

1997

## Zions First National Bank and 4447 Associates v. First Security Financial : Brief of Appellant

Utah Court of Appeals

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### Recommended Citation

Brief of Appellant, *Zions First National Bank v. First Security Financial*, No. 970644 (Utah Court of Appeals, 1997).  
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UTAH COURT OF APPEALS  
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DOCKET NO. 970644-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 and Appellee,

v.

FIRST SECURITY FINANCIAL, a  
Utah corporation,

Defendant and Appellant.

Case No. 970644-CA

Priority No. 15

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Brief of Appellant

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Appeal from Judgment Entered by  
the Third Judicial District Court, Salt Lake County,  
the Honorable Frank G. Noel

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**FILED**

Utah Court of Appeals

JUN - 8 1998

Julia D'Alesandro  
Clerk of the Court

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## TABLE OF CONTENTS

JURISDICTION . . . . .	1
ISSUES . . . . .	1
DETERMINATIVE STATUTES, RULES, AND REGULATIONS . . . . .	2
STATEMENT OF THE CASE . . . . .	3
Nature of the Case and Course of Proceedings . . . . .	3
Statement of Facts . . . . .	4
SUMMARY OF ARGUMENT . . . . .	7
ARGUMENT . . . . .	8
I.    THE DISTRICT COURT ERRED ON REMAND BY HOLDING THAT SECTION 70A-9-318(3) DOES NOT APPLY TO THIS CASE .	8
II.   THE DISTRICT COURT ERRED IN HOLDING THAT FIRST SECURITY AND CAPITOL WERE NOT ENTITLED TO MODIFY THEIR CONTRACT PURSUANT TO SECTION 70A-3-318(2) NOTWITHSTANDING NOTICE OF THE ASSIGNMENT . . . . .	16
III.  THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO 4447 ASSOCIATES . . . . .	19
CONCLUSION . . . . .	20
CERTIFICATE OF SERVICE . . . . .	21
ADDENDUM	
A.    Order Concerning Defendant's Defenses to Judgment	
B.    Findings of Fact and Conclusions of Law Concerning Defendant's Defenses to Judgment	
C.    Asset Purchase Agreement	

## TABLE OF AUTHORITIES

### CASES

<u>America First Credit Union v. First Sec. Bank</u> , 930 P.2d 1198 (Utah 1997) . . . . .	1, 6, 11, 12
<u>America First Credit Union v. First Security Bank</u> , 910 P.2d 425 (Utah 1995) . . . . .	5
<u>Bank One, Texas v. Communication Specialists</u> , 813 S.W.2d 755 (Tex. Ct. App. 1991) . . . . .	17
<u>Corbett v. Corbett</u> , 569 P.2d 292 (Ariz. Ct. App. 1977) . . . . .	14
<u>Cumming v. Johnson</u> , 616 F.2d 1069 (9th Cir. 1979) . . . . .	14
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988) . . . . .	19
<u>First Fidelity Bank v. Matthews</u> , 692 P.2d 1255 (Mont. 1984) . . . . .	14
<u>First Finance Co. v. Akathiotis</u> , 249 N.E.2d 663 (Ill. Ct. App. 1969) . . . . .	14
<u>Frankford Trust Co. v. Stainless Steel Servs., Inc.</u> , 475 A.2d 147 (Pa. Super. Ct. 1984) . . . . .	13
<u>Kennecott Copper Co. v. Salt Lake County</u> , 799 P.2d 1156 (Utah 1990) . . . . .	1
<u>Martin v. John Clay &amp; Co.</u> , 167 S.W.2d 407 (Mo. Ct. App. 1943) . . . . .	16
<u>Petty v. Clark</u> , 192 P.2d 589 (Utah 1948) . . . . .	15
<u>Time Finance Corp. v. Johnson Trucking Co.</u> , 458 P.2d 873 (Utah 1969) . . . . .	9, 10

### STATUTES

Utah Code Ann. § 70A-9-318(3) . . . . .	9, 12, 15, 16
Utah Code Annotated Section 78-2a-3(2)(j) (1996) . . . . .	1, 2, 7
U.C.C. § 9-318 . . . . .	18

### JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j) (1996).

### ISSUES

There are three issues before the Court:

I. Did the district court err in holding that Utah Code Annotated Section 70A-9-318(3), as interpreted by the Utah Supreme Court in America First Credit Union v. First Sec. Bank, 930 P.2d 1198 (Utah 1997), does not apply to this case?<sup>1</sup> Because this is a legal issue, the standard of review is de novo, and this Court reviews the decision of the district court for correctness. Kennecott Copper Co. v. Salt Lake County, 799 P.2d 1156 (Utah 1990).

