

1988

# John M. Whiteley, Barbara Whiteley and Elan Management, Inc. v. Sidney Seftel, Theresa Seftel : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 88-0248-CA

JOHN M. WHITELEY, BARBARA :  
WHITELEY and ELAN MANAGEMENT, :  
INC., a Utah corporation, :

Plaintiffs and Respondents, :

v. :

SIDNEY SEFTEL and :  
THERESA SEFTEL, :

Defendants and Appellants, :

Case No. ~~868162~~

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88-0248

RESPONDENTS' BRIEF

Appeal from an Amended Judgment and  
Judgment Vesting Title in Lieu of Conveyance of Title  
of the Third Judicial District Court of Salt Lake County  
Judge Judith M. Billings

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN M. WHITELEY, BARBARA :  
WHITELEY and ELAN MANAGEMENT, :  
INC., a Utah corporation, :  
: :  
Plaintiffs and Respondents, :

v. :

Case No. 860162

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SIDNEY SEFTEL and :  
THERESA SEFTEL, :  
: :  
Defendants and Appellants, :

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## STATEMENT OF FACTS

Respondents (hereinafter "Plaintiffs" or "Whiteleys") generally concur with the comments made in Appellants' (hereinafter "Defendants" or "Seftels") brief under the heading Statement of Facts. However, additional facts are presented herewith to clarify some of the incomplete statements and misconceptions which may be obtained by referring to Defendants facts.

On March 6, 1985 Barbara Whiteley took by assignment an interest in the Uniform Real Estate Contract previously entered between Defendants and Randy Call in 1981. (R. at 458.) On March 11, 1985 she accepted an offer for the purchase of the subject property from Terry and Jo Anne Bowns. (R. at 458.) The closing of this transaction was to have been conducted in the offices of Associated Title Company at which time the total amounts owing to Defendants, plus the underlying obligation, were to be paid. (R. at 458-59.) Whiteleys made several attempts to obtain the specific amounts owing to Defendants under the contract, and amounts owing on the underlying loan, by telephone conversations with Defendant Sidney Seftel, with Defendants' attorneys, and by a personal meeting with Defendants' attorneys. (R. at 459-60.) Defendants and their attorneys failed and refused to advise Whiteleys as to the amount which Defendants claimed was owing. (R. at 459.) Whiteleys were ready, willing and able to pay to Defendants the

amounts owing, if Whiteleys would have been able to determine that amount. (R. at 463-65.)

On September 19, 1985, Plaintiff John Whiteley, sent a letter to Defendants by certified mail advising them that the funds to pay the balance due on the property had been placed with Beehive Title Company. (R. at 461.) Plaintiffs' tender required Defendants to release any and all interests they had in the property. (R. at 461-62.) At the time this letter was mailed by Plaintiffs, certain monies were held in escrow by Beehive Title Company. (R. at 462.)

Other specific facts pertinent to this Appeal are detailed throughout the body of Respondents' brief, and are incorporated herein by reference.

#### SUMMARY OF ARGUMENTS

POINT 1: Plaintiffs' offers to deposit and release funds held by third party escrow agents was a sufficient "money equivalent" to result in a valid tender. Additionally, Plaintiffs' tender was unconditional in that Plaintiffs were prepared to perform, in full, if Defendants were willing to live up to their contractual obligations.

Even should this Court determine that Plaintiffs' tender was insufficient, the trial court's decision should be upheld since the trial court further determined that Defendants' conduct excused Plaintiffs from tendering in a form different

than that undertaken by Plaintiffs. Since Defendants have not contended that this conclusion of the trial court was in error, the trial court's decision must stand.

POINT 2. Sufficient evidence exists on the record to support the trial court's findings that the Plaintiffs had asked Defendants to specify the amounts owing on or about March 11, 1985. Moreover, Defendants had previously stipulated as an uncontested fact that Plaintiff John Whiteley had contacted Defendant Sidney Seftel and informed him Plaintiffs were prepared to pay all amounts owing, but that Defendants and their attorney refused to provide Plaintiffs with that information.

Sufficient evidence also existed to support the findings that Associated Title Company had acted as an escrow agent and had advised Defendants that they would be paid. Defendants had further stipulated as an uncontested fact that they had been contacted by Associated Title Company who inquired about the amounts Defendants claimed to be owing under the contract.

POINT 3. While Plaintiffs were admittedly delinquent in their payments as required by the express terms of the Uniform Real Estate Contract, such delinquency had no legal consequence until the Defendants strictly complied with one of the three remedies prescribed by Paragraph 16 of the contract, thereby informing the Plaintiffs what must be done for the protection

of their purchasers' interest. Until such time Whiteleys had full contractual rights and, therefore, were not in default of the contract.

POINT 4: Since, as spelled out more fully in Points 1 and 2, supra, Plaintiffs undeniably tendered payment to Defendants, or were excused from such tender by Defendants' conduct, Defendants were in breach under the express terms of the contract by not fulfilling their contractual obligations, and by not conveying title to the Plaintiffs as provided by Paragraph 8 of the Uniform Real Estate Contract.

POINT 5: The Uniform Real Estate Contract entered into between the parties requires the defaulting party to pay the non-defaulting party's attorney fees incurred in the enforcement of the contract, in obtaining possession of the property, or in pursuing any remedy provided by the statutes of the State of Utah. Since Plaintiffs properly tendered, or said tender was excused, and Defendants failed to convey title, Plaintiffs were properly awarded attorney's fees. All of Plaintiffs' efforts, and the efforts of Plaintiffs' attorneys, were directed toward the enforcement of the Plaintiff's rights under the contract. Further, the trial judge's ruling was an order enforcing the contract. Since the clear evidence produced at trial supported this ruling, the award of attorney's fees was correct.

POINT 6: The trial court's determination that Plaintiffs had properly tendered, or were excused therefrom, and the finding that Defendants had breached the express terms of the Uniform Real Estate Contract, precluded any possibility of Defendants recovering under the claims of their counter-claim. Therefore, the trial court properly prohibited Defendants from presenting their counter-claim.

Alternatively, Defendants had rested their case previous to their request to present evidence on their counter-claim and thereby were precluded from proceeding further. Therefore, the trial court's ruling was correct.

POINT 7: The trial court's granting of Plaintiffs' Motion for a Judgment Vesting Title in Lieu of Conveyance was correct for two reasons. First, the injunction previously entered by the trial court on October 15, 1985, which prohibited Defendants from forfeiting Plaintiffs' interest, was still in effect pending the final adjudication of this appeal, or a termination of the period for appeal. Therefore, the injunction remained in effect after the trial and prohibited Defendants from forfeiting under the terms of the contract.

Second, the express terms of Paragraph 16 of the Uniform Real Estate Contract prohibited the Defendants from declaring a forfeiture until such time as a payment by the Plaintiffs was thirty days past due. Since the trial court ordered Plaintiffs to make payments by September 11, 1986, by the express terms of

the contract, Defendants could not declare a forfeiture until thirty days after said date. Defendants' purported notice of default was delivered before the expiration of this thirty day period, and therefore was invalid. Since Plaintiffs fully performed before the expiration of this period, the trial court's granting of Plaintiffs' Motion for a Judgment Vesting Title in Lieu of Conveyance was correct.

#### ARGUMENT

POINT 1. THE STATEMENTS MADE BY WHITELEYS, AND BY THE TWO TITLE COMPANIES, CONSTITUTED SUFFICIENT AND PROPER TENDER. ALTERNATIVELY, TENDER IN ANY OTHER FORM WAS EXCUSED BECAUSE OF DEFENDANTS' CONDUCT.

The trial court, in its Findings of Facts and Conclusions of Law, correctly found that the "declarations and statements made by Plaintiff, John Whiteley, and by Associated Title Company and Beehive Title Company constituted sufficient and proper tender to Defendants of the total amounts then due and owing to Defendants under the Uniform Real Estate Contract." (Conclusion of Law No. 1; R. at 467.) Defendants maintain that this conclusion was error because Plaintiffs never produced money or its equivalent, and because Plaintiffs' offer was conditioned upon Defendants releasing their interest in the property.

As recognized by Defendants in their brief, at page 11, a valid tender does not require an actual production of the

money. A tender is sufficient if a money "equivalent" is offered. Zions Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975). Defendants' argument ignores the fact that Associated Title Company, as a third party escrow agent, would have held funds sufficient to make payment of the amounts due to the Defendants under the Uniform Real Estate Contract had the Defendants, or their agents, simply informed the Whiteleys or Associated Title Company of the amounts then owing. Additionally, Defendants' argument also ignores the fact that Defendants, and/or their agents, were informed in both August and September, 1985, that Beehive Title Company had on deposit sufficient funds to pay the amounts then owing to the Defendants. However, again, Defendants and their agents refused to release the requested information. (R. at 466.) Clearly these amounts held by the escrow agents were sufficient to constitute the requisite "equivalent to cash."

This Court has previously recognized that tender is sufficient when a check is left with a bank, and the seller is informed that the check is available (Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah 1976)) and that the mere telephoning with an offer of payment is sufficient to constitute a tender (Romero v. Schmidt, 15 Utah 2d 300, 392 P.2d 37 (Utah 1964)). A California court, in facts similar to those in the instant case, recently held funds deposited in a bank, which was prepared to deliver the funds to the escrow (not even to the seller) if requested, was sufficient to constitute "the

equivalent of cash" and that the tender was sufficient. Hutton v. Gliksberg, 128 Cal. App. 3d 240, 180 Cal. Rptr. 141, 145 (1982). The amounts held by the title companies as escrow agents were patently sufficient to be considered equivalent to cash in this case.

Defendants next contend that Whiteleys' tender was insufficient since the tender was conditioned upon Defendants' release of their interest in the property. Defendants' contention cannot stand. Plaintiffs' tender was unconditional in that Plaintiffs were prepared to perform, in full, if Defendants were willing to live up to their contractual obligations. Escrow closings traditionally require that both parties perform concurrently as a protection for both buyer and seller. Therefore, it is unreasonable to conclude that Plaintiffs' tender was insufficient because the general rules of escrow closing required the Defendants to perform as required by their contract.

The above general principle was supported and recognized in this Court's decision of Hansen v. Christensen, 545 P.2d 1152 (Utah 1976). In Hansen, the Plaintiff went to Defendant's home and offered full payment, which Defendant refused. The Plaintiff then left a check for the full amount with the bank, and the Defendant received notice that the money was available, "in exchange for a deed." Id. at 1153. Despite the fact that, as in this case, the tender required the Defendant to produce a deed at the same time as receiving

payment, the Court held that the actions of the Plaintiff constituted sufficient tender. Id. at 1154.

Defendants' reliance on the Utah Supreme Court's decision of Beckstead v. Smith, 656 P.2d 1003 (Utah 1982), is misplaced. In Beckstead, the purchaser had stipulated that no valid tender had been made. The only issue for the court to decide was whether the buyer was excused from tendering because of the seller's behavior. Id. at 1004. Even were this Court to decide that the Beckstead decision was binding, the conclusions reached by Defendants are inconsistent with the holding in Beckstead. There this Court merely held that the seller's performance of conveyance is conditioned upon, and not concurrent with, the buyer's performance of payment. Id. at 1004. As stated above, the buyer's performance can be by tendering the "equivalent" of payment, which Whiteleys did by setting up an escrow agent and informing Defendants of the arrangement. Once Whiteleys validly tendered, they had performed sufficiently to require Defendants to perform their contractual obligations by releasing the payoff information to Plaintiffs.

