

1990

William R. Kelley, Jr. v. Leucadia Financial Corporation : Brief of Respondent

Utah Supreme Court

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BRIEF

900187

IN THE UTAH SUPREME COURT

WILLIAM R. KELLEY, JR.,
Plaintiff-Petitioner,

vs.

LEUCADIA FINANCIAL
CORPORATION, a Delaware
corporation,

Defendant-Respondent.

Case No. 900187

Priority No. 14

Review by Writ of Certiorari of an
Opinion and Order of the Utah Court
of Appeals, Case No. 880534-CA,
Reversing a Judgment of the
Third Judicial District Court for
Summit County, State of Utah

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FILED

FEB 4 1991

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

WILLIAM R. KELLEY, JR.,)	
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Plaintiff-Petitioner,)	
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vs.)	
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PARTIES TO THE PROCEEDING BELOW

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

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

2. Craig L. Taylor, Esq., Anthony B. Quinn, Esq. and Jeffrey D. Eisenberg, Esq. of Ray, Quinney & Nebeker previously appeared as counsel for First Security Mortgage Company prior to the above-mentioned substitution of parties.

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

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JURISDICTION

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

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Was Kelley required under the agreement to waive the title defects and claims for property damage before he would be entitled to specific performance?

2. Was Kelley's tender of performance defective because conditional and therefore insufficient to enable Kelley to bring this action for specific performance?

3. Was Kelley required to make an unconditional tender of performance before the closing date in order to maintain an action for specific performance?

4. Was Kelley excused from tendering his own performance?

5. Was the Court of Appeals correct in ordering that judgment be entered in favor of Leucadia?

In reviewing a case disposed of by summary judgment, the reviewing court determines whether or not there are genuine issues of material fact that preclude summary judgment and the correctness of the application of controlling law. Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Themy v. Seagull Enter., Inc., 595 P.2d 526 (Utah 1979).

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-Petitioner William R. Kelley, Jr. ("Kelley") commenced this action against First Security Mortgage Company ("First Security").¹ In this action, Kelley requested a declaratory judgment for the interpretation of rights, status and legal relationship under an Earnest Money Sales Agreement ("Agreement"), sought a decree of specific performance requiring First Security to convey certain property as contracted in the Agreement, and prayed for an abatement of the purchase price and damages for breach of the Agreement. (R. 1-11)

B. Course of Proceedings

Kelley commenced this action on September 22, 1987. On November 10, 1987, First Security filed a Motion to Dismiss and for Attorneys' Fees. (R. 72-73) In response, Kelley filed a Motion for Partial Summary Judgment on November 27, 1987. (R. 137-39) The Court entered its Order granting Kelley Partial Summary Judgment on February 3, 1988. (R. 562-64) This Order granted Kelley's request for a decree of specific performance and retained jurisdiction over the matter to determine whether Kelley was entitled to an abatement of the purchase price and

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

damages. (R. 562-64) First Security filed a Motion to Amend Judgment (R. 343-344), an Objection to Proposed Order Granting Partial Summary Judgment (R. 345-46), and a Motion for Reconsideration (R. 907), all of which were denied by the Court.

First Security filed a Motion for Summary Judgment relating to Kelley's claims for punitive damages and on May 6, 1988, the Court entered its Order which, among other things, granted summary judgment in favor of First Security. (R. 812-14) On the same day, the Court found the parties had otherwise settled all claims relating to the amount of damages to be awarded Kelley and entered its Final Judgment and Decree of Specific Performance. (R. 815-18)

Leucadia Financial Corporation ("Leucadia") was substituted for First Security on June 3, 1988 for purposes of appeal concerning the decree of specific performance and all orders or judgments. (R. 844-46) In that capacity, Leucadia filed its notice of appeal on June 3, 1988. (R. 847-49) This appeal was commenced by Leucadia from the Order of Partial Summary Judgment signed by the Honorable Homer F. Wilkinson on February 1, 1988, the Final Judgment and Decree of Specific Performance, signed by the Honorable Pat B. Brian on May 6, 1988 and the Order, signed by the Honorable Pat B. Brian on May 6, 1988. All of these orders and judgments were entered in the Third Judicial District Court for Summit County, Utah. On

August 22, 1988, the Supreme Court notified the parties that the case was poured over to the Court of Appeals for disposition.

C. Disposition by the Utah Court of Appeals

The Court of Appeals issued an unpublished opinion on January 5, 1990, in which it reversed the trial court and directed that judgment be entered in favor of Leucadia. (The Opinion is Appendix 1.) The Court of Appeals entered an Order denying Kelley's Motion for Rehearing on February 16, 1990.

D. Statement of the Facts

The facts before the District Court and the Utah Court of Appeals were as follows:

1. The Agreement Between The Parties.

On or about March 2, 1987, First Security Mortgage Company ("First Security"), as seller, and William R. Kelley, Jr. ("Kelley"), as buyer, executed an Earnest Money Sales Agreement (the "Agreement") for the purchase of real property. A copy of the Agreement and addenda thereto are Appendix 2 to this brief. (R.14-22) Pursuant to this Agreement, Kelley agreed to purchase and First Security agreed to convey title to certain property situated at 320 West Snows Lane, Park City, Utah ("Subject Property"). (R.14)

There were several addenda to the Agreement which altered the Agreement only by extending the time for closing. In the first addendum to the Agreement, the parties agreed to

extend the closing to April 20, 1987. (R.18) Thereafter, the parties extended the closing date to on or before June 1, 1987 (R.19); on or before July 1, 1987 (R.20); on or before August 31, 1987 (R.21). By letter dated September 4, 1987, the closing date was extended to September 15, 1987 (R.114); by letter dated September 14, 1987, the time for closing was extended until September 22, 1987 (R.116).

2. The Terms Of The Agreement.

The parties bargained for the following terms in their Agreement:

a) The property is sold "as is" without warranty with title to be conveyed by special warranty deed. (R.16; Appendix 2)

b) The agreement is conditioned on seller furnishing good and marketable title to the property as evidenced by a current policy of title insurance. (R.16; Appendix 2, ¶13)

c) Seller is to provide a current certified survey of the property. (R.18; Appendix 2)

d) In the event of a title defect, Buyer is to give Seller written notice of his objections to title. Thereafter, Seller is required to cure the defects to which Buyer has objected, if such can be done through escrow at closing. If the defects are not curable through an escrow agreement at closing, the Buyer has the option of waiving the defects and proceeding

with the closing or he may require the Seller to return the earnest money deposit and the Agreement will be null and void. (R. 15; Appendix 2, ¶G)

e) In the event that title cannot be made insurable without exceptions through an escrow agreement at closing, the Buyer may either (1) waive the defects and proceed with the sale, or (2) terminate the Agreement and have his earnest money refunded. (R. 15; Appendix 2, ¶H)

f) In the event there is loss or damage to the property between the date of the Agreement and the date of closing by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage exceeds ten percent of the purchase price of the property, Buyer may either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing, or declare this Agreement null and void. If damage to property is less than ten percent of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed. (R. 17; Appendix 2, ¶P)

g) With regard to the extension of closing dates, time is of the essence of the agreement. (R. 17; Appendix 2, ¶Q)

h) This Agreement constitutes the entire agreement of the parties. (R. 17; Appendix 2, ¶L)

3. The Dispute.

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

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

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

4. The Termination Of The Agreement.

By August 31, 1987, the last closing date mutually agreed to by the parties, neither party had performed nor tendered performance under the Agreement. (R. 359) On September 4, 1987, First Security sent Kelley a letter indicating that resolution of the boundary dispute and property damage could not be done through negotiation but, rather, would require substantial litigation. (R. 114-15) Accordingly, First Security offered Kelley the options bargained for in the Agreement in the event of a dispute rendering title to the property unmarketable or in the case of damage to property prior to closing. Namely, Kelley could either waive the defects and

proceed to closing or First Security would return the earnest money deposit. (R. 114-15; R. 15 ¶G; R. 17 ¶P) A copy of First Security's letter is Appendix 3 to this brief. Under these terms, the closing was scheduled for September 15, 1987. At Kelley's request, the closing date was extended until September 22, 1987. (R. 114-15, 116) A copy of First Security's letter extending the closing to September 22, 1987 is Appendix 4 to this brief.

On September 22, 1987, however, Kelley declined to close under either of the agreed-upon options stated in the letter and required by the Agreement. (R. 119-21) Instead, Kelley tendered the down payment in escrow, and stated that such tender was conditioned on First Security resolving the boundary dispute, rectifying the property damage, and clearing title prior to closing. (R. 120) A copy of Kelley's tender is Appendix 5 to this brief. Thereafter, First Security offered to extend the closing deadline to October 8, 1987, if, in accordance with the Agreement, Kelley desired to purchase the property "as is." (R. 296) Kelley refused this offer, however, stating that First Security was obligated to resolve the disputes and then convey the property to Kelley. (R. 297) Inasmuch as First Security was unable and did not agree to repair or replace the damaged property, and because Kelley did not waive the defects in the title and close the sale on or

before September 22, 1987, First Security executed a release of Kelley's earnest money deposit on September 24, 1987.