II. Did the district court err in holding that Utah Code Annotated Section 70A-9-318(2) does not entitle First Security to judgment in its favor.<sup>2</sup> This is a legal issue, and the standard of review is de novo. Id.

III. Did the district court err in awarding attorney's fees to 4447 Associates when the dispute between the parties did not "arise under" the original contract but centered around whether

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<sup>1</sup>This issue was raised in First Security's Motion for Entry of Judgment in Favor of First Security, R. 2245-62.

<sup>2</sup>This issue was raised in First Security's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R. 1871-78.

First Security had received notice of an assignment of the contract?<sup>3</sup> The standard of review is de novo. Id.

**DETERMINATIVE STATUTES, RULES, AND REGULATIONS**

This case is governed by Utah Code Annotated Section 70A-9-318 (1990), which provides:

(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.

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<sup>3</sup>This issue was originally raised in First Security's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R. 1883-85.

## STATEMENT OF THE CASE

### Nature of the Case and Course of Proceedings.

This appeal involves a dispute between 4447 Associates and First Security Financial ("First Security") over whether First Security received proper notice that its debt to its original creditor had been assigned and that First Security should make payments to the assignee.

After trial, the district court held that the required notice had not been given and that First Security was therefore free to satisfy its debt through an agreement with the original creditor. R. 781. The district court entered judgment in favor of First Security, R. 783-84, and 4447 Associates appealed, R. 789-90. This Court reversed and held that notice of the assignment had been given. 889 P.2d 467. The case was then remanded to the district court. Id. Before the district court entered judgment in the case, the Utah Supreme Court issued its decision in America First. First Security then moved for judgment in its favor based upon the America First decision. R. 2245-46. First Security also argued on remand that it was allowed to modify the contract with Capitol pursuant to section 318(2). R. 1871-78. The district court denied First Security's motion, R. 2351-56, and entered judgment in favor of 4447 Associates, R. 2357-59. First Security then filed a timely notice of appeal. R. 2369-70.



**Statement of Facts.**

1. In 1982 First Security and Capitol Thrift & Loan Company ("Capitol") entered into an Asset Purchase Agreement whereby First Security acquired certain assets from Capitol and became obligated to make certain payments to Capitol. R. 776.

2. Disputes subsequently arose between First Security and Capitol. On July 10, 1985, the parties entered into a Settlement Agreement whereby Capitol settled its disputes with First Security and cancelled First Security's debt to Capitol under the Asset Purchase Agreement. R. 780.

3. Prior to settling with First Security, Capitol had assigned to Zions First National Bank ("Zions") its interest in the Asset Purchase Agreement as collateral for a loan that Capitol obtained from Zions. R. 777.

4. Zions, as assignee, filed suit against First Security to collect the debt that had been cancelled by Capitol. R. 2-39.

5. In June 1990, after filing suit, Zions assigned its interest in the Asset Purchase Agreement to the appellee, 4447 Associates. R. 780.

6. At trial before the Third District Court, the court held that 4447 Associates "failed to prove that First Security received sufficient notice of the assignment, as required by law," to preclude First Security from satisfying its debt with the original creditor, Capitol. R. 709.

7. 4447 Associates then filed an appeal, which was heard by this Court. 889 P.2d 467. The issue on that appeal was whether the district court had correctly determined that First Security did not receive adequate notice of the assignment from Capitol to Zions. Id. at 470. First Security argued that under section 70A-9-318(3), First Security had to receive notice of two things: (a) notice of the fact of the assignment, and (b) notice that First Security should make payments to Zions rather than Capitol. Id. at 472 n.8.