Even should this Court determine that Plaintiffs' tender was insufficient, the trial court's ruling should not be overturned. Defendants do not contend that the trial court's Conclusion of Law No. 2 was error. That Conclusion of Law, in essence, states that Whiteleys were excused from making a valid tender because of Defendants' conduct, which frustrated

Plaintiffs' attempts to tender. (R. at 467.) Since this conclusion was not challenged by Defendants, and since it leads to the same result as if Plaintiffs' tender had been valid (i.e. Plaintiffs were not in default under the terms of the Uniform Real Estate Contract, while Defendants were), this Court should affirm the trial court's decision.

POINT 2. SUFFICIENT EVIDENCE EXISTS TO SUPPORT THE TRIAL COURT'S FINDINGS THAT WHITELEYS ASKED DEFENDANTS WHAT WAS OWING ON MARCH 11, 1985, AND THAT ASSOCIATED TITLE ACTED AS AN ESCROW AGENT AND ADVISED DEFENDANTS THAT THEY WOULD BE PAID.

This Court has held that "[t]o mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Scharf further recognizes that this requirement puts on the Appellant a "heavy burden." Id. at 1070. The arguments made by Defendants in their brief, at Argument II, Page 15, simply do not meet this burden.

Defendants maintain that there is no factual basis for the finding that Plaintiff John Whiteley, during a telephone conversation on March 11, 1985, requested Defendant Sidney Seftel to advise him as to the amount owing under the contract. Defendants' claim that Plaintiff John Whiteley

testified at trial that he knew how much was owing to Western Savings and Loan, and to the Defendants, and that therefore Plaintiffs were aware of the amounts owing. The portions of the trial transcript cited by Defendants in their brief simply do not support their contentions. For example, Plaintiff John Whiteley testified:

Q. So in February you knew the amount that was due to Western Savings and Loan?

A. Approximately.

(Transcript of Trial, page 109, lines 2-4; R. at 595.) It goes without saying that having an approximate knowledge of the amounts owing in February is not the same as knowing the amounts due in March.

In the Stipulated Statement of Contested and Uncontested Facts, Defendants acknowledge that they had claimed they had an equity in the property and did not until April 14, 1986 (more than one year after Mr. Whiteley's first inquiry as to the amount claimed to be owing) cause Plaintiffs to be advised that they no longer so claimed. (Uncontested Fact #22 and #32, R. at 275 and 279.) Plaintiffs' concern was not only with what contract payments were owing, but the total of all amounts which Defendants claimed to be due them under the contract.

There was further evidence that Plaintiff John Whiteley asked Defendants for information regarding the amounts owing. In his previous testimony he told of a telephone conversation with Defendant Sidney Seftel in which he informed Mr. Seftel

that a buyer had been found, and that he expected to fully pay whatever was owing. (Trial Transcript pages 78-80, R. at 562 to 564.) Mr. Whiteley further testified:

Q. Did you have any further conversation with him [Defendant Sidney Seftel]?

A. I think that I called him another time a little later to tell him the same thing and to find out what he claimed was owing.

Q. Did you make any further attempts to contact Mr. Seftel?

A. I think I made two or three phone calls after that and left word for him to call or talked to his wife and asked her to have him call. And he didn't return the calls.

(Trial Transcript page 80, lines 14-17, 21 to page 81, line 1; R. at 564-65.)

When John Whiteley was shortly thereafter asked to explain the purpose of the phone calls, he responded:

Q. And the purpose for the phone calls, again, to Mr. Seftel?

A. Was to assure him that we were proceeding with this sale and that we needed his figures and that the payoff was imminent.

(Trial Transcript, page 81, lines 13 to 15; R. at 565.) Mr. Whiteley further testified that these conversations took place around March 11, 1985. (Trial Transcript page 81, lines 21-22;

R. at 565.) The above statements patently support the trial court's Finding of Fact that Plaintiffs asked Defendants what was owing on or about March 11, 1985, and that Defendants refused to give this information to them.

Additionally, Defendants previously stipulated, in the Stipulated Statement of Contested and Uncontested Facts, that it was an uncontested fact that Plaintiff John Whiteley telephoned Defendant Sidney Seftel and informed him that Plaintiffs were prepared to pay all amounts owing (Uncontested Fact #19, R. at 274-75), and that Defendants did not advise Plaintiffs as to the amounts claimed owing (Uncontested Fact #20, R. at 275). Uncontested Fact #20 (R. at 275) goes on to reveal that "Plaintiff John Whiteley made additional attempts to obtain information regarding the amount claimed by Mr. Seftel to be owing under the contract [but that] Defendants and their attorneys failed and refused to provide Plaintiffs with the requested information." These facts, stipulated to by Defendants, further support the trial court's findings.

The Defendants next contend that there were insufficient factual evidence to find that Mr. and Mrs. Bowns were prepared to complete the purchase of the property from Plaintiffs and would have completed it if Defendants had provided the requested information as to the amounts owing. At trial, Mrs. Jo Anne Bowns, after testifying that they were prepared to purchase the subject property, stated:

Q. Did you complete the purchase of that property?

A. No, we didn't.

Q. And why not?

A. The owner couldn't come up with free title on it, clear title, I guess that's what you call it.

(Trial Transcript, pages 22, lines 24-25, page 23, lines 1-3; R. at 507-508.) Again, as further clarified in the statements by Plaintiff John Whiteley above, the reason Plaintiffs could not obtain clear title was because Defendants refused to specify the amount that needed to be paid off.

Defendants further contend that the trial court's findings that Associated Title Company was involved in the Bowns' sale as a third party escrow agent, which would hold sufficient funds to make payment of the amounts owing, was not supported by substantial evidence. However, testimony by Blake T. Heiner, vice-president and legal council of Associated Title, and especially Plaintiff's Exhibit 11, introduced into evidence through Mr. Heiner, support the trial court's findings. (See Trial Transcript, pages 67 to 74; R. 551-58.) Specifically, Exhibit 11 indicates that \$53,961.00 was held by Associated Title Company at the critical time. Such was clearly sufficient to pay the amounts due and owing to Defendants, if Respondents or Associated Title would have properly been given the requested information.

Finally, Defendants stipulated as an uncontested fact that, in connection with the proposed sale of the property to the Bowns, "certain employees at Associated Title Company

contacted the Defendants to inquire about the amounts Defendants claimed to be owing under the subject contract" (Uncontested Fact #25; R. at 276). All of the above constitutes substantial support for the trial court's findings.

POINT 3: THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS WERE NOT IN DEFAULT UNDER THE UNIFORM REAL ESTATE CONTRACT.

Contrary to the conclusion reached by Defendants in Argument III of their brief, Plaintiffs were not in default under the terms of the Uniform Real Estate Contract such as to terminate their rights under the contract. Defendants confuse "delinquency" or "default in payment" with a contractual default sufficient to preclude further rights under the contract.

Contract payments were due on the 1st day of the month. Remedies to enforce payment were available to the contract seller only after a payment was more than thirty days delinquent. (Uniform Real Estate Contract, Plaintiffs' Trial Exhibit #1.) Payments were made through February, 1985. (Stipulated Fact #24, R. at 276.) Mr. Whiteley testified that on March 11, 1985 he requested Mr. Seftel to tell him the amounts owing under the contract. The thirty day grace period had not yet run as to the payment due March 1st. The requested information was not provided and no payments were thereafter made until the payment of October 21, 1985. (Stipulated Fact #24, R. at 276.)

While Plaintiffs were admittedly delinquent or in default in their post February, 1985 payments as required by the express terms of the Uniform Real Estate Contract, such delinquency had no legal consequence until the Defendants strictly complied with one of the three alternative remedies of Paragraph 16 of the contract, thus putting the Plaintiffs on notice of what remedial measures must be initiated to protect their interest. Before that occurred, the Plaintiffs-purchasers had full contractual rights and, therefore, were not in "default" under the contract.

This Court has held that full contractual rights remain pending the contract seller's strict compliance with the requirements of Paragraph 16. In Hansen v. Christensen, 545 P.2d 1152 (Utah 1976), the Court stated that "the contractual relations between seller and buyer are in existence until such time as the seller chooses to notify the defaulting buyer of its election to proceed under one, or all, of its options." Id. at 1154. Similarly, the Court stated in a case cited by Defendants in their brief, Hadlock v. Showcase Real Estate, Inc., 680 P.2d 395 (Utah 1984), that the sellers have "no cause of action" until the Paragraph 16 requirements have been strictly complied with. Id. at 398. Further, the Court has said the "provisions of the Uniform Real Estate Contract are not self-executing, and to enforce them, it requires some affirmative act on the part of the seller to notify the buyer of what specific provision in the contract the seller is

proceeding under and state what the buyer must do to bring the contract current." Grow v. Marwick Development, Inc., 621 P.2d 1249, 1251-52 (Utah 1980), citations omitted. See also Pomeroy on Specific Performance of Contracts (3d Ed.), §393, p. 836, wherein it is said:

If the clause be not absolute that the contract shall be ipso facto void upon a default in payment at the time, that its object in its language is to give the vendor his election and power to put an end to the agreement upon the vendee's failure in paying at the appointed day, then the vendor, if he intends to avail himself of the provisions must give the purchaser a timely and reasonable notice of his intention to avoid the contract, or must do some unequivocal act which unmistakably shows that intention, for the vendor cannot treat the default alone as terminating the agreement. (Emphasis added.)

The above was recognized by the Utah Supreme Court to be a "correct doctrine" in Leone v. Zuniga, 84 Utah 417, 34 P.2d 699, 703 (1934).

On August 28, 1985, Defendants mailed to John Whiteley a notice (Plaintiffs' Trial Exhibit #8) advising of default and the election to pursue the forfeiture remedy prescribed by Paragraph 16A of the contract. (Stipulated Fact #29, R. at 278.) No previous Paragraph 16 election had been given. By this time numerous attempts had been made both by John Whiteley at Associated Title Company months earlier to pay off the contract balance. Plaintiffs had lost their April 1985 sale to Mr. and Mrs. Bown. Additionally during the month of August, Beehive Thrift had attempted to obtain information from Defendants so to pay off the contract balance. (Testimony of Grant G. Orton; R. at 527-528.) Finally, Defendants filed

their counterclaim in this action seeking recovery of damages under Paragraph 16B of the contract, rather than the Paragraph 16A forfeiture remedy elected by their letter of August 28, 1985.

Defendants had failed to properly comply with any of the provisions of Paragraph 16 of the Uniform Real Estate Contract. Plaintiffs, therefore, were not placed in default under the contract. Defendants cite to this Court's ruling in Fireman's Insurance Co. v. Brown, 529 P.2d 419 (Utah 1974), for support of their contention that each month's failure to pay resulted in a default by Plaintiffs. However, a close look at the result of that case leads to an opposite conclusion. In Fireman's Insurance Co., the Court allowed the buyer to receive title to the property even though he was over twenty months behind in payments. The seller had improperly given notice to the purchaser. She had not strictly complied with the requirements of the default provisions of the Uniform Real Estate Contract. Contrary to Defendants' contention, the Court merely concluded that it is obvious the purchaser was in default of his payments. Id. at 420. This delinquency or default in payments did not lead to the result that the purchaser was in default under the contract, and had no rights thereunder. In the instant case, while Plaintiffs were admittedly delinquent or in default of some payments, that delinquency was occasioned by the "straight arm" tactics of Defendants who had failed to pursue their contract remedies.