(R. 122-25)

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

5. The Sale Of The Subject Property To Leucadia.

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

SUMMARY OF THE ARGUMENT

Kelley's failure to waive the title defects and any claim for property damage resulted in termination of the Agreement pursuant to its own terms. Further, an unconditional tender of performance by Kelley was a prerequisite to this action for specific performance. Kelley's tender of performance was conditional on First Security providing a remedy not required by the Agreement and, therefore, Kelley was precluded from maintaining this action. Moreover, Kelley failed to make

an adequate tender prior to the expiration of the Agreement. Accordingly, the decision of the Utah Court of Appeals that the Agreement terminated was correct as a matter of law.

ARGUMENT

I. KELLEY'S REFUSAL TO WAIVE CLAIMS REGARDING TITLE DEFECTS AND PROPERTY DAMAGE CAUSED THE AGREEMENT TO TERMINATE BY ITS OWN TERMS.

The Agreement provides the options available to Kelley in the event of title defects or property damage due to vandalism. As to title defects, the Agreement provides that if a defect is not curable through an escrow agreement at closing, Kelley could either (i) waive the defect and proceed to closing, or (ii) refuse to waive the defect, and have his earnest money deposit returned and the Agreement terminated. (R. 15; Appendix 2, ¶¶G and H)² In the event of property damage caused by vandalism, the Agreement provides that Kelley may (1) proceed to closing if First Security agrees to repair or replace the damaged property, or (2) declare the Agreement null and void if

² Unlike Paragraph H of the Agreement, Paragraph G does not specifically state that the buyer must waive any title defects as a condition to proceeding with the transaction. However, that condition is implicit in Paragraph G. Otherwise, the last sentence of Paragraph G has no meaning or purpose. Also, such interpretation is supported by the express provision of Paragraph H, which states specifically that if title defects are not curable through an escrow agreement, the buyer must waive the defects to proceed with the transaction.

First Security does not agree to repair or replace the damaged property. (R.17; Appendix 2, ¶P) If First Security refuses to repair or replace damaged property, then Kelley could proceed with the closing only if he waived any claims for such damage.³

First Security by its letter of September 4, 1987 (Appendix 3) offered Kelley his options under the Agreement, which were either to waive the title defects and close the transaction or, alternatively, to permit the Agreement to terminate and receive a refund of his deposit. First Security did not agree in its letter to repair the damaged property. In his response by letter dated September 22, 1987 (Appendix 5), Kelley refused these options and demanded, as a condition to closing, that First Security resolve the boundary dispute and the water rights problem and repair or replace the property damage caused by vandalism. (R.61) Kelley's response to First Security's letter was clearly and unequivocally a refusal to waive the title defects. As a result, the Agreement terminated by its own terms under Paragraphs G and H. Furthermore, since First Security did not agree to repair or replace the damaged

³ Paragraph P does not clearly state the remedy available to a purchaser in the event the seller refuses to repair or replace property damage caused by vandalism. However, the only reasonable interpretation of the Paragraph is that the Agreement terminates unless the purchaser waives property damage claims. Otherwise, there is no need or purpose for the language in the Paragraph concerning the agreement of the seller to repair or replace.

property, and Kelley did not waive any claim for such damage, the Agreement also terminated under Paragraph P.

Notwithstanding his September 22 letter, Kelley argues that he did not intend to terminate the Agreement and that he would have waived the title defects (and presumably any claim for property damage) if he was required to do so. (Kelley's Brief, p. 35 n.9) The issue, however, is not whether Kelley intended to terminate the Agreement. The issue under Paragraphs G, H and P of the Agreement is whether Kelley waived the title defects and claims for property damage.⁴ In his September 22 letter Kelley not only refused to waive the defects, but insisted that First Security cure the problems. Since Kelley refused to waive the defects, the Agreement terminated automatically, regardless of his unexpressed intent. See Reno v. Beckett, 555 F.2d 757, 767 (10th Cir. 1977).⁵

⁴ Paragraph H specifically provides that in the event of title defects, the Agreement will automatically terminate by its own terms, unless Kelley waives the defects.

⁵ In addition, Kelley seems to argue that even if the September 22 letter could be construed as a failure to waive title defects and claims for property damage, he was subsequently willing to do so. After September 22, it was too late for Kelley to alter his position because the Agreement had terminated. See the discussion concerning the time of the essence provision of the Agreement at Argument IV, commencing infra at 30.

A clause in a land sales contract providing for cancellation of the contract in the event of a title defect is not an uncommon provision. Professor Powell notes:

One of the issues that may arise in an action for specific performance of a contract to sell an interest in land is the marketability of the landowner's title. Some contracts avoid or at least minimize the likelihood of litigation or of the vendor's liability by providing that if the title proves unmarketable, the agreement is canceled and a refund of the deposit is to be made to the purchaser.

6A R. Powell, The Law of Real Property ¶ 925[2][b], 84-24 & 25 (1990). Such provisions are binding and are enforceable by the seller, at least in the absence of fault or bad faith by the vendor. Lanna v. Greene, 175 Conn. 453, 399 A.2d 837, 840-841 (1978); Scerbo v. Robinson, 63 App. Div. 2d 1096, 406 NYS2d 370, 371 (1978); Robison v. Compton, 97 Idaho 615, 549 P.2d 274, 276 (1976); Sawl v. Kwiatkowski, 349 Mass. 712, 212 N.E.2d 228 (1965); De Propriis v. Smith, 342 Mich. 457, 70 N.W.2d 712, 713 (1955).⁶

It is argued, primarily in the amicus curiae briefs, that Leucadia's interpretation of Paragraphs G and H of the Agreement eliminates the recognized right of a purchaser to seek

⁶ In Sawl, the court defined "fault" to mean conduct by the seller subsequent to the purchase agreement and tending to impair the seller's title. 212 N.E.2d at 230. Also see, Trabucco v. Nelson, 8 Mass. App. 641, 396 N.E.2d 466, 468 (1979).

specific performance, with an abatement of the purchase price, in the event of title defects. In both briefs the case of Castagno v. Church, 552 P.2d 1282 (Utah 1976), is cited for the proposition that the purchaser has such a right. However, the Castagno court recognized that this remedy can be contractually modified. The court stated:

At the time of the execution of the contract, [sellers] knew there was no existing water right to the well. They undertook the duty to procure such a right, but they made no provision in the contract to excuse them, if the state engineer did not grant their change application to divert a water right to the well.

552 P.2d at 1284. Contrary to the contention of the amicus parties, the Castagno court recognized that any right of specific performance with abatement can be contractually modified.⁷

The issue of the effect of contractual provisions on the remedy of specific performance was addressed in Lanna v. Greene, 175 Conn. 453, 399 A.2d 837 (1978). In that case, a purchaser brought an action against the seller seeking, among other things, specific performance of a real estate contract and

⁷ In the amicus curiae briefs, the cases of Eliason v. Watts, 615 P.2d 427 (Utah 1980), Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980), Reed v. Alvey, 610 P.2d 1374 (Utah 1980), and Huck v. Hayes, 560 P.2d 1124 (Utah 1977) are also cited for the notion that a purchaser can specifically enforce an agreement. Those cases are not instructive. The Court did not address in those cases the effect of contractual remedies on the right to specific performance or abatement of the purchase price.

damages for breach. The agreement provided that if the sellers were unable to deliver marketable title, the purchaser could elect either to accept the title subject to encumbrances with no reduction in the purchase price, or to reject title and recover its deposit. 399 A.2d at 839. The court first noted that generally, in the event of unmarketable title, a purchaser may elect to have the contract specifically performed to the extent of the seller's ability, with an abatement in the purchase price. Id. at 840. The court then stated:

It is also fundamental, however, that vendor and vendee may contract to limit their remedies for breach.

Id. The court concluded that the contractual remedy of waiver or refund was exclusive and intended for the benefit of both parties, and that the purchasers were precluded from any other relief, including abatement.

In Robison v. Compton, 97 Idaho 615, 549 P.2d 274 (1976), the court held that remedy provisions concerning title defects similar to those in this case are binding. In holding that the purchasers were not entitled to specific performance and an abatement of the price, the court stated:

The Earnest Money Agreement also contains the following provision: "The earnest money deposited herein shall be refunded to Buyer and this Agreement voided . . . if merchantable title cannot be delivered within a reasonable time." By including this clause in their Agreement, the parties have agreed as to what the remedy will be in

case of the failure or inability of the vendor to provide merchantable title. Such a stipulation is binding, at least in the absence of bad faith, and will foreclose an action for a different remedy.