8. The court of appeals determined that First Security had received notice of the assignment through a footnote in a financial statement received by First Security. Id. at 474. The court of appeals also held that while First Security "clearly" had not received the dual notice required by section 318(3), id. at 470 n.5, as a legal matter, section 318(3) did not apply to its analysis. Id. at 472 n.8. The court of appeals reversed and remanded this case to the district court.

9. First Security then filed a petition for certiorari with the Utah Supreme Court seeking review of the decision of the court of appeals. The petition was denied without comment by the Utah Supreme Court. 899 P.2d 1231.

10. However, the supreme court granted a petition for certiorari in the similar case of America First Credit Union v. First Security Bank. 910 P.2d 425 (Utah 1995). First Security's

petition in America First specifically referred to this case and urged the supreme court to resolve the issue in both cases concerning the proper application of the dual notice requirement in section 70A-9-318(3). R. 2008.

11. While this case was on remand to the district court, and before judgment was entered, the Utah Supreme Court issued its decision in the America First case. 930 P.2d 1198 (Utah 1997). Based upon that decision, First Security moved for judgment in its favor. R. 2245-46. First Security argued that the district court was obligated to follow the law as announced by the supreme court in America First, which implicitly overruled portions of the decision of the court of appeals in this case. R. 2252-55.

12. The district court disagreed with 4447 Associates' argument that res judicata and law of the case prevented the district court from considering the America First decision. The court held: "The Court has the authority to consider and apply the Utah Supreme Court's decision in America First Credit Union v. First Security Bank of Utah." R. 2355. However, the district court ruled against First Security on the merits and entered

judgment in favor of 4447 Associates.<sup>4</sup> The court also awarded attorney's fees to 4447 Associates. R. 2357-58.

13. First Security then filed a timely notice of appeal from the judgment entered in favor of 4447 Associates. R. 2369-70.

#### SUMMARY OF ARGUMENT

I. On remand the district court was required to apply the law as announced by the highest appellate court in the state. In America First, the Utah Supreme Court held that, even in cases where an account debt is fully satisfied, section 70A-9-318(3) requires notice not only that the account has been assigned but also that the debtor should make payments to the assignee. Because there is no dispute that the dual notice requirement of section 70A-9-318 was not satisfied in this case, the district court erred by not entering judgment in favor of First Security.

II. Section 318(2) provides that parties may modify executory contracts even when notice of an assignment has been provided. There is no dispute that the contract in this case was executory because a number of quarterly interest payments remained due. The district court therefore erred in holding that First Security was not entitled to judgment in its favor.

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<sup>4</sup>The district court held: "Utah Code Annotated Section 70A-9-318(3) does not apply to this action pursuant to the decision of the Utah Court of Appeals." R. 2354. The district court did not state whether it believed that America First overruled the decision of the court of appeals. R. 2358.

III. In addition, the district court erred in awarding attorney's fees to 4447 Associates. The Asset Purchase Agreement between First Security and Capitol allows attorney's fees only for disputes "arising under" the Asset Purchase Agreement. The dispute between First Security and 4447 Associates did not involve any provision of the Asset Purchase Agreement or arise under it in any way. Rather, the dispute turned solely on whether First Security had received notice of an assignment of the Asset Purchase Agreement. This dispute is extraneous to the Asset Purchase Agreement and not contemplated by it. Therefore the district court erred in awarding attorney's fees to 4447 Associates.

#### **ARGUMENT**

**I. THE DISTRICT COURT ERRED ON REMAND BY HOLDING THAT SECTION 70A-9-318(3) DOES NOT APPLY TO THIS CASE.**

As an account debtor whose account obligation was assigned to a third party, First Security's rights and duties are governed by section 70A-9-318(3) of the Utah Code. That section provides:

(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.

(Emphasis added.)

When this case was before this Court on the first appeal, this Court ruled that, as a matter of law, section 318(3) did not apply to its analysis, stating:

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 became due does not merit consideration.

889 P.2d at 472 n.8 (emphasis added). This Court apparently believed that the dual notice requirement of section 318(3) applies only to "payments as they become due" and not a payment in full like the settlement in this case. Id. However, as shown below, the Utah Supreme Court reached a contrary conclusion in America First.