The Plaintiffs still had full rights under the Uniform Real Estate Contract to require Defendants to advise them as to the balance they claimed as owing under the contract and to accept payment thereof and deliver title to the land subject of the contract.

POINT 4: THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANTS HAD BREACHED THEIR CONTRACTUAL OBLIGATIONS UNDER THE UNIFORM REAL ESTATE CONTRACT.

Defendants maintain that the trial court incorrectly ruled that they were in default under the terms of the Uniform Real Estate Contract. Defendants principal contention is that Plaintiffs were obligated to bring all past payments current before Defendants were under any obligation to deliver a deed. While Defendants state the correct law, they apply the law incorrectly to the facts in this case. As supported by the facts, and more specifically spelled out in Points 1 and 2, supra, Plaintiffs clearly and undeniably tendered and offered to pay to Defendants the entire amounts owing under the contract, including the delinquent payments that were owing at that time. If Defendants or their agents would have merely informed Plaintiffs or either title company of the total amounts owing, that amount would have been paid to Defendants. It is unreasonable to argue that since the delinquent payments had not been paid, Defendants could not be in default, especially since those amounts were in fact tendered by

Plaintiffs, or at the very least, tender was excused because of Defendants' conduct. This Court has accepted the rule that:

there is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the others performance of his obligations thereunder; and that one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused.

Zions Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975) (footnotes omitted).

Additionally, while Defendants initially claimed that they had an equity in the subject property (Uncontested Fact #22; R. at 275), not until April 14, 1986 did they inform Plaintiffs that they were no longer claiming any such equity.

(Uncontested Fact #32, R. at 279.) As the Defendants were themselves unable to accurately and timely identify what amount they were claiming under the contract, they could not fault the Plaintiffs for not making payment of said amounts.

The Faulkner cases cited by Defendants in Argument IV of their brief are factually distinguishable and are not supportive of the contentions raised by Defendants. Faulkner v. Farnsworth, 665 P.2d 1219 (Utah 1983); Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986). In the Faulkner cases, the Court limited its discussion to the award of attorney's fees, and was not addressing the explicit provisions of the contract. Further, the facts of Faulkner reveal that the purchaser never tendered payment to the seller, as was done by the Plaintiffs in the instant case.

POINT 5: THE TRIAL COURT WAS CORRECT IN ITS AWARD  
OF PLAINTIFFS' ATTORNEYS FEES.

Defendants, in their brief, have correctly stated the law as being that when parties have agreed by contract to the payment of attorney's fees, the court may award fees in accordance with the terms of the agreement, Turbo Management, Inc. v. Haggas Management, 645 P.2d 667 (Utah 1982), and that a party is entitled to those fees attributable to the successful vindication of contractual rights within the terms of the agreement, Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984). Additionally, it is generally recognized that the amount of attorney's fees to be awarded is within the sole discretion of the trial court. Id. at 858. Contrary to the conclusion reached by Defendants, however, and as more fully spelled out in Points 3 and 4, supra, the trial court properly concluded that Plaintiffs were not in default under the terms of the contract and that Defendants' breached the contract by refusing to permit payment by Plaintiffs and refusing to deliver to Plaintiffs title to the property. Since the above rulings by the trial court were patently correct, the Court's award to Plaintiffs of attorney's fees as provided in Paragraph 21 of the Uniform Real Estate Contract was also correct.

Also contrary to Defendant's conclusions, the trial court's award of attorney's fees was made on the basis of findings of fact supported by evidence and an appropriate conclusion of law. Plaintiffs, and their attorneys, from the

beginning made it clear that they were attempting to enforce the express provision of the Uniform Real Estate Contract. Their efforts have been directed at attempting to enforce the express provisions of the contract and to obtain a "successful vindication of contractual rights within the terms of [the] agreement." Trayner, supra, at 858. Plaintiffs pursued and obtained injunctive relief against Defendants precluding any forfeiture or foreclosure of the contract pending final adjudication of all issues. Finally, they obtained a conveyance of the property as required by the terms of the contract.

Additionally, there can be no doubt that the trial court judge's ruling was an order enforcing the contract. The trial court, as urged by Plaintiffs, looked to Rule 54(c) of the Utah Rules of Civil Procedure which specifies that "every final judgment shall grant the relief which the party in whose favor it is rendered is entitled . . . ." The evidence introduced at trial supported the trial judge's ruling. Therefore, Plaintiffs' efforts were attributable to the successful vindication of Plaintiffs contractual rights and the award was correct.

POINT 6: THE TRIAL COURT'S REFUSAL TO ALLOW  
DEFENDANTS TO PRESENT THEIR  
COUNTER-CLAIM WAS NOT ERROR.

Defendants argue that the trial court committed reversible error in refusing to allow presentation of evidence on their

counter-claim. The counter-claim sought damages, pursuant to Paragraph 16B of the Uniform Real Estate Contract, as well as for any amounts realized by Plaintiffs from any sale of the property. Claim was further made for costs and attorney's fees. (R. at 70-75.)

The trial record indicates that at the end of Defendants' case-in-chief, Defendants' counsel rested his case. No evidence had been offered or presented as to Defendants' attorney's fees. The record reflects the following exchange:

Mr. Jackson: That's all the questions I have, Your Honor.

Mr. Weston: Nothing further, Your Honor.

Judge Billings: Thank you very much. We appreciate your assistance.

Mr. Jackson: Can this witness be excused, Your Honor?

Judge Billings: Yes.

Mr. Jackson: That's all the testimony I will present at this time.

Judge Billings: The Defendant rests then?

Mr. Jackson: It rests.

Mr. Weston: No rebuttal, Your Honor.

Judge Billings: Do you wish to make comments to the court, counsel?

Mr. Weston: Yes, I would like to, if I might, Your Honor.

Judge Billings: Please proceed.

(Whereupon, counsel made comments to the court.)  
(Trial Transcript Pages 151-52; R. at 637-38.) The Defendants resting of their case resulted in the trial court correctly prohibiting Defendants from later presenting evidence to support their counter-claim.

It was not until after closing argument by counsel and after the Trial Judge's announcement of her findings and decision that there occurred the exchange to which Defendants refer in Argument VI of their brief. In other words, Defendants did not request an opportunity to present further evidence regarding their counter-claim until after they had rested, argued their case and received the ruling of the court. Clearly, their opportunity was then waived and forfeited. In any event, the Court had determined Defendants in default under the contract and therefore no award to them of damages or attorney's fees was then proper.

POINT 7: THE TRIAL COURT CORRECTLY GRANTED  
PLAINTIFFS' MOTION FOR A JUDGMENT  
VESTING TITLE IN LIEU OF CONVEYANCE.

Defendants contend that the trial court committed reversible error in granting Plaintiffs' Motion for a Judgment Vesting Title in Lieu of Conveyance because, following entry of the Judgment, Plaintiffs failed to make payments as ordered by the Court and Defendants properly served a Notice of Default upon Plaintiffs. Defendants argument must fail for two reasons.

First, as recognized in Argument VII of Defendants' brief, on or about October 15, 1985, the trial court entered an injunction enjoining Defendants from any action to declare a forfeiture or otherwise foreclose on Plaintiffs' property interest pending "*final adjudication*" of the case (R. at 26-27). The Defendants wrongfully conclude, however, that once the trial was concluded the injunction was lifted, freeing Defendants to pursue the property.

It is generally agreed that "final adjudication" of a case does not occur until all of the appeals process is completed. Ellison v. Gray, 702 P.2d 360, 367 (Okla. 1985); Lussy v. Dye, 695 P.2d 465 (Mont. 1985); Wycoff v. Quickway Homes, Inc., 201 Kan. 442, 441 P.2d 886 (Kan. 1968); General Motors Corp. v. Miller Buick, Inc., 56 Md. App. 374, 467 A.2d 1064 (1983). In cases which are not appealed, the adjudication does not become final until the termination of the possible period for filing of an appeal. Wycoff, supra, 441 P.2d at 890.

Since the injunction entered on October 15, 1985, remains in effect until the outcome of this appeal, Defendants were prohibited from proceeding against Plaintiffs' contract interest. Since Plaintiffs did subsequently comply with the requirements of the trial court's order, the trial court's granting of Plaintiffs' Motion for a Judgment Vesting Title in Lieu of Conveyance was correct.

Alternatively, while Plaintiffs were unable to procure the financing necessary for their payment to Defendants in the

amounts ordered to be paid by the trial court by September 11, 1986, on that date Plaintiffs' attorney, Gary A. Weston, notified the court and Defendants' attorney, Daniel W. Jackson, that Plaintiffs were as yet unable to obtain the financing necessary to make the ordered payment, but that they would be able to obtain the financing within the next ten days or two weeks. (R. at 392.) Despite Plaintiffs' attorney's telephone call, Defendants' attorney caused a letter to be delivered the following day to Plaintiffs' attorney demanding payments be made as provided under Paragraph 16A of the Uniform Real Estate Contract. (R. at 397-98.) Said letter expressly provided that payments must be made within five days of the notice.

Defendants maintain that since Plaintiffs did not pay within the five day period of the notice, Plaintiffs were in default.

Defendants' argument fails to recognize the specific language of Paragraph 16 of the contract. That paragraph explicitly provides that no election can be made by the seller until a payment becomes thirty days delinquent. (R. at 13.) It was unquestionably, the order, as well as the spirit, of the Judgment by the trial court that the amounts owing to the Defendants by the Plaintiffs under the contract were first due and payable on September 11, 1986. Therefore, there could be no default relative to payment prior to that date. As a result, the Paragraph 16 remedies of the Real Estate Contract did not become available to the Defendants until thirty days following that date. As a result, the notice intended by the

letter of September 12, 1985, was premature. Since Plaintiffs subsequently complied with the terms of the trial court's order before the expiration of that contractual period, and before proper notice was given by Defendants, the trial court correctly granted Plaintiffs' Motion for Judgment Vesting Title in Lieu of Conveyance.

An additional factor is that Plaintiffs received two separate notices from Defendants' counsel within a seven day period, each specifying the total amount of the delinquency. The amounts were different in the two notices. Plaintiffs received, on or about September 19, 1986, a letter and "Declaration of Forfeiture" indicating that the amounts in delinquency were approximately \$200.00 less than the previous September 12, 1986, letter and Notice (See R. at 337-405). The conflicting notices did not constitute proper compliance with Paragraph 16 of the Uniform Real Estate Contract. Nevertheless, Plaintiffs paid all requisite amounts and the trial court properly granted Plaintiffs' Motion for Judgment Vesting Title in Lieu of Conveyance.

