

1988

# William R. Kelley v. Leucadia Financial Corporation : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 88-0534 IN THE UTAH COURT OF APPEALS

WILLIAM R. KELLEY, JR.

Plaintiff-Respondent.

vs.

LEUCADIA FINANCIAL  
CORPORATION, a Delaware  
corporation,

Defendant-Appellant.

Case No. 880534-CA

On Appeal From the Judgment of  
the Third Judicial District Court  
for Summit County, State of Utah  
Honorable Homer F. Wilkinson and  
Honorable Pat B. Brian, District Judges

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BRIEF OF APPELLANT

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PARTIES TO THE PROCEEDING BELOW

The following parties or attorneys are now or have been interested in this litigation or any related proceedings.

1. First Security Mortgage Company was the named defendant when this litigation commenced. On June 3, 1988, Judge Pat B. Brian entered an Order whereby Leucadia Financial Corporation was substituted for First Security Mortgage Company for all purposes. (R.844-46) Leucadia Financial Corporation is asserting the rights of First Security Mortgage Company in this appeal.

2. Craig L. Taylor, Esq., previously appeared as counsel for First Security Mortgage Company prior to the above-mentioned substitution of parties.

3. All other parties are reflected in the caption, and all other counsel have entered their appearance.

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#### NATURE OF PROCEEDINGS BELOW

This appeal is from the Order of Partial Summary Judgment signed by the Honorable Homer F. Wilkinson on February 1, 1988, the Final Judgment and Decree of Specific Performance, signed by the Honorable Pat B. Brian on May 6, 1988 and the Order, signed by the Honorable Pat B. Brian on May 6, 1988. All of these orders and judgments were entered in the Third Judicial District Court for Summit County, Utah. This appeal was filed on June 3, 1988 with the Utah Supreme Court pursuant to section 78-2-2(3)(j), Utah Code Annotated (1988). On August 22, 1988, the Supreme Court notified the parties that the case was poured-over to the Court of Appeals for disposition.

#### ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in ordering specific performance where plaintiff Kelley's tender of performance was defective because conditional and therefore insufficient to enable Kelley to bring this action?
2. Did the trial court err in ordering specific performance where an unconditional tender of performance was not made by the closing date?

### STATEMENT OF THE CASE

Plaintiff-Respondent William R. Kelley, Jr. ("Kelley") commenced this action in the Third Judicial District Court on September 22, 1987, against Defendant-Appellant First Security Mortgage Company ("First Security").<sup>1</sup> In this action, Kelley requested a declaratory judgment for the interpretation of rights, status and legal relationship under an Earnest Money Sales Agreement ("Agreement"), sought a decree of specific performance requiring First Security to convey certain property as contracted in the Agreement, and prayed for damages for breach of the Agreement. (R.1-11)

Thereafter, on November 10, 1987, First Security filed a Motion to Dismiss and for Attorneys' Fees. (R.72-73) In response, Kelley filed a Motion for Partial Summary Judgment on November 27, 1987. (R.137-39) The Court entered its Order granting Kelley Partial Summary Judgment on February 3, 1988. (R.562-64) This Order granted Kelley's request for a decree of specific performance and retained jurisdiction over the matter to determine whether Kelley was entitled to an abatement of the purchase price and damages. (R.562-64) First Security filed a

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1. First Security was the named defendant when this litigation commenced. By order of the Court, Leucadia Financial Corporation was substituted for First Security and is asserting the rights of First Security in this appeal. (R.844-46)



Motion to Amend Judgment (R.343-344), an Objection to Proposed Order Granting Partial Summary Judgment (R.345-46), and a Motion for Reconsideration (R.907), all of which were denied by the Court.

First Security filed a Motion for Summary Judgment relating to Kelley's claims for punitive damages and on May 6, 1988, the Court entered its Order which, among other things, granted summary judgment in favor of First Security.

(R.812-14) On the same day, the Court found the parties had otherwise settled all claims relating to the amount of damages to be awarded Kelley and entered its Final Judgment and Decree of Specific Performance. (R.815-18) Leucadia Financial Corporation ("Leucadia") was substituted for First Security on June 3, 1988 for purposes of appeal concerning the decree of specific performance and all orders or judgments. (R.844-46) In that capacity, Leucadia filed its notice of appeal on June 3, 1988. (R.847-49)

#### STATEMENT OF THE FACTS

The facts before the District Court were not disputed. They are as follows:

##### 1. The Agreement Between The Parties.

On or about February 20, 1987, First Security Mortgage Company, as seller, and William R. Kelley, Jr., as buyer, executed an Earnest Money Sales Agreement for the purchase of

real property, a copy of which is Appendix 1 to this brief.

