

2013

**Ruth B. Hardy Revocable Trust, Et Al., Plaintiffs and Appellants, vs.
Mark Lee Rindlesback, Individually and as Trustee of the
Rindlesback Construction, Inc. Profit Sharing Plan, Defendants
and Appellees : Brief of Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RUTH B. HARDY REVOCABLE TRUST,
et al.,

Plaintiffs and Appellants,

vs.

MARK LEE RINDLESBACH,
INDIVIDUALLY AND AS TRUSTEE OF
THE RINDLESBACH CONSTRUCTION,
INC. PROFIT SHARING PLAN,

Defendants and Appellees.

Case No. 20130390 - CA

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court of
Salt Lake County

The Honorable Deno Himonas

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Stacy J. McNeill (9516)
James Dunkelberger (13690)
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LIST OF PARTIES TO PROCEEDING BELOW

| | |
|---------------------------------|--|
| <i>Appellants/Plaintiffs</i> | The Ruth B. Hardy Revocable Trust Delcon Corporation Profit Sharing Plan fbo A. Wesley Hardy Finesse, P.S.P. MJS Real Properties, LLC Uintah Investments, LLC David D. Smith David L. Johnson Steven Condie Berrett PSP VW Professional Homes PSP Ty Thomas D.R.P. Management PSP |
| <i>Appellee/Defendant</i> | Mark L. Rindlesbach, Trustee of the Rindlesbach Construction Inc. Profit Sharing Plan |
| <i>Dismissed Defendants</i> | Robert A. Jones Steve Jones Barley Curtis Kevin Shamey Royal Richards Mark L. Rindlesbach (individually) |

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78A-4-103(2)(j).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Does Rindlesbach have standing to challenge the Trustee's and the Hardy Party's motion to reverse and remand the trial court's entry of summary judgment in Rindlesbach's favor?
2. Is this appeal moot where the Plaintiffs/Appellants (the "**Lenders**") seek reversal of the trial court's dismissal of their claims against Mark L. Rindlesbach ("**Rindlesbach**") individually and where the Lenders have already received a judgment against the Rindlesbach Construction, Inc. Profit Sharing Plan (the "**Plan**") for the full relief pleaded by the Lenders?
3. Should this Court reverse the district court based on the stipulation of the Lenders and the Trustee of Rindlesbach's Chapter 7 Bankruptcy Estate (the "**Trustee**")?
4. Under Utah law, is Rindlesbach personally liable for a guaranty signed in his capacity as trustee of the Plan?

The District Court below decided the question of Rindlesbach's personal liability on Rindlesbach's Motion for Summary Judgment. This Court reviews the "trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness." *DePacto, Inc. v. Teton View Golf Estates, LLC*, 2014 UT App 266, ¶ 6, 339 P.3d 126 (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600).

STATEMENT OF THE CASE

Nature, Course, and Disposition of Proceedings

The Plan, along with others, guaranteed a \$3,300,000 loan (the “*Guaranty*”) made by the Lenders to a third party borrower. The borrower failed to pay back the loan and the lenders brought suit on the Guaranty. The Lenders initially pleaded breach of the Guaranty against the Plan not Rindlesbach individually. The Lenders subsequently amended their complaint and, in a single, footnote reference to Rindlesbach individually, stated that if the Plan proved to not be liable on the Guaranty, Rindlesbach should be individually liable.

All the guarantors except the Plan and Rindlesbach filed bankruptcy and received a discharge before trial. Also prior to trial, Rindlesbach successfully moved for summary judgment on the alternative claim against him, leaving the Plan the only defendant at the time of trial. A jury trial was held from August 6, 2012 to August 11, 2102, and a jury verdict was entered in favor of the Lenders.¹ Judgment was entered against the Plan on December 3, 2012.² The Lenders now seek reversal of the trial court’s summary judgment ruling dismissing Rindlesbach individually.

Statement of Facts

1. In May 2007, the Lenders, a group of twelve hard money lenders, made a \$3,300,000 loan to a borrower, Eagle Mountain Lots, LLC, to facilitate the purchase of

¹ R. 7275 (Special Verdict).

² R. 8106-8109.

160 acres of land in Eagle Mountain, Utah.³

2. The Plan, along with eight other guarantors, guaranteed the \$3,300,000 loan made by the Lenders to Eagle Mountain Lots, LLC.⁴

3. The Guaranty does not name Rindlesbach individually as a guarantor, and Rindlesbach did not sign the Guaranty in his individual capacity.⁵

4. The Guaranty's signature block listed "Mark Rindlesbach" as a signatory, however, Rindlesbach manually crossed out his name and wrote "Rindlesbach Construction, Inc. Profit Sharing Plan by Mark L. Rindlesbach Trustee."⁶

~~MARK RINDLESBACH~~
Rindlesbach const Inc
PROFIT SHARING PLAN
by Mark L. Rindlesbach
TRUSTEE

(R. 203).

5. The borrower, Eagle Mountain Lots, LLC, failed to pay back the loan and the Lenders brought this action against all the guarantors seeking to recover on the Guaranty.

6. The Lenders' initial complaint did not name Rindlesbach individually as a defendant.⁷

³ R. 1058–1065 (Second Amended Complaint at ¶¶ 1, 4, 8, 16).

⁴ See, e.g. R. 1058–1065 (Second Amended Complaint) (listing guarantors).

⁵ R. 1093–1096 (Guaranty).

⁶ R. 1096 (Guaranty).

⁷ R. 1–3 (Complaint).

7. However, the Lenders named Rindlesbach as a defendant in their Second Amended Complaint, which was the operative complaint at the time of trial.⁸

8. The Second Amended Complaint refers to Rindlesbach in a single footnote, which reads:

With respect to the [Plan], Plaintiffs seek judgment against [Rindlesbach] in his capacity as Trustee of such Plan. In the event that the Court should determine that his execution of the Guaranty is not binding on the Plan for any reason, Plaintiffs seek judgment against [Rindlesbach] personally.⁹

9. Rindlesbach moved for summary judgment (the “*Rindlesbach MSJ*”) and argued that he could not be liable under the Guaranty because he did not sign the Guaranty in his individual capacity.¹⁰

10. The Lenders opposed the Rindlesbach MSJ and argued, *inter alia*, that (1) either the Plan or Rindlesbach must be liable on the Guaranty; (2) and if the Plan proved to not be liable, Rindlesbach individually was liable.¹¹ The Lenders relied specifically on the Utah Uniform Trust Code (the “*Utah Trust Code*”), Utah Code Ann. Section 75-7-1010(1) to support their argument.¹²

11. Thereafter, with the trial court’s leave, the parties filed supplemental briefs, specifically addressing whether the Utah Trust Code applies in this case.

⁸ R. 1058, 1063 (Second Amended Complaint, Caption & n.1).

⁹ R. 1063 (Second Amended Complaint n.1).

¹⁰ R. 1955–1964 (Motion for Summary Judgment and supporting memorandum).

¹¹ R. 2333–2341 (Memorandum in Opposition to Mark L. Rindlesbach’s Motion for Summary Judgment).

¹² R. 2338–2340 (Memorandum in Opposition to Mark L. Rindlesbach’s Motion for Summary Judgment at 6–8).

12. Rindlesbach took the position that the Plan did not meet the definition of “Trust” under the Utah Trust Code, which specifically excludes trusts “for the primary purpose of paying . . . salaries, wages, profits, pensions, or employee benefits of any kind.”¹³

13. Rindlesbach also argued that ERISA and federal case law, not Utah law, governed Rindlesbach’s individual liability (or lack thereof) for contracts signed in his capacity as a Plan trustee.¹⁴

14. The Lenders’ initial supplemental brief argued that the Utah Trust Code applies.¹⁵ However, the Lenders’ apparently backed off of this view in response to Rindlesbach’s ERISA argument.¹⁶ ERISA case law showed that similar statutes had been preempted by federal ERISA law.¹⁷

¹³ R. 3579 (Supplemental Reply Memorandum in Support of Defendant Mark L. Rindlesbach’s Motion for Summary Judgment); R. 3911–3221 (Memorandum in Opposition to Plaintiffs’ Motion to Strike Federal Pre-emption Argument and Alternative Motion for Leave to Submit Memorandum in Response to Pre-emption Argument)

¹⁴ R. 3580) (Supplemental Reply Memorandum in Support of Defendant Mark L. Rindlesbach’s Motion for Summary Judgment).

¹⁵ R. 3691–3697 (Plaintiff’s Supplemental Memorandum in Opposition to Mark L. Rindlesbach’s Motion for Summary Judgment); R. 3712–3719 (Motion to Strike Federal Pre-emption Argument and Alternative Motion for Leave to Submit Memorandum in Response to Pre-emption Argument and supporting memorandum)

¹⁶ R. 3718 (Memorandum in Support of Motion to Strike Federal Pre-emption Argument and Alternative Motion for Leave to Submit Memorandum in Response to Pre-emption Argument at 4 n.1).

¹⁷ R. 4113 (Reply Memorandum in Support of Defendant Mark L. Rindlesbach’s Motion for Leave to Amend Answer).

15. The Lenders strenuously opposed Rindlesbach's ERISA pre-emption argument.¹⁸

16. The trial court did not resolve the ERISA pre-emption issue in its memorandum decision on the Rindlesbach MSJ (the "*Memorandum Decision*").¹⁹ The Memorandum Decision is attached to the Addendum as Exhibit 1 (R. 4269-4276).

17. The trial court concluded that Rindlesbach could not be individually liable because he signed the Guaranty in his capacity as Plan trustee.²⁰

18. All the guarantor defendants except Rindlesbach and the Plan filed bankruptcy, their liability was discharged, and they were dismissed from the case prior to trial.²¹

19. Summary judgment in Rindlesbach's favor meant that the Plan was the sole remaining defendant at the time of trial.²²

20. A jury trial was held on August 6, 2012 – August 11, 2012 against the sole remaining defendant—the Profit Sharing Plan.²³

¹⁸ R. 3946–3953 (Reply Memorandum in Support of Motion to Strike Federal Pre-emption Argument and Alternative Motion for Leave to Submit Memorandum in Response to Pre-emption Argument)

¹⁹ R. 4270 (Memorandum Decision at 2 n.5).

²⁰ R. 4272 (Memorandum Decision at 4).

²¹ R. 7098 (Preliminary Instruction No. 13) (instructing the jury that all of the other defendants had filed bankruptcy and received a discharge).

²² R. 7098 (Preliminary Instruction No. 13).

²³ R. 7090-7091, 7101-7106, 7167-7168 (Jury Trial Minutes).

21. On August 11, 2012, the jury entered a special verdict against the Profit Sharing Plan, finding that the Plan owed the Hardy Lenders \$5,317,800, plus reasonable attorney fees, under the guarantee.²⁴

22. On December 3, 2012, the Court entered judgment (the “*Judgment*”) in favor of the Hardy Lenders against the Profit Sharing Plan in the amount of \$6,367,203.64.²⁵

23. The trial court entered its Order of Dismissal as to Mark Lee Rindlesbach Individually on December 4, 2014.²⁶

24. The Lenders took action immediately to discover and collect on the assets of the Plan through:

a. Supplemental proceedings, depositions, and other discovery aimed at Rindlesbach as Plan trustee;²⁷

b. Subpoenas and depositions requesting documents and information from third-parties (including Rindlesbach individually and Rindlesbach’s wife, Brenda Rindlesbach) concerning the Plan;²⁸

²⁴ R. 7275 (Special Verdict).

²⁵ R. 8106-8109.

²⁶ R. 8115–8117.

²⁷ R. 8150–51 (Notice of Supplemental Hearing, dated December 12, 2012); R. 8484–85 (Notice of Deposition of Mark Lee Rindlesbach, Trustee of the Rindlesbach Construction Inc. Profit Sharing Plan, dated January 22, 2013); R. 8488–89 (Notice of Supplemental Hearing, dated January 22, 2013); R. 8608–32 (Amended and Supplemental Responses to Interrogatories to Judgment Debtor).

²⁸ R. 8158–61 (Subpoena Duces Tecum to Central Bank, dated December 7, 2012); R. 8167–70 (Subpoena Duces Tecum to Guardian Title Company of Utah, dated December 7, 2012); R. 8249–50 (Notice of Deposition and Notice of Subpoenas Duces Tecum to

c. Garnishment of the Plan's assets held by banks and other third parties (including Rindlesbach individually);²⁹ and a

d. Writ of Execution issued on July 16, 2013.³⁰

25. The Lenders also pursued fraudulent transfer actions to collect from third parties money or assets the Lenders alleged the third parties received from the Plan.³¹

26. The Lenders filed the instant appeal on April 26, 2013. The Lenders sought, among other things, reversal of certain conclusions of law relevant to its claims against the Plan and reversal of the trial court's summary judgment ruling and subsequent dismissal of Rindlesbach individually.³²

27. On September 13, 2013, Rindlesbach filed for personal bankruptcy under Chapter 11 of the Bankruptcy Code, which caused an automatic stay to go into effect on all collections efforts (including against Mr. Rindlesbach as trustee of the Profit Sharing Plan).³³

Tim Krueger, dated December 7, 2012); R. 8329–33 (Subpoena Duces Tecum to Mark Lee Rindlesbach, dated December 21, 2012); R. 8546–50 (Subpoena Duces Tecum to Brenda N. Rindlesbach, dated December 21, 2012).

²⁹ R. 8353–56 (Application for Writ of Garnishment, dated December 21, 2012); R. 9170–73 (Application for Writ of Garnishment, dated February 15, 2013 (seeking garnishment of funds held by Rindlesbach individually)).

³⁰ R. 9697–9698.

³¹ R. 8733 (Memorandum in Opposition to Motion for Mandatory Injunction and in Support of Expedited Motion to Dissolve Temporary Restraining Order (describing fraudulent transfer actions commenced)); R. 8745–8752 (Complaint).

³² R. 9537–39 (Notice of Appeal).

³³ R. 9734–9738.

