

2011

# Insight Assets, Inc. v. Homero Farias : Brief of Appellee

Utah Supreme Court

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Ronald G. Russell; Rodger M. Burge; Jeffery A. Balls; Parr Brown Gee & Loveless, P.C.; Counsel for Appellee.

Kelly Ann Booth; Kelly Ann Booth, PLLC; Counsel for Appellant.

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**IN THE UTAH SUPREME COURT**

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INSIGHT ASSETS, INC., a Utah  
corporation,

Appellant/Cross-Appellee and  
Plaintiff/Counterclaim-Defendant,

v.

HOMERO FARIAS, an individual,

Appellee/Cross Appellant/ and  
Defendant/Counterclaim-Plaintiff.

**BRIEF OF APPELLEE/CROSS  
APPELLANT  
HOMERO FARIAS**

Appellate Case No. 20110020-SC

---

**APPEAL FROM A SUMMARY JUDGMENT OF THE  
SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY  
HONORABLE W. BRENT WEST, DISTRICT COURT JUDGE**

---

Kelly Ann Booth  
KELLY ANN BOOTH, PLLC  
The Judge Building  
8 East Broadway, Suite 700  
Salt Lake City, Utah 84111

*Attorneys for Appellant/Cross Appellee  
Insight Assets*

Ronald G. Russell  
Rodger M. Burge  
Jeffery A. Balls  
PARR BROWN GEE & LOVELESS, P.C.  
185 South State Street, Suite 800  
Salt Lake City, Utah 84111

*Attorneys for Appellee/Cross Appellant  
Homero Farias*

***Oral Argument Requested***

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OCT 12 2011**

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Kelly Ann Booth  
KELLY ANN BOOTH, PLLC  
The Judge Building  
8 East Broadway, Suite 700  
Salt Lake City, Utah 84111

*Attorneys for Appellant/Cross Appellee  
Insight Assets*

Ronald G. Russell  
Rodger M. Burge  
Jeffery A. Balls  
PARR BROWN GEE & LOVELESS, P.C.  
185 South State Street, Suite 800  
Salt Lake City, Utah 84111

*Attorneys for Appellee/Cross Appellant  
Homero Farias*

***Oral Argument Requested***

## **LIST OF PARTIES**

Appellant/Cross-Appellee and Plaintiff/Counterclaim-Defendant:

Insight Assets, Inc.

Appellee/Cross-Appellant and Defendant/Counterclaim-Plaintiff:

Homero Farias

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-3-102(3)(j) (2011).

## **ISSUES PRESENTED FOR REVIEW**

1. Did the district court correctly determine that a subsequent purchaser for value of real property is protected against a claim that a second-in-time recorded trust deed is senior in priority, notwithstanding the order of recording, to an earlier recorded trust deed from which the purchaser's chain of title originates, under a common law rule that confers priority in certain instances on purchase money mortgages?

A district court's grant of summary judgment is reviewed for correctness. *See Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (citation omitted). This issue was raised below. *See* [R. 320-40.]

2. Does the Purchase Money Rule apply in the instant case where there is no evidence the third-party purchase money lender knew of the sellers' trust deed?

A district court's grant of summary judgment is reviewed for correctness. *See Harvey*, 2010 UT 12, ¶ 10. This Court may affirm a grant of summary judgment upon any grounds apparent in the record. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. This issue was raised below. *See* Memorandum in Support of Homero Farias' Motion for Partial Summary Judgment [R. 335-37.]

3. Are Insight Assets' claims barred by the doctrine of laches where it, and its predecessor in interest, waited over four years to commence a lawsuit and numerous parties detrimentally relied on the priority of the trust deeds established by the order of recording?

A district court's grant of summary judgment is reviewed for correctness. *See Harvey*, 2010 UT 12, ¶ 10. This Court may affirm a grant of summary judgment upon any grounds apparent in the record. *See Bailey*, 2002 UT 58, ¶ 10. This issue was raised

below. *See* Memorandum in Support of Homero Farias' Motion for Partial Summary Judgment [R. 337-39.]

4. Did the district court err by refusing to grant Appellee Homero Farias' request for attorney fees under UTAH CODE ANN. § 78B-5-826, on the basis that Farias was not an original party to the contracts, even though the litigation was based upon a written contract which allowed one party to the litigation to recover attorney fees?

A district court's interpretation of a statute is reviewed for correctness. *See Hooban v. Unicity Intern., Inc.*, 2009 UT App 267, ¶ 7, 220 P.3d 485. "'Correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (citations omitted). This issue was raised below. *See* Memorandum in Support of Homero Farias' Motion for Partial Summary Judgment, at p. 20 [R. 339]; Ruling [R. 573.] A copy of the Ruling is included in the Addendum hereto as Tab "A."

### **DETERMINATIVE STATUTES**

The following provisions are determinative of the above-captioned appeal:

UTAH CODE ANN. § 57-3-103 (2011):

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded.

A copy of section 57-3-103 of the Utah Code is included in the Addendum hereto at Tab "B."

UTAH CODE ANN. § 78B-5-826 (2011):

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other

writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

A copy of Section 78B-5-826 of the Utah Code is included in the Addendum hereto at Tab "C."

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This is an appeal arising from a grant of summary judgment on a quiet title counterclaim brought by Appellee Homero Farias ("Farias") concerning real property located in Weber County. Farias is the current owner of record of the property, and has owned the property since 2007. Appellant Insight Assets, Inc. ("Insight Assets") asserts that it has an interest in the property under a trust deed that was executed in 2004, and brought a judicial foreclosure proceeding against the property.

The trust deed under which Insight Assets asserts its alleged interest, however, was recorded in a second position behind a trust deed given to a third-party lender who provided the bulk of the financing for the purchase of the property. The third-party lender's trust deed was subsequently foreclosed and, under Utah law, extinguished any junior liens and encumbrances, including the later-recorded trust deed claimed by Insight Assets. Indeed, since the foreclosure, numerous conveyances of the property have occurred with the parties relying on this fact in purchasing the property, including Farias.

Insight Assets claims that the trust deed under which it claims an interest was not extinguished because it was actually senior to the third-party lender's trust deed under a

common law rule of priority that confers priority on a seller's purchase money trust deed under certain circumstances that do not apply here (the "Purchase Money Rule").

Insight Assets' claim fails, however, for several reasons. First, the law affords protection to subsequent purchasers of real property who take an interest in real property without actual or constructive notice of unknown claims and interests in real property. Farias satisfies all the requirements of this defense, and thus takes free of any claim by Insight Assets that its trust deed remains an encumbrance on the property. Moreover, the Purchase Money Rule does not apply in cases where the first recorded lender did not know that the seller retained an interest in the property. Finally, Insight Assets' claim is barred by the doctrine of laches where it (and its assignor) waited over four years to raise the instant claim, and several parties have relied on the documents of record, which reflect the trust deed being extinguished in the foreclosure of the earlier-recorded lender's trust deed, in conveying the property.

## **II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Insight Assets sued Farias in the Second Judicial District Court in and for Weber County on November 19, 2009. *See* Complaint [R. 1-46.] Specifically, Insight Assets asserted claims for declaratory relief and *in rem* judicial foreclosures. *See id.* Farias answered the Complaint and brought Counterclaims against Insight Assets and W. Andrew McCullough for quiet title, slander of title, and wrongful lien. *See* Answer and Counterclaim [R. 47-60.]

Insight Assets moved for summary judgment against Farias on February 9, 2010. Among other things, Insight Assets sought a determination that the trust deed it acquired

was a vendor purchase money mortgage, that it had priority over a prior recorded trust deed, and that its trust deed still validly encumbered the Property. *See* Insight Assets' Motion for Summary Judgment [R. 80-90.] Farias opposed Insight Assets' Motion for Summary Judgment and filed a cross-motion for summary judgment seeking a determination that Farias was a bona fide purchaser for value and that he took free and clear of any alleged interest Insight Assets had under the Phalen Trust Deed. *See* Memorandum in Support of Homero Farias' Motion for Partial Summary Judgment [R. 329-35.] Farias also sought summary judgment on the basis that the vendor purchase money rule did not apply and that Insight Assets' claims were barred by the doctrine of laches. *See id.* [R. 335-39.]

After full briefing, and oral argument, the district court denied Insight Assets' motion for summary judgment and granted Farias' cross-motion for summary judgment relating to Farias' quiet title claim. *See* Ruling, Tab A [R. 573-79.] The district court, however, denied Farias' request for attorney fees. *See id.* [R. 578.] The parties stipulated to a dismissal of Farias' remaining claims for slander of title and wrongful lien. *See* Stipulated Motion for Order of Dismissal with Prejudice of Counts II and III of Farias' Counterclaim [R. 582-83.] The district court dismissed counts II and III and entered final judgment on December 14, 2010. *See* Final Judgment and Order [R. 601-04.] A copy of the Final Judgment and Order is included in the Addendum hereto at Tab "D." Insight Assets appealed. *See* Notice of Appeal [R. 599-600.] Farias cross appealed. *See* Notice of Cross-Appeal [R. 605-07.]

### III. STATEMENT OF FACTS

Both Farias and Insight Assets claim an interest in real property in Weber County, located at 2915 Madison Avenue, Ogden, Utah 84403 (the "Property"), the legal description of which is as follows:

PART OF LOT 3, BLOCK 4, SOUTH OGDEN SURVEY, WEBER COUNTY, UTAH, AND PART OF VACATED PORTION OF MADISON AVENUE DESCRIBED AS FOLLOWS: BEGINNING AT A POINT 400 FEET NORTH OF THE SOUTHEAST CORNER OF LOT 2, BLOCK 4, AND RUNNING THENCE WEST 75 FEET, THENCE NORTH 50 FEET, THENCE EAST 94.5 FEET, THENCE SOUTH 50 FEET, THENCE WEST 19.5 FEET TO THE PLACE OF BEGINNING.

Situated in WEBER County  
Parcel Identification Number: 04-032-0022

In 2004, Joseph and Denise Phalen (the "Phalens") were the owners of the Property. *See* Warranty Deed from Brian Wynn to the Phalens [R. 352.] On or about March 4, 2004, the Phalens and William and Roberta Boeck (the "Boecks") entered into a Real Estate Purchase Contract for the sale of the Property. *See* Real Estate Purchase Contract [R. 374-84]; Deposition of Joseph Phalen, 13-14 [R. 358.] The parties agreed on a purchase price of \$88,000, which would be financed through a "conventional loan" in the amount of \$70,300, a \$100 earnest money deposit, and the remaining \$17,600 would be provided through seller financing by the Phalens. *See* Real Estate Purchase Contract [R. 374.]

The Phalens knew that the Boecks were obtaining a conventional loan to finance the purchase of the Property and that said loan would be secured with a mortgage. The Phalens never had any communications with the Boecks' lender, First Franklin Financial

Corporation (“FFFC”). *See* Joseph Depo., 16:14-23, 20:16-20 [R. 358-59]; Denise Depo., 20:9-16, 21:11-17, 23:17-19[R. 368-69.] Mr. Phalen understood that, because FFFC was providing the bulk of the financing for the purchase of the Property, FFFC would be paid first from any foreclosure sale of the Property. *See* Joseph Depo., 21:16-22:3 [R. 360.] Indeed, Mr. Phalen did not believe FFFC would have provided a loan to the Boecks to purchase the Property if it was not going to be paid first from any foreclosure sale. *See* Joseph Depo., 22:4-14 [R. 360.] With this understanding, Mr. Phalen was agreeable to going forward with the sale of the Property. *See* Joseph Depo., 21:16—22:17 [R. 360.]

At the closing of the sale, which occurred on or about April 19, 2004, the Phalens executed a Warranty Deed to convey the Property to the Boecks. *See* Warranty Deed [R. 354.] A copy of the Warranty Deed is included in the Addendum hereto at Tab “E.” The Boecks executed a Deed of Trust naming FFFC as beneficiary (the “FFFC Trust Deed”), which trust deed covered the Property and secured repayment of the \$72,000 conventional loan provided by FFFC to the Boecks. *See* FFFC Trust Deed [R. 386-402.] A copy of the FFFC Trust Deed is included in the Addendum hereto at Tab “F.” Additionally, the Boecks executed a Trust Deed Note to evidence the seller financing, in the principal amount of \$17,600, which note was secured by a Trust Deed with the Phalens as beneficiaries (the “Phalen Trust Deed”). *See* Trust Deed Note [R. 404]; Phalen Trust Deed [R. 345-48.] A copy of the Phalen Trust Deed is included in the Addendum hereto at Tab “G.” The Trust Deed Note provides for an award of attorney fees to the holder of the Trust Deed Note “if this note is collected by an attorney after



default in the payment of principal or interest, either with or without suit, the undersigned, trustors jointly and severally agree to pay all costs and expenses of collection including a reasonable attorneys' fee." [R. 404.] The Phalen Trust Deed further provides for an award of attorney fees:

[u]pon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

[R. 347.]

At the time of closing, the Phalens had a mortgage on the Property in the approximate amount of \$47,000 through Washington Mutual Bank, which was paid off out of the proceeds from the sale of the Property. *See* Joseph Depo., 22:23-24:4 [R. 360]; Denise Depo., 24:11-13, 25:10-12 [R. 369-70.] Additionally, the Phalens received a cash payment from the sale of the Property in the amount of approximately \$14,000. *See* Joseph Depo., 25:13-24 [R. 3600]; and Deposition Exhibit "4" [R. 364.]