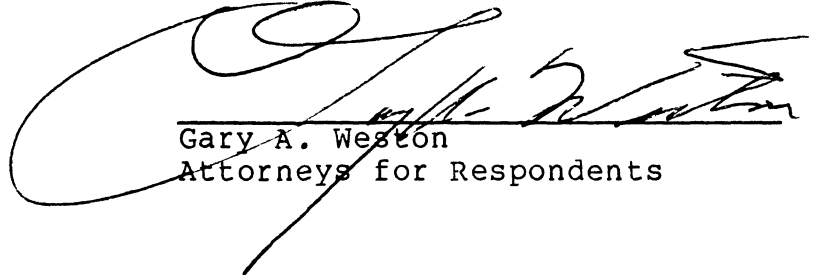
#### CONCLUSION

The trial court properly ruled that Plaintiffs' tender was sufficient, that Plaintiffs were not in default under the Uniform Real Estate Contract, that Defendants had breached their contractual obligations and that an award of Plaintiffs' attorney's fees was proper. Further, it properly refused to allow Defendants to present further evidence on their

counter-claim, and granted Plaintiffs' Motion for Judgment Vesting Title in Lieu of Conveyance. This Court should affirm the District Court, dismiss the above-captioned Appeal, and award Plaintiffs their costs herein, including a reasonable attorney's fee.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 1987.

NIELSEN & SENIOR



Gary A. Weston  
Attorneys for Respondents

## ADDENDUM

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# UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 8th day of JANUARY, A. D., 19 81  
by and between SIDNEY SEFTTEL and THERSA SEFTTEL, husband and wife  
hereinafter designated as the Seller, and RANDY D. CALL, a married man

hereinafter designated as the Buyer, of Salt Lake County, Utah

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Salt Lake, State of Utah, to-wit: 2337 East 3395 South, SLC, UT

More particularly described as follows:

Part of the Southwest Quarter of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, described as follows:

Commencing 577.5 feet North and 208.6 feet East of the Southwest corner of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 236.4 feet; thence East 77 feet; thence North 236.4 feet; thence West 77 feet to the place of beginning.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of SIXTY-ONE THOUSAND AND NO/100ths Dollars (\$61,000.00) payable at the office of Seller, his assigns or order strictly within the following times, to-wit: FIFTEEN THOUSAND SEVEN HUNDRED FORTY- (\$15,747.00) cash, the receipt of which is hereby acknowledged, and the balance of \$45,253.00 SEVEN shall be paid as follows:

See EXHIBIT A attached hereto and incorporated herein by reference.

Possession of said premises shall be delivered to buyer on the 10th day of JANUARY, 19 81

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from POSSESSION on all unpaid portions of the purchase price at the rate of 10.25 per cent (10.25 %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of WESTERN SAVINGS AND LOAN COMPANY with an unpaid balance of \$ 45,253.00 (Approximate) xxx

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following NONE

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed ZERO percent (0.0 %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

SALT LAKE COUNTY SUBURBAN SANITATION DISTRICT

SALT LAKE COUNTY SPECIAL DISTRICT NO. 1

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

*intiffs  
Exhibit A*

*one*

## 12. The Buyer agrees to pay the general taxes after \_\_\_\_\_

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or \$ \_\_\_\_\_ and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of  $\frac{1}{4}$  of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within THIRTY (30) days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto \_\_\_\_\_

See EXHIBIT A attached hereto and incorporated herein by reference.

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

Simon K. Bittigah

Signey Seftel

Theresa Seftel

Randy D. Call

Buyer

Buyer

Approved Form:  
BLANK NO. 108—A GEM PRINTING CO.—SALT LAKE CITY

Uniform Real Estate Contract

No.

To

EXHIBIT A

TO UNIFORM REAL ESTATE CONTRACT BETWEEN

SIDNEY SEFTTEL and THERSA SEFTTEL, SELLER

RANDY D. CALL, BUYER

3. (A) Consecutive monthly payments of Four Hundred Seventy-One Dollars (\$471.00) for principal, interest and taxes, plus Five Dollars (\$5.00) Service Charge with said payments to commence on or before February 1, 1981, with successive payments due on or before the 1st day of each and every month thereafter until principal and interest are paid in full.
- (B) Ten Thousand Seven Hundred Forty-Seven Dollars (\$10,747.00) cash, with no interest, due in a balloon payment on or before April 16, 1981.
- (C) The parties agree to adjust the payments for property taxes annually on or before November 30th of each and every year this Contract is in effect.
- (D) All parties acknowledge that this loan may or may not be assumable and agree as follows:
  1. Buyer agrees to accept full responsibility should the interest rate on said loan increase.
  2. Seller agrees to accept full responsibility if the interest rate should increase due to any action on his part.
- (E) The parties agree that Seller shall execute a Warranty Deed on this date, conveying said property to Buyer, with said Deed to be held in escrow pending satisfaction of the terms of said Agreement.

H. Dixon, Henry Co. 3rd Dist. Court  
By C. R. R. R.  
Deputy

**FILMED**

000268

3395 South in Salt Lake County, State of Utah, and more particularly described as:

Part of the Southwest Quarter of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, described as follows:

COMMENCING 577.5 feet North and 208.6 feet East of the Southwest corner of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 236.4 feet; thence East 77 feet; thence North 236.4 feet; thence West 77 feet to the place of beginning.

2. At the time of the execution of the said Uniform Real Estate Contract, Defendants executed a Warranty Deed (Exhibit B) wherein Mr. Call was named as grantee of the property in question and placed said deed in escrow with Colony Title Company.

3. At the time Randall Call entered into the Uniform Real Estate Contract in question, he was acting as an undisclosed representative of Plaintiff John M. Whiteley who owned property adjacent to the property in question. At the time the contract was executed, Mr. Call and Plaintiffs were aware that an obligation of \$45,253.00 owing by Sidney and Theresa Seftel to Western Savings & Loan Company was secured by a trust deed lien against the property in question. In addition, the parties understood and knew that the loan from Western Savings & Loan Company contained a Due on Sales clause and was not assumable.

4. At the time the contract was executed, Mr. Call paid Mr. Seftel \$5,000.00 cash as down payment and partial consideration for the purchase of the property under the terms and conditions of the Uniform Real Estate Contract. Thereafter, on

February 1, 1981, Mr. Call made the first monthly payment to Defendants in the amount of \$471.00 for principal, interest and taxes, plus \$5.00 service charge pursuant to the terms of the Uniform Real Estate Contract.

5. On or about April 16, 1981, Mr. Call paid to Mr. and Mrs. Seftel the sum of \$10,747.00 as a balloon payment pursuant to the terms of the Uniform Real Estate Contract. This payment completed the payment of \$15,747.00 as provided in paragraph 3 of the Contract and reduced the outstanding balance due under the Purchase Agreement to \$45,253.00, less the portion of the monthly payments paid for each of the months of February, March and April as were attributable to a repayment of principal. This amount was then considered by the parties to be the amount then owing to Western Savings & Loan Company on the underlying trust deed loan.

6. The \$5,000.00 paid by Mr. Call at the time of the execution of the contract plus the \$10,747.00 which he paid on or about April 16, 1981, represented the amount of \$15,747.00 which was the equity which Mr. and Mrs. Seftel had in the property at the time of their contract sale.

7. After payment of \$10,747.00, Defendants remained as record owners of the property pursuant to the terms of their contract with Mr. Call to attempt to avoid an increase in the interest rate on the trust deed loan against the property or the acceleration of payment of the loan balance.

8. Mr. Call received, but did not record the warranty deed (Exhibit B). He determined to continue making payments to

Defendants until such time as he, Mr. Call, determined to assume the underlying loan against the property. Mr. Call did not thereafter assume the underlying loan. He continued to make payments to Defendants.

9. Pursuant to the agreement and understanding of the parties, Defendants would remain the sole obligors under the loan from Western Savings & Loan Company, and the Company would not be informed of the purchase of the property. Under the agreement of the parties, Defendants would continue to make monthly payments to Western Savings & Loan Company, and Plaintiffs or their representative, Mr. Call, would pay Defendants \$476.00 per month\* under the terms of the Uniform Real Estate Contract until the contract balance was paid or the underlying loan was assumed.

10. Mr. Call continued to make monthly payments to Defendants pursuant to the terms of the Uniform Real Estate Contract on the first day of each month from February 1981 through January 1982. All payments made by Mr. Call including the initial down payment and balloon payment were derived from funds advanced to Mr. Call by Plaintiffs for the purpose of purchasing said property.

11. Mr. Call defaulted in the making of the requisite monthly payments for January 1982 through August 1982, and the Defendants obtained a judgment against him for the past due

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\*The actual monthly payment amount was initially \$476.00, but pursuant to paragraph 3(c) of the Uniform Real Estate Contract that amount increased yearly to reflect changes in the taxes due.

payments. Thereafter, Call continued in default and Defendants prepared to initiate a second action against him in which they sought forfeiture of the contract. Prior to the filing of the second complaint, Plaintiff John Whiteley satisfied the initial judgment by the payment of \$3,317.51. Defendants then initiated their second civil action captioned Sidney Seftel and Theresa Seftel v. Randy D. Call, Civil No. C82-9703 in the Third Judicial District Court for Salt Lake County, State of Utah. Upon receipt of service of the Complaint in that action, Mr. Call advised Defendants that he had assigned his interest in the property to Plaintiffs. Thereafter, in April, 1983, the Seftels caused the complaint to be amended and served upon John M. Whiteley. Following his answering the Seftels' Complaint, Plaintiff John Whiteley and Mr. Call on July 29, 1983, entered into a stipulation pursuant to which they paid \$4,760.00 representing 10 months of past due monthly payments and additionally paid \$1,900.00 attorney fees, and thereupon deposited an additional \$1,000.00 with the Seftels to be held by them for five years to be applied to any future defaults during the life of the Uniform Real Estate Contract. Said action was dismissed August 31, 1983.

12. Following the settlement of the above-described action, Plaintiff Whiteley again fell delinquent in making payments under the terms of the contract and the Defendants applied the above referenced \$1,000.00 to cure those delinquencies.

13. Subsequent to the conclusion of the above-described lawsuit, the Plaintiffs assigned their interest in the property in

question to Prisbrey Investment Company in consideration of a loan that Prisbrey Investment Company had made to Plaintiffs.

Following that assignment, Prisbrey Investment Company made monthly payments to Defendants under the terms of the Uniform Real Estate Contract for approximately one year.

14. In February, 1985, John and Barbara Whiteley were indebted to Mr. Call on a previous business transaction. In that same month, Mr. Call paid approximately \$3,500.00 to Prisbrey Investment Company for the subject property, and that entity relinquished to Mr. Call any and all interest it had in the property. On February 1, 1985, Prisbrey Investment Company had made a monthly payment to Defendants under the terms of the Uniform Real Estate Contract.

15. On February 22, 1985, Plaintiff John Whiteley met with Randall Call and James Deans. At that meeting and in consideration of the payment of \$7,000.00 from Mr. Deans, Mr. Call assigned by Assignment of Contract (Exhibit C) his interest in the Uniform Real Estate Contract to James Deans and delivered to Mr. Deans a Quit Claim Deed covering the property. Mr. Deans purchased this interest in the property at the request of Plaintiff John Whiteley and granted to Plaintiffs an option to acquire the interest in the Uniform Real Estate Contract then held by Mr. Deans.