28. On November 27, 2013, the Hardy Lenders obtained relief from the automatic stay to continue to pursue plan assets.³⁴

29. On December 11, 2013, the Lenders filed a Second Application for Writ of Execution to execute on all of the Plan's property in satisfaction of the Judgment. The Court issued the requested Writ the same day.³⁵

30. Rindlesbach's bankruptcy was converted to a Chapter 7 case on January 13, 2014, and Philip G. Jones became the Chapter 7 trustee (the "*Trustee*").

31. As the Lenders' efforts to collect against the Plan continued, the Trustee reached a settlement with Rindlesbach's primary creditors, including the Lenders (the "*Settlement*").

32. The Settlement contained the following terms, among others:

a. Notwithstanding the trial court's summary judgment and subsequent dismissal in Rindlesbach's favor, the Lenders would receive a claim against the bankruptcy estate;

b. The Trustee stipulated that this Court would reverse the trial court's summary judgment in favor of Rindlesbach and remand the case to the district court for entry of a post-discharge judgment in the amount of \$4 million against Rindlesbach individually.

See Settlement Agreement, attached as Exhibit 2 to Addendum.

³⁴ R. 9854–9857 (Order Modifying Automatic Stay).

³⁵ R. 9861–67.

33. The Bankruptcy Court approved the Settlement but expressed misgivings about claims asserted against Rindlesbach after his anticipated discharge in bankruptcy. The Trustee reassured the Bankruptcy Court that no claims would be brought against Rindlesbach in violation of his discharge. The following exchange between the Bankruptcy Court and the Trustee took place at the hearing to approve the Settlement in July 2014:

Court: [s]o, Mr. Toscano [Rindlesbach's bankruptcy counsel], I'm speaking for your benefit. I know some of the concerns you have are about what's going on here is, "[H]ow is this going to impact my client after this?

As I view it, the Hardy parties have no – assuming Mr. Rindlesbach gets a discharge – the trustee doesn't file a 727 or the Trustee does and doesn't prevail – the Hardy parties have no claim against [Rindlesbach], and –

Counsel for Trustee: Have a claim, it would be discharged.

Court: Correct.
Counsel for Trustee: The settlement's approved.

I agree with that. If the settlement's approved, then he gets a general discharge, the Hardy Parties cannot for example, file a 523 action at this point. They are – that claim is barred. So I want to make sure you understand that's what I believe has happened in this case thus far, and that might address some of your concerns about what the heck is going on here and what's going to happen if this settlement is approved.

See Hearing Transcript before the Honorable Judge Joel T. Marker, United States Bankruptcy Court, July 2, 2014, p. 8:8-25—9:5 (“*July 2 Hearing Trans.*”), attached to Addendum as Exhibit 3.³⁶ The Trustee also stated what it intended with the discharge to be entered after the Settlement:

Counsel for
Trustee:

So the trustee’s belief is that – assume that – for a moment the trustee does not file a 727 cause of against [Rindlesbach] which is entirely possible. If that’s the case [Rindlesbach] would receive a general discharge. If the Court approves the settlement in that fact scenario, [Rindlesbach] would have the obligation that the Trustee had agreed to, but that obligation would be discharged, and so action could not be taken, *obviously*, in violation of the discharge injunction.

July 2 Hearing Trans., p. 10:12-22, attached to Addendum as Exhibit 3.

34. The Bankruptcy Court also made clear that, even though it approved the settlement stipulating to this Court’s reversal of the trial court’s summary judgment ruling, it was not requiring this Court to take action one way or the other.

35. The Lenders informed this Court of the Settlement in a “Status Report” filed on June 3, 2014.

36. On July 28, 2014, the Court dismissed this action (the “*2014 Dismissal*”) on the assumption that the Settlement had been approved.

³⁶ In accordance with this Court’s Order dated March 23, 2015, this Court may take judicial notice of the Transcript from the Bankruptcy Court.

37. On August 1, 2014, the Bankruptcy Court granted Rindlesbach a discharge under Section 272 of Title 11, United States Code. A copy of the Notice of Discharge is attached to the Addendum as Exhibit 4.

38. Pursuant to 11 U.S.C. § 524, the discharge operates as an injunction against the commencement or continuation of an action against Rindlesbach to collect or recover any debt as a personal liability of Rindlesbach.

39. Nevertheless, the Lenders sought to reinstate this Appeal in the wake of the 2014 Dismissal.

40. On August 21, 2014, the Court reinstated the Lenders' appeal with respect to the Hardy Lenders' claims against the Plan. However, with respect to Rindlesbach individually, the Court held: "[B]ased on Mark L. Rindlesbach's Notice of Bankruptcy Discharge, no claims may be hereafter pursued in this appeal against Mark Lee Rindlesbach, in his individual capacity." See Order, dated August 21, 2014 (on file with the Court) (the "*August 21, 2014 Order*").

41. The Court reaffirmed this view in an order dated September 29, 2014 (on file with the Court) (the "*September 29, 2014 Order*").

42. The September 29, 2014 Order also granted the Trustee's motion to substitute for Rindlesbach as a party to this appeal. However, the Court noted that "[t]he Bankruptcy Court's order expressly indicates that it is not ordering any State Court to take any specific action."

43. On September 30, 2014, the Lenders moved this Court for summary reversal of the trial court's summary judgment ruling in Rindlesbach's favor.

44. The Court denied the motion on November 6, 2014, favoring a plenary review of this appeal.

SUMMARY OF ARGUMENTS

This appeal is moot. The Lenders have already received a judgment against the Plan for the full amount pleaded. There is no basis in Utah law for a judgment against *both* the Plan and Rindlesbach for a contract that Rindlesbach did not sign in his individual capacity. Such a judgment exceeds even the relief sought by the Lenders where the Lenders clearly pleaded their claims against Rindlesbach in the alternative. Even if the Court reverses the trial court's summary judgment ruling and dismissal of Rindlesbach individually, the trial court on remand could not properly enter judgment against Rindlesbach. Entry of judgment against Rindlesbach individually would result in a duplicate judgment and windfall for the Lenders. It would also violate Rindlesbach's bankruptcy discharge.

Further, the Settlement does not provide a basis for reversal. The Bankruptcy Court made clear that it could not and would not bind this Court to reverse the summary judgment in favor of Rindlesbach. Further, the Trustee cannot waive Rindlesbach's defenses to individual liability. As such, the Settlement is irrelevant.

Finally, the trial court properly held that a trustee signing in his or her representative capacity is not individually liable for a contract between the trust and a third party. The Lenders' argument is based on an ancient common law rule that no longer reflects the law's view on trustee and entity liability. Rather, it is a throw-back to a time when a trustee could not bind a trust to contacts with third parties. Obviously,

even if this rule was good law (which it is not), it does not apply here where the Lenders have already taken a judgment against the trust and have been collecting directly against trust assets for more than two years.

ARGUMENT

A. Mark L. Rindlesbach Has Standing to Object to the Entering of Any Order Against Him as the Trustee Cannot Unilaterally Waive His Meritorious Defenses.

The Lenders advance the Settlement as the basis for their requested duplicate judgment. While it is true that, in general, a bankruptcy trustee has authority to settle lawsuits implicating estate assets, that general rule does not apply in this case. Nor does the Trustee's power have any bearing on whether this Court should reverse and remand based on the Settlement. Here, Rindlesbach does not contest the Trustee's power to settle claims with the Lenders. Rindlesbach contests the Trustee's power to unilaterally waive Rindlesbach's defenses in a case from which he was dismissed before filing for bankruptcy.

The Hardy Lenders argue that the dismissal is appropriate simply because the Trustee has stipulated to it. A bankruptcy trustee may not waive a debtor's defenses in an action, and the debtor may assert them concurrently with the trustee. *See In re Larkin*, 468 B.R. 431, 436 (Bankr. S.D. Fla. 2012); *see also In re Maier*, 2012 Bankr. LEXIS 6222, 2012 WL 9187579 (Bankr. M.D. Fla. Dec. 14, 2012); *In re Nasr*, 120 B.R. 855, 858 (Bankr. S.D. Tex. 1990); 5 Collier on Bankruptcy ¶ 558.01. "[W]hile § 541(a)(1) effectively transfers a debtor's causes of action into the bankruptcy estate, the debtor still has access to, and may assert, personal defenses." *In re Beach*, 447 B.R. 313, 323

(Bankr. D. Idaho 2011) (citing 5 Collier on Bankruptcy, ¶ 558.01(1)(a) (Alan N. Resnick & Henry J. Sommer, 16th ed.).

Other parties have argued, as the Hardy Lenders and the Trustee do now, that it is the bankruptcy estate that holds the debtor's defenses. Such an argument, however, has been expressly rejected by the bankruptcy courts. For example, in *Larkin*, a bankruptcy trustee sought approval from the bankruptcy court to settle a state court action with a debtor's creditor. *See* 468 B.R. at 433. By the terms of the stipulation and settlement, the creditor would pay the bankruptcy estate \$10,000 in exchange for the complete waiver of debtor's defenses and counterclaim in the state court action. *See id.* at 433–34. The bankruptcy court declined to approve the stipulation, concluding that the waiver of the debtor's defenses was “beyond the Trustee's power.” *Id.* at 437. The bankruptcy court held that, while the Bankruptcy Code allows a trustee to assert a defense concurrently with the debtor, “[a] trustee's waiver of the right to assert a defense of the debtor does not preclude the debtor from independently raising the same defense.” *Id.* at 436. The bankruptcy court further concluded that “the Trustee may waive the Debtor's Defenses on behalf of the estate, but may not waive the Defenses in any manner that purports to limit the Debtor's right to use such Defenses.” *Id.*

The court of *In re Maier*, similarly rejected any settlement by a trustee that purported to take the defenses of a debtor. 2012 Bankr. LEXIS 6222 at *6-8. The court of *In re Nasr* also rejected a trustee's arguments that the debtor could not raise defenses owned by the bankruptcy estate, holding defenses “are not exclusive to the trustee and may be asserted by the debtor.” 120 B.R. 855 at 858. Notably, neither the Trustee, nor

the Hardy Lenders, have put forth any cases contradicting *Larkin*, *Maier*, *Nasr*, and *Beach*.

Just like the parties in *Larkin*, *Maier*, and *Nasr*, the Hardy Lenders argue that Mark L. Rindlesbach lacks standing to challenge the reversal of the Summary Judgment because any defenses he raises are owned by the Trustee – who is stipulating to the Motion. The Trustee attempts to stipulate around Rindlesbach's defense to individually liability in the proceedings below. In fact, the Trustee attempt to take his powers one step further than the trustee in *Larkin*. The Trustee seeks not only waiver of Rindlesbach's unadjudicated defenses. The Trustee seeks to reinstate Rindlesbach as a defendant and allow judgment to be entered against him, even though he was dismissed more than two years ago. This result appears an even greater abuse of the Trustee's proper role given that the Lenders have spent the last two years collecting against their judgment against the Plan—the very judgment they now seek against Rindlesbach.

The *only* way that the Hardy Lenders can prevail in reversing the trial court, however, is if this Court rules that Mark L. Rindlesbach's defenses were waived by the Trustee, which, as demonstrated above, exceeds the lawful powers of a Chapter 7 trustee. Moreover, as discussed in greater detail below, this court would also violate the injunction imposed upon Mark L. Rindlesbach's discharge. Mark L. Rindlesbach is entitled to defend himself in an appeal attacking a judgment dismissing him from the case. In light of the case law, and with no case law supporting the Hardy Lenders

position, Mark L. Rindlesbach must be permitted to maintain his defenses and has standing to object to the entrance of any order reversing the Summary Judgment Ruling.³⁷

B. The Appeal Is Moot Because Reversal and Remand Would Lead to Entry of Judgment Against Rindlesbach Individually, Which Violates the Bankruptcy Injunction and Exceeds the Relief the Lenders Sought in the Proceeding Below.

The Appellants' Brief completely overlooks the elephant in the room. The Court cannot reverse and remand for entry of judgment against Rindlesbach individually because it would exceed the scope of relief the Lenders pleaded in their Second Amended Complaint. It would also violate Rindlesbach's bankruptcy discharge.

1. Judgment Against Rindlesbach Individually Exceeds the Relief the Lenders Sought in their Pleadings.

"Under Utah law, '[i]f the requested judicial relief cannot affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits.'" *Murray City v. Maese*, 2011 UT App 73, ¶ 2, 251 P.3d 843 (alteration in original) (quoting *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981)). A party's "requested judicial relief cannot affect the rights of the litigants" where the party appealing has already obtained everything it asked for in the proceeding below. *See id.*

In this case, the Lenders' requested relief (judgment against Rindlesbach) cannot affect the parties' rights because the Lenders have already obtained everything they asked for in the Second Amended Complaint. The Second Amended Complaint pleaded

³⁷ While the bankruptcy court approved the Settlement over Mark L. Rindlesbach's objection, this approval was error. Mark L. Rindlesbach has raised this issue in a Notice of Appeal filed with the United States District Court, pending before Judge Clark Waddoups, Case No. 2:14-cv-00577.

damages against the Plan *or* against Rindlesbach, not damages against both. The Lenders, through the Judgment, obtained all the relief they sought in the proceeding below—a judgment against the Plan totaling over \$6 million.

The Lenders overlook this reality and ask the Court to simply turn a blind eye to it. The Lenders, at the end of the day, would like to have their \$6 million judgment against the Plan and a \$4 million dollar judgment against Rindlesbach individually. There are at least two major problems with this request. First, as discussed below, there is no basis in Utah law to hold Rindlesbach personally liable on a contract that he indisputably signed in his capacity as Plan trustee. But, even if Rindlesbach *could* be personally liable though he signed as trustee, there is no basis in law or equity to hold *both* the Plan and Rindlesbach liable.

