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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

INTERSTATE INCOME PROPERTIES, INC., a Utah corporation, and BRB-5 A, LLC, a Utah Limited Liability Company,

Plaintiffs and Appellees,

vs.

D. GREGORY HALES aka DON GREGORY HALES aka D. ROBERT HALES; et al.,

Defendants and Appellants.

Appellate No. 20100025

District Court No. 090907394

BRIEF OF APPELLANTS

APPEAL FROM THE DECEMBER 9, 2009 JUDGMENT ENTERED BY THE UTAH THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE KATE TOOMEY PRESIDING

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LIST OF ALL PARTIES

Following is a list of all parties to this lawsuit:

Plaintiffs/Appellees: Interstate Income Properties, Inc., a Utah corporation, and BRB-5 A, LLC, a Utah Limited Liability Company.

Defendants/Appellants: La Jolla Loans, Inc., a California corporation; KVB Enterprises, Inc.; Thomas L. Black and Wilma J. Black, Trustees of the Black Family Trust UDT 1-26-82; Mary E. Bullard, Trustee of the Bullard Family Trust of 11-18-87; Helen Y. Chang, MD, Inc.; Raymond Y. Chan, MD, Phyllis Gross Corner; Trustee of the William Fletcher Corner and Phyllis Gross Corner Revocable Trust 2-16-83; The Frederick R. Darling Trust dated 7-25-01; Joan Drinkwater, Trustee of the Joan Drinkwater Family Trust dated 2-14-84; First Regional Bank CFBO Paul J. Dufour IRA #0634; First Regional Bank CFBO Dufour & Associates Defined Benefit Plan & Trust; First Regional Bank CFBO David S. Engelman Self Employed PSP; Gerald L. Fisher, Trustee of the Gerald L. Fisher Colorado Family Trust dated 2-21-06; Kathleen B. Fisher, Trustee of the Kathleen B. Fisher Employee Retirement Trust; Albert J. Fries, Trustee of the Fries Family Trust dated 11-19-87; J.H. Guthrie and Wilma J. Guthrie, Trustees of the J.H. Guthrie Family Trust dated 5-3-96; The Bertha M. Haffling Revocable Intervivos Trust dated 3-12-02; First Regional Bank CFBO Mark Hannah IRA; Security Financial Bancorp, Inc.; First Regional Bank CFBO Apara Kohls Individual 401K; Ronald L. & Barbara J. McCafferty; Matthew E. McMahon Trust dated 9-20-06; Christian Credit Counselors; First Regional Bank CFBO Kenneth Olmscheid

IRA; First Regional Bank CFBO Voncille Olmscheid; James Parker; James R. Patterson and Janet K. Patterson; Robert L. Phillips, Trustee under Declaration of Trust dated 9-15-89 as amended; Cynadhow Investments, LLC; Allan L. Russell; Edward S. Soren and Raeline Scott, Trustees of the Edward S. Soren Family Trust Agreement dated 11-10-04; First Regional Bank CFBO Richard E. Trossen IRA; First Regional Bank CFBO Svata S. Trossen IRA; Karen Vold; First Regional Bank CFBO William A. Waite IRA; Kenneth F. Wiesemann and Lila N. Wiesemann, Trustee of the Wiesemann Family Revocable Trust dated 12-10-87;First Regional Bank CFBO William C. Harp Defined Benefit Pension Plan, Christopher G. Louis and Helen B. Louis, Robert H. Ziegler IRA, and KVB Management, LLC.

Other Defendants Not Parties to this Appeal: D. Gregory Hales aka Don Gregory Hales aka D. Robert Hales, Carlsbad Development, LLC, Carlsbad Development II, LLC, eTitle Insurance Agency, in its capacity as substitute trustee.

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IN THE UTAH COURT OF APPEALS

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INTERSTATE INCOME PROPERTIES, INC., a Utah corporation, and BRB-5 A, LLC, a Utah Limited Liability Company,

Plaintiffs and Appellees,

vs.

D. GREGORY HALES aka DON GREGORY HALES aka D. ROBERT HALES; et al.,

Defendants and Appellants.

Appellate No. 20100025

District Court No. 090907394

BRIEF OF APPELLANTS

JURISDICTION

Plaintiffs filed their complaint, and then a petition against Defendant La Jolla Loans, Inc., to nullify liens under Utah Code Ann. § 38-9-1, et seq. The Third District Court of Salt Lake County, Judge Kate Toomey presiding, held an evidentiary hearing on Plaintiffs' petition to nullify La Jolla's liens, and entered an order granting the petition on September 29, 2009. This order did not dispose of all of the claims between all of the parties. On December 9, 2009, the trial court entered a Judgment, which resolved all of the claims between Plaintiffs, on the one hand, and La Jolla Loans, Inc., numerous assignees of La Jolla, and eTitle

Insurance Agency, made an express finding that there was no just reason for delay in entry of final judgment, and directed entry of final judgment. This is an appeal from the December 9, 2009 Judgment by La Jolla Loans, Inc., and its assignees. Jurisdiction to hear this appeal is conferred on the Utah Court of Appeals pursuant to Section 78A-4-103, Utah Code Annotated (1953, as amended), and Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue on Appeal: Whether the trial court erred when it necessarily determined that BRB-5 was a duly organized and validly existing entity on October 22, 1997. (*See* R. 518-21, & 765; Tr. at 112:16-113:24 & 116:25-117:6.)

Standard of Review: A question of law is reviewed under a correctness standard and the trial court's decision is given no deference. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue on Appeal: Whether the trial court erred when it necessarily determined that Interstate effectively conveyed Pad A to BRB-5 on October 22, 1997, even though BRB-5 had not yet been legally organized. (*See* R. 518-21, 526-30 & 765; Tr. at 112:16-113:24 & 116:25-117:6.)

Standard of Review: This presents a mixed question of fact and law. The court reviews the trial court's factual determinations for clear error, and its legal conclusions for correctness. *EDSA/Cloward, LLC v. Klibanoff*, 2008 UT App 284, ¶ 7.

Issue on Appeal: Whether the trial court erred when it failed to make sufficient findings of fact in support of the decision to nullify the lien and to award Plaintiffs attorney's

fees and costs pursuant to Utah Code Ann. § 38-9-7. (*See* R. 518-21, 526-30 & 765; Tr. at 113:10-116:6.)

Standard of Review: A trial court's findings of fact will not be reversed unless they are clearly erroneous, and the trial court's application of law to those findings will not be reversed absent an abuse of discretion. *Clark v. Clark*, 2001 UT 44, ¶ 14. Furthermore, if the trial court failed to make sufficient findings in support of its determinations regarding the petition to nullify the wrongful lien, the matter must be remanded to the trial court to make such determinations. *Neerings v. Utah State Bar*, 817 P.2d 320, 323 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

While several Utah statutes are pertinent to this matter, Appellants do not believe any Constitutional provisions, statutes, or rules are determinative or of central importance.