549 P.2d at 276. See also Sawl v. Kwiatkowski, 349 Mass. 712, 212 N.E.2d 228 (1965).⁸

It is also argued by the amicus parties that if Leucadia's interpretation of Paragraphs G and H is correct, a seller could avoid a sales contract by simply encumbering title. This argument illustrates the distinction between encumbrances on title that can be cleared through escrow and defects in title so fundamental they cannot be cleared by the payment of money into escrow. If, as suggested by the amicus parties, the seller encumbered title such as by incurring a lien on the property, such an encumbrance could be cured through escrow and hence would not relieve the seller of his obligations under Paragraphs G and H of the sales contract. Moreover, the termination provision found in those paragraphs would not be available to a seller acting in bad faith or who is at fault. In Trabucco v.

⁸ The Utah Association of Realtors cites Ace Realty, Inc. v. Looney, 531 P.2d 1377 (Okla. 1974) for the argument that the contractual remedies contained in the Agreement were for the benefit of the purchaser, who could waive those provisions and, therefore, still seek specific performance. Id. at 1380. Such conclusion by the Ace court, if indeed it was its conclusion, was reached without discussion or citation to other authority. This conclusion is obviously contrary to the holdings in Lanna v. Greene, Scerbo v. Robinson, Robison v. Compton, De Propriis v. Smith, and Sawl v. Kwiatkowski, supra text at p. 14.

Nelson, 8 Mass. App. 641, 396 N.E.2d 466 (1979), referring to a clause in a land sales contract that provided for termination in the event the seller is unable to convey good title, the court stated:

The clause, therefore, does not protect a seller who is not acting in good faith and who does not intend to carry out the agreement. (citation omitted).

Id. at 468. Also see, Lanna v. Greene, 399 A.2d 837, 841 (Conn. 1978); Sawl v. Kwiatkowski, 349 Mass. 712, 212 N.E.2d 228, 230 (1965).

The amicus curiae argue that the interpretation of Paragraphs G and H of the Agreement by Leucadia effectively eliminate the provisions of Paragraph N of the Agreement.⁹ Paragraph N is a general remedy clause, and does not address specifically the remedies available in the event of defects in title. It is fundamental that contractual provisions addressing a specific issue control and preclude application of a general

⁹ Paragraph N provides in part:

In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer.

contractual provision. Norman v. Recreation Centers of Sun City, Inc., 156 Ariz. 425, 752 P.2d 514, 517 (Ariz. App. 1988). Accordingly, the provisions of Paragraph N would apply only to situations not specifically addressed by Paragraphs G and H.

II. KELLEY'S FAILURE TO MAKE AN UNCONDITIONAL TENDER OF PERFORMANCE PRECLUDES SPECIFIC PERFORMANCE.

A. An Unconditional Tender Is Required As A Condition Precedent To A Decree Of Specific Performance.

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

Thereafter, the plaintiff made two "tenders of performance." In January, 1979, the plaintiff tendered the 10 percent down payment but did not state whether she had made application for the loan for the additional 90 percent; defendant did not respond to this tender. Id. In February, 1979, plaintiff tendered more money for the two units and required seller to carry a contract for 90 percent of the sales price; defendant did not respond to this tender. 622 P.2d 810. Thereafter, plaintiff brought an action for specific performance of the original agreement. The Court held that the plaintiff did not tender the performance required by the terms of the agreement and, accordingly, specific performance was denied. 622 P.2d at 811.

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

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

this rule, a tender, such as an offer to pay money, must be complete and unconditional.

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

- B. Kelley's Tender Was Not Unconditional And He Is Therefore Precluded From A Decree Of Specific Performance.

In this case, Kelley's "tender" was not in accordance with the terms of the Agreement, because it was conditioned on First Security undertaking obligations that were not required by the Agreement. The Agreement clearly provided the options available in the event the title to the property was unmarketable: Where the defects in title were not curable through an escrow agreement at closing (e.g., paying money to release liens or other encumbrances), the purchaser could either waive the defects and close the sale, or his earnest money deposit would be returned and the Agreement declared null and void. (R.15; Appendix 2, ¶¶G and H) Similarly, the options

available to the purchaser in the event of property damage caused by vandalism were provided by the Agreement: If the seller agrees to repair or replace the damaged property the buyer may, at his option, either proceed to closing or declare the Agreement null and void. (R.17; Appendix 2 ¶P)

In this case, Kelley's tender was expressly conditioned on First Security resolving the boundary dispute, clearing title, and resolving the water rights problem, even though Kelley had knowledge that substantial litigation was required to do so. (R.120) Clearly, such a tender was not made in accordance with the provisions in the Agreement; rather, it was conditioned on First Security undertaking obligations not provided for in the Agreement and over which First Security had no control.

By this Agreement, the parties stipulated to what the remedy would be in case of the failure or inability of First Security to provide merchantable title. Such a stipulation is binding, at least in the absence of fault or bad faith by the vendor. Supra, at p. 14. First Security clearly contemplated limiting its obligation to cure defects to title -- both before closing, as demonstrated by Paragraphs G and H of the Agreement, and after closing, as demonstrated by its inserting in the Agreement the "as is" and "without warranty" and "title conveyed

by special warranty deed" language.¹⁰ By annexing an unwarranted condition to his tender of performance, Kelley in effect refused to perform. See Gerritsen v. Draney, 351 P.2d 667, 673 (Wyo. 1960) (a tender made not in conformity with the contract is the same as if no tender is made at all); Johnson v. Goldberg, 130 Cal.App.2d 571, 279 P.2d 131 (1955) (conditional tender of performance is a refusal to perform).

The parties also, by their Agreement, stipulated to the remedy in the event of property damage caused by vandalism. First Security had no obligation to repair or replace the damaged property. Rather, the Agreement provided that if First Security agreed to repair the damage, then Kelley could proceed with the Agreement. However where, as in this case, the First Security did not agree to repair the damaged property, the only obligation First Security had was to allow for the termination of the Agreement by its terms, unless Kelley waived any claim for the property damage. Again, Kelley's tender of performance was not in conformance with the Agreement and, therefore, in effect was a refusal to perform. Gerritsen, 351 P.2d at 673; Johnson, 279 P.2d at 131.

¹⁰ As to the definition of a "special warranty deed," and the limited liabilities of the seller, see 6A R. Powell, The Law of Real Property, ¶ 900[2](d), 81A-141 (1990). Also see, Central Life Assurance Soc. v. Impelmans, 13 Wash.2d 632, 126 P.2d 757, 763 (1942).

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

Kelley argues that his tender of performance, evidenced by the September 22, 1987 letter (Appendix 5), was not defective because the only condition that the letter imposed was that "First Security honor[] its obligation pursuant to the Earnest Money Sales Agreement and deliver[] the property free from those defects which it has undertaken to cure." (Kelley Brief, pp. 21-22) Kelley argues that a tender conditioned on the other party performing its obligations under an agreement does not render the tender defective.

Kelley's argument begs the question. The issue is whether or not Kelley had the right to insist that First Security deliver title to the property free from the defects it undertook to cure. Clearly, First Security did not have that obligation. The Agreement set forth the obligations, rights and options of the parties in the event of a title defect or property damage. As noted above, those contractual provisions are binding. (Supra at p. 14) Accordingly, Kelley's demand

that First Security deliver unencumbered title and repair the property damage was contrary to the Agreement, and imposed conditions not authorized by the Agreement.

Kelley also argues that he and First Security had a difference of opinion concerning First Security's duty to clear title, which was why the lawsuit was filed and claims that the September 22 letter was merely to set forth Kelley's understanding of First Security's obligations. Regardless of how Kelley characterizes the September 22 letter, it specifically states it is a tender and that the tender was specifically conditioned on First Security resolving the title defects, resolving the water rights issues and repairing or replacing the damaged property. (Appendix 5) These obligations were not assumed by First Security under the Agreement, and Kelley's attempt to impose these obligations on First Security in his tender caused the tender to be defective.

III. KELLEY WAS NOT EXCUSED FROM TENDERING HIS OWN PERFORMANCE.

Kelley was required to tender his own performance if he desired to enforce the Agreement, and the tender had to be complete and unconditional. Century 21 All Western Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982). Kelley now argues that his tender was excused, and that he can therefore still seek to enforce the Agreement.

It is first noted that once the title defects became known, the Agreement required that Kelley either waive the defects and proceed with the Agreement, or accept a refund of his deposit and permit the Agreement to terminate. He was required by the Agreement to make an election. Even assuming for purposes of argument that Kelley's tender was excused, he was still required to make an election. His election, as evidenced by the September 22 letter, was to refuse to waive the title defects and claim for property damage. Accordingly, the Agreement terminated by its own terms.¹¹

Kelley argues that he was excused from making his own tender because First Security's tender, as evidenced by its September 4 letter (Appendix 3), was defective. Kelley claims that in its September 4 letter First Security repudiated its obligations to convey marketable title, and that this excused Kelley's own tender. It is not First Security who is now seeking to enforce the Agreement. Kelley is. Therefore whether First Security made a tender or even a defective tender is irrelevant. The party seeking to enforce an agreement must make

¹¹ See the discussion in Argument IV, commencing infra at page 29 regarding the time of the essence provision in the Agreement and the fact that had Kelley failed to make any election or tender by September 22, 1987, the Agreement would have terminated in any event.

its own tender, unless excused. As noted in the Century 21 case:

In other words, the party who desires to use legal process to exercise his legal remedies under such a contract must make a tender of his own agreed performance in order to put the other party in default. (citations omitted).

