

1988

Leon H. Saunders, Robert Felton, J. Richard Rees, Saunders Land Investment Corp., a Utah corporation, White Pine Ranches, a Utah general partnership, and White Pine Enterprises, a Utah general partnership v. John C. Sharp, Geraldine Y. Sharp and Associated Title Company, a Utah corporation as Trustee v. Commissioner of Financial Institutions as Receiver for Tracy Collins Bank and Trust Company : Brief of Appellant

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

LEON H. SAUNDERS, ROBERT FELTON,  
J. RICHARD REES, SAUNDERS LAND  
INVESTMENT CORP., a Utah  
corporation, WHITE PINE RANCHES,  
a Utah general partnership, and  
WHITE PINE ENTERPRISES, a Utah  
general partnership,

BRIEF OF SURETY/APPELLANT

Plaintiffs/Appellants,

vs.

CASE NO. 880710-CA

JOHN C. SHARP, GERALDINE Y. SHARP  
and ASSOCIATED TITLE COMPANY,  
a Utah corporation, as Trustee,

Defendants/Respondents,

vs.

COMMISSIONER OF FINANCIAL  
INSTITUTIONS AS RECEIVER FOR  
TRACY COLLINS BANK AND TRUST  
COMPANY, as Surety,

DISTRICT COURT

AUG 17 1990

Surety/Appellant.

On Appeal from a judgment and order entered by the  
Honorable J. Dennis Frederick in the Third Judicial  
District Court for Salt Lake County, State of Utah

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FILED

JUL 20 1990

IN THE UTAH COURT OF APPEALS

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LEON H. SAUNDERS, ROBERT FELTON,	)	
J. RICHARD REES, SAUNDERS LAND	)	
INVESTMENT CORP., a Utah	)	
corporation, WHITE PINE RANCHES,	)	
a Utah general partnership, and	)	BRIEF OF SURETY/APPELLANT
WHITE PINE ENTERPRISES, a Utah	)	
general partnership,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
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COMMISSIONER OF FINANCIAL	)	
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TRACY COLLINS BANK AND TRUST	)	
COMPANY, as Surety,	)	
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|---|--|
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| 12. Paul H. Landes<br>(Counterclaim Defendant)            | Was never served in this<br>action   |

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### STATEMENT OF JURISDICTION

Section 78-2a-3(2)(j) of the Utah Code Annotated confers appellate jurisdiction upon the Utah Court of Appeals to review final judgments of the District Courts of this state in matters of this nature, upon referral from the Utah Supreme Court. On December 22, 1988 this appeal was poured-over from the Utah Supreme Court to the Utah Court of Appeals for disposition.

### NATURE OF PROCEEDINGS

This appeal is taken by the Commissioner of Financial Institutions as Receiver for Tracy Collins Bank and Trust Company ("Tracy Collins") from a portion of a final judgment and order of the Third Judicial District Court, Honorable J. Dennis Frederick presiding, granting judgment and setting liability on an injunction bond ("Injunction Bond") issued by Tracy Collins as surety. See Appendix A.

After trial, the district court made its Findings of Fact and Conclusions of Law ("Findings and Conclusions"). R. 1326-1364. See Appendix B. The district court then entered its Judgment on September 26, 1988 ("Judgment"). R. 1370-1377. See Appendix C. Tracy Collins filed a motion for a new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure on October 6, 1988. The district court entered its Order Denying Tracy Collins' Motion for New Trial on October 31, 1988. The District Court's Order Re: Motion To Set Liability on the Bond with Supplemental Findings of Fact was entered on October 31, 1988 ("Bond Order"). R. 1393-1397. See Appendix D. Tracy

Collins filed its Notice of Appeal on November 8, 1988 in which it appealed the district court's Judgment, denial of its motion for new trial, and the Bond Order.

ISSUES PRESENTED ON APPEAL

The following issues are presented for determination in this appeal:

(1) Was there sufficient evidence to support the district court's judgment for damages incurred as a result of the wrongful injunction?

(2) Did the district court err by assessing damages on the Bonds for damages not incurred as a result of the wrongfully issued injunction?

(3) Did the district court err by assessing damages on the Bonds in the amount the Sharps were undersecured?

(4) Did the district court err by assessing damages on the Bonds in the full amount of the interest incurred on the Trust Deed Note?

(5) Did the district court err by assessing damages on the Bonds for attorneys' fees incurred by the Sharps in defending against the initial motion for a temporary restraining order?

(6) Did Tracy Collins lack power to act as a surety in issuing the Injunction Bond?

### APPLICABLE RULE

Rule 65A(c), Utah Rules of Civil Procedure, provides:

Security. Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

### STATEMENT OF THE CASE

1. Nature of the Case, Course of the Proceedings and the Disposition Below.

The district court allowed recovery of interest, attorneys' fees and other damages on an injunction bond issued by Tracy Collins. This award represented the amount for which the defendants/respondents John C. Sharp and Geraldine Y. Sharp ("Sharps") were undersecured on their Judgment against the plaintiffs/appellants Leon H. Saunders, et al. ("Saunders").

This action arose when Saunders enjoined the Sharps' foreclosure sale and sought specific performance of certain obligations under a contract of sale. The Sharps counterclaimed, alleging breach of contract by Saunders, claiming entitlement to judicial foreclosure of certain property in accordance with the trust deed and trust deed note, and asserting that Saunders' restraining order, issued on September 4, 1986 by the Honorable Judith Billings, was wrongful. The initial Temporary Restraining Order ("Initial TRO"), R. 50-51, required a bond in the amount of \$2,400. In a hearing held in January 1987, Judge J. Dennis Frederick continued the injunction and required additional

security in the amount of \$50,000. Tracy Collins posted the \$50,000 Injunction Bond on January 11, 1988. (The Initial TRO and resulting injunction are hereafter collectively referred to as the "Injunctions" and the initial cash bond and Injunction Bond are collectively referred to as the "Bonds").

During trial on January 28, 1988, January 29, 1988, and March 22, 1988 through March 25, 1988, no evidence was presented as to those damages specifically resulting from the issuance of the Initial TRO and Injunction. See Trial Transcript, R. 1642-1650. On September 16, 1988, the Sharps' Motion to Set Liability on the Injunction Bond was heard by the district court. On September 26, 1988, the district court entered judgment for the Sharps on their counterclaim against Saunders for breach of contract. The district court also held that the Initial TRO entered on September 4, 1986 was wrongfully issued. The district court then awarded the Sharps judgment against the bond posted by plaintiffs in the amount of \$2,400 and against the security posted by Tracy Collins in the amount of \$28,570.63, "for which amounts the [Sharps] are not secured by the fair market value of the subject premises." Judgment, R. 1373.

On October 31, 1988, the district court entered its Bond Order with Supplemental Findings of Fact. The Bond Order awarded the Sharps their costs and damages, including attorneys' fees, incurred as a result of the wrongfully issued injunction. Bond Order, R. 1396. The district court specifically found that \$5,763.55, representing 4% of the total fees related to the

defense of the overall action, was associated with the defense of the Injunctions. The district court also found that interest had accumulated since September 1986 when the injunction was first issued and now far exceeded the combined amount of the Bonds. Bond Order, R. 1396-1397. The Judgment against Tracy Collins has been stayed pending this appeal.

2. Statement of Facts.

The relevant facts in this case are largely undisputed. Many can be determined by referring to the District Court's Findings and Conclusions, Judgment, and Bond Order. See Appendix B, R. 1326-1364; Appendix C, R. 1370-1377; Appendix D, R. 1393-1397. The remaining facts were established during the trial held on January 28, 1988, January 29, 1988 and March 22, 1988 through March 25, 1988. See Trial Transcripts, R. 1642-1650.

1. On September 4, 1986, Saunders filed an action for breach of contract and obtained an Initial TRO enjoining the Sharps' trustees' sale of certain property located in Summit County. Saunders posted a cash bond in the amount of \$2,400 as a condition of the granting of the Initial TRO. Findings and Conclusions, R. 1352.

2. The Sharps counterclaimed, alleging that Saunders were in breach of contract and sought judicial foreclosure of the property in accordance with the Trust Deed and Trust Deed Note and dissolution of the Initial TRO issued on September 4, 1986. Findings and Conclusions, R. 1354.

3. In January of 1987, Judge J. Dennis Frederick continued the injunction and ordered an Injunction Bond in the additional amount of \$50,000. Tracy Collins as surety posted this Injunction Bond on behalf of Saunders on January 11, 1988. Findings and Conclusions, R. 1352; Bond Order, R. 1395.

4. At trial, Mr. LeRoy J. Pia, the appraiser whose valuations were used in determining value of the property, testified that at the January 1987 bond hearing it was agreed that the land would only be worth approximately \$17,500 per acre as a lower limit of value (without sewer and water), and that an upper limit of value (without sewer and water) would be approximately \$20,000 per acre. Trial Transcript, R. 1644 at 493-494.

5. Following trial, the district court found that the present fair market value of the property with one sewer and water connection was \$20,000 per acre. Bond Order, R. 1394.

6. Following trial, the district court found that the present fair market value of all of the property upon which the Sharps may foreclose pursuant to the Judgment is \$728,445.00. Bond Order, R. 1394.

7. Under the Judgment, the district court found various of the Saunders plaintiffs jointly and severally indebted to the Sharps in the total amount of \$759,415.63. Bond Order, R. 1395.

8. The district court found that the Initial TRO was wrongfully issued, Bond Order, R. 1396, and that the Sharps were

entitled to recover on the Bonds the difference between the damages which the court found the Sharps have suffered as a result of Saunders' breaches of contract (\$759,415.63) and the appraised value of the collateral (\$728,445.00). Accordingly, the Sharps are undersecured by the amount of \$30,970.63. Bond Order, R. 1394-1395.

9. The judgment on the Bonds in the amount of \$30,970.63 was for the Sharps' "interest, attorneys' fees, and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order . . . ." Findings and Conclusions, R. 1363; Bond Order, R. 1396.

10. The district court found that \$5,763.55 of the Sharps' attorneys' fees was incurred in defending against the Motion for a Temporary Restraining Order. Bond Order, R. 1396. This amount was based upon Sharps' counsel's estimate that at least four percent (4%) of the Sharps' total fees related to the defense of the breach of contract action was specifically related to the defense of the Initial TRO. Id.

11. The district court found that interest on the principal due under the Trust Deed Note for the period of July 1, 1986 through March 22, 1988 equalled \$115,677.12. Bond Order, R. 1395.

12. The district court awarded the Sharps judgment on the cash bond in the amount of \$2,400.00, and "against the security posted by Tracy Collins Bank with the Clerk of the Third Judicial District Court in the amount of \$28,570.63, for which

amounts the Sharps are not secured by the fair market value of the subject premises." Judgment, R. 1373.

13. The district court additionally found that the amount of interest alone which has accumulated since September 1986, when the Injunction was first issued, far exceeds the amount of the Bonds. Bond Order, R. 1396-1397.

#### SUMMARY OF ARGUMENT

The district court incorrectly allowed recovery on the Bonds for damages caused independently of the Injunctions. Only those damages that were incurred "as a result of the wrongfully issued injunctions" are recoverable on the Bonds. The Injunctions were merely ancillary to the main action for breach of contract. The damages sought to be recovered against the Bonds are all recoverable against the Saunders in the main action.