(R.14-22) Pursuant to this Agreement, Kelley agreed to purchase and First Security agreed to convey title to certain property situated at 320 West Snows Lane, Park City, Utah ("Subject Property"). (R.14)

There were several addenda to the Agreement which altered the Agreement only by extending the time for closing. In the first addendum to the Agreement, the parties agreed to extend the closing to April 20, 1987. (R.18) Thereafter, the parties extended the closing date to on or before June 1, 1987 (R.19); on or before July 1, 1987 (R.20); on or before August 31, 1987 (R.21). By letter dated September 4, 1987, the closing date was extended to September 15, 1987 (R.114); by letter dated September 14, 1987, the time for closing was extended until September 22, 1987 (R.116).

## 2. The Terms Of The Agreement.

The parties bargained for the following terms in their Agreement:

a) The property is sold "as is" without warranty with title to be conveyed by special warranty deed. (R.16)

b) Agreement is conditioned on seller furnishing good and marketable title to the property as evidenced by a current policy of title insurance. (R.16 ¶3)

c) Seller to provide a current certified survey of the property. (R.18)

d) In the event of a title problem, Buyer is to give Seller written notice of his objections to title.

Thereafter, Seller is required to cure the defects to which Buyer has objected, if such can be done through escrow at closing. If the defects are not curable through an escrow agreement at closing, the Buyer has the option of waiving the defects and proceeding with the closing or he may require the Seller to return the earnest money deposit and the Agreement will be null and void. (R.15 ¶G)

e) In the event there is loss or damage to the property between the date of the Agreement and the date of closing by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage exceeds ten percent of the purchase price of the property, Buyer may either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing, or declare this Agreement null and void. If damage to property is less than ten percent of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed. (R.17 ¶P)

f) With regard to the extension of closing dates, time is of the essence of this Agreement. (R.17 ¶Q)

g) This instrument constitutes the entire Agreement of the parties. (R.17 ¶L)

### 3. The Dispute.

At the time this Agreement was executed, both Kelley and First Security understood the Subject Property to include land which was enclosed by fences, a stream, a spring and a pond. (R.276) Shortly after the Agreement was executed, First Security, in accordance with the Agreement, had a survey conducted of the Subject Property. Through this survey, First Security discovered that the Quit-Claim Deed by which it claimed its interest in the property contained an erroneous property description which did not coincide with the natural boundaries of the property. (R.143) This faulty property description was a result of a prior erroneous survey and previous conveyances of the property incorporating the description from the erroneous survey. (R.81, 150) The result of this erroneous description was that the boundary shifted approximately 15.22 feet to the south such that neither the spring, the stream nor the pond would be included in the conveyance contemplated by the Agreement. (R.143)

In addition, First Security believes that one or more of the adjacent landowners came on the property and sawed off a pipe supplying water to the pond located on the property and removed fish from the pond. (R.82) Consequently, the pond virtually dried up and the water feeding the pond from the pipe has been diverted from the property. (R.82)

First Security attempted to resolve these problems with the landowners of the adjacent property, but was unable to do so through negotiation. (R.357) Accordingly, First Security commenced a lawsuit against the landowners to recover for damages to the property, to compel the determination of any claims adverse to First Security's title, to establish correct boundaries, to quiet title to, and to obtain a declaration of First Security's rights with respect to the property. (R.23-59) It became clear, however, that the adjacent landowners would not resolve the dispute without substantial litigation which First Security was unwilling to undertake without reimbursement from Kelley. (R.114-15)

#### 4. The Termination Of The Agreement.

By August 31, 1987, the last closing date mutually agreed to by the parties, neither party had performed nor tendered performance under the Agreement. (R.359) On September 4, 1987, First Security sent Kelley a letter

indicating that resolution of the boundary dispute and property damage could not be done through negotiation but, rather, would require substantial litigation. (R.114-15) Accordingly, First Security offered Kelley the options bargained for in the Agreement in the event of a dispute rendering title to the property unmarketable or in the case of damage to property prior to closing. Namely, Kelley could either waive the defects and proceed to closing or First Security would return the earnest money deposit. (R.114-15; R.15 ¶G; R.17 ¶P) Under these terms, the closing was scheduled for September 15, 1987, and, at Kelley's request, later extended until September 22, 1987. (R.114-15, 116)

On September 22, 1987, however, Kelley declined to close under either of the options provided in the letter as required by the Agreement. (R.119-21) Instead, Kelley tendered the down payment in escrow, and stated that such tender was conditioned on First Security resolving the boundary dispute, rectifying the property damage, and clearing title prior to closing. (R.120) A copy of Kelley's tender is Appendix 2 to this brief. Thereafter, First Security orally offered to extend the closing deadline to October 8, 1987, if, in accordance with the Agreement, Kelley desired to purchase the property "as is." (R.296) Kelley refused this offer, however, stating that First Security was obligated to resolve

the disputes and then convey the property to Kelley. (R.297) Inasmuch as First Security was unable to repair or replace the damaged property, and because Kelley did not waive the defects in the title and close the sale on or before September 22, 1987, but rather, made his tender of down payment conditional, First Security executed a release of Kelley's earnest money deposit on September 24, 1987. (R.122-25)

