70A-9-318. Defenses against assignee--  
Modification of contract after  
notification of assignment--Term  
prohibiting assignment ineffective--  
Identification and proof of assignment**

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 70A-9-206 the rights of an assignee are subject to:

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in chattel paper or a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

*\*20850 As last amended by Chapter 197, Laws of Utah 1990.*

Search this disc for cases citing this section.

Tab C

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IN THE UTAH SUPREME COURT

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ZIONS FIRST NATIONAL BANK, a	:	
national banking association,	:	
and <u>4447 ASSOCIATES</u> , a Utah	:	
general partnership,	:	
	:	
Plaintiffs-Appellant-	:	Court of Appeals No. 930923
Respondent,	:	
	:	Priority No. 15
v.	:	
	:	
FIRST SECURITY FINANCIAL, a	:	
Utah corporation,	:	
	:	
Defendant-Appellee-	:	
Petitioner.	:	

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petition for Review by Writ of Certiorari  
of the Opinion of the Utah Court of Appeals

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Jeffrey M. Jones  
J. Mark Gibb  
DURHAM, EVANS & JONES  
50 South Main Street  
Suite 850  
Salt Lake City, Utah 84144

Attorneys for Respondent,  
4447 Associates

Scott H. Clark  
Craig Carlile  
Brent D. Wride  
RAY, QUINNEY & NEBEKER  
79 South Main Street  
P. O. Box 45385  
Salt Lake City, Utah  
84145-0385

Attorneys for Petitioner,  
First Security Financial

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CONTROLLING STATUTORY PROVISIONS

Utah Code Ann. § 70A-9-318 (1990):

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 70A-9-206 the rights of an assignee are subject to:

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a party thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

## ARGUMENT

- I. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF SECTION 70A-9-318(1) BECAUSE THE SETTLEMENT AGREEMENT IN THIS INSTANCE AROSE FROM THE ASSET PURCHASE AGREEMENT.

The court of appeals incorrectly held that the Settlement Agreement in this case was "totally unrelated to" the original contract. 4447 Associates argues the Settlement Agreement does not arise from the terms of the contract because it covers more obligations than represented by the Purchase Agreements. For example, 4447 Associates points out that the Settlement Agreement covers Christenson's claim against First Security for wrongful termination.

4447 Associates argues that "the Purchase Agreements make no reference to Christenson at all." Respondent's Brief in Opposition to Petition for Writ of Certiorari at 11. This is simply incorrect. The Asset Purchase Agreement states: "[I]t is of the essence to this transaction that Capitol's president and executive vice president, Richard A. Christenson and Bruce L. Moesser, respectively, become officers in FS Financial." See Asset Purchase Agreement at 5 (emphasis added) (for the court's convenience, a copy of the Asset Purchase Agreement is attached as Addendum A).

Further, 4447 Associates' argument overlooks the court of appeals' own finding that Richard Christenson's financial statement, which was submitted in conjunction with the Settlement

Agreement, had a "uniquely close nexus to the main purpose of the Settlement Agreement." Addendum A to Petition for Writ of Certiorari at 12 (emphasis added).

4447 Associates also asserts that the Settlement Agreement does not arise out of the terms of the Purchase Agreements because of mention made in the Settlement Agreement of certain claims involving property in East Canyon and a personal guaranty of Christenson. However, the only reason these items are mentioned in the Settlement Agreement is to exclude them from the terms of the Settlement Agreement. Far from establishing that the Settlement Agreement covers items not arising from the Purchase Agreements, the exclusion of extraneous items actually demonstrates that the Settlement Agreement does arise from the terms of the Purchase Agreements.

4447 Associates argues that courts have held that settlement agreements do not arise from the terms of a contract. In support of its argument 4447 Associates cites no Utah cases. The two cases it does cite do not apply here. In Bank Leumi Trust Co. v. Collins Sales Serv., 393 N.E.2d 468 (N.Y. 1979), the court held that section 318 did not apply to an agreement made to set off moneys owed to a third party that was not a party to the underlying agreement. Id. at 470. In In re Bancroft Dairy, Inc., 10 B.R. 920 (Bankr. W.D. Mich. 1981), there was a question as to whether the terms of the settlement agreement in the case "were ever carried out." Id. at 923. Further, the Bancroft

court was careful to note that "considering the release agreement itself as a separate defense, not arising from the terms of the contract, does not prevent the account debtors from asserting defenses which may have been considered when the parties were negotiating the release agreement." Id. at 925. Thus at the very least, the Bancroft case, which is cited by 4447 Associates, stands for the proposition that the case should be remanded to the district court so that if Zions is not subject to the Settlement Agreement, at least First Security will be able to assert against Zions' assignee the defense that Capitol breached its warranties to First Security under the Purchase Agreements concerning the quality of the assets it was selling to First Security.

II. THE SUPREME COURT MAY AFFIRM THE DECISION OF THE DISTRICT COURT ON THE BASIS OF SECTION 70A-9-318(2).

First Security has argued that section 70A-9-318(2) supports the argument that First Security was entitled to settle its differences with its original creditor. 4447 Associates argues that this is a new argument that cannot be raised for the first time on appeal. First, the argument is not a new one. First Security has consistently argued that it was free to pay its original creditor through the means of a settlement agreement. First Security has merely offered additional support for its argument. This is no different from 4447 Associates'

citing the appellate court to additional cases that were not brought to the attention of the district court.

Further, Utah case law is clear that the appellate court can affirm the decision of the lower court on any proper basis, even if it was not considered by the district court. See, e.g., Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988).

III. THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 70A-9-318(3) DOES NOT APPLY IN THIS CASE.

First Security argued to the court of appeals that section 70A-9-318(3) authorized First Security to satisfy its obligation to its original creditor until it received notice of (1) the assignment and (2) the duty to begin paying Zions directly. 4447 Associates argues that a settlement agreement cannot constitute "payment" under section 318(3).<sup>1</sup> The question of whether a settlement agreement can constitute a payment is an important question that should be decided by the Utah Supreme Court. 4447 Associates offers no Utah cases for its contention that settlement agreements cannot constitute payments. As pointed out above, the two cases cited by 4447 Associates from other jurisdictions do not apply here. Therefore, the court

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<sup>1</sup> 4447 Associates also argues that First Security failed to raise this issue below. However, in response to questions at oral argument First Security cited the court of appeals to the case of Judah AMC & Jeep, Inc. v. Old Republic Ins. Co., 293 N.W.2d 212, 214 (Iowa 1980). That case holds that under section 318(3), which authorizes a debtor to "pay" the original creditor, a debtor had a right to "settle" with its creditor.

should grant the petition for certiorari so that this important question concerning commercial law can be decided by the Utah Supreme Court.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE FOOTNOTE IN CHRISTENSON'S FINANCIAL STATEMENT CONSTITUTED SUFFICIENT NOTICE OF THE ASSIGNMENT.

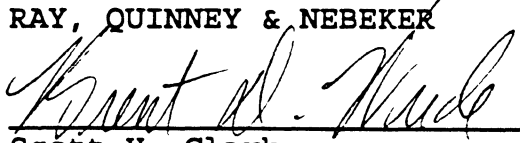
4447 Associates argues that the Time Finance case is not applicable. However, it is the only Utah case cited by either party on the question of the type of notice that must be received by an account debtor. 4447 Associates has offered no reason why different policies should apply to commercial transactions than to insurance transactions. This court should grant the petition for a writ of certiorari so that the supreme court can clarify the important issue of what kind of notice must be received by an account debtor.

#### CONCLUSION

For the foregoing reasons, First Security Financial respectfully requests that this court issue a Writ of Certiorari and review the decision of the court of appeals in this case.

DATED this 16<sup>th</sup> day of May, 1995.

RAY, QUINNEY & NEBEKER

  
\_\_\_\_\_  
Scott H. Clark  
Craig Carlile  
Brent D. Wride

Attorneys for First Security  
Financial, Defendant-  
Appellee

CERTIFICATE OF SERVICE

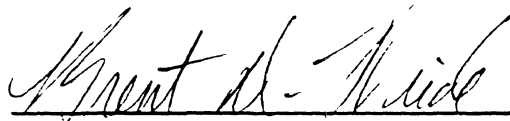
I hereby certify that on the 16<sup>th</sup> day of May, 1995,  
two true and correct copies of the foregoing REPLY BRIEF IN  
SUPPORT OF PETITION FOR WRIT OF CERTIORARI were mailed, postage  
prepaid, to the following:

Jeffrey M. Jones  
J. Mark Gibb  
DURHAM, EVANS & JONES  
50 South Main  
Suite 850  
Salt Lake City, Utah 84144

and one copy was mailed, postage prepaid, to the following:

Randall D. Benson  
CALLISTER, DUNCAN & NEBEKER  
10 East South Temple  
Suite 800  
Salt Lake City, Utah 84133

RAY, QUINNEY & NEBEKER



Scott H. Clark  
Craig Carlile  
Brent D. Wride

Attorneys for First Security  
Financial, Defendant-  
Appellee



## ASSET PURCHASE AGREEMENT

THIS AGREEMENT is made and entered into this 16 day of December, 1982, by and between First Security Financial, a Utah corporation ("FS Financial"); Capitol Thrift and Loan Company, a Utah corporation ("Capitol"); Richard A. Christenson, an individual ("Christenson"); and Bruce L. Moesser, an individual ("Moesser").