645 P. 2d at 56.

In any event, First Security, by its September 4 letter, did not repudiate its obligations under the Agreement. As discussed in Argument I above, the Agreement sets forth the remedies and options available to Kelley in the event First Security is unable to convey marketable title. First Security's letter does not repudiate those remedies or options. In fact, the letter offers to Kelley the right to proceed with the Agreement or terminate, as expressly provided in the Agreement.

Kelley further argues that, notwithstanding the provisions in the Agreement, First Security still had an obligation to exercise reasonable diligence to clear title. Kelley contends that First Security's failure to do so excused his tender. This argument is also faulty. As noted above, a contractual provision such as Paragraphs G and H of the Agreement, are enforceable absent fault or bad faith by the vendor. Supra at 14. In this case, there is no indication or claim that the defective title was the fault of First Security or that First Security acted in bad faith.

Kelley relies on Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265 (1984) to support his argument that First Security was required to exercise diligence. In that case, the real estate contract contained a termination provision similar to that found in Paragraphs G and H of the Agreement and had a "time of the essence" provision. The seller argued that the contract was terminated because the buyer failed to tender performance by the closing date. The court stated that the seller had a duty to clear title, if it could be done with reasonable diligence and prior to the closing date. 678 P.2d at 1271. In the Langston case, the title defect was easily curable, and could have been cured by the closing date, if the seller had exercised diligence. The court essentially concluded that failure to cure the defect was bad faith, which precluded the seller from terminating the agreement based on the time of the essence provision. The court held that the bad faith of the seller excused the buyer's obligation to make a tender by the closing date. However, in this matter, there is not any evidence or even an argument that First Security was acting in bad faith or failed to exercise diligence to clear title by the closing date.

In fact, First Security did exercise reasonable diligence to clear title, but was unable to do so by the closing date of August 31 (Appendix 2) or the closing date of

September 22 (Appendix 4). After the boundary dispute and water problems were discovered, First Security first tried through negotiations to resolve the problems with the abutting property owners, the Armstrongs, but without success. First Security then, on July 10, 1987, filed a lawsuit against the Armstrongs. By August 31, 1987, the date set for closing, First Security had not been able to clear title. Since time was of the essence, and the date for closing had arrived, First Security properly gave notice to Kelley to elect his remedy under the Agreement, i.e., waive the defects and close, or terminate the Agreement. Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265 (1984). In Ace Realty, Inc. v. Looney, 531 P.2d 1377 (Okla. 1974), a case cited by Kelley, the Court observed that, "[i]f the seller is truly unable to satisfy a title defect, and the purchaser refused to waive satisfaction, then the seller is entitled to claim frustration of the contract and avoid specific performance." Ace Realty, 531 P.2d at 1380. The court in Ace Realty also noted that a seller can only be put in default "by the purchaser's tender of performance and a demand for merchantable title when the defective title could be cleared without difficulty in a reasonable time." Id. at 1380 (emphasis added). Also see, Cohen v. Kranz, 12 N.Y.S.2d 242, 238 N.Y.S.2d 928, 189 N.E.2d 473, 475 (1963).

Kelley argues at length concerning the meaning of the provision in the Agreement that states:

Property sold 'as is' without warranty.
Title conveyed by Special Warranty Deed
corp. form. Other terms to remain the same.

Kelley insists that First Security is relying on that provision to relieve it of its obligation to convey marketable title.

(Kelley Brief, pp. 26-29) Regardless of the meaning of the provision, the Agreement sets forth the remedies and options available to Kelley in the event First Security is unable to convey marketable title. (Appendix 2, ¶¶G and H) First Security's letter of September 4 does not repudiate those remedies and options. It merely states:

First Security is prepared to sell the
property to you "'as is' without warranty"
in accordance with the terms of the earnest
money agreement.

As noted above, the Agreement recites that the "[p]roperty sold 'as is' without warranty." Nothing in the letter contradicts the provisions of the Agreement. Accordingly, First Security did not repudiate its obligations, and Kelley was not excused from making an unconditional tender of performance.

IV. WHERE TIME IS THE ESSENCE OF THE AGREEMENT FAILURE TO TENDER BY THE CLOSING DATE PRECLUDES SPECIFIC PERFORMANCE.

A. The Agreement Terminated By Its Own Terms Because Of The Time Of The Essence Clause.

The Agreement terminated by its own terms because the transaction was not closed nor adequate tender made by the agreed upon date. This has been expressly considered by the Utah Supreme Court. The Court has stated that where time is made the essence of the agreement, the parties must make tender by the stated closing date or both parties will be discharged from their obligations.

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

to close on this transaction" provided the seller cleared the encumbrance. 645 P.2d at 54-55.

The court noted that the tender was, in that situation, made within the contract period; the court reasoned that in cases where the executory contract contains no declaration that time is of the essence, the contract obligations can continue for some time beyond the stated closing date. However, the court made clear this holding was limited to situations in which there is no time of essence agreement between the parties:

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

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

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

The Court's notation that time of the essence clauses are to be strictly enforced is in accord with holdings of other courts. E.g., Nix v. Clary, 640 P.2d 246 (Colo. App. 1981) (purchasers were not entitled to specific performance as they failed to tender payment as required by the contract which

provided that time was of the essence and give notice of their unconditional commitment to be bound by the contract); In re Estate of Gauthier, 493 P.2d 377 (Colo. App. 1972) (not selected for official publication) (where time is of essence of a contract, failure to tender payment when due destroyed right to specific performance of contract).

In this action, the Agreement provides that "time is of the essence." (R.17; Appendix 2, ¶Q) Significantly, this provision goes on to state: "This provision relates only to the extension of closing date." (R.17; Appendix 2, ¶Q) The last extension of the closing date in this case provided that the closing was to occur on or before September 22, 1987. (R.116) On September 22, 1987, however, the performance Kelley tendered was insufficient as a matter of law because Kelley's tender was conditional on a term not found in the Agreement. See Century 21, 645 P.2d at 56; see Argument II, supra. Because Kelley did not tender unconditional performance of the Agreement on or before September 22, 1987, the time of essence clause of the Agreement caused the Agreement to lapse. On that date, both parties were discharged from their obligations and thus neither party could be said to be in default and susceptible to judgment for damages or a decree for specific performance. See Century 21, 645 P.2d at 56 and at 55 n.1.

Even assuming that despite the time of essence clause, the Agreement remained open, Kelley never attempted to tender unconditional performance of the Agreement after the last extension had expired. Indeed, First Security offered to allow closing on October 8, 1987, if Kelley would make an unconditional tender of performance. (R.296) Again, however, Kelley refused, stating that First Security was obligated to provide a remedy to the title and property damage disputes not provided for in the Agreement. (R.297)

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

Moreover, by the time Kelley changed his position to seek conveyance of "whatever title [First Security] has," the

time of essence clause of the Agreement had rendered the Agreement void.¹² Indeed, by this time, First Security had pursued other options in reliance on Kelley's failure to tender appropriate performance on the date set for closing and, in fact, had entered into an agreement for the sale of the Subject Property to Leucadia. (R. 362)

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

B. The Time Of The Essence Clause Was Not Waived.

Kelley argues that the parties waived the time of the essence provision of the Agreement by the extensions of the

¹² It is also noted that in a suit for specific performance of a real estate contract, the purchaser must show that a proper tender was made prior to commencement of the suit. Reed v. Alvey, 610 P.2d 1374, 1379 (Utah 1980).

closing date, and cites to Century 21 All Western Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 55 (Utah 1982). The court in the Century 21 case did state that where an executory contract does not contain a time of the essence provision, the contract obligation can continue beyond the closing date. However, there was no discussion in that case concerning waiver of such a provision.¹³ In this case, the Agreement contains a time of the essence provision and it was not waived by the extensions of the closing dates.

Contrary to the position of Kelley, the extensions of the closing date to a date certain did not have the effect of waiving the time of the essence provision. In fact, an extension of a closing to a date certain has the effect of making time of the essence as to the closing date. Moore v. Lovelace, 413 So.2d 1100 (Ala. 1982). Also see, Bishop v. Tolbert, 249 S.C. 289, 153 S.E.2d 912, 918 (1967) In the case of Hart v. Lyons, 106 Ill.App.3d 803, 436 N.E.2d 723 (Ill. App.

¹³ Kelley relies on Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980), Sohayegh v. Oberlander, 155 A.D.2d 436, 547 N.Y.S.2d 98 (1989), and Cline v. Hullum, 435 P.2d 152 (Okla. 1967) for the proposition that a party must be given a reasonable time within which to perform before the other party can make time of the essence once waived or if the agreement does not contain such a provision. Those cases are not pertinent because the subject Agreement contained a time of the essence provision which was not waived, as discussed in the text infra. In any event, as to what constitutes a reasonable length of time, see generally 32 ALR 4th Vendor's Notice - Time of Performance §§ 6-8 (1984).