Kelley filed this action on September 22, 1987, requesting an order of the Court that First Security was obligated to resolve the boundary dispute, repair or replace the property, and then convey the property to Kelley. (R.7)

5. The Sale Of The Subject Property To Leucadia.

On September 25, 1987, First Security received an earnest money offer to purchase the Subject Property from Leucadia, and began negotiating a purchase and sale agreement with Leucadia. (R.362) On November 2, 1987, First Security and Leucadia entered into a binding Earnest Money Sales Agreement for the sale of the Subject Property. (R.362) On November 25, 1987, the Subject Property was sold to Leucadia. (R.362)

SUMMARY OF THE ARGUMENT

The Utah Supreme Court has held that an unconditional tender of performance is a prerequisite to an action for specific performance. In this action, First Security argues that the lower court erred in ordering specific performance of

the Agreement because Kelley's tender of performance was conditional on First Security providing a remedy not required by the Agreement. Moreover, Kelley failed to make an adequate tender prior to the expiration of the Agreement on its own terms. Accordingly, the lower court's order of specific performance of the Agreement is erroneous, as a matter of law.

#### ARGUMENT

In reviewing a case disposed of in the District Court by summary judgment, the reviewing court must consider the evidence in the light most favorable to the losing party, and affirm the decision only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Themy v. Seagull Enter., Inc., 595 P.2d 526 (Utah 1979). In this action, the facts are undisputed. Appellant's contention is that the District Court erred as a matter of law in ordering specific performance of the Agreement.

#### I. AN UNCONDITIONAL TENDER OF PERFORMANCE IS A CONDITION PRECEDENT TO A DECREE OF SPECIFIC PERFORMANCE.

On several occasions, the Utah Supreme Court has considered under what circumstances a tender of performance is sufficient for purposes of ordering specific performance of a contract. In response to this query, the Utah Supreme Court



has repeatedly and consistently held that a complete and unconditional tender is a prerequisite to an action for specific performance.

In Baxter v. Camelot Properties, Inc., 622 P.2d 808 (Utah 1981), for example, a purchaser brought an action for specific performance of a purchase agreement involving two condominium units entered into between the parties in May, 1977. The terms of the initial purchase agreement were that the buyer was to make a cash down payment of 10% and to obtain a mortgage loan for the remaining 90%. 622 P.2d 809. The date of the closing was left open. In October, 1978, the seller requested that the purchaser complete the purchase within the next ten days by depositing the 10% down payment and making application for the 90% loan. Plaintiff did not comply with this letter, but proposed several alternative offers, none of which was accepted by the defendant. Id.

Thereafter, the plaintiff made two "tenders of performance." In January, 1979, the plaintiff tendered the 10% down payment but did not state whether she had made application for the loan for the additional 90%; defendant did not respond to this tender. Id. In February, 1979, plaintiff tendered more money for the two units and required seller to carry a contract for 90% of the sales price; defendant did not respond to this tender. 622 P.2d 810. Thereafter, plaintiff brought

an action for specific performance of the original agreement. The Court held that the plaintiff did not tender the performance required by the terms of the agreement and, accordingly, specific performance was denied. 622 P.2d at 811.

The following year, the Utah Supreme Court explained why a conditional tender, that is one not in conformance with the terms of the agreement, is inadequate as a matter of law for purposes of bringing an action to compel performance:

[With respect to] a contract . . . which contemplates simultaneous performance by both parties, such as the Earnest Money agreement involved in this case, neither party can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance. . . . In other words, the party who desires to use legal process to exercise his legal remedies under such a contract must make a tender of his own agreed performance in order to put the other party in default. . . . To qualify under this rule, a tender, such as an offer to pay money, must be complete and unconditional.

Century 21 All Western Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982) (citations omitted; emphasis added). See also Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975) (a tender requires that there be a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent); Fischer v. Johnson, 525 P.2d 45 (Utah 1974) (to claim specific performance, a party must either perform or

tender performance in accordance with the covenants in the contract.)

In this case, Kelley's "tender" was not in accordance with the terms of the Agreement between the parties. The Agreement clearly provided the options open to the purchaser in the event the title to the property was unmarketable: Where the defects in title were not curable through an escrow agreement at closing (e.g., paying money to release liens or other encumbrances), the purchaser could either waive the defects and close the sale, or his earnest money deposit would be returned and the Agreement declared null and void. (R.15 ¶G) Similarly, the options available to the purchaser in the event of property damage caused by vandalism were provided by the Agreement: If the seller agrees to repair or replace the damaged property the buyer may, at his option, either proceed to closing or declare the Agreement null and void. (R.17 ¶P)

Yet in this case, Kelley's tender was expressly conditioned on First Security resolving the boundary dispute, clearing title, and repairing or replacing the damaged property prior to closing, even though Kelley had knowledge that substantial litigation was required to do so. (R.120) Clearly, such a tender was not made in accordance with the provisions in the Agreement; rather, it was conditioned on

First Security undertaking obligations not provided for in the Agreement and over which First Security had no control.