### R E C I T A L S :

A. Capitol is an operating industrial loan corporation under the laws of the State of Utah.

B. Christenson is the majority stockholder of Capitol.

C. Christenson and Moesser are the president and executive vice president of Capitol, respectively.

D. FS Financial is a newly organized industrial loan corporation under the laws of the State of Utah.

E. Upon consummation of the transactions contemplated herein, FS Financial will be a wholly owned subsidiary of First Security Corporation ("FS Corp.").

F. FS Financial is in the process of acquiring the assets and liabilities of Murray First Thrift & Loan Company ("MFT") pursuant to that certain Purchase and Assumption Agreement between FS Financial, FS Corp., MFT, et al., dated December 13, 1982 (the "MFT Agreement").

G. In connection with and contingent upon its acquisition of MFT, FS Financial desires also to acquire the assets of Capitol, and Capitol is willing to sell its assets to FS Financial, on the terms and conditions set forth below.

NOW, THEREFORE, the parties hereto agree as follows:

1. Purchase of Assets. Capitol hereby agrees to sell to FS Financial, and FS Financial hereby agrees to purchase from Capitol, all of the assets of Capitol as shown on the audited balance sheet of Capitol dated June 30, 1982, attached hereto as Exhibit "A" and made a part hereof by this reference, subject to adjustment as provided in Paragraph 3 below. Included among the assets sold shall be all leases, insurance policies and other contract rights, and all books of account, customer records and documents of every nature relating to the business of Capitol

being acquired by FS Financial. Not included among the assets sold shall be the corporate documents, books and records which relate to the overall organization and continuing financial affairs of Capitol and only those additional specific items of tangible and intangible personal property identified on Exhibit "B", attached hereto and made a part hereof by this reference, and Capitol's leasehold interest in the premises currently occupied by it in the Continental Bank Building in Salt Lake City, Utah.

2. Consideration. As consideration for the purchase of the assets of Capitol, except as limited in the following sentence, FS Financial agrees to assume all of the liabilities of Capitol set forth on the balance sheet attached hereto as Exhibit "A," as adjusted pursuant to Paragraph 3 below, and also all liabilities of Capitol which may be asserted after the Closing Date which relate to the collection of any of the receivables of Capitol acquired by FS Financial and which were incurred in the normal course of business prior to the Closing Date, and to indemnify and hold Capitol harmless therefrom. Not included among the liabilities assumed shall be any liabilities of Capitol not expressly disclosed on said balance sheet (other than those incurred in the normal course of business prior to Closing which relate to the collection of receivables), any liabilities arising out of or in connection with Capitol's leasehold interest in its premises in the Continental Bank Building, and any accrued but unpaid wages, employment taxes, employee benefit plan liabilities, net income, franchise, sales, use, property and any other state or Federal tax liabilities, including any tax liabilities arising as a result of this transaction, and Capitol agrees to indemnify and hold FS Financial harmless therefrom.

As further consideration, subject to adjustment as provided in Paragraph 3 below, FS Financial agrees to pay Capitol the sum of One Million Three Hundred Seventy-Nine Thousand Nine Hundred Eleven and 78/100 Dollars (\$1,379,911.78) cash, payable as follows:

(a) Two Hundred Thousand Dollars (\$200,000.00) at the Closing (hereinafter defined);

(b) The balance of One Million One Hundred Seventy-Nine Thousand Nine Hundred Eleven and 78/100 Dollars (\$1,179,911.78) shall be paid in a lump sum on the third anniversary of the Closing Date;

(c) The principal amount of the deferred portion of the purchase price shall earn interest at the rate of ten percent (10.0%) per annum and accrued interest shall be

paid in twelve (12) quarterly installments beginning three (3) months after the Closing Date.

For purposes of arriving at the above purchase price, the assets of Capitol were valued at their book value and the cash portion of the purchase price was determined to be equal to the book net worth of Capitol as shown on the balance sheet attached hereto as Exhibit "A".

At the end of the three (3) year period of deferral and prior to the payment of the principal amount of the deferred portion of the purchase price, the real estate and receivables of Capitol acquired by FS Financial shall be valued in the manner set forth below. In the event that (i) the aggregate value of the real estate is less than its book value as of the Closing Date and/or (ii) the actual and anticipated losses on the collection of the amount of the receivables as of the Closing Date exceeds the reserve for losses as of the Closing Date, the principal amount of the deferred portion of the purchase price shall be adjusted downward in an equivalent amount. Further, the principal amount of the deferred portion of the purchase price shall also be adjusted downward in the amount of any liabilities of Capitol relating to the collection of receivables which were incurred in the normal course of business prior to Closing but were not disclosed on Capitol's balance sheet at Closing and which were assumed by FS Financial hereunder. The aggregate of such downward adjustments of the principal amount of the deferred portion of the purchase price shall in no event exceed One Million Dollars (\$1,000,000.00). Notwithstanding any such downward adjustments of the principal amount of the deferred portion of the purchase price, there shall be no adjustment of the amount of interest paid by FS Financial under Paragraph 2(c) hereof during the three (3) year period.

Actual and anticipated losses on receivables shall include losses on those receivables already written off by FS Financial in accordance with standard financial practice and FS Financial's actual experience and also one hundred percent (100.0%) of those receivables classified either as a "loss" or as "doubtful" by the Department of Financial Institutions in its most recent examination of FS Financial, provided one has been conducted within three (3) months prior to the end of the three (3) year period; provided, further, if no such examination has been conducted within the final three (3) months, the parties shall call for one. Out-of-pocket costs of collection incurred by FS Financial with respect to any such receivables (other than with respect to any liabilities relating to the collection of receivables which have been assumed by FS Financial hereunder),

including without limitation reasonable attorney's fees, shall be added to the principal amount of such receivables in determining the amount of loss suffered thereon. Any such receivables which are written off by FS Financial or which are classified as a "loss" or as "doubtful" for purposes of this paragraph shall be reassigned to Capitol by FS Financial at the end of the three (3) year period.

Any remaining unsold real estate at the end of the three (3) year period shall be valued by M.A.I. appraisal as of that time. To the extent any real estate has been sold during the three (3) year period, it shall be valued at its contract sales price. In both cases, the value of the real estate shall be reduced by the costs of sale and preparation for sale, such as necessary fix-up expenses, if any, incurred by FS Financial.

In order to facilitate the above valuations, FS Financial shall keep its books in such a way that the receivables and real estate acquired from Capitol can be separately identified at all times during the three (3) year period.

3. Changes Prior to Closing. To the extent there are changes in the assets, liabilities and net worth of Capitol between June 30, 1982, and the Closing Date, which changes are a result of transactions entered into in the ordinary course of business, it is understood and agreed by the parties that those assets being sold by Capitol to FS Financial shall be the assets of Capitol, as defined herein, as of the Closing Date, and that those liabilities being assumed by FS Financial shall be the liabilities of Capitol, as defined herein, as of the Closing Date. Further, the principal amount of the deferred portion of the purchase price shall be adjusted up or down, as the case may be, in an amount equal to the change in the book net worth of Capitol between June 30, 1982, and the Closing Date. For this purpose, Capitol shall prepare a balance sheet of those of its assets and liabilities as of the Closing Date which are included in the sale, complete with detailed schedules identifying individual assets and liabilities and also any off-balance sheet items included in the sale. At the Closing, the parties shall execute an appropriate amendment to this Agreement specifying the principal amount of the deferred portion of the purchase price as adjusted in accordance with the provisions of this paragraph.

Capitol hereby represents and warrants that the balance sheet attached hereto as Exhibit "A" is true, complete and accurate in every material respect as of June 30, 1982, and that during the period beginning June 30, 1982, and ending on the date of this Agreement there have been no material changes in the

assets and liabilities of Capitol other than as a result of transactions entered into in the ordinary course of business. Capitol hereby covenants and agrees that during the period beginning with the date of this Agreement and ending on the Closing Date, it shall not enter into any transactions other than in the regular course of business. Capitol further represents and warrants that the balance sheet to be prepared by it as of the Closing Date will be true, complete and accurate in every material respect as of the Closing Date.