The Lenders, in essence, ask the Court to go back to the Guaranty and rewrite it and treat the Plan and Rindlesbach as though they had both signed it. If the Lenders wanted both the Plan and Rindlesbach on the hook, they could have required both to sign. The Court cannot now impose a de facto reformation and make a better contract for the Lenders than they secured for themselves. *See U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, ¶ 41, 990 P.2d 945 (“[A] court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself.”). Similarly, reversal and entry of judgment against Rindlesbach would amount to a *de facto* amendment of the Lenders’ Second Amended Complaint and allow them, without a good faith legal basis, to assert claims against both the Plan and Rindlesbach. It is axiomatic that courts will not award

relief that is not pleaded, tried, or proven. *See* Utah R. Civ. P. 8(a) (“An original claim . . . shall contain a short and plain . . . statement of the claim showing that the party is entitled to relief”); Utah R. Civ. P. 54(c)(1) (“[E]xcept as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” (emphasis added)); *Combe v. Warren’s Family Drive-Inns, Inc.*, 680 P.2d 733, 735 (Utah 1984) (“Although Rule 54(c)(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised or tried.”).

2. Judgment Against Rindlesbach Individually Would Violate Rindlesbach’s Bankruptcy Discharge.

Section 524 of Title 11 of the Bankruptcy Code provides that a discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt, as a personal liability of the debtor” 11 U.S.C. § 524(a)(2). Accordingly, after a discharge there can be no “action,” “process,” or “act” against the debtor, Mark L. Rindlesbach – any third party is enjoined from pursuing a discharged debtor.

Despite the discharge and injunction the Trustee now moves this Court to *reverse* the trial court and remand for further proceedings against Mark L. Rindlesbach. Rindlesbach received a discharge from the bankruptcy court just days after the bankruptcy court entered an order approving the Settlement. *See* Notice of Discharge, attached to Addendum as Exhibit 4. Any action by this Court reversing the Summary Judgment Ruling against Rindlesbach would violate the discharge injunction.

The Bankruptcy Court was very clear at the hearing that the Settlement Agreement did not authorize the Lenders to pursue Rindlesbach post-discharge. The Bankruptcy Court stated that, upon the approval of the Settlement Agreement and Rindlesbach's subsequent discharge, neither the Hardy Parties, nor any other third-parties, could pursue Rindlesbach in his individual capacity. *See* Statements of Fact 33.

The Trustee also stated what it intended with the discharge to be entered after the Settlement Agreement. *See* Statements of Fact 33. This Court too has previously recognized the limitations imposed upon it and the Hardy Lenders by the discharge. *See* August 21, 2014 Order.

The Lenders argue that they are permitted to pursue fraudulent transfer actions against third-parties and that the injunction does not stop them from doing so. The Lenders are correct. However, the right to pursue fraudulent transfer actions does not give them the right to pursue claims against the discharged debtor. Because the relief the Lenders seek violates Rindlesbach's discharge, the relief is unavailable, and the Lenders' appeal is moot.

C. Reversing Dismissal of Rindlesbach is Contrary to the Jury Verdict and Public Policy

1. The Reversal and Entry of Judgment is Contrary to the Jury Verdict and Unnecessary.

Here, The Lenders claim that reversal of summary judgment against Mark is needed in order to pursue fraudulent transfer actions against Rindlesbach's relatives. This argument is confusing. As discussed above, the Lenders' *motivation* for seeking the judgment has no bearing on whether it is properly taken under Utah law and given the

facts and pleadings in this case. Even more fundamentally, though, it is unclear what basis the Lenders would have to “claw-back,” through fraudulent transfer actions, transfers that Rindlesbach made. If the Lenders are attempting to collect a judgment against the Plan, and the Plan is the only party indebted to the Lenders, Rindlesbach’s transfers of personal funds are irrelevant. The Lenders cannot bring an action to recover them in the name of satisfying their judgment against the Plan.

The Lenders point out that their claim is for “the reduced amount of \$4 million,” which obviated the need to adjudicate the proper amount of the Lenders’ claim against Rindlesbach’s bankruptcy estate.³⁸ The Lenders miss the point. The \$4 million figure clearly demonstrates that the relief they seek has no basis in fact or evidence in this case where a jury has already found damages against the Plan in excess of \$6 million. And, calling the \$4 million a “reduced amount” ironically ignores the fact that they seek to add \$ 4 million dollars on top of the \$6 million judgment upon which the Lenders have been collecting (with no apparent plans to alter course) for over two years.

The Lenders also claim that “[t]he Bankruptcy Court granted” the Trustee authority to enter into the Settlement and stipulate to reversal in this case.³⁹ While it is true that the Bankruptcy Court approved the Settlement, that in no way compels the result the Lenders seek. The Bankruptcy Court made very clear that it thought the Settlement unusual on this point and made equally clear that the Bankruptcy Court would not purport to order the Court to reverse and remand. The Bankruptcy Court’s approval signals only

³⁸ Appellants’ Br. 9.

³⁹ Appellants’ Br. 10.

what the Trustee *could* do. The Lenders seek to bootstrap that into what this Court *should* do. But the Settlement is irrelevant and is not probative of whether reversal is warranted in this appeal. Tellingly, the Lenders cite no case wherein a bankruptcy trustee stipulates with a principal creditor to reverse a prior judgment in the debtors favor to allow the creditor to pursue judgment against the debtor post-discharge. Research reveals no such case.

2. Reversal is a Waste of Judicial Resources and Contrary to Public Policy

i. *Reversal is a Waste of Judicial Resources and Will Create a Legal Quagmire.*

The Lenders invoke public policy to argue that the Court should favor settlement of the Lenders' claims to foster private resolution of the Trustee's and the Lenders' claims and conserve judicial and estate resources. Public policy, however, cuts directly against the Settlement and entry of a second judgment in favor of the Lenders.

The relief requested does not serve the interests of judicial economy and finality but merely spawns continued litigation on an issue outside the proceeding below and not part of the record on this appeal. *See Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 613 (Utah 1983) ("One reason public policy favors the settlement of disputes by compromise is that this avoids the delay and the public and private expense of litigation."). *Cf. MacKay v. Hardy*, 973 P.2d 941, 947 (Utah 1998) ("Judicial economy and the parties' interests in finality of judgment are in no way furthered if parties are allowed to engage in piecemeal appeals"). It creates a tangle of unresolved issues and casts doubt on the finality of the judgment against the Plan.

Even if judgment could be properly taken against Rindlesbach after the proceeding in the trial court, the *amount* of the judgment is by no means certain. The Lenders offered, and the jury heard, no evidence on damages Rindlesbach owed in his individual capacity. There are no findings of fact that the Court could use to render a judgment against Rindlesbach. As such, this Court would not be prepared to order entry of judgment against Rindlesbach for \$4 million – nor could it without a jury. At most it could reverse for further proceedings by the trial court and a jury trial (which as discussed below expressly violates the injunction prohibiting actions against Rindlesbach, a discharged bankruptcy debtor). *See State v. Mirquet*, 914 P.2d 1144 (Utah 1996) (stating that the appellate court can only dispose of a matter where there is no issue in the underlying facts and no additional evidence relevant to dispositive issues); *Alder v. Bayer Corp.* 2002 UT 115, 61 P.3d 1068 (court must remand to the trial court for factual determinations).

Accordingly, reversal and remand based on the Settlement, not on the legal merits of the appeal, raises an entirely separate, appealable issue.

ii. *Public Policy Does Not Encourage Reversal*

Public policy favors settlement only where the settlement is consistent with the rights of all concerned parties. *See, e.g., Ziarko v. Soo Line R. Co.*, 641 N.E.2d 402, 410 (Ill. 1994); *Triad Energy Corp. of West Virginia, Inc. v. Renner*, 600 S.E.2d 285, 288 (W. Va. 2004).

The Lenders' reliance on *Neary v. Regents of the Univ. of California*, 834 P.2d 119, 125 (Cal. 1992) to support its public policy argument is misplaced. *Neary* is

inapposite because it is distinguishable from the facts of this case and does not provide the rule governing reversal in this context. With respect to the facts, in *Neary*, unlike in this case, all concerned parties agreed to the stipulated reversal. *See* 834 P.2d at 120. There was no interested party like Rindlesbach opposing the reversal. *See id.* As such, the court of appeal's decision to deny the stipulated reversal and dismissal essentially required parties to continue fighting after an agreement had been reached.

In addition, *Neary* is not like this case because, in *Neary*, the settlement, reversal, and dismissal of the case would actually quell an ongoing dispute. By contrast, here, as discussed above, the Lenders are actually the ones that seek to multiply litigation by reinstating dismissed claims and calling into question the validity of the judgment against the Plan. In fact, this case, unlike *Neary* does not even save the parties from the cost and expense of the appeal and the associated briefing. In *Neary*, had the court of appeal followed the stipulation and reversed the case, it would have saved the parties' the cost of the appeal. Judicial economy is not served where the parties must incur the expense of the appeal (much less additional litigation) notwithstanding the stipulation. *See Lucich v. City of Oakland*, 19 Cal. App. 4th 494, 501–502, 23 Cal. Rptr 2d. 450 (1993) (distinguishing and declining to follow *Neary* where the parties entered into the settlement after the briefing, oral argument, and submission of the appeal because no “interests of judicial or private economy would be served”).

In addition to being distinguishable on its facts, *Neary* is at odds with other cases addressing reversal of trial court rulings. For example, the Tenth Circuit Court of Appeals has held:

“[P]arties cannot compel [the court] to reverse (or modify) a district court's determination by stipulation. Reversal of a district court's order requires [the court's] examination of the merits of the case, thereby invoking our judicial function. Parties may not, by stipulation or other means, usurp [the court's] Article III powers. Parties may, of course, either (1) move to dismiss an appeal voluntarily, or (2) moot an appeal by acting in a manner that obviates resolution of the pending controversy, but in such cases this court can do no more than dismiss the appeal and, where appropriate, direct that the judgment appealed be vacated. Even joint action of the parties to an appeal may not effect or compel a substantive alteration of the judicial disposition under review.”

Bolin v. Secretary of Health & Human Servs., 32 F.3d 449, 450 (10th Cir. 1994); *see also* *United States v. Furman*, 112 F.3d 435, 438 (10th Cir. 1997). Though Utah case law lacks such a clear pronouncement, the Utah Supreme Court has noted that it is “not permitted to reverse a trial court unless it has committed reversible error during some of the proceedings in this case.” *State v. Hansen*, 540 P.2d 935, 936 (Utah 1975); *see also* *Great Salt Lake Minerals & Chemical Corp. v Arthur G. McKee & Co.*, 539 P.2d 371 (Utah 1975) (holding that the Supreme Court could not overturn the trial court unless the evidence would sway all reasonable minds against the trial court's findings).

In sum, the Lenders cannot support their quest for reversal and judgment against Rindlesbach with the Settlement. The Settlement has no bearing on this case, and the Court must consider the merits of the Lenders' claim against Rindlesbach individually. This includes consideration of Rindlesbach's defenses separately from the Trustee's stipulation.

D. The Trial Court Correctly Held That Rindlesbach Is Not Personally Liable Under The Guaranty.

There may have been a time when, under common law, a trustee would be personally liable for contracts entered into on behalf of a trust. *See Galdjie v. Darwish*, 113 Cal. App. 4th 1331, 1343–49, 7 Cal. Rptr. 3d 178 (reciting “a brief review of common law as it relates to suits involving trusts and trustees”); Bogert’s Trust and Trustees § 712 (same). This now antiquated view stems from the fact that a trust is not a legal entity. *See Galdjie*, 113 Cal. App. 4th at 1343 (“Unlike a corporation, a trust is not a legal entity.”). Many early cases held that a trust could neither sue nor be sued and, indeed, a trustee *could not* bind trust assets to contracts made with third parties. *See, e.g., Societe Generale v. U.S. Bank Nat’l Ass’n*, 325 F. Supp. 2d 435, 437 (S.D.N.Y. 2004) (“[A] trustee cannot, through contract, directly bind the trust estate or its beneficiary.” (quoting *Taylor v. Mayo*, 110 U.S. 330, 335 (1884))); *Galdjie*, 113 Cal. App. 4th at 1344; Bogert’s Trust and Trustees § 712. However, even this historic general rule was not uniform across the United States and many cases allowed a third party to proceed directly against the trust assets. *See* Bogert’s Trust and Trustees § 712 (collecting cases).

Trust law has since moved away from the general rule set forth above. “Today, either by statute or by judicial decision, the majority of United States jurisdictions provide for suits against trustees in their representative, rather than their personal capacities, provided the representative capacity was disclosed.” *See id.* The Restatement (Third) of Trusts states that a trustee is personally liable “on a contract entered into in the course of trust administration only if”:

- (a) in so doing, the trustee committed a breach of trust; or
- (b) the trustee's representative capacity was undisclosed and unknown to the third party; or
- (c) the contract so provides.

Restatement (Third) of Trusts § 106(1). The Restatement (Third) of Trusts recognizes that it departs from the rule on personal trustee liability set forth in the Restatement (Second) of Trusts. *See id.* Reporter's Notes on § 106. This change is "to reflect the now-prevalent doctrine authorizing third parties to proceed against a trust, i.e., against a trustee in the trustee's representative capacity . . . with the trustee protected from personal liability to the extent the trustee acted properly." *Id.* Indeed, the current view is that a trustee of a business trust is not individually liable for contracts that it enters into on behalf of the trust and where the trustee signs the contract in his representative capacity. One leading treatise, which the Lenders cite, notes:

The mere signing of an obligation by trustees in their individual names with the descriptive words 'trustees' or the like added to their signature does not alone except them from personal liability, but the rule is usually otherwise where they sign in the trust name or in such a manner as clearly to specify that they are signing on behalf of the trust alone and not as individuals.

16A Fletcher Cyc. Corp. § 8254; *see also Adams v. Swig*, 125 N.E. 857, 861–62 (Mass. 1920).