Damages arising from Saunders' breach of contract cannot be assessed against the Bonds. The correct measure of damage as a result of an injunction is the difference between the fair market value of the property on the date the injunction prevented its sale and the fair market value on the date the injunction was lifted.

The district court held that the fair market value of the property on the date of judgment, which is the date the Injunctions were dissolved, was \$20,000 per acre. Bond Order, R. 1394. See property valuation summary, Appendix E. The closest valuation to the September 4, 1986 Temporary Restraining Order



was January 1987, at the hearing where the increased Injunction Bond was ordered. In January 1987, the fair market value was \$17,500 -- \$20,000 per acre. Trial Transcript, R. 1644 at 493-494. Therefore, the Injunctions resulted in no decrease in the fair market value of the property.

The district court erred in awarding attorneys' fees for resisting the Initial TRO as damages on the Bonds. Only attorney's fees expended in dissolving an injunction are recoverable. Thus, the specific award of attorneys' fees in the amount of \$5,762.55 must be reduced by the amount of fees incurred in defending against the Initial TRO and the district court should be directed to determine the amount of attorneys' fees, if any, associated with efforts expended to dissolve the Injunctions. However, this Court may find that the Injunctions were so ancillary to the main breach of contract action that no damages for attorneys' fees are recoverable on the Bonds.

Appellant asserts for the first time that Tracy Collins lacked the power to act as a surety and that its actions in issuing the Injunction Bond are ultra vires and void.

#### ARGUMENT

##### I. ONLY DAMAGES INCURRED AS A RESULT OF THE WRONGFULLY ISSUED INJUNCTIONS ARE RECOVERABLE.

Under Rule 65A(c) of the Utah Rules of Civil Procedure and the terms of Tracy Collins' Injunction Bond, Appendix A, the Sharps are only entitled to recover "costs [or] damages incurred as a result of the wrongfully issued injunction." Mountain

States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1262 (Utah 1984). Recoverable damages under an injunction bond are limited to those that "arise from the operation of the injunction itself and not from damages occasioned by the suit independently of the injunction." Beard v. Dugdale, 741 P.2d 968, 969 (Utah Ct. App. 1987) (quoting Lever Bros. Co. v. International Chem. Workers Union, 554 F.2d 115, 120 (4th Cir. 1976)). The district court failed to adhere to these requirements when it awarded the Sharps damages for the amount the principal judgment was undersecured. This measure of damages is based on the suit independently of the Injunctions and was incorrect.

Although Tracy Collins may have been a surety for all damages caused as a result of the Injunctions, it did not assume liability as a guarantor for the Sharps' damages flowing from Saunders' breach of contract. The Sharps' damages resulting from the underlying suit for breach of contract are not recoverable from the Bonds.<sup>1/</sup> Carr v. Citizens Bank and Trust Co., 228 Va. 644, 325 S.E. 2d 86, 89-90 (1985).

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<sup>1/</sup> In its Supplemental Findings of Fact, the district court found that the Sharps' damages for breach of the Trust Deed and Trust Deed Note were \$759,415.63. Bond Order, R. 1395. This amount included all attorneys' fees in defending the action and in prosecuting their claims against the Saunders, plus interest under the Trust Deed Note. Id. In addition, the district court found that the present fair market value of the property was \$728,445.00. Bond Order, R. 1394. Accordingly, the Sharps' judgment against the Saunders for breach of contract was undersecured by the amount of \$30,970.63. Id., R. 1395. This amount was awarded against the Bonds. Id.

The proper measure of damages is the reduction or diminution in the value of the security during the period of restraint. Glens Falls Ins. Co. v. First Nat'l Bank of Nev., 83 Nev. 196, 427 P.2d 1, 4 (1967). The Glens Falls court stated that:

If the property was not sold, we fail to see where respondent suffered any damages because its accruing interest at the contract rate, and the cost of preserving and maintaining the property and expenses of the default proceedings may still be recovered either upon the default being cured by payment or ultimately upon the trustee's sale.

Id. at 4.

In Carr v. Citizens Bank and Trust Co., 325 S.E. 2d at 90, where the sale of property was stopped by a wrongfully issued injunction, the court stated that:

[t]he proper measure of a decrease in market value of property caused by delay resulting from wrongful issuance of an injunction is the difference in market value at the time it would have been sold absent any restraint and the market value when the injunction no longer prevented the sale.

Id. See Global Contact Lens, Inc. v. Knight, 254 So. 2d 807, 809 (Fla. Dist. Ct. App. 1971) cert. denied, 260 So.2d 520 (1972) (proper measure of damages is the fair market value of the premises at the time the wrongful restraint was imposed compared with the value of the property the day the injunction was dissolved).

The Sharps failed to meet their burden of proving both the amount and the cause of damages. It is especially important for the court to evaluate the source of the Sharps' damages since the Injunctions were only ancillary to the principal relief

sought. Id.

Following trial, the district court found that the present fair market value of the property was \$20,000 per acre. Bond Order, R. 1394; Appendix E. At trial, Mr. LeRoy J. Pia, the appraiser whose valuations were used to determine present fair market value, testified that at the January 1987 bond hearing the property was worth approximately \$17,500 per acre as a lower limit of value with an upper limit around \$20,000 per acre.<sup>2/</sup> Trial Transcript, R. 1644 at 493-494. Thus, on the date the Injunctions were dissolved, the fair market value of the property was approximately the same as the fair market value of the property on the date of restraint.

From the only evidence in the record, the delay caused by the wrongful Injunctions resulted in no decrease in the market value of the property. Consequently, no damages<sup>3/</sup> are recoverable on the Bonds as no damages were "incurred as a result of the wrongfully issued injunction." Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d at 1262. See Beard v. Dugdale, 741 P.2d at 969; Carr v. Citizens Bank and Trust Co., 325 S.E. 2d at 90; Glens Falls Ins. Co. v. First Nat'l Bank of Nev., 427 P.2d at 4.

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<sup>2/</sup> No evidence was introduced as to the fair market value of the property with one sewer and water connection on September 4, 1986. The closest appraisal to the date of the Initial TRO is the January 1987 appraisal.

<sup>3/</sup> However, damages for attorneys' fees expended in dissolving an injunction may be recoverable, as is more fully discussed in Point III, infra.

II. THE DISTRICT COURT ERRED IN AWARDING CONTRACT INTEREST AS RECOVERABLE DAMAGE ON THE BONDS.

The district court found that the interest accumulated since September 1986, when the Injunctions were first issued, far exceeds the amount of the Bonds. Bond Order, R. 1396-1397. Not only does this approach obscure the true source of the Sharps' damages, but it is based on the mistaken belief that interest on a Trust Deed Note is properly assessed against an injunction bond when the sale of property is delayed.

The proper approach is to distinguish damages, such as interest on the Trust Deed Note, which are recoverable in the main contract action, from damages incurred as a result of the wrongfully issued injunction. In Glens Falls, the Nevada Supreme Court reversed the lower court's award of interest damages on an injunction bond and stated, as follows:

Appellant, as surety under the restraining order bond, was no party to that contract, nor did its assurance run to the performance of the contract. Furthermore, when the property is ultimately sold under the trust deed or the default cured, the beneficiary would receive in either event its interest at the contract rate. Thus if the measure of damages was interest, either at the contract or legal rate, beneficiary would enjoy double recovery. [The surety's] undertaking against loss, in the event the restraint was improper, was only to "damages and costs" sustained or incurred by reason of the restraining order.

427 P.2d at 4.

The damages assessed against the Bonds include contract interest that was also awarded on the Judgment. Facts and Conclusions, R. 1343, 1361-1362; Appendix E. Nowhere did the district court find that the interest "directly" or "proximately"

arose out of the wrongful issuance of the Injunctions. These damages must be separated from those occasioned by the underlying suit. Beard v. Dugdale, 741 P.2d at 969 (citations omitted).

The district court supposedly avoided the "double recovery" concern of the Glens Falls court by only awarding interest damages up to the amount the Judgment was undersecured. This interpretation of Glens Falls not only ignores the holding of the Nevada Supreme Court that the proper measure of damages would be the reduction or diminution in the value of the security during the period of restraint, but also ignores the extent of Tracy Collins' undertaking. Tracy Collins was a surety only for those damages caused as a result of the wrongful injunction, not a guarantor of the Saunders' performance under their contract with the Sharps. Furthermore, since the property has not been sold, the Sharps could receive a "double recovery" if the property sells for more than the present fair market valuation. The Sharps may argue that this is a remote possibility, but it nevertheless illustrates what the Glens Falls court was attempting to avoid. The Sharps have their remedy for accrued interest against the Saunders and this Court should not hold the surety liable for a contract undertaking that Tracy Collins did not assume.

There is no controlling Utah precedent addressing the recoverability of interest. However, Utah cases addressing Rule 65A(c) of the Utah Rules of Civil Procedure support the denial of the recovery of interest on the Trust Deed Note as damages on the

Bonds. Cf. Beard v. Duqdale, 741 P.2d at 969; Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d at 1262. Just as the Supreme Court of Nevada denied interest as an appropriate measure of damages in Glens Falls, this Court should also reverse the district court's award of interest on the Bonds.

Such a ruling would not deny the Sharps' recovery because they retain a judgment for the same interest against the Saunders for breach of contract. It merely separates damages arising from the Injunctions from those awarded against the breach of contract action and gives proper effect to Rule 65A(c) of the Utah Rules of Civil Procedure.

**III. THE DISTRICT COURT ERRED IN CALCULATING THE RECOVERABLE AMOUNT OF ATTORNEYS' FEES ON THE BONDS.**

The District Court found that \$5,762.55 of the Sharps' attorneys' fees were incurred in defending against the Motion for a Temporary Restraining Order. This amount was based solely on the estimate of opposing counsel that approximately four percent (4%) of the Sharps' total attorneys' fees related to the breach of contract action were specifically related to the defense of the Initial TRO. Bond Order, R. 1396. It is undisputed that certain types of attorneys' fees are recoverable on an injunction bond in Utah. See Beard v. Duqdale, 741 P.2d 968. However, such attorneys' fees are limited only to the hours spent by the Sharps' counsel as a result of the wrongfully issued Injunctions. Id. at 969. The District Court erred in not requiring a specific showing of attorneys' fees expended "as a result" of the

Injunctions and further erred in including in the award of attorneys' fees an amount for time expended in resisting the issuance of the Initial TRO.

Recoverable damages on an injunction bond include reasonable attorneys' fees rendered in proceedings directed at removing an injunction. State ex rel. County of Shannon v. Chilton, 626 S.W. 2d 426, 430 (Mo. Ct. App. 1981). However, fees incurred in resisting the initial issuance of an injunction are not recoverable. Wolverton v. Holcomb, 329 S.E. 2d 885, 889 (W. Va. 1985). It was error for the district court to include in its award of attorney's fees an amount for resisting the Initial TRO. Braun v. Intercontinental Bank, 452 So.2d 998, 999 (Fla. App. 1984) (attorneys' fees awarded must be restricted to services rendered in undoing a wrongful injunction).

