

2016

**Zb, n.a. D/B/a Zions First National Bank, Plaintiff and Appellee, v.
Shayne D. Crapo, Defendant and Appellant**

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZB, N.A. d/b/a ZIONS FIRST NATIONAL
BANK,

Plaintiff and Appellee,

vs.

SHAYNE D. CRAPO,

Defendant and Appellant.

Case No. 20160218-SC

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court of
Salt Lake County
The Honorable Barry Lawrence

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The caption of this brief contains the names of all parties to the proceeding before the district court.

TABLE OF CONTENTS

| | |
|--|----|
| <u>STATEMENT OF JURISDICTION</u> | 1 |
| <u>STATEMENT OF ISSUE PRESENTED FOR REVIEW</u> | 1 |
| <u>DETERMINATIVE PROVISIONS</u> | 1 |
| <u>STATEMENT OF FACTS</u> | 3 |
| <u>SUMMARY OF ARGUMENTS</u> | 9 |
| <u>ARGUMENT</u> | 12 |
| I. CRAPO DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO AN ESTOPPEL DEFENSE. | 12 |
| A. The 1099-C Was Not Evidence of Inconsistent Conduct. | 13 |
| B. Crapo Did Not Present Other Evidence That Zions Acted Inconsistently.. 15 | |
| C. Crapo Did Not Present Evidence of Reasonable Reliance on an Inconsistent Act or Omission. | 19 |
| D. Crapo Did Not Present Evidence of the Fact of His Injury, Let Alone the Amount. | 22 |
| II. CRAPO DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO WHETHER ZIONS ACTUALLY EFFECTED A DISCHARGE OF CRAPO’S OBLIGATIONS UNDER THE NOTE. | 25 |
| <u>REQUEST FOR ATTORNEYS’ FEES ON APPEAL</u> | 28 |
| <u>CONCLUSION</u> | 29 |
| <u>CERTIFICATE OF COMPLIANCE</u> | 30 |

TABLE OF AUTHORITIES

CASES

| | |
|---|--------|
| <i>Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization</i> , 2012 UT 4, 270 P.3d 441 | 16 |
| <i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158 | 1, 19 |
| <i>Bolitho v. East</i> , 143 P. 584 (Utah 1914) | 23 |
| <i>Bononi v. Bayer Employees Fed. Credit Union (In re Zilka)</i> , 407 B.R. 684 (Bankr. W.D. Pa. 2009) | 15, 19 |
| <i>CECO Corp. v. Concrete Specialists, Inc.</i> , 772 P.2d 967 (Utah 1989) | 13, 15 |
| <i>Coulter & Smith Ltd. v. Russell</i> , 1999 UT App 55 15 , 976 P.2d 1218 | 26 |
| <i>Federal Deposit Ins. Corp. v. Cashion</i> , 720 F.3d 169 (4th Cir. 2013) | 15 |
| <i>First Inv. Co. v. Andersen</i> , 621 P.2d 683 (Utah 1980) | 17 |
| <i>Franklin Credit Mgmt. Corp. v. Nicholas</i> , 812 A.2d 51 (Conn. Ct. App. 2002) | 27 |
| <i>Gold Standard, Inc. v. Getty Oil Co.</i> , 915 P.2d 1060 (Utah 1996) | 20, 22 |
| <i>Hahnel v. Duchesne Land, LC</i> , 2013 UT App 150, 305 P.3d 208 | 28 |
| <i>Hillsboro Nat. Bank v. C.I.R.</i> , 460 U.S. 370 (1983) | 19 |
| <i>I.X.L. Stores Co. v. Success Markets</i> , 97 P.2d 577 (1939) | 23 |
| <i>In re Riley</i> , 478 B.R. 736 (Bankr. D.S.C. 2012) | 15 |
| <i>Long v. Turner</i> , 134 F.3d 312 (5th Cir. 1998) | 24 |
| <i>Ogar v. City of Haines</i> , 51 P.3d 333 (Alaska 2002) | 23 |
| <i>Overstock.com, Inc. v. SmartBargains, Inc.</i> , 2008 UT 55, 192 P.3d 858 | 1 |
| <i>Perkins v. Great-W. Life Assur. Co.</i> , 814 P.2d 1125 (Utah Ct. App. 1991) | 21 |
| <i>Prince, Yeates & Geldzahler v. Young</i> , 2004 UT 26, 94 P.3d 179 | 26 |

| | |
|---|------------|
| <i>RJW Media, Inc. v. CIT Grp./Consumer Fin., Inc.</i> , 2008 UT App 476, 202 P.3d 291 | 20 |
| <i>Ross v. Epic Eng'g, PC</i> , 2013 UT App 136, 307 P.3d 576 | 1 |
| <i>Rothey v. Walker Bank & Trust Co.</i> , 754 P.2d 1222 (Utah 1988) | 16 |
| <i>Salt Lake City Corp. v. Big Ditch Irrigation Co.</i> , 2011 UT 33, 258 P.3d 539 | 13, 15, 23 |
| <i>Sell v. MBNA Am. Bank, N.A.</i> , 2007 UT App 316, 2007 WL 2793249 | 18, 19 |
| <i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944) | 14 |
| <i>Ware v. Bank of Am. Corp.</i> , 9 F. Supp. 3d 1329 (N.D. Ga. 2014) | 15 |
| <i>Whitaker v. Utah State Ret. Bd.</i> , 2008 UT App 282, 191 P.3d 814 | 23 |
| <i>Youngblood v. Auto-Owners Ins. Co.</i> , 2007 UT 28, 158 P.3d 1088 | 13 |

STATUTES

| | |
|--|--------|
| 26 U.S.C. § 166 | 18, 28 |
| 26 U.S.C. § 6511 | 24 |
| UTAH CODE ANN. § 25-5-4(1)(4) | 25 |
| UTAH CODE ANN. § 78A-4-103(2)(j) | 1 |

RULES

| | |
|--------------------------------|----|
| UTAH R. APP. P. 11(h) | 5 |
| UTAH R. CIV. P. 56(c)(1) | 16 |
| UTAH R. EVID. 1002 | 19 |

REGULATIONS

| | |
|--|-------------|
| 26 C.F.R. § 1.166-1 | 18, 28 |
| 26 C.F.R. § 1.6050P-1 | 2, 14, 1, 2 |
| IRS Info. 2005–0207, 2005 WL 3561135 (Dec. 30, 2005) | 14 |
| IRS Info. 2005–0208, 2005 WL 3561136 (Dec. 30, 2005) | 14 |
| Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903-01 (June 12, 2000) | 18 |
| UTAH R. EVID. 1002 | 8 |

OTHER AUTHORITIES

| | |
|--|----|
| RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981) | 26 |
|--|----|

STATEMENT OF JURISDICTION

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

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Given that Plaintiff and Appellee ZB, N.A. d/b/a Zions First National Bank (“**Zions**”) undisputedly loaned Defendant and Appellant Shayne D. Crapo (“**Crapo**”) \$250,000, and that Crapo failed to repay that loan, did Zions’ issuance of a mandatory tax report (Form 1099-C) raise a genuine issue of material fact to preclude judgment in favor of Zions?

This Court reviews the grant of a summary judgment motion for correctness. [Ross v. Epic Eng’g, PC](#), 2013 UT App 136, ¶ 13, 307 P.3d 576. “Although [courts] consider the facts in the light most favorable to the nonmoving party, to defeat a motion for summary judgment, any alleged issue of fact must be material.” [Overstock.com, Inc. v. SmartBargains, Inc.](#), 2008 UT 55, ¶ 12, 192 P.3d 858. Moreover, this Court may affirm the judgment below on any ground apparent from the record. [Bailey v. Bayles](#), 2002 UT 58, ¶ 13, 52 P.3d 1158.

DETERMINATIVE PROVISIONS

The following statutes, ordinances, rules, or regulations are determinative (in part) of this appeal:

1. [26 C.F.R. § 1.6050P-1](#)¹

(a) Reporting requirement—(1) In general. . . . [A]ny applicable entity . . . that discharges an indebtedness of any person . . . of at least \$600 during a calendar year must file an information return on Form 1099-C with the Internal Revenue Service. Solely for purposes of the reporting requirements of section 6050P and this section, a discharge of indebtedness is deemed to have occurred . . . if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, whether or not an actual discharge of indebtedness has occurred on or before the date on which the identifiable event has occurred.

* * *

(2) Identifiable events—(i) In general. An identifiable event is—

(A) A discharge of indebtedness under title 11 of the United States Code (bankruptcy);

(B) A cancellation or extinguishment of an indebtedness that renders a debt unenforceable in a receivership, foreclosure, or similar proceeding in a federal or State court . . . ;

(C) A cancellation or extinguishment of an indebtedness upon the expiration of the statute of limitations for collection of an indebtedness . . . ;

(D) A cancellation or extinguishment of an indebtedness pursuant to an election of foreclosure remedies by a creditor that statutorily extinguishes or bars the creditor's right to pursue collection of the indebtedness;

(E) A cancellation or extinguishment of an indebtedness that renders a debt unenforceable pursuant to a probate or similar proceeding;

¹ A copy of this provision is attached as **Addendum 1**.

(F) A discharge of indebtedness pursuant to an agreement between an applicable entity and a debtor to discharge indebtedness at less than full consideration;

(G) A discharge of indebtedness pursuant to a decision by the creditor, or the application of a defined policy of the creditor, to discontinue collection activity and discharge debt; or

(H) In the case of an entity described in section 6050P(c)(2)(A) through (C), the expiration of the non-payment testing period, as described in [§ 1.6050P-1\(b\)\(2\)\(iv\)](#).

* * *

(iv) Expiration of non-payment testing period. There is a rebuttable presumption that an identifiable event under paragraph (b)(2)(i)(H) of this section has occurred during a calendar year if a creditor has not received a payment on an indebtedness at any time during a testing period (as defined in this paragraph (b)(2)(iv)) ending at the close of the year. The testing period is a 36-month period increased by the number of calendar months during all or part of which the creditor was precluded from engaging in collection activity by a stay in bankruptcy or similar bar under state or local law.

STATEMENT OF FACTS

The facts of this case are simple and undisputed. On or about December 29, 2006, Crapo executed a Home Equity Line Credit Agreement and Disclosure (the “*Note*”), under which Crapo agreed to pay all credit advances.² That same day, Crapo drew upon the full amount of the line of credit, and Zions disbursed to Crapo the \$250,000 in loan proceeds.³

² R. at 233. A copy of the Note (R. at 284–292) is included as **Addendum 2**.

³ R. at 235.

The term of the Note was thirty (30) years, with monthly interest payments being due during the first ten years, and all principal and interest being amortized over the following twenty years.⁴ In the Note, Crapo expressly agreed that delay in enforcement would not constitute a waiver of Zions' right to enforce the Note:

Delay in Enforcement. We may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right. If we delay or waive our rights, we may enforce that right at any time in the future without advance notice. For example, not terminating your account for non-payment will not be a waiver of our right to terminate your account in the future if you have not paid.⁵

Crapo made payments on the Note sufficient to cover the accruing interest until September 2010, after which he defaulted.⁶ On or about October 20, 2010, Zions exercised its right to accelerate the entire balance of the Note.⁷ Crapo subsequently failed to make any further payments on the Note.⁸ On or about January 6, 2011, Zions created an internal "Charge Off Request," in which a Zions representative requested that Crapo's loan balance "be charged off due to the lack of collateral and transferred to [the] Recovery Department for further collection efforts."⁹ Crapo did not indicate that he ever received or relied on the Charge Off Request.¹⁰

⁴ Note at 1 (R. at 284; Addendum 2).

⁵ Note at 5 (R. at 288; Addendum 2).

⁶ R. at 235.

⁷ R. at 235.

⁸ R. at 236.

⁹ R. at 384, 428. While the copy of the document included in the record is illegible, the relevant language was quoted in the district court's ruling. Ruling at 10 (R. at 563; Addendum 5). Additionally, the relevant language is quoted in the Brief of Appellant at

By December 31, 2013, Crapo had not made any payments in the preceding 36-month period.¹¹ Accordingly, in January 2014, as mandated by IRS regulations, Zions issued a Form 1099-C (the “**1099-C**”) to Crapo.¹² The Form 1099-C contains several boxes of information, one of which is box 6, which requires the issuer to input an “identifiable event code” explaining the reason for issuance of the form.¹³ There are eight different codes available in the form, including several options indicating an actual discharge and one option indicating a debtor’s failure to make payments.¹⁴ In the 1099-C issued to Crapo, Zions indicated “H” in box 6 as the “identifiable event code.”¹⁵ The “Instructions for Debtor” section of the 1099-C explains that option “H” denotes the “Expiration of nonpayment testing period.”¹⁶ The IRS publication entitled *Instructions for Forms 1099-A and 1099-C* further explain code “H” as follows: “This event occurs when the creditor has not received a payment on the debt during the testing period. The testing period is a 36-month period ending on December 31, plus any time when the

4, ¶ 7. Further, Crapo’s Addendum 2 includes both the illegible copy included in the record, and a legible copy that was not in the record. Zions stipulates that the legible copy included as part of Crapo’s Addendum 2 may be considered part of the record on appeal. Cf. [UTAH R. APP. P. 11\(h\)](#) (“If anything material to either party . . . is omitted from the record by error [or] by accident . . . the parties by stipulation . . . may direct that the omission or misstatement be corrected.”).

¹⁰ R. at 384–385, 402–403.

¹¹ R. at 236.

¹² R. at 236. A copy of the 1099-C (R. at 308) is included as **Addendum 3**.

¹³ 1099-C (R. at 308; Addendum 3); R. at 236.

¹⁴ 1099-C (R. at 308; Addendum 3); R. at 462.

¹⁵ 1099-C (R. at 308; Addendum 3); R. at 462.

¹⁶ 1099-C (R. at 308; Addendum 3); R. at 236.

creditor was precluded from collection activity by a stay in bankruptcy or similar bar under state or local law.”¹⁷

Box 4 of the 1099-C is where the creditor indicates a “debt description.”¹⁸ Box 4 of the 1099-C issued to Crapo contains the phrase “FORGIVEN DEBT AMT 3 YRS NO PAYMENT.”¹⁹ This phrase appears in box 4 of the 1099-C not because of an actual forgiveness or discharge, but simply as another description of the expiration of the 36-month testing period without receipt of any payment.²⁰

In issuing the 1099-C, Zions had no intent to waive its claims against Crapo and did not intend the 1099-C to reflect any agreements or discussions with Crapo.²¹ Rather, the 1099-C was issued solely for purposes of complying with applicable tax regulations and was generated through automatic processes in place to ensure compliance with such regulations.²² Zions has never at any time taken any action to grant an actual release, forgiveness, or discharge of Crapo’s debt.²³ Further, there is no agreement, signed writing, or other indication in the books and records of Zions reflecting an actual release, forgiveness, or discharge of Crapo’s debt to Zions.²⁴ As a matter of policy, Zions does

¹⁷ See Instructions for Forms 1099-A and 1099-C at 4 (R. at 313). A copy of the Instructions for Forms 1099-A and 1099-C (R. at 310–315) is included as **Addendum 4**.

¹⁸ 1099-C (R. at 308; Addendum 3).

¹⁹ 1099-C (R. at 308; Addendum 3); R. at 463.

²⁰ 1099-C (R. at 308; Addendum 3); R. at 463.

²¹ R. at 236, 462.

²² R. at 236, 462.

²³ R. at 463.

²⁴ R. at 463.

not forgive, release, or discharge debts for reasons other than full payment except under exceptional circumstances, such as where a borrower is discharged in bankruptcy.²⁵

Citing language in the 1099-C, Crapo claims that a Form 1099-C is issued “when ‘an applicable financial entity (a lender) has discharged (cancelled or forgiven) a debt’ owed by the person who receives the form.”²⁶ However, Crapo’s statement conspicuously omits (without even using an ellipsis) the remainder of the quoted sentence, which states “. . . or because an *identifiable event* has occurred that either is or is deemed to be a discharge of a debt of \$600 or more.”²⁷ As noted above, one of the eight “identifiable events” that leads to the issuance of a Form 1099-C is the debtor’s failure to make a payment for 36 months.²⁸ Crapo also incorrectly claims that the 1099-C provided that “he was ‘required to include the discharged amount in [his] income’ and that a failure to do so would result in ‘a negligence penalty or other sanction.’”²⁹ However, Crapo’s description again misleadingly characterizes the 1099-C, which states: “If an identifiable event has occurred but the debt has not actually been discharged, then include any discharged debt in your income in the year that it is *actually* discharged . . .,”

²⁵ R. at 463.