In concluding the closing on the sale of the Property, the following instruments were recorded with the Weber County Recorder on April 22, 2004, by FFFC and the Phalens' escrow agent, U.S. Title of Utah, in the following order:

- The Warranty Deed, dated April 19, 2004, from the Phalens to the Boecks, was recorded first as Entry No. 2026212 [R. 354];
- The FFFC Trust Deed, dated April 19, 2004, was recorded next as Entry No. 2026213 [R. 386-402]; and

- The Phalen Trust Deed, dated April 19, 2004, was recorded last as Entry No. 2026214 [R. 345-48.]

The FFFC Trust Deed was subsequently assigned to Wells Fargo Bank, N.A. (“Wells Fargo”), with notice of said assignment being recorded on December 23, 2004. *See* Corporate Assignment of Deed of Trust [R. 406-07.] Shortly after the closing, the Boecks defaulted on their obligations under the FFFC Loan, and a “Substitution of Trustee” and a “Notice of Default” were recorded. [R. 408-11.] Likewise, immediately after the closing, the Boecks defaulted on their obligations under the Trust Deed Note by failing to make any payments to the Phalens. *See* Joseph Depo., 44:6-9 [R. 363.]

On or about June 7, 2005, Wells Fargo foreclosed on the Property pursuant to the FFFC Trust Deed, and a Trustee’s Deed was executed on June 14, 2005, conveying the Property to Wells Fargo, and said deed was recorded on the same date with the Weber County Recorder as Entry No. 2109270. *See* Trustee’s Deed [R. 413-14.] The Phalens never attempted to foreclose on the Property under the Phalen Trust Deed. *See* Denise Depo., 33:23-25 [R. 371.]

Following the foreclosure of the FFFC Trust Deed, Wells Fargo conveyed the Property to TTR Holdings, LLC by way of Special Warranty Deed, recorded with the Weber County Recorder on November 18, 2005. *See* Special Warranty Deed [R. 416-18.] TTR Holdings then conveyed the Property to Alan H. Reisert by way of Warranty Deed, recorded with the Weber County Recorder on February 27, 2006. [R. 327.] Finally, Alan Reisert conveyed the Property to Farias by way of Warranty Deed, recorded with the Weber County Recorder on August 17, 2007. *See* Warranty Deed [R. 342.]

Farias is the current owner of record of the Property. At the time he acquired the Property, Farias had no actual knowledge of the existence of the Phalen Trust Deed, or any existing liens or encumbrances on the Property, including any lien, encumbrance, or claim arising under the Phalen Trust Deed. *See* Declaration of Homero Farias, ¶¶ 4-6 [R. 450.]

On or about August 27, 2009, the Phalens purportedly assigned their interest in the Phalen Trust Deed and the Trust Deed Note to Insight Assets for \$500. *See* Assignment of Trust Deed [R. 350]; Denise Depo., 38:25- 39:21[R. 372]; Joseph Depo., 34:11-25[R. 362.] Insight Assets subsequently caused a substitution of trustee to be recorded on August 31, 2009, purportedly appointing W. Andrew McCullough (“McCullough”) as successor trustee under the Phalen Trust Deed. *See* Substitution of Trustee [R. 421.] The same day, McCullough, as the purported trustee of the Phalen Trust Deed, recorded a notice of default, stating that a default in the Trust Deed Note had occurred and that Insight Assets had elected to sell the property to satisfy the amounts owed under the Trust Deed Note, including all costs and attorney fees accrued thereunder. *See* Notice of Default [R. 423.] McCullough subsequently recorded a corrected notice of default. *See* Corrected Notice of Default [R. 424.] This lawsuit ensued.

#### **IV. RESPONSE TO INSIGHT ASSETS’ STATEMENT OF FACTS**

Several of Insight Assets’ “facts” are unsupported by any record evidence. For example, Insight Assets asserts that “First Franklin and the Phalens knew they were each financing a portion of the property and had knowledge of each other.” Appellant’s Brief, at p. 5. Insight Assets, however, cites no evidence to support this proposition. Instead,

Insight Assets merely cites to its legal argument concerning the imputation of knowledge of the escrow officer to FFFC. As set forth in the Argument section below, this legal argument is incorrect. There was no evidence submitted to the district court regarding FFFC's knowledge of the Phalen Trust Deed.

Insight Assets further alleges that the FFFC Trust Deed and the Phalen Trust Deed were recorded simultaneously with the other documents reflecting the sale. *See* Brief of Appellant, at p. 5. Insight Assets misconstrues the evidence of the order of recording. Although the documents were recorded consecutively on April 22, 2004, they were not recorded simultaneously. The Warranty Deed to the Boecks was recorded first as Entry No. 2026212 [R. 354]; the FFFC Trust Deed was recorded second as Entry No. 2026213 [R. 386-402]; and the Phalen Trust Deed was recorded last as Entry No. 2026214 [R. 345-48.]

Insight Assets also states that the Phalen Trust Deed was never reconveyed and that the records kept by the Weber County Recorder still show the Phalen Trust Deed encumbering the Property. *See* Brief of Appellant, at p. 6. What the records of the Weber County Recorder show, and the effects thereof, is a legal determination not a statement of fact. In any event, the fact that the Recorder's records show all documents that have been recorded does not support the legal conclusion that a trust deed still encumbers property. Furthermore, the citations to the record provided by Insight Assets do not relate to, or support, this "factual" allegation.

Finally, Insight Assets misstates the holding of the district court and the grounds for its granting summary judgment in favor of Farias. Insight Assets claims that "[t]he

district court found that the Phalen Trust Deed was a vendor purchase money mortgage, but that its priority as a vendor purchase money mortgage was eviscerated by Utah's Recording Statute, and therefore junior to the extinguished First Franklin Trust Deed." Appellant's Brief, at p. 6. The district court did not rule on the priority of the Phalen Trust Deed vis-à-vis the FFFC Trust Deed.<sup>1</sup> Rather the district court found that regardless of the priority between the FFFC Trust Deed and the Phalen Trust Deed, Farias took ownership of the Property, as a bona fide purchaser for value, free and clear of any alleged claim that Insight Assets had in the Property pursuant to the Phalen Trust Deed or otherwise. [R. 577-78.]

### **SUMMARY OF ARGUMENTS**

**Argument I:** The main issue presented in this case is whether a party like Insight Assets can invoke the Purchase Money Rule years later to the detriment of subsequent purchasers for value who have no notice that a seller trust deed given several years ago continues to encumber real property notwithstanding a foreclosure of an earlier recorded trust deed, which extinguished the seller trust deed barring some legal claim to the contrary. Farias had no knowledge of the Phalen Trust Deed when he acquired the Property in 2007. Subsequent to his purchase of the Property, Insight Assets has now come forth and is seeking to foreclose on the Property to satisfy the unpaid amount owed under the Trust Deed Note (an instrument to which Farias is not a party). Insight Assets

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<sup>1</sup> Farias argued below that the FFFC Trust Deed had priority over the Phalen Trust Deed because the Purchase Money Rule did not apply. The district court, however, did not reach this issue, instead relying on Farias' status as a bona fide purchaser. Farias again presents the argument that the FFFC Trust Deed had priority over the Phalen Trust Deed as an additional ground to affirm the district court's ruling. *See infra* Section II.

claims to be the beneficiary under the Phalen Trust Deed, and argues the trust deed was not extinguished by foreclosure of the earlier-recorded FFFC Trust Deed due to the operation of the Purchase Money Rule. Insight Assets incorrectly takes the position that the Purchase Money Rule is an immutable, absolute rule that operates to the exclusion of recording acts and to the detriment of subsequent bona fide purchasers.

For reasons explained herein, the district court correctly ruled that the Purchase Money Rule is not absolute and that it is subject to the operation of recording acts and the bona fide purchaser for value defense (the “BFP Defense”). Insight Assets is unable to cite to, and Farias is unaware of, any articulation of the Purchase Money Rule that indicates it vitiates the effect of recording acts and the BFP Defense. To the contrary, both the black letter law found in the Restatement and this Court’s articulation of the rule in *Kemp v. Zions First Nat’l Bank*, 470 P.2d 390 (Utah 1970) hold it is subject to the operation of the recording act and the BFP Defense.

The district court correctly analyzed the recording act and BFP Defense in determining that Farias qualified as a bona fide purchaser for value. As stated above, when Farias purchased the Property for value, it is undisputed that he had no actual knowledge of the Phalen Trust Deed or Insight Assets’ claim that it continued to encumber the Property. Because he had no actual knowledge of the Phalen Trust Deed and Insight Assets’ claim, it is axiomatic he could not be put on “inquiry notice” of the same. The only issue remaining for consideration, therefore, is whether he had constructive “record notice” of Insight Assets’ claim. Under Utah law, the order of recording governs priority under the recording statute. The only argument Insight Assets

made in the district court to support the argument that the recording order should not control is that Farias is somehow charged with the knowledge of a title company that may have seen the trust deed (even though Insight Assets produced no evidence that Farias had obtained title insurance, what search the title insurer performed, or what the results of the search showed). Even assuming Farias obtained title insurance, this argument is without any legal support, and thus the district court correctly determined that Farias qualified as a bona fide purchaser.

**Argument II:** While the district court did not need to address the issue because it ruled on the basis of the recording act and the BFP Defense, Insight Assets' claim would fail in any event because the Purchase Money Rule would not apply to the transaction in which the FFFC Trust Deed and the Phalen Trust Deed arose. The Purchase Money Rule does not apply to the detriment of a third-party purchase money lender like FFFC where it does not have knowledge of the vendor's purchase money mortgage. In this case, Insight Assets was unable to produce any evidence that FFFC knew about the Phalen Trust Deed. Instead, it argued that because the Phalens and FFFC shared a common escrow agent at the closing of the transaction, somehow the escrow agent's knowledge of the Phalen Trust Deed was imputed to FFFC. Again, this argument is contrary to law, which holds an escrow agent is a limited agent, and its knowledge is not imputed to a principal. The Purchase Money Rule would therefore not apply to the Phalen Trust Deed and FFFC Trust Deed conveyances.

**Argument III:** Again, because the district court ruled in Farias' favor under the BFP Defense, it did not reach his argument that Insight Assets' claim is barred under the

doctrine of laches. Insight Assets brings the present claim several years after the foreclosure of the FFFC Trust Deed, and numerous parties have bought and sold the Property on the basis that the FFFC Trust Deed extinguished the Phalen Trust Deed. Insight Assets' (and the Phalens') delay in bringing the present claim has prejudiced Farias' ability to defend the claim. Specifically, with the lapse of time, Farias has been unable to locate the Boecks to obtain information about their transaction with the Phalens. More problematic, due to the intervening crash in the lending and real estate markets, many lenders, including FFFC, have gone out of business. Farias therefore is incapable of locating and obtaining critical evidence from FFFC to support his defense. It is precisely this type of situation to which the doctrine of laches applies. Accordingly, the Court could affirm the district court's decision on this basis as well.

**Argument IV:** The district court denied Farias' request for an award of attorney fees under Utah's reciprocal fee statute (§ 78B-5-826) on the basis that he was not a party to the Phalen Trust Deed or the Trust Deed Note (which contain attorney fee provisions in favor of the beneficiary/holder). In doing so, the district incorrectly interpreted and applied Utah law that holds only one party to the litigation need be a party to the writing that confers the right to an award of attorney fees. Farias prevailed in the litigation, and as the purported assignee of the Phalen Trust Deed and Trust Deed Note, at least one party – Insight Assets – had the right to an award of attorney fees had it prevailed. Farias is therefore entitled to an award of attorney fees.



## ARGUMENT

### **I. FARIAS TAKES THE PROPERTY FREE OF ANY INTEREST ARISING UNDER THE PHALEN TRUST DEED AS A BONA FIDE PURCHASER FOR VALUE.**

While Insight Assets makes several errors of law, one of the most critical errors it makes, which underlies its entire position in this matter, is its argument and belief that a vendor purchase money mortgage always has priority over any other interest in real property, regardless of its order of recording or any other factor. Appellant's Brief, p. 9. Insight Assets further asserts that "a vendor trust deed recorded simultaneously with a third party trust deed in the same transaction is on its face in a first lien position, without further inquiry into the recorded documents," and that a vendor trust deed therefore operates to the detriment of subsequent purchasers for value by providing "clear notice to anyone looking at the title that the vendor trust deed is superior, regardless of recording order." *Id.* at p. 17. Simply put, Insight Assets overstates the scope and application of the rule, and relies on case law that does not even address the situation presented in this case involving a subsequent purchaser acquiring real property years later without any knowledge that the seller trust deed at issue was not extinguished through foreclosure of an earlier-recorded trust deed. To understand the error in Insight Assets' argument, it is useful to discuss the role of Utah's recording act, the defense it embodies for bona fide purchasers for value, as well as the scope and proper application of the Purchase Money Rule (including its interaction with recording statutes).

**A. Utah's Recording Act and the Bona Fide Purchaser for Value Defense.**

**1. Utah is a "Race-Notice" Jurisdiction.**

Recording statutes in this country have long operated to determine the priority of various interests and property rights on the basis of notice, recording, or some combination of the two. *See ALH Holding Co. v. The Bank of Telluride*, 18 P.3d 742, 744 (Colo. 2000). Utah has a recording statute, which provides as follows:

**57-3-103. Effect of failure to record.**

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded.