STATEMENT OF THE CASE

Plaintiffs filed a complaint, and then a petition to nullify liens under Utah Code Ann. § 38-9-1, et seq., seeking to undo certain transactions and agreements executed by Defendant D. Gregory Hales ("Hales"). Hales was an officer of Interstate Income Properties, Inc. ("Interstate") and the putative manager or other authorized agent of BRB-5 A, LLC, aka BRB-5 (hereinafter "BRB-5"), as well as an officer and/or agent of several other entities owned in whole or in part by Robert and/or Barbara Busch (the "Busches"). Hales was the Busches' son-in-law, and also acted under powers of attorney for the Busches. Cloaked with

this authority, in 2007, Hales executed a quit claim deed as vice president of Interstate, which transferred property known as "Pad A" from Interstate to Carlsbad Development, LLC ("Carlsbad"), an entity owned by Hales. Carlsbad then pledged Pad A as collateral for a loan from La Jolla Loans, Inc. ("La Jolla" or "Appellant").[1] Plaintiffs petitioned the trial court to, among other things, nullify the deed of trust on Pad A that was given by Carlsbad to secure the $3,245,000 borrowed from La Jolla.

Plaintiffs raised two primary arguments in trying to avoid or nullify the trust deed to La Jolla. First, Plaintiffs argued that Interstate had previously conveyed Pad A to BRB-5 in 1997; thus, Interstate did not own the property in 2007, and could not convey it to Carlsbad. Second, Plaintiffs argued that Hales lacked authority to execute the 2007 quit claim deed from Interstate to Carlsbad, that the 2007 deed was invalid, and, therefore, the trust deed from Carlsbad to La Jolla was ineffective in creating a lien on Pad A.

In rebuttal, La Jolla argued that the purported 1997 transfer of Pad A from Interstate to BRB-5 was a nullity, since BRB-5 was not organized and did not exist at the time of the alleged conveyance, and the 1997 deed was not properly executed on behalf of Interstate. Consequently, Interstate was the owner of Pad A in 2007, when the quit claim deed to Carlsbad was executed and delivered, and Interstate therefore conveyed Pad A to Carlsbad. La Jolla also argued that Hales had actual authority as an officer of Interstate, and under

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[1]La Jolla assigned partial interests in its trust deed to various persons and entities, who are appellants herein, in their capacities as successors in interest.

durable powers of attorney from the Busches, to effectuate the transfer of the property from Interstate to Carlsbad.

After a trial on Plaintiffs' wrongful lien petition, the trial court found and held that the 1997 deed from Interstate to BRB-5 was effective and transferred title to Pad A to BRB-5. Accordingly, the district court nullified the lien of La Jolla Loans, Inc. on Pad A, and found La Jolla Loans liable for Plaintiffs' attorney's fees and costs based on the wrongful lien statute. The court did not make any findings respecting the authority of Hales to execute the 2007 deed from Interstate to Carlsbad. This appeal followed.

STATEMENT OF FACTS

A. Procedural History

1. Plaintiffs filed their complaint on May 4, 2009 ("Complaint"). R. at 1-28. Among other things, Plaintiffs sought an order quieting title to Pad A in BRB-5. R. at 26. Plaintiffs also requested an order that the May 10, 2007 quit claim deed from Interstate to Carlsbad was null and void. *Id.*

2. On June 5, 2009, Plaintiffs also filed a Petition to Nullify Wrongful Liens against La Jolla (the "Petition"). R. at 366-78.

3. On August 17, 2009, the district court held an evidentiary hearing on the Petition. R. at 849.

4. On September 29, 2009, the district court entered the Order Re: Plaintiffs' Petition to Nullify Wrongful Lien (the "Order"), in which the district court made findings in

support of the order, nullified the deed of trust granted to La Jolla, and awarded Plaintiffs their attorney's fees and costs against La Jolla.[2] R. at 885-90.

5. On or about December 9, 2009, the parties submitted a Stipulation for Entry of Judgment. R. at 904-17.

6. On December 9, 2009, the district court entered the Judgment, which resolved all of the claims between Plaintiffs and La Jolla (and its assignees). R. at 898-903.

7. On January 4, 2010, Appellants filed their Notice of Appeal. R. at 918-21.

B. <u>Background</u>

1. On January 5, 1988, the Busches incorporated BE2, Inc. R. at 10. On April 27, 1988, the Busches changed the name of BE2 to Interstate Income Properties, Inc. ("Interstate"). *Id.*

2. The business of Interstate, according to its articles of incorporation, was "to engage in the general business of owning, developing and leasing real property." Tr. Ex. 11, at Tab 13.

3. Robert R. Busch, Greg Hales, and Barbara Busch were the directors of Interstate. Tr. at 11:23-24.

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[2]The judgment for attorney's fees runs only against La Jolla Loans, Inc., and not the other appellants.

4. Prior to October 22, 1997, Interstate owned a parcel of property that Plaintiffs refer to as Pad A. R. at 368-69; *see also* R. at 11. Pad A is a parcel of property with a structure. Tr. at 6:6-8.

5. Interstate obtained Pad A from Busch Willow Creek Limited by Warranty Deed recorded on December 12, 1994. Tr. at 6:11-17; R. at 11, 368-69.

6. As of October 22, 1997, Barbara Busch was the sole shareholder of Interstate and its vice president. R. at 7; Tr. at 8:15-20 & 12:5-6.

7. On October 22, 1997, Barbara Busch signed a quit claim deed purporting to convey Pad A to BRB-5. *See* R. at 12 & 886; Tr. at 12:21-13:3, 14:5-10, 55:10-56:3 & 78:3-15; Tr. Ex. 11, at Tab 3 (a copy is also attached hereto as Addendum "B").

8. Although the typewritten name of the grantor on the quit claim deed is stated to be Interstate, the deed was signed by Barbara Busch individually, and does not state that it was signed by her as an officer of Interstate. The acknowledgment on the deed is of Barbara Busch individually, and not acting as an officer or agent of Interstate. Tr. at 97:8-14; Tr. Ex. 11, at Tab 3.

9. The deed was recorded on October 24, 1997. Tr. Ex. 11, at Tab 3.

10. On October 24, 1997, the articles of organization for BRB-5 were filed with the Utah Division of Corporations and Commercial Code. Tr. at 14:8-10, 15:19-16:2 & 81:25-82:21; Tr. Ex. 11, at Tab 14. The articles state that the members of BRB-5 were Barbara Busch and Robert Busch. Tr. at 15:8-12; Tr. Ex. 11, at Tab 14. Neither Robert nor

Barbara Busch had any recollection of when the articles were actually filed on that day. Tr. at 58:20-23 & 82:6-21.

11. Hales was designated as an officer, member, and/or manager of various entities owned by Robert and/or Barbara Busch. In some instances he was recognized as an agent for the entities. The Busches also gave Hales powers of attorney. Tr. at 63:1-9 & 79:9-16;[3] Tr. Ex. 13 and 14.