By this Agreement, the parties stipulated to what the remedy would be in case of the failure or inability of First Security to provide merchantable title. Such a stipulation is binding, at least in the absence of bad faith. E.g., Lanna v. Greene, 175 Conn. 453, 399 A.2d 837, 842 (1978); Scerbo v. Robinson, 63 App.Div.2d 1096, 406 N.Y.S.2d 370, 371 (1978); Robison v. Compton, 97 Idaho 615, 549 P.2d 274, 276 (1976). First Security never contemplated assuming the obligation to cure defects to title that could not be cured through escrow -- either before closing, as demonstrated by paragraph G of the Agreement, or after closing, as demonstrated by its inserting the "as is" and "without warranty" and "title conveyed by special warranty deed" language. By annexing an unwarranted condition to his tender of performance, Kelley in effect refused to perform. See Gerritsen v. Draney, 351 P.2d 667, 673 (Wyo. 1960) (a tender made not in conformity with the contract is the same as if no tender is made at all); Johnson v. Goldberg, 130 Cal.App.2d 571, 279 P.2d 131 (1955) (conditional tender of performance is a refusal to perform).

The parties also, by this Agreement, stipulated to what the remedy would be in the event of property damage caused by vandalism. First Security had no obligation to repair or

replace the damaged property. Rather, the Agreement provided that if First Security had the ability to repair the damage and in fact did repair the damage, then Kelley could proceed with the Agreement. However where, as in this case, the correction of the damaged property was out of First Security's hands, the only obligation First Security had was to allow for the termination of the Agreement by its terms. Again, Kelley's tender of performance was not in conformance with the Agreement and, therefore, in effect was a refusal to perform.

Gerritsen, 351 P.2d at 673; Johnson, 279 P.2d at 131.

First Security, as a matter of law, was not obligated to accept Kelley's tender of performance requiring First Security to provide a remedy and undertake obligations not required by the Agreement. In turn, Kelley's conditional tender, as a matter of law, was deficient and therefore an insufficient basis to enable Kelley to bring an action in specific performance. The District Court's order of specific performance should be reversed.

## II. WHERE TIME IS THE ESSENCE OF THE AGREEMENT FAILURE TO TENDER BY THE CLOSING DATE DESTROYS RIGHT TO SPECIFIC PERFORMANCE.

The second question presented by this appeal, whether specific performance is appropriate where the Agreement terminated because the transaction was not closed nor adequate

tender made by the agreed upon date, has also been expressly considered by the Utah Supreme Court. To this question, the Court has stated that where time is made the essence of the agreement, the parties must make tender by the stated closing date or both parties will be discharged from their obligations.

In Century 21 All Western Real Estate & Inv., Inc. v. Webb, 645 P.2d 52 (Utah 1982), as in this case, the purchasers brought an action against the seller of real property seeking specific performance of the sale of the seller's home pursuant to an earnest money receipt and offer to purchase agreement signed by the parties. 645 P.2d at 54. After the contract was signed but prior to closing, the buyers learned of an encumbrance on the property. The buyers insisted that the encumbrance be satisfied prior to closing, although under the terms of their contract, such a demand was not the buyer's right. 645 P.2d at 55. The parties had agreed upon a closing date of December 22; neither party made a tender of performance on or before that date. 645 P.2d at 54. However, on January 9, 1979, the buyer advised the seller they were "ready and willing to close on this transaction" provided the seller cleared the encumbrance. 645 P.2d at 54-55.

The court noted that the tender was, in that situation, made within the contract period; the court reasoned that in cases where the executory contract contains no

declaration that time is of the essence, the contract obligations can continue for some time beyond the stated closing date. However, the court made clear this holding was limited to situations in which there is no time of essence agreement between the parties:

Where the contract states that time is of the essence, cases hold that both parties are discharged from their contract obligations if neither makes tender by the agreed closing date.

Century 21, 645 P.2d at 55 n.1 (citations omitted).

Significantly, the court found that even though made while the contract was still in effect (due to the lack of a time of essence clause), the tender was insufficient as a matter of law because it was conditional on a term not found in the agreement and declined to order specific performance. 645 P.2d at 56.