UTAH CODE ANN. § 57-3-103 (2011). This statute is characterized as a "race-notice" statute," and thus Utah is a race-notice jurisdiction. *See Haik v. Sandy City*, 2011 UT 26, ¶ 13, 254 P.3d 171. Concerning the priority of competing interests in property, this Court has ruled "[u]nder our recording act, priority is given to that document which is recorded before another that asserts the same interest. This is the time-honored method of determining interests in property. One's priority must necessarily be established by the sequence of entry numbers." *Anderson v. American Savings & Loan Assn.*, 668 P.2d 1253, 1254 (Utah 1983).<sup>2</sup> Indeed, Insight Assets acknowledges that priority of interests is generally established by recording order. Appellant's Brief, p. 12. Accordingly, Utah's recording act and reviewing the order of recording of prior interests in real

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<sup>2</sup> This statement is partially correct, inasmuch as there is a "notice" aspect to priority under Utah's recording statute as well. *See Utah Farm Prod. Credit Ass'n v. Wasatch Bank of Pleasant Grove*, 734 P.2d 904, 906 n. 2 (Utah 1986).

property provides subsequent purchasers, lenders, and other parties acquiring an interest in real property with a reliable method of determining title to, and any encumbrances on, real property (assuming they have no actual knowledge that the priority of interests in property is other than as reflected in the order of their recording).

## 2. The Bona Fide Purchaser for Value Defense.

Embodied within Utah's recording statute is the BFP Defense. Under the BFP Defense, a party who acquires real property for value without actual or constructive notice of any interest, claims, or equities against his predecessor's title, does so free of said interests, claims or equities as a "bona fide purchaser for value." *See* 77 AM. JUR. 2d Vendor and Purchaser § 368 (2010); *Haik*, 2011 UT 26 at ¶ 13 ("a subsequent purchaser for value prevails over a previous purchaser if the subsequent purchaser (1) takes title in good faith and (2) records before the previous purchaser."). Utah has long recognized the BFP Defense against off-record claims and unrecorded interests in property. *See e.g.*, *Bennion Ins. Co. v. 1<sup>st</sup> OK Corp.*, 571 P.2d 1339 (Utah 1977); *Pender v. Dowse*, 265 P.2d 644 (Utah 1954); and *Lawley v. Hickenlooper*, 212 P. 526 (Utah 1922). In commenting on the strong public policy favoring bona fide purchasers for value, one court recently noted that "one who buys bona fide and for value occupies one of the most highly favored positions in the law," and that the defense brings a much desired stability and certainty in real property law. *Scotch Bonnett Realty Corp. v. Matthews*, 11 A.3d 801, 810-11 (Md. Ct. App. 2011).

To establish the BFP Defense in Utah, one must (1) acquire an interest in real property for value, (2) in good faith, and (3) record one's interest first. *See Haik*, 2011

UT 26 at ¶ 13 (*citing* UTAH CODE ANN. § 57-3-103). “To be in good faith, a subsequent purchaser must take [title to] the property without notice of a prior, unrecorded interest in the property.” *Id.* at ¶ 14 (*quoting* *Salt Lake City v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 13, 89 P.3d 155). Utah recognizes two types of notice: (1) actual notice, and (2) constructive notice. *See id.* “Actual notice arises from actual knowledge ‘of an unrecorded interest or infirmity in the grantor’s title.’” *Id.* Regarding constructive notice, this Court held:

Constructive notice can be either inquiry or record notice. To be on inquiry notice, a person must have “[actual] knowledge of certain facts and circumstances that are sufficient to give rise to a duty to inquire further.” But inquiry notice “does not arise from a record.” Record notice “results from a record or . . . is imputed by the recording statutes.” Thus, purchasers of real property are charged with having record notice of the contents of recorded documents.

*Id.* (*quoting* *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 838 (Utah 1998)).

3. The District Court did not Err in Holding Utah’s Recording Statute Creates a Bona Fide Purchaser Defense.

Insight Assets argues the district court erred in holding the recording act creates a bona fide purchaser defense. Appellant’s Brief, p. 24. It asserts that the BFP Defense is only a “creature of common law as defined by this Court” in *Baldwin v. Burton*, 850 P.2d 1188, 1197-98 (Utah 1993), and not a product of the recording statute. *Id.* Insight Assets then goes on to cite the alleged common law articulation of the rule: “one who pays valuable consideration for a conveyance, acts in good faith, and takes without notice of an adverse claim or others’ outstanding rights to the seller’s estate.” *Id.* (*citing* *Baldwin*, 850 P.2d at 1197-98). This argument is without merit.

Farias does not dispute that the BFP Defense has its origins in common law, and has been recognized for years by courts. A comparison of Section 57-3-103 with the common law articulation of the rule set out in *Baldwin*, however, shows that the two are substantively identical. Insight Assets makes the mistake of assuming that the two are mutually exclusive. Utah's recording statute is the codification of the defense as a means for establishing priority of interests in real property. No error occurred by the district court in applying the defense under the recording statute, particularly where the result would be the same under the common law rule as well.

**B. The Purchase Money Mortgage Rule.**

A "purchase money mortgage" is a mortgage given to a vendor of the real estate or to a third party lender to the extent that the proceeds are used to acquire title to the real estate. *See* RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.2 (1996). A "vendor purchase money mortgage" arises where the vendor receives part of the purchase price for property in cash, and takes back a mortgage on the real estate to secure a promissory note for the balance of the purchase price. *See id.* at cmt. a. Similarly, when a third party lender takes the purchaser's promissory note secured by a mortgage on the purchaser's newly acquired real estate, the mortgage is characterized as a "third party purchase money mortgage." *See id.*

1. The Priority Afforded Purchase Money Mortgages.

Under the common law, a purchase money mortgage is conferred priority over any mortgage, lien, or other claim that attaches to the real estate but is created by or arises against the purchaser-mortgagor's acquisition of title to the real estate. *See e.g.,*

RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.2; *Nelson v. Stoker*, 669 P.2d 390, 394 (Utah 1983) (finding a purchase money mortgage had priority over a pre-existing judgment lien against the purchaser's real property). The rationale for the preference given to purchase money mortgages in this situation is as follows:

The vendor-mortgagee should prevail because the lien creditor has not extended credit or perfected the lien in reliance on the right to be repaid out of any specific property, much less out of real estate previously owned by the vendor. This is obvious, since the judgment was obtained before the debtor acquired the real estate to which the judgment lien attached. . . But for the willingness of the vendor to part with the real estate, it would have been completely unavailable to those persons for the satisfaction of their claims. To give such claimants priority over the vendor would confer on them a pure windfall.

See RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.2 at cmt. b; *see also Nelson*, 669 P.2d at 394.

A different issue is presented where there are competing purchase money mortgages given in the same transaction, such as a vendor purchase money mortgage and a third-party purchase mortgage. The priority given to either mortgage depends on the operation of the recording act.

2. The Interplay of the Recording Statute, the BFP Defense and the Purchase Money Rule.

The underlying theme of Insight Assets' argument is that a vendor purchase money mortgage enjoys priority over every other mortgage, claim or interest in real property, regardless of the order of recording and/or what the documents of record reflect. Appellant's Brief, p. 9 ("Yet under Utah law, vendor mortgages have first priority regardless of recording order..."); 12 ("Yet Utah law recognizes that vendor

purchase money mortgages supersede Utah's race-notice statute.”). This claim is incorrect and is contrary to both Utah case law addressing the priority of purchase money mortgages, as well as the common law. Not a single articulation of the Purchase Money Rule holds that the rule supersedes recording acts, that order of recording is forever irrelevant as to all future bona fide purchasers, or that purchase money mortgages are exempt from the protection afforded bona fide purchasers for value. To the contrary, every articulation of the rule holds that this priority rule is subject first and foremost to the operation of applicable recording acts.

Oddly, Insight Assets relies on *Kemp v. Zions First Nat'l Bank*, 470 P.2d 390 (Utah 1970) to support its argument that the Purchase Money Rule is immutable, absolute, and supersedes recording acts and the BFP Defense. Appellant's Brief, p. 12. In fact, this Court stated the exact opposite in its decision in *Kemp*, by noting that whether the preference given to purchase money mortgages applies “depends upon the circumstances of the given case, the equities, **and the effect of the recording act.**” *Kemp*, 470 P.2d at 393 (emphasis added). Courts of other jurisdictions have held similarly. For example, the Colorado Supreme Court in *ALH Holding Co.* started its analysis with the recording act. Indeed, it noted that “*Bray* [a prior Colorado decision] recognized, however, that purchase money mortgages were instruments **to which the recording statute applied.**” *ALH Holding Co.*, 18 P.3d at 745 (emphasis added). The court established that the Purchase Money Rule only applies “when the priority of rights in real property is not dictated by the operation of the recording statute. . . .” *Id.* at 746. The court only applied the common law priority rule after it determined that Colorado's race-

notice statute did not apply, because both the seller and the third-party lender had actual knowledge that each other was taking an interest in the property and had not agreed on the priority of their interests. *Id.* at 745-46.

The Restatement also makes clear that the Purchase Money Rule is expressly subject to the operation of recording acts. In articulating the rule providing a preference to vendors vis-à-vis third party purchase mortgagees, it states:

A purchase money mortgage given to a vendor of real estate, in the absence of a contrary intent of the parties to it ***and subject to the operation of the recording acts***, has priority over a purchase money mortgage on that real estate given to a person who is not its vendor.

RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.2 (emphasis added). The comments to the section further clarify the interplay between recording acts and the Purchase Money Rule. For example, if both the vendor and the third-party lender have notice of the other's mortgage, the vendor's mortgage will be superior to its third party counterpart, in the absence of any intent or agreement between the two as to the priority of their respective interests. *See id.* at cmt. d. In such a case, "the recording acts do not vary this result, since the great majority of states [including Utah] they award priority only to a subsequent purchaser *without notice*, and here each mortgagee has notice of the other." *Id.* By extension, the BFP defense would not apply to a third party lender in such a situation because he has actual notice of the seller's mortgage.

Likewise, the vendor will also prevail where both he and the third-party lender lack notice of the other's mortgage. The rationale for this result is that the recording acts will not vary this result "since they operate to award priority only to a *subsequent*



purchaser without notice, and here neither mortgagee can meaningfully be said to be subsequent to the other, since both mortgages arise from the same transaction.” *Id.*

Finally, the Restatement holds that “where only one of the parties has notice of the other, the recording acts, rather than [the Purchase Money Rule], should govern and award priority to the party lacking notice. . . .” *Id.* This is exactly the result this Court reached in *Kemp*. See *Kemp*, 470 P.2d at 393 (holding that the Purchase Money Rule did not apply to Zions Bank, a third-party mortgagee, where it had no actual or constructive notice of the vendor’s trust deed).

In short, the Purchase Money Rule only applies to give preference to a vendor purchase money mortgagee over a third-party purchase money mortgagee where (i) the third-party lender and vendor know of each other’s mortgage and do not have an intent or agreement regarding the priority of their respective interests, (ii) the vendor purchase money mortgagee is unaware of the third-party lender’s mortgage, and the third-party mortgagee knows of the vendor’s purchase money mortgage, or (iii) where neither of the lender’s know of each other’s mortgage. The rationale for favoring the vendor in these instances has been stated as follows:

Nevertheless, the equities favor the vendor. Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case even though the vendor may know that the mortgagor is going to finance the transaction in part by borrowing from a third party and giving a mortgage to secure that obligation. In the final analysis, the law is more sympathetic to the vendor’s hazard of losing real estate previously owned than to the third party lender’s risk of being unable to collect from an interest in the real estate that never previously belonged to it.

RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.2, cmt. 6.

For these reasons, Insight Assets is wrong in arguing that the Purchase Money Rule operates to the exclusion of the recording acts and the BFP Defense, and to the detriment of subsequent parties relying on the order in which documents are recorded.

**C. The District Court Correctly Determined that Farias Took the Property Free of any Claim by Insight Assets Under the Phalen Trust Deed.**

This case originates from a transaction occurring in 2004. At that time, the Boecks and the Phalens entered into an agreement whereby the Boecks agreed to purchase the Property from the Phalens [R. 374-84.] The Boecks' purchase of the Property was financed through third-party financing from FFFC, and seller financing provided by the Phalens [R. 374.] Both financings were secured by trust deeds – the Phalen Trust Deed and the FFFC Trust Deed. The FFFC Trust Deed was recorded prior to the Phalen Trust Deed [R. 386-402; 345-48.] The Boecks subsequently defaulted on their loan with FFFC, and a foreclosure occurred under the FFFC Trust Deed. [R. 326-27.] Since that time, the Property has been conveyed to four different parties -- Wells Fargo Bank, N.A., TTR Holdings, LLC, Alan H. Reisert, and finally to Farias. [R. 327.]

Under Utah law, at the time of the foreclosure under the FFFC Trust Deed and the execution by the trustee of the Trustee's Deed conveying the property to Wells Fargo, all junior encumbrances and were extinguished. Specifically, Utah Code Annotated Section 57-1-27 provides in part:

(3) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title,

interest, and claim of the trustor and the trustor's successors in interest and of all persons claiming by, through, or under them, in and to the property sold, including all right, title, interest, and claim in and to the property acquired by the trustor or the trustor's successors in interest subsequent to the execution of the trust deed, which trustee's deed shall be considered effective and relate back to the time of the sale.