²⁶ Brief of Appellant at 4, ¶ 10.

²⁷ 1099-C (R. at 308; Addendum 3) (emphasis added); R. at 462. Crapo included the same omission in his summary judgment opposition memorandum (R. at 385, ¶ 7), and Zions pointed out Crapo’s omission in its reply memorandum (R. at 458).

²⁸ Instructions for Forms 1099-A and 1099-C at 4 (R. at 313; Addendum 4).

²⁹ Brief of Appellant at 4, ¶ 12.

and that a penalty may be imposed only “if taxable income results from this transaction and the IRS determines that it has not been reported.”³⁰

In addition to Crapo’s incorrect statements regarding the 1099-C, Crapo also overstates the facts in the record concerning his reliance on the 1099-C. Contrary to Crapo’s suggestion, there is no admissible record evidence that he actually reported the discharged debt, that his tax burden was increased, or that Zions’ tax burden was decreased.³¹ Crapo’s claim that he reported the discharged income on his 2013 tax return relies wholly upon his own declaration.³² Zions specifically objected to Crapo’s declaration testimony based upon the fact that Crapo had neither attached a copy of his 2013 tax return nor even produced that return as part of his disclosures, and was thus precluded from referencing the substance of his 2013 tax return by [Utah Rule of Evidence 1002](#).³³

Ultimately, the district court found no genuine issue of material fact and granted summary judgment in favor of Zions.³⁴ In addressing the 1099-C generally, the district court explained:

The regulation and the Form are both clear and unequivocal – the issuance of the 1099-C signifies *either* an

³⁰ 1099-C (R. at 308; Addendum 3) (emphasis added). Again, Crapo included the same misleading statement in his opposition memorandum (R. at 385, ¶ 10), and Zions pointed out the problem in its reply memorandum (R. at 459).

³¹ Brief of Appellant at 4–5, ¶¶ 13–17.

³² See Brief of Appellant at 4–5, ¶¶ 13, 17; R. at 403.

³³ R. at 460.

³⁴ See Order Granting the Plaintiff’s Motion for Summary Judgment (the “**Ruling**”) (R. at 554–570). A copy of the Ruling is included as **Addendum 5**.

actual discharge *or* some other identifiable event. It is a “means of satisfying a reporting obligation to the IRS; it is not a means of accomplishing an actual discharge of debt.” The Form does not, in and of itself, effectuate a discharge, nor does it constitute evidence of a discharge, *especially* in this case where the form made clear that the reason for the issuance of the Form was due to “identifiable Event ‘H’,” which signified the “expiration of the non-payment testing period” and not an actual discharge, cancellation or extinguishment.³⁵

Having concluded that the 1099-C, in itself, did not constitute a discharge or evidence of a discharge, the district court carefully considered the other evidence raised by Crapo, including the written-in language in the 1099-C (“FORGIVEN DEBT AMT 3 YRS NO PAYMENT”), the fact that the debt was charged off, and the alleged delay in collection.³⁶ The district court also specifically considered and rejected Crapo’s estoppel defense, holding that Crapo had not raised a genuine issue of fact as to *any* of the elements of estoppel.³⁷ The district court subsequently entered its final judgment, and this appeal followed.

SUMMARY OF ARGUMENTS

The district court properly entered summary judgment in favor of Zions’ on its claim for breach of contract. There is no dispute that Crapo obtained a loan from Zions and failed to repay that loan. The district court properly rejected Crapo’s arguments that the 1099-C evidenced an actual discharge or constituted a basis for estopping Zions from enforcing the Note. A Form 1099-C is a tax reporting tool that a lender is required to

³⁵ Ruling at 6 (R. at 559; Addendum 5) (emphasis in original) (citations omitted).

³⁶ Ruling at 7–12 (R. at 560 to 565; Addendum 5).

³⁷ Ruling at 13–15 (R. at 566–568; Addendum 5).

issue upon the occurrence of an “identifiable event.” Several identifiable events are based upon an actual discharge of a debt, whether by agreement, bankruptcy, or otherwise. However, the identifiable event in Crapo’s 1099-C was Crapo’s failure to make payments for 36 consecutive months (also referred to as the “nonpayment testing period”), which is not an actual discharge of debt.

Crapo focuses on three facts that he argues should have precluded summary judgment in favor of Zions. First, Crapo emphasizes that the 1099-C contains the words “FORGIVEN DEBT AMT.” What Crapo fails to address is that those words are followed immediately by “3 YRS NO PAYMENT.” Moreover, the 1099-C expressly identifies expiration of the nonpayment testing period as the reason for issuance. For those reasons, the 1099-C did not give rise to genuine issues of material fact.

Crapo also argues that Zions’ alleged delay in enforcing the Note raised an issue of fact to preclude summary judgment. However, Crapo fails to establish that Zions had a duty to enforce the Note any sooner than it did. Moreover, Crapo expressly agreed in the Note that a delay in enforcement would not in any way constitute a bar to enforcement. As such, any delay was neither inconsistent with the enforceability of the Note nor evidence of an actual discharge.

The third fact on which Crapo focuses is the Charge Off Request. The term “charge off” is used to describe a bank’s regulatory and accounting obligation to remove a debt from its balance sheet, typically due to lack of payment or doubt as to the collectability of the debt. As a result of a charge of, a bank is entitled to a tax deduction

claimed on bad debt. If a lender charges off a debt but subsequently recovers the debt, the recovery must be reported as income. The fact that a debt is charged off has no impact on a debtor's obligation to repay the debt. In this case, Zions' Charge Off Request expressly indicated that Zions intended to continue pursuing Crapo's debt. Moreover, Crapo did not allege that he even received, let alone relied upon the Charge Off Request. Even if Crapo had relied on the Charge Off Request, there is no question or ambiguity as to Zions' intention to continue collection of the loan. For the foregoing reasons, the Charge Off Request did not constitute a genuine issue of material fact.

On appeal, Crapo has woven these three facts into two legal theories. First, Crapo argues that Zions was equitably estopped from enforcing the Note because he relied on Zions' inconsistent conduct in reporting the loan amount on his 2013 tax return. Second, Crapo argues that he raised a genuine issue of fact as to whether Zions, in fact, discharged his liability on the Note.

Crapo's estoppel defense fails on several grounds. To begin with, Crapo failed to present evidence to support his estoppel defense. Based on Crapo's declaration, the only information on which Crapo relied was the instructions portion of the 1099-C (which told Crapo to report a discharge *only* in the event of an actual discharge). There was no evidence that Crapo relied on the "FORGIVEN DEBT" language, the alleged delay in collection, or the Charge Off Request. Similarly, Crapo failed to present any admissible evidence that he actually reported the debt or paid additional taxes, or otherwise suffered any injury as a result of Zions' conduct. Crapo certainly did not present any evidence of

the amount of additional taxes he purportedly paid. In any event, none of the conduct cited by Crapo was inconsistent with Zions' intent to enforce the Note.

The facts raised by Crapo also did not constitute or evidence an actual discharge of debt. Again, the 1099-C was a required tax document that expressly stated it was issued due to Crapo's failure to make payments. The purported delay in enforcing the Note was immaterial because Crapo expressly agreed that delay was not waiver, and because Zions otherwise bore no duty to bring an action on the Note any sooner than it did. Finally, the Charge Off Request was immaterial to an actual discharge because it did not evidence an intent to discharge Crapo's debt – to the contrary, it expressly stated Zions' continued intent to enforce the Note. Moreover, Crapo has cited no authority to support the claim that a charge off impacts a debtor's obligation to pay.

In summary, Crapo received a loan and failed to repay it. Zions' conduct was consistent with applicable banking and tax regulations and did not give rise to an actual discharge of debt. The trial court correctly granted summary judgment in favor of Zions.

ARGUMENT

I. CRAPO DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO AN ESTOPPEL DEFENSE.

Equitable estoppel is an affirmative defense that requires its proponent to prove three elements:

- (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from

allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969–70 (Utah 1989). However, estoppel is a “disfavored remedy” that should be “applied rarely,” and it is generally “reserved for instances of wrongdoing by the estopped party.” *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 40, 258 P.3d 539 (citations omitted); *see also Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 15, 158 P.3d 1088 (“We typically only apply equitable estoppel to circumstances involving misrepresentations of past or present fact, along with the other necessary factors.”).

In view of Crapo’s failure to set forth specific, relevant facts to support his claim of estoppel, as set forth more fully below, the Court should affirm the district court’s conclusion that Crapo “cannot prove any of these elements [of equitable estoppel].”³⁸ Inasmuch as each one of these elements must be established by Crapo, the Court should affirm the district court if it finds that Crapo failed to provide relevant, admissible evidence for any of one of these elements.

A. The 1099-C Was Not Evidence of Inconsistent Conduct.

Crapo’s estoppel argument focuses on the various aspects of the 1099-C and the attendant circumstances. Therefore, it bears emphasis to recognize that a Form 1099-C is a reporting requirement and not a document intended to alter the legal relationship between debtors and creditors.

³⁸ Ruling at 14 (R. at 567; Addendum 5).

Under IRS regulations, financial institutions must issue a 1099-C when a “discharge” occurs. [26 C.F.R. § 1.6050P-1](#). However, these requirements specifically limit the effect of a “discharge” by defining that term as follows: “***Solely for purposes of the reporting requirements of section 6050P and this section***, a discharge of indebtedness is deemed to have occurred . . . if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, ***whether or not an actual discharge of actual indebtedness has occurred . . .***” [Id. § 1.6050P-1\(a\)](#) (emphasis added). And, a covered entity must issue a Form 1099-C “regardless of whether the debtor is subject to tax on the discharged debt.” [Id. § 1.6050P-1\(a\)\(3\)](#). An identifiable event – and consequent obligation to issue a Form 1099-C – arises if a debtor fails to make a payment for 36 months. [Id. § 1.6050P-1\(b\)\(2\)\(i\)\(H\)](#).

The IRS itself has stated that it “does not view a Form 1099–C as an admission by the creditor that it has discharged the debt and can no longer pursue collection.” [IRS Info. 2005–0207, 2005 WL 3561135 \(Dec. 30, 2005\)](#). The IRS has explained that the issuance a Form 1099–C satisfies statutory and regulatory requirements, neither of which “prohibit collection activity after a creditor reports by filing a Form 1099–C.” [IRS Info. 2005–0208, 2005 WL 3561136 \(Dec. 30, 2005\)](#). And while these opinion letters are not absolutely binding on courts, they are “entitled to respect.” [Skidmore v. Swift & Co., 323 U.S. 134, 140 \(1944\)](#).

Likewise, the majority of courts to consider the issue have held that a 1099-C does not constitute an actual discharge and, where summary judgment is concerned, does not

even raise a genuine issue of material fact that would preclude summary judgment in favor of the lender. *See, e.g., Federal Deposit Ins. Corp. v. Cashion*, 720 F.3d 169, 176 (4th Cir. 2013); *Ware v. Bank of Am. Corp.*, 9 F. Supp. 3d 1329, 1340 (N.D. Ga. 2014); *In re Riley*, 478 B.R. 736, 744 (Bankr. D.S.C. 2012); *Bononi v. Bayer Employees Fed. Credit Union (In re Zilka)*, 407 B.R. 684, 689 (Bankr. W.D. Pa. 2009).

Given the nature and purpose of a Form 1099-C, the 1099-C issued to Crapo does not constitute evidence of inconsistent conduct by Zions, with or without the additional facts raised by Crapo.

B. Crapo Did Not Present Other Evidence That Zions Acted Inconsistently.

The first element of equitable estoppel – i.e., that the plaintiff previously committed an act or omission inconsistent with a later claim – “is met only when the party sought to be estopped has intentionally or through culpable negligence induced the other party to change its position by relying on the inconsistent act.” *Big Ditch Irrigation*, 2011 UT 33, ¶ 42. On appeal, Crapo argues there were three inconsistent acts/omissions that raise a genuine issue of fact regarding estoppel: (i) Zions’ purported delay in enforcing the Note; (ii) the phrase in the 1099-C “FORGIVEN DEBT AMT 3 YRS NO PAYMENT”; and (iii) Zions’ internal Charge Off Request.³⁹ However, these arguments fail because Crapo did not submit evidence that he relied on these actions.

Reliance is an essential element of equitable estoppel, *CECO Corp.*, 772 P.2d at 969–70. Therefore, any allegedly inconsistent acts without reliance cannot support an

³⁹ Brief of Appellant at 6.

estoppel claim. In Crapo’s summary judgment opposition, the only evidence proffered of reliance was Crapo’s purported reliance on “the *instructions* in the 1099-C.”⁴⁰ Though Crapo’s opposition memorandum was somewhat vague about the acts on which he relied,⁴¹ Crapo’s supporting declaration clearly limited his reliance to “the instructions in the 1099-C.”⁴² Thus, even to the extent that Crapo argued there were other inconsistent acts or omissions, such inconsistencies were irrelevant without *evidence* of reliance. *See UTAH R. CIV. P. 56(c)(1)* (noting that factual assertions must be supported by citing to relevant portions of the record). Having failed to support his summary judgment opposition with evidence that he relied on anything other than “the instructions in the 1099-C,” Crapo cannot claim on appeal that there were other grounds for estoppel. *See Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization*, 2012 UT 4, ¶ 31, 270 P.3d 441 (“[I]n reviewing the material facts on appeal, we are limited to the facts as provided in the record.”). *Cf. Rothery v. Walker Bank & Trust Co.*, 754 P.2d 1222, 1225 (Utah 1988) (“Even if the Bank’s silence could be construed as a representation that the Bank was not

⁴⁰ R. at 403, ¶ 7 (emphasis added). Despite that this was the only evidence of reliance, the 1099-C instructions are conspicuously absent from Crapo’s argument regarding estoppel, and Crapo has apparently abandoned this aspect of his estoppel argument. *See* Brief of Appellant at 6–8.

⁴¹ R. at 385, ¶ 11 (“As a result, Crapo included the full \$250,000.00 value of the Loan as income in his 2013 tax return.”). The paragraph immediately preceding the phrase “As a result,” discusses the 1099-C instructions about reporting discharged debts. R. at 385, ¶ 10. Thus, the most plausible textual interpretation of “As a result” is to infer “As a result of *the instructions in the 1099-C . . .*,” which would be consistent with Crapo’s declaration.

⁴² R. at 403, ¶ 7 (“Following the instructions in the 1099-C, I included the full \$250,000.00 value of the loan in my gross income for the tax year 2013.”).

claiming the fees expended in defending the earlier actions, there is no finding or evidence to indicate any reliance on such a representation. “).

Even if Crapo had presented evidence of reliance, none of the acts or omissions argued by Crapo was inconsistent with Zions’ intent to enforce the Note. First, as a matter of law, Zions’ purported delay in enforcing the Note cannot be the basis of estoppel because Zions had no legal duty to act before the statute of limitations expired. *See First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980) (“[I]n order for silence to work an estoppel, there must be a legal duty to speak, or there must be something willful or culpable in the silence which allows another to place himself in an unfavorable position by reason thereof.” (citation omitted)). In this case, Crapo specifically agreed that Zions could delay enforcement of the Note without losing the right to enforce the Note in the future.⁴³ Given this express agreement, the alleged delay was not inconsistent with Zions’ right to enforce the Note at a later time.