In this case, the Lenders attempt to sidestep this shift in the law by distinguishing between trusts subject to the Uniform Probate Code and/or Uniform Trust Code and those subject to background common law principles. As an initial matter, Rindlesbach concedes that the Utah Uniform Trust Code, Utah Code Ann. § 75-7-1010 does not apply

in this case. Rindlesbach argued as much before the trial court and, ironically, it was the Lenders thought sought to apply Section 75-7-1010. However, as the district court noted below, while the Utah Probate and Trust Codes do not control this case, they are indicative of the shift in the law of trusts that has taken place over the last hundred years. At least in Utah, these statutes have occupied the field of trustee liability for decades and research reveals no “business trust” case decided under common law. This is not a case where the Court can simply peel back the statute and apply the prior law as the Lenders urge. The statutes reflect a fundamental difference in who a third party dealing with a trust can sue and from where damages may be collected. The statutes do nothing more than reflect the prevalent view that a third party dealing with a trust should be able to seek recovery from trust assets and that the trustee is not generally personally liable. Even without the statute, this is the better-reasoned view and, therefore, the likely result under the common law of trusts. The Lenders ask the Court to rewind a hundred years of legal development and impose a regime that does not reflect modern views of entity and fiduciary liability.

The Lenders, however, ask the Court to adopt only a portion of the ancient common law rule. The Lenders want personal liability for Rindlesbach but they overlook the second part of the former rule—that a trustee of a trust cannot bind the trust to contracts with third parties implicating trust assets. Of course, the Lenders stop far short of suggesting that *only* Rindlesbach is liable, and Rindlesbach lacked power to bind the Plan. Indeed, the Lenders could not make such an argument because they have spent the

last few years collecting on their judgment against the Plan. The Lenders cannot have their cake and eat it too.

The Lenders cite *Andrus v. Blazzard*, 63 P. 888 (Utah 1901) as support for their claim that Rindlesbach is personally liable. As the trial court pointed out, *Andrus* does not control in this case for at least two main reasons. First, *Andrus* dealt with a fiduciary's liability in the probate context (whether a guardian would be personally liable for debts incurred on behalf of the ward). See 63 P. 889–90. A guardian's liability for such debt, like a trustee's personal liability, is now governed by statute. See Utah Code Ann. § 75-5-429. *Andrus* has no bearing on how a similar case would come out today under Utah's current. Second, *Andrus* was decided long before the modern view of trustee and entity liability became prevalent. Even if the modern statutes governing guardian and trustee liability do not apply, the better-reasoned common law result would be informed by the statutes and recognize the shift in the law's view toward fiduciary/principal liability. There is no reason that the modern, common law view should be any different than the controlling statutes. Accordingly, the result in this case should differ from *Andrus*, even in the absence of a controlling modern statute.

The other cases and authorities that the Lenders cite are distinguishable for similar reasons. The Lenders reliance on *Gibbons v. Pan Am. Petroleum Corp.*, 262 F.2d 852 (1958) is misplaced. That case imposes individual liability on a trustee. But the only support cited is the Bogert treatise, cited above, which now makes clear that the law has shifted away from individual liability, and the first Restatement of Trusts, which also lays down the former rule. The courts applied the same outdated rule in *Taylor v. Mayo*, 110

U.S. 330 (1884); *Societe Generale v. U.S. Bank Nat'l Ass'n*, 325 F. Supp. 2d 435 (S.D.N.Y. 2004); *Colorado Springs Cablevision, Inc. v. Lively*, 579 F. Supp 252 (D. Colo. 1984); *Taylor v. Richomd's New Approach Ass'n, Inc.*, 351 So. 2d 1094 (Fla. Ct. App. 1977); *Maine Shipyard & Marine Ry. V. Lilley*, 743 A.2d 1264 (Maine 2000); and *Frist Eastern Bank, N.A. v. Jones*, 602 N.E.2d 211, 215 (Mass. Jud. Ct. 1992). In those jurisdictions, as in Utah, legislatures have since passed statutes that reflect the modern thinking concerning trust liability.⁴⁰ Further, in at least some of those cases, the outcome—personal liability for the trustee—was expressly based on the equally outdated premise that “a trustee cannot through contract, directly bind the trust estate or its beneficiary.” *Societe Generale*, 325 F. Supp. 2d at 437; *see also Taylor*, 110 U.S. at 335–36. As noted above, the Lenders make no argument (nor could they) that Rindlesbach’s liability should be premised on his inability to bind the Plan. The Lenders cannot claim that *Andrus* and the other cases they cite “applied precisely the same common law rule as advocated by the [Lenders].”⁴¹ Again, they seek to apply only “half” of the ancient common law rule.

The bottom line is that the Lenders do not, and cannot, cite a single case wherein a third party proceeded against both a trustee and a trust on a contract signed only once by the trustee in his or her fiduciary capacity. Formerly, the law favored action against the

⁴⁰ The Lenders also cite *Just Pants v. Bank of Ravenswood*, 438 N.E.2d 331 (Ill. 1985). Illinois apparently still inheres more or less to the ancient common law rule, and its current statutes provide for only partial limited liability for a trustee. *See Bogert* § 712 n.31. In this respect, Illinois appears to be an outlier and does not reflect the prevailing view.

⁴¹ Appellant’s Br. 18.

fiduciary individually. Now the law favors proceeding directly against the trust. But neither regime ever prescribed the relief the Lenders' seek—two signatures for the price of one. The Lenders' requested relief overreaches regardless of whether the Court decides to apply the ancient or modern rule. Even if Rindlesbach *could* be liable under modern trust law, personal liability is inappropriate here where the Lenders have spent the last two years directly pursuing trust assets.

CONCLUSION

For the foregoing reasons, the Court should deny the appeal and affirm the trial court's summary judgment ruling and subsequent dismissal of Rindlesbach individually.

REQUEST FOR ATTORNEYS' FEES ON APPEAL

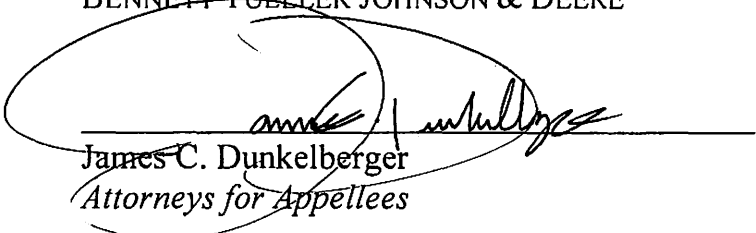
Appellee/Cross-Appellants request an award of attorneys' fees and costs incurred on appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), the undersigned hereby certifies that the foregoing Brief of Appellee contains 7,776 words, not including the cover, table of contents, and table of authorities. The number of words was determined using Microsoft Word's word count feature.

RESPECTFULLY SUBMITTED this 6th day of April, 2015.

BENNETT TUELLER JOHNSON & DEERE



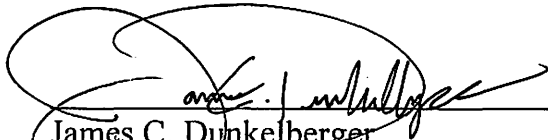
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2015, I caused to be served, via U.S. Mail, First Class, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEES**, together with an electronic Courtesy Brief in searchable PDF format, upon the following:

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ADDENDUM

1. Memorandum Decision (R.4269-76)
2. Settlement Agreement
3. Transcript of July 2, 2014 Hearing Before the Honorable Judge Joel T. Marker,
United States Bankruptcy Court, District of Utah, Case No. 13-30552.
4. Notice of Discharge

EXHIBIT 1

Memorandum Decision (R.4269-76)

FEB 06 2012

| In the Third Judicial District Court, Salt Lake County, ^{SALT LAKE COUNTY} State of Utah  <small>Deputy Clerk</small> | |
|--|--|
| RUTH B. HARDY REVOCABLE TRUST, et al., Plaintiffs, vs. ROBERT A. JONES, et al., Defendants. | MEMORANDUM DECISION Case No. 080913314 Hon. Deno G. Himonas |

INTRODUCTION

There are currently five motions that remain pending¹ in this matter: (1) Defendant Mark L. Rindlesbach's motion for summary judgment in his favor on Plaintiffs' claims, (2) Plaintiffs' motion for summary judgment in their favor against Defendant Rindlesbach Construction Inc. Profit Plan (the Plan), (3) Rindlesbach's motion to amend his answer to assert a defense that federal law preempts Plaintiffs' claims, (4) Plaintiffs' motion to strike Rindlesbach's federal preemption defense, and (5) Plaintiffs' evidentiary objections to declarations that Rindlesbach submitted. For the reasons discussed below, I GRANT Rindlesbach's motion for summary judgment, GRANT, in part, and DENY, in part, Plaintiffs' motion for summary judgment, and DISMISS the motion to amend, motion to strike, and evidentiary objections as moot.

BACKGROUND

Plaintiffs' claims against Rindlesbach and the Plan relate to a loan agreement (the Agreement) and a Guaranty (the Guaranty) that were entered into in May 2007. Plaintiffs had a third party, Sutherland Title Company (STC), draft the documents. The Agreement states that Plaintiffs would provide a 3.3 million dollar loan to Eagle Mountain Lots, LLC (EML).² According to Plaintiffs, they insisted on having several guarantors guarantee repayment as a condition before Plaintiffs would provide the requested financing. In connection with that requirement, Plaintiffs had STC prepare the Guaranty for the signatures of several guarantors, including one signature block bearing Rindlesbach's name.

On May 25, 2007, Rindlesbach went to the STC offices, where he was presented with a copy of the Guaranty for his signature. However, rather than signing the signature block above his name, Rindlesbach crossed off his name, handwrote a new signature block indicating that he was acting as the Plan's Trustee, and executed the Guaranty below the handwritten signature

¹ The Court has granted or denied (with or without prejudice), either in whole or in part, all other pending matters.

² The Agreement initially listed another borrower, Land Design Group, LLC (LDG), but LDG was deleted as a borrower before the final version of the Agreement was executed. Nevertheless, LDG is listed as a borrower in the Guaranty, which Plaintiffs claim was due to a scrivener's error.

block.³ The Plan disputes that Rindlesbach's signature, by itself, was sufficient to bind the Plan because the Plan's governing documents had allegedly been amended to require the signature of Rindlesbach's co-trustee.

Either shortly before or after Rindlesbach executed the Guaranty, Plaintiffs began the process of transferring the loan funds to EML. Ultimately, EML defaulted on the loan and Plaintiffs brought this action to seek recovery from the Plan, Rindlesbach, and others.⁴

ANALYSIS

Rindlesbach now seeks summary judgment in his favor on Plaintiffs' claims against him personally. In their motion, Plaintiffs seek summary judgment in their favor on their claims against the Plan. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Orvis v. Johnson*, 2008 UT 2, ¶ 13, 177 P.3d 600 (quoting Utah R. Civ. P. 56(c)). Therefore, beginning with Rindlesbach's motion for summary judgment, I analyze each party's motion to determine whether they are entitled to summary judgment. In doing so, I "view[] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Id.* ¶ 6 (internal quotation marks omitted).

I. Rindlesbach's Motion for Summary Judgment

Turning first to Rindlesbach's motion for summary judgment, Rindlesbach argues that he signed the Guaranty in his capacity as trustee or co-trustee of the Plan, and therefore, is not personally liable under Utah law.⁵ In response, Plaintiffs assert that Utah law imposes personal liability on a trustee who signs a contract. In support of that assertion, Plaintiffs cite several cases for the proposition that, "At common law, a trustee is personally liable for every obligation he incurs in his capacity as trustee unless he expressly stipulates that he is not to be personally responsible." (Mem. Opp. 6.) I disagree with Plaintiffs and, based on the great weight of the common law, I conclude that a trustee is not liable under a contract where it is clear that the trustee signed the contract in that capacity on behalf of the trust.

First, the cases cited by Plaintiffs do not control because they are factually distinguishable, are not binding on this Court, or have been overruled, either in whole or in part, by statute. Plaintiffs cite only one Utah case, *Andrus v. Blazzard*, 23 Utah 233, 63 P. 888 (1901), to support their claim that a trustee is personally liable on a contract. However, *Andrus* is clearly distinguishable. In that case, our supreme court dealt with the liability of a guardian in a

³ Including Rindlesbach's signature, the full text of the handwritten signature block states as follows: "Rindlesbach Const., Inc. Profit Sharing Plan by Mark L. Rindlesbach, Trustee."

⁴ Plaintiffs' complaint lists causes of action against several other defendants but the issues and claims raised in the parties' motions do not relate to the claims against the other defendants. Consequently, this Memorandum Decision only addresses Plaintiffs' claims against Rindlesbach and the Plan.

⁵ Rindlesbach also argues that he is not personally liable under the Employee Retirement and Income Security Act (ERISA), 29 U.S.C.A. §§ 1001, *et seq.* (2011). However, it is unnecessary for the Court to reach that argument in order to resolve the motion for summary judgment, and the Court declines to do so.

guardian-ward context, which the court likened to a conservatorship relationship.⁶ *See id.* at 890-91. Moreover, the supreme court's holding that the guardian was personally liable, *see id.*, has since been superseded, either in whole or in part, by statute, *see* Utah Code Ann. § 75-5-429(1) (2011). Therefore, *Andrus* has only limited, if any, applicability to the case at bar.

Plaintiffs next cite the decisions of several federal courts that have held a trustee is personally liable under the contract when they sign in their capacity as trustee. *See Taylor v. Mayo*, 110 U.S. 330, 335-36 (1884); *Gibbons v. Pan Am. Petroleum Corp.*, 262 F.2d 852, 855-56 (10th Cir. 1958); *Pan Am. Petroleum Corp v. Gibbons*, 168 F.Supp. 867, 876 (D. Utah 1958). However, it is well-settled that federal court decisions on matters of state law are not binding on state courts. *See Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 33; 67 P.3d 436; *Cottonwood Mall Shopping Ctr., Inc. v. Pub. Serv. Comm'n*, 558 P.2d 1331, 1331 (Utah 1977); *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 502 (Utah Ct. App. 1992). Furthermore, the current legal landscape is vastly different from that which was in effect at the time the federal courts rendered their decisions, *see generally Galdijie v. Darwish*, 113 Cal. App. 4th 1331, 1344-48 (2003) (discussing the evolution of the law regarding a trustee's personal liability under a contract),⁷ which further diminishes any value the federal decisions might have in resolving this issue.