UTAH CODE ANN. § 57-1-27 (2011). This is consistent with the common law, which holds that a foreclosure by a senior trust deed or lien will foreclose and extinguish the liens arising from any junior and subordinate instruments. *See gen. City Consumer Services, Inc. v. Peters*, 815 P.2d 234 (Utah 1991); *Randall v. Valley Title*, 681 P.2d 219 (Utah 1984). Consequently, when Farias acquired the Property, the recorded documents showed a foreclosure under the earlier-recorded FFFC Trust Deed which extinguished the Phalen Trust Deed.

This dispute arose when Insight Assets purportedly obtained an assignment of the Phalen Trust Deed, and claimed it was not extinguished by foreclosure of the FFFC Trust Deed because it was actually senior in priority to the FFFC Trust Deed by virtue of application of the Purchase Money Rule. Farias, however, is protected from such off-record claim as a bona fide purchaser. As stated above, to qualify as a bona fide purchaser, Farias must establish (1) he acquired an interest in the Property, (2) in good faith, and (3) recorded his interest first. *See Haik*, 2011 UT 26 at ¶ 13 (*citing* UTAH CODE ANN. § 57-3-103).

1. Farias Acquired the Property for Value.

At the time Farias acquired the Property, he did so for value. *See* Declaration of Homero Farias, ¶ 2 [R. 450.] Insight Assets does not dispute that Farias acquired the Property for value, and thus this element of the BFP Defense is satisfied.

2. Farias did not have Actual Knowledge of the Phalen Trust Deed and any Claim that it Remained an Encumbrance on the Property.

At the time he acquired the Property, Farias had no knowledge of the existence of the Phalen Trust Deed, including any claim that it continued to encumber the Property. *See* Declaration of Homero Farias, ¶¶ 4-6 [R. 450.] Farias therefore had no “actual notice” of the Phalen Trust Deed, and Insight Assets’ claim that it continued to encumber the Property.

In an attempt to refute this evidence, Insight Assets argues that Equity Title Insurance (“Equity”), the purported issuer of Farias’ title insurance policy, was allegedly an agent of both Farias and First American Title Insurance Company (“FATCO”), that Equity conducted a title search, that FATCO knew about the Purchase Money Rule, and that this knowledge was somehow imputed through Equity to Farias. Appellant’s Brief, p. 30. Insight Assets failed to offer any evidence at the district court level, however, that Equity was either Farias or FATCO’s agent, that Equity conducted a title search, what the results of any such search were, or that it issued a title insurance policy to Farias.

Further, even if Insight Assets had shown that Equity was in fact Farias’ title insurer and conducted a title search revealing the prior recording of the Phalen Trust Deed, it still would not result in Equity’s knowledge being imputed to Farias. Any title

insurance policy Farias obtained in connection with his acquisition of the Property is simply a contract. *See e.g., Holmes Development, LLC v. Cook*, 2002 UT 38, ¶ 24, 48 P.3d 895 (“A title insurance policy, like other insurance policies, serves as a contract between the insurer and the insured....”); *see also Wallace v. Frontier Bank, N.A.*, 903 So. 2d 792, 801 (Ala. 2004) (holding that title insurance company is independent contractor and that insured exercises no supervision or control over them); *Lewis v. Superior Court*, 30 Cal.App.4th 1850, 1869 (1994) (holding that title insurance company is in business for profit and title insurance policy is the result of an arm’s length deal, in which there is no room for the operation of fiduciary relationships).

There is no Utah authority holding that an agency relationship arises between parties to a contract, and thus the knowledge of one is imputed to the other. Courts of other jurisdictions that have addressed the issue, however, have held that a title insurer’s knowledge is not imputed to the insured. “It is a ‘well-settled rule ... that a title insurance company is not the agent of its insured, and the insurer’s knowledge is not imputed to its insured.’” *See Lewis*, 30 Cal.App.4th at 1870 (holding as a matter of law that title insurer’s knowledge is not imputed to insured); *see also e.g., In re Marriage of Cloney*, 91 Cal. App.4<sup>th</sup> 429, 438-39 (2001); *Wallace*, 903 So. 2d at 801; *Huntington v. Mila, Inc.*, 75 P.3d 354, 359 (Nev. 2003) (holding that lender was bona fide encumbrancer because title insurer’s knowledge could not be imputed to insured). As the *Lewis* court properly recognized, imputing the knowledge of a title insurer to its insured:

would be like imputing a car salesperson’s knowledge of defective brakes to an unsuspecting buyer, and then using that imputed knowledge to subject the buyer to liability for reckless conduct for driving a car with actual

knowledge that its brakes didn't work. Such a conclusion would be contrary to law, as well as to the most basic notions of fair play. It is no more appropriate here.

*Lewis*, 30 Cal.App.4th at 1870.

Because a title insurer is not the agent of its insured, its knowledge cannot be imputed to its insured. Thus, whatever knowledge any title insurance company had concerning the Purchase Money Rule and the state of the title, cannot be imputed to Farias. See *In re Marriage of Cloney*, 91 Cal.App. 4th 429, 438-39 (Cal.App.Ct. 2001).

Moreover, even if Equity were Farias' agent (there is also no proof FATCO was Farias' agent), the fact that FATCO was generally aware of the Purchase Money Rule would not give rise to actual knowledge that the Phalen Trust Deed allegedly remained an encumbrance on the Property and was not foreclosed out, simply because it was a purchase money mortgage. Insight Assets has failed to produce any evidence to dispute Farias' testimony that he had no knowledge of the Phalen Trust Deed and any claim it continued to encumber the Property.

4. Farias had no Constructive Record Notice of the Phalen Trust Deed and any Claim that it Remained an Encumbrance on the Property.

As a preliminary matter, the Phalen Trust Deed should be treated as an "unrecorded document" for purposes of Utah's recording statute in light of the foreclosure of the earlier-recorded FFFC Trust Deed. This is similar to this Court's treatment of a recorded trust deed in *Diversified Equities, Inc. v. American Sav. & Loan Assn.*, 739 P.2d 1133 (Utah Ct. App. 1987). In *Diversified*, a lender was a beneficiary of a recorded trust deed, and a deed of reconveyance regarding said trust deed was later

recorded, which the lender claimed occurred through error or mistake. *See id.* at 1134-1135. Prior to the lender's recording an affidavit regarding the alleged error, subsequent purchasers acquired the property without knowledge of the lender's claim of an improvidently recorded deed of reconveyance, and thus were unaware of the lender's claim that the trust deed still encumbered the property. *See id.* Even though the lender's trust deed was recorded, and thus subsequent purchasers had constructive record notice of it, this Court treated it as "unrecorded" for purposes of the recording statute, because absent the lender's "off-record" claim of mistake or error in recording the deed of reconveyance, the deed of reconveyance would have extinguished the trust deed. *See id.* at 1136, fn. 3. Likewise, in this case, but for Insight Assets' claim that the Purchase Money Rule applies to the Phalen Trust Deed, the Phalen Trust Deed would have been extinguished in the foreclosure of the FFFC Trust Deed, and thus the Phalen Trust Deed should be treated as an "unrecorded document" for purposes of Farias' BFP Defense.<sup>3</sup>

Regarding "notice," Farias had no "actual notice" the Phalen Trust Deed continued to encumber the Property. Without such actual notice or knowledge, as a matter of law, Farias was not on "inquiry notice" of the trust deed's continued existence as a lien on the Property. *See Haik*, 2011 UT 26 at ¶ 13 (*quoting J.B. Ranch, Inc.*, 966 P.2d at 838). Accordingly, the only issue remaining to determine if Farias is protected by the BFP Defense against Insight Assets' claim is whether the Warranty Deed from the Phalens to

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<sup>3</sup> Even if the Court were to narrowly construe the BFP defense under Section 57-3-103 as not applying to "off-record" claims regarding recorded documents, such as the claim Insight Assets now brings, the common law bona fide purchaser for value defense would still protect Farias against "adverse claims" and "other's outstanding rights." *See Baldwin*, 850 P.2d at 1197-98.

the Boecks, the FFFC Trust Deed, and/or the Phalen Trust Deed put Farias on constructive record notice that the Phalen Trust Deed was not extinguished by foreclosure of the FFFC Trust Deed because the Purchase Money Rule elevated it in priority ahead of the FFFCT Trust Deed. For this to occur, the recorded documents would have to establish all of the following:

- The Phalen Trust Deed actually secured “purchase money” and therefore was a purchase money mortgage.
- The knowledge of FFFC and the Phalens regarding each other’s trust deeds. Specifically, for Insight Assets to prevail, the recorded documents must show that either FFFC knew of the Phalen Trust Deed *or* both FFFC and the Phalens were unaware of each other’s trust deeds. Stated differently, the Purchase Money Rule would not apply if FFFC did not know of the Phalen Trust Deed, but the Phalens knew of the FFFC Trust Deed;
- If FFFC and the Phalens did in fact have knowledge of each other’s trust deeds, the recorded documents must show an absence of an intent or agreement by FFFC and the Phalens as to the priority of their respective purchase money mortgages; and
- The circumstances and equities of the transaction warrant a court applying the rule.

*See Nelson*, 669 P.2d at 394; *Kemp*, 470 P.2d at 393; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES), § 7.2. There simply is nothing contained in the recorded documents that provides constructive notice to Farias of all of the foregoing, such that he would be on notice that the Phalen Trust Deed remained a lien on the Property, and was not extinguished by the foreclosure of the FFFC Trust Deed, because it enjoyed priority under the Purchase Money Rule (despite being recorded in a second position).



a. Purchase Money.

The Purchase Money Rule applies to purchase money mortgages, which by definition are mortgages (or trust deeds) that secure purchase money. Consequently, the Warranty Deed and/or Phalen Trust Deed would have to provide constructive notice to Farias that the Phalen Trust Deed secured purchase money. There simply is nothing in these documents, however, establishing that the Phalen Trust Deed secured purchase money. The only possible way Farias could determine if it did secure money would be through further inquiry outside the record – something Utah does not require. *See Haik*, 2011 UT 26 at ¶ 13.

b. Knowledge of the Phalens and FFFC

The Purchase Money Rule only applies where the recording statute by its terms does not, which requires an inquiry into the knowledge of FFFC and the Phalens. Specifically, if the Phalens knew of the FFFC Trust Deed, but FFFC was unaware of the Phalen Trust Deed, the recording act would apply to the exclusion of the Purchase Money Rule. *See Kemp*, 470 P.2d at 393. There is nothing in the Warranty Deed, the FFFC Trust Deed, or the Phalen Trust Deed that gives any insight as to whether FFFC was aware of the Phalen Trust Deed. Insight Assets argues for the first time on appeal, however, that FFFC is “deemed” to know of the Phalen Trust Deed because US Title acted as trustee under both trust deeds, and its knowledge is imputed to FFFC. Appellant’s Brief, pgs. 19-20. Because Insight Assets failed to make this argument below, it cannot raise it for the first time on appeal. *See Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). At the district court level, Insight Assets argued that FFFC had

knowledge of the Phalen Trust Deed because they shared an *escrow agent* (as opposed to a common trustee), US Title, and thus the knowledge of US Title is imputed to FFFC. This argument is flat-rejected by Utah law.

It is well-established that, at most, an escrow agent is a limited or special agent. *Schoepe v. Zions First Nat'l Bank*, 750 F. Supp. 1084, 1088-89 (D. Utah 1990). The Utah Supreme Court has long-embraced the concept of limited agency, *see e.g., Naujoks v. Suhrmann*, 337 P.2d 967, 969 (Utah 1959) (“It is appreciated that the fact that one may be an agent for one purpose does not make him an agent for every purpose, but the agency is limited to acts within the scope of authorized duties.”), including the concept that notice to a limited agent is not imputed to its principals. *See Ind. Oil & Gas Co. v. Shelton*, 6 P.2d 1027, 1031 (Utah 1932) (concluding that although the escrow agent was given actual notice of a preexisting, unrecorded mortgage by one of its principals, such knowledge was not imputed to the escrow agent’s other principal). There simply is nothing of record that put Farias on record that FFFC knew of the Phalen Trust Deed.

Moreover, even if Insight Assets were allowed to argue for the first time that FFFC had knowledge of the Phalen Trust Deed because the two shared a common trustee, this argument is without any support. The cases relied on by Insight Assets – *Macris v. Sculpted Software, Inc.*, *Latses v. Nick Floor, Inc.*, and *First Nat'l Bank of Nephi v. Foote* – are all cases addressing the issue of whether an agent’s knowledge is imputed to his principal, and have nothing at all to do with trustees and whether a

common trustee's knowledge is imputed to each of the beneficiaries.<sup>4</sup> Further, as a matter of law, a common trustee's knowledge is not imputed to the beneficiaries of the various trust deeds for which the trustee is appointed. A trustee's duties to the parties of a trust deed are confined to those duties memorialized in the deed of trust, and set forth in the applicable statutes that have "outlined the steps needed to ensure good faith and fair dealing." See *Five F, L.L.C. v. Heritage Savings Bank*, 2003 UT App 373, ¶ 23, 81 P.3d 105; UTAH CODE ANN. §§ 57-1-1, *et seq.* (setting forth duties of trustee, all of which arise only in connection with foreclosure proceedings). Because a trustee's scope of their duties is limited to foreclosure, any knowledge acquired by a trustee cannot be imputed to the trustor or beneficiary. See *Macris v. Sculptured Software, Inc.*, 2001 Utah 43, ¶ 21, 24 P.3d 984 (only knowledge of agent within scope of authority can be imputed to a principal).

c. The Existence/Absence of an Intent or Agreement  
Between the Phalens and FFFC Concerning the  
Priority of their Respective Trust Deeds.