The Court's notation that time of essence clauses are to be strictly enforced is in accord with holdings of other courts. E.g., Nix v. Clary, 640 P.2d 246 (Colo. App. 1981) (purchasers were not entitled to specific performance as they failed to tender payment as required by the contract which provided that time was of the essence and give notice of their unconditional commitment to be bound by the contract); In re Gauthier, 493 P.2d 377 (Colo. App. 1972) (not selected for official publication) (where time is of essence of a contract,

failure to tender payment when due destroyed right to specific performance of contract).

In this action, the Agreement provides that "time is of the essence." (R.117 ¶Q) Significantly, this provision goes on to state: "This provision relates only to the extension of closing date." (R.117 ¶Q) The last extension of the closing date in this case provided that the closing was to occur on or before September 22, 1987. (R.116) On September 22, 1987, however, the performance Kelley tendered *was insufficient as a matter of law because Kelley's tender was conditional on a term not found in the Agreement.* See Century 21, 645 P.2d at 56; see Point I supra. Because Kelley did not tender unconditional performance of the Agreement on or before September 22, 1987, the time of essence clause of the Agreement caused the Agreement to lapse. On that date, both parties were discharged from their obligations and thus neither party could be said to be in default and susceptible to judgment for damages or a decree for specific performance. See Century 21, 645 P.2d at 56 and at 55 n.1.

Even assuming that despite the time of essence clause, the Agreement remained open, Kelley never attempted to tender unconditional performance of the Agreement after the last extension had expired. Indeed, First Security offered to allow closing on October 8, 1987, if Kelley would make an



unconditional tender of performance. (R.296) Again, however, Kelley refused, stating that First Security was obligated to provide a remedy to the title and property damage disputes not provided for in the Agreement. (R.297)

In fact, when Kelley filed this action on September 22, 1987, he requested an order of the Court that First Security was obligated to resolve the boundary dispute, rectify the property damage and then convey the property to Kelley -- which prayer is consistent with the position Kelley had assumed in refusing to go forward with the closing. (R.7) At some point, first reflected in the pleadings on November 25, 1987, Kelley's position changed. In the memorandum in support of Kelley's motion for summary judgment (R.140-274), Kelley requests the court to order First Security to convey "whatever title it has" to the Subject Property. (R.181) Even then, Kelley sought damages in the form of abatement of the purchase price -- a remedy not bargained for in the Agreement.

Moreover, by the time Kelley changed his position to seek conveyance of "whatever title [First Security] has," the time of essence clause of the Agreement had rendered the Agreement void. Indeed, by this time, First Security had pursued other options in reliance on Kelley's failure to tender appropriate performance on the date set for closing and, in

fact, had entered into an agreement for the sale of the Subject Property to Leucadia. (R.362)

The Agreement between First Security and Kelley provides that with respect to closing dates, time is of the essence. As a matter of law, this Agreement expired because Kelley did not make an unconditional tender of performance by the last agreed upon closing date, September 22, 1987. Even if the Agreement remained open despite the time of essence clause, Kelley never made an unconditional tender, despite First Security's willingness to close the deal according to the terms of the Agreement. As a matter of law, the Agreement expired by the failure of Kelley to proffer an unconditional tender. As such, the Agreement is incapable of being specifically enforced.

#### CONCLUSION

The trial court erred, as a matter of law, in ordering specific performance of the Agreement for several reasons. First, Kelley's tender of performance was deficient in that it required First Security to provide a remedy not required by the Agreement. Such a conditional tender is deficient as a matter of law and is therefore an insufficient basis to enable Kelley to bring an action in specific performance. Second, the agreement between First Security and Kelley provides that with respect to closing dates, time is of the essence. As a matter of law, this Agreement expired because Kelley did not make an

unconditional tender of performance by the closing date on September 22, 1987. As such, the Agreement is incapable of being specifically enforced. The District Court's order of specific performance should be reversed.

DATED this 23rd day of November, 1988.

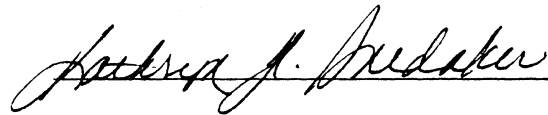
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By *Kathryn H. Snedaker*  
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the within and foregoing Brief of Appellant to be hand delivered, this 23rd day of November, 1988, to the following:

David R. Olsen  
Charles P. Sampson  
Claudia F. Berry  
SUITTER AXLAND ARMSTRONG & HANSON  
175 South West Temple, Suite 700  
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Sandra J. Brudaker", is written over a horizontal line.

2438Q

# EARNED MONEY SALES AGREEMENT

APPENDIX 1

Legend Yes (X) No

This is a legally binding contract. Read the entire document.



## GENERAL PROVISIONS (Sections)

SEC 6  
NO WRITTEN NOTICE WAS  
GIVEN BY KELLEY BECAUSE  
THE P.R. & Survey jobs had  
been completed so close  
to the closing date that  
everybody (bank Kelley,  
Vic, Vic, & Don were in  
communication daily  
trying to decide what  
course of action to take  
i.e. Everyone knew of  
the issues & were working  
on it.