Second, while the cryptic phrase “FORGIVEN DEBT AMT” might, if used in another context, be interpreted as actual forgiveness, the context it was used in this case precludes any such construction. The words immediately following “FORGIVEN DEBT AMT” were “3 YRS NO PAYMENT” – a phrase consistent with the identifiable event code “H” included on the form, and which was defined by the IRS in Form 1099-C instructions and pertinent regulations as “Expiration of nonpayment testing period.”⁴⁴ As

⁴³ R. at 288

⁴⁴ 1099-C (R. at 308; Addendum 3); R. at 462.

recognized by the trial court, the “forgiven debt” language, when viewed in context, does not evidence actual discharge of a debt, but is “a reference to the testing period in Identifiable Event Code H.”⁴⁵

Third, Zions’ internal Charge Off Request is clearly not inconsistent with its intent to enforce the Note. As Crapo himself acknowledges, the document expressly states that the loan be “transferred to Recovery Department for further collection efforts” and that Zions would search for assets to satisfy a judgment.⁴⁶ Moreover, a “charge off” is a tax and bank regulatory action that does not constitute or evidence a discharge. Federal tax code and regulations permit creditors to claim a deduction by charging off bad debts. *See* [26 U.S.C. § 166](#); [26 C.F.R. § 1.166-1](#). With respect to regulated financial institutions, federal agencies have promulgated rules mandating that such institutions charge off debt within certain time frames. *See* [Uniform Retail Credit Classification and Account Management Policy](#), 65 Fed. Reg. 36903-01 (June 12, 2000). Accordingly, Utah courts have recognized that a charge off does not have any legal impact on a debtor’s liability. *See* [Sell v. MBNA Am. Bank, N.A.](#), 2007 UT App 316, 2007 WL 2793249 (unpublished) (“The fact that a creditor charges off a debt for tax purposes has no effect on a debtor’s liability.”). As also recognized in the *Sell* opinion, a creditor who later recovers a charged off debt is required to treat the recovery “as new taxable income in the year it is

⁴⁵ Ruling at 9 (R. at 562; Addendum 5).

⁴⁶ R. at 384, 428 (Appellant’s Addendum 2).

collected.” *Id.*; accord, e.g., *Hillsboro Nat. Bank v. C.I.R.*, 460 U.S. 370, 377–79 (1983); *In re Zilka*, 407 B.R. at 691.

In short, the inconsistent conduct of which Crapo complains cannot form the basis for estoppel because Crapo presented no evidence to the trial court that he relied on such conduct. While Crapo “[f]ollow[ed] the instructions in the 1099-C,” there was no evidence that he relied on anything other than those instructions. In any event, none of the conduct identified by Crapo was inconsistent with Zions’ intent to enforce the Note.

C. Crapo Did Not Present Evidence of Reasonable Reliance on an Inconsistent Act or Omission.

Crapo argues that in reliance on Zions’ purportedly inconsistent acts and omissions, he “included the full value of the Note in his income for the tax year 2013.”⁴⁷ However, the only evidence that Crapo presented to support this contention was his own declaration testimony.⁴⁸ As Zions pointed out in its reply memorandum,⁴⁹ unless an exception applies, an original writing or duplicate is required to prove the content of a document. [UTAH R. EVID. 1002, 1003](#). Crapo’s testimony about the content of his 2013 tax return is therefore not admissible to prove the contents thereof. While acts independent of a writing are not subject to the original writing rule, testimony as to what is reported in a tax return filing necessarily describes the contents of the actual return.

⁴⁷ Brief of Appellant at 7.

⁴⁸ R. at 385, 403.

⁴⁹ R. at 460. The trial court did not rule on Zions’ objection, but instead found that Crapo’s purported reliance was unreasonable. R. at 567–568. However, this Court may affirm the trial court’s judgment based on any grounds apparent from the record. [Bailey v. Bayles](#), 2002 UT 58, ¶ 13, 52 P.3d 1158.

Having failed to produce the actual form on which income is reported, and having failed to establish any applicable exception, Crapo cannot testify as to what he did or did not report in his 2013 tax return.

Even if Crapo's testimony were accepted as admissible evidence, his alleged reliance was not reasonable as a matter of law. While the question of reasonable reliance is generally an issue of fact, "there are instances where courts may conclude that as a matter of law, there was no reasonable reliance." *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1067 (Utah 1996). In particular, "a party cannot reasonably rely upon oral statements by the opposing party in light of contrary written information." *Id.* at 1068.

In this case, Crapo cannot have reasonably relied on Zions' conduct in reporting his debt on his tax return. First, given Crapo's express agreement that delay did not constitute waiver, he cannot have reasonably relied on Zions' forbearance in enforcing the Note. Even without Crapo's no-waiver agreement, there was no logical reason for him to assume he was forgiven merely because Zions waited to commence enforcement action. Zions had no duty to commence action prior to the expiration of the statute of limitations, and Crapo cannot have reasonably relied on any purported delay. See *RJW Media, Inc. v. CIT Grp./Consumer Fin., Inc.*, 2008 UT App 476, ¶ 34, 202 P.3d 291 ("Because CIT had no duty to inform RJW of a possible procedural defect, not only was it unreasonable for RJW to rely on CIT's silence, but CIT's silence cannot be construed as an inconsistent act sufficient to establish an equitable estoppel claim.").

Second, Crapo could not have reasonably relied on the phrase “FORGIVEN DEBT AMT” in assuming he was required to report the loan amount on his tax return. These words were immediately followed and clarified by the phrase “3 YRS NO PAYMENT,” which phrase correlates with the designated “identifiable event.” The “identifiable event” specified in the 1099-C was the “Expiration of nonpayment testing period” – an event that does not constitute an actual discharge. Further, the 1099-C expressly instructed Crapo not to report the debt until he received an *actual* discharge.⁵⁰ Therefore, any reliance on Crapo’s part was unreasonable as a matter of law. See *Perkins v. Great-W. Life Assur. Co.*, 814 P.2d 1125, 1130–31 (Utah Ct. App. 1991) (“With reasonable diligence, Mrs. Perkins could have easily learned that she was not eligible for coverage under Great–West’s insurance policy. Given Mrs. Perkins’ failure to learn the terms of her insurance policy, her reliance thereon was not reasonable.”).

Finally, Crapo could not have reasonably relied on Zions’ Charge Off Request. Crapo did not even present evidence that he even discovered the Charge Off Request prior to his tax filing, let alone that he relied on it.⁵¹ Even assuming he had discovered and relied on the document prior to filing his return, nothing in that document even remotely indicates that Zions intended to discharge Crapo’s debt. To the contrary, it expressed an unequivocal intent to pursue collection.

⁵⁰ 1099-C (R. at 308; Addendum 3).

⁵¹ R. at 403, ¶ 7 (noting that Crapo’s tax filing was in reliance on the 1099-C instructions).

In conclusion, Crapo relied solely on the instructions in the 1099-C, not any of the other acts or omissions he now emphasizes on appeal. Even assuming Crapo had relied on such acts in reporting the discharged loan amount, Crapo's reliance was unreasonable. The 1099-C specifically identified the event code for issuance and instructed Crapo to report the income only in the event of an actual discharge. In light of this "contrary written information," Crapo's purported reliance was unreasonable as a matter of law. *See Gold Standard*, 915 P.2d at 1067.

D. Crapo Did Not Present Evidence of the Fact of His Injury, Let Alone the Amount.

Crapo argues that because he reported the discharged debt on his tax return, his taxes increased and he "paid taxes on the full value of the Note."⁵² As noted above, Crapo did not provide his tax return. He also did not provide any details or calculations regarding the allegedly increased tax burden, and such information would be necessary for him to prevail on his estoppel claim. In the context of estoppel, Utah courts have held that generalized allegations of injury are insufficient; a party claiming estoppel must establish both the fact and amount of injury with some particularity:

A detriment or damage was suffered by the Lessee due to the mistakes in the statements submitted by the Lessor. The amount of the damage or detriment is not shown. The evidence does not indicate how much less the taxes paid the federal and state government would have been had the true facts been known. . . . The damage or detriment caused by the change of position on the part of the Lessee is speculative.

⁵² Brief of Appellant at 9.

I.X.L. Stores Co. v. Success Markets, 97 P.2d 577, 580–81 (1939); accord *Whitaker v. Utah State Ret. Bd.*, 2008 UT App 282, ¶ 28, 191 P.3d 814 (“Had he done so, he says, he could have earned an additional \$3000 per year working as an appraiser. This unsubstantiated allegation, however, is insufficient to establish estoppel.”). Having failed to establish “how much less the taxes paid the federal and state government would have been had the true facts been known,” Crapo failed to establish a genuine issue of fact concerning injury resulting from his reliance.

Moreover, estoppel requires injury that directly results from reliance. *Big Ditch Irrig. Co.*, 2011 UT 33, ¶ 41. Therefore, the party claiming estoppel can obtain relief only to the extent of that reliance. See *Bolitho v. East*, 143 P. 584, 587 (Utah 1914) (“[I]f she was guilty of any conduct which would have created an estoppel against her respecting her claim to the horses in question, such an estoppel could not have been enforced except to the extent of the rent due under the lease, to wit, \$291.87, and accrued interest, if any, and not for \$943.32 as was done in this action.”).⁵³ In other words, Zions could only be estopped from collecting the amount of additional tax liability imposed on Crapo, but the rest of the debt would still be enforceable. While Utah has not decided any cases in the particular context of a 1099-C, the Fifth Circuit has explained this principle as follows:

⁵³ While *Bolitho* was decided more than 100 years ago, it was never overruled. Moreover, more recent courts to address the issue have held that equitable estoppel applies only to the extent of the claimant’s reliance. See, e.g., *Ogar v. City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

Appellant at oral argument advised that it had no objection to awarding Dennis Ratliff, John Ratliff, and Truman Smith a credit on their liability on the August 1990 judgment to the extent of the federal income taxes they paid in reliance on the 1099As . . . and we thus hold those three appellees are entitled to such a credit. Because this is the extent of the detriment shown to be suffered by each of these three, none is entitled to any further relief or to complete cancellation of the indebtedness.

Long v. Turner, 134 F.3d 312, 319 (5th Cir. 1998).

Here, Crapo failed to provide admissible evidence of the fact, let alone the amount, of his additional tax burden. Even accepting Crapo's allegation that he in fact reported the cancelled debt, he still failed to set forth any admissible evidence that he, in fact, suffered an injury as a result of reporting that debt. His declaration includes the bald, conclusory statement that his "tax burden increased for that year."⁵⁴ However, as in *I.X.L. Stores*, Crapo failed to submit any evidence of what that "burden" was. He failed to set forth both the amount of tax he actually paid (if any) and the amount that he would have paid but for reporting the discharged debt (if any).

Finally, even assuming that Crapo had paid additional taxes as a result of his alleged reliance on the 1099-C, there is a three-year deadline to claim an overpayment. See 26 U.S.C. § 6511. The earliest Crapo could have filed a return would have been early 2013. Zions commenced a lawsuit against Crapo in September 2014. To the extent that Crapo reasonably believed he had received an actual discharge, he was clearly

⁵⁴ R. at 403 ¶ 8.

disabused of that notion when Zions brought suit. Crapo has presented no reasons why he could not have amended his 2013 tax return(s) to exclude the reported loan amount.

In short, Crapo did not raise a genuine issue of material fact as to whether he had suffered an injury as a result of his reliance on Zions' conduct.

II. CRAPO DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO WHETHER ZIONS ACTUALLY EFFECTED A DISCHARGE OF CRAPO'S OBLIGATIONS UNDER THE NOTE.

Independent of estoppel, Crapo suggests that he presented evidence sufficient to raise a question of whether Zions had, in fact, discharged his debt. Crapo suggests that the trial court's judgment rested solely upon *Cashion*, without accounting for the additional "contextual clues" raised by Crapo. Contrary to Crapo's suggestion, the trial court expressly addressed each fact raised by Crapo and included an entire section in its Ruling entitled "Analysis of Other Evidence to Determine Whether a Discharge Occurred."⁵⁵ In any event, none of the evidence presented by Crapo indicated that an actual discharge had occurred.

Generally, any evidence that Crapo presented was irrelevant to the issue of actual discharge because Utah law requires that a discharge of a loan (by a financial institution) be evidenced by a signed agreement. Under the statute of frauds, "every credit agreement" is "void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement." [UTAH CODE ANN. § 25-5-4\(1\)\(4\)](#). The term "credit agreement" includes an agreement to

⁵⁵ Ruling at 7–12 (R. at 560–565; Addendum 5).

modify an existing debt. *Id.* § 25-5-4(2)(a)(i)(A). Without a signed agreement, any other evidence was insufficient as a matter of law to raise a genuine issue of fact regarding an actual discharge. The 1099-C does not constitute an “agreement,” as it lacks any promises or definite terms. See *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ 16, 94 P.3d 179 (“[A] contract cannot exist without a meeting of the minds on the central features of the agreement. . . . which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.” (internal quotation marks and citations omitted)); see also *RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981)* (explaining that to satisfy the statute of frauds, a writing must “state[] with reasonable certainty the essential terms of the unperformed promises in the contract”).

Citing *Coulter & Smith Ltd. v. Russell*, 1999 UT App 55, ¶ 15 n.2, 976 P.2d 1218, Crapo argued in the district court that “a writing may be sufficient even though it is cryptic, abbreviated, and incomplete.”⁵⁶ However, Crapo conspicuously omitted the fact that the cited language was preceded and qualified by the following clause: “With ample explanation and corroboration to be found in undoubted surrounding circumstances or even in accompanying oral testimony” In other words, a cryptic writing may be sufficient, but only where it is accompanied by corroborating evidence and explanation. In this case, Crapo did not even attempt to establish that he had, in fact, reached an agreement with Zions to discharge his debt. The 1099-C itself stated no unperformed promises or even past consideration given in exchange for the discharge. Further, it

⁵⁶ R. at 514.

expressly identified its reason for issuance as expiration of the non-payment testing period. The 1099-C was not a “note or memorandum of [an] agreement,” but was a report that was required by law due to Crapo’s failure to make payments for 36 consecutive months.

Crapo also cited *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 61 (Conn. Ct. App. 2002), for the proposition that the 1099-C was a sufficient writing.⁵⁷ However, that case addressed only whether a Form 1099-C is a *signed* writing and did not address the sufficiency of its terms. See *id.* at 60 (“In the case before this court, the plaintiff does not deny that the form 1099–C was sent to the defendant. It claims, however, that the defendant has not proved that form 1099–C was a signed writing.”).

Even if the 1099-C satisfied the statute of frauds, the other “contextual clues” cited by Crapo did not raise a genuine issue of material fact. First, the words “FORGIVEN DEBT” were followed by the phrase “3 YRS NO PAYMENT,” and further put into context with the identified event code “H”, which is expiration of the non-payment testing period. Additionally, Zions submitted un rebutted testimony that the “forgiven debt” language was used “not because of an actual forgiveness or discharge, but simply as another description of the 36-month testing period without receiving a payment.”⁵⁸ Second, the internal Charge Off Request in no way evidenced a discharge. It expressly evidenced the fact that Zions intended to collect the debt; part of the request was for the

⁵⁷ R. at 515.

⁵⁸ R. at 477, ¶ 5.

debt to be transferred to “Recovery Department for further collection efforts.”⁵⁹ Finally, the alleged shifting of tax burdens does not evidence an actual discharge. Again, the reason the 1099-C was issued was expressly identified as an event other than an actual discharge. Moreover, Zions is entitled to write off bad debt independent of whether it issues a Form 1099-C. *See* [26 U.S.C. § 166](#); [26 C.F.R. § 1.166-1](#). In any event, Crapo failed to present competent evidence of shifting tax burdens.

In sum, the 1099-C, even in light of other facts identified by Crapo, did not evidence an actual discharge and did not preclude summary judgment in favor of Zions.

REQUEST FOR ATTORNEYS’ FEES ON APPEAL

Pursuant to [Rule 24\(a\)\(9\) of the Utah Rules of Appellate Procedure](#), Zions requests an award of attorneys’ fees and costs incurred on appeal. The basis for this request is the Note that is the subject of this action, and on which the district court relied in awarding fees and costs.⁶⁰ Further, because it was “entitled to attorney fees in the trial court, [Zions] may also recover [its] reasonable fees incurred on appeal.” [*Hahnel v. Duchesne Land, LC*, 2013 UT App 150, ¶ 22, 305 P.3d 208.](#)

⁵⁹ R. at 428 (Appellant’s Addendum 2).

⁶⁰ *See* Note at 5 (R. at 288); R. at 610–611.