Even if FFFC and the Phalens were aware of each of others' trust deeds, the Purchase Money Rule would only apply in the absence of an intent or agreement of the parties regarding the priority of the two trust deeds. See *Nelson*, 669 P.2d at 394. There

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<sup>4</sup> Insight Assets' argument would lead to unbelievable results where some entities act as trustee for numerous trust deeds. For example, some entities, like ReconTrust Company, N.A., act as trustees for thousands of trust deeds throughout the country. Apparently, Insight Assets would argue that each of the beneficiaries under those trust deeds is imputed with the knowledge of the contents of every other trust deed for which an entity like ReconTrust Company acts as trustee.

is nothing in the recorded documents that suggests, one way or another, the existence or absence of any such intent or agreement.

Insight Assets argues that, in the absence of a written and recorded subordination agreement, it is legally impossible for any such intent or agreement to have occurred. Consequently, because no written subordination agreement was recorded, as a matter of law, no such intent or agreement exists in this case. Appellant's Brief, pgs. 14-16. Insight Assets only cites Utah's statute of frauds as support for its argument. *Id.* at 16. Utah law is silent, however, on whether the statute of frauds applies to subordination of an interest in real property. Other authorities suggest subordination is not necessarily a contract, and thus not subject to the statute of frauds. For example, the Restatement notes:

One frequently sees references to "subordination agreements." It is true that a subordination can be incorporated in a contract, and that one can contract to give a subordination in the future. However, in its essence a subordination is not a contract but a declaration by a mortgagee that it is relinquishing the priority of mortgage to some other interest. . . .

*See e.g.*, RESTATEMENT (THIRD) PROPERTY, MORTGAGES, § 7.7, cmt. a.

Moreover, where the interests are created as part of the same transaction (like the present case), subordination need not occur by writing at all; rather, the parties can employ the order of recording to establish the priority of their respective interests. *See id.* § 7.2 cmt d. ("Subordination by the vendor to a third party mortgagee may sometimes be found by virtue of the fact that the latter's mortgage was recorded prior to the former's, if the evidence indicates that the particular order of recording was consciously used as a

means of establishing priority.”); § 7.7 (“Alternatively, the parties may purport to establish priority between the mortgage and the other interest by the order of recording the two documents.”); *see also ALH Holding Co.*, 18 P.3d at 747 (noting that subordination can be found through implication by the order of recording documents). Consequently, Farias would not be on constructive notice of the absence of an intent or agreement to subordinate the Phalen Trust Deed to the FFFC Trust Deed simply because no “subordination agreement” was recorded – the order of recording indicated the parties’ intent regarding the priority of their respective interests. The only way Farias could determine that the parties intended otherwise would be through further inquiry, and under Utah law he is not required to make any such inquiry. *See Haik*, 2011 UT 26 at ¶ 13.

d. Constructive Notice of the Equities.

This Court held in *Kemp* that the application of the Purchase Money Rule “depends upon the circumstances of the given case, the equities. . . .” *Kemp*, 470 P.2d at 393. Obviously, it is impossible for a subsequent purchaser like Farias to determine whether the circumstances and equities of a transaction that occurred several years prior, and to which he was not a party, are such that a court of law would find application of the Purchase Money Rule is warranted. For this reason, Farias could not have constructive record notice that the priority of the Phalen Trust Deed vis-à-vis the earlier recorded FFFC Trust Deed was anything other than as reflected by said order of recording.

- e. The District Court Correctly Determined Farias was Protected under the BFP Defense Against any Claim by Insight Assets that the Phalen Trust Deed Continued to Encumber the Property.

The district court correctly rejected Insight Assets' argument that the Purchase Money Rule is an immutable, absolute rule that applies to the exclusion of recording acts and to the detriment of bona fide purchasers for value. Ruling, p. 3 [R. 575]. For reasons explained above, the district court likewise correctly determined that there was no evidence Farias had actual notice of Insight Assets' claimed interest (and thus no inquiry notice either), and that nothing contained in the recorded documents that would put him on constructive record notice of the claimed purchase money priority. *See id.* at pgs. 4-5 [R. 576-77.] Further, the district court correctly ruled that "parties are entitled to rely on the order of recording." *Id.* at p. 5 [R. 577.]

Under Utah law, purchasers of property are entitled to rely on the documents of record and the legal effect of those documents. For example, in *Diversified Equities, Inc. v. American Sav. & Loan Assn.*, 739 P.2d 1133 (Utah Ct. App. 1987), the defendant American Savings held a trust deed on property. The property was conveyed several times, but remained subject to the trust deed. One of the subsequent purchasers contacted American Savings about the status of the trust deed, and American Savings responded that the loan had been repaid, and it then recorded a deed of reconveyance. American Savings at some point later determined that the loan in fact had not been repaid, and thus the recording of the deed of conveyance was in error. Prior to discovering the alleged error, however, the property was conveyed two more times before American recorded an

affidavit regarding the alleged error, and thus claiming its trust deed remained an encumbrance on the property. The court held that the subsequent purchasers were bona fide purchasers for value and without notice of American Savings' alleged error in recording the deed of reconveyance. The court noted that because the trust deed had been reconveyed, there was no constructive or record notice from that instrument. *Id.* at 1136-37. To hold otherwise, the court noted, "would defeat the purpose of the recording statutes and subvert the sound commercial policy they promote." *Id.* at 1137. In this case, the record reflects termination of the Phalen Trust Deed as a consequence of the foreclosure of the earlier-recorded FFFC Trust Deed, upon which subsequent purchasers are entitled to rely.

Courts of other jurisdictions have ruled that bona fide purchasers are entitled to rely on the priority of interests as reflected in the record, and take free of claims that the priority is other than as reflected in the record. In *Credit Based Asset Servicing & Securitization, LLC v. Flagstar Bank*, 2007 WL 866935 (Mich. Ct. App. March 22, 2007), two separate mortgages against a property were consecutively recorded. 2007 WL 866935, at \* 1 (Mich. Ct. App. March 22, 2007). A foreclosure of the first recorded trust deed occurred and the property was subsequently sold to a purchaser for value who obtained loans for the purchase of the property. *Id.* The holder of the second recorded trust deed subsequently assigned its interest to another party who brought an action that asserted that the order of recording of the two trust deeds was incorrect. *Id.* The court held that although the second recorded trust deed appeared in the chain of title the subsequent purchaser of the property was allowed to rely on the order of recording and

the legal effect of a foreclosure, which would extinguish any junior liens. *Id.* at \* 2-3. The court also noted that if there was a mistake in the order of recording the two mortgages, the lender had opportunity to take corrective action but failed to do so, and thus the purchaser at the foreclosure sale was entitled to rely on the record as stated. *Id.* at \* 4; *see also Land Title Ins. Co. v. Ameriquest Mortg. Co.*, 207 P.3d 141 (Colo. 2009) (holding that subsequent purchaser was entitled to rely on order of recording to conclude that junior lien would have been foreclosed out).

Similarly, in *Washington Mutual Bank, F.A. v. Elfelt*, the court ruled that a subsequent purchaser was able to rely on the order of recording in determining the respective priority of those deeds. 756 N.W.2d 501, 506-07 (Minn. Ct. App. 2008). Even if the deeds had been recorded in the incorrect order, the subsequent purchaser took free and clear of any claim that the order of recording was other than as reflected. *Id.*

In this case, if the Phalens believed their trust deed was to be senior to the FFFC Trust Deed, the Phalens could have instituted an action seeking a determination that Insight Assets now seeks five years after the fact, and more than four years after foreclosure of the FFFC Trust Deed and several conveyances of the Property since that time. The Phalens could have asserted this claim and recorded a lis pendens to give notice to the public that the priority of the Phalen Trust Deed vis-à-vis the FFFC Trust Deed was other than reflected by the Weber County Recorder's records. They failed to do so, and they (and Insight Assets as assignee) cannot now be heard to complain against



Farias, a bona fide purchaser for value, that the priority was other than reflected at the time Farias acquired the Property.

At the district court level, the only argument Insight Assets made that Farias allegedly had constructive notice the Phalen Trust Deed remained an encumbrance on the Property was the fact that no deed of reconveyance had been recorded for the Phalen Trust Deed. [R. 473.] Insight Assets continues to make this argument on appeal. Appellant's Brief, pgs. 27-28. This argument appears to be a result of a failure to understand basic principles of real estate law. Section 57-1-33.1(1)(a) (2011), cited by Insight Assets, describes the circumstances where a deed of reconveyance is given – namely, “when an obligation secured by a trust deed *has been satisfied*. . . .” UTAH CODE ANN. § 57-1-33.1(1)(a) (emphasis added). By executing a deed of reconveyance, the trust property is reconveyed back to the trustor. In a foreclosure, however, any junior encumbrances are *extinguished*, and thus the junior lienholder would have *nothing* to reconvey. Accordingly, where a foreclosure of the earlier-recorded FFFC Trust Deed occurred, the second-in-time recorded Phalen Trust Deed would normally be extinguished, and thus one would not expect any deed of reconveyance to be recorded. The only way the Phalen Trust Deed would not be extinguished is if the order of recording did not reflect the priority of these trust deeds – i.e., an “off-record” claim by the Phalens or Insight Assets. The absence of a deed of reconveyance did not put Farias on notice that the Phalen Trust Deed continued to encumber the Property, and it certainly could not trigger a duty on Farias to inquire further outside the record as Insight Assets now argues. *See Haik*, 2011 UT 26 at ¶ 13.

In short, nothing contained in the Warranty Deed, the Phalen Trust Deed, and/or the FFFC Trust Deed put Farias on constructive record notice that the Phalen Trust Deed was not extinguished in the foreclosure of the earlier-recorded FFFC Trust Deed, and thus remained an encumbrance on the Property. The district court did not err on this point, and its decision should be affirmed.

**II. THE FFFC TRUST DEED IS SUPERIOR TO THE PHALEN TRUST DEED BECAUSE THE VENDOR PURCHASE MONEY RULE IS INAPPLICABLE.**

This case can be analyzed and decided on several levels. The district court analyzed and decided the case based on the effect of the recording act and the BFP Defense for the transaction whereby Farias acquired the Property. As explained above, the recording act and the BFP Defense, however, could be applied to the transaction whereby the Boecks acquired the Property and FFFC took an interest in the Property under the FFFC Trust Deed. Likewise, the recording act and the BFP Defense could potentially apply to any of Farias' predecessors in title who took title to the Property after foreclosure of the FFFC Trust Deed – Wells Fargo, TTR Holdings, LLC, and Alan Reisert. If any of these predecessors in title were protected under the recording statute and BFP Defense, Farias would likewise be protected and take title free of Insight Assets' claim under the so-called "shelter-rule." *See Strekal v. Espe*, 114 P.3d 67, 74 (Colo. Ct. App. 2004); 77 Am. Jur. 2d Vendor and Purchaser § 419.

Insight Assets brought this action seeking a declaration that the Phalen Trust Deed was senior in priority to the FFFC Trust Deed by invoking the Purchase Money Rule. [R. 5-6.] As such, Insight Assets bears the burden of establishing all conditions necessary for

the application of the rule. The district court did not address whether the rule would have applied to the transaction among FFFC, the Phalens, and the Boecks, because it decided the case on the basis that Farias was a bona fide purchaser. Even if the district would have addressed the issue, however, Insight Assets' claim would fail as a matter of law.

First, as set forth above, the Purchase Money Rule would not apply if FFFC was unaware of the Phalen Trust Deed. The only evidence offered by Insight Assets on this point is that FFFC shared a common trustee with the Phalens in US Title, and as explained above, this claim fails as a matter of law. Moreover, there is a presumption under Utah law that FFFC did not know of the Phalen Trust Deed. Specifically, Utah Code Section 57-4a-4 states that a recorded document creates a presumption regarding title to the real property affected that "the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times." UTAH CODE ANN. § 57-4a-4(1)(f) (2011). "Good faith" for purposes of Utah real estate law means lacking actual or constructive notice of an adverse or competing claim or interest in property. In the absence of any evidence to the contrary, a presumption therefore exists that FFFC did not know of the Phalen Trust Deed, in which case the recording act would apply and the FFFC Trust Deed would enjoy priority over the Phalen Trust Deed as the earlier recorded instrument. *See Kemp*, 470 P.2d at 393; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES), § 7.2 (c), cmt. d.<sup>5</sup> The rule would therefore not apply.

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<sup>5</sup>This is particularly so where, like the vendor in *Kemp*, the Phalens accepted the proceeds from the FFFC Loan.

**III. INSIGHT ASSETS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES WHERE IT, AND ITS PREDECESSOR IN INTEREST, BROUGHT THE CLAIMS OVER FOUR YEARS AFTER THE FACT AND NUMEROUS PARTIES HAVE RELIED ON THEIR INACTION.**

Although the district court decided the case based on Farias' status as a bona fide purchaser for value, the district court's decision can also be affirmed because Insight Assets' claims are barred by the doctrine of laches. *See Bailey*, 2002 UT 58, ¶ 10 (stating an appellate court can affirm on "any legal ground or theory apparent on the record").