Indeed, the most recent versions of the Uniform Trust Code and the Restatement adopt the modern view that a trustee is not personally liable under a contract where the trustee properly enters into the contract and the contract indicates that the trustee is signing in his or her capacity as trustee.⁸ *See* Uniform Trust Code § 1010 (2000); Restatement (Third) of Trusts § 106 (Tentative Draft No. 6, 2011). Likewise, the persuasive authority—including the current version of the treatise cited in two of the cases relied on by Plaintiffs—indicates that most states apply the modern rule that a trustee is not liable where the trustee signs in their capacity as trustee. *See* George G. Bogert, Amy M. Hess, *Trusts & Trustees* § 712 (3d ed. 2009); 16A *Fletcher Cyclopedic of the Law of Private Corporations* § 8254 (rev. ed. 2003); 76 Am. Jur. 2d *Trusts* § 414 (2011); 90A C.J.S. *Trusts* § 387 (2011). *But see* 63 Am. Jur. 2d *Business Trusts* § 63 (2011); 76 Am. Jur. 2d *Trusts* § 410 (2011). Moreover, the federal cases cited by Plaintiffs have been expressly superseded in Utah because the legislature adopted the portion of the Uniform

⁶ It is true that in dicta, the supreme court noted that other states applied the common law principle that a trustee who “undertakes to bind the [trust] estate, and fails to do so for want of authority, . . . binds himself personally, and may be sued upon his contract individually. And in such cases it avails him nothing that he intended only to bind himself in his representative capacity.” *Andrus v. Blazzard*, 23 Utah 233, 63 P. 888, 894 (1901) (citation omitted). However, as explained below, that statement does not accurately reflect the current state of the law regarding trustees' liability.

⁷ The same also holds true with respect to the changed legal landscape in Utah since the time *Andrus* was decided.

⁸ The term “properly entered into,” which is used in both the Uniform Trust Code and the Utah statutes based on the Uniform Trust Code, “mean[s] that the trustee is exercising an available power and is not violating a duty” to the beneficiaries of the trust. Uniform Trust Code § 1010 cmt. (2000). The comment to the Restatement similarly states that a trustee improperly enters a contract where the trustee either exceeds their authority or violates their fiduciary duty to the beneficiaries of the trust. *See* Restatement (Third) of Trusts § 106 cmt. (b)(1) (Tentative Draft No. 6, 2011). Otherwise, a trustee is only personally liable on a contract “if: the terms of the contract so provide; or the trustee's representative capacity was not disclosed or known to the third party.” *Id.* Those exceptions clearly do not apply in this case. In addition, the provision that a trustee may be personally liable for his or her own torts, *see* Uniform Trust Code § 1010(b) & cmt.; Restatement (Third) of Trusts § 106(2) & cmt. (b)(2), also does not apply because, as the parties have acknowledged, Plaintiffs have not asserted any fraud, misrepresentation, or other tort claim against Rindlesbach.

Trust Code that eliminates a trustee's personal liability on a contract where the trustee properly enters into a contract and indicates that he or she is signing on behalf of the trust.⁹ See Utah Code Ann. § 75-7-1010(1) (2011). Thus, like *Andrus*, the federal cases cited by Plaintiffs also do not resolve the issue before the Court.

In the absence of any controlling statutory or case law, the Court is left with the persuasive authority, which, as stated above, generally adopts the modern rule that a trustee is exempted from personal liability on a contract where the trustee "sign[s] in the trust name or in such a manner as clearly to specify that they are signing on behalf of the trust alone and not as individuals." *Fletcher Cyclopedica*, § 8254; accord Uniform Trust Code § 1010; Restatement (Third) of Trusts § 106; 76 Am. Jur. 2d *Trusts* § 414; 90A C.J.S. *Trusts* § 387. Furthermore, in the only relevant statutes that have been brought to the Court's attention, the Utah Legislature has repeatedly expressed a preference that trustees and other fiduciaries should not be personally liable on contracts they properly entered into and executed in those capacities.¹⁰ See, e.g., Utah Code Ann. § 75-5-429(1); *id.* § 75-7-1010(1). Based on that statutorily indicated preference and the great weight of persuasive authority, I conclude that a trustee is not personally liable on a contract where the trustee has authority to execute the contract and clearly indicates that they are on behalf of the trust in their capacity as trustee.

There is no genuine issue of fact regarding whether the Plan had authorized Rindlesbach to sign the Guaranty and other similar documents on behalf of the Trust.¹¹ There is also no question that the handwritten signature block indicated that Rindlesbach was signing the Guaranty on behalf of the Plan, in his capacity as trustee. Therefore, as a matter of law, Rindlesbach is not personally liable on the Guaranty and is entitled to summary judgment. Accordingly, I GRANT Rindlesbach's motion for summary judgment.

Moreover, that ruling makes it unnecessary to address Rindlesbach's motion to amend and Plaintiffs' motion to strike. Both the motion to amend and the motion to strike pertain to the federal preemption defense that Rindlesbach sought to raise, but because the claim against Rindlesbach has now been dismissed, any decision on the affirmative defense would not affect the outcome of the case and, therefore, would be merely advisory. See generally *Summit Water Distrib. Co. v. Summit Cnty.*, 2005 UT 73, ¶ 50, 123 P.3d 437 ("Our settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us."). Consequently, I DISMISS both the motion to amend and the motion to strike without addressing the merits of the motions.

⁹ As Rindlesbach points out, Utah's Uniform Trust Code may not control this action because the Code does not apply to trusts like the Plan that are created "for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind." Utah Code Ann. § 75-1-201(55) (2011).

¹⁰ If 75-7-1010 were to apply, the outcome would be the same because it is undisputed that Rindlesbach was authorized to execute the Guaranty and that he clearly indicated that he was signing on behalf of the Plan rather than in his individual capacity. See generally Utah Code Ann. § 75-7-1010(1) ("[A] trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.").

¹¹ There is, of course, a disputed issue of fact regarding whether his signature was sufficient to bind the Plan.

II. Plaintiffs' Motion for Summary Judgment Against the Plan

Next, Plaintiffs assert that they are entitled to summary judgment on their claims against the Plan. Before addressing that assertion, however, it is first necessary to address a preliminary issue. In their motion for summary judgment, Plaintiffs also seek the Court's reconsideration of Judge Lindberg's January 12, 2010 ruling in this case. However, such a request is improper in the context of a motion for summary judgment. Therefore, the Court DENIES the request to reconsider without prejudice to Plaintiffs' ability to raise those issues in a separate motion to reconsider.

Turning to Plaintiffs' motion for summary judgment, Plaintiffs argue that they are entitled to summary judgment because they have established that: (1) The Guaranty should be reformed to remove LDG as a borrower, (2) the Guaranty is supported by adequate consideration, and (3) the two-signature amendment to the Plan's governing documents was a nullity and, consequently, Rindlesbach's signature was binding on the Plan. Although I agree that Plaintiffs have established that the Guaranty should be reformed, there are disputed issues of fact with respect to Plaintiffs' other claims.

a. Plaintiffs are Entitled to Reformation of the Guaranty.

Plaintiffs assert that the Guaranty should be reformed to remove LDG as a borrower because the inclusion of LDG in the Guaranty was due to an error on the part of the scrivener who drafted the loan documents. As Plaintiffs correctly state, the Guaranty and Agreement must be read together. "[U]nder established Utah law, when two agreements are 'executed substantially contemporaneously and are clearly interrelated, they must be construed as a whole and harmonized if possible.'" *Shields v. Harris*, 934 P.2d 653, 657 (Utah Ct. App. 1997) (quoting *Winegar v. Froerer Corp.*, 813 P.2d 104, 109 (Utah 1991)) (additional quotation marks omitted). Here, it is undisputed that the Agreement and the Guaranty were executed as part of the same transaction over a relatively short time period, and therefore, the two documents must be read together.

When the Guaranty and the Agreement are read together, it is apparent that there is a conflicting term that creates a facial ambiguity because the Guaranty includes LDG as a borrower while the Agreement omits any mention of LDG. *See Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235 ("We have explained that ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." (internal quotation marks omitted)). Plaintiffs have introduced uncontroverted evidence¹² that the scrivener understood that LDG was supposed to be removed as a borrower but that the scrivener failed to

¹² The Plan argues that parol evidence is inadmissible to vary the terms of the Guaranty under *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326, where the Utah Supreme Court held that parol evidence is not admissible where a contract is integrated and unambiguous, *see id.* ¶¶ 16-17. I do not read *Tangren* so broadly. First, the question of whether parol evidence is admissible in a reformation claim was not before the court in *Tangren*. Moreover, to read *Tangren* as broadly as the Plan suggests would effectively overturn a century's worth of supreme court decisions to the contrary and make the doctrine of reformation inapplicable to a written contract. *See Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints*, 565 P.2d 63, 64 (Utah 1977) ("Appellant is in error in her contention that testimony concerning the mistake was inadmissible because it varied the terms of a written contract. If such a contention could be sustained then the equitable theory of reformation of contracts would not apply to written instruments.").

do so. Indeed, other than citing to the language of the Guaranty itself, the Plan makes no attempt to show that the parties intended that LDG be listed as a borrower. Thus, it is undisputed that the parties did not intend for LDG to be listed as a borrower on the Guaranty. Consequently, it is appropriate for the Court to reform the Guaranty to remove LDG as a borrower, which also makes it possible to harmonize the provisions of the two documents. *See Haslem v. Ottosen*, 689 P.2d 27, 30-31 (Utah 1984). Accordingly, the Court GRANTS Plaintiffs' motion for summary judgment with respect to their claim that the Guaranty should be reformed.¹³

b. Disputed Issues of Fact Exist With Respect to Plaintiffs' Other Claims.

Turning to Plaintiffs' other arguments, it is evident that there are disputed issues of fact that would preclude the entry of summary judgment. First, in denying the Plan's motion for summary judgment on Plaintiffs' claims, the Court determined that there are disputed issues of fact regarding the validity of the two-signature amendment. Those same factual disputes are also present here, which makes summary judgment on that issue inappropriate. Second, there is also a factual dispute with respect to the adequacy of consideration and Plaintiffs' allegation that they were relying on the Plan's guarantee of repayment. Drawing all inferences in favor of the Plan, as I must, the following facts, among others, show that Plaintiffs may have been relying on Rindlesbach's personal guarantee, rather than the Plan's guarantee of repayment: (1) The Guaranty was drafted for Rindlesbach's personal signature, and (2) one of the lenders, Don Parker, gave sworn testimony that he did not know whether Rindlesbach would sign personally or on behalf of the Plan.¹⁴ Those disputed issues of fact preclude the entry of summary judgment in Plaintiffs' favor on their claims against the Plan. Therefore, I DENY the remainder of Plaintiffs' motion for summary judgment.

Having determined that Plaintiffs' motion for summary judgment should be denied, that also makes it unnecessary to reach Plaintiffs' evidentiary objections, much of which relate to Rindlesbach's calculations regarding the amount owing on the loan. I do not believe I have not relied on any of the allegedly objectionable statements in reaching these decisions. Therefore, I DISMISS the evidentiary objections without prejudice.

CONCLUSION

As stated above, under Utah law, a trustee is not liable on a contract where he or she properly enters into the contract on behalf of the trust in their official capacity. It is undisputed that Rindlesbach did so here, and therefore, I GRANT Rindlesbach's motion for summary judgment. Because that makes it unnecessary to address the federal preemption defense, I DISMISS the motion to amend and the motion to strike without prejudice.

The undisputed evidence shows that the parties did not intend to include LDG as a borrower in the Guaranty. Therefore, I GRANT Plaintiffs' motion for summary judgment, insofar as it seeks reformation of the Guaranty to remove LDG as a borrower. However, there


¹³ I recognize that a party must establish their entitlement to reformation by clear and convincing evidence, *see Haslem v. Ottosen*, 689 P.2d 27, 30 (Utah 1984); *Wolf Mountain Resorts, LC v. ASC Utah, Inc.*, 2011 UT App 425, ¶ 10, 697 Utah Adv. Rep. 27, and I have taken that into consideration in evaluating Plaintiffs' claim.

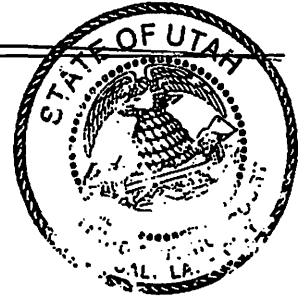
¹⁴ The Court believes that due to these issues of fact, the additional arguments made by Plaintiffs, i.e., invalid ratification, equitable estoppel, etc., are rendered moot.

are disputed issues of fact regarding whether Rindlesbach's signature was sufficient to bind the Plan and whether Plaintiffs did, in fact, rely on the Plan's guarantee of repayment. Accordingly, I DENY the remainder of Plaintiffs' motion for summary judgment against the Plan. Because I did not rely on any of the allegedly objectionable statements in Rindlesbach's declaration, I also DISMISS Plaintiffs' evidentiary objections without prejudice. Finally, it was improper for Plaintiffs to bring their request to reconsider in the context of the summary judgment, and therefore, I DENY the request without prejudice to the filing of a proper motion to reconsider.

DATED this 6th day of February, 2012

THIRD DISTRICT COURT


Deno G. Himonas
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080913314 by the method and on the date specified.

MAIL: MARY (PEGGY) M HUNT 136 S MAIN ST STE 1000 SALT LAKE CITY, UT 84101

MAIL: JONATHAN C MOFFITT 4626 N 300 W STE 375 PROVO UT 84604

MAIL: JAMES C SWINDLER 15 W S TEMPLE ST STE 1700 SAL LAKE CITY UT 84101

MAIL: JAMES K TRACY 3165 E MILLROCK DR STE 500 SALT LAKE CITY UT 84121

Date: 02/06/2012

/s KRISTENE LATERZA

Deputy Court Clerk

EXHIBIT 2

Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement (this "Agreement") is made as of May 21, 2014, by and among Phillip G. Jones (the "Trustee"), in his capacity as Chapter 7 Trustee of the bankruptcy estate of Mark Rindlesbach (the "Debtor"), and The Ruth B. Hardy Revocable Trust, Delcon Corporation Profit Sharing Plan fbo A. Wesley Hardy, Finesse P.S.P., MJS Real Properties, LLC, Uintah Investments, LLC, David D. Smith, Steven Condie, David L. Johnson, Berrett PSP, VW Professional Homes PSP, Ty Thomas, and D.R.P. Management PSP (collectively, the "Hardy Parties"). The Trustee and the Hardy Parties are referred to herein as the "Parties."