As noted by the supreme court, section 70A-9-318(3) clearly requires notice not only of the fact of the assignment but also that the account debtor must pay the assignee. The burden is on the assignee to provide clear and adequate notice. This requirement is supported by the same policy considerations set forth in the supreme court's earlier decision in Time Finance Corp. v. Johnson Trucking Co., 458 P.2d 873 (Utah 1969):

"The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought home to the debtor with much exactness and certainty before he has paid the debt. The rule of notice to him is much more stringent than that which may defeat the title of a purchaser of a chose in action or of real estate. The latter is free to purchase or refuse to purchase as he chooses, and therefore it is his duty, before acting to

trace out any reasonable doubt and to inform himself of the true facts as soon as anything arises to put him on inquiry. But the debtor is not so situated. He must pay to his original creditor when the debt is due unless he can establish affirmatively that someone else has a better right. The notice to him therefore must be of so exact and specific a character as to convince him that he is no longer liable to such original creditor."

Id. at 876-77.

Section 318(3) protects consumers and other account debtors by allowing them to deal directly with their creditors in resolving disputes, notwithstanding the common practice of assigning accounts to remote lenders as collateral for accounts and inventory financing. A typical example of such a case is as follows:

John Smith purchased a car from Uptown Used Cars and arranged for financing at the dealership. At the time of the purchase, John received written notice that Uptown Used Cars assigns its accounts to Friendly Finance. The notice did not indicate that John should make payments to Friendly Finance.

A few months later, John decided to sell his car to his neighbor and called Uptown Used Cars for the payoff amount. Uptown Used Cars provided this information, and John sent a check to Uptown for the entire amount.

Thereafter, Uptown Used Cars went out of business without paying Friendly Finance. Friendly Finance then sued John for the full payoff amount, arguing that John knew that the account had been assigned and was therefore prohibited from paying the account in full to Uptown Used Cars. Friendly Finance acknowledged that John was authorized to make his regular monthly payments to Uptown Used Cars as they became due, but it asserted that the notice of assignment prohibited John from paying the account in full to Uptown Used Cars without the permission of Friendly Finance.

Under the prior ruling of this Court, John would have no protection under section 318(3) because he did not make "payments

as they became due" to Uptown Used Cars but instead resolved the debt in its entirety despite knowledge of the assignment. However, the supreme court correctly recognized in America First that the protections of section 318(3) are not so narrow and that the words "as they become due" should not be inserted into section 318(3).

In America First, America First Credit Union ("America First") made three loans to a food service company called Renaissance. 930 P.2d at 1200. As security for these loans, Renaissance assigned to America First a savings certificate it had with First Security Bank of Utah, N.A. ("First Security"). Id. First Security was given notice of the assignment and acted on this assignment by placing a "flag" or "block" on the account in its computer system. Id.

When its savings certificate expired, Renaissance represented to First Security that the assignment to America First had been released. Id. First Security then paid Renaissance the entire amount of the certificate. Id. America First later sued First Security for payment of the certificate. Id. The trial court held that First Security had recognized both that there had been an assignment and "'that payment should be made to America First'" and had flagged its computer system accordingly. Id. at 1201. Therefore, the district court entered judgment in favor of America First. Id. First Security



appealed. Id. The court of appeals concluded that "First Security had not shown the factual findings of the trial court to be clearly erroneous." Id. The supreme court then granted certiorari. Id.

In its decision, the supreme court emphasized certain portions of section 318(3) as follows:

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.

Id. (emphasis added by supreme court). The court then stated:

This statute imposes a two-pronged notice requirement. First, notice of the assignment must be given. Second, the notice must state that payments are to be made to the assignee.

Id. While the credit union in America First argued--similar to the reasoning in this Court's prior opinion--that the second prong of section 318(3) "is tailored to 'indirect collection' situations and therefore does not apply," the supreme court rejected this interpretation and applied both prongs of section 318(3) even though there had been a full payment.<sup>5</sup> Id. In doing so, it made clear that section 318(3) is not limited to cases

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<sup>5</sup>Under the facts of America First, the supreme court ultimately found that "First Security received notice of the assignment and that payment was to be made to [America First] as required by Utah Code Ann. § 70A-9-318(3)." Id. at 1201-1202 (emphasis added). Thus, the supreme court found that the second prong of section 318(3) was satisfied.

involving the assignment of payments "as they become due," as held by this Court in its prior opinion.