**A INCLUDED ITEMS.** Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property: plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

**B INSPECTION.** Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

**C SELLER WARRANTIES.** Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing, (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing, and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

**D CONDITION OF WELL.** Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

**E CONDITION OF SEPTIC TANK.** Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

☒ **F ACCELERATION CLAUSE.** No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, then within three (3) days after notice of nonwaiver or disapproval or on the date of closing, whichever is earlier, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

☒ **G TITLE INSPECTION.** No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Buyer shall have the opportunity to inspect either an abstract of title brought current with an attorney's opinion, or a preliminary title report on the subject property. Buyer shall have a period of three (3) days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall give written notice thereof to Seller or Seller's agent, within the prescribed time period specifying objections to title. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

**H TITLE INSURANCE.** If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

**I EXISTING TENANT LEASES.** If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer no later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, a copy of all existing leases (and any amendments thereto) affecting the property. Unless written objection is given by Buyer to Seller or Seller's agent within three (3) working days thereafter, Buyer shall take title subject to such leases. If objection is not remedied within the stated time, this Agreement shall be null and void.

**J CHANGES DURING TRANSACTION.** During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

0015

Legend - Yes(X) No(O)

EARNEST MONEY RECEIPT

DATE FEBRUARY 20, 1987

The undersigned Buyer BILL KELLEY hereby deposits with Brokerage as EARNEST MONEY the amount of ten thousand Dollars (\$ 10,000.00) in the form of personal check to be deposited in escrow which shall be deposited in accordance with applicable State Law  
GUMP & AYERS REAL ESTATE INC.  
Brokerage 801-649-8550 Phone Number Received by [Signature]

OFFER TO PURCHASE

1 PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 320 WEST SNOWS LANE in the City of PARK CITY County of SUMMIT Utah subject to any restrictive covenants zoning regulations utility or other easements or rights of way government patents or state deeds of record approved by Buyer in accordance with Section G Said property is more particularly described as \_\_\_\_\_

CHECK APPLICABLE BOXES

☒ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_  
☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other \_\_\_\_\_

(a) Included items. Unless excluded below this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property

The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title ALL PERSONAL PROPERTY CURRENTLY AT SUBJECT PROPERTY.

(b) Excluded items. The following items are specifically excluded from this sale NONE

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price  
☒ public sewer ☒ connected ☒ well ☒ connected ☐ other \_\_\_\_\_ ☒ electricity ☒ connected  
☒ septic tank ☒ connected ☒ irrigation water 'secondary system ☒ ingress & egress by private easement  
☒ other sanitary system \_\_\_\_\_ # of shares \_\_\_\_\_ Company \_\_\_\_\_ ☒ dedicated road ☐ paved  
☒ public water ☒ connected ☒ TV antenna ☐ master antenna ☐ prewired ☒ curb and gutter  
☒ private water ☒ connected ☒ natural gas ☒ connected ☐ other rights \_\_\_\_\_

(d) Survey. A certified survey ☒ shall be furnished at the expense of SELLER prior to closing. ☒ shall not be furnished

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below accepts it in its present physical condition, except \_\_\_\_\_

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Six Hundred Thousand Dollars (\$ 600,000.00) which shall be paid as follows

\$ 10,000 which represents the aforescribed EARNEST MONEY DEPOSIT  
\$ 590,000 representing the approximate balance of CASH DOWN PAYMENT at closing  
\$ X representing the approximate balance of an existing mortgage trust deed note real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_ which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees. ☐ other \_\_\_\_\_  
\$ 0 representing the approximate balance of an additional existing mortgage trust deed note real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_ which include ☐ principal ☐ interest. ☐ taxes ☐ insurance. ☐ condo fees. ☐ other \_\_\_\_\_  
\$ 0 representing balance, if any including proceeds from a new \_\_\_\_\_ loan to be paid as follows \_\_\_\_\_

\$ 40000 Other UPON ACCEPTANCE BUYER TO DEPOSIT AN ADDITIONAL \$40,000, NON-REFUNDABLE IN CONSIDERATION OF 60 DAY CLOSING  
\$ 600,000 TOTAL PURCHASE PRICE BUYER HAS THE OPTION TO EXTEND THE OFFER CLOSING 15 DAYS FOR AN ADDITIONAL \$100,000

If Buyer is required to assume an underlying obligation and/or obtain outside financing Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within NA days after Seller's acceptance of this Agreement, to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed \_\_\_\_\_ % If Buyer does not qualify for the assumption and/or financing within NA days after Seller's acceptance of this Agreement this Agreement shall be voidable at the option of the Buyer or Seller upon written notice

Seller agrees to pay \$ NA towards Buyer's total financing and closing costs including but not limited to loan discount points If this Agreement involves the assumption of an existing loan or obligation on the property Section F shall apply

Real estate contract transfer of Seller's ownership interest shall be made as set forth in Section 3. The Agent shall furnish good and marketable title to the property subject to encumbrances and exceptions stated herein evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current with an attorney's opinion ☐ (on H)

4. **INSPECTION OF TITLE.** In accordance with Section G Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants including condominium restrictions (CC & R's). Buyer ☐ has ☒ has not reviewed any condominium CC & R's prior to signing this Agreement.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows AS DIRECTED 5 DAYS PRIOR TO CLOSING.