12. At various times, commencing as early as 1995, Hales executed documents and instruments on behalf of entities owned by the Busches. For example:

- In 1995, he executed a Use Restriction as vice president of Interstate. Tr. at 41:19-42:6; Tr. Ex. 11, at Tab 1.
- In 1999, he executed a quit claim deed as vice president of Interstate, to BRB-1, another Busch entity. Tr. at45:19-46:12; Tr. Ex. 11, at Tab 5.
- In 2001, he executed a Correction Quit Claim Deed (which recites it was "to correct the legal description and Grantor execution" of another 1997 deed), as vice-president of Interstate, to BRB-4, another Busch entity. Tr. at 43:21-45:18; Tr. Ex. 11, at Tab 6.

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[3]The alleged written revocations of these powers of attorney have reportedly disappeared. Tr. at 63:13-23 & 79:17- 80:11.

- In 2001, Hales executed a Non-Exclusive Parking Easement as Vice President of Interstate and as Member of BRB-4, LLC, in favor of a third party. Tr. at 46:13-47:23; Tr. Ex. 11, at Tab 7.

- In March 2002, acting as Vice President of Interstate and member or agent of BRB-5, Hales executed a deed to Sandy City on behalf of Interstate Income and BRB-5, involving a portion of Pad A. Tr. at 17:23-18:6, 40:8-19 & 47:24-49:2; Tr. Ex. 7 & Ex. 11, at Tab 8.

- At some point, Hales also signed a deed for a parcel called Pad C on behalf of another Busch entity. Tr. at 68:1-21.

13. The Plaintiffs did not challenge the efficacy of these transactions entered into by Hales on behalf of the various Busch entities, nor do they suggest that he lacked authority to enter into those transactions in their Complaint or Petition. *See generally* R. 1-28 & 366-378; Tr. at 48:16-49 & 52:24-54:4.

14. Hales acted as the secretary/treasurer of Interstate until 2009. Tr. at 40:5-8; R. at 370.

15. On or about March 6, 2007, Hales organized Carlsbad Development, LLC. R. at 370; R. at 13.

16. On May 10, 2007, Hales, as the purported vice-president, executed a quit claim deed on behalf of Interstate, transferring Pad A from Interstate to Carlsbad Development,

LLC. R. at 887. Tr. Ex. 11, at Tab 9. This quit claim deed was recorded on or about May 10, 2007. R. at 370; *see also* R. at 12-13.

17. On or about June 6, 2007, Carlsbad Development, LLC, acting through Hales as its Manager, executed a deed of trust in favor of La Jolla to secure a $3,245,000 loan.[4] R. at 887; R. at 370; Tr. Ex. 9.

18. The trust deed in favor of La Jolla was recorded on June 8, 2007. *Id.*

19. Plaintiffs argued that the May 10, 2007 conveyance of Pad A by Interstate to Carlsbad was ineffective since, according to Plaintiffs, Interstate already conveyed Pad A to BRB-5 on October 22, 1997. R. at 369.

20. Plaintiffs also argued that Hales did not have written authority to act on behalf of Interstate and convey Pad A to Carlsbad. Tr. at 28:12-29:7; R. at 370. Plaintiffs, however, admitted that they have no record of any written authorizations for Hales to have transacted any of the other business for which they have no complaints. Tr. at 90:6-10.

21. Salt Lake County did not recognize the 1997 quit claim deed, executed by Barbara Busch personally, as having conveyed title to Pad A to BRB-5: From 1997 through

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[4]Hales also caused Carlsbad Development II, LLC to grant a trust deed on other property to La Jolla. R. at 888; R. 371-72; Tr. Ex. 10. Although both trust deeds contain legal descriptions for both Pad "A," and other parcels (referred to in the documents respectively as the "Retail Center Property" and the "Cottonwood Heights Property"), a close reading of the trust deeds indicates that the trust deed executed by Carlsbad Development, LLC, encumbers only the Retail Center Property (Pad A) and the trust deed executed by Carlsbad Development II, LLC, encumbers only the Cottonwood Heights Property. *See* Tr. Ex. 10.

2007, Salt Lake County continued to assess property taxes for Pad A to Interstate. Tr. at 35:5-18; Tr. Ex. 11, at Tab 12. At no time did Interstate or BRB-5 takes steps to have the tax assessments transferred to BRB-5, or attempt to correct the defective deed. Tr. at 76:15-20 & 90:18-21.

22. Also illustrating the fact that BRB-5 was not considered the owner of Pad A is the lease of land on Pad A to Village Cleaners, *see* R. 369, Tr. Ex. 12, wherein BRB-1 was designated as the landlord. Tr. at 59:5-12. Hales also signed this lease agreement as a managing member. Tr. at 59:8-61:23.

23. Records available from the Utah Division of Corporations and Commercial Code reflect the following information with respect to Interstate:

a. The corporate annual report, filed on February 3, 1997, states that Robert Busch was the president, Barbara Busch was the vice-president, and Hales was the secretary and treasurer, of Interstate, and all three were directors.

b. Reinstatement documents filed in 2003, 2006, and 2008, do not reflect any different officers or directors.

c. A Summary of Online Changes dated May 6, 2009, reflects that Hales was removed as a director, secretary and treasurer on that date.

See Tr. Ex. 11, at Tab 13.

24. Records available from the Utah Division of Corporations and Commercial Code state the following with respect to BRB-5:

a. BRB-5 was initially formed by the filing of Articles of Organization on October 24, 1997. The members were identified as Robert and Barbara Busch, and Hales was listed as the registered agent.

b. In October of 1998, the Articles of Organization were amended to designate Hales as the manager of BRB-5.

c. The 2001 annual report reflects no changes in the members or manager.

d. The 2003 Application for Reinstatement reflects the addition of Hales as a member, but otherwise effects no changes. *But see* Tr. at 18:12-13 (Mr. Busch testifying that Hales was not a member of BRB-5).

e. In 2005, BRB-5 was administratively dissolved. At present, BRB-5 has expired and is not authorized to act as an LLC in Utah. *See also* Tr. at 34:13-15; Tr. Ex. 11, at Tab 14.

C. <u>Findings Made by the District Court to Support the Order and Judgment</u>

1. In the Order, the district court found as follows:

a. On October 22, 1997, Interstate conveyed Pad A to BRB-5 by quit claim deed. R. at 886.

b. The quit claim deed satisfied the requirements of Utah Code Ann. § 57-1-13. *Id.*

c. The October 22, 1997 quit claim deed transferred all of Interstate's interest in Pad A to BRB-5. *Id.*

d. The quit claim deed was recorded with the Salt Lake County Recorder's Office on October 24, 1997. R. at 887.

e. On May 10, 2007, Hales executed a quit claim deed transferring Pad A from Interstate to Carlsbad. *Id.*

f. On June 6, 2007, Carlsbad executed a deed of trust in favor of La Jolla to secure a $3,245,000 loan. *Id.*

g. The deed of trust was recorded on June 8, 2007. *Id.*

h. Plaintiffs requested La Jolla to remove the deed of trust against Pad A and, as of the hearing date, La Jolla had not removed the deed of trust. *Id.*

2. The district court then granted Plaintiff's petition to nullify the wrongful lien and declared the deed of trust recorded on June 8, 2007, to be null and void. R. at 888 & 901.