The decision of the supreme court in America First is in accordance with the decisions of other jurisdictions that have decided whether section 318(3) applies only to "payments as they become due" or also to cases where debts are paid in full or extinguished. In Frankford Trust Co. v. Stainless Steel Servs., Inc., the defendant, Stainless Steel Services, entered into a lease agreement for certain equipment. 475 A.2d 147, 149 (Pa. Super. Ct. 1984). Disputes arose between the defendant and the original lessor. The parties agreed to abrogate the lease, and the original lessor released Stainless from its duties thereunder. However, the lease had already been assigned to Frankford Trust Co. The court was therefore faced with the very question that exists in this case: May a party settle an obligation with its original creditor if it has not received the dual notice required by section 318(3)? In ruling on this question the court held:

Among the defenses to the entry of judgment asserted by Stainless is the argument that the original parties had agreed to abrogate the lease agreement and to release Stainless from its duties thereunder. Such discharge of contractual obligation if agreed to by both Stainless and Commercial before notice of assignment, would establish a binding and meritorious defense against Frankford's claim as assignee. Under the Pennsylvania Uniform Commercial Code and as a settled principle of contract law an "assignor [Commercial] retains his power to discharge or modify the duty of the obligor [Stainless] . . . [until] the obligor receives notification that the right has been assigned and

that performance is to be rendered to the assignee  
[Frankford]."

Id. at 150 (brackets and ellipses in original; emphasis added).

Likewise, the court held in First Fidelity Bank v. Matthews that the original parties to an agreement were entitled to "terminate" the agreement where the dual notice required by section 318(3) had not been provided. 692 P.2d 1255, 1260 (Mont. 1984). In addition, the Ninth Circuit has held that participation in a settlement "constituted 'payment'" for purposes of section 318. Cumming v. Johnson, 616 F.2d 1069, 1073 (9th Cir. 1979). The Court of Appeals of Arizona reached the same conclusion: "Where one purports to pay an obligation prior to the time he is obligated to pay it, and the obligee receives his tender for the purpose of extinguishing all or part of debt, then there is 'payment.'" Corbett v. Corbett, 569 P.2d 292, 294 (Ariz. Ct. App. 1977). See also First Finance Co. v. Akathiotis, 249 N.E.2d 663, 665 (Ill. Ct. App. 1969) ("Defendant paid the full contract price to his seller as he was authorized to do under section 9-318 of the Code, absent notice by the assignee of the assignment and demand that payments be made to the assignee").

The cases cited above support the decision of the Utah Supreme Court in America First and demonstrate that First Security was entitled to settle its obligation with its original

creditor, Capitol, until it received notice that it was to pay Zions.<sup>6</sup>

Because the second prong of section 318(3) applies as a matter of law to cases involving the full payment of an obligation, the only remaining issue in this case is the factual question of whether First Security ever received notice that it was to pay Zions. This factual issue has been conclusively decided by both this Court and the district court. This Court stated in its prior opinion:

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.

889 P.2d 467, 470 n.5 (emphasis added). Because the dual notice required by the Utah Code was "clearly" not provided, the district court erred in not granting judgment in favor of First Security.

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<sup>6</sup>The district court was bound to follow the law as announced by the Utah Supreme Court in America First. In Petty v. Clark, 192 P.2d 589 (Utah 1948), the Utah Supreme Court held that where an intermediate appellate court announces a rule and remands a case, but in the meantime the highest appellate court has reached a contrary conclusion, the lower court "is bound by the decision of the highest court of appeals." Id. at 594.

**II. THE DISTRICT COURT ERRED IN HOLDING THAT FIRST SECURITY AND CAPITOL WERE NOT ENTITLED TO MODIFY THEIR CONTRACT PURSUANT TO SECTION 70A-3-318(2) NOTWITHSTANDING NOTICE OF THE ASSIGNMENT.**

As a matter of law, First Security and Capitol were free to modify or substitute the terms of their original contract. Utah law provides in section 70A-9-318(2):

(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.

Utah Code Ann. § 70A-9-318(2) (1990) (emphasis added).