In the case at bar, the Sharps did not attempt to have the Injunctions dissolved. Instead, the Sharps proceeded to judgment against Saunders on their contract claims. The focus of the district court was not the Injunctions, but the Sharps' right to relief in the principal case. Thus, the Injunctions were only an ancillary matter. See, e.g., Wolverton v. Holcomb, 329 S.E. 2d at 886-87; Global Contact Lens, Inc. v. Knight, 254 So.2d at 810. "[I]t is incumbent on the plaintiff to show either that injunction was the sole relief to which the suit pertained, or that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction, as distinguished from expenditures for the hearing of the principal issues



involved in the case." Wolverton v. Holcomb, 329 S.E. 2d at 889 (quoted citation omitted). The failure of the district court to segregate those services performed in dissolving the injunction is reversible error. Global Contact Lens, Inc. v. Knight, 254 So. 2d at 810.

Ordinarily, a case of this nature should be remanded to the district court with the direction to obtain specific evidence as to the amount of attorneys' fees expended, if any, in seeking the dissolution of the Initial TRO and the resulting Injunction. However, since no motion attempting to dissolve the injunction was filed, this Court can conclude that the issuance of the Injunctions relative to the whole action was so ancillary as to result in a de minimus award of attorneys' fees. Absent a specific and segregated accounting, the Sharps should take nothing on the Bonds for their attorneys' fees.

IV. TRACY COLLINS LACKED THE POWER TO ACT AS SURETY ON THE INJUNCTION BOND.

Surety/Appellant submits that Tracy Collins lacked power to issue the Injunction Bond and thus its issuance is an ultra vires act and void. Counsel for Tracy Collins understandably failed to raise this issue below because to do so could have exposed Tracy Collins and its officers and directors to possible liability. In director and officer liability suits the courts have created the doctrine of adverse domination which recognizes that a party cannot be expected to bring suit against himself. Federal Deposit Ins. Corp. v. Hudson, 673 F. Supp.

1039, 1043 (D. Kan. 1987); Federal Deposit Ins. Corp. v. Carlson, 698 F. Supp. 178, 180 (D. Minn. 1988) (doctrine of adverse domination tolls statute of limitations as long as the parties against whom the claims are brought controlled the bank). The Commissioner of Financial Institutions as Receiver has stepped into the shoes of Tracy Collins and as a non-control party should now be entitled to raise this issue for the first time.

Under Utah law, a banking corporation's general powers are limited. It is an established principle of banking law that a bank does not have the power to act as a surety or guarantor. See Trust Co. of New Jersey v. Jefferson Trust Co., 14 N.J. Misc. 656, 186 A. 732, 734 (N.J. 1936) (both an accommodation guaranty made for the benefit of another and an indemnity agreement were outside the corporate powers and were, therefore, void as ultra vires acts). A national "bank has no power to act as a guarantor or surety upon the obligation of another." American Empire Ins. Co. v. Hanover Nat'l Bank of Wilkes-Barre, 409 F. Supp. 459, 463 (M.D. Penn. 1976), aff'd, 556 F.2d 564 (3rd Cir. 1977). See Utah Code Annotated, § 7-3-17 (the business of banking includes "all powers and authority that a national bank having its principal office in this state possesses"). By analogy, Tracy Collins, as a state chartered member bank of the Federal Reserve System, should also be restricted from acting as a guarantor or surety. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557, 559 (N.D. Ga. 1980) suggests that the FDIC regulations prohibiting member banks from executing contracts of guaranty or

surety under 12 C.F.R. section 332.1 also apply to nonmember banks.

Even though this issue was not raised below, the Commissioner of Financial Institutions, now Appellant herein, urges this Court to consider sua sponte whether Tracy Collins' issuance of its Injunction Bond is a prohibited ultra vires act, which is void from its inception.


#### CONCLUSION

The district court misapplied the law and Tracy Collins' statutory and contractual undertaking to assure the payment of only those damages incurred as a result of the wrongfully issued Injunctions. Such damages do not include attorneys' fees incurred in defending against the Initial TRO and they do not include contract damages such as interest. The evidence before the district court demonstrated that the fair market value of the property was approximately the same on the date of restraint and date of judgment. In light of this evidence, the district court committed error in awarding interest damages on the Bonds. The judgment of the district court should be reversed and remanded for the taking of evidence on the limited issue of the amount of attorneys' fees that resulted from the Sharps' efforts to dissolve the Initial TRO and resulting injunction.

However, this Court may simply reverse the district court's Judgment by concluding that the Injunctions were so ancillary to the main action that not even damages for attorneys'

fees are recoverable on the Bonds. Finally, this Court should rule sua sponte that Tracy Collins lacked the power to issue the Injunction Bond and, therefore, that the Injunction Bond is void.

DATED this 19<sup>th</sup> day of July, 1989.

A handwritten signature in black ink, appearing to read "Patrick L. Anderson", written over a horizontal line.

Stanford B. Owen  
Patrick L. Anderson  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Appellant  
Commissioner of Financial  
Institutions as Receiver for  
Tracy Collins Bank and Trust  
Company

CERTIFICATE OF SERVICE

This is to certify that on this 19<sup>th</sup> day of July, 1989, I caused to be mailed four (4) true and correct copies of the foregoing Brief of Surety/Appellant, postage prepaid, to the following:

Robert M. Anderson, Esq.  
Glen D. Watkins, Esq.  
Mark R. Gaylord, Esq.  
HANSEN & ANDERSON  
Attorneys for Saunders, Felton and White Pine  
Valley Tower Building  
50 West Broadway, 6th Floor  
Salt Lake City, Utah 84101

Donald J. Winder, Esq.  
Kathy A.F. Davis, Esq.  
Tamara K. Prince, Pro hac vice  
WINDER & HASLAM  
Attorneys for John and Geraldine Sharp  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Karen Richardson

pla:070389a

pla:070589a

Tab A



WHEREAS, the defendants have been temporarily restrained by a temporary restraining order, dated September 4, 1986 which remains in effect pursuant to the Honorable J. Dennis Frederick's order of January 4, 1988 (the "Order").

WHEREFORE, the conditions of the Bond are that (1) if the court adjudges and declares that the Sharps have been wrongfully enjoined or restrained by the Order, then Surety shall pay in full the cost and damages as the court shall determine in accordance with Rule 65(c), Utah R. Civ. P., that the Sharps have incurred or suffered as a result of being wrongfully enjoined or restrained, provided, as to the Surety, such costs and damages, shall not exceed the amount of the Bond; and (2) if the court adjudges and declares that the Sharps have not been wrongfully enjoined or restrained by the Order, then this Bond is void.

\* In connection with this Bond, Tracy, as Surety, submits itself to the jurisdiction of this court and irrevocably appoints the clerk of this court as an agent upon whom any papers affecting its liability on the Bond may be served, and further agrees that its liability may be enforced on motion without the necessity of an independent action.

DATED this 11<sup>th</sup> day of January, 1988.

WHITE PINE RANCHES, a Utah  
partnership

By  
Its

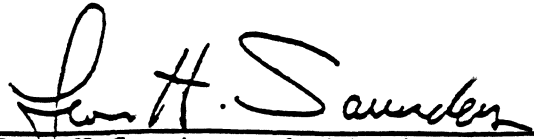
Don H. Saunders

WHITE PINE ENTERPRISES, a Utah  
partnership

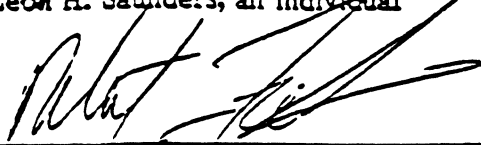
By

White Pine Ranches  
By: Don H. Saunders, General Partner



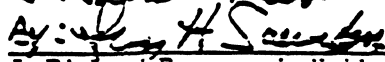


Leon H. Saunders, an individual

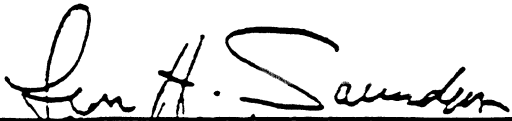


Robert Felton, an individual

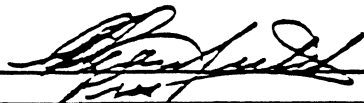


By:  attorney in fact.  
J. Richard Rees, an individual

SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corporation

By   
Its President

TRACY COLLINS BANK & TRUST CO., a  
Utah corporation

By   
Its President

MAILING CERTIFICATE

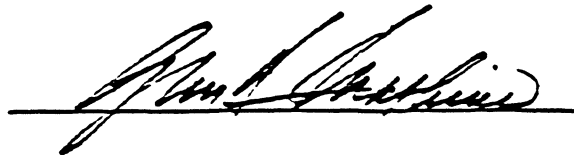
On this 11th day of January, 1988, I hereby certify that I caused to be mailed via United States first class mail, postage prepaid, a true and accurate copy of the foregoing BOND, to the following:

Donald J. Winder, Esq.  
Kathy A. F. Davis, Esq.  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

John B. Anderson, Esq.  
623 East 100 South  
Salt Lake City, Utah 84102

Robert Felton, Esq.  
310 South Main Street, Suite 1309  
Salt Lake City, Utah 84101

and that the original Bond was delivered to the Clerk of the Third Judicial District Court in and for Salt Lake County, Utah, prior to 5:00 o'clock p.m. on the aforesaid date as required by the Order of January 4, 1988, of the Honorable J. Dennis Frederick, Third District Judge.

A handwritten signature in black ink, appearing to read "John B. Anderson", is written over a horizontal line.

Tab B

9-23-88

Donald J. Winder, Esq. (#3519)  
Kathy A. F. Davis, Esq. (#4022)  
Tamara K. Prince, Esq. (#5224)  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Attorneys for Defendants Sharps

---

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

---

LEON H. SAUNDERS; ROBERT  
FELTON; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; WHITE PINE RANCHES,  
a Utah general partnership;  
WHITE PINE ENTERPRISES, a  
Utah general partnership,

Plaintiffs,

vs.

JOHN C. SHARP, and GERALDINE  
Y. SHARP; ASSOCIATED TITLE  
COMPANY, as Trustee, a Utah  
corporation,

Defendants.

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Civil No. C87-1621

Judge J. Dennis Frederick

JOHN C. SHARP, and GERALDINE  
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

ROBERT FELTON; LEON H.  
SAUNDERS; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; KENNETH R. NORTON dba  
INTERSTATE RENTALS, INC.,

WINDER & HASLAM  
A PROFESSIONAL CORPORATION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110 2668  
(801) 322-2222

and PAUL H. LANDES, indivi- :  
dually; WHITE PINE RANCHES, :  
a Utah general partnership, :  
and WHITE PINE ENTERPRISES, :  
a Utah general partnership, :  
: :  
Counterclaim-Defendants.:

---

This cause came on for trial before the Honorable J. Dennis Frederick on January 28, 1988 through January 29, 1988 and March 22, 1988 through March 25, 1988, with the defendants John C. and Geraldine Y. Sharp (hereinafter the "Sharps") appearing by counsel Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince, the latter being admitted pro hac vice, and plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders (hereinafter "Saunders"), Robert Felton (hereinafter "Felton"), J. Richard Rees and Saunders Land Investment Corporation appearing by counsel Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. Counterclaim defendant Kenneth R. Norton ("Norton") appeared through his counsel John B. Anderson, only to introduce a Stipulation and Indemnification Agreement between plaintiffs and counterclaim defendant Norton. Defendant Associated Title was never served in this action. Counterclaim defendant Paul H. Landes (hereinafter "Landes") was never served in this action.