SUMMARY OF ARGUMENT

The 1997 quit claim deed from Interstate to BRB-5 was invalid and conveyed no title, for two reasons. First, BRB-5 had not been organized and formed as of the date of execution and delivery of the deed. Utah law holds that a deed purporting to convey title to a non-existent entity is void and conveys no title. Second, the 1997 quit claim deed was not properly executed on behalf of Interstate; contrariwise, the deed was signed and acknowledged by Barbara Busch individually. Since Interstate held title to Pad A, and did not sign the 1997 deed, no title was conveyed.

The trial court made no findings on the Plaintiffs' other argument, i.e., that Hales lacked authority to execute the 2007 quit claim deed from Interstate to Carlsbad. Accordingly, the findings are insufficient to support the court's ruling that La Jolla's liens on Pad A should be nullified, or holding that La Jolla was liable to Plaintiffs for attorney's fees under the wrongful lien statute.

Since the trial court did not reach or make findings on the validity of the 2007 quit claim deed, the case should be remanded for further proceedings.

ARGUMENT

POINT I

THE 1997 QUIT CLAIM DEED FROM INTERSTATE TO BRB-5 WAS INVALID AND INEFFECTIVE BECAUSE BRB-5 HAD NOT BEEN LEGALLY FORMED AS OF THE DATE OF DELIVERY OF THE DEED.

In finding for the Plaintiffs, the trial court necessarily concluded that the October 22, 1997 quit claim deed from Interstate of Pad A was made to an existing and legally viable entity, i.e., BRB-5. The trial court's necessary determination that BRB-5 was a viable legal entity was a legal conclusion. On appeal, the trial court's legal conclusions are accorded no particular deference; they are reviewed for correctness. *Grayson Roper P'ship v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

A person cannot transfer property to a non-existing entity. BRB-5 was not a legally organized and existing entity on October 22, 1997. Accordingly, the purported transaction is a legal nullity. It never happened.

In Utah, a business entity does not exist until duly formed by filing the appropriate papers with the Division of Corporations and Commercial Code. Utah does not recognize the doctrine of de facto business entities. In *American Vending Servs. v. Morse*, 881 P.2d 917 (Utah Ct. App. 1994), the Morses sold a car wash to American Vending Services, Inc. ("AVSI"). The officers of AVSI were attorneys and they advised the sellers that the corporate entity AVSI would purchase the car wash. *Id.* at 918. The parties executed a purchase agreement on July 10, 1985. *Id.* Although an officer of AVSI claimed to have attempted to organize the entity, it was not until August 19, 1985, that the officer actually filed the articles of incorporation. *Id.* The sellers argued that the officers were personally liable on the contract because the corporate entity, AVSI, did not legally exist when the parties executed the contract. *Id.*

The trial court found, among other things, that the sellers knew the putative purchaser of the car wash was a corporate entity, that they intended to contract with the corporate entity, and that the organizers of AVSI actually tried to organize the entity. *Id.* at 919. The trial court concluded that AVSI was a de facto corporation and that the organizers were not liable on the contract. *Id.* On appeal, the sellers challenged the trial court's determination that the organizers were not personally liable. *Id.*

This Court identified one of the issues on appeal as "[w]hether the trial court erroneously concluded that AVSI was a de facto corporation." *Id.* at 919-20. The Court then stated that the issues "raised by the [sellers] challenge the trial court's legal conclusions,"

which the Court reviewed for correctness, according no deference to the trial court. *Id.* at 920. The Court then refused to recognize de facto corporate status. *Id.* (*see also Miller v. Celebration Mining Co.*, 2001 UT 64, ¶ 26 (C. J. Howe, dissenting) (recognizing abolition of de facto status)).[5] The fact that the corporate entity was not organized at the time the contract was signed meant that the officers were personally liable on the contract. *Id.* at 923. It did not matter that the officers intended to have the then-nonexistent corporate entity participate in the purchase agreement. "Utah's adoption of the Business Corporation Act extinguished the doctrine of de facto corporations." *American Vending Servs.*, 881 P.2d at 922.

Similarly, in *Gillham Advertising Agency, Inc. v. Ipson*, 567 P.2d 163 (Utah 1977), an individual signed an agreement for payment of advertising debts as president of a corporation that did not exist in Utah when he signed the agreement. The agreement imposed liability on the nonexistent corporation. The Utah Supreme Court held that the individual was personally liable on the debt. The Supreme Court noted, "signing the paper as he did, [the president] left

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[5]A majority of states also recognize that de facto corporate status is no longer a viable theory. *Warthan v. Midwest Consolidated Ins. Agencies*, 450 N.W.2d 145 (Minn. App. 1990) ("The doctrine of de facto corporations is inapplicable in this state"); *Pharmaceutical Sales and Consulting Corp., v. J.W.S. Delavau*, 59 F. Supp.2d 408, 413-15 (D.N.J. 1999) (no de facto corporation); *Robertson v. Levy*, 197 A.2d 443, 446 (D.C. App. 1964) (noting that authorities on MBCA agree that it eliminated de facto corporations); *Timberline Equipment Co. v. Davenport*, 267 Ore. 64, 514 P.2d 1109, 1110-11 (Or. 1973) (citing comment to section 146 of the MBCA in holding that de facto corporations no longer exist in Oregon); 8 Fletcher Cyclopedia of the Law of Private Corporations (2001), § 3762.10 (MBCA-based legislation "eliminate[s] the common law concepts of de facto corporations, de jure corporations, and corporations by estoppel").

himself obligated for there was no corporation...." *Id.* at 164-65. The imposition of personal liability on the individual was required because no corporation existed at the time the parties executed the agreement. *Id.* at 165.

Likewise, in *Loveridge v. Dreagoux*, 678 F.2d 870 (10th Cir. 1982), two individuals signed corporate debentures in their capacities as president and secretary of the corporation issuing the debentures. Two investors purchased the debentures one and five days, respectively, before the corporation was incorporated under the laws of Nevada. When the corporation failed to pay the debentures when due, the investors brought suit to recover their investments. *Id.* at 872-73. Applying Utah law, the Tenth Circuit held that the officers were personally liable on the debentures because at the time they signed and sold them, no corporation existed.

Similarly, Utah does not recognize de facto limited liability companies. Utah Code Ann. § 48-2c-208; Utah Code Ann. § 48-2c-402 ("The company shall be considered formed as of the time, day, month, and year indicated by the division's stamp or seal on the articles of organization.").