BACKGROUND

Whereas, on September 13, 2013, the Debtor filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Utah (the "Court"), commencing case number 13-30552 (the "Case");

Whereas, by Order of the Court dated January 13, 2014, the Case was converted to one under Chapter 7 of the Bankruptcy Code, and the Trustee was appointed as the Chapter 7 Trustee of the Debtor's bankruptcy estate (the "Estate");

Whereas, currently on deposit with the clerk of the Third Judicial District Court in and for Salt Lake County, State of Utah, in connection with an action entitled Ruth B. Hardy Revocable Trust, et al. vs. Brenda N. Rindlesbach, et al., Case No. 130900183 (the "Salt Lake County Action") are the proceeds of three checks, in the amounts of \$400,000, \$1,763,025 and \$3,700, respectively. The \$400,000 check represents a portion of the proceeds of the sale of property formerly owned by the Rindlesbach

Construction Inc. Profit Sharing Plan (the "PSP") located in Tooele County, Utah (the "Tooele Property"). The other two checks represent a portion of the proceeds of property located in West Jordan, Utah (the "West Jordan Property"), record title to which was formerly held by the Rindlesbach Construction Employees Pension Plan (the "Pension Plan");

Whereas, a part of the proceeds of the Tooele Property was used to purchase a certificate of deposit at Lake Forest Bank, and the Trustee and the Hardy Parties believe that approximately \$23,507 remains of that certificate of deposit (the "Lake Forest Account");

Whereas, in connection with the Case, the Hardy Parties have previously obtained relief from the automatic stay with respect to 5,2328 shares in the West Smith Ditch Water Company (the "Water Stock"), which has been exchanged for banked water entitlements for use in Elk Ridge, Utah, and the Hardy Parties are currently liquidating the banked water entitlements in cooperation with the Trustee;

Whereas, the Trustee has been informed that the the Debtor loaned more than \$500,000 to the PSP before the Petition Date (the "PSP Loan");

Whereas, the Hardy Parties assert an unsecured claim against the Estate in an amount of \$17,524,705.13 (the "Hardy Parties Claim"), comprised of the following components:

A. \$7,030,836.74 based on the Hardy Parties' assertion that the Debtor is personally liable for the judgment the Hardy Parties secured in 2012 against the PSP, in the case of Ruth B. Hardy Revocable Trust, et al., vs. Robert A. Jones, et al., Case No. 080913314 in the Third Judicial District Court in and for Salt Lake County, State of Utah

(the "Guaranty Case"), which is the subject of a pending appeal to the Utah Court of Appeals (the "Personal Liability Claim");¹

B. A claim for the value of the assets transferred by the PSP or the Pension Plan to or for the benefit of the Debtor, including the proceeds of the West Jordan Property and the Tooele Property, interest on each transfer at the legal rate and attorney fees incurred in seeking avoidance of such transfers, which claim is in the amount of \$3,592,703.24 (the "Fraudulent Transfer Claim"), which claim is to be reduced by any recovery the Hardy Parties are able to obtain on fraudulent transfer claims. \$317,533.75 of that amount is duplicative of the attorney fees included in paragraph A above; and

C. A claim for punitive damages that may be awarded as a result of the fraudulent transfers described above, in an estimated amount of \$5,000,000 (the "Punitive Damage Claim").

Whereas, the Trustee disputes aspects of the Hardy Parties' Claim, and asserts that grounds may exist to equitably subordinate the Hardy Parties' Claim under Bankruptcy Code § 510(c), and the Hardy Parties deny that there is any basis for equitable subordination of their claims.

Whereas, mutually desiring to avoid the burdens, risks and expenses of potential litigation between themselves, the Parties have entered into this Agreement to facilitate a full and final resolution and settlement of the matters described above and to fully and finally resolve and settle any and all disputes between and among themselves;

¹ This amount includes estimated attorneys' fees of \$533,602.49 in enforcing the judgment. In addition, if the Hardy Parties' appeal with respect to the 12% finance charge is successful, the Hardy Parties assert that the Debtor's liability on this claim would be \$9,249,535.64.

Whereas, the Trustee has considered the benefit to the Estate and creditors that will be received as a result of the settlement of these matters, particularly in light of the costs, uncertainties and risks of further litigation, and has concluded that the settlement contained herein is (i) fair and equitable, (ii) a reasonable resolution of the Parties' disputes, and (iii) in the best interests of the Estate and its creditors.

NOW, THEREFORE, for good and valuable consideration as provided herein, the legal sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1. Payment to Estate. The Hardy Parties will request, or in the case of the Lake Forest Account will consent to, payment to the Trustee, in the aggregate amount of \$500,000 (the "Settlement Amount") to be paid to the Trustee on behalf of the Estate on or before August 31, 2014. For clarity, the Trustee's obligations under this Agreement are contingent upon his timely receipt of the portions of the Settlement Amount described in subparagraphs A and C below. The Settlement Amount shall be derived from assets of the Profit Sharing Plan, shall constitute the repayment of a portion of the PSP Loan, and shall be comprised of the following components:

- A. \$400,000 from the proceeds of the Tooele Property;
- B. \$23,507 from the Lake Forest Account; and
- C. \$76,493, or more as necessary to complete payment to the Trustee in the total amount of \$500,000, from the proceeds of the banked water entitlements derived from the Water Stock.

2. Allowance and Agreed Reduction of Certain Claims. The Parties agree that the Hardy Parties Claim shall be allowed in the reduced amount of \$4,000,000, and

shall be subordinated in priority to all other allowed unsecured claims against the Estate which are not subordinated under 11 U.S.C. § 510(c) or otherwise (the "Subordinated Claim"). Such subordination is limited to the treatment of the Hardy Parties Claim in the Case and such claim is not subordinated for any other purpose or in any other context. Except as specifically allowed and subordinated by this paragraph, the Hardy Parties Claim shall be disallowed in its entirety. The Subordinated Claim shall be allowed in the following component parts, each of which shall constitute a binding obligation of the Debtor owed to the Hardy Parties:

- A. The Personal Liability Claim in the amount of \$2,610,000.00;
- B. The Fraudulent Transfer Claim in the amount of \$1,390,000.00; and
- C. The Punitive Damages Claim in the amount of \$0.

3. Release by Trustee. On the Effective Date, the Trustee, for himself and on behalf of the Debtor and the Estate (the "Debtor Releasors"), shall and hereby does fully, finally and forever release and discharge the Hardy Parties and their representatives, principals and attorneys of and from any and all claims, counterclaims, crossclaims, actions, causes of action, suits, contracts, covenants, agreements, promises, trespasses, debts, dues, demands, accounts, bonds, bills, notices, controversies, obligations, liabilities, damages, judgments, executions, liens, encumbrances, claims for contribution and indemnity, losses, costs or expenses of any nature whatsoever, in law or in equity, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, matured or unmatured, which any of the Debtor Releasors at any time has had, owned or held from the beginning of the world through the date of this Agreement against any of the Hardy Parties or any of their

representatives, principals or attorneys by reason of any matter, cause, occurrence, fact, thing, act or omission whatsoever arising out of, based upon, or relating to any matter or event whatsoever, past or present (except for any obligations arising under this Agreement) (all of the foregoing are hereinafter collectively referred to as the "Debtor Claims"). On and after the Effective Date, the Trustee hereby irrevocably waives the right to commence, institute or prosecute any lawsuit, action or other proceeding against the Hardy Parties or any of their representatives, principals or attorneys relating to, arising from or in connection with the Debtor Claims.

4. Release By Hardy Parties In favor of Trustee. On the Effective Date, the Hardy Parties shall and hereby do fully, finally and forever release and discharge the Trustee and the Estate, and all attorneys and accountants retained by the Trustee (the "Hardy Releasees") of and from any and all claims, counterclaims, crossclaims, actions, causes of action, suits, contracts, covenants, agreements, promises, trespasses, debts, dues, demands, accounts, bonds, bills, notices, controversies, obligations, liabilities, damages, judgments, executions, liens, encumbrances, claims for contribution and indemnity, losses, costs or expenses of any nature whatsoever, in law or in equity, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, matured or unmatured, which any of the Hardy Parties at any time has had, owned or held from the beginning of the world through the date of this Agreement against any of the Hardy Releasees by reason of any matter, cause, occurrence, fact, thing, act or omission whatsoever arising out of, based upon, or relating to any matter or event whatsoever, past or present (except for any obligations arising under this Agreement and except for the Subordinated Claim) (all of the foregoing are hereinafter

collectively referred to as the "Hardy Claims"). On and after the Effective Date, the Hardy Parties hereby waive the right to commence, institute or prosecute any lawsuit, action or other proceeding against the Hardy Releasees relating to, arising from or in connection with the Hardy Claims. The Hardy Parties reserve all claims and causes of action whatsoever against any party other than the Hardy Releasees.

5. No Assignment. (a) The Trustee represents and warrants that he has not assigned, transferred, encumbered, granted a security interest in, or conveyed the Debtor Claims or any interest therein to any person or entity. (b) The Hardy Parties represent and warrant that they have not assigned, transferred, encumbered, granted a security interest in, or conveyed the Hardy Claims or any interest therein to any person or entity.

6. Trustee's Administration of the Estate. The Hardy Parties agree and consent that the Trustee shall have no obligation to administer assets or seek recoveries for the purpose of payment of the Subordinated Claim except as the same may be incidental to the administration of the estate for the benefit of other creditors. The Trustee shall have no obligation to file, join as a party, or prosecute any action that may be assigned to the Hardy Parties pursuant to this Agreement, but reserves the right to do so upon request of the Hardy Parties. The Hardy Parties agree, absent the Trustee's consent, not to join the Trustee as a party to any action that may be assigned to the Hardy Parties pursuant to this Agreement.

7. Assignment of Assets, Claims and Causes of Action to the Hardy Parties. Upon the Effective Date, the Trustee shall assign, transfer and convey to the Hardy Parties any and all assets of the Estate (including assets that become or are determined

to be property of the Estate after the Effective Date) other than the Settlement Amount (the "Estate Assets") and any and all claims and causes of action of or available to the Trustee or the Estate (the "Estate Claims"), including without limitation any claims and causes of action arising out of Chapter 5 of the Bankruptcy Code or under Utah Code Ann. § 25-6-1 et seq. and any and all rights to seek substantive consolidation of any other entity with the Debtor. Notwithstanding the foregoing, in the event the Hardy Parties recover any money solely as a result of the assertion of any of the Estate Claims, they agree to pay five percent (5%) of the net amount of such recovery (i.e., net of any attorney fees, expert witness fees and other expenses incurred in prosecuting any of the Estate Claims): (a) to the Trustee if this Case remains open at the time of the recovery or (b) if this Case has been closed, to the holders of allowed unsecured claims in the Case in proportion to the allowed amounts of such claims to the extent such claims have not been paid in full, but the Hardy Parties shall not be required to pay more than the allowed amount of any such claim.

8. Representations and Warranties. (a) The Trustee represents and warrants that he has not assigned, transferred, encumbered, granted a security interest in, or conveyed the Estate Assets or any interest therein to any person or entity. (b) Notwithstanding anything to the contrary in this Agreement and except as provided in section 8(a) above, the Estate Assets will be transferred "as is," "where is," and "if is" in all respects; neither the Trustee nor any of his agents, attorneys, or representatives have made or makes any warranty or representation whatsoever regarding the Estate Claims, or any other matter in any way related to the Estate Claims, including, but not limited to, title to the Estate Claims, use, value, or any other condition of the Estate

Claims. The Hardy Parties agree that they are not relying on and hereby specifically waive any claim of liability based on any statement, representation, warranty, promise, covenant, or undertaking by the Trustee or any other person representing or purporting to represent the Trustee in connection with the transfer of the Estate Claims, BY SIGNING BELOW, EXCEPT AS PROVIDED IN SECTION 8(a) ABOVE, THE HARDY PARTIES EXPRESSLY DISCLAIM ALL REPRESENTATIONS AND WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, IN CONNECTION WITH THE TRANSFER OF THE ESTATE CLAIMS, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

9. Cooperation. The Trustee and the Hardy Parties agree to cooperate in seeking the following relief and executing any additional documents that are reasonably required to carry out the provisions of this Agreement. The Parties recognize that the outcome of litigation cannot be guaranteed (hence the failure to obtain any of the following relief described in this paragraph shall not constitute a breach of this Agreement), and the Parties shall not be required to expend unlimited or unreasonable amounts of attorneys' fees to obtain such relief specified or its reasonable equivalent:

A. In removed adversary proceedings pending under case numbers 13-2399 and 13-2400, the Hardy Parties and the Trustee will stipulate to: (i) an order directing the Clerk of the Third District Court to disburse \$400,000 from the proceeds of the Tooele Property to the Trustee and to disburse the remainder of the funds held in connection with either of those proceedings to Prince, Yeates & Geldzahler in trust for the Hardy Parties and (ii) an order remanding those proceedings to Utah state courts. Upon remand, the Hardy Parties and the Trustee will likewise stipulate to the

disbursement of the funds held in connection with those proceedings consistent with this Agreement (as provided in Section 9.A(l) above).

B. In connection with the pending appeal by the Hardy Parties from the Guaranty Case, the Trustee and the Hardy Parties will stipulate to the entry of a consent order by the Court of Appeals reversing the order granting summary judgment in favor of the Debtor and remanding the case (with the remaining aspects of the appeal being dismissed).