The Court, having heard the testimony of witnesses, having reviewed and received exhibits, having heard the arguments of counsel, having received stipulations of counsel, having reviewed memoranda presented by counsel, having presented its oral ruling on the issues involved in the case on March 30,

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1988, having heard and ruled upon the plaintiffs' objections to defendants' proposed Findings of Fact and Conclusions of Law and Plaintiffs' Proposed Alternate and Additional Findings of Fact and Conclusions of Law on September 16, 1988, and for good cause appearing, hereby makes and enters the following:

FINDINGS OF FACT

1. On or about December 9, 1980, Leon H. Saunders, Robert Felton, Norton and Paul H. Landes entered into an Earnest Money Receipt and Offer to Purchase (hereinafter "Earnest Money") with the Sharps for the purchase of certain real property located in White Pine Canyon, Snyderville, Summit County, State of Utah (hereinafter "the Subject Property"). (Exhibit 14).

2. Plaintiffs' "development plans presently anticipated 12 to 15 four-acre to five-acre lots" and the Earnest Money provided "such plans shall be subject to the reasonable approval of Seller [the Sharps]."

3. The Earnest Money also provided, inter alia:

At a time desired by Seller, Purchaser shall allow Seller to hook into the culinary water system and sewer system developed by Purchaser on the subject Property at the same per-hook-up price charged by Purchaser to the buyers of lots developed on the subject Property.

4. The plaintiffs acted upon the understanding that before Summit County would approve any planned development, they, as the developer, must provide to Summit County for approval an environmental impact statement, a plat map and, if a planned residential development, a declaration of protective

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covenants. The Snyderville Basin Sewer Improvement District ("SBSID") required all sewer design improvements be approved and construction must receive final approval.

5. Plaintiffs wanted to promptly develop the Subject Property and anticipated the approval process would be completed by June, 1981.

6. Prior to closing the transaction which was the subject of the Earnest Money, a Shared Water System Cost Estimate was prepared for Saunders by J. J. Johnson & Associates, engineers in Park City. The Estimate proposed two alternatives wherein 15 units at Saunders Ranch (subsequently White Pine Ranches), known herein as the "Subject Property", develop a water system sufficient for its needs and the needs of various adjacent properties in order to provide users of the water system an economy of scale resulting in lower water system costs to each user. (Exhibit 105). Although considered by him, Saunders never adopted any of these proposals.

7. In April, 1981, an Environmental Impact Statement (hereinafter "EIS") was prepared by J. J. Johnson for Saunders Land Investment Corporation concerning development of the Subject Property and was delivered to the Sharps prior to closing. (Exhibit 67).

8. The EIS provided the "sewer system will be connected to the Snyderville Basin Sewer Improvement District and a line extension agreement with the Sewer Improvement District will be signed." The EIS also provided two alternative water storage systems for the development on the Subject Property which

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would be available to other proposed developments, including Ranch Place and Landmark Plaza, as well. The EIS further provided that the internal traffic circulation in the subject project would be via private road.

9. In April 1981, Felton, Norton, Saunders and Landes operated under the assumed name of White Pine Ranches. (Plaintiffs' Complaint, ¶¶1 and 5).

10. Thereafter, on or about July 16, 1981, the parties closed the sale of the Subject Property through the execution of a Memorandum of Closing Terms (Exhibit 15) executed by Saunders, Felton, Norton, Landes and the Sharps; a Special Warranty Deed (Exhibit 17) executed by the Sharps and conveying the title to the Subject Property to Landes, Felton, Saunders and Interstate Rentals, Inc.; a Trust Deed Note executed by Felton, Saunders, Landes, Norton and Interstate Rentals, Inc. by its president, Norton, in the amount of \$963,055.30, together with an addendum to the Trust Deed Note (Exhibit 3) outlining the schedule of payments, and a Trust Deed covering the Subject Property executed by Saunders, Landes, Felton and Interstate Rentals, Inc. by its president, Norton, and securing the Trust Deed Note (Exhibit 2) (hereinafter collectively referred to as "the Closing Documents").

11. A partnership agreement establishing White Pine Ranches was executed September 25, 1982 with Felton, Saunders, Dan Hunter and J. Richard Rees as general partners. (Exhibit 49). Saunders Land Investment Corporation subsequently as-

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sumed and bought out the interest of Dan Hunter in the White Pine Ranches partnership.

12. On June 30, 1982 White Pine Ranches and Howells Investment executed a Partnership Agreement of White Pine Enterprises for the purposes of "investing in, managing, leasing, developing, subdividing and selling unimproved real estate (Exhibit 48) described on Exhibit 'A' attached" thereto, which unimproved real estate was the approximately 27 southern acres of the Subject Property that was never platted.

13. Both partnerships, White Pine Ranches and White Pine Enterprises, are general partnerships.

14. Preliminary plats (Exhibits 18 and 19) of the Subject Property were prepared by J. J. Johnson & Associates for the development prior to closing, but were modified by plaintiffs because the County Commission was opposed to the private road concept. (Exhibit 109). These preliminary plats were not approved prior to closing because the County Attorney would not approve a private road system (Exhibit 114). A new plat was prepared for White Pine Ranches, a Planned Unit Development ("PUD") and attached as Exhibit "A" to the Memorandum of Closing Terms. This Exhibit "A" to the Memorandum of Closing Terms platted all of the Subject Property and was initialed by all the parties thereto except Felton. (Exhibit 20).

15. Paragraph 1 of the Memorandum of Closing Terms (Exhibit 15) provided as follows:

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1. It is mutually agreed and understood that after recordation of the PUD Plat and the Declaration of Covenants, Conditions and Restrictions, and upon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), Seller shall execute and deliver to Buyer a Partial Deed of Reconveyance for one (1) PUD lot. (Emphasis added.)

16. Paragraph 2 of the Memorandum of Closing Terms provided as follows:

2. Upon the payment of the release price, Buyer shall be entitled to the release of one (1) lot of Buyer's choice upon receipt of the payment or at any time thereafter. (Emphasis added.)

17. Paragraph 3 of the Memorandum of Closing Terms provided as follows:

3. It is agreed that, at the time of execution of this Memorandum, Buyer has paid to Seller the sum of \$620,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway. (Emphasis added.)

18. Paragraph 5 of the Memorandum of Closing Terms provided as follows:

5. The proposed plat is attached hereto as Exhibit "A" and by this reference incorporated herein. Seller

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hereby acknowledges and agrees to execute as a lienholder the original plat prior to recordation. Changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller. (Emphasis added.)

19. The proposed plat, Exhibit "A" attached to the Memorandum of Closing Terms included a boundary description describing all of the Subject Property and an Owner's Dedication. The Owner's Dedication is a standard printed form used by J.J. Johnson, parallels dedications used in the city limits of Park City and is commonly used in plats to dedicate roads to public use, not as a dedication for a private road as originally contemplated in the EIS. The Owner's Dedication provides in pertinent part as follows:

Know all by these present that we the undersigned owners of the herein described tract of land, having caused the same to be subdivided into lots and streets to hereafter be known as White Pine Ranches Subdivision, do hereby dedicate for perpetual use of the public all parcels of land shown on this plat as intended for public use, and do warrant, defend, and save the city harmless against any easements or other encumbrances on the dedicated streets which will interfere with the city's use, operation, and maintenance of the streets and do further dedicate the easements as shown. (Emphasis added.)

(Exhibit 20).

20. Paragraph 6 of the Memorandum of Closing Terms provided in part as follows:

6. Seller agrees to grant to Summit County the ten and one-half (10-

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1/2) foot strip of land outlined in red on Exhibit "A". Said conveyance shall be for the sole purpose of widening the County roadway. If possible, such grant shall be in the form of an easement. The County indicates that it is possible that the County road as it exists is not where it is platted.

21. The County roadway has not been widened, there are no current plans to do so, and Summit County has never requested such an easement from plaintiffs or the Sharps. (See Exhibit 107, p. 15; Exhibit 87, p. 8; and Exhibit 34).

22. Paragraph 7 of the Memorandum of Closing Terms provided in pertinent part as follows:

7. Buyer agrees to provide Seller with one (1) sewer connection and one (1) culinary water connection into Buyer's systems at such time as each is available, and Seller shall pay a connection fee and service fee equal to the pro rata cost to the purchaser of a lot in Buyer's proposed PUD plus any charges of Summit Water Distributing Company. The sewer and water connection granted above can be used by Seller in new construction if allowed on the 8.5 acre parcel or for connection to the existing residence of Seller....  
(Emphasis added.)

23. Subsequent to closing, attorney Jon Heaton represented Saunders in continuing plaintiffs' attempts, begun prior to closing, to obtain County approval of a private road for the development. (Exhibit 127).

24. Before signing the Closing Documents, on June 16, 1981 and subsequently on November 1, 1983, Plaintiff White

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Pine Ranches entered into sewer extension agreements with the SBSID to install a sewer trunk line up White Pine Canyon pursuant to which agreements White Pine Ranches would receive reimbursement for their construction costs of the sewer line to the development from connection fees charged to third parties connecting to that line:

Said third parties will be allowed to connect to such lines only upon payment to the District of the applicable number of connection fees. The District shall retain \$100 plus the actual costs of construction and inspection from each such connection fee and pay the balance of each such connection fee to Applicant [White Pine Ranches].

(Exhibits 80 ¶5(c) and 81 ¶5C).

25. At the time plaintiffs were trying to obtain County approval of the development and agreeing to run the sewer line to Subject Property, it was anticipated that additional developments by third parties would occur in the White Pine Canyon vicinity, including the development of a ski resort in White Pine Canyon and the development of adjoining parcels of land, all of which future developments would hook into the sewer trunk line plaintiffs were to construct, allowing plaintiffs the opportunity to recoup expenditures for the sewer system through the connection fees paid pursuant to the provisions of the line extension agreements. (Exhibits 104, 105, 107 and 117).

26. On June 30, 1982, White Pine Ranches paid the Sharps the installment payment of \$308,177.69, by check (Exhibit 44)

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enclosed with a cover letter from Felton stating: "Upon final plat approval, we will notify you to obtain the releases for the lots and the road as per the contract." (Exhibit 21).

27. On June 28, 1983 and June 30, 1983, Felton and Saunders Land Investment Corporation paid to the Sharps the sum of \$178,165.23 by two checks in the amount of \$71,266.09 and \$106,899.14 respectively. (Exhibit 44). The remaining portion of the June 30, 1983 installment payment due from plaintiffs, a check from Dan Hunter in the amount of \$106,849.14 was returned for insufficient funds, resulting in a default in the June 30, 19823 installment payment. (Exhibit 22).