This section makes clear that if a contract is executory<sup>7</sup>, the original parties to the contract may modify or substitute the contract in good faith and in accordance with reasonable commercial standards. Such modification is effective against an assignee "notwithstanding notification of the assignment." Id. (emphasis added).

The official comment to subsection 9-318(2) states:

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<sup>7</sup>A contract that is executory is one in which something remains to be done by one or more of the parties. Martin v. John Clay & Co., 167 S.W.2d 407, 411 (Mo. Ct. App. 1943) (quoted by Levitz v. Warrington, 877 P.2d 1245 (Utah Ct. App. 1994) (Dissent)). The Asset Purchase Agreement in this case was executory because the value of the assets and the price had not yet been determined as outlined in the contract.

Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor without the assignee's consent was possible after notification of an assignment. Subsection (2) makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement.

As made clear by this comment, First Security and Capitol were free to modify or substitute their contract, and any assignee, such as Zions or 4447 Associates, is bound by those modifications or substitutions. In the case of Bank One, Texas v. Communication Specialists, 813 S.W.2d 755 (Tex. Ct. App. 1991), a dispute apparently arose between the original parties to a contract. An amount of \$47,780 was originally due on the contract, and the contract was assigned to a third party. The parties to the contract thereafter modified their agreement and reduced the account receivable to \$24,206.61. Id. at 758. The court held that, notwithstanding notification, the adjustment was binding on the assignee. The court held that an assignee was entitled only to the rights that the assignor "possessed after modification." Id.

In this case, as in Bank One, Capitol and First Security had a dispute about how much, if anything, was owed on the Asset Purchase Agreement. The original parties modified their original agreement through the means of a Settlement Agreement. Notwithstanding the prior assignment of the Asset Purchase

Agreement to Zions, and subsequent reassignment to 4447 Associates, the modification of the original agreement was binding on both assignees. 4447 Associates possessed only the rights that Capitol possessed after modification.<sup>8</sup>

Because section 9-318(2) allows the original parties to the contract to modify the contract, the parties can clearly enter into a settlement agreement concerning the contract. One commentator writes:

Does the right to modify the assigned contract include the right to terminate it altogether? If both Seller and Buyer agree that the widget supply contract should end prematurely, this can happen without the consent of Bank, although such termination might constitute default under the assignment. Official Comment 2 to UCC § 9-318 certainly suggests that modification includes termination. Article 9 itself draws no distinction between a reduction in supply of widgets by 20 percent and total abandonment of the supply contract; in both cases, the key is honesty and commercial reasonableness.

B. Clark, The Law of Secured Transactions Under the Uniform Commercial Code, § 11.04[2] (1993). There was no evidence at trial that the Settlement Agreement was not entered into in good faith or was not commercially reasonable. Accordingly, the contract was properly modified and, notwithstanding the fact that this Court held that notice had been received, the district court erred in entering judgment against First Security.

---

<sup>8</sup>Under section 318(2), 4447 Associates may still have a cause of action against Capitol for modifying the Asset Purchase Agreement.

**III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO 4447 ASSOCIATES.**

The Utah Supreme Court has held that "the award of attorney fees is allowed only in accordance with the terms of the contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The only contract in this case is the Asset Purchase Agreement between First Security and Capitol.<sup>9</sup> That contract states:

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.

(Emphasis added.)

The dispute between First Security and 4447 Associates did not "arise under" the Asset Purchase Agreement but revolved around whether First Security had received notice of a subsequent assignment of the Asset Purchase Agreement. First Security was not a party to this subsequent assignment. Nor was the assignment contemplated in the Asset Purchase Agreement.

If there had been a dispute between First Security and 4447 Associates regarding the proper interpretation of some provision of the Asset Purchase Agreement, then 4447 Associates, as the assignee of Capitol's assignee, would have been entitled to recover any attorney's fees that Capitol would have been entitled

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<sup>9</sup>There is no contract between First Security and 4447 Associates.