Notwithstanding anything herein to the contrary, it shall be a condition precedent to the obligation of FS Financial to close this transaction that there have been no material changes in the assets or liabilities of Capitol between June 30, 1982, and the Closing Date, and that the representations, warranties and covenants of Capitol contained in this Paragraph shall not have been breached in any material respect.

4. Payment of Indemnity. The amount of any payment made by FS Financial or Capitol to a third party for which FS Financial or Capitol is entitled to indemnification hereunder shall accrue interest at the rate of ten percent (10.0%) per annum from the date of payment by FS Financial or Capitol to said third party through the date of reimbursement by the indemnifying party. If FS Financial is the party entitled to indemnification, it may require payment immediately or, at its option, it may set off the principal and interest portions of the amount of such indemnity against the payments otherwise due Capitol under Subparagraphs 2(b) and 2(c), respectively, as adjusted pursuant to Paragraph 3, above. If Capitol is the party entitled to indemnification, it may require payment immediately or, at its option, it may add the principal and interest portions of the amount of such indemnity to the payments otherwise due it under Subparagraphs 2(b) and 2(c), respectively, as adjusted pursuant to Paragraph 3, above.

5. Personnel. It is contemplated that FS Financial will employ all of the current personnel of Capitol in FS Financial's operation. In particular, it is of the essence to this transaction that Capitol's president and executive vice president, Richard A. Christenson and Bruce L. Moesser, respectively, become officers in FS Financial. However, the terms of any such employment arrangement shall be subject to good faith negotiations between the parties and no assurances are given in this Agreement as to what the particulars of such employment arrangements can or will be. It is understood, however, that all employee benefits or claims, whether of a pension, health or other nature, which have accrued or which arise out of events prior to the Closing Date,

shall be and remain the sole liability of Capitol, and Capitol agrees to indemnify and hold FS Financial harmless therefrom.

6. Noncompetition. During such time as Christenson and Moesser are employed by FS Financial, Christenson and Moesser covenant and agree, each for himself, that he will not engage, directly or indirectly, whether as sole proprietor, partner, shareholder, officer, director, employee or consultant, in any activity in the industrial loan, thrift and loan or banking industry in the State of Utah except as an officer and employee of FS Financial. It is understood that Christenson, Moesser, Sally Taylor, and Merlyn Hanks are officers and/or trustees of and will continue to have an ownership and participation in Franklin Financial, Cape Trust, the corporate entity surviving Capitol Thrift and Loan (which is contemplated to be named "The Capitol Company"), Capitol Leasing, Seahurst, and affiliated companies, and that they will be allowed to wind down and preserve the value of these assets without being in violation of the terms of this Agreement.

If at any time Christenson or Moesser leave the employ of FS Financial, for any reason, Christenson and Moesser covenant and agree, each for himself, that he will not divulge or make use of any trade secrets, customer information or other confidential knowhow or information gained by him as a result of his employment by FS Financial nor will he solicit other persons to leave their employ with FS Financial, other than Christenson's personal secretary, Sally Taylor. Also, for one (1) year after leaving the employ of FS Financial, Christenson agrees not to engage in any activity in direct competition with FS Financial in the thrift and loan industry.

Further, Capitol agrees to change its name as of the Closing Date and to transfer to FS Financial at the Closing all rights to the use of its name, but reserving to itself the right to use any other name which includes the name "Capitol" but not the words "Thrift and Loan" or any combination thereof.

7. Government Approvals. It shall be a condition precedent to the obligation of FS Financial to close this transaction that FS Corp shall have received the prior approval of the Federal Reserve Board to acquire the shares of FS Financial in connection with FS Financial's acquisition of the assets and liabilities of Capitol and MFT as set forth herein and in the MFT Agreement. It shall be a further condition precedent hereto that the Utah Department of Financial Institutions shall have given its approval to this transaction, and that there be no other required

regulatory approval or consent which has not been obtained. It shall be a further condition precedent hereto that the MFT Agreement be consummated in accordance with its terms.

8. Closing. The closing of this transaction (the "Closing" or "Closing Date") shall take place at the same time and place and simultaneously with the closing of the MFT Agreement, but in no event later than six (6) months after the date of this Agreement. At the Closing, Capitol shall transfer title to those of its assets being sold to FS Financial by quit claim deed, bill of sale, or other appropriate instrument of transfer, and FS Financial shall assume all of the liabilities of Capitol which it has agreed to assume hereunder by an appropriate assumption agreement. At the Closing, FS Financial shall also pay to Capitol the portion of the purchase price payable under Paragraph 2(a) hereof, and the parties shall execute an appropriate amendment to this Agreement to specify the exact Closing Date and the principal amount of the deferred portion of the purchase price payable under Paragraph 2(b) hereof, as adjusted at the Closing pursuant to Paragraph 3 hereof.

9. Guaranty. Christenson hereby guarantees that the representations and warranties made by Capitol herein are true, complete and accurate in every material respect as of the date for which they are made, and hereby guarantees the performance by Capitol of its obligation of indemnity with respect to liabilities and obligations of Capitol not assumed by FS Financial hereunder, such guaranties to be continuing, absolute, unconditional and primary.

10. Press Releases. All parties agree that no press release or other statement, whether written or verbal, shall be made or given to any representative of the news media with respect to this transaction without the express prior approval of all other parties.

11. Corporate Authority. Capitol represents and warrants that it is a duly organized, validly existing corporation in good standing under the laws of the State of Utah; that it is in full compliance with all laws, regulations, orders and other governmental rulings which regulate or purport to regulate Capitol's operation as an industrial loan corporation in the State of Utah; that it has full corporate power and authority to execute, deliver and carry out the provisions of this Agreement, including the necessary consent of its shareholders; and that when so executed and delivered this Agreement shall constitute a legal, valid and binding obligation of Capitol, enforceable against it in accordance with its terms. FS Financial represents and warrants

that it is a duly organized, validly existing corporation in good standing under the laws of the State of Utah; that it has full corporate power and authority to execute, deliver and carry out the provisions of this Agreement; and that when so executed and delivered this Agreement shall constitute a legal, valid and binding obligation of FS Financial, enforceable against it in accordance with its terms. The representations and warranties made in this paragraph shall be deemed made as of the date hereof and again at the Closing. Capitol and FS Financial agree to provide each other at the Closing with certified copies of Board of Directors and shareholder resolutions authorizing this transaction.

12. Survival. The parties understand and agree that all representations and warranties made herein are true and effective both when made and as of the Closing, and that all such representations and warranties shall survive the Closing.

13. Notice. Any notice or other communication to any party under this Agreement shall be in writing and shall be deemed to have been given on the date on which such notice is either hand delivered to the party to whom such notice is directed or is deposited in the United States mail as a certified or registered letter, postage prepaid, return receipt requested, properly addressed to such party at the address specified below:

If to FS Financial, at:

First Security Financial  
P. O. Box 30006  
Salt Lake City, Utah 84130  
Attn: Treasurer

If to Capitol, at:

c/o Richard A. Christenson  
2356 Dallin Street  
Salt Lake City, Utah 84109

If to Christenson, at:

c/o First Security Financial  
135 South Main Street  
Salt Lake City, Utah 84111



With a copy to:

Richard A. Christenson  
2356 Dallin Street  
Salt Lake City, Utah 84109

If to Moesser, at:

c/o First Security Financial  
135 South Main Street  
Salt Lake City, Utah 84111

With a copy to:

Bruce L. Moesser  
2467 East 3750 South  
Salt Lake City, Utah 84109

Any such address may be changed by giving notice thereof to the other parties in accordance with the above procedure.

14. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the parties and their respective legal representatives, heirs, successors and assigns.

15. Counterpart Originals. For the convenience of the parties, this Agreement shall be executed in four (4) counterpart originals, which taken together shall constitute a single agreement.

16. Headings. The headings of the Paragraphs herein have been inserted for ease of reference only and shall not control or affect the meaning or interpretation of any of the terms and provisions hereof.

17. Governing Law. This Agreement is entered into under and shall be governed by the laws of the State of Utah.

18. Further Action. The parties hereby agree to execute and deliver such additional documents and to take such further action as may become necessary or desirable to fully carry out the provisions and intent of this Agreement.

19. Severability. In the event one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect the validity, legality and enforceability of any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or

unenforceable provision had never been contained herein, provided that the Agreement as so modified preserves the basic intent of the parties.

20. Construction. As used herein, all words in any gender shall be deemed to include the masculine, feminine, or neuter gender, all singular words shall include the plural, and all plural words shall include the singular, as the context may require. The term "person" shall include an individual, corporation, partnership, trust, estate or any other entity.