The Plaintiffs' reliance on the 1997 quit claim deed as having effectively transferred title to BRB-5 fails because there was no valid and effective delivery of the deed on October 22, 1997. The question of delivery is generally a question of fact or a mixed law and fact. *See Poulsen v. Poulsen*, 672 P.2d 97, 99 (Utah 1983). Delivery depends upon the intent of the grantor to vest an estate in the grantee. *Id.*

Under Utah law, the deed must be in writing, signed by the grantor, supported by consideration, and delivered to the grantee. *See* Utah Code Ann. § 25-5-1 (1995); *Cereghino v. Einberg*, 4 Utah 514, 11 P. 568 (Utah 1886); *Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979); 26 C.J.S. Deeds § 34 (1956). A conveyance is valid only upon delivery of a deed with present intent to transfer. *Givan v. Lambeth*, 10 Utah 2d 287, 351 P.2d 959 (1960).

A deed is presumed to have been delivered on the date of the deed. *See, e.g., Washington Mutual Bank v. Homan*, 2009 Md. App. LEXIS 79 (2009) ("The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later."); *Martin v. Martin*, 720 N.W.2d 732, 736 (Iowa 2006) (recognizing long standing presumption that delivery occurs on date the deed is signed); *DeCristofaro v. DeCristofaro*, 13 LCR 143 (Mass. Land Ct. 2005) ("The date shown on the deed...is prima facie evidence of the date of delivery."); *Patterson v. Seavoy*, 822 N.E.2d 206, 210 (Ind. App. 2005) (recognizing presumption that the deed was delivered to the grantee on the date of the deed); *Sandoval v. Guzman*, 2002 Tex. App. LEXIS 7650 (2002) (noting that it will be presumed that the deed was delivered on the date of the deed and not the date of the acknowledgment); *Option One Mortgage Corp. v. Boyd*, 2001 Ohio App. LEXIS 2654 (2001) (deed is presumed to be executed and delivered as of the date it bears); *Spaulding v. H.E. Fletcher Co.*, 124 Vt. 318, 321-22, 205 A.2d 556 (1964) ("A deed is presumed to have been delivered at the date of the instrument, and this presumption is strengthened if the date of the acknowledgment is that

same as that of the deed."); *Toussaint v. Fraser*, 2005 Cal. App. Unpub. LEXIS 4051 (2005) (recognizing that the date of execution is the presumptive date of delivery) (citing 3 Miller & Starr, Cal. Real Estate, Supra, § 8.2, p. 9); *Daughdrill v. Lockhart*, 181 Ala. 338, 61 So. 802 (Ala. 1913) (stating that the law presumes that a deed was delivered on the date of its date and acknowledgment). Accordingly, it is well recognized that the date of delivery is the date at which the legal status of the parties is to be determined.

Under Utah law, a recorded deed creates the presumption of delivery or that delivery occurred, *see Jacobs v. Hafen*, 875 P.2d 559, 561 (Utah App. 1994); however, this presumption goes only "to the fact of delivery and not the date thereof." Accordingly, the date of recording is not considered to be the date of delivery. To the contrary, the date of the deed would be considered presumptive evidence of the date of delivery. *Id.*

The quit claim deed from Interstate to BRB-5 was dated and acknowledged on October 22, 1997. That is the presumptive date of delivery. Further corroborating this presumption is the fact that the person acting as or for the grantor and the grantee were one and the same; namely, Barbara Busch. For the Busches to even attempt to argue that Barbara did not intend to deliver the quit claim deed on the day she signed it is to suggest that she personally effectuated an intentional– albeit mental– delay in the transaction whereby she signed the deed as grantor for Interstate and simultaneously chose to pretend not to deliver the deed to herself as grantee of BRB-5 on that date. There is no evidence anywhere to support this jaunt into

the land of make believe, much less overcome the presumption that delivery was not in fact attempted on the date the deed was signed.

For delivery of the deed to be effective, the grantee must be a legal entity then in existence that is legally able to take title and hold property. As shown above, BRB-5 was not in existence on the date of delivery. Any attempted delivery to a nonexistent entity or person is void.

In *Jetmar Properties, LLC v. Ortega*, 733 N.W.2d 480 (Minn. App. 2007), the court held that a deed delivered to an LLC before it was organized was void. In *Jetmar*, the grantor conveyed to Jetmar Properties, LLC, by quit claim deed, his interest in a duplex. On the date of delivery, the LLC had not been organized. After a lender of the purported grantee LLC foreclosed, the grantor argued that the attempted conveyance was void. After acknowledging that Minnesota (like Utah) does not recognize de facto corporate status, the court held that the conveyance was void because a deed cannot be delivered to a non-existent entity. Explaining why the law will not permit the deed to take effect upon the formal organization of the LLC, the Court stated "[w]e can find no basis in Minnesota law for delaying transfer of title to some indeterminate future date when the grantee might come into existence." In like manner, there is no basis under Utah law for the court to pretend that Barbara Busch intentionally and specifically delayed transferring title until the date that BRB-5 was actually formed.

In *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, the Utah Court of Appeals recognized that a conveyance to a nonexisting entity would be void. In footnote 5, the court stated:

> "The rule that a deed which names as grantee a nonexistent person is void applies only when the named grantee does not in fact exist . . . . If a living or legal person is identifiable as the grantee named in the deed, the deed is valid." 23 Am. Jur. 2d Deeds § 29 (2002). Thus, there is a two-part inquiry involved in situations such as this one. First, the court must determine whether the grantor's intended grantee is readily identifiable. Second, the court must then determine whether that grantee is a living person or existing legal entity that is capable of holding title.
>
> As discussed above, we think that the intended grantee in the present case was readily identifiable. Given this identification, the question then becomes whether PCO Holding Company, Inc. was an existing entity capable of holding title. There is no dispute from either party that it was. Thus, this situation is different from those found in either *Julian* or *Sharp*. In *Julian*, the court expressly noted that the conveyance involved in that case was invalid because it had purported to convey title to a deceased person. *See* 966 P.2d at 881 ("Because Mrs. Corbridge died in 1988, the attempted conveyance to her by affidavit in 1995 is invalid."). Similarly, in *Sharp*, the court held that the deed was invalid because it purported to convey title to a trust, which the court declared to be a "property interest[] which cannot hold property." 747 P.2d at 1046. The *Sharp* court thus emphasized that "a deed of conveyance is void unless the grantee named is capable of taking and holding the property named in the deed." *Id.* (quoting Rixford v. Zeigler, 150 Cal. 435, 88 P. 1092, 1093 (Cal. 1907)). Here, where PCO Holding Company, Inc., was a valid, existing entity that was capable of holding title, we hold that there was no error to find the conveyance valid.