CONCLUSION

Crapo failed to raise a genuine issue of material fact. The undisputed evidence demonstrated that Crapo received the 1099-C due to his failure to make payments for 36 months. Zions' conduct was not inconsistent with this fact and did not evidence an actual discharge. The judgment of the district court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 23rd day of September, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, the undersigned counsel certifies that this Brief of Appellee contains 8,773 words and therefore complies with the type-volume limitation set forth in Rule 24(f)(1)(A).

BENNETT TUELLER JOHNSON & DEERE

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2016, I caused to be served, via U.S. Mail, First Class, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE**, together with an electronic Courtesy Brief in searchable PDF format, upon the following:

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ADDENDA

1. 26 C.F.R. § 1.6050P-1
2. Note
3. 1099-C
4. Instructions for Forms 1099-A and 1099-C
5. Ruling

Addendum No. 1

(26 C.F.R. § 1.6050P-1)

Code of Federal Regulations

Title 26. Internal Revenue

Chapter I. Internal Revenue Service, Department of the Treasury

Subchapter A. Income Tax

Part 1. Income Taxes (Refs & Annos)

Procedure and Administration

Information and Returns

Returns and Records (Refs & Annos)

Information Returns

26 C.F.R. § 1.6050P–1, Treas. Reg. § 1.6050P–1

§ 1.6050P–1 Information reporting for discharges of indebtedness by certain entities.

Effective: July 15, 2014

[Currentness](#)

(a) Reporting requirement—(1) In general. Except as provided in paragraph (d) of this section, any applicable entity (as defined in [section 6050P\(c\)\(1\)](#)) that discharges an indebtedness of any person (within the meaning of [section 7701\(a\)\(1\)](#)) of at least \$600 during a calendar year must file an information return on Form 1099–C with the Internal Revenue Service. Solely for purposes of the reporting requirements of [section 6050P](#) and this section, a discharge of indebtedness is deemed to have occurred, except as provided in paragraph (b)(3) of this section, if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, whether or not an actual discharge of indebtedness has occurred on or before the date on which the identifiable event has occurred. The return must include the following information—

- (i) The name, address, and taxpayer identification number (TIN), as defined in [section 7701\(a\)\(41\)](#), of each person for which there was an identifiable event during the calendar year;
- (ii) The date on which the identifiable event occurred, as described in paragraph (b) of this section;
- (iii) The amount of indebtedness discharged, as described in paragraph (c) of this section;
- (iv) An indication whether the identifiable event was a discharge of indebtedness in a bankruptcy, if known; and
- (v) Any other information required by Form 1099–C or its instructions, or current revenue procedures.

(2) No aggregation. For purposes of reporting under this section, multiple discharges of indebtedness of less than \$600 are not required to be aggregated unless such separate discharges are pursuant to a plan to evade the reporting requirements of this section.

(3) Amounts not includible in income. Except as otherwise provided in this section, discharged indebtedness must be reported regardless of whether the debtor is subject to tax on the discharged debt under [sections 61](#) and [108](#) or otherwise by applicable law.

(4) Time and place for reporting—(i) In general. Except as provided in paragraph (a)(4)(ii) of this section, returns required by this section must be filed with the Internal Revenue Service office designated in the instructions for Form 1099-C on or before February 28 (March 31 if filed electronically) of the year following the calendar year in which the identifiable event occurs.

(ii) Indebtedness discharged in bankruptcy. Indebtedness discharged in bankruptcy that is required to be reported under this section must be reported for the later of the calendar year in which the amount of discharged indebtedness first becomes ascertainable, or the calendar year in which the identifiable event occurs.

(b) Date of discharge—(1) In general. Solely for purposes of this section, except as provided in paragraph (b)(3) of this section, indebtedness is discharged on the date of the occurrence of an identifiable event specified in paragraph (b)(2) of this section.

(2) Identifiable events—(i) In general. An identifiable event is—

(A) A discharge of indebtedness under title 11 of the United States Code (bankruptcy);

(B) A cancellation or extinguishment of an indebtedness that renders a debt unenforceable in a receivership, foreclosure, or similar proceeding in a federal or State court, as described in [section 368\(a\)\(3\)\(A\)\(ii\)](#) (other than a discharge described in paragraph (b)(2)(i)(A) of this section);

(C) A cancellation or extinguishment of an indebtedness upon the expiration of the statute of limitations for collection of an indebtedness, subject to the limitations described in paragraph (b)(2)(ii) of this section, or upon the expiration of a statutory period for filing a claim or commencing a deficiency judgment proceeding;

(D) A cancellation or extinguishment of an indebtedness pursuant to an election of foreclosure remedies by a creditor that statutorily extinguishes or bars the creditor's right to pursue collection of the indebtedness;

(E) A cancellation or extinguishment of an indebtedness that renders a debt unenforceable pursuant to a probate or similar proceeding;

(F) A discharge of indebtedness pursuant to an agreement between an applicable entity and a debtor to discharge indebtedness at less than full consideration;

(G) A discharge of indebtedness pursuant to a decision by the creditor, or the application of a defined policy of the creditor, to discontinue collection activity and discharge debt; or

(H) In the case of an entity described in [section 6050P\(c\)\(2\)\(A\) through \(C\)](#), the expiration of the non-payment testing period, as described in § 1.6050P–1(b)(2)(iv).

(ii) Statute of limitations. In the case of an expiration of the statute of limitations for collection of an indebtedness, an identifiable event occurs under paragraph (b)(2)(i)(C) of this section only if, and at such time as, a debtor's affirmative statute of limitations defense is upheld in a final judgment or decision of a judicial proceeding, and the period for appealing the judgment or decision has expired.

(iii) Decision to discontinue collection activity; creditor's defined policy. For purposes of the identifiable event described in paragraph (b)(2)(i)(G) of this section, a creditor's defined policy includes both a written policy of the creditor and the creditor's established business practice. Thus, for example, a creditor's established practice to discontinue collection activity and abandon debts upon expiration of a particular non-payment period is considered a defined policy for purposes of paragraph (b)(2)(i)(G) of this section.

(iv) Expiration of non-payment testing period. There is a rebuttable presumption that an identifiable event under paragraph (b)(2)(i)(H) of this section has occurred during a calendar year if a creditor has not received a payment on an indebtedness at any time during a testing period (as defined in this paragraph (b)(2)(iv)) ending at the close of the year. The testing period is a 36-month period increased by the number of calendar months during all or part of which the creditor was precluded from engaging in collection activity by a stay in bankruptcy or similar bar under state or local law. The presumption that an identifiable event has occurred may be rebutted by the creditor if the creditor (or a third-party collection agency on behalf of the creditor) has engaged in significant, bona fide collection activity at any time during the 12-month period ending at the close of the calendar year, or if facts and circumstances existing as of January 31 of the calendar year following expiration of the 36-month period indicate that the indebtedness has not been discharged. For purposes of this paragraph (b)(2)(iv)—

(A) Significant, bona fide collection activity does not include merely nominal or ministerial collection action, such as an automated mailing;

(B) Facts and circumstances indicating that an indebtedness has not been discharged include the existence of a lien relating to the indebtedness against the debtor (to the extent of the value of the security), or the sale or packaging for sale of the indebtedness by the creditor; and

(C) In no event will an identifiable event described in paragraph (b)(2)(i)(H) of this section occur prior to December 31, 1997.

(v) Special rule for certain entities required to file in a year prior to 2008. In the case of an entity described in [section 6050P\(c\)\(1\)\(A\)](#) or [\(c\)\(2\)\(D\)](#) required to file an information return in a tax year prior to 2008 due to an identifiable event described in paragraph (b)(2)(i)(H) of this section, and who failed to so file, the date of discharge is the first event, if any, described in paragraphs (b)(2)(i)(A) through (G) of this section that occurs after 2007.

(3) Permitted reporting. If a discharge of indebtedness occurs before the date on which an identifiable event occurs, the discharge may, at the creditor's discretion, be reported under this section.

(c) Indebtedness. For purposes of this section and [§ 1.6050P-2](#), indebtedness means any amount owed to an applicable entity, including stated principal, fees, stated interest, penalties, administrative costs and fines. The amount of indebtedness discharged may represent all, or only a part, of the total amount owed to the applicable entity.

(d) Exceptions from reporting requirement—(1) Certain bankruptcy discharges—(i) In general. Reporting is required under this section in the case of a discharge of indebtedness in bankruptcy only if the creditor knows from information included in the reporting entity's books and records pertaining to the indebtedness that the debt was incurred for business or investment purposes as defined in paragraph (d)(1)(ii) of this section.

(ii) Business or investment debt. Indebtedness is considered incurred for business purposes if it is incurred in connection with the conduct of any trade or business other than the trade or business of performing services as an employee. Indebtedness is considered incurred for investment purposes if it is incurred to purchase property held for investment, as defined in [section 163\(d\)\(5\)](#).

(2) Interest. The discharge of an amount of indebtedness that is interest is not required to be reported under this section.

(3) Non-principal amounts in lending transactions. In the case of a lending transaction, the discharge of an amount other than stated principal is not required to be reported under this section. For this purpose, a lending transaction is any transaction in which a lender loans money to, or makes advances on behalf of, a borrower (including revolving credits and lines of credit).

(4) Indebtedness of foreign debtors held by foreign branches of U.S. financial institutions—(i) Reporting requirements. [Reserved]

(ii) Definition. An indebtedness held by a foreign branch of a U.S. financial institution is described in this paragraph (d)(4) only if—

(A) The financial institution is engaged through a branch or office in the active conduct of a banking or similar business outside the United States;

(B) The branch or office is a permanent place of business that is regularly maintained, occupied, and used to carry on a banking or similar financial business;

(C) The business is conducted by at least one employee of the branch or office who is regularly in attendance at such place of business during normal working hours;

(D) The indebtedness is extended outside of the United States by the branch or office in connection with that trade or business; and

(E) The financial institution does not know or have reason to know that the debtor is a United States person.

(5) Acquisition of indebtedness by related party. No reporting is required under this section in the case of a deemed discharge of indebtedness under [section 108\(e\)\(4\)](#) (relating to the acquisition of an indebtedness by a person related to the debtor), unless the disposition of the indebtedness by the creditor was made with a view to avoiding the reporting requirements of this section.

(6) Releases. The release of a co-obligor is not required to be reported under this section if the remaining debtors remain liable for the full amount of any unpaid indebtedness.

(7) Guarantors and sureties. Solely for purposes of the reporting requirements of this section, a guarantor is not a debtor. Thus, in the case of guaranteed indebtedness, reporting under this section is not required with respect to a guarantor, whether or not there has been a default and demand for payment made upon the guarantor.

(e) Additional rules—(1) Multiple debtors—(i) In general. In the case of indebtedness of \$10,000 or more incurred on or after January 1, 1995, that involves more than one debtor, a reporting entity is subject to the requirements of paragraph (a) of

this section for each debtor discharged from such indebtedness. In the case of indebtedness incurred prior to January 1, 1995, and indebtedness of less than \$10,000 incurred on or after January 1, 1995, involving multiple debtors, reporting under this section is required only with respect to the primary (or first-named) debtor. Additionally, only one return of information is required under this section if the reporting entity knows, or has reason to know, that co-obligors were husband and wife living at the same address when an indebtedness was incurred, and does not know or have reason to know that such circumstances have changed at the date of a discharge of the indebtedness. This paragraph (e)(1) applies to discharges of indebtedness after December 31, 1994.

(ii) Amount to be reported. In the case of multiple debtors jointly and severally liable on an indebtedness, the amount of discharged indebtedness required to be reported under this section with respect to each debtor is the total amount of indebtedness discharged. For this purpose, multiple debtors are presumed to be jointly and severally liable on an indebtedness in the absence of clear and convincing evidence to the contrary.

(2) Multiple creditors—(i) In general. Except as otherwise provided in this paragraph (e)(2), if indebtedness is owned (or treated as owned for federal income tax purposes) by more than one creditor, each creditor that is an applicable entity must comply with the reporting requirements of this section with respect to any discharge of indebtedness of \$600 or more allocable to such creditor. A creditor will be considered to have complied with the requirements of this section if a lead bank, fund administrator, or other designee of the creditor complies on its behalf in any reasonable manner, such as by filing a single return reporting the aggregate amount of indebtedness discharged, or by filing a return with respect to the portion of the discharged indebtedness allocable to the creditor. For purposes of this paragraph (e)(2)(i), any reasonable method may be used to determine the portion of discharged indebtedness allocable to each creditor.

(ii) Partnerships. For purposes of paragraph (e)(2)(i) of this section, indebtedness owned by a partnership is treated as owned by the partners.

(iii) Pass-through securitized indebtedness arrangement—(A) Reporting requirements. [Reserved]

(B) Definition. For purposes of this paragraph (e)(2)(iii), a pass-through securitized indebtedness arrangement is any arrangement whereby one or more debt obligations are pooled and held for twenty or more persons whose interests in the debt obligations are undivided co-ownership interests that are freely transferrable. Co-ownership interests that are actively traded personal property (as defined in [§ 1.1092\(d\)-1](#)) are presumed to be freely transferrable and held by twenty or more persons.

(iv) REMICs. [Reserved]

(v) No double reporting. If multiple creditors are considered to hold interests in an indebtedness for purposes of this paragraph (e)(2) by virtue of holding ownership interests in an entity, and the entity is required to report a discharge of that indebtedness under paragraph (e)(5) of this section, then the multiple creditors are not required to report the discharge of indebtedness.

(3) Coordination with reporting under section 6050J. If, in the same calendar year, a discharge of indebtedness reportable under section 6050P occurs in connection with a transaction also reportable under section 6050J (relating to foreclosures and abandonments of secured property), an applicable entity need not file both a Form 1099-A and a Form 1099-C with respect to the same debtor. The filing requirements of section 6050J will be satisfied with respect to a borrower if, in lieu of filing Form 1099-A, a Form 1099-C is filed in accordance with the instructions for the filing of that form. This paragraph (e)(3) applies to discharges of indebtedness after December 31, 1994.

(4) Direct or indirect subsidiary. For purposes of section 6050P(c)(2)(C), the term direct or indirect subsidiary means a corporation in a chain of corporations beginning with an entity described in section 6050P(c)(2)(A), if at least 50 percent of the total combined voting power of all classes of stock entitled to vote, or at least 50 percent of the total value of all classes of stock, of such corporation is directly owned by the entity described in section 6050P(c)(2)(A), or by one or more other corporations in the chain.

(5) Entity formed or availed of to hold indebtedness. Notwithstanding § 1.6050P-2(b)(3), if an entity (the transferee entity) is formed or availed of by an applicable entity (within the meaning of section 6050P(c)(1)) for the principal purpose of holding indebtedness acquired (including originated) by the applicable entity, then, for purposes of section 6050P(c)(2)(D), the transferee entity has a significant trade or business of lending money.

(6) Use of magnetic media. Any return required under this section must be filed on magnetic media to the extent required by section 6011(e) and the regulations thereunder. A failure to file on magnetic media when required constitutes a failure to file an information return under section 6721. Any person not required by section 6011(e) to file returns on magnetic media may request permission to do so under applicable regulations and revenue procedures.

(7) TIN solicitation requirement—(i) In general. For purposes of reporting under this section, a reasonable effort must be made to obtain the correct name/taxpayer identification number (TIN) combination of a person whose indebtedness is discharged. A TIN obtained at the time an indebtedness is incurred satisfies the requirement of this section, unless the entity required to file knows that such TIN is incorrect. If the TIN is not obtained prior to the occurrence of an identifiable event, it must be requested of the debtor for purposes of satisfying the requirement of this paragraph (e)(7).

(ii) Manner of soliciting TIN. Solicitations made in the manner described in § 301.6724-1(e)(1)(i) and (2) of this chapter will be deemed to have satisfied the reasonable effort requirement set forth in paragraph (e)(7)(i) of this section. A TIN solicitation made after the occurrence of an identifiable event must clearly notify the debtor that the Internal Revenue Service requires the debtor to furnish its TIN, and that failure to furnish such TIN may subject the debtor to a \$50 penalty imposed by the Internal Revenue Service. A TIN provided under this section is not required to be certified under penalties of perjury.