16. On March 6, 1985, James Deans assigned by Assignment of Contract (Exhibit D) his interest in the Uniform Real Estate Contract to Plaintiff, Barbara Whiteley, in consideration for the

payment by Plaintiffs of \$7,200.00. On March 20, 1985, Mr. Deans executed a Quit Claim Deed to Barbara Whiteley covering the subject property.

17. On March 11, 1985, Barbara Whiteley accepted from Terry E. Bowns and JoAnn Bowns an offer for the purchase of the subject property (Exhibit E) for a price of \$58,000.00. The closing of the transaction was to have been conducted in the offices of Associated Title Company at which time the unpaid loan balance owing to Western Savings & Loan was to be paid.

(Exhibit F)

18. On April 9, 1985, Plaintiffs or one of them caused the Warranty Deed (Exhibit B) from Defendants as grantor to Randy D. Call as grantee covering the property in question to be recorded in the Salt Lake County Recorder's office. Said deed was executed pursuant to the express terms of the Uniform Real Estate Contract (Exhibit A) under which the Defendants agreed to execute said deed conveying the subject property to the contract buyer with the deed to be held in escrow. Randy Call had delivered said deed to John Whiteley in April or May of 1981. The Plaintiffs and Defendants are not in agreement as to whether Plaintiffs retained possession of the deed or thereafter temporarily released possession and control pursuant to subsequent dealings with the subject property. Plaintiffs caused the deed to be recorded on April 9, 1985.

19. Plaintiff John Whiteley telephoned Defendant Sidney Seftel. The Plaintiffs and Defendants are not in agreement as to

whether the telephone call was before or after the recording of the deed. In that telephone conversation Mr. Whiteley advised Mr. Seftel that Whiteleys were then in the process of selling the property and were prepared to pay the full amount that was then owed to Western Savings on the underlying loan and such amount, if any, as may have been owing to Mr. and Mrs. Seftel. Mr. Whiteley made additional telephone calls to Mr. Seftel but received no response from him.

20. Defendants did not advise Plaintiffs as to the amount which Defendants claimed to be owing under the contract.

21. Plaintiff John Whiteley made additional attempts to obtain information regarding the amount claimed by Mr. Seftel to be owing under the contract. Mr. Whiteley made telephone inquiry of Devendants' attorneys, Jeffrey W. Wilkinson and Daniel W. Jackson and on one occasion met personally with Mr. Jackson in Mr. Jackson's law office for the purpose of obtaining information as to the amounts claimed by Defendants to be owing under the contract. Defendants and their attorneys failed and refused to provide Plaintiffs with the requested information.

22. Defendants claimed that they had an equity in the property. (Amended Answer and Counterclaim, ¶5 of Second Defense.)

23. Defendants claimed and represented that neither Randy Call nor Plaintiffs were entitled to the delivery of the Warranty Deed (Exhibit B) and on April 30, 1985, did commence suit against Randy D. Call and Plaintiff John Whiteley in the above

entitled court in Civil Action No. C85-2749 alleging that neither Mr. Call nor Mr. Whiteley had any right, title or interest in the subject property other than the right to possession under the Uniform Real Estate Contract and had no legal right to have the subject Warranty Deed recorded (Exhibit G) and caused a Lis Pendens to be recorded on said date in the office of the Salt Lake County Recorder in Book 5650 at Page 845 giving notice of the pendency of said action and the allegations of the Complaint therein filed.

24. Defendants received no payment from Plaintiffs or any other persons under the terms of the Uniform Real Estate Contract during March, 1985 or thereafter until Plaintiffs paid to Defendants the sum of \$2,836.00 on October 21, 1985. Said amount represents approximately six monthly payments. No monthly payments had then been paid since February, 1985. Plaintiffs have made no payments to Defendants following the October 21, 1985 payment.

25. In relation to the proposed sale of the property in question by Barbara Whiteley to the Bowns, certain employees at Associated Title Company contacted the Defendants to inquire about the amount Defendants claimed to be owing under the subject contract. During a subsequent inquiry, from Associated, the Defendants were informed for the first time of the filing of the Warranty Deed. Upon being informed by Associated Title Company of the filing of the Warranty Deed by Plaintiffs, Defendants filed

the said action in this Court identified as Civil No. C85-2749.

26. On July 13, 1985, Plaintiff Barbara Whiteley executed a second Warranty Deed covering the property in question granting the property to Elan Management, Inc. Said Warranty Deed was filed in the Salt Lake County Recorder's office on July 19, 1985. Thereafter, on September 15, 1985, Elan Management, Inc. sold a portion of the property in question to U.Q., Inc. for the sum of \$65,200.00 and in partial consideration took back a Trust Deed Note and an All-Inclusive Trust Deed.

27. On September 19, 1985, Plaintiff John M. Whiteley sent a letter to Defendants by certified mail in which he advised them that the funds to pay your balance due on the property in question were "now placed with Beehive Title Company." The letter went on to state that "if you (Defendants) will contact them with a release of your contract or other interest in the property they will make payment to you." In addition, the letter stated: "The title company has the final payoff figure from the Western Savings and will handle payment of that balance as well as any amounts you have made to Western. Our records show you have made the payments from March 1 through August 1, 1985, at \$486 per month, or \$2,516.00, and this amount should be reimbursed."

28. The tender of payment by Plaintiffs as described in the letter of September 19, 1985 was contingent upon the Defendants' release of any and all interests they had in the property in question. At the time the letter was mailed by Plaintiff John Whiteley, certain monies were held in escrow by

Beehive Title Company. The Plaintiffs and Defendants contest the source and amount of said monies.

29. On August 28, 1985 and prior to the above-referenced letter, Defendants mailed to Randall D. Call and John Whiteley, notice (Exhibit H) advising that they were in default under the terms of the Uniform Real Estate Contract and demanding pursuant to paragraph 16A of the contract that they cure the default or forfeit all interest they may have in the property in question. Plaintiffs caused Defendants to be advised that funds were on deposit with Beehive Title Company with which to make full payment. Defendants served a Notice of Forfeiture (Exhibit I) upon Randy Call and John Whiteley on the 23rd day of September, 1985. On the same day, Defendants served a Notice to Quit (Exhibit J) on Messrs. Call and Whiteley.

30. In response to the Defendants' Notices Plaintiffs filed the above-referenced action on September 30, 1985 and caused a temporary restraining order to be issued by this court on October 1, 1985 enjoining Defendants from attempting to foreclose Plaintiffs' interest in the property in question. Thereafter on October 15, 1985, a hearing was held before this court and an injunction issued pending the outcome of this action. Said injunction required plaintiffs to unconditionally tender to Defendants or their counsel the sum of \$2,836.00 within five business days and enjoined Defendants from any action to declare a forfeiture or otherwise foreclose and deprive Plaintiffs of their interest in the property in question.

31. On October 23, 1985, Plaintiff tendered said amount to Defendants' counsel and have not made any additional payments to Defendant under the express terms of the Uniform Real Estate Contract.

32. Defendants caused Plaintiffs to be first advised on April 14, 1986, that Defendants do not now claim any equity in the property.

#### CONTESTED FACTS

The following remain as contested facts to be resolved at trial:

1. Was the Warranty Deed (Exhibit B) to have been held in escrow until Defendants received payment of the \$10,747.00 due April 16, 1981? When did Mr. Call receive possession of the deed?

2. Pursuant to the terms of the Uniform Real Estate Contract in question, how long was the Warranty Deed to be held in escrow?

3. Did the Plaintiffs at any time make an unconditional tender to Defendants of the balance due under the terms of the Uniform Real Estate Contract (Exhibit A)?

4. Were the Plaintiffs in default after March 1, 1985 under the terms of the said Uniform Real Estate Contract?

5. When and how did the Defendants first learn of the attempts of the Plaintiff Barbara Whiteley to sell the property to Mr. and Mrs. Terry Bown?

6. Was Plaintiff Barbara Whiteley unable to consummate the sale of the property to Mr. and Mrs. Terry Bown because of the inability of Plaintiffs to obtain information from the Defendants regarding the amount claimed by the Defendants as owing under the contract and the representations and claims made by Defendants to the effect that the title and interest of Randy Call and Barbara Whiteley as his successor in interest was disputed by said Defendants?

7. What was the source, purpose and amount of monies held by Beehive Title Company for payment on the unpaid balance of the Uniform Real Estate Contract?

8. At the time Plaintiff John Whiteley sent the letter of September 19, 1985, to Defendants, were Plaintiffs then in default under the express terms of the Uniform Real Estate Contract as a result of their failure to make any payments to Defendants from March 1, 1985, to the time the letter was mailed. At the time Mr. Whiteley mailed the letter, were the Plaintiffs then insolvent and not have sufficient monies in their possession or control to make payment of the contract balance?

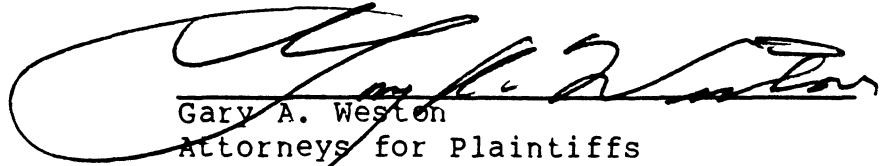
9. Did Plaintiffs sustain damages as a result of an inability to obtain from Defendants a contract payoff balance and, if so, what was the amount of said damages?

10. What amount of attorney fees should either

Plaintiffs or Defendants be awarded?

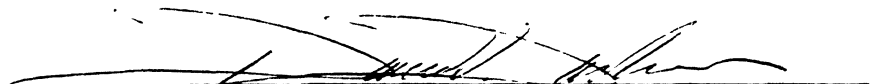
DATED this 28th day of July, 1986.

NIELSEN & SENIOR

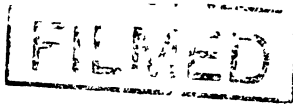


Gary A. Weston  
Attorneys for Plaintiffs

JACKSON & WILKINSON



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*C. Porter*

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

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JOHN M. WHITELEY, BARBARA	)	
WHITELEY, and ELAN MANAGEMENT,	)	
INC., a Utah corporation,	)	AMENDED
	)	FINDINGS OF FACT AND
Plaintiffs,	)	CONCLUSIONS OF LAW
	)	
v.	)	
	)	Civil No. C85-6571
SIDNEY SEFTEL and THERESA	)	
SEFTEL,	)	
	)	Judge Billings
Defendants.	)	

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This matter came on for trial on the 31st day of July, 1986, before the Honorable Judith M. Billings, one of the judges of the court, with Gary A. Weston of the firm of Nielsen & Senior appearing as attorney for the Plaintiffs, and Daniel W. Jackson of the firm of Jackson & Wilkinson appearing as attorney for the Defendants. The court took testimony and received exhibits by way of evidence on the issues, and counsel addressed the court regarding the application of law to the evidence presented, and the court entered its Findings of Fact and Conclusions of Law on August 27, 1986. On September 23, 1986, with counsel for all parties present, the court heard Defendants' Motion to Amend the

Findings of Fact and Conclusions of Law as previously entered. The court now makes and enters its Amended Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

The court adopts and includes as part of its findings, the following paragraphs 1 through 32 which the parties have stipulated as being uncontested facts pursuant to their Stipulated Statement of Contested and Uncontested Facts on file with the court and dated July 28, 1986.