Id. at ¶ 23. *See also Julian v. Petersen*, 966 P.2d 878, 881 (Utah Ct. App. 1998) ("It is well-settled that an attempted conveyance of land to a nonexisting entity is void."); *Sharp v. Riekhof*, 747 P.2d 1044, 1046 (Utah 1987) ("An attempted conveyance of land to a nonexisting entity is void."); 26 C.J.S. Deeds § 10(2) (1956) (stating that deed takes effect at

delivery and execution or not at all); *Lester Associates v. Commonwealth of Penn.*, 816 A.2d 394 (Pa. Commw. Ct., 2003) (holding that conveyance to non-existing LLC was void ab initio); *Kiamesha Development Corp. v. Guild Properties, Inc.*, 4 N.Y.2d 63, 175 N.Y.Supp. 63 (1958) ("[T]he tax certificate was thus made to a nonexistent entity incapable of taking thereunder, and accordingly could transfer no rights whatsoever– it was void."); *Sullivan v. Buckhorn Ranch Partnership*, 119 P.3d 192 (Okla. 2005) ("[T]here must be a grantor and a grantee to be a valid deed, and that the grantee must have a legal existence. An attempted conveyance to a non-existing legal entity may, like an attempted conveyance to a fictitious person, be of no effect and void-passing no title and conveying no interest whatsoever."); *Borough of Elizabeth v. Aim Sher Corp.*, 316 Pa. Super. 97, 462 A.2d 811 (Pa. Super. Ct.) ("A deed that purports to convey real estate to a non-existent corporation is of no effect."); *Zulver Realty Co. v. Snyder*, 191 Md. 374, 62 A.2d 276 (1948) ("a deed to a supposed corporation which has not been duly incorporated...does not pass any title."); *Harwood v. Masquelette*, 95 Ind. App. 338, 181 N.E. 380 (1932) (citing "the almost universally accepted rule that a deed to ... a corporation not yet organized, or having a valid existence, is a nullity and passes no title to anyone."); 9 Thompson on Real Property § 82.08(a)(2) ("The effective date of a deed is usually stated to be the date of delivery, and if at that date the corporate is 'non-existent,' the ordinary rule governs and the deed is treated as a nullity.").

The attempted conveyance to a non-existent entity was a legal nullity. Because BRB-5 was not organized at the time of the conveyance, it could not have taken title to Pad A. The

trial court's decision to the contrary was wrong. Because BRB-5 was not the owner of Pad A, the order finding La Jolla liable for a wrongful lien lacked a legal foundation. Furthermore, because Interstate did not convey the property to BRB-5 in 1997, Interstate, as reflected by the Salt Lake County Tax Assessor, was the owner of the Property, until the conveyance to Carlsbad.

Even though Plaintiffs acknowledged that the October 22, 1997 deed predated the organization of BRB-5, Plaintiffs argued to the district court that Utah Code Ann. § 48-2c-404 specifically permits the transaction at issue in this case.[6] (*See* Tr. at 107:11-15.) Plaintiffs argued that BRB-5 was organized to hold Pad A, thus, the conveyance of Pad A to it was a mere incidental transaction permitted by statute. (*See* Tr. at 107:8-109:1 & 119:6-13.) Utah Code Ann. § 48-2c-404 states that "[a] company may not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until its articles of organization have been filed with the division. Nevertheless, this section may not be interpreted to invalidate any debts, contracts, or liabilities of the company incurred on behalf of the company prior to the filing of its articles of organization with the division."

Plaintiffs' expansive interpretation of this statute turns this limited exception on its head. Plaintiffs were unable to provide any cases supporting this sweeping reading of the

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[6]The transcript refers to Utah Code Ann. § 57-4-404, but is clear that Plaintiffs' counsel intended to refer to Utah Code Ann. § 48-2c-404.

statute. Plaintiffs admit that BRB-5 was designed only to own Pad A and, then, Plaintiffs argue that the transaction designed to fully carry out its *raison d'etre* was a mere incidental transaction. (*See, e.g.*, R. 369.)

Even though there do not appear to be any reported cases on this particular statute, logic dictates that "incidental" transactions referenced by the statute contemplate something far less than taking ownership of property, e.g., actions that are preparatory to filing articles of organization or commencing business. Plaintiffs' proposed interpretation would effectively overrule the litany of cases which clearly hold that one cannot convey property to a non-existing entity. By their overly generous reading of the statute, Plaintiffs would resurrect in the name of incidental transactions the de facto corporation doctrine, which was undisputedly abolished in this State. This argument should have been rejected by the trial court.

In short, title to Pad A was not conveyed to BRB-5 pursuant to the October 22, 1997 quit claim deed. BRB-5 did not exist on the date of delivery; therefore, the quit claim deed was simply a nullity.

POINT II

THE 1997 QUIT CLAIM DEED WAS NOT EXECUTED BY A PROPER SIGNATORY FOR INTERSTATE, AND DID NOT CONVEY TITLE TO BRB-5.

The 1997 quit claim deed was neither executed by, nor acknowledged on behalf of, the then owner of the property, Interstate. The very face of the instrument bears this out. The October 22, 1997 quit claim deed was signed by Barbara Busch individually, with no

statement of her position or agency to act on behalf of Interstate. The acknowledgment is that of Barbara Busch individually.

Utah law defines the meaning of "acknowledged before me," which is the phrase contained in the subject deed. According to Utah Code Ann. §57-2a-2, it means, in the case of a "natural person," that "he executed the document for the purposes stated in it." The acknowledgment in this deed, therefore, means that Barbara Busch executed the instrument individually. The trial court made no findings that Ms. Busch in fact executed the quit claim deed as an owner or officer of Interstate, or as the act of Interstate.

Plaintiffs argued below that Utah Code Ann. § 57-4a-4(g) establishes a presumption that a person executing a document as agent or officer of an entity in fact holds such position, and is authorized to act on behalf of the organization. That argument is unavailing since the statute speaks only to the status of the person as it is published on the instrument itself. For example, if a deed states that Jane Doe signed it as president of ABC Corporation, the statute accords a presumption that Jane Doe was the president of ABC Corporation and authorized to execute the deed on its behalf. On this quit claim deed, however, there is no statement whatsoever as to the purported status, agency, or position held by Barbara Busch. Instead, the deed contains only the unambiguous personal acknowledgment and signature of Barbara Busch on the deed. There can be no presumption under the statute that Barbara Busch was an officer of Interstate, or authorized to sign for Interstate, since there is no language in the deed reflecting those facts.

In addition, the evidence showed that Salt Lake County continued to recognize Interstate as the owner of Pad A, since it continued to assess taxes to Interstate. Despite ten years of receiving tax notices addressed to Interstate, neither BRB-5 nor Interstate took any action to correct the alleged defect in the deed.

Other evidence before the trial court established that the Busches did not consistently acknowledge that BRB-5 was the purported owner of Pad A. For example, in February 1998, a mere five months after the purported transfer, an entity called BRB-1, LLC, leased a portion of Pad A to Village Cleaners, Inc. Apparently, the ineffectiveness of the quit claim deed was not a cause of concern to the Busches from 1997 to 2007–it only became a matter of concern when the property was subject to rights of La Jolla as security for the $3,245,000 loan.