(8) Recordkeeping requirements. Any applicable entity required to file a return with the Internal Revenue Service under this section must also retain a copy of the return, or have the ability to reconstruct the data required to be included on the return under paragraph (a)(1) of this section, for at least four years from the date such return is required to be filed under paragraph (a)(4) of this section.

(9) No multiple reporting. If discharged indebtedness is reported under this section, no further reporting under this section is required for the amount so reported, notwithstanding that a subsequent identifiable event occurs with respect to the same amount. Further, no additional reporting or Form 1099-C correction is required if a creditor receives a payment of all or a portion of a discharged indebtedness reported under this section for a prior calendar year.

(f) Requirement to furnish statement—(1) In general. Any applicable entity required to file a return under this section must furnish to each person whose name is shown on such return a written statement that includes the following information—

(i) The information required by paragraph (a)(1) of this section. An IRS truncated taxpayer identifying number (TTIN) may be used as the TIN of the person for whom there was an identifiable event in lieu of the identifying number appearing on the information return filed with the Internal Revenue Service. For provisions relating to the use of TTINs, see [§ 301.6109-4](#) of this chapter (Procedure and Administration Regulations);

(ii) The name, address, and TIN of the applicable entity required to file a return under paragraph (a) of this section;

(iii) A legend identifying the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iv) Any other information required by Form 1099-C or its instructions, or current revenue procedures.

(2) Furnishing copy of Form 1099-C. The requirement to provide a statement to the debtor will be satisfied if the applicable entity furnishes copy B of the Form 1099-C or a substitute statement that complies with the requirements of the current revenue procedure for substitute Forms 1099.

(3) Time and place for furnishing statement. The statement required by this paragraph (f) must be furnished to the debtor on or before January 31 of the year following the calendar year in which the identifiable event occurs. The statement will be considered furnished to the debtor if it is mailed to the debtor's last known address.

(g) Penalties. For penalties for failure to comply with the requirements of this section, see [sections 6721](#) through [6724](#).

(h) Effective/applicability date. This section applies to discharges of indebtedness after December 31, 2013. For discharges of indebtedness before January 1, 2014, § 1.6050P-1 (as contained in 26 CFR part 1, revised April 2013) shall apply.

Credits

[T.D. 8654, 61 FR 268, Jan. 4, 1996; T.D. 8895, 65 FR 50408, Aug. 18, 2000; T.D. 9160, 69 FR 62186, Oct. 25, 2004; T.D. 9430, 73 FR 66540, Nov. 10, 2008; T.D. 9461, 74 FR 47728, Sept. 17, 2009; T.D. 9675, 79 FR 41131, July 15, 2014]

SOURCE: Sections 1.6001-1 to 1.6091-4 contained in T.D. 6500, 25 FR 12108, Nov. 26, 1960; T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, unless otherwise noted.

Notes of Decisions (14)

Current through September 15, 2016; 81 FR 63661

End of Document

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Addendum No. 2

(Note)



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HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

| Principal | Loan Date | Maturity | Loan No | Call / Coll | Account | Officer | Initials |
|---|------------|------------|---------|-------------|--------------|---------|----------|
| \$250,000.00 | 12-29-2006 | 12-29-2036 | *** | 8320 | 0041-4021028 | | |
| References in the shaded area are for our use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations. | | | | | | | |

Borrower: SHAYNE CRAPO
665 EAST BRISTLECONE LANE
DELTA, UT 84624

Lender: ZIONS FIRST NATIONAL BANK
OREM/WASATCH OFFICE
1220 SOUTH 800 EAST
OREM, UT 84058

CREDIT LIMIT: \$250,000.00

DATE OF AGREEMENT: December 29, 2006

Introduction. This Home Equity Line Credit Agreement and Disclosure ("Agreement") governs your line of credit (the "Credit Line" or the "Credit Line Account") issued through ZIONS FIRST NATIONAL BANK. In this Agreement, the words "Borrower," "you," "your," and "Applicant" mean each and every person who signs this Agreement, including all Borrowers named above. The words "we," "us," "our," and "Lender" mean ZIONS FIRST NATIONAL BANK. You agree to the following terms and conditions:

Promise to Pay. You promise to pay ZIONS FIRST NATIONAL BANK, or order, the total of all credit advances and **FINANCE CHARGES**, together with all costs and expenses for which you are responsible under this Agreement or under the "Deed of Trust" which secures your Credit Line. You will pay your Credit Line according to the payment terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

Term. The term of your Credit Line will begin as of the date of this Agreement ("Opening Date") and will continue as follows: for 360 months (30 years). All indebtedness under this Agreement, if not already paid pursuant to the payment provisions below, will be due and payable at the end of this term. The draw period of your Credit Line will begin on a date, after the Opening Date, when the Agreement is accepted by us in the State of Utah, following the perfection of the Deed of Trust, and the meeting of all of our other conditions and will continue as follows: **TEN YEARS FROM THE DATE OF THIS AGREEMENT**. You may obtain credit advances during this period ("Draw Period"). After the Draw Period ends, the repayment period will begin and you will no longer be able to obtain credit advances. The length of the repayment period is as follows: **TWENTY YEARS, WITH FULL AMORTIZATION**. You agree that we may renew or extend the period during which you may obtain credit advances or make payments. You further agree that we may renew or extend your Credit Line Account.

Minimum Payment. Your "Regular Payment" will equal the amount of your accrued **FINANCE CHARGES** or \$50.00, whichever is greater ("First Payment Stream"). You will make 120 of these payments. Your payments will be due monthly. Your "Minimum Payment" will be the Regular Payment, plus any amount due and all other charges. An increase in the **ANNUAL PERCENTAGE RATE** may increase the amount of your Regular Payment.

After completion of the First Payment Stream, your "Regular Payment" will be based on an amortization of your balance at the start of this payment period as shown below or \$50.00, whichever is greater ("Second Payment Stream"). Your payments will be due monthly.

| <u>Range of Balances</u> | <u>Number of Payments</u> | <u>Amortization Period</u> |
|--------------------------|---------------------------|----------------------------|
| All Balances | 240 | 240 payments |

Your "Minimum Payment" will be the Regular Payment, plus any amount past due and all other charges.

A change in the **ANNUAL PERCENTAGE RATE** can cause the balance to be repaid more quickly or more slowly. When rates decrease, less interest is due, so more of the payment repays the principal balance. When rates increase, more interest is due, so less of the payment repays the principal balance. If this happens, we may adjust your payment as follows: your payment may be increased by the amount necessary to repay the balance by the end of this payment stream. Each time the **ANNUAL PERCENTAGE RATE** changes, we will review the effect the change has on your Credit Line Account to see if your payment is sufficient to pay the balance by the Maturity Date. If it is not, your payment may be increased by an amount necessary to repay the balance by the Maturity Date.

In any event, if your Credit Line balance falls below \$50.00, you agree to pay your balance in full. You agree to pay not less than the Minimum Payment on or before the due date indicated on your periodic billing statement.

How Your Payments Are Applied. Unless otherwise agreed or required by applicable law, payments and other credits will be applied first to late charges and other charges; then to Finance Charges; and then to unpaid principal.

Receipt of Payments. All payments must be made by a check, automatic account debit, electronic funds transfer, money order, or other instrument in U.S. Dollars and must be received by us at the remittance address shown on your periodic billing statement. Payments received at that address prior to 3:00 P.M. Mountain Time on any business day will be credited to your Credit Line as of the date received. If we receive payments at other locations, such payments will be credited promptly to your Credit Line, but crediting may be delayed for up to five (5) days after receipt.

If you have authorized that payments be automatically deducted from your deposit account at this Bank, the deduction will be for the minimum payment shown on the monthly billing statement. If, on the date that the Bank automatically attempts to pay your credit line payment, there are not sufficient funds in your deposit account to cover the payment, the Bank at its option may pay the account into the overdraft or notify you that funds were not sufficient to cover the payment. Should you desire to pay more than the minimum payment amount or otherwise make additional payments on the line, you will need to make a separate payment.

Credit Limit. This Agreement covers a revolving line of credit for the principal amount of Two Hundred Fifty Thousand & 00/100 Dollars (\$250,000.00), which will be your "Credit Limit" under this Agreement. During the Draw Period we will honor your request for credit advances subject to the section below on Lender's Rights. You may borrow against the Credit Line, repay any portion of the amount borrowed, and re-borrow up to the amount of the Credit Limit. Your Credit Limit is the maximum amount you may have outstanding at any one time. You agree not to attempt, request, or obtain a credit advance that will make your Credit Line Account balance exceed your Credit Limit. Your Credit

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 2

Limit will not be increased should you overdraw your Credit Line Account. If you exceed your Credit Limit, you agree to repay immediately the amount by which your Credit Line Account exceeds your Credit Limit, even if we have not yet billed you.

Charges to your Credit Line. We may charge your Credit Line to pay other fees and costs that you are obligated to pay under this Agreement, the Deed of Trust or any other document related to your Credit Line. In addition, we may charge your Credit Line for funds required for continuing insurance coverage as described in the paragraph titled "Insurance" below or as described in the Deed of Trust for this transaction. We may also, at our option, charge your Credit Line to pay any costs or expenses to protect or perfect our security interest in your property. These costs or expenses include, without limitation, payments to cure defaults under any existing liens on your property. If you do not pay your property taxes, we may charge your Credit Line and pay the delinquent taxes. Any amount so charged to your Credit Line will be a credit advance and will decrease the funds available, if any, under the Credit Line. However, we have no obligation to provide any of the credit advances referred to in this paragraph.

Credit Advances. After the Effective Disbursement Date of this Agreement, you may obtain credit advances under your Credit Line as follows:

Credit Line Checks. Writing a preprinted "Home Equity Credit Line Check" that we will supply to you.

Requests By Mail. Requesting an advance by mail.

Requests in Person. Requesting a credit advance in person at any of our authorized locations.

Other Methods. Any other access method or device which we may allow or provide.

If there is more than one person authorized to use this Credit Line Account, you agree not to give us conflicting instructions, such as one Borrower telling us not to give advances to the other.

Limitations on the Use of Checks. We reserve the right not to honor Home Equity Credit Line Checks in the following circumstances:

Credit Limit Violation. Your Credit Limit has been or would be exceeded by paying the Home Equity Credit Line Check.

Termination or Suspension. Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Home Equity Credit Line Check.

If we pay any Home Equity Credit Line Check under these conditions, you must repay us, subject to applicable laws, for the amount of the Home Equity Credit Line Check. The Home Equity Credit Line Check itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Home Equity Credit Line Checks along with your periodic billing statements; however, your use of each Home Equity Credit Line Check will be reflected on your periodic statement as a credit advance. We do not "certify" Home Equity Credit Line Checks drawn on your Credit Line.

Transaction Requirements. The following transaction limitations will apply to the use of your Credit Line:

Credit Line Home Equity Credit Line Check Limitations. The following transaction limitations will apply to your Credit Line and the writing of Home Equity Credit Line Checks.

Minimum Advance Amount. The minimum amount of any credit advance that can be made on your Credit Line is \$500.00. This means any Home Equity Credit Line Check must be written for at least the minimum advance amount.

Request By Mail, in Person Request and Other Methods Limitations. There are no transaction limitations for requesting an advance by mail, requesting an advance in person or accessing by other methods.

Authorized Signers. The words "Authorized Signer" on Home Equity Credit Line Checks as used in this Agreement mean and include each person who (a) signs the application for this Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for the Credit Line Account.

Stop Payments. We do not honor stop payment orders for Home Equity Credit Line Checks drawn against your Credit Line Account. You therefore should not use your Credit Line Account if you anticipate the need to stop payment. You agree that we will have no liability to you or to any other party because we do not honor stop payment orders.

Lost Home Equity Credit Line Checks. If you lose your Home Equity Credit Line Checks or if someone is using them without your permission, you agree to let us know immediately. The fastest way to notify us is by calling us at (800) 789-2265. You also can notify us at ZIONS FIRST NATIONAL BANK P.O. BOX 1507, SALT LAKE CITY, UT 84110-1507.

Future Credit Line Services. Your application for this Credit Line also serves as a request to receive any new services (such as access devices) which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

Insurance. You must obtain insurance on the Property securing this Agreement that is reasonably satisfactory to us. You may obtain property insurance through any company of your choice that is reasonably satisfactory to us. You have the option of providing any insurance required under this Agreement through an existing policy or a policy independently obtained and paid for by you, subject to our right, for reasonable cause before credit is extended, to decline any insurance provided by you. Subject to applicable law, if you fail to obtain or maintain insurance as required in the Deed of Trust, we may purchase insurance to protect our own interest, add the premium to your balance, pursue any other remedies available to us, or do any one or more of these things.

Periodic Statements. If you have a balance owing on your Credit Line Account or have any account activity, we will send you a periodic statement. It will show, among other things, credit advances, FINANCE CHARGES, other charges, payments made, other credits, your "Previous Balance," and your "New Balance." Your statement also will identify the Minimum Payment you must make for that billing period and the date it is due.

When FINANCE CHARGES Begin to Accrue. Periodic FINANCE CHARGES for credit advances under your Credit Line will begin to accrue on the date credit advances are posted to your Credit Line. There is no "free ride period" which would allow you to avoid a FINANCE CHARGE on your Credit Line credit advances.

Method Used to Determine the Balance on Which the FINANCE CHARGE Will Be Computed. A daily FINANCE CHARGE will be imposed on all credit advances made under your Credit Line imposed from the date of each credit advance based on the "daily balance" method. To get the daily balance, we take the beginning balance of your Credit Line Account each day, add any new advances and subtract any payments or credits and any unpaid FINANCE CHARGES. This gives us the "daily balance."

Method of Determining the Amount of FINANCE CHARGE. Any FINANCE CHARGE is determined by applying the "Periodic Rate" to the balance described herein. Then we add together the periodic FINANCE CHARGES for each day in the billing cycle. This is your FINANCE CHARGE.

ZION 00283

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 3

calculated by applying a Periodic Rate.

You also agree to pay **FINANCE CHARGES**, not calculated by applying a Periodic Rate, as set forth below:

Other. The following other **FINANCE CHARGE** is applicable: \$350.00. This charge will be due as follows: If this home equity credit line was not charged an origination fee and is closed within 36 months of this agreement.

Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE. We will determine the Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** as follows. We start with an independent index which is the "VARIABLE LINE RATE INDEX" which is fully described in the ATTACHED EXHIBIT (the "Index"). We will use the most recent Index value available to us as of the "Variable Rate Line Reference Date" for any **ANNUAL PERCENTAGE RATE** adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of this Credit Line Account, we may designate a substitute index after notice to you. To determine the Periodic Rate that will apply to your First Payment Stream, we subtract a margin from the value of the Index, then divide the value by the number of days in a year (daily). To obtain the **ANNUAL PERCENTAGE RATE** we multiply the Periodic Rate by the number of days in a year (daily). This result is the **ANNUAL PERCENTAGE RATE** for your First Payment Stream. To determine the Periodic Rate that will apply to your Second Payment Stream, we subtract a margin from the value of the Index, then divide the value by the number of days in a year (daily). To obtain the **ANNUAL PERCENTAGE RATE** we multiply the Periodic Rate by the number of days in a year (daily). This result is the **ANNUAL PERCENTAGE RATE** for your Second Payment Stream. The **ANNUAL PERCENTAGE RATE** includes only interest and no other costs. Initially, during the discount period, we will reduce the total rate of the index plus margin by the percentage shown herein.

The Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** on your Credit Line will increase or decrease as the Index increases or decreases from time to time. Any increase in the Periodic Rate will take the form of higher payment amounts. Adjustments to the Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** resulting from changes in the Index will take effect monthly. After the initial discount period is completed, the corresponding **ANNUAL PERCENTAGE RATE** cannot be less than 3.990% per annum. In no event will the corresponding **ANNUAL PERCENTAGE RATE** be more than the lesser of 21.000% or the maximum rate allowed by applicable law. Today the Index is 8.250% per annum, and therefore the initial Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** on your Credit Line are as stated below:

Rates During the Discount Period

| <u>Term of Discount Range of Balances</u> | <u>Discount Percentage</u> | <u>ANNUAL PERCENTAGE RATE</u> | <u>Daily Periodic Rate</u> |
|---|--------------------------------|-----------------------------------|--------------------------------|
| First 6 payments | | | |
| All Balances | 2.000% | 5.740% | 0.01573% |

The term of the discount period is 6 payments.