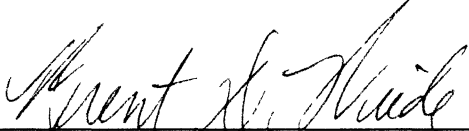
to receive. However, the dispute between 4447 Associates and First Security for which the trial court awarded attorney's fees did not relate to the Asset Purchase Agreement but to a subsequent agreement between Capitol and Zions and a later subsequent agreement between Zions and 4447 Associates. The question before the trial court related solely to whether notice of the assignment was given. That dispute did not "arise under" the Asset Purchase Agreement. Thus, the district court erred in awarding attorney's fees to 4447 Associates.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the judgment entered in favor of 4447 Associates and remand the case for judgment in favor of First Security.

DATED this 3<sup>rd</sup> day of June, 1998.

RAY, QUINNEY & NEBEKER



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

Attorneys for Defendant and  
Appellant, First Security  
Financial

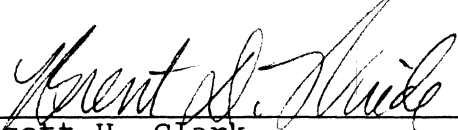
**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT were hand-delivered on this 8<sup>th</sup> day of June, 1998, to:

Jeffrey M. Jones  
Mark J. Gibb  
DURHAM, EVANS, JONES & PINEGAR  
50 South Main Street, #850  
Salt Lake City, Utah 84111

DATED this 8<sup>th</sup> day of June, 1998.

RAY, QUINNEY & NEBEKER

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

Attorneys for Defendant and  
Appellant, First Security  
Financial

## Exhibit A

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

Attorneys for Plaintiff 4447 Associates

FILED DISTRICT COURT  
THIRD JUDICIAL DISTRICT

JUL 1 1997

SALT LAKE COUNTY  
BY DEPUTY CLERK *Pat Jones*

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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 CONCERNING DEFENDANT'S  
DEFENSES TO JUDGMENT**

Case No. 870901578CN

Judge Frank G. Noel

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Based upon the Findings of Fact and Conclusions of Law Concerning Defendant's Defenses to Judgment, the Court's previous orders and the entire record in this action,

IT IS HEREBY ORDERED:

1. Defendant's defenses relating to Section 70A-9-318 are hereby DENIED.

2. Defendant's defenses which allegedly accrued prior to receipt of the notice of assignment are DENIED.

3. Defendant's motion for entry of judgment in favor of defendant is DENIED.

4. All other defenses to judgment in favor of plaintiff which are raised or asserted by defendant, are hereby DENIED.

5. Pursuant to the Court's Order Denying Defendant's Motion for Stay, the Court again DENIES defendant's request that this Court refrain from entering judgment.

6. Defendant's defenses relating to the award of attorney fees and costs in favor of plaintiff are DENIED.

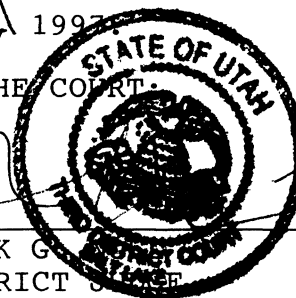
7. Pursuant to the Court's February 29, 1996 Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Stay, judgment should enter in favor of Plaintiff 4447 Associates against Defendant First Security Financial in the amount of \$282,741.52 as of March 27, 1997. From and after March 27, 1997, interest shall accrue thereon at the per diem rate of \$33.51 in favor of Plaintiff 4447 Associates and against Defendant First Security.

8. Judgment should enter in favor of plaintiff 4447 Associates against defendant First Security Financial in the amount of \$82,240.12 for attorney fees and costs incurred as of March 17, 1997. From and after the date of entry of judgment, interest shall accrue at the per diem rate of \$22.53 in favor of Plaintiff 4447 Associates and against Defendant First Security.

DATED this 15 day of July, 1997.