POINT III

THE DISTRICT COURT FAILED TO MAKE SUFFICIENT FINDINGS TO SUPPORT ITS CONCLUSION TO VOID LA JOLLA'S TRUST DEED.

At the close of the evidentiary hearing, the district court orally ruled as follows: "All right. I have determined that the – they should be declared void ab initio. Property should be– the property should be released from these liens." (Tr. at 120:20-22.) The district court entered an order to effectuate its decision and in support of the order, the district court found that on October 22, 1997, Interstate conveyed Pad A to BRB-5; the October 22, 1997 quit claim deed transferred all of Interstate's interest in Pad A to BRB-5, and BRB-5 was organized on October 24, 1997.

The district court did not make any findings that Plaintiffs' prosecution of the wrongful lien petition was within the ken of "winding up" the affairs of the now defunct company. Since BRB-5 was administratively dissolved in 2005, before the claim arose (i.e., 2007 transfer of Pad A to Carlsbad and subsequent deed of trust), it lacks authority to bring the claim now. *See Diamond T. Developments, Inc., v. Brown*, 2008 UT App 435 (claim did not arise prior to corporation's dissolution, thus, corporation was not statutorily authorized to bring action unless the suit qualified as winding up).

Additionally, the district court did not make any findings about Hales's authority (or lack of authority) to act for Interstate, BRB-5 and other entities owned or controlled by the Busches, for which he was, at least from time to time, an admitted agent.[7] Hales also had a power of attorney from the Busches. The district court failed to make any findings with respect to the powers of attorney given to Hales by Robert and Barbara Busch. The court did not address any of the issues regarding the many documents and transaction that Hales executed or authorized on behalf of BRB-5 and other Busch entities, which were not

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[7]2Where one of two innocent parties must suffer a loss, the law generally leans toward placing the loss upon the one who made the choice and created the circumstances out of which the loss came about. *See Hanson v. Beehive Sec. Co.*, 14 Utah 2d 157, 380 P.2d 66 (Utah 1963); *G. Eugene England Found. v. Smith's Food King No. 6*, 542 P.2d 753, 755 (Utah 1975); *Valley Bank and Trust Co. v. Gerber*, 526 P.2d 1121 (Utah 1974); *Transfer Realty Co. v. Lichfield*, 84 Utah 163, 33 P.2d 179 (1934); 27 Am.Jur. 2d Equity § 146. In this case, the Plaintiffs and the Busches allowed and permitted Hales to act as a officer of Interstate, a manager of BRB-5, and an attorney in fact for Barbara and Robert Busch. If the Busches did not keep informed as to their agent's activities and failed to take action accordingly, they should bear the risk of adverse consequences, not innocent lenders like La Jolla.

challenged by the Plaintiffs. Furthermore, the court did not make any findings about the intent of the grantor of the October 22, 1997 quit claim deed; namely, when the deed was intended to be delivered to BRB-5.

The sole support for the voiding of the La Jolla deed of trust was the asserted validity and vitality of the October 22, 1997 quit claim deed. Indeed, Plaintiffs' attorney argued as much in oral argument: "I think when you boil this down to its essence, the question really is, is Exhibit 5, the Interstate Income Properties to BRB-5, is that a valid deed." (Tr. at 105:20-23.) Or, stated another way, "... if that deed's good, their deed is not good." (Tr. at 111:18-19.)

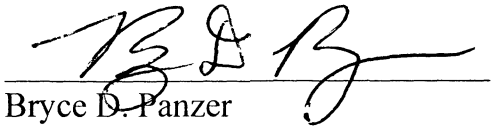
Since Plaintiffs and the district court relied solely on the efficacy of the October 22, 1997 deed to trump the later quit claim deed to Carlsbad, and thereby void the La Jolla trust deed, it only follows that the failure of the October 22, 1997, deed would likewise irreparably disturb the trial court's judgment. There are no other findings on the record to support the trial court's decision.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court and, if necessary, remand for further proceedings.

DATED this 5th day of April, 2010.

BLACKBURN & STOLL, LC



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CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for certain defendants, and that on the 5th day of April, 2010, she served the **BRIEF OF APPELLANTS** (Utah Ct. App., Case No. 20100025), along with a courtesy CD, upon the following counsel of record by first-class mail, postage prepaid:

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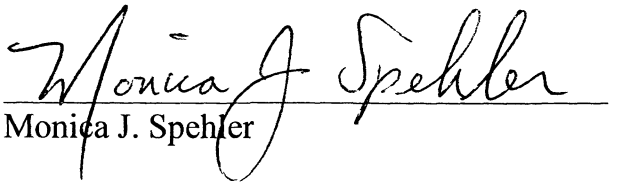

Monica J. Spehler

ADDENDA

"A" – September 29, 2009 Order Re: Plaintiffs' Petition to Nullify Wrongful Lien

IMAGED

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FILED DISTRICT COURT
Third Judicial District
SEP 29 2009
SALT LAKE COUNTY
By Deputy Clerk

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 10/05/09

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

Interstate Income Properties, Inc., a Utah Corporation, and BRB-5 A, LLC, a Utah Limited Liability Company, Plaintiffs, vs. D. Gregory Hales aka Don Gregory Hales aka D. Robert Hales; et al. Defendants.	**ORDER RE: PLAINTIFFS' PETITION TO NULLIFY WRONGFUL LIEN** Case No. 090907394 Judge Kate Toomey

On August 17, 2009, the parties appeared for an evidentiary hearing regarding Plaintiffs' Petition to Nullify Wrongful Lien. Upon consideration of the following pleadings: Petition to Nullify Wrongful Lien, Motion to Continue the Hearing on Petition to Nullify Wrongful Liens and to Permit Discovery, and in Opposition to the Petition (and its supporting memorandum), Opposition to Motion to Continue the Hearing on Petition to Nullify Wrongful Liens and to Permit Discovery and Reply to the Opposition to the Petition, the Trial Brief of La

29-09

Jolla Loans, Inc. re: Wrongful Lien Petition, and the Plaintiffs' Supplemental Reply to Opposition to the Petition to Nullify Wrongful Lien and upon receiving testimony of witnesses and documentary evidence at the hearing, the Court does hereby find as follows:

1. On November 24, 1994, Interstate Income Properties, Inc. received, by warranty deed, real property more commonly known as Pad A.

2. Pad A includes all of the property included in the following legal description:

> BEGINNING at a point on the South line of Alta Canyon Drive, said point being South 89°40'33" East along the Section line 855.75 feet and South 0°19'27" West 60.00 feet from the Northwest corner of Section 3, Township 3 South, Range 1 East, Salt Lake Base and Meridian, thence along said South line Sough 89°40'33" East 28.30 feet to a point of 431.11 foot radius curve, the center of which bears South 0°19'27" West; thence along said South line and said curve to the right through a central angle of 16°29'43" a distance of 124.18 feet; thence South 12°00'22" West 131.75 feet; thence North 77°52'00" West 150.76 feet; thence North 1146'12" East 118.27 feet to the point of BEGINNING.