Notwithstanding the example above, the initial Annual Percentage Rate and Daily Periodic Rate during the discount period shall be as follows: Annual Percentage Rate: 6.25% which is today's Index minus 2.00%. Daily Periodic Rate: 0.017123%. The discount period expires on the first billing date following six (6) monthly billing cycles from the date this Agreement is signed by the parties, regardless of whether a balance has been advanced hereunder or whether payments have become due.

The rate during the discount period is the Index minus 2.00%. During the discount period, the Daily Periodic Rate and the corresponding Annual Percentage Rate on your Credit Line will increase or decrease as the Index increases or decreases from time to time which will affect your Daily Periodic Rate.

Current Non-discounted Rates for the First Payment Stream

| <u>Range of Balance or Conditions</u> | <u>Margin Added to Index</u> | <u>ANNUAL PERCENTAGE RATE</u> | <u>Daily Periodic Rate</u> |
|---|----------------------------------|-----------------------------------|--------------------------------|
| All Balances | -0.510% | 7.740% | 0.02121% |

Current Non-discounted Rates for the Second Payment Stream

| <u>Range of Balance or Conditions</u> | <u>Margin Added to Index</u> | <u>ANNUAL PERCENTAGE RATE</u> | <u>Daily Periodic Rate</u> |
|---|----------------------------------|-----------------------------------|--------------------------------|
| All Balances | -0.510% | 7.740% | 0.02121% |

Notwithstanding any other provision of this Agreement, we will not charge interest on any unadvanced loan proceeds.

Conversion Option. This Agreement contains an option to convert the interest rate from a variable rate with interest rate limits to a fixed rate as calculated below. The following information describes the terms and features of the conversion option "LockSelect" available under this Agreement:

ANNUAL PERCENTAGE RATE Increase. Your **ANNUAL PERCENTAGE RATE** may increase if you exercise this option to convert to a fixed rate.

Conversion Periods. You can exercise the option to convert to a fixed rate only during the following period or periods: at any time during the draw period.

Conversion Fees. You will be required to pay the following fees at the time of conversion to a fixed rate: \$25 for each LockSelect loan you request us to establish.

Rate Determination. The fixed rate will be determined as follows: The **ANNUAL PERCENTAGE RATE** for any LockSelect loan will be determined by reference to a Fixed Rate Credit Line Index on the Fixed Rate Reference Date. Once this rate is determined for any LockSelect loan, it will not change and will be applicable for as long as there is any balance remaining in that subaccount. The **ANNUAL PERCENTAGE RATE** applicable for any LockSelect loan will be the Fixed Rate Margin shown below plus the value of the applicable Fixed Rate Credit Line Index on the day that you request us to set up that LockSelect sub-loan. The **ANNUAL PERCENTAGE RATE** and rate information for any LockSelect loan in effect at the time you open your account is shown in the "Additional Provision: Fixed Rate

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 4

Information About LockSelect Loans". The ANNUAL PERCENTAGE RATES and Daily Periodic Rates listed in the first and second payment streams apply only to all balances except for balances which have been converted to LockSelect loans.

Fixed Rate Credit Line Indexes

The Fixed Rate Credit Line Indexes that we use to determine the ANNUAL PERCENTAGE RATE applicable to any LockSelect loan are based on the U.S. Treasury note rate plus the Swap Spread as quoted on Bloomberg "SWYC" <Go>, "23" <Go>, "2" <Go> Ask Side. We use the five (5) year U.S. Treasury note with the five (5) year Swap Spread for loans with a term from 12 to 60 months. And we use the ten (10) year U.S. Treasury note with the ten (10) year Swap Spread for loans from 61 to 120 months. The Fixed Rate Reference Date is any Wednesday with the rate determined as of that date effective throughout the following Monday through Saturday period. If for any reason the rate is not available on the Reference Date, we will use the rate in effect on the most recent, previously available date. Any Fixed Rate Credit Line Index is only a standard for determining rates, and is not necessarily a rate commonly charged to any class of borrowers. We have the right to verify and correct or resolve any error or other discrepancy in any published value of any Fixed Rate Credit Line Index.

Daily Balance Calculation with LockSelect Loans

To get the daily balance when LockSelect loans are present, we determine the beginning daily balance each day, separately for the Variable Rate Line and each LockSelect loan. To do that, we start with the beginning daily balance each day and add to each balance, as applicable, that day's debits and cash advances and subtract from each balance, as applicable, that day's payments and credits. The resulting daily balance also includes all unpaid payments and other charges, excluding finance charges and late payment charges.

Conversion Rules. You can convert to a fixed rate only during the period or periods described above. In addition, the following rules apply to the conversion option under this Agreement: Your Home Equity Credit Line account consists of a primary credit line (the "Variable Rate Line") and as many as three (3) LockSelect sub-loans at any one time that you request and we agree to establish (each being a "LockSelect loan"). A maximum of three (3) LockSelect sub-loans can be established in any one calendar year. If you choose a fixed rate term between 12 months and 60 months, the minimum loan amount is \$2500. The minimum loan amount is \$5000 if a fixed rate term of 61 months to 120 months is chosen. We may establish any LockSelect loan at the request of any one of you without the consent of, or notice to, any other(s) of you. At your request and upon our approval, we will transfer a specific advance to a LockSelect loan or you may arrange to have the LockSelect sub-loan established before you request the advance.

In order to obtain current advertised rate a minimum draw of \$20,000 with a 1- to 5-year term contracted for at closing is required.

If any previously established LockSelect loan(s) exists at the start of the Repayment Period, the agreed upon payment amount(s) will continue to be due until we receive payment in full regarding that sub-loan(s).

The total outstanding balance of your account consists of the amount of all advances (including the Variable Rate Line and any LockSelect Sub-loan(s)) you have not repaid, plus any unpaid finance charges and unpaid other charges on your account, together with any other outstanding debit applicable to your account.

Minimum Payment for LockSelect loans

When you request us to establish a LockSelect loan, you must choose any period from 12 to 120 months for amortization of the advance transferred to that sub-loan. While sub-loans can only be established during the Draw Period, the amortization can extend into the Repayment Period. We will determine the payment amount that would be required to pay off the balance in that sub-loan in as substantially equal installments as possible over the amortization period you request at the fixed rate applicable to that sub-loan. The payment amount determined in accordance with the preceding sentence will be the minimum payment due for that LockSelect loan. If the total outstanding balance in that LockSelect loan is less than such payment amount, such balance will then be the minimum payment amount with respect to that LockSelect loan. The minimum payment with respect to any LockSelect loan will continue to be due for as long as there is any outstanding balance in that LockSelect loan, even if that is longer than the Draw Period. Also, the amount of the final minimum payment for any LockSelect loan may be more or less than the prior minimum payments for that sub-loan.

Minimum Payment

For each monthly statement period during the Draw Period, you must make a minimum payment that is the sum of the minimum payment due for the Variable Rate Line and the minimum payment due for each LockSelect Sub-loan. If any LockSelect Sub-loan exists, the payment will first be applied to the Variable Rate Line and then to the sub-loan(s) in the order of origination, beginning with the oldest. The payment will be applied to each sub-loan in the same manner as with the Variable Rate Line.

Conditions Under Which Other Charges May Be Imposed. You agree to pay all the other fees and charges related to your Credit Line as set forth below:

Returned Items. You may be charged \$15.00 if you pay your Credit Line obligations with a check, draft, or other item that is dishonored for any reason, unless applicable law requires a lower charge or prohibits any charge.

Overlimit Charge. Your Credit Line Account may be charged \$30.00 if you cause your Credit Line Account to go over your Credit Limit. This includes writing a Home Equity Credit Line Check in excess of your available balance.

Charge for Advance Less than Minimum. Your Credit Line Account may be charged \$15.00 if you obtain a credit advance for less than the minimum advance amount disclosed above, whether we decide to honor it or whether we refuse to honor it, unless applicable law requires a lower charge or prohibits any charge.

Miscellaneous Photocopying. If you request a copy of any document, we may charge your Credit Line Account \$5.00 per copy for the time it takes us to locate, copy, and mail the document to you. If your request is related to a billing error (see "Your Billing Rights" notice) and an error is found, we will reverse any photocopying charges.

Late Charge. Your payment will be late if it is not received by us within 10 days after the "Payment Due Date" shown on your periodic statement. If your payment is late we may charge you 5.000% of the unpaid amount of the payment or \$25.00, whichever is greater.

Lien Release Fees. In addition to all other charges, you agree, to the extent not prohibited by law, to pay all governmental fees for release of our security interests in collateral securing your Credit Line. You will pay these fees at the time the lien or liens are released. The estimated amount of these future lien release fees is \$12.00.

Other Charges. Your Credit Line Account may be charged the following other charges: Hourly Research Charge. The amount of this other charge is: \$7.50.

Lender's Rights. Under this Agreement, we have the following rights:

Termination and Acceleration. We can terminate your Credit Line Account and require you to pay us the entire outstanding balance in one payment, and charge you certain fees, if any of the following happen: (1) You commit fraud or make a material misrepresentation at any time in connection with this Credit Agreement. This can include, for example, a false statement about your income, assets, liabilities, or

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 5

any other aspects of your financial condition. (2) You do not meet the repayment terms of this Credit Agreement. (3) Your action or inaction adversely affects the collateral for the plan or our rights in the collateral. This can include, for example, failure to maintain required insurance, waste or destructive use of the dwelling, failure to pay taxes, death of all persons liable on the account, transfer of title or sale of the dwelling, creation of a senior lien on the dwelling without our permission, foreclosure by the holder of another lien, or the use of funds or the dwelling for prohibited purposes.

Suspension or Reduction. In addition to any other rights we may have, we can suspend additional extensions of credit or reduce your Credit Limit during any period in which any of the following are in effect:

(1) The value of your property declines significantly below the property's appraised value for purposes of this Credit Line Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity is reduced by fifty percent and may include a smaller decline depending on the individual circumstances.

(2) We reasonably believe that you will be unable to fulfill your payment obligations under your Credit Line Account due to a material change in your financial circumstances.

(3) You are in default under any material obligations of this Credit Line Account. We consider all of your obligations to be material. Categories of material obligations include the events described above under Termination and Acceleration, obligations to pay fees and charges, obligations and limitations on the receipt of credit advances, obligations concerning maintenance or use of the property or proceeds, obligations to pay and perform the terms of any other deed of trust, mortgage or lease of the property, obligations to notify us and to provide documents or information to us (such as updated financial information), obligations to comply with applicable laws (such as zoning restrictions), and obligations of any cosigner. No default will occur until we mail or deliver a notice of default to you, so you can restore your right to credit advances.

(4) We are precluded by government action from imposing the **ANNUAL PERCENTAGE RATE** provided for under this Agreement.

(5) The priority of our security interest is adversely affected by government action to the extent that the value of the security interest is less than one hundred twenty percent (120%) of the Credit Limit.

(6) We have been notified by governmental authority that continued advances may constitute an unsafe and unsound business practice.

Change in Terms. We may make changes to the terms of this Agreement if you agree to the change in writing at that time, if the change will unequivocally benefit you throughout the remainder of your Credit Line Account, or if the change is insignificant (such as changes relating to our data processing systems). If the Index is no longer available, we will choose a new Index and margin. The new Index will have an historical movement substantially similar to the original Index, and the new Index and margin will result in an **ANNUAL PERCENTAGE RATE** that is substantially similar to the rate in effect at the time the original Index becomes unavailable. We may prohibit additional extensions of credit or reduce your Credit Limit during any period in which the maximum **ANNUAL PERCENTAGE RATE** under your Credit Line Account is reached.

Collection Costs. We may hire or pay someone else to help collect this Agreement if you do not pay. You will pay us that amount. This includes, subject to any limits under applicable law, our reasonable attorneys' fees and our legal expenses, whether or not there is a lawsuit, including without limitation all reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, you also will pay any court costs, in addition to all other sums provided by law.

Access Devices. If your Credit Line is suspended or terminated, you must immediately return to us all Home Equity Credit Line Checks and any other access devices. Any use of Home Equity Credit Line Checks or other access devices following suspension or termination may be considered fraudulent. You will also remain liable for any further use of Home Equity Credit Line Checks or other Credit Line access devices not returned to us.

Delay in Enforcement. We may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right. If we delay or waive any of our rights, we may enforce that right at any time in the future without advance notice. For example, not terminating your account for non-payment will not be a waiver of our right to terminate your account in the future if you have not paid.

Cancellation by you. If you cancel your right to credit advances under this Agreement, you must notify us and return all Home Equity Credit Line Checks and any other access devices to us. Despite cancellation, your obligations under this Agreement will remain in full force and effect until you have paid us all amounts due under this Agreement.

Prepayment. You may prepay all or any amount owing under this Credit Line at any time without penalty, except we will be entitled to receive all accrued **FINANCE CHARGES**, and other charges, if any. Payments in excess of your Minimum Payment will not relieve you of your obligation to continue to make your Minimum Payments. Instead, they will reduce the principal balance owed on the Credit Line. You agree not to send us payments marked "paid in full", "without recourse", or similar language. If you send such a payment, we may accept it without losing any of our rights under this Agreement, and you will remain obligated to pay any further amount owed to us. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Zions First National Bank, P.O. Box 30813 Salt Lake City, UT 84130.

Notices. All notices will be sent to your address as shown in this Agreement. Notices will be mailed to you at a different address if you give us written notice of a different address. You agree to advise us promptly if you change your mailing address.

Annual Review. You agree that you will provide us with a current financial statement, a new credit application, or both, annually, on forms provided by us. Based upon this information we will conduct an annual review of your Credit Line Account. You also agree we may obtain credit reports on you at any time, at our sole option, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We may require a new appraisal of the Property which secures your Credit Line at any time, including an internal inspection, at our sole option. You agree to reimburse us for any costs we incur in connection with the annual review. You authorize us to release information about you to third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you did not opt out of the applicable policy, or as permitted by law.

Transfer or Assignment. Without prior notice or approval from you, we reserve the right to sell or transfer your Credit Line Account and our rights and obligations under this Agreement to another lender, entity, or person, and to assign our rights under the Deed of Trust. Your rights under this Agreement belong to you only and may not be transferred or assigned. Your obligations, however, are binding on your heirs and legal representatives. Upon any such sale or transfer, we will have no further obligation to provide you with credit advances or to perform any other obligation under this Agreement.

Tax Consequences. You understand that neither we, nor any of our employees or agents, make any representation or warranty whatsoever concerning the tax consequences of your establishing and using your Credit Line, including the deductibility of interest, and that neither we nor our employees or agents will be liable in the event interest on your Credit Line is not deductible. You should consult your own tax advisor for

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 6

guidance on this subject.

Notify Us of Inaccurate Information We Report To Consumer Reporting Agencies. Please notify us if we report any inaccurate information about your account(s) to a consumer reporting agency. Your written notice describing the specific inaccuracy(ies) should be sent to us at the following address: Zions First National Bank P.O. Box 1507 Salt Lake City, UT 84110-1507.

Representations and Warranties. We are extending this Home Equity Credit Line and agree to make Advances to you based on the following representations or warranties made by you. These representations or warranties must remain in effect throughout the signing of this Agreement and the recording of the Deed of Trust.

(a) There are no actions, suits, or proceedings currently being brought against you or threatened against or affecting you or the property securing this account before any court, administrative office, or agency that might result in any material adverse change in your business or the property.