BY THE COURT:

FRANK G. [unclear]  
DISTRICT JUDGE

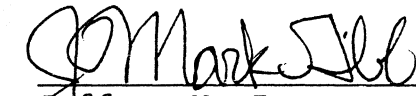


APPROVED AS TO FORM:

RAY, QUINNEY & NEBEKER

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

DURHAM, EVANS, JONES & PINEGAR

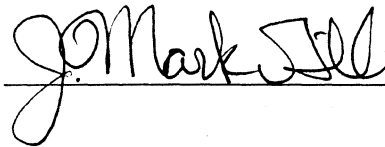
  
\_\_\_\_\_  
Jeffrey M. Jones  
J. Mark Gibb

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be hand-delivered this 4th day of ~~April~~ <sup>June</sup>, 1997, 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/4447/order3

  
\_\_\_\_\_

## Exhibit B

FILED DISTRICT COURT  
THIRD JUDICIAL DISTRICT

JUL 1 1997

SALT LAKE COUNTY  
BY DEPUTY CLERK Pat. Jones

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

Attorneys for Plaintiff 4447 Associates

---

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---

ZIONS FIRST NATIONAL BANK,	)	
a National Banking Association )	)	<b>FINDINGS OF FACT AND CONCLUSIONS</b>
and 4447 ASSOCIATES, a Utah )	)	<b>OF LAW CONCERNING DEFENDANT'S</b>
general partnership,	)	<b>DEFENSES TO JUDGMENT</b>
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 870901578CN
FIRST SECURITY FINANCIAL,	)	
a National corporation )	)	
	)	Judge Frank G. Noel
Defendant.	)	

---

This matter is before the Court on First Security Financial's claims of defenses to entry of judgment argued by defendant after remand to this Court. Pursuant to the Court's Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Stay, the parties filed extensive memoranda and presented argument on October 3, 1996 and March 20, 1997 (the "Hearings") regarding all remaining issues. Plaintiff 4447 Associates was represented by Jeffrey M. Jones and J. Mark Gibb of Durham, Evans, Jones & Pinegar; Defendant First Security Financial was represented by James S. Jardine and Brent D. Wride of Ray, Quinney & Nebeker. Pursuant to Rule 52,



Utah Rules of Civil Procedure, and based upon a review of the evidence presented at trial in this matter and reargued upon remand, the memoranda filed by both parties, the stipulations of counsel regarding the reasonableness of each party's respective attorney fees and costs and the arguments of counsel at the Hearings, the Court is now fully informed and enters the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

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.

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.

6. Each finding of fact which may be construed to be a conclusion of law shall be so construed.

#### CONCLUSIONS OF LAW

1. Utah Code Annotated Section 70A-9-318(3) does not apply to this action pursuant to the decision of the Utah Court of Appeals.

2. Utah Code Annotated Section 70A-9-318(1) does apply to this action pursuant to the decision of the Utah Court of Appeals.

3. Pursuant to the Court's Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Stay, the terms of the

Asset Purchase Agreement and applicable Utah law including Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988), plaintiff is entitled to an award of attorney fees and costs incurred.

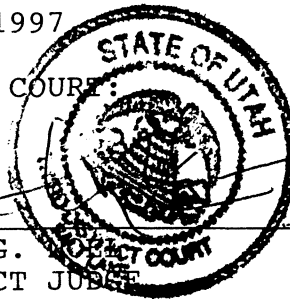
4. The Court has the authority to consider and apply the Utah Supreme Court's decision in America First Credit Union v. First Security Bank of Utah, No. 950274 (Utah January 21, 1997); however, the America First decision is not applicable to this action as the Court's decision interprets Utah Code Annotated Section 70A-9-318(3), not Section 70A-9-318(1).

5. Each conclusion of law which may be construed to be a finding of fact shall be so construed.

DATED this 1<sup>st</sup> day of July, 1997

BY THE COURT:

FRANK G. [unclear]  
DISTRICT JUDGE



APPROVED AS TO FORM:

RAY, QUINNEY & NEBEKER

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

DURHAM, EVANS, JONES & PINEGAR

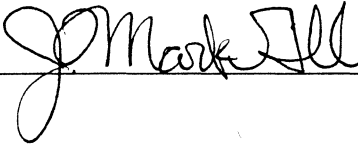
J. Mark Gibb  
Jeffrey M. Jones  
J. Mark Gibb

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be hand-delivered this 4th day of ~~April~~ <sup>June</sup>, 1997, 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/findings.co3

  
\_\_\_\_\_

## Exhibit C

## ASSET PURCHASE AGREEMENT

THIS AGREEMENT is made and entered into this 10 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)~~ <sup>\*\$1,077,777.99</sup> 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 Marilyn 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. 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