C. Upon remand of the Guaranty Case from the Court of Appeals, the Hardy Parties and the Trustee will stipulate to entry of a judgment against the Debtor in the amount of \$2,610,000.00 consistent with the terms of this Agreement (provided that notwithstanding anything in this Agreement to the contrary, the stipulated judgment shall remain subordinated to all other allowed claims for purposes of the Case).

D. The Trustee and the Hardy Parties will share between them any documents obtained from the Debtor or any third parties (subject to any confidentiality obligations the Parties may have) regarding the Debtor's financial affairs. In addition, the Party for whose primary benefit the relief above is sought shall be required to perform the work required to seek such relief, but each Party shall be responsible for his/its attorneys fees and costs associated with seeking the relief.

E. The Hardy Parties shall cooperate with the Trustee in seeking the disallowance of any claim against the Estate (other than the Subordinated Claim).

10. Relief from Automatic Stay. The Parties stipulate to an order of the Court granting the following relief from the automatic stay, the granting of which relief is a condition to this Agreement:

A. Modification of the automatic stay to allow the prosecution of the claims in the proceedings pending under case numbers 13-2399 and 13-2400, including prosecution thereof following remand, for any purpose other than collecting money from the Estate or the Debtor and to allow the Third District Court to enter findings of fact and conclusions of law in the contempt proceeding for which an evidentiary hearing was conducted in August 2013.

B. Modification of the automatic stay to allow the Utah Court of Appeals to take the action described in Section 9.B above or any other action it deems appropriate in that appeal.

C. Modification of the automatic stay to allow the entry of the judgment described in Section 9.C above.

D. Modification of the automatic stay to allow the Hardy Parties to pursue any previously asserted or other claim for avoidance and recovery of any alleged pre-petition fraudulent transfer as against the Debtor's wife or any other transferee of the Debtor's property, including subsequent transferees, and any person for whose benefit a transfer was made.

11. Effective Date. As used in this Agreement, the "Effective Date" shall mean the date the Settlement Amount other than the Lake Forest Account is paid in full to the Trustee.

12. Bankruptcy Court Approval, the Lexon Settlement, and Occurrence of the Effective Date. The Parties hereby acknowledged and agree that this Agreement is subject to the approval of the Court. If the Court does not approve this Agreement and also the companion Settlement Agreement between the Lexon Parties and the Trustee

(the "Lexon Agreement") on or before July 15, 2014, or if the Effective Date does not occur on or before September 30, 2014, the terms and conditions of this Agreement shall be null and void, the Parties shall retain all of their respective rights and claims, and nothing contained herein shall be deemed a waiver of any rights or remedies of the Parties nor an acknowledgement by any of the Parties as to the respective rights and claims as provided for herein or otherwise. The Parties reserve the right to extend either or both of the dates specified in this section by mutual consent.

13. Lexon Counterclaims. Effective upon the Effective Date, the Hardy Parties assign to the Lexon Parties without warranty or representation any and all interest in any counterclaim of the Debtor or the PSP in the litigation filed by the City of Saratoga Springs on October 6, 2011 against the Debtor, the PSP, and the Lexon Parties (as defined in the Lexon Agreement), known as *City of Saratoga Springs v. Rindlesbach, et al.*, Civil No. 110402838, pending in the Fourth Judicial Court for Utah County (the "Saratoga Springs Litigation"). The Hardy Parties and the Trustee agree not to oppose the motion for relief from stay that has been filed by the City of Saratoga Springs to allow that litigation to proceed to conclusion.

14. Subject to Fed. R. Evid. 408. The Parties agree that this Agreement is entitled to the protections of Rule 408 of the Federal Rules of Evidence.

15. No Admission of Liability. The Parties agree that neither the acceptance of, nor the performance of any obligations under this Agreement shall constitute or be construed as an admission of liability or fault by any of the Parties.

16. Entire Agreement. This Agreement embodies the entire agreement and understanding between the Parties with respect to the subject matter hereof and

supersedes all prior oral or written agreements and understandings relating to the subject matter hereof. No statement, representation, warranty, covenant or agreement of any kind not expressly set forth in this Agreement shall affect, or be used to interpret, change or restrict, the express terms and provisions of this Agreement.

17. Modifications and Amendments. The terms and provisions of this Agreement may be modified or amended only by a written agreement executed by all Parties.

18. Waivers and Consents. Any term or provision of this Agreement may be waived, or consent for the departure therefrom granted, only by a written document executed by the party entitled to the benefit of such term or provision. No such waiver or consent shall be deemed to be or shall constitute a waiver or consent with respect to any other term or provision of this Agreement. Each such waiver or consent shall be effective only in the specific instance and for the purpose for which it was given, and shall not constitute a continuing waiver or consent.

19. Benefit. All statements, representations, warranties, covenants and agreements in this Agreement shall be binding on the Parties and shall inure to the benefit of the respective successors and permitted assigns of each party hereto. Nothing in this Agreement shall be construed to create any rights or obligations except among the Parties, and no person or entity shall be regarded as a third-party beneficiary of this Agreement.

20. Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall be construed in accordance with and governed by the laws of the State of Utah, without giving effect to the conflict of law principles thereof.

21. Retention of Jurisdiction. The Court shall retain jurisdiction to adjudicate any controversy, dispute or claim arising out of or in connection with this Agreement, or the breach, termination or validity hereof.

22. Headings and Captions. The headings and captions of the various subdivisions of this Agreement are for convenience of reference only and shall in no way modify, or affect the meaning or construction of any of the terms or provisions hereof.

23. No Waiver of Rights, Powers and Remedies. No failure or delay by a party hereto in exercising any right, power or remedy under this Agreement, and no course of dealing between the Parties hereto, shall operate as a waiver of any such right, power or remedy of the party. No single or partial exercise of any right, power or remedy under this Agreement by a party hereto, nor any abandonment or discontinuance of actions to enforce any such right, power or remedy, shall preclude such party from any other or further exercise thereof or the exercise of any other right, power or remedy hereunder. The election of any remedy by a party hereto shall not constitute a waiver of the right of such party to pursue other available remedies. No notice to or demand on a party not expressly required under this Agreement shall entitle the party receiving such notice or demand to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the party giving such notice or demand to any other or further action in any circumstances without such notice or demand.

24. Counterparts. This Agreement may be executed in one or more counterparts, and by different Parties hereto on separate counterparts, each of which

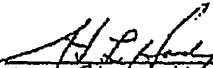
shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have signed this Agreement as of the date first above written.




Phillip G. Jones, Chapter 7 Trustee of the
Estate of Mark L. Rindlesbach


The Ruth B. Hardy Revocable Trust

By: 
Name: Steven L. Hardy
Title: Trustee

Delcon Corporation Profit Sharing Plan
Ibo A. Wesley Hardy

By: 
Name: Steven L. Hardy
Title: Trustee

Finesse P.S.P.

By: 
Name: Steven L. Hardy
Title: Trustee

MJS Real Properties, LLC

By: _____
Name:
Title:

shall be deemed an original, part of which together shall constitute one and the same
instrument.

IN WITNESS WHEREOF, the Parties have signed this Agreement as of the date
first above written.

Philip G. Jones, Chapter 7 Trustee of the
Estate of Mark L. Rindfleisch

The Ruth B. Hardy Revocable Trust

By: _____
Name:
Title:

Deacon Golparian Profit Sharing Plan
Rio A. Wesley Hardy

By: _____
Name:
Title:

Pinegro P.S.P.

By: _____
Name:
Title:

MJS Real Properties, LLC

By: [Signature]
Name:
Title:

Unish Investments, LLC

By: [Signature]
Name:
Title: Unish Investments

David D. Smith, individually

Steven Condit, individually

David L. Johnson, individually

Baird PSP

By: _____
Name:
Title:

VW Professional Hubbs PSP

By: _____
Name:
Title:

Ty Thomas, individually

D.R.P. Management PSP

By: [Signature]
Name:
Title: Trustee

Uintah Investments, LLC

By: _____
Name: _____
Title: _____


David D. Smith, Individually

Steven Condie, individually

David L. Johnson, Individually

Berrett PSP

By: _____
Name: _____
Title: _____

VW Professional Homes PSP

By: _____
Name: _____
Title: _____

Ty Thomas, Individually

D.R.P. Management PSP

By: _____
Name: _____
Title: _____

Uintah Investments, LLC

By: _____
Name: _____
Title: _____

David D. Smith, Individually



Steven Condie, Individually

David L. Johnson, Individually

Berrett PSP

By: _____
Name: _____
Title: _____

VW Professional Homes PSP

By: _____
Name: _____
Title: _____

Ty Thomas, Individually

D.R.P. Management PSP

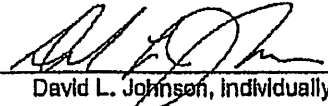
By: _____
Name: _____
Title: _____

Utah Investments, LLC

By: _____
Name: _____
Title: _____

David D. Smith, Individually

Steven Condie, Individually



David L. Johnson, Individually

Borrett PSP

By: _____
Name: _____
Title: _____

VW Professional Homes PSP

By: _____
Name: _____
Title: _____

Ty Thomas, Individually

D.R.P. Management PSP

By: _____
Name: _____
Title: _____

Unish Investments, LLC

By: _____
Name:
Title:

David O. Smith, individually

Gleason Gendia, individually

David L. Johnson, individually

Barnett PSP

By: _____
Name:
Title:

VW Professional Services, PSP

By: _____
Name:
Title:

Ty Thomas, individually

D.H.A. Management PSP

By: _____
Name:
Title:

Uintah Investments, LLC

By: _____
Name: _____
Title: _____

David D. Smith, Individually

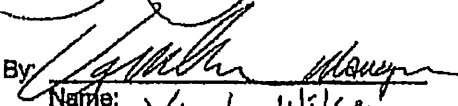
Steven Condle, Individually

David L. Johnson, Individually

Barrett PSP

By: 
Name: _____
Title: _____

VW Professional Homes PSP

By: 
Name: _____
Title: Vaughn Wilson
Manager

Ty Thomas, Individually

D.R.P. Management PSP

By: _____
Name: _____
Title: _____

SETTLEMENT AGREEMENT

This Settlement Agreement (this "Agreement") is made as of May 2, 2014, by and among Philip G. Jones (the "Trustee"), in his capacity as Chapter 7 Trustee of the bankruptcy estate of Mark Rindlesbach (the "Debtor"), and Lexon Surety Group, LLC, Bond Safeguard Insurance Company, and Lexon Insurance Company (collectively, the "Lexon Parties").

BACKGROUND

Whereas, on September 13, 2013, the Debtor filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Utah (the "Court"), commencing case number 13-30552 (the "Case");

Whereas, by Order of the Court dated January 13, 2014, the Case was converted to one under Chapter 7 of the Bankruptcy Code, and the Trustee was appointed as the Chapter 7 Trustee of the Debtor's bankruptcy estate (the "Estate");

Whereas, Lexon has filed Claim No. 15-1 in the Case, asserting an unsecured claim in the amount of \$2,097,194.10 (the "Lexon Proof of Claim");

Whereas, the Trustee disputes aspects of the Lexon Proof of Claim, and in particular aspects of the Lexon Proof of Claim are contingent upon future events, and hence portions of the Lexon Proof of Claim may be subject to objection under Bankruptcy Code § 502(e).

Whereas, mutually desiring to avoid the burdens, risks and expenses of potential litigation between themselves, the Parties have entered into this Agreement to facilitate a full and final resolution and settlement of the matters described above and to fully and finally resolve and settle any and all disputes between and among themselves;

Whereas, the Trustee has considered the benefit to the Estate and creditors that will be received as a result of the settlement of these matters, particularly in light of the costs, uncertainties and risks of further litigation, and has concluded that the settlement contained herein is (i) fair and equitable, (ii) a reasonable resolution of the Parties' disputes, (iii) in the best interests of the the Estate and its creditors.

NOW, THEREFORE, for good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1. Allowance and Agreed Reduction of Lexon Proof of Claim. The Parties agree that the Lexon Proof of Claim shall be allowed in a reduced amount which is the greater of (a) \$350,000, or (b) the sum of all allowed claims against the Estate (other than the subordinated claim of the Hardy Parties) multiplied by 85%, up to a maximum amount of \$930,000 (the "Allowed Claim"). The Lexon Proof of Claim shall be disallowed to the extent it exceeds the Allowed Claim. In the event of (i) either (a) a judicial determination that the Debtor and the Rindlesbach Construction Inc. Profit Sharing Plan (the "PSP") are alter egos; or (b) the substantive consolidation of the PSP with the Debtor, and (ii) Stone River Falls or any of its affiliates or principals re-files a proof of claim, then the remainder of the Lexon Proof of Claim shall not be disallowed, subject to further objection by the Trustee.

2. Release by Trustee. On the Effective Date, the Trustee, for himself and on behalf of the Debtor and the Estate (the "Debtor Releasers"), shall be deemed to have fully, finally and forever released and discharged the Lexon Parties (and their respective officers, directors, shareholders, attorneys, agents, successors, and assigns) of and from any and all claims, counterclaims, crossclaims, actions, causes of action,

suits, contracts, covenants, agreements, promises, trespasses, debts, dues, demands, accounts, bonds, bills, notices, controversies, obligations, liabilities, damages, judgments, executions, liens, encumbrances, claims for contribution and indemnity, losses, costs or expenses of any nature whatsoever, in law or in equity, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, matured or unmatured, which any of the Debtor Releasors at anytime had, owned or held from the beginning of the world through the date of this Agreement against any of the Lexon Parties by reason of any matter, cause, fact, thing, act or omission whatsoever arising out of, based upon, or relating to any matter or event whatsoever, past or present (except for any obligations arising under this Agreement) (all of the foregoing are hereinafter collectively referred to as the "Debtor Claims"). On and after the Effective Date, the Trustee hereby irrevocably waives the right to commence, institute or prosecute any lawsuit, action or other proceeding against the Lexon Parties relating to, arising from or in connection with the Debtor Claims or the Case.