28. On or about July 19, 1983, while the June 30, 1983 payment was in default and prior to the recordation of a final plat on the Subject Property, Felton wrote a letter to attorney Jon Heaton, inquiring about obtaining a release from the Sharps of the road and five lots. The letter further explained that a final plat had not been recorded because "[a]s soon as we file the plat real estate taxes are going to go up significantly, which we would like to avoid until we have an actual buyer for one of the lots." (Exhibit 23).

29. On or about September 23, 1983, a Notice of Default was filed pursuant to the Trust Deed on the Subject Property for the default in the June 30, 1983 payment. (Exhibit 24.)

30. Plaintiffs made no claim during 1983 that the Sharps had breached the Closing Documents.

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31. On or about November 14, 1983, the June 30, 1983 default under the Trust Deed was cured with a payment in the sum of \$118,397.39 from Saunders Land Investment Corporation (Exhibits 4 and 44).

32. On or about November 18, 1983, attorney Jon Heaton sent a letter to the Sharps enclosing for their approval a proposed final plat, which was later recorded with Summit County (hereinafter the proposed "final plat"), and a Declaration of Protective Covenants (hereinafter "CCRs"), which Declaration was prepared on behalf of Saunders by Heaton and which contained covenants, conditions and restrictions for use of respecting a portion of the Subject Property by lot owners. (Exhibit 25).

33. The proposed final plat enclosed with the November 18, 1983 letter did not plat the entire approximately 60 acre parcel as originally contemplated in the Earnest Money and the Memorandum of Closing Terms, but platted only the northern portion of the Subject Property into six PUD lots, leaving the southern portion (approximately 27 acres) of the Subject Property unplatted (hereinafter the "unplatted acreage"). (Exhibit 1).

34. The proposed final plat included an Owner's Dedication for a private road in the PUD and delineated the existence and location of the private road and certain utility easements, including easements for water lines, water tank and water systems. (Exhibit 1).

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35. The November 18, 1983 letter from attorney Jon Heaton to the Sharps further provided in pertinent part that:

At a later time in the near future, Hy [Saunders] has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane).... We will handle that matter when it is presented.... When those releases are made, pursuant to your instruction we will insure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid. (Emphasis added.)

(Exhibit 25 and 25a).

36. On or about November 21, 1983, Felton mailed a letter to Jon Heaton regarding the November 18, 1983 letter to John Sharp. The letter provided in pertinent part: "It is perfectly acceptable to us that he [Mr. Sharp] retain an easement over White Pine Lane to the southern part of his property as well as to Lot 6 from White Pine Canyon Road up to the western boundary of Lot 6." (Exhibit 26).

37. On or about November 28, 1983, Felton had a telephone conversation with attorney Heaton memorialized by notes of attorney Heaton in the margin of Felton's November 21, 1983 letter (Exhibit 26). Felton agreed that "access over road [White Pine Lane] retained if Sharp develops undeveloped property Lots 7-12 White Pine Ranch." (Exhibit 26a).

38. On or about November 23, 1983, the Sharps authorized the recording of a Cancellation of Notice of Default relating to the June 30, 1983 payment (Exhibit 27).

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39. On or about November 23, 1983, the Sharps, in consideration of the agreement of plaintiffs to allow them access over the private roadway (White Pine Lane) in the event of foreclosure, and pursuant to their right of approval under paragraph 5 of the Memorandum of Closing Terms, also executed a Consent to Record Phase I of White Pine Ranches, which Consent after setting forth the metes and bounds description of Phase I of White Pine Ranches granted:

[A] non-exclusive easement for water lines, water tank and water systems over, under and across the property, shown here near the southwest corner of the subject property, and specifically described in the Declaration of Protective Covenants and reserving unto the owners, for granting to the owners of adjacent or nearby property, a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway shown on the plat and from the well sites as developed. (Emphasis added.)

(Exhibit 51). As additional consideration for signing the Consent to Record, the Sharps permitted the platting of only a portion of the Subject Property.

40. The proposed final plat of White Pine Ranches Phase I sent to the Sharps for approval on November 18, 1983 was recorded on December 23, 1983 in the office of the Summit County Recorder following the execution of the Consent to Record by the Sharps. (Exhibit 1). The CCRs were also recorded in the office of the Summit County Recorder on December 23, 1983 and the Consent to Record was attached as an exhibit thereto. (Exhibit 51).

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41. After recordation of the final plat, the CCRs and the Consent to Record, plaintiffs proceeded with construction of the improvements on the Subject Property. However, instead of adopting any of the alternatives described in Finding No. 6, supra, plaintiffs constructed a small, private water system for this development.

42. On or about January 18, 1984, the Sharps executed a direction to the Trustee under the Deed of Trust to release from the Deed of Trust Lots 1 through 5 of White Pine Ranches (Exhibit 28).

43. The Partial Reconveyance of Lots 1 through 5 directed and authorized by the Sharps, was not prepared by Associated Title, the trustee under the Trust Deed, until January 7, 1986 and was recorded March 26, 1986 (Exhibit 45). No explanation of the delay in preparing the Partial Reconveyance was provided at trial. Plaintiffs, although naming Associated Title as a defendant in this action, chose not to serve or pursue and question Associated Title for such delay. No other request for reconveyance was authorized by the Sharps.

44. On or about January 20, 1984, Felton sent a letter to attorney Heaton expressing astonishment that the deeds to Lots 1 through 5 had not been received but stating, "I realize that the deeds for the road may be difficult to do." (Exhibit 30).

45. On or about January 17, 1984, Felton sent a letter to attorney Heaton requesting the approval by the Sharps of a "multi-family development" on the unplatted acreage, "which is

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the only way it [the development] will be economically feasible." (Exhibit 29). A multi-family concept was never adopted.

46. Felton testified at trial and affirmed on May 7, 1986 in a letter sent to the Sharps that the plaintiffs "were in a position to prepare and obtain approval of that plat [for the unplatted acreage] immediately." (Trial Transcript, p. 110, hereinafter "R." 110 and Exhibit 37).

47. It was the actual practice of plaintiffs and a requirement of paragraph 2 of the Memorandum of Closing Terms to make specific requests for the release of specific PUD lots from the Sharps after required payments were made and provided no defaults existed under the Closing Documents. (R. 334).

48. Property taxes on the unreleased property (Lot 6 and the unplatted acreage) became delinquent pursuant to law on November 30, 1984 when plaintiffs failed to pay all of the 1984 property taxes due on the Subject Property (Stipulation of counsel at Trial) in violation of paragraphs 5 and 14 of the Trust Deed, which provided in paragraph 5 that the Trustor [plaintiffs] agrees "to pay at least 10 days before delinquency all taxes and assessments affecting said property...." (Exhibit 2).

49. Except for \$1,515.24 in property taxes paid on the unplatted acreage in 1984, no taxes have been paid on the unreleased Subject Property (Lot 6 and the unplatted acreage) subsequent to November 30, 1984, and including 1985, 1986 and 1987 (Stipulation of counsel at Trial), and plaintiffs, there-

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fore, remained in default under the provisions of paragraphs 5 and 14 of the Trust Deed.

50. Plaintiffs paid the 1984 installment payment. However, on or about June 27, 1985, the Sharps received only a portion of the June 30, 1985 installment payment in the form of a check from Felton in the amount of \$59,709.47 (Exhibit 44).

51. As a result of plaintiffs' defaults, a Notice of Default was recorded on September 16, 1985 covering the Subject Property as described in the Trust Deed, which description included Lots 1-5. (Exhibit 55).

52. On or about September 24, 1985, Felton sent a letter to Mr. Sharp acknowledging receipt of the September 1985 Notice of Default and assuring him "every attempt is being made to resolve the problem...." (Exhibit 31). Felton, in his letter made no allegation that the Sharps had slandered plaintiffs' title as a result of the inclusion of Lots 1-5 in the Notice of Default nor did Felton or any other plaintiff allege in 1984 or 1985 any breach of Closing Documents by the Sharps.

53. Significantly, as bearing upon the credibility of plaintiffs' arguments is the fact unrebutted that plaintiffs made no claims whatsoever of breach by the Sharps until after their own admitted breaches of the Closing Documents. (Exhibit 31).

54. On or about January 10, 1986, Felton wrote a letter to Blake G. Heiner of Associated Title Company, the Trustee under the Trust Deed, informing him that the Notice of Default

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(Exhibit 55) and Amended Notice of Sale (Exhibit 56) covering the Subject Property included Lots 1 through 5 which were to have been released, pursuant to the Sharps' direction. (Exhibit 57).

55. In response to Felton's letter (Exhibit 57), Blake Heiner for Associated Title Company prepared and recorded an Amended Notice of Trustee's Sale against the Subject Property, excluding Lots 1 through 5. (Exhibit 58). Other Notices filed subsequently against the Subject Property also excluded Lots 1 through 5. (Exhibits 3 and 36).

56. All of the Notices of Default and Notices of Trustee's Sale recorded against the Subject Property specifically provided that such Notices are:

SUBJECT TO Easements, Encroachments,  
Restrictions, Rights-of-Way and matters  
of record enforceable in law (sic)  
equity.

(Exhibits 5, 36, 55, 56, and 58).

57. No payment at all was made when the final installment under the Closing Documents was due on June 30, 1986.

58. The balance owing to the Sharps under the Trust Deed Note through March 22, 1988 is \$557,642.46, including \$371,739.35 principal; \$23,113.33 interest at 12%; \$147,920.21 default interest at 18%; and \$14,869.52 late payment charges of 4% on each overdue payment. Interest is accruing at a per diem rate of \$183.32. (Exhibit 122).

59. Plaintiffs made no written or oral request for the release of the roadway or Lot 6 prior to their default in

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November 1984, when the 1984 property taxes became delinquent, and prior to their default in failing to make the entire 1985 installment payment when due. Plaintiffs' first requests were made for such releases on February 27, 1986 and May 7, 1986, respectively. (Exhibits 35 and 37). Also for the first time in the letter dated February 27, 1986, plaintiffs requested a release from the Sharps for 7.5 acres of the unplatted acreage, despite the provision in paragraphs 1-3 of the Memorandum of Closing Terms for the release by the Sharps of "PUD lots" only. As of these dates, plaintiffs were still and are in of default for the 1984 and 1985 property taxes and the payment a portion of the 1985 payment and the full 1986 payment required under the Addendum to the Trust Deed Note.

60. The Sharps perceived that the execution by them of the Consent to Record constituted substantial performance of any obligation to release the roadway pursuant to paragraphs 3 and 6 of the Memorandum of Closing Terms.

61. As plaintiff Felton testified, "the contract [Memorandum of Closing Terms] says lots of buyer's choice and that would require a choice." After the release of Lots 1-5, plaintiffs may have chosen to prepare a plat of the then unplatted acreage and seek a release of a portion of it instead of Lot 6.

62. Also in the letter of February 27, 1986, Felton demanded from the Sharps for the first time approximately \$73,000.00 as their "cost of the sewer and water hook-ups which are now available." (Exhibit 35). No demand for such

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costs had been made of the Sharps prior to that time nor had plaintiffs provided an accounting of such costs. Before trial, plaintiffs claimed exorbitant expenses of \$1,638,753.61 for the complete costs for the construction of the improvements on and to the Subject Property (Exhibit 32a).