Utah law recognizes the doctrine of laches, which is "based upon [the] maxim that equity aids the vigilant and not those who slumber on their rights." *CIG Exploration, Inc. v. State*, 2001 UT 37 ¶ 15, 24 P.3d 966. "Laches bars a recovery when there has been a delay by one party causing a disadvantage to the other party." *Collard v. Nagle Construction, Inc.*, 2002 UT App. 306, ¶ 28, 57 P.3d 603 (citing *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1260 (Utah 1975)). As such, two elements must be met for laches to bar an action: "(1) a party's lack of diligence and (2) an injury resulting from that lack of diligence." *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Hon. Denise P. Lindberg*, 2010 UT 51, ¶ 27, 238 P.3d 1054 (holding that doctrine of laches barred the petitioners from asserting their claims where they had waited over three years to bring their claims challenging the modification of the trust and numerous parties had relied on the unchallenged trust modifications in conducting transactions). Laches is also applicable where a party is disadvantaged

because parties have died, memories have faded, and documents are not obtainable. *See Nilson-Newey & Co. v. Utah Resources Intern.*, 905 P.2d 312, 316 (Utah Ct. App. 1995).

In this case, both of the elements of laches are present. Insight Assets and its predecessor in interest, the Phalens, lacked diligence in bringing their claim that the priority of the Phalen Trust Deed vis-à-vis the FFFC Trust Deed was other than as reflected in the order of recording in the Weber County Recorder's Office. In April 2004, the FFFC Trust Deed was recorded prior to the Phalen Trust Deed. On June 7, 2005, the FFFC Trust Deed was foreclosed and the Property was conveyed to Wells Fargo. The Phalens never brought an action to determine the priority of the Phalen Trust Deed vis-à-vis the earlier recorded FFFC Trust Deed. Nor did the Phalens attempt to foreclose on the Phalen Trust Deed. It was not until August 31, 2009, over five years after the Phalen Trust Deed was recorded behind the FFFC Trust Deed and over four years after the FFFC Trust Deed was foreclosed, that Insight Assets recorded a notice of default, alleging that the Phalen Trust Deed still encumbered the Property.

During this interim period, numerous parties relied on the priority of the trust deeds as established by the order of recording in buying, selling, encumbering, and making warranties regarding the Property. Indeed, the Property has been conveyed four times since the Boecks purchased the Property. At the time Farias obtained the Property in August 2007, he had no knowledge that any party claimed an interest in the Property under the Phalen Trust Deed or otherwise. [R. 450.]

In addition, Insight Assets' and its predecessor in interest's lack of diligence in pursuing their claims has placed Farias at a distinct disadvantage in defending his interest

in the Property because of the passage of time. The Boecks had moved and could not be located, and the lender, FFFC, a primary witness of critical importance in this case, had gone out of business and Farias was unable to obtain their records or locate individuals who have knowledge of the sale of the Property and the loan made by FFFC.<sup>6</sup> [R. 329.]

**IV. THE DISTRICT COURT ERRED IN RULING THAT FARIAS WAS NOT ENTITLED TO HIS REASONABLE ATTORNEY FEES PURSUANT TO UTAH CODE ANN. § 78B-5-826.**

**A. The Conditions for Attorney Fees Under UTAH CODE ANN. § 78B-5-826 are met in this Case.**

“Generally, attorney fees are awarded only when authorized by contract or by statute.” *Bilanzich v. Lonetti*, 2007 UT 26, ¶11, 160 P.3d 1041. In this case, both the Phalen Trust Deed and the Trust Deed Note allow for attorney fees in favor of the beneficiary/holder thereof. While the attorney fees provision in the Phalen Trust Deed and the Trust Deed Note are one-sided, in that they only provide a right to attorney fees to the beneficiary/holder of the trust deed/note, Utah law rectifies this inequitable situation through UTAH CODE ANN. § 78B-5-826. This statute provides that:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

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<sup>6</sup> Insight Assets claims are barred by the doctrine of laches even though the statute of limitations on the Trust Deed Note had not entirely lapsed when Insight Assets brought its judicial foreclosure action. Utah courts have consistently recognized that laches “may apply in equity . . . whether or not an applicable statute of limitations has been satisfied.” See *American Tierra Corp. v. West Jordan*, 840 P.2d 757, 763 (Utah 1992); *Nilson-Newey & Co. v. Utah Resources Intern.*, 905 P.2d 312, 314 (Utah Ct. App. 1995).

UTAH CODE ANN. § 78B-5-826. To be entitled to attorney fees under this statute, two conditions must be met: “first, the underlying litigation must be based upon a contract; and second, the contract must allow at least one party to recover attorney fees.” *See Hooban v. Unicity Int’l, Inc.*, 2009 UT App 287, ¶ 9, 220 P.3d 485; *Bilanzich*, 2007 UT 26, ¶ 14.

In this case, both of these elements are met. First, the litigation is based upon a contract. Insight Assets sought to foreclose against Farias’ property pursuant to the Phalen Trust Deed and Trust Deed Note. Second, both the Phalen Trust Deed and the Trust Deed Note allow the holder of the Phalen Trust Deed and Trust Deed Note to recover attorney fees in enforcing the respective contracts. The relevant portion of the Phalen Trust Deed provides that

[u]pon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney’s fee in such amount as shall be fixed by the court.

[R. 347.] Similarly, the Trust Deed Note further provides that “if this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, trustors jointly and severally agree to pay all costs and expenses of collection including a reasonable attorneys’ fee.” [R. 404.] Presumably relying on these contracts, Insight Assets, in its Complaint claimed that it was entitled to recover its attorney fees incurred in bringing the lawsuit. *See* Complaint, ¶¶ 38-39 [R. 7.]

Although the district court purported to exercise its discretion in denying Farias' request for attorney fees, it refused to allow attorney fees because "[Farias] is not an original party to the Phalen trust deed or the corresponding trust deed note." [R. 578.] In doing so, the district court misread and misapplied the decisions in both *Bilanzich* and *Hooban*. In *Bilanzich*, this Court repeatedly emphasized that the statute "requires only that a party to the litigation assert the writing's enforceability as basis for recovery." *Bilanzich*, 2007 UT 26, ¶ 15 (emphasis added). This Court also held that a court may award attorney fees to the prevailing party where "the litigation was based on a writing that granted attorney fees to at least one of the parties in the litigation." *Id.* at ¶ 16 (emphasis added). Contrary to the holding of the district court, there is no requirement that both parties to the lawsuit be original parties to the contract. In *Hooban*, the Utah Court of Appeals explicitly held that even though Hooban was not a party to the original contract, it could still recover attorney fees pursuant to UTAH CODE ANN. § 78B-5-826 because "the statute 'requires only a party to the litigation assert the [contract's] enforceability as a basis for recovery.'" 2009 UT App 287, ¶ 9 (alteration in original).

The district court's ruling interpreted this Court's ruling in *Bilanzich* that the statute "was designed to 'create a level playing field' for parties to a contractual dispute," *Bilanzich*, 2007 UT 26, ¶ 18, to require that both litigants be parties to the contract. As *Bilanzich* makes clear, for Section 78B-5-826 to be applicable, the parties must merely be parties to the contractual dispute. Because Farias and Insight Assets are both parties to the contractual dispute, Section 78B-5-826 is applicable and the district court should have awarded attorney fees to Farias.



**B. The Underlying Policies of the Statute Support an Award of Attorney Fees in this Case.**

Although UTAH CODE ANN. § 78B-5-826 leaves it to the discretion of the district court to determine whether to award attorney fees, this Court has noted that “district courts should award fees liberally under Utah Code section [78B-5-826] where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees.” *Bilanzich*, 2007 UT 26, ¶ 19. This Court identified two underlying policies behind the statute. First, the statute was designed to remedy “the unequal allocation of litigation risks.” *Id.* at ¶ 18 (emphasis added). “[E]xposure to the risk of a contractual obligation to pay attorney fees must give rise to a corresponding risk of a statutory obligation to pay fees.” *Id.* at ¶ 19. Second, this Court stated that the statute “rectifies the inequitable common law result where a party that seeks to enforce a contract containing an attorney fees clause has a significant bargaining advantage over a party that seeks to invalidate the contract.” *Id.* at ¶ 18.

The district court, however, misstated the underlying policies and applied an incorrect standard in weighing the attorney fees issues. Although *Bilanzich* holds that the purpose behind the reciprocal fees statute is “to ‘creat[e] a level playing field’ for parties to a contractual dispute,” 2007 UT 26, ¶ 18, the district court refused to grant attorney fees because it stated an award of attorney fees would not help in “‘creating a level playing field’ between contractual parties.” *See* Ruling [R. 578.] The district court’s ruling required that the litigants not only be parties to a contractual dispute, but that they

be actual parties to the contract. This additional requirement is not supported by Utah law.

Here, each of the underlying policies of the statute supports an award of attorney fees. There is unequal litigation risk to pay attorney fees between Insight Assets and Farias that is created by the Phalen Trust Deed and Trust Deed Note. In taking the assignment of the Phalen Trust Deed and Trust Deed Note and seeking to enforce it against Farias and the Property, Insight Assets would have been entitled to its attorney fees under the contract had it prevailed. Farias would have been forced to pay off the amount owed under the Phalen Trust Deed and Trust Deed Note, including the attorney fees incurred by Insight Assets, to prevent foreclosure of his Property. Under the Phalen Trust Deed and Trust Deed Note, Farias is not similarly entitled to his attorney fees. As such, Insight Assets held a distinct bargaining advantage over Farias. This inequitable position created by the Phalen Trust Deed and Trust Deed Note is exactly what UTAH CODE ANN. § 78B-5-826 was designed to prevent. The reciprocal attorney fees statute subjects Insight Assets to a statutory claim for attorney fees to balance out the litigation risks of the parties.


### **CONCLUSION**

For all of the foregoing reasons, Farias respectfully requests that this Court affirm the District Court's grant of summary judgment in its favor and denial of Insight Assets' motion for summary judgment relating to Farias' status as a bona fide purchaser for value. Farias further requests the Court to overturn the District Court's denial of Farias' request for attorney fees pursuant to UTAH CODE ANN. § 78B-5-826, and remand this

case to the District Court with instructions to determine and award the reasonable amount of attorney fees incurred by Farias.

DATED this 12<sup>th</sup> day of October, 2011.

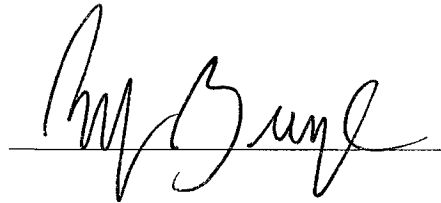
PARR BROWN GEE & LOVELESS, P.C.

By:   
\_\_\_\_\_  
Ronald G. Russell  
Rodger M. Burge  
Jeffery A. Balls

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of October, 2011, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE/CROSS APPELLANT HOMERO FARIAS** to be served via U.S. Mail, first-class postage prepaid, on the following:

Kelly Ann Booth  
THE LAW OFFICES OF KELLY ANN BOOTH  
The Judge Building  
8 East Broadway, Suite 700  
Salt Lake City, Utah 84111-2225

A handwritten signature in black ink, appearing to read "Amy Bunge", is written over a horizontal line.

## **ADDENDUM “A”**

**(Ruling)**

---

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

---

INSIGHT ASSETS, INC., a Utah  
Corporation,

Plaintiff,

vs.

HOMERO FARIAS, an individual,

Defendant.

RULING

*WKB*

Case No. 090908263

Judge W. Brent West

---

HOMERO FARIAS,

Counterclaimant,

vs.

INSIGHT ASSETS, INC., a Utah  
Corporation, and W. ANDREW  
McCULLOUGH, in his capacity as Trustee,

Counterclaim Defendants.

This matter is before the Court on cross motions for summary judgment. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Here, because the undisputed facts establish that Defendant had no actual or constructive knowledge of Plaintiff's claim to the property in controversy, Defendant is entitled to the protection of Utah's recording

act and takes the property free of all other interests as a bona fide purchaser for value. For this reason, the Court grants Defendant's motion for summary judgment.

### **I. Undisputed Factual Background**

Defendant owns the real property that is the subject of this dispute (hereinafter "the property"). After Defendant purchased the property in 2007, Plaintiff claimed a lien on the property by way of a trust deed that had been assigned to it by Joseph and Denise Phalen. The Phalens, who were prior owners of the property, took this trust deed as security for their financing a portion of the purchase price of the property when they sold it to William and Roberta Boeck via warranty deed in 2004. This trust deed, however, was recorded in a second position behind a trust deed given to a third-party lender, First Franklin Financial Corporation ("FFFC"). The Boecks subsequently defaulted and the prior-recorded FFFC trust deed was foreclosed. Three years after the foreclosure, Defendant purchased the property.

### **II. Analysis**

Plaintiff argues that its trust deed was not extinguished by the foreclosure of the prior-recorded FFFC trust deed because the common law confers priority on a vendor's purchase money mortgage over a third-party lender's purchase money mortgage. Plaintiff's argument fails, however, because this common law rule is not absolute. On the contrary, a review of the case law clearly demonstrates that the vendor purchase money priority rule is subject to the recording act. Consequently, since the facts establish that Defendant is a bona fide purchaser for value under Utah's recording act, Defendant takes free of Plaintiff's claim that its vendor purchase money mortgage remains an encumbrance on the property.