21. Prior Agreements Superseded. This Agreement supersedes any prior understandings or agreements among the parties, whether written or verbal, respecting the within subject matter, and contains the entire understanding of the parties with respect thereto.

22. Enforcement. In the event of a dispute among the parties arising under this Agreement, the party or parties prevailing in such dispute shall be entitled to collect their costs from the other parties, including without limitation court costs and reasonable attorney's fees.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date hereinabove first written.

FIRST SECURITY FINANCIAL

By Elmer D. Tucker  
Elmer D. Tucker  
Vice President

CAPITOL THRIFT AND LOAN COMPANY

By Richard A. Christenson  
Richard A. Christenson,  
President

Richard A. Christenson  
Richard A. Christenson,  
Individually

Bruce L. Moesser  
Bruce L. Moesser,  
Individually

CAPITOL THRIFT AND LOAN COMPANY  
BALANCE SHEETS  
AS AT JUNE 30, 1982 AND JUNE 30, 1981

ASSETS	June 30, 1982	June 30, 1981	LIABILITIES AND CAPITAL	June 30, 1982	June 30, 1981
Cash in Bank & On Hand	\$ 452,349.70	\$ 409,849.44	Accounts Payable	\$ 58,624.32	\$ 74,904.4
Savings Certificates of Deposit	1,313,344.36	1,715,511.46	Interest Payable	27,670.30	12,791.5
Short Term Liquid Investment	65,893.12	309,801.90	Notes Payable Current	227,615.01	126,787.4
Receivables:			Subordinated Debenture		
Accounts Receivable	\$ 2,624.61	\$ 18,785.86	Notes Current	15,000.00	15,000.0
Contracts	1,199.72	10,001.36	Dealer & Loan Reserves		2,754.2
Industrial Loans	6,760,093.78	6,195,842.98	Bonus Benefit & Thrift		
Purchased Loans	309,816.09	589,630.05	Savings Certificates	8,070,595.42	7,420,237.4
Interest	430,231.49	248,606.47	Long-term Liabilities:		
Total Receivables	<u>7,501,965.69</u>	<u>7,062,866.72</u>	Subordinated Debenture		
Less:			Notes	45,000.00	60,000.0
Reserve for Credit Losses	238,645.15	101,932.12	Subordinated Capital		
Unearned Finance and			Notes	<u>316,592.14</u>	<u>373,225.2</u>
Discounts	24,748.61	79,158.11	Total Liabilities	<u>8,761,097.39</u>	<u>8,317,073.1</u>
Total	<u>263,393.76</u>	<u>181,090.23</u>	Capital:		
Net Receivables	<u>7,240,571.93</u>	<u>6,881,776.49</u>	Common Stock, \$1.00		
Real Estate Owned	971,057.04	274,850.84	Par Value - 252,115		
Fixed Assets:			Shares Issued and		
Office Equipment	38,714.83	38,714.83	Outstanding	\$ 252,115.00	\$ 252,115.00
Less: Reserve for			Additional Paid in		
Depreciation	<u>(15,528.99)</u>	<u>(8,435.95)</u>	Capital	35,878.60	35,878.60
Net Fixed Assets	<u>23,185.84</u>	<u>30,278.87</u>	Surplus	<u>1,071,918.18</u>	<u>1,040,295.75</u>
Other Assets:			Total Capital	<u>1,323,911.78</u>	<u>1,323,243.3</u>
Investment Unconsolidated					
Subsidiary	10,000.00				
Purchased Discounts	<u>64,607.18</u>	<u>74,607.18</u>			
TOTAL ASSETS	<u>110,141,009.17</u>	<u>112,640,162.50</u>	TOTAL LIABILITIES AND CAPITAL	<u>110,141,009.17</u>	<u>112,640,162.50</u>

The accompanying notes are an integral part of the financial statements.

**EXHIBIT "B"**

**ASSETS NOT BEING PURCHASED**

**Stock in Subsidiary**

**Highway Health and Racquet Club**

**Industrial Loan License**

**Membership in ILGC**

**Loans No.'s 053946 and 053947 to Child Cor, Inc.  
(principal and accrued interest)**

Tab D

Jeffrey M. Jones, Esq. (1741)  
J. Mark Gibb, Esq. (5702)  
DURHAM, EVANS, JONES & PINEGAR  
Key Bank Tower, Suite 850  
50 South Main Street  
Salt Lake City, Utah 84144  
Telephone: (801) 538-2424

FILED DISTRICT COURT  
Third Judicial District

FEB 29 1996

By B. B. B.  
SALT LAKE COUNTY  
Deputy Clerk

Attorneys for Plaintiff 4447 Associates

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

ZIONS FIRST NATIONAL BANK,  
a National Banking Association )  
and 4447 ASSOCIATES, a Utah )  
general partnership, )

Plaintiff, )

v. )

FIRST SECURITY FINANCIAL,  
a National corporation )

Defendant. )

ORDER ON PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND DEFENDANT'S  
MOTION FOR STAY

Case No. 870901578CN

Judge Frank G. Noel

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This case is before the Court on Plaintiff's Motion for Summary Judgment (the "Motion") pursuant to the remand order entered by the Utah Court of Appeals on January 6, 1995.<sup>1</sup> Plaintiff 4447 Associates ("4447 Associates") moves the Court for entry of summary judgment and an award of damages due under the Asset Purchase Agreement and Closing Agreement dated December 10, 1982 which 4447 Associates alleges are five (5) unpaid interest payments, the unpaid contract balance, together with interest

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<sup>1</sup>Thereafter, the Utah Supreme Court denied First Security's petition for a writ of certiorari in an order dated June 5, 1995.

thereon, and its attorney fees and costs. Defendant First Security Financial ("First Security") opposed the Motion and asserted defenses contained in Utah Code Section 70A-9-318(1)(b), Section 70A-9-318(2) and Section 70A-9-318(3). The Motion came before the Court for oral argument on December 6 and 22, 1995. Prior to that time, the parties filed extensive memoranda in support of and in opposition to the Motion. First Security further filed a Motion for Stay which was opposed by 4447 Associates.

Having fully considered the issues in this case, the Court declines at this time to grant plaintiff's Motion for Summary Judgment or Defendant's Motion for Stay. Rather, the court will at this time make the following findings and rulings which shall govern further proceedings in this case.

1) First Security's indebtedness owed to 4447 Associates under the Asset Purchase Agreement, including principal and interest as of December 6, 1995, is \$266,757.25 as shown in detail below. From and after December 6, 1995, interest shall continue to at the per diem rate of \$33.51 in favor of 4447 Associates and against First Security.

# I. UNPAID INTEREST PAYMENTS

<u>Due Date of Interest Payment</u>	<u>Unpaid Amount</u>	<u>Accrued Interest to December 6, 1995</u>
12/13/84	\$21,536.07	\$23,660.18
3/13/85	24,849.31	26,687.48
6/13/85	25,401.51	26,640.27
9/13/85	25,401.51	26,000.01
12/13/85	<u>25,125.41</u>	<u>25,717.41</u>
Subtotal	122,313.81	128,705.35

# II. UNPAID CONTRACT BALANCE

12/13/85 (After \$1,000,000 Downward Adjustment on 12/13/85)	7,777.42	7,960.67
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TOTAL (I & II)	\$266,757.25
----------------	--------------

2) 4447 Associates' request for an award of attorney fees under the Asset Purchase Agreement is GRANTED in an amount to be determined at a later evidentiary hearing; however, 4447 Associates is not entitled to an award of attorney fees regarding First Security's Motion for Partial Summary Judgment which was granted by the court on May 24, 1990 and affirmed on appeal.

3) First Security's defense under Section 70A-9-318(2) is DENIED as the Settlement Agreement dated July 10, 1985 was more than a modification of the contract within the meaning of Section 70A-9-318(2); instead, the Settlement Agreement improperly attempted to terminate and discharge obligations owed under the Asset Purchase Agreement as found by the appellate court.

4) The Court will allow First Security to marshal evidence in the record currently before the Court in support of its claim

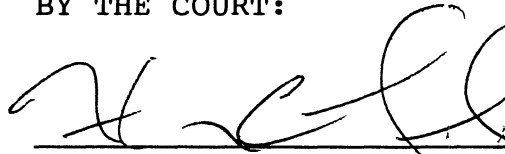


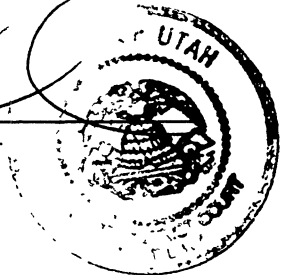
that Section 70A-9-318(1)(b) is a defense to payment of the indebtedness described above. First Security will file and serve a memorandum regarding its defense under Section 70A-9-318(1)(b) on or before February 12, 1996. 4447 Associates will file and serve its response thereto on or before March 8, 1996. Thereafter, the Court will hold a hearing to determine whether First Security's alleged defense under Section 70A-9-318(1)(b) precludes the entry of judgment against First Security as described in this order.