1982), the court stated that the mere extension of a closing date does not waive a time of the essence provision, without some evidence of intent to modify that clause. Furthermore, the Agreement in this case specifically states that the time of the essence provision relates to extensions of the closing date.

(R. 17; Appendix 2, ¶ Q)

The usual case holding a waiver of the time of essence provision by conduct arises in the context of a seller who grants the purchaser an indefinite extension of time within which to perform. Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980) (seller waived time of essence provision for payments due for purchase of real estate where seller never communicated any urgency for buyer to arrange for financing and continually made extensions over a nine-month period without setting a specific extension deadline). Also see, Schwoyer v. Fenstermacher, 251 Pa. Super. 243, 380 A.2d 468 (1977) (seller waived time of essence provision where seller indefinitely extended closing dates until title searches could be completed).¹⁴

Such is not the situation presented in this case, however. In this case, there is no dispute that the Agreement

¹⁴ Kelley argues that he was not provided a reasonable time within which to perform between the September 4 letter and September 22. Even assuming that the time of the essence provision had been waived, which it was not, Kelley was given ample time to perform. Under Paragraph G of the Agreement, the buyer is only given three days after receipt of an abstract or preliminary title policy to accept or reject title.

provided that time was of the essence. (R. 17 ¶ Q) Indeed, the Agreement expressly states that the time of essence provision relates "only to extensions of the closing date."

(R. 17 ¶ Q) With respect to the extensions, the time of essence provision was annexed to the extensions ending on June 1, 1987, on July 1, 1987, and on August 31, 1987, as each of these extensions was written on a form addendum which provided that "all other terms of the Agreement shall remain the same." (R. 19-21) (Appendix 2)

The extension made by letters dated September 4, 1987 (R. 114) and September 14, 1987 (R. 116) (Appendices 3 and 4, respectively), extending the time for performance to September 22, 1987, each provided clear notice that if Kelley failed to perform by September 22, 1987, his right to purchase the property under the Agreement would terminate. Any question of First Security's intentions to adhere strictly to the time for performance was dispelled by its letter dated September 14, 1987 (R. 17-18) (Appendix 4), which unequivocally stated that if Kelley failed to tender performance the Agreement would be considered null and void. See Boehnlein v. Ansco, Inc., 61 Or. App. 389, 657 P.2d 702, petition denied, 294 Ore. 682, 662 P.2d 725 (1983); Wachung Realty & Development Co. v. Llewellyn Holding Corp., 96 N.J. 498, 126 A. 326 (1924).

Thus, the conduct surrounding the extensions agreed to between First Security and Kelley does not give rise to a claim of waiver of the time of essence provision. First Security never granted an indefinite extension of time for closing the transaction. Each extension clearly and unequivocally stated that failure to perform would result in the Agreement being declared null and void, either by annexation of the words "time is of the essence" or by clear indications that failure to perform would not be excused.

V. THE COURT OF APPEALS PROPERLY DIRECTED JUDGMENT BE ENTERED IN FAVOR OF LEUCADIA.

Kelley argues that the Court of Appeals improperly remanded the case for entry of judgment in favor of Leucadia. Kelley claims that this remedy was not requested, and that the Court of Appeals should have remanded the case for resolution of factual issues. The argument of Kelley is incorrect.

The Court of Appeals held that because Kelley refused to waive title defects, the Agreement terminated pursuant to Paragraph H and the remedy of specific performance was unavailable. Since specific performance was not available and the Agreement terminated, as a matter of law, the only remaining remedy under the Agreement was a refund of Kelley's deposit. There were no factual issues to resolve. Accordingly, the Court of Appeals directed judgment be so entered.

When an issue resolved on appeal disposes of the entire action, as in this case, the appellate court should properly direct the lower court to enter judgment accordingly. This is true even if the appeal is from a summary judgment. Pioneer Finance & Thrift Co. v. Powell, 21 Wash.2d 201, 443 P.2d 389 (1968); Leithead v. American Colloid Co., 721 P.2d 1059, 1063-64 (Wyo. 1986); Harlow v. Carleson, 16 Cal.3d 731, 129 Cal. Rptr. 298, 548 P.2d 698, 703 (1976).

Kelley argues that there were three factual issues which precluded the Court of Appeals from directing that judgment be entered. Those included whether or not (i) Kelley refused to waive the title defects, (ii) title was insurable, and (iii) the title defects could have been cured through an escrow agreement. As to the title defects, as discussed above, there is no question that Kelley refused to waive the defects. Kelley, in fact, insisted in the September 22 letter and his Complaint that First Security remedy the title defects and the property damage. For Kelley to argue to the contrary is disingenuous.

The title was not insurable, and there is no factual issue in that regard. Kelley's present position that title may have been insurable without exceptions for defects is somewhat astounding. In both his tender of performance, evidenced by the letter dated September 22, 1988, and in his Brief, Kelley claims

that title to the Property was defective and unmarketable.

(Appendix 5; Opening Brief at 5-6, 24-25)

Those defects to which Kelley refers would have been excepted from coverage in a title policy. It is fundamental that a title policy is issued to insure a party against any loss due to defects in title, except losses caused by defects "excepted" from coverage. It is also fundamental that the title insurance excepts from coverage defects which affect marketability of title.¹⁵

The nature of the boundary dispute clearly makes the title to the Property uninsurable or only insurable with exceptions. As Kelley argues, the erroneous property description caused the Property to shift to the south 15.22 feet. (Opening Brief, p. 5) Accordingly, First Security could not even convey the northern 15.22 feet of the Subject Property and 15.22 feet of the southern portion of the Subject Property would overlap onto the property of the abutting property to the south. There cannot be any serious question that title to the Property was, at best, only insurable with exceptions.

Kelley also argues that there is a factual issue as to whether the defects could have been cured through an escrow. It

¹⁵ See generally, 9 Appleman, Insurance Law & Practice, §§5201, 5208 (1981); 7 R. Powell, The Law of Real Property ¶¶1029, 1030, 1036 (1990)1 See also, Utah Code Ann. §§31A-1-301(82) and 31A-20-110(1) (1986).

has been suggested that the defects could have been cured by reducing the purchase price and depositing the amount of the reduction in escrow. Such an escrow does not "cure" the defects. Escrow agreements generally are used to "satisfy" unreleased liens or similar encumbrances. The escrow itself makes the title marketable. E.g., Webb v. Consolidated Oil Co., 100 F.2d 865 (5th Cir. 1939); Holmby, Inc. v. Dino, 98 Nev. 358, 647 P.2d 392 (1982); Rankin v. McFerrin, 626 P.2d 720 (Colo. App. 1980); Robeson-Marion Development Co. v. Powers Co., 256 S.C. 583, 183 S.E.2d 454 (1971). In this case, the escrow cannot make the title to the Property marketable because the boundary problem would still exist.

Kelley's argument that title was insurable under Paragraph H or could be cured by an escrow also ignores the fact that in the September 22, 1988 letter, Kelley refused to close the transaction until the boundary dispute was "resolved." (R. 61; Appendix 5) If the boundary dispute was in fact not a title defect to which Kelley could complain under Paragraph H, or could have been cured through an escrow, then his demand that First Security resolve the dispute further supports the argument that his tender of performance was defective. The argument further ignores the fact that in the September 22 letter Kelley also demanded that First Security resolve the water rights

problem. This problem could not have been "cured" through an escrow.

CONCLUSION

The decision of the Court of Appeals was correct, as a matter of law, for several reasons. First, Paragraphs G, H and P specifically provide the remedies available in the event of a title defect or property damage due to vandalism. Under Paragraphs G, H and P, Kelley was required to waive the title defects and property damage if he desired to proceed with the transaction. His failure to do so resulted in cancellation of the Agreement. Second, Kelley's tender of performance was deficient in that it required First Security to provide a remedy not required by the Agreement. Such a conditional tender is deficient as a matter of law and is therefore an insufficient basis to enable Kelley to bring an action in specific performance. Third, the agreement between First Security and Kelley provides that with respect to closing dates, time is of the essence. As a matter of law, this Agreement expired because Kelley did not make an unconditional tender of performance by the closing date on September 22, 1987. As such, the Agreement

is incapable of being specifically enforced. Accordingly, this Court should affirm the decision of the Utah Court of Appeals.