(b) Neither the execution and delivery of this Agreement or the Deed of Trust, nor the consummation of the transactions contemplated by this Agreement, nor your compliance with the terms of this Agreement or the Deed of Trust will conflict with or be inconsistent with or result in any breach of any of the terms, covenants or conditions of or constitute a default under or result in the creation or imposition of any lien, charge or encumbrance upon any of your property or assets pursuant to the terms of any indenture, mortgage, deed of trust, security agreement or other instrument to which you are a party or by which you may be bound;

(c) None of your property or assets, including the Property, is subject to any security interest, mortgage, pledge, lien or other encumbrance or exception to the title of any character as of the date hereof, except as previously disclosed by you and approved by us;

(d) Any underlying encumbrance on the Property and any promissory notes secured thereby are in full force and effect, and no default exists in any of such promissory notes or the underlying encumbrances. You have not received any notice of default, acceleration, foreclosure, or exercise of power of sale. And you are not aware of any litigation, cause of action, claim or demand relating to or affecting the promissory notes, the underlying encumbrances, or the Property; and

(e) Neither the Property nor any part thereof has been condemned, threatened with condemnation, or materially damaged by any casualty.

Interest Rate Cap Option Declined. You did not select an "interest rate cap option" which, for a fee, would limit future increases in the interest rate on this loan. Therefore, except for the interest rate ceiling, no interest rate caps will occur on this line.

Additional Provision: Fixed Rate Information About LockSelect Sub-Loans. An example of the ANNUAL PERCENTAGE RATE and rate information for a LockSelect Sub-loan in effect at the time you open your account is:

Fixed Rate Margin: 2.25%

If a 10 year LockSelect Sub-loan was established at the time you opened your account, the ANNUAL PERCENTAGE RATE for that LockSelect Sub-loan would be 7.34%

(0.020110% daily periodic rate).

REPORTING NEGATIVE INFORMATION. We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

Governing Law. This Agreement will be governed by federal law applicable to us and, to the extent not preempted by federal law, the laws of the State of Utah without regard to its conflicts of law provisions. This Agreement has been accepted by us in the State of Utah.

Choice of Venue. If there is a lawsuit, you agree upon our request to submit to the jurisdiction of the courts of SALT LAKE County, State of Utah.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Interpretation. You agree that this Agreement, together with the Deed of Trust, is the best evidence of your agreements with us. If we go to court for any reason, we can use a copy, filmed or electronic, of any periodic statement, this Agreement, the Deed of Trust or any other document to prove what you owe us or that a transaction has taken place. The copy, microfilm, microfiche, or optical image will have the same validity as the original. You agree that, except to the extent you can show there is a billing error, your most current periodic statement is the best evidence of your obligation to pay.

Severability. If a court finds that any provision of this Agreement is not valid or should not be enforced, that fact by itself will not mean that the rest of this Agreement will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Agreement even if a provision of this Agreement may be found to be invalid or unenforceable.

Arbitration Disclosures.

1. ARBITRATION IS FINAL AND BINDING ON THE PARTIES AND SUBJECT TO ONLY VERY LIMITED REVIEW BY A COURT.
2. IN ARBITRATION THE PARTIES ARE WAIVING THEIR RIGHT TO LITIGATE IN COURT, INCLUDING THEIR RIGHT TO A JURY TRIAL.
3. DISCOVERY IN ARBITRATION IS MORE LIMITED THAN DISCOVERY IN COURT.
4. ARBITRATORS ARE NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING IN THEIR AWARDS. THE RIGHT TO APPEAL OR SEEK MODIFICATION OF ARBITRATORS' RULINGS IS VERY LIMITED.
5. A PANEL OF ARBITRATORS MIGHT INCLUDE AN ARBITRATOR WHO IS OR WAS AFFILIATED WITH THE BANKING INDUSTRY.
6. ARBITRATION WILL APPLY TO ALL DISPUTES BETWEEN THE PARTIES, NOT JUST THOSE CONCERNING THE AGREEMENT.
7. IF YOU HAVE QUESTIONS ABOUT ARBITRATION, CONSULT YOUR ATTORNEY OR THE AMERICAN ARBITRATION ASSOCIATION.
- (a) Any claim or controversy ("Dispute") between or among the parties and their employees, agents, affiliates, and assigns, including, but not limited to, Disputes arising out of or relating to this agreement, this arbitration provision ("arbitration clause"), or any related agreements or instruments relating hereto or delivered in connection herewith ("Related Agreements"), and including, but not limited to, a Dispute based on or arising from an alleged tort, shall at the request of any party be resolved by binding arbitration in accordance with the applicable arbitration rules of the American Arbitration Association (the "Administrator"). The provisions of this arbitration clause shall survive any termination, amendment, or expiration of this agreement or Related Agreements. The provisions of this arbitration clause shall supersede any prior arbitration agreement between or among the parties.
- (b) The arbitration proceedings shall be conducted in a city mutually agreed by the parties. Absent such an agreement, arbitration will be conducted in Salt Lake City, Utah or such other place as may be determined by the Administrator. The Administrator and the arbitrator(s) shall have the authority to the extent practicable to take any action to require the arbitration proceeding to be completed and the arbitrator(s)' award issued within 150 days of the filing of the Dispute with the Administrator. The arbitrator(s) shall have the authority to impose sanctions on any party that fails to comply with time periods imposed by the Administrator or the arbitrator(s), including the sanction of summarily dismissing any Dispute or defense with prejudice. The arbitrator(s) shall have the authority to resolve any Dispute regarding the terms of this agreement, this arbitration clause, or Related Agreements, including any claim or controversy regarding the arbitrability of any Dispute. All limitations periods applicable to any Dispute or defense, whether by statute or agreement, shall apply to any

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE

Loan No: 001000410004021029

(Continued)

Page 7

arbitration proceeding hereunder and the arbitrator(s) shall have the authority to decide whether any Dispute or defense is barred by a limitations period and, if so, to summarily enter an award dismissing any Dispute or defense on that basis. The doctrines of compulsory counterclaim, res judicata, and collateral estoppel shall apply to any arbitration proceeding hereunder so that a party must state as a counterclaim in the arbitration proceeding any claim or controversy which arises out of the transaction or occurrence that is the subject matter of the Dispute. The arbitrator(s) may in the arbitrator(s)' discretion and at the request of any party: (1) consolidate in a single arbitration proceeding any other claim arising out of the same transaction involving another party to that transaction that is bound by an arbitration clause with Lender, such as borrowers, guarantors, sureties, and owners of collateral; and (2) consolidate or administer multiple arbitration claims or controversies as a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure.

(c) The arbitrator(s) shall be selected in accordance with the rules of the Administrator from panels maintained by the Administrator. A single arbitrator shall have expertise in the subject matter of the Dispute. Where three arbitrators conduct an arbitration proceeding, the Dispute shall be decided by a majority vote of the three arbitrators, at least one of whom must have expertise in the subject matter of the Dispute and at least one of whom must be a practicing attorney. The arbitrator(s) shall award to the prevailing party recovery of all costs and fees (including attorneys' fees and costs, arbitration administration fees and costs, and arbitrator(s)' fees). The arbitrator(s), either during the pendency of the arbitration proceeding or as part of the arbitration award, also may grant provisional or ancillary remedies including but not limited to an award of injunctive relief, foreclosure, sequestration, attachment, replevin, garnishment, or the appointment of a receiver.

(d) Judgement upon an arbitration award may be entered in any court having jurisdiction, subject to the following limitation: the arbitration award is binding upon the parties only if the amount does not exceed Four Million Dollars (\$4,000,000.00); if the award exceeds that limit, either party may demand the right to a court trial. Such a demand must be filed with the Administrator within thirty (30) days following the date of the arbitration award; if such a demand is not made with that time period, the amount of the arbitration award shall be binding. The computation of the total amount of an arbitration award shall include amounts awarded for attorneys' fees and costs, arbitration administration fees and costs, and arbitrator(s)' fees.

(e) No provision of this arbitration clause, nor the exercise of any rights hereunder, shall limit the right of any party to: (1) judicially or non-judicially foreclose against any real or personal property collateral or other security; (2) exercise self-help remedies, including but not limited to repossession and setoff rights; or (3) obtain from a court having jurisdiction thereover any provisional or ancillary remedies including but not limited to injunctive relief, foreclosure, sequestration, attachment, replevin, garnishment, or the appointment of a receiver. Such rights can be exercised at any time, before or after initiation of an arbitration proceeding, except to the extent such action is contrary to the arbitration award. The exercise of such rights shall not constitute a waiver of the right to submit any Dispute to arbitration, and any claim or controversy related to the exercise of such rights shall be a Dispute to be resolved under the provisions of this arbitration clause. Any party may initiate arbitration with the Administrator. If any party desires to arbitrate a Dispute asserted against such party in a complaint, counterclaim, cross-claim, or third-party complaint thereto, or in an answer or other reply to any such pleading, such party must make an appropriate motion to the trial court seeking to compel arbitration, which motion must be filed with the court within 45 days of service of the pleading, or amendment thereto, setting forth such Dispute. If arbitration is compelled after commencement of litigation of a Dispute, the party obtaining an order compelling arbitration shall commence arbitration and pay the Administrator's filing fees and costs within 45 days of entry of such order. Failure to do so shall constitute an agreement to proceed with litigation and waiver of the right to arbitrate. In any arbitration commenced by a consumer regarding a consumer Dispute, Lender shall pay one half of the Administrator's filing fee, up to \$250.

(f) Notwithstanding the applicability of any other law to this agreement, the arbitration clause, or Related Agreements between or among the parties, the Federal Arbitration Act, 9 U.S.C. Section 1 et seq., shall apply to the construction and interpretation of this arbitration clause. If any provision of this arbitration clause should be determined to be unenforceable, all other provisions of this arbitration clause shall remain in full force and effect.

Acknowledgment. You understand and agree to the terms and conditions in this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled "What you should know about Home Equity Lines of Credit," given with the application.

BORROWER:

X

SHAYNE CHAPMAN

Effective Disbursement Date: _____

HOME EQUITY LINE CREDIT AGREEMENT AND DISCLOSURE
Loan No: 001000410004021029 (Continued)

Page 8

BILLING ERROR RIGHTS

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify us in case of errors or questions about your bill.

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at

Zions First National Bank
P.O. Box 30160

West Valley City, UT 84130-0160

or at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

Your name and account number.

The dollar amount of the suspected error.

Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three (3) business days before the automatic payment is scheduled to occur.

Your rights and our responsibilities after we receive your written notice.

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your Credit Limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten (10) days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill was correct.

"VARIABLE RATE LINE INDEX" EXHIBIT

| Principal | Loan Date | Maturity | Loan No | Call / Coll | Account | Officer | Initials |
|---|------------|------------|---------|-------------|--------------|---------|----------|
| \$250,000.00 | 12-29-2006 | 12-29-2036 | *** | 6320 | 0041-4021029 | | |
| References in the shaded area are for our use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations. | | | | | | | |

Borrower: SHAYNE CRAPO
865 EAST BRISTLECONE LANE
DELTA, UT 84624

Lender: ZIONS FIRST NATIONAL BANK
OREM/WASATCH OFFICE
1220 SOUTH 800 EAST
OREM, UT 84058

This "VARIABLE RATE LINE INDEX" EXHIBIT is attached to and by this reference is made a part of the Home Equity Line Credit Agreement and Disclosure, dated December 29, 2006, and executed in connection with a loan or other financial accommodations between ZIONS FIRST NATIONAL BANK and SHAYNE CRAPO.

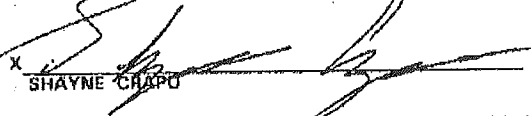
"Variable Rate Line Index". The ANNUAL PERCENTAGE RATE for the Variable Rate Line will be the amount of the Variable Rate Margin shown in the "Margin Added to Index" listed in the Home Equity Line Credit Agreement and Disclosure plus the value of the Variable Rate Line Index on the Variable Rate Line Reference Date as defined below. If no "Margin Added to Index" percentage is listed in the Home Equity Line Credit Agreement and Disclosure, the ANNUAL PERCENTAGE RATE will be the value of the Variable Rate Line Index.

Variable Rate Credit Line Index:
The Variable Rate Line Index which we use to determine changes in the ANNUAL PERCENTAGE RATE for the Variable Rate Line is the published commercial loan variable rate index held on the Variable Rate Line Reference Date by any two of the following banks: J.P. Morgan Chase & Co., Wells Fargo Bank, N.A., and Bank of America, N.A. In the event no two of the above banks have the same published rate, the bank having the median rate will establish the Variable Rate Line Index. The Variable Rate Line Index is only a standard for measuring rates, and is not necessarily a rate commonly charged to any class of borrowers, nor is it the best or lowest rate offered by any lender. The Variable Rate Line Index may also be referred to as Zions "Prime Rate".

Variable Rate Line Reference Date:
The value of the Variable Rate Line Index for the initial ANNUAL PERCENTAGE RATE for the Variable Rate Line, and for any changes in the ANNUAL PERCENTAGE RATE for the Variable Rate Line, is determined on the Variable Rate Line Reference Date. The Variable Rate Line Reference Date is the last day of your statement cycle. The rate on that date will apply to the balance in your Variable Rate Line throughout the following statement cycle up to and including the last day of your statement cycle. If for any reason the Variable Rate Line Index is not available on the Reference Date, we will use the Variable Rate Line Index in effect on the most recent, previously available date. We have the right to verify and correct or resolve any error or other discrepancy in any published value of the Variable Rate Line Index.

THIS
"VARIABLE RATE LINE INDEX" EXHIBIT IS EXECUTED ON DECEMBER 29, 2006.

BORROWER:

X 
SHAYNE CRAPO

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Addendum No. 3

(1099-C)

ZIONS FIRST NATIONAL BANK
ONE SOUTH MAIN
STE 800
SALT LAKE CITY UT 84133

144277



SHAYNE CRAPO
665 BRISTLECON LN
DELTA UT 84624-8913



☐ CORRECTED (if checked)

| | | | | |
|---|---|---|---|--|
| CREDITOR'S name, street address, city or town, province or state, country, ZIP, or foreign postal code, and telephone no. ZIONS FIRST NATIONAL BANK ONE SOUTH MAIN STE 800 SALT LAKE CITY, UT 84133 800-789-2265 | | 1 Date of identifiable event 12/31/2013 | OMB No. 1545-1424 2013 Form 1099-C | Cancellation of Debt |
| | | 2 Amount of debt discharged \$250,000.00 | | |
| | | 3 Interest if included in box 2 | | |
| CREDITOR'S federal identification number 87-0189025 | DEBTOR'S identification number 528-57-2357 | 4 Debt description FORGIVEN DEBT AMT 3 YRS NO PAYMENT | | Copy B For Debtor This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if taxable income results from this transaction and the IRS determines that it has not been reported. |
| DEBTOR'S name, street address, city or town, province or state, country, and ZIP or foreign postal code SHAYNE CRAPO 665 BRISTLECON LN DELTA, UT 84624-8913 | | 5 If checked, the debtor was personally liable for repayment of the debt <input checked="" type="checkbox"/> | | |
| Account number (see instructions) 1101211011001066 | | 6 Identifiable event code H | 7 Fair market value of property \$714,000.00 | |

Form 1099-C

(keep for your records)

www.irs.gov/form1099c

Department of the Treasury - Internal Revenue Service

1099-C Instructions for Debtor

You received this form because a Federal Government agency or an applicable financial entity (a lender) has discharged (canceled or forgiven) a debt you owed, or because an identifiable event has occurred that either is or is deemed to be a discharge of a debt of \$600 or more. If a creditor has discharged a debt you owed, you are required to include the discharged amount in your income, even if it is less than \$600, on the "Other income" line of your Form 1040. However, you may not have to include all of the canceled debt in your income. There are exceptions and exclusions, such as bankruptcy and insolvency. See Pub. 4681, available at IRS.gov, for more details. If an identifiable event has occurred but the debt has not actually been discharged, then include any discharged debt in your income in the year that it is actually discharged, unless an exception or exclusion applies to you in that year.

Debtor's identification number. For your protection, this form may show only the last four digits of your SSN, ITIN, or ATIN. However, the issuer has reported your complete identification number to the IRS, and, where applicable, to state and/or local governments. **Account number.** May show an account or other unique number the creditor assigned to distinguish your account.

Box 1. Shows the date the earliest identifiable event occurred or, at the creditor's discretion, the date of an actual discharge that occurred before an identifiable event. See the code in box 6.