5) Defendant's argument relating to Section 70A-9-318(3) and Defendant's Motion to Stay are taken under advisement.

DATED this 29 day of Feb., 1996.

BY THE COURT:

  
FRANK G. NOEL  
DISTRICT JUDGE




APPROVED AS TO FORM:

RAY, QUINNEY & NEBEKER

\_\_\_\_\_  
James S. Jardine  
Scott H. Clark  
Brent D. Wride

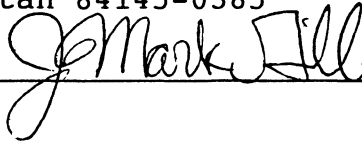
DURHAM, EVANS, JONES & PINEGAR

  
\_\_\_\_\_  
Jeffrey M. Jones  
J. Mark Gibb

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Order On Plaintiff's Motion for Summary Judgment and Defendant's Motion for Stay to be hand-delivered this 6<sup>th</sup> day of February, 1996, to the following:

James S. Jardine  
Brent D. Wride  
RAY, QUINNEY & NEBEKER  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

  
\_\_\_\_\_

jmg/4447msj.ord

Tab E

**\*949 Judicial Administration Rule 4-501**

**WEST'S UTAH COURT RULES  
UTAH CODE OF JUDICIAL  
ADMINISTRATION  
PART I. JUDICIAL COUNCIL  
RULES OF JUDICIAL  
ADMINISTRATION  
CHAPTER 4. OPERATION OF THE  
COURTS  
ARTICLE 5. CIVIL PRACTICE**

*Current with amendments received through  
11-15-97*

**RULE 4-501. MOTIONS**

**Intent.** To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

**Applicability.** This rule shall apply to motion practice in all district courts except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

**Statement of the Rule.**

**(1) Filing and Service of Motions and Memoranda.**

**(a) Motion and Supporting Memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities, appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-

length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

**(b) Memorandum in Opposition to Motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

**(c) Reply Memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

**\*950 (d) Notice to Submit for Decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

**(2) Motions for Summary Judgment.**

**(a) Memorandum in Support of a Motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

**(b) Memorandum in Opposition to a Motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be

stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and

time.

**\*951** (e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) Expedited Dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone Conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

[Amended effective November 1, 1996.]

Tab F

889 P.2d 467  
27 UCC Rep.Serv.2d 1060  
(Cite as: 889 P.2d 467)

**4447 ASSOCIATES, a Utah general  
partnership; and Zions First National  
Bank, a  
national banking association; Plaintiffs  
and Appellant,**  
v.  
**FIRST SECURITY FINANCIAL, a Utah  
corporation, Defendant and Appellee.**

**No. 930293-CA.**

Court of Appeals of Utah.

Jan. 6, 1995.

Assignee of asset purchase agreement appealed from judgment of the District Court, Salt Lake County, Frank G. Noel, J., holding that account debtor was not responsible under assignment of account of security. The Court of Appeals, Orme, P.J., held that: (1) downward adjustment value of asset purchase agreement at issue was to be calculated on agreement closing date, and not on payment due date; (2) account debtor received notice of existence of assignment prior to extinguishing debt as part of its settlement, and thus, account debtor could not extinguish account, for reasons not contemplated in underlying contract, without consent of assignee; and (3) account debtor had duty to notify assignee of pending settlement.

Affirmed in part, reversed in part, and vacated.

**[1] APPEAL AND ERROR k842(2)**  
30k842(2)

Appellate court reviews trial court's decision to grant partial summary judgment for

correctness, according no deference to trial court's legal conclusions.

**[1] APPEAL AND ERROR k863**  
30k863

Appellate court reviews trial court's decision to grant partial summary judgment for correctness, according no deference to trial court's legal conclusions.

**[2] ASSIGNMENTS 1134**  
38k134

Assignee seeking to enforce assignment had burden of proving account debtor received notice of assignment, since assignee would materially benefit from favorable determination of its rights.

**[3] APPEAL AND ERROR k842(1)**  
30k842(1)

Determination concerning whether party had notice or knowledge of particular transaction or occurrence is finding of fact and will not be set aside unless clearly erroneous, but determination concerning effect of notice presents question of law, reviewed for correctness. Rules Civ.Proc., Rule 52(a).

**[3] APPEAL AND ERROR k1008.1(8.1)**  
30k1008.1(8.1)

Determination concerning whether party had notice or knowledge of particular transaction or occurrence is finding of fact and will not be set aside unless clearly erroneous, but determination concerning effect of notice presents question of law, reviewed for correctness. Rules Civ Proc., Rule 52(a).

**[4] APPEAL AND ERROR k757(3)**  
30k757(3)

In order to challenge findings of fact, appellant must marshal all evidence supporting findings and then demonstrate that despite this evidence, trial court's findings are so lacking in support as to be against clear weight of evidence.

**[4] APPEAL AND ERROR k1012.1(4)**

30k1012.1(4)

In order to challenge findings of fact, appellant must marshal all evidence supporting findings and then demonstrate that despite this evidence, trial court's findings are so lacking in support as to be against clear weight of evidence.

**[5] SALES k72(4)**

343k72(4)

Downward adjustment value of asset purchase agreement at issue was to be calculated on agreement closing date, and not on payment due date, since contract, read in its entirety, unambiguously stated that adjustment in value was to be done three years after closing date.

**[6] SECURED TRANSACTIONS k188**

349Ak188

Account debtor received notice of existence of assignment of asset purchase agreement prior to extinguishing debt as part of its settlement with asset seller, and thus, account debtor could not extinguish account, for reasons not contemplated in underlying contract, without consent of assignee; although account debtor received no written notice of assignment, and though debtor's president did not know assignment had actually been made, financial statements referring to assignment, submitted to debtor's counsel in conjunction with settlement, were sufficient to confer actual notice of assignment.

**[7] SECURED TRANSACTIONS k185.1**

349Ak185.1

In context of assignment, Uniform Commercial Code (UCC) provision

addressing assignments of security interests distinguishes between claims and defenses arising from contract and other unrelated claims and defenses, and thus, account debtor can assert claims and defenses based on terms of contract whether they arise before or after notification of assignment, but assertion of unrelated claims and defenses are limited to those which accrue before account debtor receives notification of assignment. U.C.A.1953, 70A-9-318, 70A-9-318(1)(b).

**[8] SECURED TRANSACTIONS k182**

349Ak182

While filing financing statement is constructive notice that is effective for other purposes under Article 9 of the Uniform Commercial Code (UCC), it does not suffice for actual notice required in provision regulating assignment of security interests. U.C.A.1953, 70A-9-312(5)(a), 70A-9-318.

**[9] SECURED TRANSACTIONS k131**

349Ak131

Financing statement only offers notice that security interest may exist, and requires potential creditors to make further inquiry to confirm existence or specific details of transaction. U.C.C. § 9-402 comment.

**[10] SECURED TRANSACTIONS k185.1**

349Ak185.1

Account debtor, unlike potential creditor, is not obligated to check UCC recordings continually to ascertain whether debt has been assigned, and filed financing statement offers no actual notice of assignment's existence that would affect account debtor's right to assert subsequent claims and defenses. U.C.A.1953, 70A-9-318(1)(b).

**[11] SECURED TRANSACTIONS k131**

349Ak131

One can receive "notice," under Uniform Commercial Code (UCC), when it comes to one's attention, regardless of circumstances



through which notice was received.  
U.C.A.1953, 70A-1-201(26)(b)(i).

**[12] SECURED TRANSACTIONS k183**  
349Ak188

Account debtor had duty to notify assignee of asset purchase agreement of pending settlement with seller and debtor's president, which extinguished debtor's debt, since debtor had knowledge of assignment prior to settlement. U.C.A.1953, 70A-9-318(1)(b).

**[13] SECURED TRANSACTIONS k183**  
349Ak183

Actual knowledge of another's property interest may limit one's right to acquire or interfere with that property, and thus, since secured creditor acquires personal property right, actual knowledge of assignment's existence precludes substantial interference with assignee's rights. U.C.A.1953, 70A-1-201(37)(a).

**[14] SUBROGATION k31(4)**  
366k31(4)

Doctrine of equitable subrogation cannot be used by subsequent lender to trump prior intervening lien if lender had actual knowledge of lien.

**[15] VENDOR AND PURCHASER k228(1)**  
400k228(1)

Subsequent purchaser of land cannot cut off prior unrecorded interest in land if purchaser had personal knowledge of prior conveyance.