63. At trial, plaintiffs claimed costs for the construction of improvements on and to the Subject Property of \$1,063,348.10, (Exhibit 60) and plaintiffs modified their demand from the Sharps for water and sewer connection fees to \$43,706.00. (Exhibit 66).

64. Prior to actual construction of the sewer system, Saunders told the Summit County Planning Commission in a meeting on December 14, 1982 that they "would really like to have the septic tank system used because of the high cost of the sewer line but in the long run it may be the best way to go." (Exhibit 79). On or about September 16, 1983, Felton wrote Summit County challenging the requirement "to install a sewer line up the County road from Highway U-224 to the Project, a distance of about one and one-half (1-1/2) miles." (Exhibit 79). Felton concluded the letter by declaring: "In the event we are required to install the sewer line, we will test the validity of that requirement in court."

65. Plaintiffs made formal demand upon Summit County on or about July 26, 1984 for, inter alia, the following damages:

The sum of \$117,297.15 being the costs of off-site sewer which we were, under protest, required to install to service the subdivision.

\*\*\*

[W]e [plaintiffs] have lost one sale or more sales and anticipate the damages, loss of profit and interest at between \$250,000 and \$500,000.

\*\*\*

[D]amages for the loss of sale, reduction in business and damages suffered in reduction to profit ....

(Exhibit 84).

66. Soon thereafter plaintiffs brought suit in the United States District Court, District of Utah, Civil No. C84-2090W, against Summit County, the SBSID and various officials thereof to recover their claimed damages.

67. In answer to interrogatories dated December 28, 1984 in the Federal Court litigation, plaintiffs stated:

Because of the imposition of the requirement that Plaintiffs construct an off-site sewer approximately one mile in length, the costs of developing the entire project became prohibitive.

(Exhibit 116; see also, Exhibit 107, p. 7).

68. In further interrogatory answers on March 31, 1986, Saunders declared:

At the present time I have recently found out that the right-of-way servicing my property has been forfeited by Summit County contrary to law. This will not allow my development to proceed, will not allow me to recover costs for the capital improvement and significantly diminishes the value of the property.

(Exhibit 107, p. 15).

69. In Saunders' Federal Court affidavit dated March 17, 1986, he also swore:

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10. As a result of the various delays [caused by the County and the SBSID], which are detailed below, the market for exclusive building lots is now virtually non-existent, cost of improvements escalated to be several times what I had anticipated, and much of the real property in the project is threatened by foreclosure.

(Exhibit 86, p. 3).

70. Most of the damages sought to be recovered by the plaintiffs in the lawsuit against the SBSID and Summit County are the same damages plaintiffs sought to recover from the Sharps in the present case. (R. 252 and 263; cf. Exhibits 60 with 86; see also Exhibits 87, 88, 107, 116 and Plaintiffs' Verified Complaint herein).

71. No written or oral claim of default on the part of the Sharps under the Closing Documents was made by the plaintiffs until February 27, 1986, subsequent to plaintiffs' own defaults in failing to pay the 1984 and 1985 property taxes and failing to pay the full 1985 payment required under the Addendum to the Trust Deed Note.

72. The Sharps did not interfere with plaintiffs' attempts to market or sell the Subject Property.

73. Plaintiffs received only one invitation for an offer to purchase Lot 1 or Lot 6, which invitation was not consummated due to the failure of conditions imposed by the one, B. F. Sammons, and the failure of such conditions were unrelated to any actions or statements of the Sharps. (Exhibit 88).

74. One of the conditions of purchase by Sammons was an independent appraisal supporting a \$220,000 proposed sales price (Exhibit 88). The plaintiffs provided Sammons with a letter appraisal, dated August 8, 1986, which had been prepared by LeRoy Pia. (Exhibit 9a). This appraisal stated that Lots 1 and 6 had a fair market value of \$220,000. On or about November 11, 1986, while Sammons and Saunders were still negotiating, a letter appraisal was obtained by Steve Clyde, attorney for the plaintiffs from the same appraiser, valuing the lots at an average of only \$190,000.00 (Exhibit 9). The November 11, 1986 appraisal was not shown to Sammons. (R. 283-4).

75. Saunders had given Sammons "the impression" that plaintiffs could convey Lot 6 to him even though it had not been released from the Trust Deed. (R. 389; see also R. 284).

76. On or about March 24, 1987, Felton, pursuant to the request of the real estate agent, Steve Clegg, employed by plaintiffs to list Lots 1, 2 and 5, wrote a letter to Clegg for dissemination to other Park City real estate agents, which letter stated "[t]he current litigation does not affect the marketability or encumber that [Subject] property." (Exhibit 89.)

77. After the commencement of this action, the Sharps took all reasonable steps to facilitate the sale and marketing of the Subject Property as evidenced by a letter dated September 30, 1986, to plaintiffs' prior attorney, Steven Clyde, who was notified by Donald J. Winder, the Sharps' attorney, that

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the Sharps would take all steps reasonable to effect a sale of Lot 6 or the unplatted acreage (Exhibit 33), and the Sharps' Motion to Appoint a Receiver for the Subject Property in this proceeding dated May 14, 1987.

78. There have been no arms length sales to purchasers of PUD lots at the Subject Property wherein sewer and water connection and service fees have been assessed. The only conveyance of a PUD lot has been to Felton, a member of the partnerships. At trial, plaintiffs testified that they intended, at all times, to include the cost of the sewer and water connection and service fees within the sales price of lots. (R. 310-312).

79. Mr. Sammons was not to be charged any sum above and beyond a \$220,000 land price for sewer or water connection fees. (R. 285).

80. Felton testified that a purchaser of one of the PUD lots listed with real estate agent Clegg would only be charged "over and above ... the purchase price" "the hook-up fee to be charged by Snyderville Basin for sewer." (R. 310).

81. If plaintiffs sold a lot to Sammons at \$220,000, they would not have been "compensated for those [sewer and water] improvement costs...." At a \$220,000 sales price it's "impossible" to recover the costs of sewer and water improvements to the Subject Property. "You have to take a loss." (R. 311-312).

82. The sewer system, as of the date of trial, is not completed or operational, nor has its construction been

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approved by the SBSID. (Exhibits 83, 83a and 99 through 103). The culinary water system as of the date of trial is also not operational. Under paragraph 7 of the Memorandum of Closing Terms, the Sharps do not have to pay connection fees for these systems until they are "available." (Exhibit 15).

83. The sewer system constructed by plaintiffs has a capacity to handle between 2,000 and 3,800 connections. (Exhibit 86).

84. Under the line extension agreements with the SBSID, a connection fee "at the rate in effect at the time of connection" shall be determined by the SBSID for the system on the Subject Property (Exhibit 81, paragraph 4D; see Exhibit 80, paragraph 4(d)). The "connection fee shall be paid by the property owner" before issuance of a building permit, to the Application (the plaintiffs herein), except that the SBSID, shall be entitled to "the first \$100 of the connection fee."

85. The parties intended the language in the Earnest Money concerning "same per-hook-up price" to be synonymous with the language contained in paragraph 7, Memorandum of Closing Terms, regarding "pro rata cost" to a PUD lot purchaser.

86. Average and reasonable connection fees for culinary water and sewer systems in the Park City and Snyderville Basin area are \$2,000.00 each. (See Testimony of John C. Brown and Rex Ausburn, cf. Exhibit 86, p. 6).

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87. The Sharps intended and wanted to be charged only what purchasers of a PUD lot would be charged as fees to connect to the culinary water and sewer systems on the Subject Property, and the plaintiffs should have understood that this was the intent of paragraph 7, Memorandum of Closing Terms.

88. The Sharps repeatedly assured plaintiffs that they did not intend, through their foreclosure, to interfere with access rights over the private roadway or to the utility easements shown on the Consent to Record which the Sharps signed. (R. 64; Exhibits 33 and 51; cf. Exhibits 25, 25a, 26 and 26a).

89. Correspondingly, it was both the mutual intent and agreement of the parties that the Sharps be granted use of the roadway in event of default (Exhibits 25, 25a, 26 and 26a), which agreement was later memorialized and recorded in the Consent to Record. (Exhibit 51).

90. The inclusion of Lots 1 through 5 in the September 1985 Notice of Default (Exhibit 55) and December 1985 Amended Notice of Trustee's Sale (Exhibit 56) was inadvertent, unintentional and without malice.

91. In refusing to reconvey Lot 6, the road, the unplatted acreage, the Sharps acted in good faith and relied on the advice of attorney Jon Heaton.

92. The Sharps have been charged trustees' fees by Associated Title in their efforts to foreclose the Subject Property in the amount of \$1,803.80 (Exhibit 42).

93. Plaintiffs have not suffered any damages, special or otherwise, as a result of any act or failure to act by the Sharps.

94. Paragraph 13 of the Trust Deed provides that failure to promptly enforce any right thereunder does "not constitute a waiver of any other right or subsequent default." (Exhibit 2).

95. On September 4, 1986, the day before the scheduled Trustee's Sale, plaintiffs filed a Complaint commencing this action and obtained the issuance of a Temporary Restraining Order (TRO) from Judge Judith M. Billings to restrain the Sharps from conducting the Trustee's Sale of the Subject Property. The TRO required a bond in the amount of \$2,400. In a hearing held on January 4, 1988, this Court required that the bond be increased to \$50,000 "to protect the Sharps for the payment of such costs and damages as may be incurred or suffered if the Sharps are found to have been wrongfully enjoined or restrained...."

96. The Trust Deed Note provided that if it "is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned ... agree to pay ... a reasonable attorney's fee." (Exhibit 3)., Paragraph 16 of the Trust Deed provided: "Upon the occurrence of any default hereunder, Beneficiary [the Sharps] shall have the option to ... foreclose the Trust Deed ... and Beneficiary shall be entitled to recover ... a reasonable

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attorney's fee...." (Exhibit 2; see also ¶11 thereof). Further, paragraph 6 of the Trust Deed provided that Beneficiary (the Sharps) may "commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of [sic] powers of Beneficiary ... and in exercising any such powers ... employ counsel, and pay his reasonable fees." Additionally, paragraph 7 of the Trust Deed requires Trustor to "pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby." Paragraph 11 of the Memorandum of Closing Terms provided that "the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment." (Exhibit 15).

97. Legal services have been rendered to the Sharps by the law firm of Winder & Haslam in the nature of time expended by individual members, through August 31, 1988, in the amount of \$144,469.75.

98. The foregoing amount does not include any services performed on or after August 31, 1988, including those services of Winder & Haslam necessary for finalizing the Findings of Fact, Conclusions of Law and Judgment and preparing for, responding to and arguing any post trial motions. The legal fees for such matters may be supplemented later.

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99. The services rendered by the law firm of Winder & Haslam were reasonably necessary for the development of the case and protection of the rights of the Sharps; and the rates charged are reasonable and are in accordance with those rates generally charged by attorneys in this area for similar services.