DATED this 4th day of February, 1991.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

John A. Snow

Kathryn H. Snedaker

50 South Main, Suite 1600

Salt Lake City, Utah 84144

Telephone: (801) 532-3333

By 

Attorneys for Respondent

By _____

Attorneys for Respondent
(Original Signature)

CERTIFICATE OF SERVICE

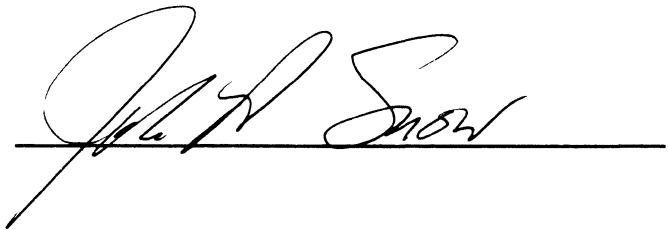
I hereby certify that I caused four true and correct copies of the within and foregoing Brief of Respondent to be mailed, postage prepaid, this 4th day of February, 1991, to the following:

David R. Olsen
Charles P. Sampson
Paul A. Simmons
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
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Attorney General
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236 Utah State Capitol
Salt Lake City, Utah 84144

D. Frank Wilkins
175 S. Main Street, #1000
Salt Lake City, Utah 84111

David W. Johnson
P.O. Box 3598
Park City, Utah 84060

A handwritten signature in dark ink, appearing to read "J. P. Snow", is written over a horizontal line.

(Original Signature)

APPENDIX 1

Court of Appeals Opinion, issued January 5, 1990

FILED

IN THE UTAH COURT OF APPEALS

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JAN 5 1990
Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

William R. Kelley, Jr.,)
)
Plaintiff and Respondent,)
)
v.)
)
Leucadia Financial Corporation,)
a Delaware corporation,)
)
Defendant and Appellant.)

OPINION
(Not For Publication)

Case No. 880534-CA

Third District Court, Summit County
The Honorable Pat B. Brian

Attorneys: John A. Snow and Kathryn H. Snedaker, Salt Lake
City, for Appellant
David R. Olsen, Charles P. Sampson, and Claudia F.
Berry, Salt Lake City, for Respondent

Before Judges Davidson, Bench, and Jackson.

JACKSON, Judge:

Leucadia Financial Corporation (Leucadia)¹ appeals a summary judgment decree of specific performance requiring it to convey real property to respondent (Kelley) pursuant to a sales agreement. The lower court reserved Kelley's damages as an issue to be tried, but the parties settled that issue out of court prior to the appeal. We reverse.

The issues we must decide are (1) whether the parties' sales agreement provides remedies to Kelley if Leucadia is unable to convey marketable title, and (2) whether those remedies require conveyance by Leucadia if title is not marketable.

1. During the proceedings below, Leucadia succeeded to the interest of the original seller, First Security Mortgage Company. For simplicity, we will refer to Leucadia as the seller.

The property contemplated by the parties in their sales agreement was not surveyed until after the parties executed that agreement. The survey revealed that Leucadia's property description did not include certain acreage containing a stream, a pond, and a spring, all of which the parties had believed to be part of their agreement. Leucadia was unable to resolve the land description problem by negotiating with the adjoining property owner. Thereafter, Leucadia initiated litigation against the adjoining owner and then decided it was not worth prosecuting. While Leucadia was trying to clear title to the disputed land and water rights, the parties in the instant action extended their closing date. Later, each of the parties maneuvered to obtain remedies which each believed to flow from their contract.

Leucadia offered to convey title subject to the defects or to return Kelley's earnest money deposit. Kelley tendered a portion of the agreed purchase price and insisted that Leucadia clear title and then convey the property. Simultaneously, Kelley filed suit for (1) a declaratory judgment of the parties' rights under the terms of the contract, and (2) specific performance pursuant to the contract terms, as declared.

The lower court implicitly interpreted the contract as not providing an agreed remedy in the event Leucadia could not convey clear and marketable title to all the property. Judgment was entered for an equitable remedy, i.e., specific performance, with an abatement of the purchase price to follow. Thus, the lower court interpreted the parties' agreement as a matter of law, not determined by extrinsic evidence of intent. We accord that construction no particular weight and review the determination under a correctness standard. See Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). Whether ambiguity exists in a contract is also a question of law. Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983). We find, as a matter of law, no ambiguity in the agreement concerning the rights and remedies of the parties in the event title was found to be defective and unmarketable.

A cardinal principle of contract law is that, in the absence of fraud or mutual mistake, a clear and unambiguous contract must be enforced according to its terms. East v. Kahan, 206 Kan. 682, 481 P.2d 958, 961 (1971). The terms of the contract, where clear and unambiguous, are conclusive. Goodman v. Newzona Inv. Co., 101 Ariz. 470, 421 P.2d 318, 320 (1966). The first source of inquiry is the written document

itself. Big Cottonwood Tanner Ditch Co. v. Salt Lake City Corp., 740 P.2d 1357, 1359 (Utah Ct. App. 1987). Thus, we turn to the terms to which these parties agreed.

Leucadia agreed "to furnish good and marketable title to the property," subject to encumbrances and exceptions noted in the contract. Paragraph G (Title Inspection) of the agreement provided a title inspection procedure prior to closing, including how the parties would deal with any title defect that appeared: "If said defect is not curable through an escrow agreement at closing, this agreement shall be null and void at the option of the buyer, and all monies received herewith shall be returned to the respective parties." Kelley refused to accept this option. The parties agreed that title insurance would be utilized for closing. Paragraph 4 (Title Insurance) of the agreement provided the procedure for insuring title: "If title cannot be made insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects and encumbrances, be refunded to Buyer, and this agreement shall thereupon be terminated." Title could not be made insurable without exceptions for defects. Kelley refused to waive the defects, thus his remedy, as agreed, was limited to a refund of his earnest money deposit, not specific performance.

We have examined the other issues argued by the parties, including that of tender,² and conclude they are meritless or that they do not require our consideration in light of the clear and unambiguous terms of the parties' agreement.³


2. This court recently discussed the requirement of tender, where a purchase agreement contemplates simultaneous performance by the parties, in Bell v. Elder, 121 Utah Adv. Rep. 16 (Ct. App. 1989), and Carr v. Enoch Smith Co., 119 Utah Adv. Rep. 89 (Ct. App. 1989). See also Utah Code Ann. § 78-27-1 (1987).

3. In its brief, Leucadia touched on a related issue of vandalism, believed to have been committed by the adjoining landowner, which diverted the water and dried up the pond. Paragraph P (Risk of Loss) of the parties' agreement provided a procedure for dealing with loss or damage to the property prior to closing. Kelley did not seek to use that procedure.

The judgment of the trial court is reversed, and the case is remanded for entry of judgment consistent with this opinion.


Norman H. Jackson, Judge

I CONCUR:


Richard C. Davidson, Judge

BENCH, Judge (dissenting):

The main opinion reverses this judgment because there is no contractual provision allowing for specific performance. If Kelley made a proper and timely tender of payment, I believe the remedy of specific performance is available.

My colleagues are correct in limiting the parties' remedies at law to the terms of the contract. If there was a "defect" in Leucadia's title, the contract permits Kelley to: 1) waive the defect and go through with the purchase; or 2) take a refund of his earnest money. In this case, Leucadia agreed to sell property located at a specific address in Summit County. Leucadia had good and marketable title to property located at that address. Leucadia erroneously believed and represented that the property contained a neighboring stream, pond, and spring. That fact should not cloud title to the property Leucadia actually owned. There is, therefore, no "defect" in Leucadia's title. See Black's Law Dictionary 1332 (5th ed. 1979) (defective title means unmarketable title). Clearly, where the contract has not provided a legal remedy, the trial court could order specific performance of the contract.

Even where a legal remedy is provided, however, the trial court has the discretion to order specific performance of the contract if the legal remedy is inadequate. See generally Restatement (Second) of Contracts §§ 357-360 (1981). "The rule

has been long established that a vendee has the right to insist upon performance by the vendor to the extent the latter is able to perform with an abatement in the purchase price equal to the value of the deficiency or defect." Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976); see also In re Hayhurst's Estate, 478 P.2d 343 (Okla. 1970); Streator v. White, 26 Wash. App. 430, 613 P.2d 187 (1980).

I believe the trial court had the discretion to order Leucadia to convey the property it owned with an abatement in the purchase price. Resolution of this appeal should turn not on the unavailability of specific performance as a remedy, but on whether Kelley made a proper and timely tender, as argued by the parties.