**\*468** Jeffrey M. Jones and J. Mark Gibb, Salt Lake City, for appellant.

Craig Carlile and Brent D. Wride, Provo, for appellee.

Before BILLINGS, ORME and WILKINS,  
JJ.

OPINION

ORME, Presiding Judge:

Plaintiff 4447 Associates appeals the trial court's judgment that defendant First Security Financial, as an account debtor, is not responsible to 4447 Associates under an assignment of the account for security. We affirm in part, reverse in part, and remand.

FACTS

In December 1982, First Security Financial and Capitol Thrift and Loan entered into an asset purchase agreement, whereby First Security purchased substantially all of Capitol's assets for \$1,379,911. Under the agreement, First Security paid \$200,000 to Capitol at closing, with interest payments due quarterly and the remaining principal due in December 1985. [FN1] This deferred principal payment was subject to an offset, not to exceed \$1,000,000, based on any subsequent reduction in the transferred assets' value prior to the 1985 due date. Also, Richard Christenson, Capitol's majority shareholder, was named president of First Security, but still retained the presidency of Capitol until June 1984.

FN1. At closing, the parties reduced the purchase price to \$1,207,777.42, leaving \$1,007,777.42 as the deferred balance.

**\*469** In June 1984, Capitol stockholders, including Christenson, sold all their interest and the remaining assets of Capitol, which consisted of its receivable from First Security and its charter, to AFS Holding Company, an affiliate of the Bertagnole Investment Company. Emanuel Floor, a Bertagnole partner, replaced Christenson as president of Capitol.

On September 28, 1984, Bertagnole reached agreement with Zions Bank to restructure

Capitol's pre-existing debt to Zions of \$870,000 into a \$1,000,000 revolving loan. To secure the loan, Capitol assigned Zions its rights to the payments due from First Security under the purchase agreement. In conjunction with the loan re-negotiation, Zions commercial loan officer Allen Potts and Bertagnole Management Company vice-president Ronald Mitchell obtained Christenson's personal guaranty for \$870,000, the amount of the original Capitol debt owed to Zions. Floor executed a notice of assignment [FN2] as part of the loan documentation, and testified that all the documents were taken by Bertagnole employees to be delivered, filed, or recorded as appropriate. Potts testified that he instructed his secretary at Zions to mail a copy of the notice of assignment to First Security as per the address specified in the asset purchase agreement for giving notice to First Security, which included the notation "Attn: Treasurer." He did not instruct that the mailing be registered or certified. [FN3] Elmer Tucker, First Security's treasurer during this period, never received the notice and had no knowledge of the assignment until 1986. Zions never obtained acknowledgement from First Security that it had received notice of the assignment or of its purported obligation to make future payments jointly to Zions and Capitol, and Zions apparently never followed up with a written or verbal inquiry as to whether First Security received the notice. Nor, apparently, did Zions complain or inquire when, at the next scheduled quarterly payment, it did not see a check from First Security on which Capitol and Zions were shown as joint payees.

FN2. Capitol's notice stated, in part, as follows:

Notice is hereby given that Capitol ... has assigned to Zions ... for purposes of security, and granted to Zions a security interest in all amounts owing

to Capitol and all rights of Capitol to receive payment from First Security Financial pursuant to the aforesaid Asset Purchase Agreement....

You are hereby requested and instructed to make all future payments pursuant to said Asset Purchase Agreement payable jointly to Capitol and Zions.

FN3. Zions's office procedure for handling mail is similar to that of many large offices. Zions employees who prepare letters for mailing leave them unstamped at designated locations to be picked up and delivered to a central mail room. There, other employees affix the appropriate postage and deposit the mail with the post office at the end of the work day.

In November 1984, Christenson was terminated as president of First Security, and some time between December 1984 and July 1985, he regained the position as president of Capitol that he had relinquished in June 1984, incident to the Bertagnole buyout. In order to resolve disagreements related to Christenson's departure from First Security, Christenson, Capitol, and First Security entered into a settlement agreement on July 10, 1985. Among its terms was an agreement by both Capitol and Christenson to release First Security from all remaining obligations under the 1982 asset purchase agreement, specifically including payment of the principal balance due. In conjunction with his negotiations with First Security, Christenson delivered three personal financial statements prior to July 1985. On each statement, Christenson listed as an asset his interest in Capitol's receivable from First Security, with the notation that the "receivable has been pledged to Zion's First National Bank."

Capitol had made payments, via checks from Bertagnole, on its restructured Zions loan, but defaulted in December 1985. Zions notified First Security on February 14 and 19, 1986, that Capitol had defaulted and that Zions "may be looking" to its security interest in First Security's payment obligations under the 1982 asset purchase agreement. In response, First Security, which denied receipt of any prior notice of the assignment, informed Zions that its debt to Capitol had been fully discharged as part of the July 1985 settlement accord.

**\*470** On March 4, 1987, Zions filed a complaint against First Security, seeking a determination of the amount owed to Capitol by First Security under the asset purchase agreement and an order requiring First Security to pay Zions, as Capitol's assignee, this amount. First Security filed a motion seeking a partial summary judgment on February 23, 1990. The trial court granted the motion, holding that pursuant to the asset purchase agreement's provision for a "change in value" offset to the principal payment due in December 1985, the amount due must be adjusted downward by \$1,000,000, the maximum amount permitted under the agreement, given the uncontroverted evidence.

4447 Associates, the sole appellant in this case, first acquired a stake in these proceedings when it purchased a participation interest in the Capitol note and collateral from Zions in late 1986. In June 1990, Zions assigned to 4447 Associates all of its remaining right, title, and interest in the Capitol note. [FN4]

FN4. Thus, 4447 Associates emerged in an unenviable position: the assignee of an assignee of a right to payment that was purportedly extinguished by the parties to the underlying transaction before anything was ever realized on the assignment.

The issues surviving the partial summary judgment were tried to the court on January 6 and 7, 1992. Subsequently, the trial court issued its Memorandum Decision and Findings of Fact and Conclusions of Law, and entered a judgment in favor of First Security on November 3, 1992. The trial court found that First Security had no duty to pay Zions, as assignee of Capitol's account receivable, or to notify Zions of its intent to settle its obligation to Capitol. 4447 Associates now appeals.

## ISSUES

4447 Associates raises the following issues on appeal that merit discussion: (1) whether the trial court erred in finding that First Security did not have notice of the assignment of its Capitol obligation to Zions prior to entering into a settlement agreement that extinguished the obligation; (2) whether the trial court erred in concluding that, even with knowledge of the assignment, First Security had no duty to obtain consent from Zions prior to entering into the settlement agreement; and (3) whether the trial court erred in its partial summary judgment determination that the value offset provision of the asset purchase agreement reduced the remaining principal due by \$1,000,000. [FN5]

FN5. The parties also debate the question of whether First Security ever received, beyond mere notice of the assignment, notice to make payment directly to Zions as contemplated in Utah Code Ann. § 70A-9-318(3) (1990). It clearly did not, and we decline to address the issue further. See, e.g., *State v. Carter*, 776 P.2d 886, 888-89 (Utah 1989) (declining to consider issues without merit); *State v. Vigil*, 840 P.2d 788, 795 (Utah App.1992) (same), cert. denied, 857 P.2d 948 (Utah 1993).

## STANDARDS OF REVIEW

[1] We employ several standards of review in resolving this appeal. We review the trial court's decision to grant partial summary judgment "for correctness, according no deference to the trial court's legal conclusions." *Christensen v. Swenson*, 874 P.2d 125, 127 (Utah 1994). Accord *Brown v. Weis*, 871 P.2d 552, 559 (Utah App.1994). "Summary judgment is appropriate when the record indicates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Christensen*, 874 P.2d at 127. "In addition, we [examine] all relevant facts and all inferences arising from those facts in the light most favorable" to the non-moving party. *Id.*

[2] Because 4447 Associates would materially benefit from a favorable determination of its rights as an assignee seeking to enforce an assignment, it bore the burden of proving First Security received notice of the assignment. See *Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 534 P.2d 887, 891 (Utah 1975). See also *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (party asserting that another party assumed assignor's liabilities has burden of proving assumption); *First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980) (assignee of non-\*471 negotiable notes has burden of proving maker issued notes for consideration); *Peoples Fin. & Thrift Co. v. Landes*, 28 Utah 2d 392, 503 P.2d 444, 446 n. 3 (1972) (assignee of account receivable has burden of proving account debtor had notice of assignment).

[3][4] A determination concerning whether a party had notice or knowledge of a particular transaction or occurrence is a finding of fact and "will not be set aside unless clearly erroneous." Utah R.Civ.P. 52(a). See *Kasco*

*Servs. Corp. v. Benson*, 831 P.2d 86, 89 (Utah 1992) (receipt of notice of anticipatory repudiation is a question of fact). In order to challenge findings of fact, the appellant must marshal all evidence supporting "the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence.' " *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 553 (Utah App.1989) (quoting *In re Bartell*, 776 P.2d 885, 886 (Utah 1989)). However, a determination concerning the effect of the notice presents a question of law, reviewed for correctness. *Kasco*, 831 P.2d at 89.