**A. The Vendor Purchase Money Priority Rule is Subject to the Recording Act.**

The Court is unaware of any case granting absolute priority to vendor purchase money mortgages. In fact, Utah case law is quite clear that there are exceptions to the rule. In *Kemp v. Zions First National Bank*, 470 P.2d 390 (Utah 1970), the Utah Supreme Court recognized the general rule that “[w]here the contest is between a purchase money mortgage to a third person who advances part of the purchase price and a purchase money mortgage to the vendor for the balance, the latter is given preference even if he had notice of the former.” *Id.* at 393. However, the Court also recognized that “in spite of the foregoing generalities, . . . an examination of the authorities and the principles involved will show that the result actually depends upon the circumstances of the given case, the equities, *and the effect of the recording act.*” *Id.* (emphasis added). This view is in line with the Restatement. “A purchase money mortgage given to a vendor of real estate, in the absence of a contrary intent of the parties to it *and subject to the operation of the recording acts*, has priority over a purchase money mortgage on that real estate given to a person who is not its vendor.” RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES), § 7.2(c) (emphasis added). In light of these authorities, the Court believes Plaintiff’s position overstates the scope of the vendor purchase money priority rule. The rule does not apply in every situation, but is rather subject to the operation of the recording act.

**B. Defendant Takes Free of Plaintiff’s Claim to the Property Because he is a Bona Fide Purchaser for Value Under Utah’s Recording Act.**

Because the vendor purchase money priority rule is subject to the operation of the recording act, the first issue that must be decided by this Court is whether Defendant is entitled to the protection of Utah’s recording act as a bona fide purchaser for value. Utah is a “race-notice” jurisdiction under which a person acquiring an interest in property does so subject to matters of



which he has actual notice, as well as matters of which he is deemed to have notice (i.e., “constructive notice”). See Utah Code Ann. §§ 57-3-102-103 (2010). Stated differently, a party who acquires real property for value without actual or constructive notice of any interest against his predecessor’s title, does so free of said interests as a bona fide purchaser for value. In this case, Plaintiff offers no evidence that Defendant had actual knowledge that Plaintiff or its predecessor claimed an interest in the property. Hence, the question for the Court is whether Defendant had constructive notice that the priority between the FFFC trust deed and the Phalen trust deed was other than reflected by the order of the recording of the documents. See e.g., *Anderson v. American savings & Loan Assn.*, 668 P.2d 1253, 1254 (Utah 1983) (holding that “[u]nder our recording act, priority is given to that document which is recorded before another that asserts the same interest”)

There are two types of constructive notice under Utah law:

One kind of constructive notice is notice which results from a record or which is imparted by the recording statutes; and the other is notice which is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.

*First American Title Ins. Co. v. J. B. Ranch, Inc.*, 966 P.2d 834, 837 (Utah 1998).

The first kind of constructive notice, often referred to as “record notice,” arises under the recording statute. The second kind of constructive notice, often referred to as “inquiry notice,” occurs “when circumstances arise that should put a reasonable person on guard so as to require further inquiry on his part.” *Id.* Importantly, the Utah Supreme Court has ruled that “inquiry notice” cannot arise from recorded documents. *Id.* at 838. It only arises if the purchaser has actual knowledge of circumstances that give rise to the duty of

further inquiry. *Id.* Since Plaintiff offers no evidence that Defendant had personal knowledge of any off-record circumstances that should have put him "on guard" so as to inquire further as to possible claims under the Phalen trust deed, the only inquiry left for the Court under a bona-fide-purchaser-for-value analysis is whether the documents on record (i.e., the warranty deed from the Phalens to the Boecks, the FFFC trust deed, and the Phalen trust deed) put Defendant on constructive notice that the priority of the Phalen trust deed vis-à-vis the FFFC trust deed was not as reflected in the order of recording.

However, on this point, there is nothing contained in these documents that provides constructive notice to Defendant that the Phalen trust deed was not extinguished by the foreclosure of the prior-recorded FFFC trust deed, but instead remained a lien on the property under the vendor purchase money priority rule. As stated above, Utah law does not hold this rule out to be immutable. Instead, Utah law holds that the application of the vendor purchase money priority rule "depends upon the circumstances of the given case, the equities, and the effect of the recording act." *Kemp*, 470 P.2d at 393. Accordingly, Defendant could not know whether the Phalen trust deed took priority under the vendor purchase money mortgage rule unless he undertook further inquiry into the circumstances surrounding the original transaction between the Phalens and the Boecks. However, as already established, parties are entitled to rely on the order of recording. Under Utah law, there is no duty of inquiry based on record notice. As a result, no genuine issue of material fact exists regarding Defendant's status as a bona fide purchaser for value. Defendant purchased the property for valuable consideration without actual or constructive notice of Plaintiff's claim to priority as a vendor purchase money mortgage holder.

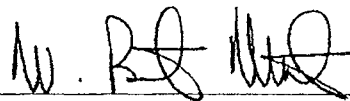
### III. Conclusion

Because no genuine issue exists as to whether Defendant was a bona fide purchaser for value, Defendant is entitled to take the property free of all other interests. Therefore, the Court grants Defendant's motion for summary judgment.

However, the Court denies Defendant's request for an award of attorneys' fees under Utah Code Ann. § 78B-5-826 (2010). "Whether attorney fees should be awarded under Utah Code section 78B-5-826 is a separate policy-driven analysis subject to the court's discretion." *Hooban v. Unicity Int'l, Inc.*, 220 P.3d 485, 488 n.3 (Utah Ct. App. 2009), *cert. granted*, 225 P.3d 880 (Utah 2010). The Utah Supreme Court has explained that the policy behind Utah Code Ann. § 78B-5-826 is "to 'creat[e] a level playing field' for parties to a contractual dispute." *Bilanzich v. Lonetti*, 160 P.3d 1041, 1046 (Utah 2007) (citation omitted). Here, Defendant is not an original party to the Phalen trust deed or the corresponding trust deed note. Consequently, the Court finds that the policy behind Utah Code Ann. § 78B-5-826 of "creating a level playing field" between contractual parties would not be served by awarding Defendant attorneys' fees in this case.

This Ruling constitutes the final order of the Court.

DATED this 3<sup>rd</sup> day of November, 2010.



W. Brent West  
District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the 8<sup>th</sup> day of November, 2010, I sent a true and correct copy  
of the foregoing ruling to counsel as follows:

Kelly Ann Booth  
Counsel for Plaintiff  
299 South Main Street, 13<sup>th</sup> Floor  
Salt Lake City, Utah 84111

Rodger M. Burdge  
Parr Brown Gee & Loveless, P.C.  
Counsel for Defendant  
185 South State Street, Suite 800  
Salt Lake City, Utah 84111

  
Deputy Court Clerk

**ADDENDUM “B”**  
**(UTAH CODE ANN. § 57-3-103)**

**§ 57-3-103. Effect of failure to record, UT ST § 57-3-103**

---

West's Utah Code Annotated

Title 57. Real Estate

Chapter 3. Recording of Documents (Refs & Annos)

Part 1. General Provisions

U.C.A. 1953 § 57-3-103

§ 57-3-103. Effect of failure to record

Currentness

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded.

**Credits**

Laws 1988, c. 155, § 15; Laws 1989, c. 88, § 9; Laws 1998, c. 61, § 3, eff. July 1, 1998.

**Codifications** R.S. 1898, § 2001; C.L. 1907, § 2001; C.L. 1917, § 4901; R.S. 1933, § 78-3-3; C. 1943, § 78-3-3; C. 1953, § 57-3-3.

Notes of Decisions (35)

Current through 2011 Second Special Session.

End of Document

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**ADDENDUM "C"**  
**(UTAH CODE ANN. § 78B-5-826)**

**§ 78B-5-826. Attorney fees--Reciprocal rights to recover attorney fees, UT ST § 78B-5-826**

---

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 5. Procedure and Evidence

Part 8. Miscellaneous (Refs & Annos)

U.C.A. 1953 § 78B-5-826

Formerly cited as UT ST § 78-27-56.5

**§ 78B-5-826. Attorney fees--Reciprocal rights to recover attorney fees**

**Currentness**

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

**Credits**

Laws 2008, c. 3, § 858, eff. Feb. 7, 2008.

Notes of Decisions (21)

Current through 2011 Second Special Session.

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**ADDENDUM “D”**  
**(Final Judgment and Order)**

171

2010 DEC 17 P 3:49

SECOND DISTRICT COURT

Ronald G. Russell (4134)  
Rodger M. Burge (8582)  
PARR BROWN GEE & LOVELESS, P.C.  
185 South State Street, Suite 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Fax: (801) 532-7750

12/17/10

Attorneys for Defendant and Couterclaimant

---

**IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH**

---

INSIGHT ASSETS, INC., a Utah Corporation,  
  
Plaintiff,

vs.

HOMERO FARIAS, an individual,  
  
Defendant.

---

HOMERO FARIAS,

Counterclaimant,

vs.

INSIGHT ASSETS, INC.; and W. ANDREW  
MCCULLOUGH,  
  
Counterclaim-Defendants.

**FINAL JUDGMENT AND ORDER**

Civil No. 090908263

Judge W. Brent West

---

WHEREAS, by the Ruling of the Court dated November 3, 2010, attached as Exhibit

“A,” the Court granted counterclaimant Homero Farias’ Motion for Partial Summary Judgment on Count I of his Counterclaim, and denied Plaintiff’s Motion for Summary Judgment (the “Summary Judgment Ruling”); and

WHEREAS, the parties have filed a Stipulated Motion for Order of Dismissal With Prejudice of Counts II and III of Farias’ Counterclaim (the “Motion to Dismiss”), which claims constitute the remaining claims of the parties in this matter;

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. For reasons set forth in the Summary Judgment Ruling, JUDGMENT is entered in favor of Homero Farias on Count of his Counterclaim. Accordingly, the Court finds and declares that defendants have no interest in or to the following real property located in Weber County, Utah (the “Property”), under that certain Trust Deed, executed by William and Roberta Boeck, recorded on April 22, 2004 as Entry No. 2026214, or otherwise, and thus title to the Property is hereby quieted in favor of Homero Farias:

PART OF LOT 3, BLOCK 4, SOUTH OGDEN SURVEY, WEBER COUNT, UTAH, AND PART OF VACATED PORTION OF MADISON AVENUE DESCRIBED AS FOLLOWS: BEGINNING AT A POINT 400 FEET NORTH OF THE SOUTHEAST CORNER OF LOT 2, BLOCK 4, AND RUNNING THENCE WEST 75 FEET, THENCE NORTH 50 FEET, THENCE EAST 94.5 FEET, THENCE SOUTH 50 FEET, THENCE WEST 19.5 FEET TO THE PLACE OF BEGINNING


Situated in WEBER County  
Parcel Identification Number: 04-032-0022

2. Based upon the Motion to Dismiss, Counts II and III of the Counterclaim are hereby dismissed with prejudice.

3. By this Final Judgment and Order, all claims of the parties are hereby adjudicated, and this Final Judgment and Order thus constitutes the final judgment of the Court for purposes of Rule 54 of the Utah Rules of Civil Procedure.

ENTERED this 14<sup>th</sup> day of December 2010.

BY THE COURT:

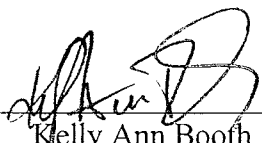
A handwritten signature in black ink, appearing to read 'W. Brent West', written over a horizontal line.

Judge W. Brent West  
Second Judicial District Court

APPROVED AS TO FORM:

THE LAW OFFICES OF KELLY ANN BOOTH

By: \_\_\_\_\_

A handwritten signature in black ink, appearing to read 'Kelly Ann Booth', is written over a horizontal line.

Kelly Ann Booth  
Attorneys for Plaintiff

## **ADDENDUM “E”**

### **(Warranty Deed)**



"W2026212"

U.S. Title File #VB7475RU

WHEN RECORDED MAIL TO:  
**WILLIAM J. BOECK**  
 2915 Madison Avenue  
 Ogden, UT. 84403

E# 2026212 PG 1 OF 1  
 DOUG CROFTS, WEBER COUNTY RECORDER  
 22-APR-04 852 AM FEE \$10.00 DEP CC  
 REC FOR: U S TITLE OF UTAH-OGDEN  
 ELECTRONICALLY RECORDED

## WARRANTY DEED

**JOSEPH A. PHALEN AND DENISE R. PHALEN**

Grantor,

of OGDEN, County of WEBER, State of UT  
 hereby CONVEYS and WARRANTS to

**WILLIAM J. BOECK and ROBERTA BOECK, HUSBAND AND WIFE**

Grantee,

of OGDEN, County of WEBER, State of UT for the sum of TEN DOLLARS and other good and valuable consideration, the following tract of land WEBER, State of UT, to-wit

**PART OF LOT 3, BLOCK 4, SOUTH OGDEN SURVEY, WEBER COUNTY, UTAH, AND PART OF VACATED PORTION OF MADISON AVENUE DESCRIBED AS FOLLOWS: BEGINNING AT A POINT 400 FEET NORTH OF THE SOUTHEAST CORNER OF LOT 2, BLOCK 4, AND RUNNING THENCE WEST 75 FEET, THENCE NORTH 50 FEET, THENCE EAST 94.5 FEET, THENCE SOUTH 50 FEET, THENCE WEST 19.5 FEET TO THE PLACE OF BEGINNING**

04-032-0022 \*

Subject to easements, restrictions and rights of way appearing of record and enforceable in law and subject to 2004 taxes and thereafter.