100. Plaintiffs breached the Memorandum of Closing Terms by, inter alia, failing to make the payments intended thereby to the Sharps and by failing to make available sewer and water connections at the same charge to purchasers of a PUD lot.

101. Pursuant to paragraph 12 of the Memorandum of Closing Terms, all "agreements contained [t]herein shall survive the closing of this transaction...." (Exhibit 15).

102. The Sharps' defense of plaintiffs' Complaint was an action purporting to offset the security under the Trust Deed and the rights and powers of the Sharps related to collecting the Promissory Note after default; related to foreclosing the Trust Deed; and related to enforcing the Memorandum of Closing Terms and rights arising out of a breach or default thereof.

103. After closing the sale on the Subject Property, on or about July 16, 1981, attorney Heaton represented White Pine Ranches relating to the development of the Subject Property (R. 789) until the filing by Associated Title of a Notice of Default on or about September 16, 1985. (R. 836; Exhibit 55). Attorney Heaton did not represent the Sharps between the closing of the sale and the filing of the first Notice of Default on or about September 23, 1983. (R. 791; Exhibit 24). For a

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period of time after the filing of the first Notice of Default on or about September 23, 1983, and after the filing of the Notice of Default on September 16, 1985 (R. 793), attorney Heaton did represent the Sharps.

104. The Sharps have incurred costs of court in this action.

Having made the above Findings of Fact, the Court herewith makes and enters the following:

#### CONCLUSIONS OF LAW

1. The Closing Documents, which term is defined in Finding No. 10 above, are the operative documents relating to the parties' closing of the sale of the Subject Property by the Sharps to the plaintiffs, and this transaction constitutes the Contract between the parties (hereinafter the "Contract").

2. Plaintiffs, by their failure to pay the 1984, 1985, 1986 and 1987 property taxes on Lot 6 and the unplatted acreage on November 30 of each respective year, are thereby in breach of the Trust Deed.

3. Plaintiffs' failure to pay the entire June 30, 1985 installment payment and the 30, 1986 final installment payment required pursuant to paragraph 1D and 1E of the Addendum to the Trust Deed Note constitutes a breach of the Trust Deed Note, Trust Deed and Memorandum of Closing Terms.

4. Plaintiffs' breaches were material, significant and continuing and were uncured when plaintiffs releases were first requested by plaintiffs for the roadway and Lot 6 on February 27, 1986 and again on May 7, 1986.

5. The breaches by plaintiffs of the Contract occurred prior in time to any alleged breaches by the Sharps, and this Court specifically holds there were no material or significant breaches on the part of the Sharps of their obligations under the parties' Contract.

6. The Sharps have substantially complied with all of their obligations under the terms of the parties' Contract.

7. Plaintiffs were obligated, under the terms of the Memorandum of Closing Terms and pursuant to their own practice, to specifically request and identify lots, including Lot 6, for release by the Sharps.

8. Because the plaintiffs' material and continuing breaches of the parties' Contract preceded timely plaintiffs' requests for reconveyance of Lot 6, the roadway and the unplatted acreage, defendants were not obligated to reconvey Lot 6, the roadway and the unplatted acreage.

9. The Sharps were justified in and were excused from performance under the Contract to reconvey Lot 6, the roadway or the unplatted acreage shown on the final plat of to the plaintiffs because the plaintiffs were in breach of the parties' Contract at the time such reconveyances were requested.

10. Alternatively, the Sharps' execution of the Consent to Record the final plat of and the CCRs constituted a release of the roadway shown on such plat in accordance with paragraphs 3 and 5 of the Memorandum of Closing Terms.

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11. The execution of the Consent to Record by the Sharps and the subsequent recordation of the final plat and the CCRs created a non-exclusive appurtenant easements to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage and the owners and purchasers thereof (including the Sharps), and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat, and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the Subject Property near the southwest corner of the unplatted acreage as shown on the final recorded plat of White Pine Ranches Phase I.

12. The Sharps are estopped to deny the dedication of White Pine Lane, pursuant to the final recorded plat, for the private use of the parcel owners, their invitees and guests, subject to the CCRs and the non-exclusive appurtenant easement for the use and benefit of the unplatted acreage described in Conclusion No. 11 above. Further, the Sharps are estopped to

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deny the non-exclusive utility easement also described in Conclusion No. 11 above.

13. The Sharps, by the execution of the Consent to Record, are estopped to deny the operative and legal effect of the recordation of the final plat and CCRs and the rights and obligations of the owners of PUD lots as set forth in the recorded final plat and CCRs for White Pine Ranches Phase I. The final recorded plat and CCRs and the non-exclusive easements set forth in Conclusion No. 11 above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of the non-exclusive easement in favor of the unplatted acreage.

14. Owners and purchasers of the unplatted acreage (including the Sharps), and their successors in interest are entitled to use of the private roadway (White Pine Lane) for access to the unplatted acreage of the Subject Property as set forth in the legal description attached hereto as Exhibit "A" and incorporated by reference herein, as a result of the mutual intent and agreements between the parties to grant to the Sharps the use of the roadway, which agreement was memorialized by the letters of Heaton and Felton and evidenced by the part performance and reliance of the Sharps on such letters and agreements in executing the Consent to Record.

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15. General partners in a partnership are bound by the actions of other partners taken on behalf of the partnership and by the actions of the partnership itself.

16. The language in paragraph 7 of the Memorandum of Closing Terms "pro rata cost to the purchaser" is ambiguous, necessitating the use of extrinsic evidence to interpret the same.

17. The extrinsic evidence presented at trial demonstrated that the parties intended to allow the Sharps, at their request, one connection each to both the culinary water and sewer systems when and if such systems are available and operational.

18. The construction costs of the culinary water and sewer systems claimed by the plaintiffs are not reasonable, in violation of the reasonable value rule.

19. Seven years is an unreasonable time within which to complete the culinary water and sewer systems and require the Sharps to mandatorily hook into these systems, which systems still are not yet operational. The Sharps are not obligated, but have the option, to hook into the culinary water and sewer systems should such systems become operational.

20. It is an unreasonable interpretation of the language "pro rata costs" in the Memorandum of Closing Terms and the earlier language in the Earnest Money delineating "the same per-hook-up price" to require the Sharps to pay 1/13 of the exorbitant construction costs for culinary water and sewer hook-ups. Such an interpretation would recast the Sharps as

developers rather than the mere sellers of Subject Property that they were and intended to be in this transaction.

21. A reasonable fee to be paid by the Sharps to the plaintiffs for a connection to the culinary water and sewer systems is \$2,000.00 each.

22. The inclusion of Lots 1-5 in the initial Notice of Default (Exhibit 55) and Notice of Trustee's Sale (Exhibit 56) on behalf of the Sharps was inadvertent, unintentional and without malice.

23. There was no improper holding by the Sharps of any requested reconveyance, but even if there were, it was not done in bad faith. The Sharps acted in reliance on the advice of their counsel, and did so in good faith.

24. Alternatively, the Sharps did not improperly withhold reconveyances and plaintiffs have failed to establish a cause of action for failure to reconvey under U.C.A. §57-1-33. U.C.A. §57-1-33 is applicable only when a beneficiary refuses to request a reconveyance within 30 days after written demand therefor is made by the Trustor. The Sharps requested the Trustee to reconvey Lots 1-5 on or about January 18, 1984, and because of plaintiffs' subsequent breaches were under no obligation to reconvey the remainder of the Subject Property.

25. As a result of plaintiffs' breaches of the Contract, the Sharps were entitled to record all of the Notices of Default and Notices of Sale described in the Findings against the Subject Property.

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26. The Sharps acted in good faith and not maliciously in having recorded the Notices of Default and the Notices of Sale and in refusing to reconvey Lot 6 and the unplatted acreage.

27. The plaintiffs have not established a cause of action for slander of title against the Sharps. The Sharps did not act maliciously or cause any special damages to the plaintiffs.

28. All of the damages, including, without limitation, those under U.C.A. §57-1-33, claimed by the plaintiffs are too remote, conjectural and speculative. The plaintiffs have failed to establish they have suffered actual damages resulting from any alleged breach by the Sharps, and this Court concludes no such breach by the Sharps occurred.

29. The attorney's fees incurred by the Sharps in this matter through August 31, 1988 in the amount of \$144,469.75 are reasonable and the Sharps are entitled to an award of the same. Further, the Sharps are entitled to supplement and augment this amount by affidavit for their reasonable attorney's fees incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and, if necessary, after prevailing on any appeal.

30. The Sharps are entitled to their costs of court in the amount as assessed or taxed pursuant to U.R.C.P. 54 and to post-judgment interest as provided by law.

31. By virtue of the significant and material breaches of the Contract by the plaintiffs, the Sharps are entitled to

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judgment against Saunders, Felton, Interstate Rentals, Inc. and Norton, jointly and severally, in the following amounts:

a. i.	Principal:	\$ 371,739.35
ii.	Interest through	
	March 22, 1988:	\$ 171,033.54
iii.	Late payment charge:	\$ 14,869.57
	TOTAL:	\$ 557,642.46

together with interest thereon at the per diem rate of \$183.32 from and after March 22, 1988.

b. i.	Trustee's fees:	\$ 1,803.80
ii.	Court Costs:	\$ 2,881.04
iii.	Attorneys' fees through	
	August 31, 1988:	\$ 144,088.75

together with interest thereon at the rate of 10% per annum from the date of expenditure by the Sharps until paid by plaintiffs.

c.	Delinquent property taxes:	\$ 20,368.62
----	----------------------------	--------------

together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

32. As a result of the significant and material breaches of the Contract by the plaintiffs, the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and the Sharps are entitled to have it lifted and dissolved.

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33. The Sharps are entitled to be paid the bond posted by plaintiffs with the Summit County Clerk in September 1986 in the amount of \$2,400 and to be paid from the security posted by Tracy Collins Bank in the amount of \$30,970.63 for their interest, attorney's fees and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order and for which amounts the Sharps are not secured by the fair market value of the Subject Property.

34. The Sharps are entitled to have Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under the Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that said Sheriff, if and when the subject premises are sold by him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorney's fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this

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Court subject to this Court's further order.

35. All persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption; that from and after the expiration of the period of redemption as provided by law, that the plaintiffs above named, and each of them, and all persons claiming by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises, and that from and after the delivery of the Sheriff's Deed to the subject premises that the grantees named therein be given possession thereof.

36. If a deficiency results after due and proper application of the proceeds of such Sheriff's Sale, the Sharps are entitled to be awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

37. The Sharps are entitled to have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

38. The Sharps are entitled to have the Complaint of the plaintiffs dismissed, no cause of action.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1988.

BY THE COURT:

\_\_\_\_\_  
Hon. J. Dennis Frederick

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Tab C

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Kathy A. F. Davis, Esq. (#4022)  
Tamara K. Prince, Esq. (#5224)  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Attorneys for Defendants Sharps

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

---

LEON H. SAUNDERS; ROBERT  
FELTON; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; WHITE PINE RANCHES, a  
Utah general partnership;  
WHITE PINE ENTERPRISES, a  
Utah general partnership,

Plaintiffs,

vs.