## SUMMARY JUDGMENT ON THE ASSET VALUE OFFSET

[5] As indicated, First Security filed a motion for partial summary judgment, contending that, as a matter of law, the terms of the asset purchase agreement provided for a downward adjustment in the amount of \$1,000,000, to be applied to the principal payment owed by First Security and due in December 1985. [FN6] The asset purchase agreement provided, in part, as follows:

FN6. According to the closing statement, signed December 13, 1982, which finalized the asset purchase agreement between First Security and Capitol, the deferred principal due in December 1985 was \$1,007,777.42. See *supra* note 1. With application of the maximum \$1,000,000 offset for the decline in asset value, the principal balance owing would become \$7,777.42.

At the end of the three (3) year period of deferral and prior to the payment of the principal amount of the deferred portion of the purchase price, the real estate and receivables of Capitol acquired by FS

Financial shall be valued in the manner set forth below. In the event that (i) the aggregate value of the real estate is less than its book value as of the Closing Date and/or (ii) the actual and anticipated losses on the collection of the amount of the receivables as of the Closing Date exceeds the reserve for losses as of the Closing Date, the principal amount of the deferred portion of the purchase price shall be adjusted downward in an equivalent amount. Further, the principal amount of the deferred portion of the purchase price shall also be adjusted downward in the amount of any liabilities of Capitol relating to the collection of receivables which were incurred in the normal course of business prior to Closing but were not disclosed on Capitol's balance sheets at Closing and which were assumed by FS Financial hereunder. The aggregate of such downward adjustments of the principal amount of the deferred portion of the purchase price shall in no event exceed One Million Dollars (\$1,000,000.00).

4447 Associates incorrectly asserts that the downward adjustment in value is to be calculated on the asset purchase agreement closing date of December 13, 1982, and not on the payment due date of December 13, 1985, and that First Security's evidence did not show a decrease in value as of the earlier closing date. In support of its assertion, 4447 Associates points to certain terms of the agreement, but fails to include a critical sentence that states the adjustment is to be calculated "[a]t the end of the three (3) year period of deferral and prior to the payment of the principal amount of the deferred portion of the purchase price." Read in its entirety, the contract unambiguously states that the adjustment in value is to be done three years after the closing date of December 13, 1982. See *Homer v. Smith*, 866 P.2d 622, 629 (Utah App.1993) (according clear and unambiguous contract terms "their plain and ordinary meaning without resorting to extrinsic

evidence"), cert. denied, 878 P.2d 1154 (Utah 1994).

Moreover, although 4447 Associates challenges the validity of First Security's calculations supporting its claim of decreased asset \*472 value, 4447 Associates offers no contrary affidavits or evidence to rebut these calculations. Thus, we are unable to find any evidence favorable to 4447 Associates that would create an issue of material fact.

Accordingly, the trial court was correct in its interpretation of the asset purchase agreement offset provision and in its decision to grant partial summary judgment in favor of First Security. We turn now to the notice issues.

#### NOTICE OF ASSIGNMENT GENERALLY

[6] Our starting point is Article 9 of the Uniform Commercial Code (UCC), pertaining to secured transactions. [FN7] See Utah Code Ann. §§ 70A-9-101 to -507 (1990 & Supp.1994). In particular, section 70A-9-318 addresses assignments of security interests in accounts, and states, in part, as follows:

FN7. All 50 states have adopted the bulk of the Uniform Commercial Code, see 3A Uniform Laws Annotated (U.C.C.) 1-2 (1992), developed by the National Conference of Commissioners on Uniform State Laws with later assistance from the American Law Institute. James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 1 (1972). Comparable provisions with identical wording, or at least the same substantive meaning, exist in most of the various state statutory schemes. Thus, other courts' interpretations of

their commercial codes may be helpful in our resolution of this appeal.

Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale ... the rights of an assignee are subject to:

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

Utah Code Ann. § 70A-9-318(1) (1990) (emphasis added).

[7] Thus, in the context of an assignment, section 9-318 distinguishes between claims and defenses arising from the contract and other unrelated claims and defenses. An account debtor can assert claims and defenses based on the terms of the contract whether they arise before or after notification of an assignment. However, subsection (1)(b) limits assertion of unrelated claims and defenses to those "which accrue[ ] before the account debtor receives notification of the assignment." Id. § 70A-9-318(1)(b) (emphasis added). See also *West One Bank v. Life Ins. Co.*, 887 P.2d 880, 885 n. 7 (Utah App.1994) (secured creditor need only give notice of its interest in order to have priority over later creditor's subsequent right of setoff). Subsection (1)(b) does not specify a particular form of notice, but simply precludes an account debtor from raising a claim or defense against an assignee after the account debtor is aware that the assignment exists. [FN8]

FN8. The two-pronged notice requirement mandated by Utah Code Ann. § 70A-9-318(3) (1990) is not applicable to our analysis. Section 9-318(3) sets forth the notice

requirements for an assignee to receive payments directly from the account debtor. In the instant case, the question of whether Zions was entitled to receive payments from First Security as they came due does not merit consideration. See *supra* note 5.

[8][9][10] In the case at hand, First Security's \$1,000,000 offset for the decreased value of the assets arose directly from the contract terms of its asset purchase agreement with Capitol. When Zions took Capitol's interest in the asset purchase agreement, its interest was subject to the terms of the original contract between First Security and Capitol, regardless of whether First Security had notice of the assignment. At issue here is whether First Security was able to extinguish the debt remaining after the \$1,000,000 offset by asserting a claim or defense not arising from its original contract with Capitol. According to the terms of section 9-318(1)(b), First Security, as an account debtor, can only succeed if its claim or defense accrued before it received notice of the assignment's existence. Thus, we now consider whether First Security received notice of the assignment prior to extinguishing the debt as part of its settlement with Capitol and Christenson.

#### FIRST SECURITY'S NOTICE OF THE ASSIGNMENT

The UCC defines notice and the related concept of knowledge of a fact as follows:

**\*473** A person has "notice" of a fact when:

- (i) he has actual knowledge of it;
- (ii) he has received a notice or notification of it; or
- (iii) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it.

Utah Code Ann. § 70A-1-201(25)(a), (b) (1990). Furthermore, one gives notice by taking such steps as may be reasonably required to inform the other person in ordinary course whether or not the other person actually comes to know of it.

A person "receives" a notice or notification when:

- (i) it comes to his attention; or
- (ii) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

Id. § 70A-1-201(26)(a), (b). The trial court concluded that

First Security never received adequate, legal notice of the Assignment sufficient to impose an obligation on First Security which would preclude First Security from satisfying its obligations under the Purchase Agreement directly with Capitol, the original account creditor.

As the debate has been drawn by the parties in this appeal, there are three means by which First Security could have learned of the assignment sufficient to satisfy section 1-201(26): by the written notice prepared by Floor; through the personal knowledge of Christenson, who for a time was First Security's president; and from the notation on Christenson's financial statements submitted to First Security as part of the negotiations culminating in the settlement agreement. [FN9]

FN9. Zions perfected its security interest by filing a UCC-1 financing statement with the Utah Department of Commerce. While filing a financing statement is constructive notice that is effective for other purposes under Article 9, see Utah Code Ann. § 70A-9-312(5)(a) (1990) (establishing priority among multiple security interests by date of filing), it does not

suffice for the actual notice required under section 70A-9-318. A financing statement only offers notice that a security interest may exist, and requires potential creditors to make further inquiry to confirm the existence or specific details of the transaction. See *Sannerud v. First Nat'l Bank*, 708 P.2d 1236, 1241 (Wyo.1985); U.C.C. § 9-402 cmt. 2 (1989). An account debtor, unlike a potential creditor, is not obligated to check the UCC recordings continually to ascertain whether the debt has been assigned, and the filed financing statement offers no actual notice of the assignment's existence that would affect an account debtor's right to assert subsequent claims and defenses. See Utah Code Ann. § 70A-9-318(1)(b) (1990); *Chase Manhattan Bank v. State*, 40 N.Y.2d 590, 388 N.Y.S.2d 896, 898-99, 357 N.E.2d 366, 369 (1976) (financing statement not actual notice that would bar account debtor from asserting setoff).