6. **SELLER WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted NONE

Exceptions to the above and Section C shall be limited to the following NONE

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing NONE

8. **CLOSING OF SALE.** This Agreement shall be closed on or before 60 DAYS FROM ACCEPTANCE BY SELLER at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R, shall be made as of ☒ date of possession ☐ date of closing ☐ other \_\_\_\_\_

9. **POSSESSION.** Seller shall deliver possession to Buyer on CLOSING unless extended by written agreement of parties.

10. **GENERAL PROVISIONS.** Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated into this Agreement by reference.

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 5:00 PM FEBRUARY 27, 1987 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer. Signature of Buyer 4/20/87 Date Signature of Buyer Date

#### CHECK ONE

☐ **ACCEPTANCE OF OFFER TO PURCHASE.** Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

☐ **REJECTION.** Seller hereby REJECTS the foregoing offer \_\_\_\_\_ (Seller's Initials)

☒ **COUNTER OFFER.** Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until 12:00 (A.M./P.M.) 3-2, 1987 to accept the terms specified below.

Purchase price to be \$756,000 cash at closing. Property sold "As is" with that warranty. Title conveyed by Special Warranty deed. Other terms to remain the same. No interest to be provided by seller. 1st Security puty - Bank Security through 8th Floor. Address of USR Street.  
Date 2-25-87  
Time 9:23 (AM/PM) Signature of Seller  
Signature of Seller

#### CHECK ONE:

☐ Buyer accepts the counter offer.

☒ Buyer accepts with modifications on attached addendum.

Date March-2-87 Signature of Buyer  
Time 12:30 (AM-PM)

**COMMISSION.** The undersigned hereby agrees to pay to Garrett a commission of As per agreement as consic 1st Security puty - Bank Security through 8th Floor. Address of USR Street.  
Signature of Seller 2-24-87 Date Signa \_\_\_\_\_ Date \_\_\_\_\_

#### DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement to be completed)

it therefore

A ☒ acknowledge receipt of a final copy of the foregoing Agreement bearing all signat

SIGNATURE OF SELLER

SIGN

Date \_\_\_\_\_ Date March-2-87  
Date \_\_\_\_\_ 0016 Date \_\_\_\_\_

B ☒ personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on March 3, 1987 by Certified Mail and return receipt attached hereto to the ☒ Seller ☐ Buyer. Sent by Wren Cropper

Page three of a four page form Seller's Initials Wren Date 2-24-87 Buyer's Initials Wren Date 2-24-87

**K. AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

**L. COMPLETE AGREEMENT — NO VERBAL AGREEMENTS.** This instrument constitutes the entire Agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

**M. COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein.

**N. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

**O. ABROGATION.** Execution of a final real estate contract, if any, shall abrogate this Agreement.

**P. RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may, at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing, or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

**Q. TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, fire, flood, extreme weather, governmental regulations, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than thirty (30) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing date. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

**R. CLOSING COSTS.** Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

**S. REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

**T. AGENCY DISCLOSURE.** Selling Brokerage may have entered into an agreement to represent the Seller.

**U. BROKERAGE.** For purposes of this Agreement, any references to the term "Brokerage" shall mean the respective listing or selling real estate office.

**V. DAYS.** For purposes of this Agreement, any references to the term "days" shall mean business or working days exclusive of legal holidays.



INCIS H. SUITTER  
ROY S. AXLAND  
JINT R. ARMSTRONG  
JWART M. HANSON, JR.  
LIAM L. PRATER  
HID R. OLSEN  
JCE T. JONES  
IOLD G. OLOROYO  
HARD J. LAWRENCE  
INCIS J. CARNEY  
MICHAEL HANSEN  
RL F. HUEFNER  
JHAEL W. HOMER  
N W. EGAN  
ED R. SILVESTER  
ERIE P. SHANTEAU  
JHAEL L. ALLEN  
ARLES P. SAMPSON

SUITTER AXLAND ARMSTRONG & HANSON

A UTAH PROFESSIONAL LAW CORPORATION  
SEVENTH FLOOR  
CLARK LEAMING OFFICE CENTER  
175 SOUTH WEST TEMPLE  
SALT LAKE CITY, UTAH 84101-1480  
TELEPHONE (801) 532-7300