3. Release By Lexon Parties. On the Effective Date, the Lexon Parties shall be deemed to have fully, finally and forever released and discharged the Trustee and the Estate, and all attorneys and accountants retained by the Trustee (the "Lexon Releasees") of and from any and all claims, counterclaims, crossclaims, actions, causes of action, suits, contracts, covenants, agreements, promises, trespasses, debts, dues, demands, accounts, bonds, bills, notices, controversies, obligations, liabilities, damages, judgments, executions, liens, encumbrances, claims for contribution and indemnity, losses, costs or expenses of any nature whatsoever, in law or in equity, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, matured or unmatured, which any of the Lexon Parties at anytime had,

owned or held from the beginning of the world through the date of this Agreement against any of the Lexon Releasees by reason of any matter, cause, fact, thing, act or omission whatsoever (except for any obligations arising under this Agreement and the Allowed Claim) (all of the foregoing are hereinafter collectively referred to as the "Lexon Claims"). On and after the Effective Date, the Lexon Parties hereby waive the right to commence, institute or prosecute any lawsuit, action or other proceeding against the Lexon Releasees relating to, arising from or in connection with the Lexon Claims or the Case. Notwithstanding anything in this Agreement to the contrary, the Lexon Parties may pursue any affiliate or party related to the Debtor (such as MLR Enterprises, L.C.) and any property of any such entity to satisfy the outstanding obligations owed to the Lexon Parties. Moreover, the Trustee stipulates that the bankruptcy automatic stay does not preclude the Lexon Parties from pursuing claims against non-debtor entities as described in the preceding sentence, and the Trustee will stipulate to relief from the automatic stay to the extent necessary to permit the Lexon Parties to pursue claims against non-debtor entities.

4. No Assignment. (a) The Trustee represents and warrants that he has not assigned, transferred, encumbered, granted a security interest in, or conveyed the Debtor Claims to any person or entity. (b) The Lexon Parties represent and warrant that they have not assigned, transferred, encumbered, granted a security interest in, or conveyed the Lexon Claims to any person or entity. The Lexon Parties further represent and covenant (for the benefit of all creditors in the Case) that they will not seek substantive consolidation of the PSP with the Debtor or assert any claim that the Debtor and the PSP are alter egos.

5. Bankruptcy Court Approval, the Hardy Parties Settlement, and Occurrence of the Effective Date. The Parties hereby acknowledged and agree that this Agreement is subject to the approval of the Court. To the extent that the Court does not approve the Agreement and also the companion Settlement Agreement between the Hardy Parties and the Trustee (the "Hardy Parties Settlement Agreement") on or before July 15, 2014, or if the Effective Date does not occur on or before September 30, 2014, the terms and conditions of this Agreement shall be null and void, the Parties shall retain all of their respective rights and claims, and nothing contained herein shall be deemed a waiver of any and all rights and remedies of the Parties nor an acknowledgement by any of the Parties as to the respective rights and claims as provided for herein or otherwise.

6. Effective Date. As used in this Agreement, the "Effective Date" shall have the meaning ascribed that term in the Hardy Parties Settlement Agreement.

7. Assignment of Certain Claims. On the Effective Date, the Lexon Parties shall assign and transfer to the Trustee, without representation or warranty of any kind, all causes of action asserted in Lexon Surety Group, LLC, et al. v. Brenda Rindlesbach, Case No. 130907362, pending in the Third Judicial District Court, Salt Lake County, excepting the Third, Sixth and Seventh Causes of Action, which the Lexon Parties shall retain in their entirety, and excepting the Eighth Cause of Action insofar as it relates to Property No. 14 (land in West Valley City titled in the name of MLR Enterprises, L.C.).

8. Subject to Fed. R. Evid. 408. The Parties agree that this Agreement is entered into pursuant to, and entitled to the protections of, Rule 408 of the Federal Rules of Evidence.

9. No Admission of Liability. The Parties agree that neither the acceptance of, nor the performance of any obligations under this Agreement shall constitute or be construed as an admission of liability or fault by any of the Parties.

10. Entire Agreement. This Agreement embodies the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes all prior oral or written agreements and understandings relating to the subject matter hereof. No statement, representation, warranty, covenant or agreement of any kind not expressly set forth in this Agreement shall affect, or be used to interpret, change or restrict, the express terms and provisions of this Agreement.

11. Modifications and Amendments. Except as set forth in paragraph 17 below, the terms and provisions of this Agreement may be modified or amended only by a written agreement executed by all Parties.

12. Waivers and Consents. The terms and provisions of this Agreement may be waived, or consent for the departure therefrom granted, only by a written document executed by the party entitled to the benefits of such terms or provisions. No such waiver or consent shall be deemed to be or shall constitute a waiver or consent with respect to any other terms or provisions of this Agreement. Each such waiver or consent shall be effective only in the specific instance and for the purpose for which it was given, and shall not constitute a continuing waiver or consent.

13. Benefit. All statements, representations, warranties, covenants and agreements in this Agreement shall be binding on the Parties and shall inure to the benefit of the respective successors and permitted assigns of each party hereto. Nothing in this Agreement shall be construed to create any rights or obligations except

among the Parties, and no person or entity shall be regarded as a third-party beneficiary of this Agreement.

14. Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall be construed in accordance with and governed by the law of the State of Utah, without giving effect to the conflict of law principles thereof.

15. Retention of Jurisdiction. The Court shall retain exclusive jurisdiction to adjudicate any controversy, dispute or claim arising out of or in connection with this Agreement, or the breach, termination or validity hereof.

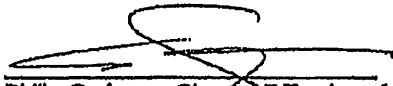
16. Headings and Captions. The headings and captions of the various subdivisions of this Agreement are for convenience of reference only and shall in no way modify, or affect the meaning or construction of any of the terms or provisions hereof.

17. No Waiver of Rights, Powers and Remedies. No failure or delay by a party hereto in exercising any right, power or remedy under this Agreement, and no course of dealing between the Parties hereto, shall operate as a waiver of any such right, power or remedy of the party. No single or partial exercise of any right, power or remedy under this Agreement by a party hereto, nor any abandonment or discontinuance of actions to enforce any such right, power or remedy, shall preclude such party from any other or further exercise thereof or the exercise of any other right, power or remedy hereunder. The election of any remedy by a party hereto shall not constitute a waiver of the right of such party to pursue other available remedies. No notice to or demand on a party not expressly required under this Agreement shall entitle the party receiving such notice or demand to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the party

giving such notice or demand to any other or further action in any circumstances
without such notice or demand.

18. Counterparts. This Agreement may be executed in one or more
counterparts, and by different Parties hereto on separate counterparts, each of which
shall be deemed an original, but all of which together shall constitute one and the same
instrument.

IN WITNESS WHEREOF, the Parties have signed this Agreement as of
the date first above written.

By: 
Phillip G. Jones, Chapter 7 Trustee of the
Estate of Mark L. Rindlesbach
Lexon Surety Group, LLC

By: 
Name: Michael Belinski
Title: Collections Attorney

Bond Safeguard Insurance Company

By: 
Name: Michael Belinski
Title: Collections Attorney

Lexon Insurance Company

By: 
Name: Michael Belinski
Title: Collections Attorney

EXHIBIT 3

**Transcript of July 2, 2014 Hearing Before the
Honorable Judge Joel T. Marker, United States
Bankruptcy Court, District of Utah,
Case No. 13-30552**

IN THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF UTAH

13-30552 (dlg)

IN THE MATTER OF:) CIVIL NO. ~~13-30522~~ →
)
MARK LEE RINDLESBACH,) COURT HEARING
)
Debtor.) JUDGE JOEL T. MARKER
)
) HEARING ON MOTION FOR
) ORDER APPROVING
) SETTLEMENT BETWEEN
) TRUSTEE AND LEXON PARTIES
) AND MOTION FOR ORDER
) APPROVING SETTLEMENT
) BETWEEN TRUSTEE AND
) HARDY PARTIES

TRANSCRIPTION OF ELECTRONICALLY RECORDED PROCEEDINGS

HELD JULY 2, 2014

1:31 P.M.

* * *

RENEE L. STACY
Registered Professional Reporter
Certified Realtime Reporter

RECEIVED
DISTRICT CLERK
U.S. BANKRUPTCY COURT
DISTRICT OF UTAH
SALT LAKE CITY

2014 NOV 12 PM 2:03

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DISTRICT CLERK
U.S. BANKRUPTCY COURT
DISTRICT OF UTAH
SALT LAKE CITY

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DEPOMAXMERIT
LITIGATION SERVICES

333 SOUTH RIO GRANDE
SALT LAKE CITY, UTAH 84101
WWW.DEPOMAXMERIT.COM

TOLL FREE 800-337-6629
PHONE 801-328-1188
FAX 801-328-1189

• A TRADITION OF QUALITY •

135

A P P E A R A N C E S

FOR THE HARDY
TRUST, ET AL.:

JAMES SWINDLER
Attorney at Law

FOR RINDLESBACH:

PAUL TOSCANO
PETER GUYON
Attorneys at Law

FOR LEXON SURETY
GROUP:

DAVID PINKSTON
Attorney at Law
SNOW CHRISTENSEN & MARTINEAU
9 Exchange Place
11th Floor
Salt Lake City, UT 84111

FOR THE TRUSTEE:

GEORGE HOFMANN
Attorney at Law

FOR BENNETT TUELLER
AND RINDLESBACH
CONSTRUCTION PROFIT
SHARING PLAN:

JAMES K. TRACY
Attorney at Law
BENNETT TUELLER JOHNSON & DEERE
3165 Millrock Drive
Suite 500
Salt Lake City, UT 84121-5027

I N D E X

Witness: Philip Jones

Direct Examination by Mr. Hofmann. 33
 Cross-Examination by Mr. Toscano 57

Witness: James Swindler

Direct Examination by Mr. Hofmann. 88
 Cross-Examination by Mr. Toscano 101

Witness: James Tracy

Direct Examination by Mr. Toscano. 116

E X H I B I T S

| <u>Exhibit No.</u> | <u>Received</u> |
|--------------------|-----------------|
| 1, 2, 3, 7-27 | 38 |
| D | 61 |
| A | 83 |
| B | 84 |
| C | 84 |
| E | 85 |
| 5 | 92 |
| 4 | 98 |

1 deadline of December 16th, 2013. The conversion
2 order to a Chapter 7 was docketed on January 13th,
3 2014, and the Chapter 7 deadline for 523 and 727
4 objections was April 28th, 2014.

5 The trustee has received several
6 extensions, Docket Numbers 173, 261, and 303. We
7 reviewed those. Those are specifically limited to a
8 727 action by the trustee, so -- so, Mr. Toscano, I'm
9 speaking for your benefit. I know some of the
10 concerns you have about what's going on here is, "How
11 is this going to impact my client after this?"

12 As I view it, the Hardy parties have no --
13 assuming Mr. Rindlesbach gets a discharge -- the
14 trustee doesn't file a 727 or the trustee does and
15 doesn't prevail -- the Hardy parties have no claim
16 against him, and --

17 MR. HOFMANN: Have a claim, it would be
18 discharged.

19 THE COURT: Correct.

20 MR. HOFMANN: The settlement's approved.

21 THE COURT: I agree with that. If the
22 settlement's approved, then he gets a general
23 discharge. The Hardy parties cannot, for example,
24 file a 523 action at this point. They are -- that
25 claim is barred. So I want to make sure you

1 understand that's what I believe has happened in this
2 case thus far, and that might address some of the
3 concerns you have about what the heck is going on
4 here and what's going to happen if the settlement is
5 approved.

6 I had some of the same concerns, so I hope
7 we flesh this out as we go along.

8 But then the other issues, Mr. Hofmann, I
9 want you to explain to me are paragraphs 9(b) and (c)
10 and 10(a). What are the effect of those provisions,
11 what are the purpose, and especially on 10(a), the
12 contempt proceeding, which, as I reviewed again
13 Mr. Rindlesbach's objection, he didn't even say
14 anything about that, but I don't know why it's there,
15 and I'm concerned about it, so --

16 MR. HOFMANN: Well --

17 THE COURT: So -- you don't need to respond
18 now.

19 MR. HOFMANN: Sure.

20 THE COURT: I'm just -- you can, if you
21 want to make an opening, go through those things, but
22 that's something I need addressed. I just wanted to
23 mention it up front so that we didn't miss it and
24 have to go back through it again afterwards, all
25 right?

1 MR. HOFMANN: Understood.

2 THE COURT: All right. Anything else? All
3 right. Mr. Hofmann, please proceed.

4 MR. HOFMANN: Let me first ask if our --
5 the colloquy we just had adequately addressed your
6 concerns about the statement that you highlight,
7 "each of which shall constitute a binding obligation
8 that the debtor owed to the Hardy parties." I think
9 I -- you understand the trustee's position on that,
10 that if --

11 THE COURT: I don't, so please explain it.

12 MR. HOFMANN: Okay. So the trustee's
13 belief is that -- assume that -- for a moment the
14 trustee does not file a 727 cause of action against
15 the debtor, which is entirely possible. If that's
16 the case, the debtor would receive a general
17 discharge. If the Court approves the settlement in
18 that fact scenario, the debtor would have the
19 obligation that the trustee had agreed to, but that
20 obligation would be discharged, and so action could
21 not be taken, obviously, in violation of the
22 discharge injunction.

23 Does that satisfy the Court on that
24 particular point?

25 THE COURT: Well, at some point, whether

EXHIBIT 4

Notice of Discharge

United States Bankruptcy Court

District of Utah

Case No. 13-30552

Chapter 7

In re: Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Mark Lee Rindlesbach
2489 East Haven Lane
Salt Lake City, UT 84117

Social Security No.:

xxx-xx-4068

Employer's Tax I.D. No.:

Petition date: 9/13/13

DISCHARGE OF DEBTOR(S)

It appearing that the debtor(s) is entitled to a discharge,

IT IS ORDERED:

The debtor(s) is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

BY THE COURT

Dated: 7/30/14

Joel T. Marker
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.