1. On or about January 8, 1981, Defendants, Sidney Seftel and Theresa Seftel, his wife, entered into a Uniform Real Estate Contract with Randy D. Call (Exhibit 1) covering the purchase by Mr. Call of certain real estate located at 2337 East 3395 South in Salt Lake County, State of Utah, and more particularly described as:

Part of the Southwest Quarter of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, described as follows:

COMMENCING 577.5 feet North and 208.6 feet East of the Southwest corner of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 236.4 feet; thence East 77 feet; thence North 236.4 feet; thence West 77 feet to the place of beginning.

2. At the time of the execution of the said Uniform Real Estate Contract, Defendants executed a Warranty Deed (Exhibit 2) wherein Mr. Call was named as grantee of the property in question and placed said deed in escrow with Colony Title Company.

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3. At the time Randall Call entered into the Uniform Real Estate Contract in question, he was acting as an undisclosed representative of Plaintiff John M. Whiteley who owned property adjacent to the property in question. At the time the contract was executed, Mr. Call and Plaintiffs were aware that an obligation of \$45,253.00 owing by Sidney and Theresa Seftel to Western Savings & Loan Company was secured by a trust deed lien against the property in question. In addition, the parties understood and knew that the loan from Western Savings & Loan Company contained a Due on Sales clause and was not assumable.

4. At the time the contract was executed, Mr. Call paid Mr. Seftel \$5,000.00 cash as down payment and partial consideration for the purchase of the property under the terms and conditions of the Uniform Real Estate Contract. Thereafter, on February 1, 1981, Mr. Call made the first monthly payment to Defendants in the amount of \$471.00 for principal, interest and taxes, plus \$5.00 service charge pursuant to the terms of the Uniform Real Estate Contract.

5. On or about April 16, 1981, Mr. Call paid to Mr. and Mrs. Seftel the sum of \$10,747.00 as a balloon payment pursuant to the terms of the Uniform Real Estate Contract. This payment completed the payment of \$15,747.00 as provided in paragraph 3 of the Contract and reduced the outstanding balance due under the Purchase Agreement to \$45,253.00, less the portion of the monthly payments paid for each of the months of February, March and April as were attributable to a repayment of principal. This amount was

then considered by the parties to be the amount then owing to Western Savings & Loan Company on the underlying trust deed loan.

6. The \$5,000.00 paid by Mr. Call at the time of the execution of the contract plus the \$10,747.00 which he paid on or about April 16, 1981, represented the amount of \$15,747.00 which was the equity which Mr. and Mrs. Seftel had in the property at the time of their contract sale.

7. After payment of \$10,747.00, Defendants remained as record owners of the property pursuant to the terms of their contract with Mr. Call to attempt to avoid an increase in the interest rate on the trust deed loan against the property or the acceleration of payment of the loan balance.

8. Mr. Call received, but did not record the warranty deed (Exhibit 2). He determined to continue making payments to Defendants until such time as he, Mr. Call, determined to assume the underlying loan against the property. Mr. Call did not thereafter assume the underlying loan. He continued to make payments to Defendants.

9. Pursuant to the agreement and understanding of the parties, Defendants would remain the sole obligors under the loan from Western Savings & Loan Company, and the Company would not be informed of the purchase of the property. Under the agreement of the parties, Defendants would continue to make monthly payments to Western Savings & Loan Company, and Plaintiffs or their

representative, Mr. Call, would pay Defendants \$476.00 per month\*

10. Mr. Call continued to make monthly payments to Defendants pursuant to the terms of the Uniform Real Estate Contract on the first day of each month from February 1981 through January 1982. All payments made by Mr. Call including the initial down payment and balloon payment were derived from funds advanced to Mr. Call by Plaintiffs for the purpose of purchasing said property.

11. Mr. Call defaulted in the making of the requisite monthly payments for January 1982 through August 1982, and the Defendants obtained a judgment against him for the past due payments. Thereafter, Call continued in default and Defendants prepared to initiate a second action against him in which they sought forfeiture of the contract. Prior to the filing of the second complaint, Plaintiff John Whiteley satisfied the initial judgment by the payment of \$3,317.51. Defendants then initiated their second civil action captioned Sidney Seftel and Theresa Seftel v. Randy D. Call, Civil No. C82-9703 in the Third Judicial District Court for Salt Lake County, State of Utah. Upon receipt of service of the Complaint in that action, Mr. Call advised Defendants that he had assigned his interest in the property to Plaintiffs. Thereafter, in April, 1983, the Seftels caused the

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\*The actual monthly payment amount was initially \$476.00, but pursuant to paragraph 3(c) of the Uniform Real Estate Contract that amount increased yearly to reflect changes in the taxes due under the terms of the Uniform Real Estate Contract until the contract balance was paid or the underlying loan was assumed.

complaint to be amended and served upon John M. Whiteley.

Following his answering the Seftels' Complaint, Plaintiff John Whiteley and Mr. Call on July 29, 1983, entered into a stipulation pursuant to which they paid \$4,760.00 representing 10 months of past due monthly payments and additionally paid \$1,900.00 attorney fees, and thereupon deposited an additional \$1,000.00 with the Seftels to be held by them for five years to be applied to any future defaults during the life of the Uniform Real Estate Contract. Said action was dismissed August 31, 1983.

12. Following the settlement of the above-described action, Plaintiff Whiteley again fell delinquent in making payments under the terms of the contract and the Defendants applied the above referenced \$1,000.00 to cure those delinquencies.

13. Subsequent to the conclusion of the above-described lawsuit, the Plaintiffs assigned their interest in the property in question to Prisbrey Investment Company in consideration of a loan that Prisbrey Investment Company had made to Plaintiffs. Following that assignment, Prisbrey Investment Company made monthly payments to Defendants under the terms of the Uniform Real Estate Contract for approximately one year.

14. In February, 1985, John and Barbara Whiteley were indebted to Mr. Call on a previous business transaction. In that same month, Mr. Call paid approximately \$3,500.00 to Prisbrey Investment Company for the subject property, and that entity relinquished to Mr. Call any and all interest it had in the property. On February 1, 1985, Prisbrey Investment Company had

made a monthly payment to Defendants under the terms of the Uniform Real Estate Contract.

15. On February 22, 1985, Plaintiff John Whiteley met with Randall Call and James Deans. At that meeting and in consideration of the payment of \$7,000.00 from Mr. Deans, Mr. Call assigned by Assignment of Contract (Exhibit 3) his interest in the Uniform Real Estate Contract to James Deans and delivered to Mr. Deans a Quit Claim Deed covering the property. Mr. Deans purchased this interest in the property at the request of Plaintiff John Whiteley and granted to Plaintiffs an option to acquire the interest in the Uniform Real Estate Contract then held by Mr. Deans.

16. On March 6, 1985, James Deans assigned by Assignment of Contract (Exhibit 4) his interest in the Uniform Real Estate Contract to Plaintiff, Barbara Whiteley, in consideration for the payment by Plaintiffs of \$7,200.00. On March 20, 1985, Mr. Deans executed a Quit Claim Deed to Barbara Whiteley covering the subject property.

17. On March 11, 1985, Barbara Whiteley accepted from Terry E. Bowns and JoAnn Bowns an offer for the purchase of the subject property (Exhibit 5) for a price of \$58,000.00. The closing of the transaction was to have been conducted in the offices of Associated Title Company at which time the unpaid loan balance owing to Western Savings & Loan was to be paid.

18. On April 9, 1985, Plaintiffs or one of them caused the Warranty Deed (Exhibit 2) from Defendants as grantor to

Randy D. Call as grantee covering the property in question to be recorded in the Salt Lake County Recorder's office. Said deed was executed pursuant to the express terms of the Uniform Real Estate Contract (Exhibit 1) under which the Defendants agreed to execute said deed conveying the subject property to the contract buyer with the deed to be held in escrow. Randy Call had delivered said deed to John Whiteley in April or May of 1981. Plaintiffs caused the deed to be recorded on April 9, 1985.

19. Plaintiff John Whiteley telephoned Defendant Sidney Seftel. In that telephone conversation Mr. Whiteley advised Mr. Seftel that Whiteleys were then in the process of selling the property and were prepared to pay the full amount that was then owed to Western Savings on the underlying loan and such amount, if any, as may have been owing to Mr. and Mrs. Seftel. Mr. Whiteley made additional telephone calls to Mr. Seftel but received no response from him.

20. Defendants did not advise Plaintiffs as to the amount which Defendants claimed to be owing under the contract.

21. Plaintiff John Whiteley made additional attempts to obtain information regarding the amount claimed by Mr. Seftel to be owing under the contract. Mr. Whiteley made telephone inquiry of Defendants' attorneys, Jeffrey W. Wilkinson and Daniel W. Jackson and on one occasion met personally with Mr. Jackson in Mr. Jackson's law office for the purpose of obtaining information as to the amounts claimed by Defendants to be owing under the

contract. Defendants and their attorneys failed and refused to provide Plaintiffs with the requested information.

22. Defendants claimed that they had an equity in the property.

23. Defendants claimed and represented that neither Randy Call nor Plaintiffs were entitled to the delivery of the Warranty Deed (Exhibit 2) and on April 30, 1985, did commence suit against Randy D. Call and Plaintiff John Whiteley in the above entitled court in Civil Action No. C85-2749 alleging that neither Mr. Call nor Mr. Whiteley had any right, title or interest in the subject property other than the right to possession under the Uniform Real Estate Contract and had no legal right to have the subject Warranty Deed recorded (Exhibit 7) and caused a Lis Pendens to be recorded on said date in the office of the Salt Lake County Recorder in Book 5650 at Page 845 giving notice of the pendency of said action and the allegations of the Complaint therein filed.

24. Defendants received no payment from Plaintiffs or any other persons under the terms of the Uniform Real Estate Contract during March, 1985 or thereafter until Plaintiffs paid to Defendants the sum of \$2,836.00 on October 21, 1985. Said amount represents approximately six monthly payments. No monthly payments had then been paid since February, 1985. Plaintiffs have made no payments to Defendants following the October 21, 1985 payment.

25. In relation to the proposed sale of the property in question by Barbara Whiteley to the Bowns, certain employees at Associated Title Company contacted the Defendants to inquire about the amount Defendants claimed to be owing under the subject contract. During a subsequent inquiry, from Associated, the Defendants were informed for the first time of the filing of the Warranty Deed. Upon being informed by Associated Title Company of the filing of the Warranty Deed by Plaintiffs, Defendants filed the said action in this Court identified as Civil No. C85-2749.

26. On July 13, 1985, Plaintiff Barbara Whiteley executed a second Warranty Deed covering the property in question granting the property to Elan Management, Inc. Said Warranty Deed was filed in the Salt Lake County Recorder's office on July 19, 1985. Thereafter, on September 15, 1985, Elan Management, Inc. sold a portion of the property in question to U.Q., Inc. for the sum of \$65,200.00 and in partial consideration took back a Trust Deed Note and an All-Inclusive Trust Deed.