Russell W. Bench, Judge

APPENDIX 2

Earnest Money Sales Agreement

EARN EASY MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



GENERAL PROVISIONS (Sections)

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

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

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

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

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

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

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

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

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

J. CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor

0183

DATE. FEBRUARY 20, 1987

The undersigned Buyer BILL KELLEY hereby deposits with Brokerage
 EARNEST MONEY the amount of ten thousand Dollars (\$ 10,000),
 the form of personal check to be deposited upon acceptance of all parties which shall be deposited in accordance with applicable State Law
UTAH REAL ESTATE INC.
 kersage 601-649-8550 Phone Number Received by [Signature]

OFFER TO PURCHASE

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

CHECK APPLICABLE BOXES

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

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

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

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

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

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

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

2 PURCHASE PRICE AND FINANCING: The total purchase price for the property is Six Hundred Thousand
 Dollars (\$ 600,000) which shall be paid as follows

10,000 which represents the aforescribed EARNEST MONEY DEPOSIT
50,000 representing the approximate balance of CASH DOWN PAYMENT at closing
 _____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed
 by buyer which obligation bears interest at _____ % per annum with monthly payments of \$ _____
 which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other _____
 _____ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
 assumed by Buyer which obligation bears interest at _____ % per annum with monthly payments of \$ _____
 which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other _____
 _____ representing balance if any, including proceeds from a new _____ loan to be paid as follows. _____

Other UPON ACCEPTANCE BUYER TO DEPOSIT AN ADDITIONAL
\$40,000 NON-REFUNDABLE IN CONSIDERATION OF 60 DAY CLOSING
500,000 TOTAL PURCHASE PRICE BUYER HAS THE OPTION TO EXTEND THE OFFER CLOSING
15 DAYS FOR AN ADDITIONAL \$10,000

If Buyer is required to assume an underlying obligation and/or obtain outside financing Buyer agrees to use best efforts to assume and/or procure same and this
 is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within NA
 days after Seller's acceptance of this Agreement, to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed _____ %.
 If Buyer does not qualify for the assumption and/or financing within NA days after Seller's acceptance of this Agreement this Agreement shall be voidable
 at the option of the Buyer or Seller upon written notice
 Seller agrees to pay \$ NA towards Buyer's total financing and closing costs including but not limited to loan discount points.
 If this Agreement involves the assumption of an existing loan or obligation on the property, Section F shall apply

property, subject to encumbrances and exceptions if there is evidence of a current policy of title insurance in the amount of purchase price. An abstract of title brought current with an attorney's opinion (Section H)

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

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

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

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

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

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

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

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

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller will have until 2:00 (2:00 PM) FEBRUARY 27 1987 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the earnest money to the Buyer.
Signature of Buyer: [Signature] Date: 4/10/87 Signature of Buyer: _____ Date: _____

COUNTER OFFER Seller hereby accepts the foregoing offer on the terms and conditions specified above.
REJECTION Seller hereby REJECTS the foregoing offer _____ (Seller's initials)
COUNTER OFFER Seller hereby accepts the foregoing offer, SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until 10:00 (AM) 3-2 1987 to accept the terms specified below.
Purchase price to be \$750,000 cash at closing. Property sold "As is" - that currently. Title conveyed by Special Warranty Deed Corp Form. Other terms to remain the same. No survey to be provided by either.
Signature of Seller: [Signature] Signature of Seller: _____
Signature of Buyer: [Signature] Signature of Buyer: _____

COMMISSION. The undersigned hereby agrees to pay to Garrett & Associates (Brokerage) a commission of As per agreement as consideration for the efforts in procuring a buyer.
Signature of Seller: [Signature] Date: 2-24-87 Signature of Seller: _____ Date: _____

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must therefore be completed)

A. ☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures.
NATURE OF SELLER: _____
Signature of Buyer: [Signature] Date: March-2-87
Signature of Seller: _____ Date: _____

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19____ by _____
Registered Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by _____

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

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

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

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

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

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

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

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

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

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

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

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

BE FOUR OF A FOUR PAGE FORM.

THIS FORM HAS BEEN APPROVED BY THE UTAH REAL ESTATE COMMISSION

**ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT**

This ADDENDUM/COUNTER OFFER constitutes ☒ a COUNTER OFFER () an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February 1987 between William R. Kelley, Jr. as buyer(s) and First Security Bank of Utah as seller(s), covering real property described as follows:

320 West Snow's Lane
Summit County, Utah

The following terms are hereby incorporated as part of THE AGREEMENT:

1. Purchase price to be \$650,000 with total earnest money deposit of \$10,000. Seller to finance 80% of purchase price, upon qualification and approval by Seller; with 7% interest only payments quarterly and balance due in full 9 months from close of escrow. No pre-payment penalty for early pay-off of this note. Loan fees to be one percent of mortgage amount plus regular closing costs.
2. Closing to be on or before April 20, 1987
3. Current certified survey will be provided by Seller

All other terms of THE AGREEMENT shall remain the same ~~by~~ Seller ~~by~~ Buyer shall have until 5:00 (~~AM~~ / P M) March 3 1987 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date February 27, 1987
Time 5:00 (~~AM~~ / P M)

Signature of ☒ Seller () Buyer

First Security Bank
By [Signature]

ACCEPTANCE COUNTER OFFER REJECTION

Check One

☒ I hereby ACCEPT the foregoing on the terms specified above

() I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

William R. Kelley, Jr.
Signature

Signature

March - 2
Date

87 - 12'25
Time

() I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

☒ I acknowledge receipt of a final copy of the foregoing bearing all signatures

William R. Kelley, Jr.
Signature of Buyer(s)

March - 2
Date

Signature of Seller(s)

Date

() I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on March - 2

1987 by Certified Mail and return receipt attached hereto to the ☒ Seller () Buyer

Sent by William R. Kelley, Jr. Fed. Express

**ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT**

This ADDENDUM/COUNTER OFFER constitutes () a COUNTER OFFER ☒ an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February 1987 between William Kelley as buyer(s) and First Security Mtg. as seller(s) covering real property described as follows

320 W Snow Lane
Park City, UT

The following terms are hereby incorporated as part of THE AGREEMENT

Closing date hereby extended to on or before
June 1, 1987.

All other terms of THE AGREEMENT shall remain the same () Seller ☒ Buyer shall have until 5:00 (A M P M) 4-29 1987 to accept the terms specified above Unless so accepted this Addendum shall lapse

Date 4-22-87
Time 245 (A M P M)

Signature of ☒ Seller () Buyer
First Security Mtg
By William Kelley

ACCEPTANCE COUNTER OFFER REJECTION

Check One

☒ I hereby ACCEPT the foregoing on the terms specified above

() I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

William R Kelley 4/27/87 3:10
Signature Date Time
() I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

☒ I acknowledge receipt of a final copy of the foregoing bearing all signatures

William R Kelley 4/27/87 _____
Signature of Buyer(s) Date Signature of Seller(s) Date

(X) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on _____

19____ by Certified Mail and return receipt attached hereto to the () Seller () Buyer

SENT BY _____

ADDENDUM/COUNTER OFFER ()
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes () a COUNTER OFFER (X) an ADDENDUM to that EARNEST MONEY
SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February 1987 between William
Kelley as buyer(s) and First Security Mtg. as seller(s).

covering real property described as follows
320 W. Snows Lane

Park City, Utah

The following terms are hereby incorporated as part of THE AGREEMENT

Closing date hereby extended to on or before July 1, 1987.

WAYNE
P. [unclear]
Sign. (of [unclear])
& Return
last day

All other terms of THE AGREEMENT shall remain the same () Seller (X) Buyer shall have until 5:00 ~~XXX~~ P.M.
June 1 1987 to accept the terms specified above Unless so accepted this Addendum shall lapse

Date May 28, 1987
Time 12:14 (A.M./P.M.)

Signature of (X) Seller () Buyer
First Security Mtg.
[Signature]

ACCEPTANCE COUNTER OFFER REJECTION

Check One

- (X) I hereby ACCEPT the foregoing on the terms specified above
() I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

William D. Kelley Signature [Signature] Signature
May 29-87 Date 11:30 Time
() I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

(X) I acknowledge receipt of a final copy of the foregoing bearing all signatures

William D. Kelley Signature of Buyer(s) May 29-87 Date
[Signature] Signature of Seller(s) 6/1 Date

(X) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on 6/1
1987 by Certified Mail and return receipt attached hereto to the (X) Seller () Buyer

Sent by [Signature] 0020

TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes () a COUNTER OFFER ~~X~~ an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20 day of February 1987 between William R. Kelley as buyer(s) and First Security Mtg as seller(s) covering real property described as follows 320 W. Snows Lane

Park City, UT

The following terms are hereby incorporated as part of THE AGREEMENT:

Closing date is extended to or before 8-31-87

All other terms of THE AGREEMENT shall remain the same. () Seller (X) Buyer shall have until 7/18/87 (A.M./P.M.) 12: PM July 18 1987 to accept the terms specified above. Unless so accepted this Addendum shall lapse

Date 7-6-87
Time _____ (A.M./P.M.)

Signature of ~~X~~ Seller () Buyer

First Security Mtg
by Wayne C. Long

ACCEPTANCE-COUNTER OFFER REJECTION

Check One

(X) I hereby ACCEPT the foregoing on the terms specified above.

() I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

William R. Kelley
Signature

Signature

7/9/87
Date

1:10
Time

() I hereby reject the foregoing _____ (Initials)

DOCUMENT RECEIPT

() I acknowledge receipt of a final copy of the foregoing bearing all signatures.