3. On October 22, 1997, Interstate Income Properties, Inc. transferred Pad A, by Quit-Claim Deed, to an entity named BRB – 5, LLC.

4. This Quit-Claim Deed satisfied the statutory requirements of U.C.A. § 57-1-13 and was signed by Interstate's authorized agent.

5. The October 22, 1997 Quit-Claim Deed transferred all of Interstate's interest in Pad A to BRB – 5, LLC

6. This Quit-Claim Deed was properly recorded on October 24, 1997 at the Salt Lake County Recorder's Office. The entry number of the Quit-Claim Deed is 6771814, book 7789, page 0852.

7. On May 10, 2007, D. Gregory Hales, purporting to be an authorized Vice President of Interstate, signed a Quit Claim Deed transferring Interstate's interest in Pad A to Carlsbad Development, LLC.

8. On June 6, 2007, Carlsbad Development, LLC executed a Deed of Trust in which it was the trustor, Founder's Title Company was the trustee, and La Jolla Loans, Inc. was the beneficiary.

9. La Jolla Loans, Inc. requested that this Deed of Trust be recorded.

10. This Deed of Trust was recorded on June 8, 2007 at the Salt Lake County Recorder's Office. The entry number of the Deed of Trust is 10126404, book 9475, page 5663.

11. On June 6, 2007, another entity named Carlsbad Development II, LLC also executed a Deed of Trust in which it was the trustor, Founder's Title Company was the trustee, and La Jolla was the beneficiary.

12. La Jolla Loans, Inc. also requested that this Deed of Trust be recorded against Pad A.

13. This Deed of Trust was recorded on June 8, 2007 at the Salt Lake County Recorder's Office. The entry number of the Deed of Trust is 10126405, book 9475, page 5703.

14. On May 13, 2009, BRB – 5 sent a written request to La Jolla Loans, Inc. to remove the Deeds of Trust that it had recorded against Pad A.

15. As of the date of the hearing, La Jolla Loans, Inc. had not removed the Deeds of Trust.

Based upon the above findings, the Court does hereby ORDER, ADJUDGE, and DECREE as follows:

1. Plaintiffs' Petition to Nullify Wrongful Lien is GRANTED.

2. The Deed of Trust recorded on June 8, 2007, as entry number 10126404, book 9475, pages 5663-5702, naming Carlsbad Development, LLC as Grantor, La Jolla Loans, Inc. as Grantee, and Founders Title Company as Trustee is hereby declared NULL and VOID AB INITIO as an encumbrance on the title of Pad A (but not as to the other parcels of property identified in the Deed of Trust).

3. The Deed of Trust recorded on June 8, 2007, as entry number 10126405, book 9475, pages 5703-5747, naming Carlsbad Development II, LLC as Grantor, La Jolla Loans, Inc. as Grantee, and Founders Title Company as Trustee is hereby declared NULL and VOID AB INITIO as an encumbrance on the title of Pad A (but not as to the other parcels of property identified in the Deed of Trust).

4. The above Findings and Orders are to be recorded in the Office of the Salt Lake County Recorder.

5. Pursuant to U.C.A. § 38-9-7, Plaintiffs are awarded their costs and reasonable attorney's fees incurred against La Jolla Loans. Based upon the Attorney's Fee Affidavit submitted by Plaintiffs' counsel, Plaintiffs are awarded $26,212.50. KT

DATED this 21 day of Sept, 2009.

BY THE COURT:

Kate Toomey

Judge Kate Toomey
Third Judicial District Court

Approved as to form:

DATED: 23 day of September, 2009.

Stephen Quesenberry
Aaron R. Harris
Attorneys for Plaintiffs

Approved as to form:

DATED: 22nd day of September, 2009.

Bryce D. Panzer
Attorney for Defendant La Jolla Loans, Inc.

ADDENDA

“B” – October 22, 1997 Quit-Claim Deed

6771814

Recorded at Request of Interstate Income Properties

at ..... M. Fee Paid $.....

by ..... Dep. Book ..... Page ..... Ref.: .....

Mail tax notice to BRB-5 a LLC Company Address P.O. Box 71494, SLC, UT 84171

QUIT-CLAIM DEED

Interstate Income Properties grantor
of Sandy County of Salt Lake State of Utah, hereby
QUIT-CLAIM to

BRB-5 a LLC Company

P.O. Box 71494, SLC, UT 84171 grantee
of for the sum of
Ten and no/100********** DOLLARS,

the following described tract of land in County,
State of Utah:

PAD "A" Sidwell #28-03-102-041-0000

BEGINNING AT A POINT ON THE SOUTH LINE OF ALTA CANYON DRIVE SAID POINT BEING SOUTH 89° 40'33" EAST ALONG THE SECTION LINE 855.75 FEET AND SOUTH 0° 19'27" WEST 60.00 FEET FROM THE NORTHWEST CORNER OF SECTION 3, TOWNSHIP 3 SOUTH, RANGE 1 EAST, SALT LAKE BASE AND MERIDIAN; THENCE ALONG SAID SOUTH LINE SOUTH 89° 40'33" EAST 28.30 FEET TO A POINT OF A 431.33 FOOT RADIUS CURVE THE CENTER OF WHICH BEARS SOUTH 0° 19'27" WEST; THENCE ALONG SAID SOUTH LINE AND SAID CURVE TO THE RIGHT THROUGH A CENTRAL ANGLE OF 16° 29'43" A DISTANCE OF 124.18 FEET; THENCE SOUTH 12° 00'22" WEST 131.75 FEET; THENCE NORTH 77° 52'00" WEST 150.76 FEET; THENCE NORTH 11° 46'12" EAST 118.27 FEET TO THE POINT OF BEGINNING. CONTAINS 19,499 SQUARE FEET.

WITNESS the hand of said grantor, this 22nd day of October, A. D. one thousand nine hundred and 97

Signed in the presence of

x Barbara J. Busch

STATE OF UTAH,
County of } ss.

On the 22nd day of October A. D. one thousand nine hundred and 97 personally appeared before me Barbara J. Busch

the signer of the foregoing instrument, who duly acknowledge to me that She executed the same.

My commission expires 5-10-99 Address:

DIGNA MARCHELO
NOTARY PUBLIC - STATE OF UTAH
5585 S.O. UNION PARK AVE. #235

BK7789PG085

BLANK NO. 103

6771814
10/24/97 1:03 PM 10.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
BARBARA J BUSCH
PO BOX 71494
SLC UT 84171
REC BY:Z JOHANSON ,DEPUTY - WI

BK7789PG0853