27. On September 19, 1985, Plaintiff John M. Whiteley sent a letter to Defendants by certified mail in which he advised them that the funds to pay your balance due on the property in question were "now placed with Beehive Title Company." The letter went on to state that "if you (Defendants) will contact them with a release of your contract or other interest in the property they will make payment to you." In addition, the letter stated: "The title company has the final payoff figure from the Western Savings and will handle payment of that balance as well as any amounts you

have made to Western. Our records show you have made the payments from March 1 through August 1, 1985, at \$486 per month, or \$2,516.00, and this amount should be reimbursed."

28. The tender of payment by Plaintiffs as described in the letter of September 19, 1985 was contingent upon the Defendants' release of any and all interests they had in the property in question. At the time the letter was mailed by Plaintiff John Whiteley, certain monies were held in escrow by Beehive Title Company.

29. On August 28, 1985 and prior to the above-referenced letter, Defendants mailed to Randall D. Call and John Whiteley, notice (Exhibit 8) advising that they were in default under the terms of the Uniform Real Estate Contract and demanding pursuant to paragraph 16A of the contract that they cure the default or forfeit all interest they may have in the property in question. Plaintiffs caused Defendants to be advised that funds were on deposit with Beehive Title Company with which to make full payment. Defendants served a Notice of Forfeiture (Exhibit 9) upon Randy Call and John Whiteley on the 23rd day of September, 1985. On the same day, Defendants served a Notice to Quit (Exhibit 10) on Messrs. Call and Whiteley.

30. In response to the Defendants' Notices Plaintiffs filed the above-referenced action on September 30, 1985 and caused a temporary restraining order to be issued by this court on October 1, 1985 enjoining Defendants from attempting to foreclose Plaintiffs' interest in the property in question. Thereafter on

October 15, 1985, a hearing was held before this court and an injunction issued pending the outcome of this action. Said injunction required plaintiffs to unconditionally tender to Defendants or their counsel the sum of \$2,836.00 within five business days and enjoined Defendants from any action to declare a forfeiture or otherwise foreclose and deprive Plaintiffs of their interest in the property in question.

31. On October 23, 1985, Plaintiff tendered said amount to Defendants' counsel and have not made any additional payments to Defendant under the express terms of the Uniform Real Estate Contract.

32. Defendants caused Plaintiffs to be first advised on April 14, 1986, that Defendants do not now claim any equity in the property.

The court makes the following additional Findings of Fact:

33. Plaintiff, John Whiteley, spoke by telephone with Defendant, Sid Seftel, on approximately March 11, 1985, and advised Mr. Seftel that Plaintiff, Barbara Whiteley, had a buyer for the subject property, and incident to the sale of said property she would make payment of the total amount owing to Western Savings and such amounts, if any, as owing to Defendants. John Whiteley requested Sid Seftel to advise him as to the amounts, if any, which Defendants claimed to be owing to them under the Uniform Real Estate Contract.

34. Associated Title Company telephoned Defendant, Sid Seftel, and advised that it was handling the closing of the sale of the subject property by Barbara Whiteley and that pursuant to the closing of the sale, full payment would be made of the amounts owing to Western Savings and the amounts, if any, owing to Defendants and requested that Mr. Seftel advise them as to what, if any, amounts were then due and owing to Defendants under the Uniform Real Estate Contract.

35. Mr. Sidney Seftel's failure and refusal to provide John Whiteley and Associated Title Company with the information requested as to the amounts which he claimed was owing to Defendants under the Uniform Real Estate Contract frustrated the efforts of Plaintiffs to determine the amounts owing to Defendants under the Contract and to complete the sale of the subject property to Terry E. Bowns and JoAnne Bowns.

36. Terry E. Bowns and JoAnne Bowns were prepared to complete the purchase of the subject property from Barbara Whiteley and would have completed said purchase had Defendants provided Associated Title with the requested information as to the amounts then claimed to be owing by Defendants under the Uniform Real Estate Contract.

37. Associated Title Company was involved in assisting Barbara Whiteley and Mr. and Mrs. Terry Bowns in closing the sale of the subject property from Mrs. Whiteley to Mr. and Mrs. Bowns, and its involvement was as a third party escrow agent which would

hold funds sufficient to make payment of the amounts as then due and owing to the Defendants under the Uniform Real Estate Contract.

38. At the time Sidney Seftel first refused to provide to Plaintiffs and Associated Title Company the requested information regarding the amounts then claimed by the Defendants to be owing to them under the Uniform Real Estate Contract, said Defendants had no equity in the property and the contract installment payments were delinquent only for the months of March, 1985, and perhaps, the month of April, 1985.

39. The letter of Defendants' attorney, Jeffrey W. Wilkinson, dated August 28, 1985 (Exhibit 8), was the first written notification given after March 1, 1985, by Defendants to Plaintiffs that Plaintiffs were claimed to be in default under the Uniform Real Estate Contract. Said letter failed to specify the amount which Defendants then claimed to be delinquent under said contract.

40. Defendants' Notice of Forfeiture (Exhibit 9) was served upon Plaintiffs on September 23, 1985, and constituted the first notification given to Plaintiffs from and after March 1, 1985, as to the amount which Defendants claimed as delinquent monthly installments owing under the Uniform Real Estate Contract. Prior to the receipt of said Notice of Forfeiture, Plaintiffs did not know the amount which Defendants claimed to be delinquent under the contract.

41. Defendants have continually claimed that the subject property was theirs and that they had defaulted the Plaintiffs out from any interest in the property.

42. In August and September, 1985, Beehive Title Company contacted Defendants' attorneys requesting information as to the amounts which Defendants then claimed to be owing to the Defendants under the Uniform Real Estate Contract and advised Defendants' attorneys that there was on deposit with Beehive Title funds with which to make payment in full of the amounts owing to Western Savings and amounts then delinquent and owing to Defendants under the Uniform Real Estate Contract. Defendants and their attorneys failed and refused to provide the requested information to Beehive Title, thereby frustrating the attempts of Beehive Title to consummate the payoff to Western Savings and to Defendants and preventing said payoff. Beehive Title then held on deposit funds sufficient to have made full payment of the amounts owing by Plaintiffs under the Uniform Real Estate Contract.

43. Defendants have continued to make monthly payments to Western Savings and were current on their payments through the month of July, 1986.

44. The conduct of Defendants has not caused Plaintiffs to sustain damages.

45. Plaintiffs have incurred attorney fees with regard to the herein action. They have incurred attorney fees in an amount of \$1,580.00 with their former counsel of record, Mr. Grant G. Orton, and with their current counsel of record, Gary A. Weston and Nielsen & Senior, in an amount of \$5,140.00. Said attorney fees are fair and reasonable with regard to the services rendered to Plaintiffs by said attorneys.

46. No evidence was received by the court relative to attorney fees incurred by the Defendants.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court now makes and enters its Conclusions of Law as follows:

1. The declarations and statements made by Plaintiff, John Whiteley, and by Associated Title Company and Beehive Title Company constituted sufficient and proper tender to Defendants of the total amounts then due and owing to Defendants under the Uniform Real Estate Contract.

2. The conduct of Defendants in withholding information from Plaintiffs with regard to the amounts which Defendants claim to be due and owing under the Uniform Real Estate Contract was improper and frustrated the efforts of the Plaintiffs to make payment to Defendants of the total amounts owing under the Uniform Real Estate Contract and thereby frustrated Plaintiffs' attempts at tender to Defendants of the amounts owing under the contract and thereby excused Plaintiffs from tender in a form or manner different than that undertaken by Plaintiffs.

3. Defendants were not justified in refusing to provide to Plaintiffs and the title insurance company the requested information regarding the amounts claimed by the Defendants as delinquent and due and owing under the Uniform Real Estate Contract.

4. Defendants did frustrate, interfere with and prevent the sale of the subject property to Mr. and Mrs. Terry Bowns by Barbara Whiteley.

5. Defendants failed to give to Plaintiffs the requisite notice of default as contemplated and required under Paragraph 16 of the Uniform Real Estate Contract and, therefore, have failed to place Plaintiffs in default under the terms of said contract. If proper notice had been given, Plaintiffs would have been required to have responded thereto.

6. Plaintiffs are not entitled to an award of damages against Defendants.

7. Defendants breached their contractual obligations to Plaintiffs under the terms of the Uniform Real Estate Contract in that Defendants failed and refused to permit payment by Plaintiffs of the amounts due and owing by Plaintiffs to Defendants thereunder said contract. Plaintiffs are not in default under the terms of said contract.

8. The warranty deed (Exhibit 2) did not constitute Defendants' conveyance of legal title of the subject property.

9. Defendants breached an express covenant and obligation of the Uniform Real Estate Contract by failing and refusing to deliver to Plaintiffs title to the property as described in said contract.

10. Judgment should be entered as follows:

a. Ordering Defendants to execute and deliver to Plaintiff, Elan Management, Inc., a general warranty deed

conveying to said Plaintiff the interest of Defendants in the hereinabove described property, subject only to such liens and encumbrance as were of record against said property on date of the Uniform Real Estate Contract of January 8, 1981. This relief is awarded said Plaintiff pursuant to Rule 54(c), Utah Rules of Civil Procedure.

b. Ordering Plaintiffs to make payment on or before 15 days from date of entry hereof, as follows:

(1) To Defendants, all amounts paid by Defendants to Western Savings and Loan since February, 1985, less the amount of \$2,836.00 paid by Plaintiffs to Defendants in October 15, 1985, pursuant to the then order of this court.

(2) To Western Savings, full payment of all amounts currently due and owing to Western Savings and Loan Association by Defendants under the Trust Deed Note against the hereinabove described property subject of this action. Plaintiffs shall apply towards said payment, the amount of \$20,000.00, together with interest accrued thereon, as is currently held on deposit with Western Savings pursuant to the terms of that certain Stipulation of Plaintiffs and Defendants with Western Savings dated January 15, 1986, on file in this action.

c. Awarding to Plaintiffs judgment against Defendants for attorney fees of \$6,720.00.

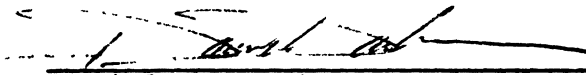
d. Awarding to Plaintiffs their costs herein incurred.

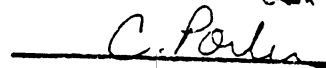
11. Defendants have no cause of action against Plaintiffs under their counterclaim.

DATED this 14 day of October, 1986.

  
JUDITH M. BILLINGS  
District Judge

APPROVED AS TO FORM:

  
Daniel W. Jackson  
Attorney for Defendants

ATTEST  
H. EASON HADLEY  
Clerk  
by   
Deputy Clerk

Law Office  
**JACKSON & WILKINSON**  
A Professional Corporation  
40 East South Temple, Suite 310  
Salt Lake City, Utah 84111  
(801) 538-0645

Jeffrey W. Wilkinson

August 28, 1985

Randy D. Call  
4764 Quail Point Rd.  
Salt Lake City, UT 84109

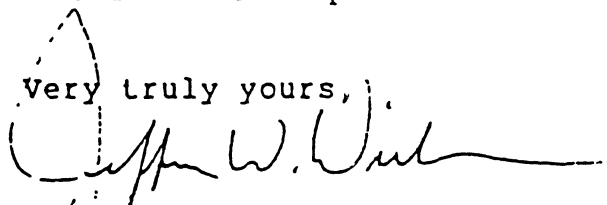
Re: Uniform Real Estate Contract between Sidney and Theresa  
Seftel (Seller) and Randy D. Call (Purchaser)

Dear Mr. Call:

On January 8, 1981, Sidney and Theresa Seftel agreed to sell you the real property located at 2331 East 3395 South. Enclosed is a copy of the Uniform Real Estate Contract. You are presently delinquent and have been so for over thirty days on the monthly payments you agreed to make to the Seftels pursuant to the Contract.