JOHN C. SHARP, and GERALDINE  
Y. SHARP; ASSOCIATED TITLE  
COMPANY, as Trustee, a Utah  
corporation,

Defendants.

JUDGMENT

Civil No. C87-1621

Judge J. Dennis Frederick

---

JOHN C. SHARP, and GERALDINE  
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

ROBERT FELTON, LEON H.  
SAUNDERS; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; KENNETH R. NORTON dba

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INTERSTATE RENTALS, INC., :  
and PAUL H. LANDES, indivi- :  
dually; WHITE PINE RANCHES, :  
a Utah general partnership, :  
and WHITE PINE ENTERPRISES, :  
a Utah general partnership, :  
: :  
Counterclaim-Defendants.:

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This cause came on for trial before the Honorable J. Dennis Frederick on January 28, 1988 through January 29, 1988 and March 22, 1988 through March 25, 1988, with the defendants John C. and Geraldine Y. Sharp (hereinafter the "Sharps") appearing by counsel Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince, the latter being admitted pro hac vice, and plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders (hereinafter "Saunders"), Robert Felton (hereinafter "Felton"), J. Richard Rees and Saunders Land Investment Corporation appearing by counsel Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. Counterclaim defendant Kenneth R. Norton ("Norton") appeared through his counsel John B. Anderson, only to introduce a Stipulation and Indemnification Agreement between plaintiffs and counterclaim defendant Norton. Defendant Associated Title was never served in this action. Counterclaim defendant Paul H. Landes (hereinafter "Landes") was never served in this action.

Having heretofore made and entered its Findings of Fact and Conclusions of Law,

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NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' Complaint be dismissed, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Saunders, Felton, Interstate Rentals, Inc. and Norton are indebted, jointly and severally, to the Sharps in the following amounts:

a.	i.	Principal:	\$ 371,739.35
	ii.	Interest through	
		March 22, 1988:	\$ 171,033.54
	iii.	Late payment charge:	\$ 14,869.57
		TOTAL:	\$ 557,642.46

together with interest thereon at the per diem rate of \$183.32 from and after March 22, 1988.

b.	i.	Trustee's fees:	\$ 1,803.80
	ii.	Court Costs:	\$ 2,881.04
	iii.	Attorneys' fees through	
		August 31, 1988:	\$ 144,088.75

together with interest thereon at the rate of 10% per annum from the date of expenditure by the Sharps until paid by plaintiffs.

c.		Delinquent property taxes:	\$ 20,368.62
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together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment shall be supplemented and augmented in the amount of the Sharps' reasonable attorney's fees as established by affidavit and as incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and after prevailing in any appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and it is hereby lifted and dissolved. The Sharps are hereby awarded judgment against the bond posted by plaintiffs with the Summit County Clerk in September, 1986 in the amount of \$2,400.00 and against the security posted by Tracy Collins Bank with the Clerk of this Court in the amount of \$28,570.63, and for which amounts the plaintiffs are not secured by the fair market value of the subject premises.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under this Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, be sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that

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said Sheriff, if and when the subject premises are sold by him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorneys' fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption; that from and after the expiration of the period of redemption as provided by law, that the plaintiffs above named, and each of them, and all persons claiming by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises, and that from and after the delivery of the Sheriff's Deed to the subject premises that the grantees named therein be given possession thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if a deficiency results after due and proper application of the

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proceeds of such Sheriff's Sale, the Sharps are hereby awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sharps shall have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a non-exclusive appurtenant easement shall run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage described on Exhibit "A" attached hereto and incorporated herein by reference and the owners and purchasers thereof (including the Sharps) and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat of White Pine Ranches Phase I, recorded with the Summit County Recorder; and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches

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Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the subject premises near the southwest corner of the unplatted acreage as also shown on the final recorded plat of White Pine Ranches Phase I.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the final plat and Declaration of Protective Covenants recorded for White Pine Ranches Phase I with the Summit County Recorder's Office and the non-exclusive easements set forth above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of the non-exclusive easement in favor of the unplatted acreage.

DATED this 26 day of September, 1988.

BY THE COURT:

JS/  
Hon. J. Dennis Frederick

ATTEST: PROFESSIONAL COURT CLERK  
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Beginning at a point South 89 degrees 43'36" West along the North line of Lot 8, 173.42 feet from the corner of Lots 1 and 8, a brass cap set by the U.S. General Land Office, said brass cap also being South 00 degrees 19'46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89 degrees 43'36" West along the North line of Lot 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00 degrees 13'29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89 degrees 47'41" East along the South line of Lot 7, 832.67 feet; thence North 61 degrees 00'00" East 1956.90 feet; thence North 47 degrees 33'15" East 462.75 feet; thence North 42 degrees 44'40" East 83.63 feet to the point of beginning.

LESS and excepting White Pine Ranches, Phase I, a Planned Residential Development, according to the official plat thereof on file and of record in the Summit County Recorder's Office, State of Utah.

EXHIBIT "A"

Tab D

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Kathy A. F. Davis (#4022)  
Tamara K. Prince (#5224)  
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Attorneys for Defendants Sharp

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

---

LEON H. SAUNDERS, et al.,	:	
	:	
Plaintiffs,	:	ORDER RE: MOTION TO SET
	:	LIABILITY ON BOND
vs.	:	
	:	
JOHN C. SHARP, et al.,	:	
	:	
Defendants.	:	Civil No. C87-1621
	:	(Judge J. Dennis Frederick)
	:	
JOHN C. SHARP, et al.,	:	
	:	
Counterclaim-Plaintiffs,	:	
	:	
vs.	:	
	:	
ROBERT FELTON, et al.,	:	
	:	
Counterclaim-Defendants.	:	

---

The Motion of defendants John C. Sharp and Geraldine Y. Sharp (hereinafter the "Sharps") came on regularly for hearing before this Court on September 16, 1988. Plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders, Robert Felton, and Saunders Land Investment Corporation (hereinafter collectively "White Pine") appeared through their counsel,

Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. The Sharps appeared through their counsel, Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince. Tracy Collins Bank was represented by its counsel, Douglas J. Parry. No other parties in this action appeared either in person or through their counsel.

The Court, having reviewed memoranda presented by counsel, having received and reviewed exhibits, having heard the arguments of counsel, and for good cause appearing, hereby makes and enters the following in support of its Judgment entered against plaintiffs' sureties:

SUPPLEMENTAL FINDINGS OF FACT

1. The 7.0414 acres of Lot 6, White Pine Ranches Phase I, according to the final recorded plat filed in the Summit County Recorder's Office, State of Utah, has a present fair market value per acre of \$25,000.00, for a total present fair market value of \$176,035.00 (Ex. 97).

2. The unplatted acreage described on Exhibit "A" to the Judgment entered herein, with one sewer and water connection available, contains 27.6205 acres and has a present fair market value of \$20,000.00 per acre, for a total present fair market value of \$552,410.00 (R. 494 and Ex. 97).

3. Therefore, the present fair market value of the properties upon which the Sharps may foreclose pursuant to the Judgment is \$728,445.00.

4. Under the Judgment, this Court found various of the White Pine plaintiffs jointly and severally indebted to the

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Sharps in the total amount of \$759,415.63, excluding interest at the rate of ten percent (10%) per annum from the date of expenditure by the Sharps of trustee fees, Court costs, and attorneys' fees, and until paid by plaintiffs, and excluding interest and penalties assessed on delinquent property taxes from November 30, 1984, through November 30, 1987, and excluding property taxes accruing but unpaid for 1988.

5. Accordingly, the Sharps are under secured by the amount of \$30,970.63, representing the difference between the Judgment (\$759,415.63) and the present fair market value of these properties (\$728,445.00).

6. As a condition of the issuance of the Temporary Restraining Order herein, White Pine posted a bond in the amount of \$2,400.00 with the Summit County Clerk in September, 1986, and subsequently, pursuant to this Court's Order, additional security was posted by Tracy Collins Bank in the amount of \$50,000.00, which was filed January 11, 1988.

7. A Temporary Restraining Order was issued in this matter by the Honorable Judith M. Billings on September 4, 1986.

8. Interest on the principal due under the Trust Deed Note for the period July 1, 1986, to June 30, 1987, equalled \$66,913.08, and interest for the period July 1, 1987 to March 22, 1988, equalled \$48,764.04 (Ex. 122).

9. Delinquent property taxes due just for the year 1987 amounted to \$2,144.15 for Lot 6 and \$2,630.85 for the unplatted acreage (Stipulation of counsel, R. 707-708).

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10. Pursuant to the Second Supplement to Affidavit in Support of Request for Attorney's Fees, attorneys for the Sharps were able to identify that at least four percent (4%) of their total fees related to defense of White Pine's injunction. Four percent (4%) of \$144,088.75 is equal to \$5,763.55, excluding legal services from and after January, 1988, through the trial and post-trial motions herein (Supplement to Affidavit of Donald J. Winder dated September 9, 1988).

Having made the above supplemental findings of fact, the Court herewith makes and enters the following in support of its Judgment entered against plaintiffs' sureties:

#### CONCLUSIONS OF LAW

1. This Court has previously ordered, adjudged and decreed that the Temporary Restraining Order entered in this matter by the Honorable Judith M. Billings on September 4, 1986, was wrongfully issued and it is hereby lifted and dissolved.

2. The Sharps, as the parties enjoined, are entitled to recover their costs and damages, including attorney's fees, incurred as a result of the wrongfully issued injunction.

3. Having determined that plaintiffs were not entitled to the injunction, it is not necessary for this Court to inquire into the good faith or bad faith of plaintiffs in obtaining the injunction.

4. The amount of interest alone which has accumulated since September, 1986, when the injunction was first issued, far ex-

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ceeds the amount of both plaintiffs' cash bond and the security posted by Tracy Collins Bank.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1988.

BY THE COURT:

HON. J. DENNIS FREDERICK, Judge

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Tab E

VALUE OF PROPERTY

A.	Value Trial Testimony (R.494) \$20,000 acre <sup>1</sup> with one sewer and water connection.	
i.	Lot 6 (appraisal \$25,000/acre x 7.0414 acres <sup>2</sup> )	\$176,035.00
ii.	Unplatted (\$20,000/acre x 27.6205 acres)	<u>552,410.00</u>
	TOTAL:	<u>\$728,445.00</u>
B.	Debt	
i.	Principal	<371,739.35>
ii.	Interest	
a.	Through 3/22/88	<171,033.54>
b.	3/23/88 - 9/16/88 (per diem \$183.32, 178 days)	< 32,630.96>
iii.	Late Fees	< 14,869.57>
iv.	Taxes	
a.	Lot 6	< 10,932.78>
b.	Unplatted	< 9,435.84>
v.	Attorney's Fees (through 8/31/88 without interest)	<144,469.75>
vi.	Trustee's Fees	< 1,803.80>
vii.	Costs	<u>&lt; 2,881.04&gt;</u>
	TOTAL:	< <u>\$759,796.63</u> >

---

<sup>1</sup>Testimony at Bond Hearing \$17,500/acre. Transcript of Pia Testimony p. 35; Trial testimony \$17,500/acre low end R.493.

<sup>2</sup>Acreage figures from appraisal (Ex. 97)