William R. Kelley
Signature of Buyer(s)

7/9/87
Date

First Security Mtg
by Wayne C. Long
Signature of Seller(s)

7-14-87
Date

() I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on July 9th - 87

19____ by Certified Mail and return receipt attached hereto to the (X) Seller () Buyer

Sent by William R. Kelley

0021

APPENDIX 3

Letter, dated September 4, 1987

RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ALONZO W. WATSON, JR.
STEPHEN B. NEBEKER
MITCHELL MELICH
L. RIDD LARSON
DON B. ALLEN
MERLIN O. BAKER
CLARK P. GILES
JAMES W. FREED
NARRVELE HALL
JAMES L. WILDE
M. JOHN ASHTON
HERBERT C. LIVSEY
WILLIAM A. MARSHALL
JAMES Z. DAVIS
J. MICHAEL KELLY
PAUL S. FELT
GERALD T. SNOW
ALAN A. ENKE
JONATHAN A. DIBBLE
SCOTT H. CLARK
STEVEN H. GUNN
JAMES S. JARDINE
KENT H. MURDOCK
JANET HUGIE SMITH
DOUGLAS MATSUMORI
ROBERT P. HILL
RICHARD G. ALLEN
ANTHONY W. SCHOFIELD

ALLEN L. ORR
BRAD D. HARDY
BRIAN E. KATZ
A. ROBERT THORUP
JOHN P. HARRINGTON (COLO. & TEXAS)
LARRY G. MOORE
ANTHONY B. QUINN
THOMAS L. KAY
BRUCE L. OLSON
JOHN A. ADAMS
DOUGLAS M. MONSON
CRAIG CARLILE
STEVEN W. HARRIS
RICHARD H. CASPER
JAMES M. DETER (COLO. ONLY)
KEVIN G. GLADE
JEFFREY D. EISENBERG
ENID GREENE
LESTER K. ESSI
IRA S. RUBINFELD
STEPHEN C. TINGEY
CRAIG L. TAYLOR
KELLY J. FLINT
MARK O. MORRIS
STEVEN J. AESCHBACHER
PAUL D. NEWMAN
KEITH A. KELLY

400 DESERET BUILDING
79 SOUTH MAIN STREET
P. O. BOX 48388
SALT LAKE CITY, UTAH 84145-0388
TELEPHONE (801) 832-1800
TELECOPIER NO. (801) 832-7843

210 FIRST SECURITY BANK BLDG.
92 NORTH UNIVERSITY AVENUE
PROVO, UTAH 84601-4420
(801) 226-7210

1020 FIRST SECURITY BANK BLDG.
2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401-2306
(801) 621-0713

OF COUNSEL
ALBERT R. BOWEN
W. J. O'CONNOR, JR.

PAUL H. RAY (1893-1967)
C. PRESTON ALLEN (1921-1971)
MARVIN J. BERTOCH (1915-1978)
A. H. NEBEKER (1893-1980)
S. J. QUINNEY (1893-1983)

September 4, 1987

William Kelly
Courtney Industries
843 Nantasket Avenue
Hull, Massachusetts 02045

William Kelly
P.O. Box 257
Hull, Massachusetts 02045

Re: Park City, Utah Property

Dear Mr. Kelly:

As you may be aware, this firm represents First Security Mortgage Company in a lawsuit against Mel and Herb Armstrong to establish correct boundaries and quiet title to certain land and water rights appurtenant to property located at 320 West Snows Lane in Park City, Utah. In February of this year you entered into negotiations with First Security for the purchase of the property. Those negotiations culminated in your acceptance on March 2nd of a counteroffer, dated February 27th, by First Security. The agreement provided for closing within 60 days of acceptance by the seller. However, the closing has been extended by several addenda, the last of which provided for closing by the end of August. The purpose of this letter is to advise you that First Security is hereby extending the closing date to September 15, 1987, at which time First Security will consider the agreement to have terminated by its own terms.

First Security is prepared to sell the property to you "as is' without warranty" in accordance with the terms of the earnest money agreement. First Security is also prepared to assign you its rights in the lawsuit against the Armstrongs. Absent any obligation

William Kelly
September 4, 1987
Page Two

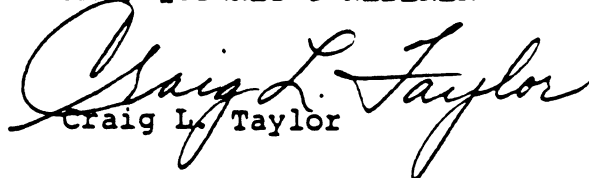
to the contrary or reimbursement from you for its legal costs and fees, First Security is no longer desirous of pursuing the lawsuit with the Armstrongs. First Security has not pursued the legal action against the Armstrongs as a result of any legal obligation, but simply because of its interest in closing the deal with you. First Security has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation. Accordingly, as indicated above, First Security will sell the property in accordance with the terms of the earnest money agreement, as extended by this letter to September 15th. Otherwise, if you elect to refuse and walk away from the deal, First Security will return the \$10,000.00 earnest money deposited in escrow to you and pursue other alternatives.

I am aware that you have some questions regarding the legal issues of the lawsuit and strongly encourage you to obtain legal counsel to advise you concerning those issues. I will be happy to cooperate with whomever you select as counsel in order that you can make a fully informed judgment. Otherwise, if you would like to discuss this matter with me personally, please do not hesitate to call. If I do not hear from you or a representative by the close of business on September 15th, I will consider the agreement as having expired and will have the funds in escrow returned to you.

Thank you for your prompt attention to this matter. I sincerely hope that this matter can be resolved quickly and in the best interests of all involved.

Sincerely,

RAY, QUINNEY & NEBEKER


Craig L. Taylor

CLT/jp

cc. Wayne Lantz
Dave Grant
Don Griffin

APPENDIX 4

Letter, dated September 17, 1987

RAY, QUINNEY & NEBEKER

PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ALONZO W. WATSON, JR.
STEPHEN B. NEBEKER
MITCHELL MELICH
L. RIDD LARSON
DON B. ALLEN
MERLIN O. BAKER
CLARK P. GILES
JAMES W. FREED
NARRVELE E. HALL
JAMES L. WILDE
M. JOHN ASHTON
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JAMES Z. DAVIS
J. MICHAEL KELLY
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400 DESERET BUILDING
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SALT LAKE CITY, UTAH 84145-0385
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OF COUNSEL
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MARVIN J. BERTOCH (1913-1978)
A. H. NEBEKER (1893-1980)
S. J. QUINNEY (1893-1983)

September 17, 1987

HAND DELIVERED

David Olsen
Dan W. Egan
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

Re: First Security Bank's Sale of 320 West
Snows Lane Property in Park City to
William Kelly

Dear David and Dan:

This letter is in response to your request on September 15th that First Security extend the closing date for the sale of the Park City property to the end of the month. My letter addressed to Dan, dated September 14, 1987, indicated that First Security would extend the closing date to September 22, 1987. First Security is not willing to grant an additional extension. Nor is First Security willing to extend credit at the rate provided in the Earnest Money Agreement beyond the period specified therein. As previously indicated, First Security is prepared to sell the property to Mr. Kelly "as is" without warranty" in accordance with the terms of the Earnest Money Agreement. First Security is not obligated to clear title prior to conveying the property to Mr. Kelly. Any suggestion that the limiting language mentioned above refers only to personal property is absurd.

Once again, if the sale is not closed by close of business on September 22nd, First Security will return the \$10,000.00 earnest money deposited in escrow and pursue other alternatives. First Security will not consider the act of placing \$140,000.00 in escrow as sufficient to close the deal.

Exhibit "C"

0117

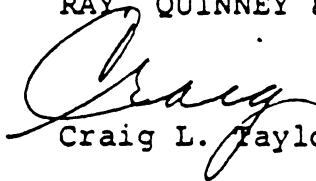
David Olsen
Dan W. Egan
September 17, 1987
Page Two

In our conversation you indicated that one of Mr. Kelly's concerns was the prospect of pursuing a lawsuit against his neighbors should he buy the property with the lawsuit at this time. I previously made the offer to Don Griffin that First Security would be willing to extend the closing and pursue the lawsuit against the Armstrongs if Mr. Kelly is willing to pay the attorney's fees and costs associated with pursuing that action. I am willing to discuss this proposal with you, but this question must be resolved prior to the 22nd of September.

I look forward to hearing from you.

Sincerely,

RAY QUINNEY & NEBEKER


Craig L. Taylor

CLT/jp

cc. Wayne Lantz
Dave Grant

APPENDIX 5

Letter, dated September 22, 1987

FRANCIS H. SUITTER
LEROY S. AXLAND
BRENT R. ARMSTRONG
STEWART M. HANSON, JR.
WILLIAM L. PRATER
DAVID R. OLSEN
BRUCE T. JONES
JEROLD G. OLDROYD
RICHARD J. LAWRENCE
FRANCIS J. CARNEY
J. MICHAEL HANSEN
CARL F. HUEFNER
MICHAEL W. HOMER
DAN W. EGAN
FRED R. SILVESTER
CHERIE P. SHANTEAU
MICHAEL L. ALLEN
CHARLES P. SAMPSON

SUITTER AXLAND ARMSTRONG & HANSON

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

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

PARK CITY, UTAH
(801) 649-4000

September 22, 1987

HAND DELIVERED

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

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

Dear Mr. Taylor:

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

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

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

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

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

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

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

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

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

Please govern yourselves accordingly.

Very truly yours,

SUITTER AXLAND ARMSTRONG & HANSON

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

David R. Olsen

db

cc: Mr. William R. Kelley, Jr.