You are hereby given notice pursuant to paragraph 16 of the Contract that you have five days in which to remedy this default. If the default is not remedied within five days, the Seftels shall be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on the contract by you shall be forfeited to the Seftels as liquidated damages for the non-performance of the contract and the Seftels may re-enter and take possession of the premises without legal process.

Very truly yours,



JEFFREY W. WILKINSON

JWW/ms

cc: John Whitely

*intiffa*  
*hibit H*  
*Eight*

CLOSING DATE: April 8, 1985 ORDER NO.: 42766-12  
 SELLER: Whiteley, Barbara  
 MAILING ADDRESS: \_\_\_\_\_  
 PHONE NUMBERS: HOME: \_\_\_\_\_ WORK: \_\_\_\_\_ COPIES RECEIVED: \_\_\_\_\_  
 BUYER: Bowns, Terry E. & Jo Anne  
 MAILING ADDRESS: 3333 South 3175 East, Salt Lake City, Utah 84109  
 PHONE NUMBERS: HOME: \_\_\_\_\_ WORK: \_\_\_\_\_ COPIES RECEIVED: \_\_\_\_\_  
 PROPERTY ADDRESS: 2337 East 3395 South, Salt Lake City, Utah 84109  
 LISTING AGENT: \_\_\_\_\_  
 PHONE NUMBERS: HOME: \_\_\_\_\_ WORK: \_\_\_\_\_ COPIES RECEIVED: \_\_\_\_\_  
 SELLING AGENT: \_\_\_\_\_  
 PHONE NUMBERS: HOME: \_\_\_\_\_ WORK: \_\_\_\_\_ COPIES RECEIVED: \_\_\_\_\_  
 INSURANCE COMPANY: \_\_\_\_\_ AGENT: \_\_\_\_\_  
 ADDRESS: \_\_\_\_\_ PHONE: \_\_\_\_\_

SALES PRICE: \$ 58,000.00 LOAN AMOUNT \$ N/A  
 ESCROW OFFICER: Stephanie ~~XXXXXXXXXX~~ Laura, Assistant Escrow Officer

CHECK NUMBER	TO WHOM	REGARDING	AMOUNT
	ASSOCIATED TITLE COMPANY	4001-004 (Policy) <u>267.00</u> 4002-004 (Escrow) <u>140.00</u> 4008-004 (Record) <u>35.00</u> 4009-004 (Recor Record) <u>7.00</u> 4003-004 (Doc Prep & handling) _____ 5048-004 (Phone) (Fed. Ex) _____	449.00
	Barbara Whiteley	Sellers Proceeds	9,010.84
	Western Savings & Loan 41 E. 100 So. Loan # 20936515 (lid left tel)	payoff on loan # 20936515 (good to 4-15-85)	44,370.00
	Arthur P. Monson Salt Lake County Treasurer City & County Bldg - #105 Edwell # 16-27-452-015	payoff 1984 power tax sale on Edwell # 16-27-452-015	75.59
	Salt Lake City Suburban Sanitary District #1 Account # F0745	assessments owing on account # F0745	55.56

Plaintiff's  
Exhibit K  
Elovas

RECEIVED: \$ 53,910.00 SHORT .R LONG TERM ESCROW  
 \$ \_\_\_\_\_  
 \$ \_\_\_\_\_  
 \$ \_\_\_\_\_  
 TOTAL: \$ 53,910.00 TOTAL DISBURSED: \$ 53,961.00

Mr. Whiteley owes

Mr. Seftel

2 months worth  
of payments  
for 486.00 / mo.  
486.00

plus interest

wants to consult his  
attorney - had to obtain  
retainers twice to get  
Whiteley to pay payments  
due & will in no way  
cooperate for a closing  
today - would authorize  
release of WD - wants to  
get w/atty this p.m.

Mr.  
Seftel

4-8-85

assigned  
Rarity  
Call  
James Dean

Exhibit Eleven,

third to last page]

DANIEL W. JACKSON, P. C.

LAW OFFICES  
**JACKSON & WILKINSON**  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
ARROW PRESS SQUARE, SUITE 200  
165 SOUTH WEST TEMPLE  
SALT LAKE CITY, UTAH 84101

TELEPHONE  
(801) 328-1800

September 12, 1986

HAND DELIVERED THIS DATE

John Whiteley  
Barbara Whiteley  
Elan Management  
c/o Gary A. Weston, Esq.  
Nielsen & Senior  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

RE: Uniform Real Estate Contract dated January 8, 1981  
between Sidney and Theresa Seftel (Seller) and Randy D.  
Call (Purchaser).

Dear Mr. Weston:

On January 8, 1981, Sidney and Theresa Seftel entered into the above-referenced Uniform Real Estate Contract with Randy D. Call, a copy of which is attached hereto. Pursuant to various assignments, Elan Management, John Whiteley and/or Barbara Whiteley have acquired Mr. Call's interest in that contract.

On August 27, 1986, the Honorable Judith W. Billings entered Findings of Fact, Conclusions of Law and Judgment in which the Court ordered that on or before 15 days of the entry of the judgment in Civil Proceeding No. C85-6571, John Whiteley, Barbara Whiteley and Elan Management were to pay to Sidney and Theresa Seftel all amounts which they had paid Western Savings and Loan since February, 1985, less the amount of \$2,836.00.

John Whiteley, Barbara Whiteley and Elan Management failed to make the payment as ordered by the court and are presently delinquent in monthly payments and have been so for over thirty days. In fact, those parties have made no monthly payments under the terms of the Uniform Real Estate Contract since the payment of \$2,836.00, pursuant to an Order of the Court, for the months of March, April, May, June, July and August, 1985.

EXHIBIT "A"

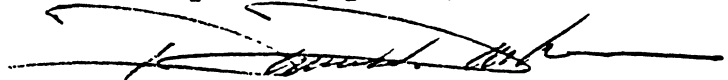
00039'

Therefore John Whiteley, Barbara Whiteley and Elan Management have failed to pay 4 monthly payments in 1985 in the amount of \$475.00 plus \$5.00 service fee and 9 monthly payments in the amount of \$483.00 plus \$5.00 service fee in 1986. This represents a total delinquency under the terms of the contract of \$6,512.54. [In addition, Mr. Seftel paid \$120.54 to Western Savings & Loan as an additional payment in 1985. This amount, while due under the terms of the Court's order, is not being assessed as a delinquent monthly payment.]

Pursuant to the terms of paragraph 16A of the Uniform Real Estate Contract this letter constitutes written notice that your clients, John Whiteley, Barbara Whiteley and Elan Management are in default under the terms of the Uniform Real Estate Contract in the amount of \$6,512.54. If your clients do not remedy the default within five days of this written notice, the Sellers, Sidney and Theresa Seftel, will exercise their rights under paragraph 16A of the contract to be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on the Contract shall be forfeited to the Seller as liquidated damages for the non-performance of the Contract and the Seftels may re-enter and take possession of the premises without legal process.

This notice is not intended nor should it be interpreted as a waiver, release or acquiescence in your clients' failure to comply with the court's judgment entered on August 27, 1986. And this notice is not intended to constitute an extension of time in which to make the payments as required by the Court's judgment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Daniel W. Jackson", with a long horizontal flourish extending to the right.

Daniel W. Jackson

DANIEL W. JACKSON, P. C.

LAW OFFICES  
**JACKSON & WILKINSON**  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
ARROW PRESS SQUARE, SUITE 200  
165 SOUTH WEST TEMPLE  
SALT LAKE CITY, UTAH 84101

TELEPHONE  
(801) 328-1800

September 19, 1986

HAND DELIVERED THIS DATE

John Whiteley  
Barbara Whiteley  
Elan Management  
c/o Gary A. Weston, Esq.  
Nielsen & Senior  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

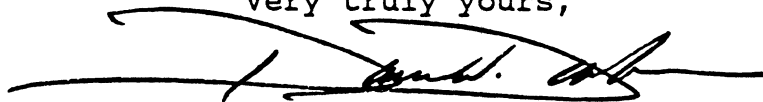
RE: Uniform Real Estate Contract dated January 8, 1981  
between Sidney and Theresa Seftel (Seller) and Randy  
D. Call (Purchaser).

Dear Mr. Weston:

Please be advised that it is our belief and position  
that your clients have already forfeited their interest in the  
property.

However, in order to fully protect our clients'  
position, enclosed is a Declaration of Forfeiture pursuant to  
the Notice of Forfeiture that was served upon you by hand  
delivery on September 12, 1986.

Very truly yours,



Daniel W. Jackson

AABP/kb

Enclosure

000402

DECLARATION OF FORFEITURE

To: JOHN M. WHITELEY, BARBARA WHITELEY AND ELAN  
MANAGEMENT, INC.  
c/o Gary A. Weston  
Attorney for John M. Whiteley  
Nielsen & Senior  
36 South State Street  
Salt Lake City, Utah 84147

You are hereby notified that you are in default under the Uniform Real Estate Contract dated January 8, 1981, wherein SIDNEY SEFTTEL and THERESA SEFTTEL are named Seller and RANDY D. CALL is named Buyer of the property located at 2337 East 3395 South, Salt Lake City, Utah, more fully described as follows:

Part of the Southwest Quarter of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, described as follows:

Commencing 577.5 feet North and 208.6 feet East of the Southwest corner of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 236.4 feet; thence East 77 feet; thence North 236.4 feet; thence West 77 feet to the place of beginning.

Payments in the amount of \$6,312.00 are delinquent.

Gary A. Weston as attorney for John M. Whiteley, Barbara Whiteley and Elan Management, Inc. was sent a notice of intent to declare forfeiture by Seller. You were notified that if the above amounts were not paid within five (5) days of receipt of such Notice, a forfeiture would be declared by Seller. The above payments were not made within five days of the receipt of said Notice.

00040

The Seller now exercises his remedy and declares a forfeiture under paragraph 16(A) of the Uniform Real Estate Contract. Such paragraph provides that following your failure to remedy the default within five days after written notice, the Sellers are now released from all obligations in law and in equity to convey the property to you, and all payments which have been made previously on this Contract are forfeited to the Seller as liquidated damages for non-performance of the Contract.

Further, pursuant to paragraph 16(A) of the Contract, the Seller exercises his option to re-enter and take possession of the premises without legal process, together with all improvements and additions you have made thereon and hereby notifies you that you are not tenants at will of the Seller.

DATED this 14th day of September, 1986.

  
DANIEL W. JACKSON

CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of June, 1987, I caused a true and correct copy of the aforesaid Respondents' Brief to be peresonally delivered to the following:

Daniel W. Jackson, Esq.  
The Walker Center, Suite 560  
175 South Main Street  
Salt Lake City, Utah 84111

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature appears to be 'Daniel W. Jackson'.

0498i