CABLE ADDRESS: SAXLAW  
TELEX: 453157  
TELECOPIER: (801) 532-7355

PARK CITY, UTAH  
(801) 649-4000

September 22, 1987

HAND DELIVERED

Craig L. Taylor, Esq.  
Ray, Quinney & Nebeker  
400 Deseret Building  
Salt Lake City, UT 84111

Re: First Security Mortgage Company/William Kelley  
643 Snow Lane, Park City, Utah

Dear Mr. Taylor:

As we have discussed, this office represents William Kelley, Jr. By date of September 4, 1987, you sent Mr. Kelley a letter demanding that he must close on certain property located in Park City, Utah on or before September 15, 1987. In that letter, you advised Mr. Kelley that he should retain the services of an attorney. The letter was sent over the Labor Day weekend and Mr. Kelley was unable to contact our office until September 9, 1987. He traveled to Utah immediately to meet with us and was here the weekend following Labor Day.

Despite the offer in your letter that First Security would cooperate in all ways with Mr. Kelley, that has not been the case. First, Mr. Kelley has requested a reasonable time within which to review the problem. First Security assumed the defense of the action and sought to clear title to the property and the water rights. On short notice and over a Labor Day weekend, First Security attempted to give Mr. Kelley five business days within which he must perform. Such was a totally unreasonable time based upon the fact that First Security had been involved with the problem for several months. Mr. Kelley could not travel to Utah and be advised of the situation in five days. You offered to make your files available, but this was not the case. Dan Egan went to your office pursuant to an appointment to review the files. Apparently because of a busy schedule, you were unable to meet with him. Subsequently, we received a copy of the Complaint and Answer only. We requested and were told we would be given copies of documents relating to water and water rights. This is critical, as the

Craig L. Taylor, Esq.  
September 22, 1987  
Page 2

Armstrongs have shut off the water which was in existence at the time my client signed the Earnest Money. Nevertheless, those documents have not been forthcoming.

First Security Mortgage Company has totally frustrated my client's ability to perform. It has placed unreasonable demands on the time of performance and has deprived him of information necessary to evaluate the status of the property for which First Security undertook an action to clear title. The unreasonable demands of First Security have placed an extreme hardship on my client. The Earnest Money was signed on February 20, 1987. He has marketed properties and incurred losses resulting from First Security's delay in being able to close on the Agreement. These losses are not less than \$4,000 per month. Nevertheless, despite these facts, First Security has acted in a most arbitrary and unreasonable manner in this action and has attempted to frustrate Mr. Kelley's performance under the contract.

My client hereby tenders the down payment owed pursuant to the Earnest Money and Receipt to Purchase and all amendments thereto. My calculation is that the down payment is to be \$130,000; \$10,000 has earlier been placed in escrow which is to be a part of the down payment, requiring payment of \$120,000. As we have seen no closing statements, notes, deeds or mortgages, we are uncertain as to the exact amount of cash necessary to close. Therefore, Mr. Kelley has wired \$140,000 to Williamsburg Savings Bank to be held in an account and applied to closing. This tender is conditioned only upon First Security honoring its obligations pursuant to the Earnest Money Sales Agreement and delivering the property free from those defects which it has undertaken to cure. Mr. Kelley further requests that First Security resolve the issue regarding the water rights to the pond immediately in front of the home. As you are aware, this pond was full and was marketed as a part of the property. Through First Security's actions, the Armstrongs acted to cut off the water and deprive Mr. Kelley of the water rights. This problem needs to be resolved prior to closing so that Mr. Kelley actually receives that for which he contracted. The pond is essential to the aesthetics of the home and the property.

Although First Security has demanded a closing on September 22 and has refused to extend the closing for a reasonable period to allow Mr. Kelley to inspect that with which First Security has been involved for months, First Security still has not complied with the contract and provided copies of the mortgage and promissory notes which it seeks signed as a part of closing. It has not in any sense complied with its obligations pursuant to the Agreement.

Craig L. Taylor, Esq.  
September 22, 1987  
Page 3

As we earlier discussed, my client strongly desires to purchase the property and will not knuckle under to First Security's strong-arm tactics. We have filed this day an action seeking declaratory judgment and an interpretation of the contract. Mr. Kelley has asked the Court to interpret the propriety and fairness of the positions asserted by First Security. We will also ask the Court to determine if the strong-arm tactics of First Security are merely an effort to drive my client away from property which he has contracted to purchase, is capable of buying and wants as a residence for he and his family so that the property can be sold to others in a manner which will net a greater return to First Security.

Please govern yourselves accordingly.

Very truly yours,

SUITTER AXLAND ARMSTRONG & HANSON

A handwritten signature in dark ink, appearing to read "David R. Olsen", with a stylized flourish at the end.

David R. Olsen

db

cc: Mr. William R. Kelley, Jr.