WITNESS the hand of said grantor, this 19th day of April, 2004

JOSEPH A. PHALEN

DENISE R. PHALEN

STATE OF UTAH )

) ss

COUNTY OF WEBER )

On the 19th day of April, 2004 personally appeared before me **JOSEPH A. PHALEN and DENISE R. PHALEN** signer(s) of the within instrument, who duly acknowledged to me that they executed the same.

Notary Public

My Commission Expires: 11-10-07  
 Residing at: Ogden, UT



**ADDENDUM “F”**  
**(FFFC Trust Deed)**





"W2026213"

Return To:

FIRST FRANKLIN FINANCIAL CORPORATION  
2150 North First St.  
San Jose, CA 95131  
Loan number: 0033844747/5,517

Prepared By: MICHELLE TAYLOR

E# 2026213 PG 1 OF 17  
DOUG CROFTS, WEBER COUNTY RECORDER  
22-APR-04 852 AM FEE \$42.00 DEP CC  
REC FOR: U S TITLE OF UTAH-OGDEN  
ELECTRONICALLY RECORDED

WB7475RU

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## DEED OF TRUST

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated April 19, 2004, together with all Riders to this document.  
(B) "Borrower" is

ROBERTA BOECK  
, and WILLIAM J. BOECK, wife and husband

Borrower is the trustor under this Security Instrument.

- (C) "Lender" is  
First Franklin Financial Corp., subsidiary of National City Bank of Indiana  
Lender is a Corporation  
organized and existing under the laws of Delaware

UTAH-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3045 1/01

UTAH-8(UT) (0005)

Page 1 of 15

Initials

RB WB

VMP MORTGAGE FORMS - (800)521-7291



Document # L074UT

Lender's address is 2150 North First St.,  
San Jose, CA 95131

Lender is the beneficiary under this Security Instrument.

(D) "Trustee" is US TITLE

(E) "Note" means the promissory note signed by Borrower and dated April 19, 2004

The Note states that Borrower owes Lender  
SEVENTY TWO THOUSAND & 00/100

Dollars

(U.S. \$ 72,000.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than May First, 2034

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- |  |   |  |
|--|---|--|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider                                 |
| <input type="checkbox"/> Balloon Rider         | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider                                  |
| <input type="checkbox"/> VA Rider              | <input type="checkbox"/> Biweekly Payment Rider         | <input checked="" type="checkbox"/> Other(s) [specify]<br>Prepayment Rider |

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard

to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

#### TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants, conveys and warrants to Trustee, in trust, with power of sale, the following described property located in the county of Weber :

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

Legal Description attached hereto and made a part hereof

Prepayment Rider attached hereto and made a part hereof

Tax Serial Number: 04-032-0022

2915 MADISON AVENUE

OGDEN

("Property Address"):

which currently has the address of

[Street]

[City], Utah

84403

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant, convey and warrant the Property and that the Property is unencumbered, except for encumbrances of record. Borrower further warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S.

1000-8(UT) (0000)

Page 3 of 16

Initials: *JS MB*

Form 3045 1/01

Document # L076UT

currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

**2. Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

**3. Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be

in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

**4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

**5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with



the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

**6. Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

**7. Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

**8. Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.



(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

**16. Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

**17. Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

**18. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

**20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline; kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If the power of sale is invoked, Trustee shall execute a written notice of the occurrence of an event of default and of the election to cause the Property to be sold and shall record such notice in each county in which any part of the Property is located. Lender or Trustee shall mail copies of such notice in the manner prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. In the event Borrower does not cure the default within the period then prescribed by Applicable Law, Trustee shall give public notice of the sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines (but subject to any statutory right of Borrower to direct the order in which the Property, if consisting of several known lots or parcels, shall be sold). Trustee may in accordance with Applicable Law, postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the county clerk of the county in which the sale took place.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Request for Notices. Borrower requests that copies of the notices of default and sale be sent to Borrower's address which is the Property Address.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

\_\_\_\_\_  
N/A

Roberta Boeck (Seal)  
ROBERTA BOECK -Borrower

\_\_\_\_\_  
N/A

William J. Boeck (Seal)  
WILLIAM J. BOECK -Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
Non -Borrower

\_\_\_\_\_  
(Seal)  
Non -Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower



STATE OF UTAH,

*Weber*

County ss:

The foregoing instrument was subscribed and sworn to and acknowledged before me this  
*April 19, 2004* by

ROBERTA BOECK, WILLIAM J. BOECK

My Commission Expires:

*11-10-07*



*[Signature]*  
Notary Public  
Residing at: *ogden, ut.*

Order Number: WB7475RU

**EXHIBIT "A"**

E# 2026213 PG 16 OF 17

PART OF LOT 3, BLOCK 4, SOUTH OGDEN SURVEY, WEBER COUNTY, UTAH, AND  
PART OF VACATED PORTION OF MADISON AVENUE DESCRIBED AS FOLLOWS:  
BEGINNING AT A POINT 400 FEET NORTH OF THE SOUTHEAST CORNER OF LOT 2,  
BLOCK 4, AND RUNNING THENCE WEST 75 FEET, THENCE NORTH 50 FEET,  
THENCE EAST 94.5 FEET, THENCE SOUTH 50 FEET, THENCE WEST 19.5 FEET TO  
THE PLACE OF BEGINNING

Situated in WEBER County

Parcel Identification Number: 04-032-0022 *X*



### PREPAYMENT RIDER

This Prepayment Rider is made this 19th day of April, 2004, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or the Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note (the "Note") to  
First Franklin Financial Corp., subsidiary of National City Bank of Indiana

("the Lender") of the same date and covering the property described in the Security Instrument and located at:  
2915 MADISON AVENUE, OGDEN, Utah 84403

**ADDITIONAL COVENANTS.** In addition to the covenants and agreements made in the Security instrument, Borrower and Lender further covenant and agree as follows:

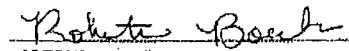
Borrower can make a partial prepayment at anytime without paying any charge. Borrower may make a full prepayment at any time subject to a prepayment charge as follows:

If within the first 3 year(s) after the date Borrower executes the Note, Borrower makes a full prepayment (including prepayments occurring as a result of the acceleration of the maturity of the Note), Borrower must, as a condition precedent to a full prepayment, pay a prepayment charge on any amount prepaid in any 12 month period in excess of 20% of the unpaid balance. The prepayment charge will equal the interest that would accrue during a six-month period on the Excess Principal calculated at the rate of interest in effect under the terms of the Note at the time of the full prepayment.

### NOTICE TO BORROWER

Do not sign this loan agreement before you read it. This loan agreement provides for the payment of a penalty if you wish to repay the loan prior to the date provided for repayment in the loan agreement.

By signing below, Borrower accepts and agrees to the terms and covenants contained in this Prepayment Rider.

 (Seal)  
ROBERTA BOECK

 (Seal)  
WILLIAM J. BOECK

(Seal)

(Seal)

(Seal)

(Seal)

Fixed Rate and Balloon Prepayment Rider - First Lien- AZ, CA, CO, CT, DE, FL, HI, ID, IA, LA, MT, NE, NV, NH, NY, ND, OK, OR, PA, SC, SD, TN, TX, UT, WA, WY

Document # L0029

**ADDENDUM “G”  
(Phalen Trust Deed)**

FILED RECORDED, MAIL TO:  
WILLIAM J. BOECK  
5 Madison Avenue  
Ogden, UT 84403  
State of Utah

WB 7475RU



\*W2028214\*

TRUST DEED  
With Assignment of Rents

E# 2026214 PG 1 OF 4  
DOUG CROFTS, WEBER COUNTY RECORDER  
22-APR-04 8:52 AM FEE \$16.00 DEP CC  
REC FOR: U S TITLE OF UTAH-OGDEN  
ELECTRONICALLY RECORDED

THIS TRUST DEED, made this 19th day of April, 2004, between  
WILLIAM J. BOECK and ROBERTA BOECK, as TRUSTOR, whose address is 2915 Madison Avenue, and U.S. TITLE OF  
'AH, INC. as TRUSTEE, and  
STEPH A. PHALEN and DENISE R. PHALEN, as BENEFICIARY,  
WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the  
following described property, situated in WEBER County, State of Utah:

3 Attached Exhibit "A"

TOGETHER with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements,  
rights, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or  
hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and  
authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date  
herewith, in the principal sum of \$ 17,600.00, made by Trustor, payable to the order of Beneficiary at the times, in the  
manner and with interest as therein set forth, and with final payment due MAY 1, 2009 and any extensions and/or  
renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment  
of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by  
promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended  
or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.  
PROVIDED, HOWEVER, that the making of such further loans, advances or expenditures shall be optional with the  
Beneficiary and PROVIDED FURTHER that it is the express intention of the parties to this Trust Deed that it shall stand as  
continuing security until all such further loans, advances and expenditures together with interest thereon, have been paid  
in full.

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

1. To keep said property continuously occupied and used, and not permit the same to become vacant, and keep said  
property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly  
and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply  
with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit,  
offer or permit any act upon said property in violation of law. To cultivate, irrigate, fertilize, fumigate, prune, and do all  
other acts which from the character of said property may be reasonably necessary, the specific enumeration's herein not  
excluding the general, and in the event the property is used for agricultural purposes, the Trustor will use all manure  
reduced by stock on said property as fertilizer, keep the premises free from foul and noxious weeds, brush, and other  
undesirable growths, provide for stock selection, seed selection, crop rotation, weed control, fertilizing the soil, drainage,  
prevention of erosion and pasture maintenance in accordance with good husbandry and the most approved methods of  
agricultural development. The Beneficiary may recover as damages for any breach of this covenant the amount it would  
cost to put the property in condition called herein: to do all other acts which from the character or use of said property  
may be reasonably necessary; and, if the loan secured hereby or any part thereof is being obtained for the purpose of  
financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance  
with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor  
under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act  
hereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the  
improvements now existing or hereafter erected or placed on said property. Trustor agrees to pay all premiums thereof.  
Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form  
acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of  
loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to  
Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied  
by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property  
damaged. Such application or release shall not cure or waive any default or notice of default hereunder or any act done  
pursuant to such notice

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such  
evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or  
renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said  
property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or  
defend any such action or proceeding, to pay all costs and expenses, including cost of evidence or title and attorney's fees  
in a reasonable sum incurred by Beneficiary or Trustee, or incurred or advanced by the Beneficiary and /or Trustee in

connection with any such action or proceeding in which the Beneficiary and/or Trustee may be joined as a party defendant or receives notice of such action, proceeding or claim asserted in such action, proceeding or claim asserted in such action or proceeding or proposed action or proceeding. Trustor covenants that the Trustor has a valid and unencumbered title in fee simple to the property as described herein and has the right to convey the same and warrants and will defend said title unto the Trustee and Beneficiary against the claims and demands of all persons whomsoever.

5. To pay when due all taxes assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

8. In addition to the payments due in accordance with the terms of the note secured hereby, the Trustor shall, at the option and demand of the Beneficiary, pay each year to the Beneficiary, in equal monthly installments, the estimated amount of the annual taxes, assessments, insurance premiums, maintenance and other charges upon the property, such sums to be held in trust by the Beneficiary for Trustor's use and benefit for payment by the Beneficiary of any such items when due. The estimate shall be paid by the Beneficiary. If the Beneficiary shall fail to make such an estimate, the amount of the preceding annual taxes, assessments, insurance premiums, maintenance and other charges as the case may be, shall be deemed to be the estimate for that year. If, however, the payments made hereunder shall not be sufficient to pay such charges when the same shall become due, the Trustor shall pay the Beneficiary any amount necessary to make up the deficiency on or before the date when the same shall become due.

#### IT IS MUTUALLY AGREED THAT:

1. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

2. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

3. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

4. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

5. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

6. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

7. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the

ion of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice of record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

8. After the lapse of such time as may then be required by law following the recordation of said notice of default, notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, in any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The proceeds in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's fees and attorney's fees (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

9. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

10. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

11. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and / or neuter, and the singular number includes the plural.

12. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

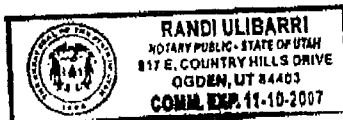
13. This Trust Deed shall be construed according to the laws of the State of Utah.

14. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder is mailed to him at the address herein before set forth.

Signature of Trustor

WILLIAM J. BOECK

ROBERTA BOECK



(If Trustor an Individual)

STATE OF UT, COUNTY OF WEBER): ss

On the 19th DAY OF April, 2004, personally appeared before me WILLIAM J. BOECK and ROBERTA BOECK the signer of the foregoing instrument, who duly acknowledge to me that THEY executed the same.

Notary Public

My residence is Ogden, UT  
Commission expires 11-10-07

Order Number: WB7475RU

**EXHIBIT "A"**

E# 2026214 PG 4 OF 4

PART OF LOT 3, BLOCK 4, SOUTH OGDEN SURVEY, WEBER COUNTY, UTAH, AND  
PART OF VACATED PORTION OF MADISON AVENUE DESCRIBED AS FOLLOWS:  
BEGINNING AT A POINT 400 FEET NORTH OF THE SOUTHEAST CORNER OF LOT 2,  
BLOCK 4, AND RUNNING THENCE WEST 75 FEET, THENCE NORTH 50 FEET,  
THENCE EAST 94.5 FEET, THENCE SOUTH 50 FEET, THENCE WEST 19.5 FEET TO  
THE PLACE OF BEGINNING

Situated in WEBER County

Parcel Identification Number: 04-032-0022 