#### A. Written Notice

The written notice prepared by Floor failed to provide adequate notice, since there is no evidence that First Security received it. Neither Capitol nor Zions mailed it registered or certified, and Zions did not secure written or oral acknowledgement of receipt from First Security. It is undisputed that the notice, addressed to the treasurer of First Security, was not received by then- treasurer Elmer Tucker. At least with respect to this document, the trial court did not err in finding that "[n]o individual representing or authorized to act on behalf of First Security received written notice of the assignment prior to 1986."

#### B. Knowledge of Christenson

[11] Of course, the knowledge of Christenson, president of First Security when the assignment to Zions was made by Capitol, can be imputed to First Security. [FN10] See, e.g., \*474 Tuft v. Federal Leasing Inc., 657 P.2d 1300, 1303 (Utah 1982) (corporate officers' knowledge of foreclosure suit imputed to corporation). It is evident that Christenson knew of the assignment by the time, some ten months after the assignment, that he agreed to the settlement with First Security. Still, there is nothing in the record to show he knew during his tenure as First Security president, which ended less than two months after the assignment was made. 4447 Associates points to the fact that Christenson was a party to various discussions relative to Capitol's effort to refinance its obligations to Zions and understood that the assignment to Zions of Capitol's right to payment from First Security was under discussion. However, the only document Christenson signed when the refinance arrangement was concluded was a limited personal guaranty of Capitol's payment to Zions. There was no testimony showing that he had knowledge of other aspects of the finalized transaction, specifically an actual assignment by Capitol of its right to payment from First Security. As the trial court found, the discussions between Potts and Christenson concerned "an intent by Zions to enter into the agreement, [and preceded] execution of the Assignment by Capitol and Zions."

FN10. First Security incorrectly argues that even if Christenson received notice, it was only through Capitol-related business dealings with Zions and not in his capacity as an officer of First Security. According to the UCC, one can receive notice when "it comes to his attention," Utah Code Ann. § 70A-1-201(26)(b)(i) (1990), regardless of the circumstances

through which the notice was received. Additionally, although Christenson may have been "wearing two hats," given the intertwined financial relationship of Christenson, Capitol, and First Security, both hats were cut from the same cloth. Thus, the fine distinction First Security seeks to draw is untenable. If Christenson knew of the assignment at any time when he was president of First Security, then First Security knew of the assignment. How Christenson knew is irrelevant.

We agree with the trial court that it is not enough that Christenson knew Zions hoped to receive an assignment as security for repayment of Capitol's loan and that Capitol was willing to make such an assignment--Christenson had to know the assignment had actually been made. Thus, 4447 Associates failed to meet its burden of proving Christenson knew the assignment had been made at a time when he was also serving as First Security's president.

### C. Financial Statements

However, notification through Christenson's submission to First Security of financial statements referring to the assignment, submitted in conjunction with the settlement agreement that purportedly extinguished the underlying debt between First Security and Capitol, cannot be dismissed as easily.

A financial institution receives many financial statements in the course of its business, which clerical personnel may simply examine for compliance with the institution's lending guidelines. It would be too burdensome, as First Security contends, to expect scrutiny of footnotes in every financial statement submitted to ascertain the existence of an encumbering security interest that might



affect the affairs of the receiving financial institution, no matter how remote from the transaction for which the financial statement was submitted.

These particular financial statements, however, were submitted in the course of negotiations between Christenson and First Security to settle their respective legal differences and not in the ordinary course of First Security's general lending business. Furthermore, the notation stating that the "receivable has been pledged to Zion's First National Bank" concerned an asset that was at the core of the negotiations which culminated in the settlement agreement. Thus, there was a uniquely close nexus between the revelation in the financial statements and the main purpose of the settlement agreement.

In addition, the trial court's factual findings confirm that First Security had notice through its receipt of the financial statements. The court noted the reference to the assignment in Christenson's financial statements, and also found that at least one statement "was delivered by Christenson's attorney to First Security's attorneys prior to July, 1985." Both First Security and 4447 Associates had stipulated to these facts, as well as to the evidence upon which the trial court based its findings. The court received as evidence correspondence between counsel for First Security and counsel for Christenson that indicated such a delivery; moreover, the exchange of letters was made in the context of documenting the settlement which featured the purported release of the very right to payment that the financial statement showed had been assigned to another. Counsel for First Security, acting as its agent, therefore received the financial statement and would have noted the assignment of the account in the course of examining the financial statement. See *First Sec. Bank v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 \*475 (Utah

1990) (describing fiduciary relationship between attorney and client).

Therefore, the trial court incorrectly concluded, contrary to its own findings of fact, that "First Security never received adequate, legal notice of the Assignment sufficient to impose an obligation on First Security." The notation on the financial statements indicating Zions's interest in the account was sufficient to confer actual notice of the assignment on First Security. Accordingly, First Security was not free to extinguish the account in the context of the settlement agreement with Capitol and Christenson, for reasons not contemplated in the underlying contract, without the consent of Zions. [FN11]

FN11. We do not suggest that an account cannot be modified in any way after notice of assignment is received. The account debtor and the assignor are free to make changes as provided by the original account contract or which may be commercially reasonable within the context of the transaction. However, the settlement agreement in this case unilaterally extinguished the account in an effort to resolve legal differences totally unrelated to, and not contemplated in, the original contract.

#### DUTY IMPOSED BY NOTICE

[12][13][14][15] The trial court in the instant case made the following conclusion pertinent to any duty imposed on First Security through actual knowledge or notice of the assignment's existence:

Knowledge of the existence of the Assignment alone, if any such knowledge existed, did not impose a duty to inquire on First Security.

This conclusion does not ring true. A

familiar principle of the law, particularly in secured transactions, is that actual knowledge of another's property interest may limit one's right to acquire or interfere with that property. See, e.g., Utah Code Ann. § 70A-9-301(1)(c), (d) (1990) (buyer not in ordinary course of business purchases collateral free of an unperfected security interest only if buyer has no actual knowledge of interest). [FN12]

FN12. Likewise, in the context of property law, actual knowledge is a critical factor. For example, the doctrine of equitable subrogation cannot be used by a subsequent lender to trump a prior intervening lien if the lender had actual knowledge of the lien. *Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606, 609 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993). A subsequent purchaser of land cannot cut off a prior unrecorded interest in the land if the purchaser had personal knowledge of the prior conveyance. *Utah Farm Prod. Credit Ass'n v. Wasatch Bank*, 734 P.2d 904, 906 n. 2 (Utah 1987).

Accordingly, since a secured creditor acquires a personal property right, see *id.* § 70A-1-201(37)(a), actual knowledge of the assignment's existence precludes substantial interference with the assignee's rights. Legal commentators have noted that under the UCC, an assignee's rights may be adversely affected by contract modifications made by the account debtor and the assignor, but such actions are "unwarranted" if the assignee's rights are jeopardized by termination of the contract or similar unilateral action. 9 *Hawkland, Lord & Lewis, UCC Series* § 9-318:01 (Callaghan 1991). See also *In re Apex Oil Co.*, 975 F.2d 1365, 1370 (8th Cir.1992) (holding company acted unreasonably by setting off debt after receiving notice of third party's security interest in same debt).

Given these principles and a plain reading of section 9-318(1)(b), which allows an account debtor to raise claims and defenses against the assignee not arising from the original contract only before it receives notice of the assignment, the trial court incorrectly concluded that knowledge alone did not impose any duty upon First Security. [FN13] We hold that First Security had a duty to notify Zions of the pending settlement with Capitol and Christenson. Its failure to do so entitles 4447 Associates to an award of damages resulting therefrom, presumably the amount due on the account, as properly reduced in accordance with the terms of the asset purchase agreement as discussed above.

FN13. "[I]f the obligation assigned could be obliterated or diminished by events happening after the assignment and notice of the assignment to the obligor, the assignment would be precarious collateral." *Seattle-First Nat'l Bank v. Oregon Pac. Indus., Inc.*, 262 Or. 578, 500 P.2d 1033, 1035 (1972) (en banc). See also Larry D. Bishop, Note, *Commercial Transactions: Protection of the Account Debtor Within and Without UCC § 9-318(1)*, 35 *Okla.L.Rev.* 415, 420-25 (1982) (explaining rights and responsibilities of account debtor after receiving notification of assignment).

#### **\*476 CONCLUSION**

We affirm the trial court's decision to grant partial summary judgment in favor of First Security, thereby allowing the value adjustment of \$1,000,000 on the principal amount owed by First Security under the asset purchase agreement. We conclude that notice of an assignment's existence precludes an account debtor from extinguishing the account post-assignment, and thereby substantially interfering with the assignee's interest, for

reasons other than those contemplated by the terms of the underlying obligation. First Security had such notice through the financial statement submitted to its attorneys.

Accordingly, we reverse in part and affirm in part, and remand to the trial court for entry of an appropriate judgment in favor of 4447 Associates in accordance with this opinion.

BILLINGS and WILKINS, JJ., concur.

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