Box 2. Shows the amount of debt either actually or deemed discharged. **Note:** If you do not agree with the amount, contact your creditor.

Box 3. Shows interest if included in the debt reported in box 2. See Pub. 4681 to see if you must include the interest in gross income.

Box 4. Shows a description of the debt. If box 7 is completed, box 4 also shows a description of the property.

Box 5. Shows whether you were personally liable for repayment of the debt when the debt was created or, if modified, at the time of the last modification. See Pub. 4681 for reporting instructions.

Box 6. May show the reason your creditor has filed this form. The codes in this box are described in more detail in Pub. 4681. A-Bankruptcy; B-Other judicial debt relief; C-Statute of limitations or expiration of deficiency period; D-Foreclosure election; E-Debt relief from probate or similar proceeding; F-By agreement; G-Decision or policy to discontinue collection; H-Expiration of nonpayment testing period; or I-Other actual discharge before identifiable event.

Box 7. If, in the same calendar year, a foreclosure or abandonment of property occurred in connection with the cancellation of the debt, the fair market value (FMV) of the property will be shown, or you will receive a separate Form 1099-A. Generally, the gross foreclosure bid price is considered to be the FMV. For an abandonment or voluntary conveyance in lieu of foreclosure, the FMV is generally the appraised value of the property. You may have income or loss because of the acquisition or abandonment. See Pub. 4681 for information about foreclosures and abandonments. If the property was your main home, see Pub. 523 to figure any taxable gain or ordinary income.

Future developments. For the latest information about developments related to Form 1099-C and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form1099c.

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Page 1 of 1

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Addendum No. 4

(Instructions for Forms 1099-A and 1099-C)



Instructions for Forms 1099-A and 1099-C

Acquisition or Abandonment of Secured Property and Cancellation of Debt

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Forms 1099-A and 1099-C and their instructions, such as legislation enacted after they were published, go to www.irs.gov/form1099a and www.irs.gov/form1099c.

What's New

At the time these instructions went to print Proposed Regulations (REG-136676-13) were issued concerning the 36-month non-payment testing period. See, www.irs.gov/form1099a for further developments.

Reminder

In addition to these specific instructions, you should also use the 2015 General Instructions for Certain Information Returns (Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G). Those general instructions include information about the following topics.

- Who must file (nominee/middleman).
- When and where to file.
- Electronic reporting requirements.
- Corrected and void returns.
- Statements to recipients.
- Taxpayer identification numbers.
- Backup withholding.
- Penalties.
- Other general topics.

You can get the general instructions from www.irs.gov/form1099a or www.irs.gov/form1099c or by calling 1-800-TAX-FORM (1-800-829-3676).

Specific Instructions for Form 1099-A

File Form 1099-A, Acquisition or Abandonment of Secured Property, for each borrower if you lend money in connection with your trade or business and, in full or partial satisfaction of the debt, you acquire an interest in property that is security for the debt, or you have reason to know that the property has been abandoned. You need not be in the business of lending money to be subject to this reporting requirement.

Coordination With Form 1099-C

If, in the same calendar year, you cancel a debt of \$600 or more in connection with a foreclosure or abandonment of secured property, it is not necessary to file both Form 1099-A and Form 1099-C, Cancellation of Debt, for the same debtor. You may file Form 1099-C only. You will meet your Form 1099-A filing requirement for the debtor by completing boxes 4, 5, and 7 on Form 1099-C.

However, if you file both Forms 1099-A and 1099-C, do not complete boxes 4, 5, or 7 on Form 1099-C. See the instructions for Form 1099-C, later.

Property

Property means any real property (such as a personal residence), any intangible property, and tangible personal property except:

- No reporting is required for tangible personal property (such as a car) held only for personal use. However, you must file Form 1099-A if the property is totally or partly held for use in a trade or business or for investment.
- No reporting is required if the property securing the loan is located outside the United States and the borrower has furnished the lender a statement, under penalties of perjury, that the borrower is an exempt foreign person (unless the lender knows that the statement is false).

Who Must File

In addition to the general rule specified above, the following rules apply.

Multiple owners of a single loan. If there are multiple owners of undivided interests in a single loan, such as in pools, fixed investment trusts, or other similar arrangements, the trustee, record owner, or person acting in a similar capacity must file Form 1099-A on behalf of all the owners of beneficial interests or participations. In this case, only one form for each borrower must be filed on behalf of all owners with respect to the loan. Similarly, for bond issues, only the trustee or similar person is required to report.

Governmental unit. A governmental unit, or any of its subsidiary agencies, that lends money secured by property must file Form 1099-A.

Subsequent holder. A subsequent holder of a loan is treated as a lender and is required to report events occurring after the loan is transferred to the new holder.

Multiple lenders. If more than one person lends money secured by property and one lender forecloses or otherwise acquires an interest in the property and the sale or other acquisition terminates, reduces, or otherwise impairs the other lenders' security interests in the property, the other lenders must file Form 1099-A for each of their loans. For example, if a first trust holder forecloses on a building, and the second trust holder knows or has reason to know of such foreclosure, the second trust holder must file Form 1099-A for the second trust even though no part of the second trust was satisfied by the proceeds of the foreclosure sale.

Abandonment

An abandonment occurs when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use. You have “reason to know” of an abandonment based on all the facts and circumstances concerning the status of the property. You will be deemed to know all the information that would have been discovered through a reasonable inquiry when, in the ordinary course of business, you become aware or should become aware of circumstances indicating that the property has been abandoned. If you expect to commence a foreclosure, execution, or similar sale within 3 months of the date you had reason to know that the property was abandoned, reporting is required as of the date you acquire an interest in the property or a third party purchases the property at such sale. If you expect to but do not commence such action within 3 months, the reporting requirement arises at the end of the 3-month period.

Statements to Borrowers

If you are required to file Form 1099-A, you must provide a statement to the borrower. Furnish a copy of Form 1099-A or an acceptable substitute statement to each borrower. For more information about the requirement to furnish a statement to the borrower, see part M in the 2015 General Instructions for Certain Information Returns.

Truncating Borrower's identification number on statements. Pursuant to Treasury Regulations section 301.6109-4, all filers of Form 1099-A may truncate a borrower's identification number (social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN)) on payee statements. Truncation is not allowed on any documents the filer files with the IRS. A lender's identification number may not be truncated on any form. See part J in the 2015 General Instructions for Certain Information Returns.

Account Number

The account number is required if you have multiple accounts for a borrower for whom you are filing more than one Form 1099-A. Additionally, the IRS encourages you to designate an account number for all Forms 1099-A that you file. See part L in the 2015 General Instructions for Certain Information Returns.

Box 1. Date of Lender's Acquisition or Knowledge of Abandonment

For an acquisition, enter the date you acquired the secured property. An interest in the property generally is acquired on the earlier of the date title is transferred to the lender or the date possession and the burdens and benefits of ownership are transferred to the lender. If an objection period is provided by law, use the date the objection period expires. If you purchase the property at a sale held to satisfy the debt, such as at a foreclosure or execution sale, use the later of the date of sale or the date the borrower's right of redemption, if any, expires.

For an abandonment, enter the date you knew or had reason to know that the property was abandoned unless you expect to commence a foreclosure, execution, or

similar action within 3 months, as explained earlier. If a third party purchases the property at a foreclosure, execution, or similar sale, the property is treated as abandoned, and you have reason to know of its abandonment on the date of sale.

Box 2. Balance of Principal Outstanding

Enter the balance of the debt outstanding at the time the interest in the property was acquired or on the date you first knew or had reason to know that the property was abandoned. Include only unpaid principal on the original debt. Do not include accrued interest or foreclosure costs.

Box 3. Reserved

Box 4. Fair Market Value (FMV) of Property

For a foreclosure, execution, or similar sale, enter the FMV of the property. See Temporary Regulations section 1.6050J-1T, Q/A-32. Generally, the gross foreclosure bid price is considered to be the FMV. If an abandonment or voluntary conveyance to the lender in lieu of foreclosure occurred and you placed an “X” in the checkbox in box 5, enter the appraised value of the property. Otherwise, make no entry in this box.

Box 5. Was Borrower Personally Liable for Repayment of the Debt

If the borrower was personally liable for repayment of the debt at the time the debt was created or, if modified, at the time of the last modification, enter an “X” in the checkbox.

Box 6. Description of Property

Enter a general description of the property. For real property, generally you must enter the address of the property, or, if the address does not sufficiently identify the property, enter the section, lot, and block.

For personal property, enter the applicable type, make, and model. For example, describe a car as “Car—2011 Honda Accord.” Use a category such as “Office Equipment” to describe more than one piece of personal property, such as six desks and seven computers. Enter “CCC” for crops forfeited on Commodity Credit Corporation loans.

Specific Instructions for Form 1099-C



The creditor's phone number must be provided in the creditor's information box. It should be a central number for all canceled debts at which a person may be reached who will insure the debtor is connected with the correct department.



Do not file Form 1099-C when fraudulent debt is canceled due to identity theft. Form 1099-C is to be used only for cancellations of debts for which the debtor actually incurred the underlying debt.

File Form 1099-C, Cancellation of Debt, for each debtor for whom you canceled a debt owed to you of \$600 or more if:

1. You are an entity described under *Who Must File*, below, and

2. An identifiable event has occurred. It does not matter whether the actual cancellation is on or before the date of the identifiable event. See *When Is a Debt Canceled*, later.



Form 1099-C must be filed regardless of whether the debtor is required to report the debt as income.

The debtor may be an individual, corporation, partnership, trust, estate, association, or company.

Do not combine multiple cancellations of a debt to determine whether you meet the \$600 reporting requirement unless the separate cancellations are under a plan to evade the Form 1099-C requirements.

Coordination With Form 1099-A

If, in the same calendar year, you cancel a debt of \$600 or more in connection with a foreclosure or abandonment of secured property, it is not necessary to file both Form 1099-A, Acquisition or Abandonment of Secured Property, and Form 1099-C for the same debtor. You may file Form 1099-C only. You will meet your Form 1099-A filing requirement for the debtor by completing boxes 4, 5, and 7 on Form 1099-C. However, you may file both Forms 1099-A and 1099-C; if you do file both forms, do not complete boxes 4, 5, or 7 on Form 1099-C. See the instructions for Form 1099-A, earlier, and *Box 4*, *Box 5*, and *Box 7*, later.

Who Must File

File Form 1099-C if you are:

1. A financial institution described in section 581 or 591(a) (such as a domestic bank, trust company, building and loan or savings and loan association).
2. A credit union.
3. Any of the following, its successor, or subunit of one of the following:
 - a. Federal Deposit Insurance Corporation,
 - b. Resolution Trust Corporation,
 - c. National Credit Union Administration,
 - d. Any other federal executive agency, including government corporations,
 - e. Any military department,
 - f. U.S. Postal Service, or
 - g. Postal Rate Commission.
4. A corporation that is a subsidiary of a financial institution or credit union, but only if, because of your affiliation, you are subject to supervision and examination by a federal or state regulatory agency.
5. A Federal Government agency including:
 - a. A department,
 - b. An agency,
 - c. A court or court administrative office, or
 - d. An instrumentality in the judicial or legislative branch of the government.
6. Any organization whose significant trade or business is the lending of money, such as a finance company or credit card company (whether or not affiliated

with a financial institution). The lending of money is a significant trade or business if money is lent on a regular and continuing basis. Regulations section 1.6050P-2(b) lists three safe harbors under which reporting may not be required for the current year. See *Safe harbor rules* next.

Safe harbor rules. The three safe harbor rules in which an entity will not be considered to have a significant trade or business of lending money are:

1. No prior year reporting required. An organization will not have a significant trade or business of lending money for the current year if the organization was not required to report in the prior year and if its gross income from lending money in the most recent test year (see item 3 below) is less than both 15% of the organization's gross income and \$5 million.

2. Prior year reporting requirement. An organization that had a prior year reporting requirement will not have a significant trade or business of lending money for the current year if, for each of the 3 most recent test years, its gross income from lending money is less than both 10% of the organization's gross income and \$3 million.

3. No test year. Newly formed organizations are considered not to have a significant trade or business of lending money even if the organization lends money on a regular and continuing basis. However, this safe harbor does not apply to an entity formed or availed of for the principal purpose of holding loans acquired or originated by another entity. In this instance, the transferee entity (including real estate mortgage investment conduits (REMICs) and pass-through securitized indebtedness arrangements) may be required to report cancellation of indebtedness on Form 1099-C. See Regulations section 1.6050P-1(e)(5).

Test year defined. A test year is a tax year of the organization that ends before July 1 of the previous calendar year. For example, X, a calendar year taxpayer who has a significant trade or business of lending money, is formed in year one. X will not have a test year in year one or year two. However, for year three, X's test year will be year one. In year three, year one is the only year that ended before July 1 of the previous calendar year (in this example, year two).

Penalties. There are penalties for failure to file correct information returns by the due date and for failure to furnish correct payee statements. See part O in the 2015 General Instructions for Certain Information Returns for details.

Exceptions. Until further guidance is issued, no penalty will apply for failure to file Form 1099-C, or provide statements to debtors, for amounts:

- Discharged in nonlending transactions, or
- Forgiven pursuant to the terms of a debt obligation.

Multiple creditors. If a debt is owned (or treated as owned for federal income tax purposes) by more than one creditor, each creditor that is described under *Who Must File*, earlier, must issue a Form 1099-C if that creditor's part of the canceled debt is \$600 or more. A creditor will be deemed to have met its filing requirements if a lead bank, fund administrator, or other designee of the creditor complies on its behalf. The designee may file a single

Form 1099-C reporting the aggregate canceled debt or may file Form 1099-C for that creditor's part of the canceled debt. Use any reasonable method to determine the amount of each creditor's part of the canceled debt.

Debt owned by a partnership is treated as owned by the partners and must follow the rules for multiple creditors.

Pass-throughs and REMICs. Until further guidance is issued, no penalty will apply for failure to file Form 1099-C, or provide statements to debtors, for a canceled debt held in a pass-through securitized debt arrangement or held by a REMIC. However, see item 3 under *Safe harbor rules*, earlier.

A pass-through securitized debt arrangement is any arrangement in which one or more debts are pooled and held for 20 or more persons whose interests in the debt are undivided co-ownership interests that are freely transferable. Co-ownership interests that are actively traded personal property (as defined in Regulations section 1.1092(d)-1) are presumed to meet these requirements.

Debt Defined

A debt is any amount owed to you, including stated principal, stated interest, fees, penalties, administrative costs, and fines. The amount of debt canceled may be all or only part of the total amount owed. However, for a lending transaction, you are required to report only the stated principal. See *Exceptions*, later.

When To File

Generally, file Form 1099-C for the year in which an identifiable event occurs. See *Exceptions*, later. If you cancel a debt before an identifiable event occurs, you may choose to file Form 1099-C for the year of cancellation. No further reporting is required even if a later identifiable event occurs with respect to an amount previously reported. Also, you are not required to file an additional or corrected Form 1099-C if you receive payment on a prior year debt.

When Is a Debt Canceled

A debt is deemed canceled on the date an identifiable event occurs or, if earlier, the date of the actual discharge if you choose to file Form 1099-C for the year of cancellation. An identifiable event is one of the following.

1. A discharge in bankruptcy under Title 11 of the U.S. Code. For information on certain discharges in bankruptcy not required to be reported, see *Exceptions*, later. Enter "A" in box 6 to report this identifiable event.

2. A cancellation or extinguishment making the debt unenforceable in a receivership, foreclosure, or similar federal nonbankruptcy or state court proceeding. Enter "B" in box 6 to report this identifiable event.

3. A cancellation or extinguishment when the statute of limitations for collecting the debt expires, or when the statutory period for filing a claim or beginning a deficiency judgment proceeding expires. Expiration of the statute of limitations is an identifiable event only when a debtor's affirmative statute of limitations defense is upheld in a final

judgment or decision of a court and the appeal period has expired. Enter "C" in box 6 to report this identifiable event.

4. A cancellation or extinguishment when the creditor elects foreclosure remedies that by law extinguish or bar the creditor's right to collect the debt. This event applies to a mortgage lender or holder who is barred by local law from pursuing debt collection after a "power of sale" in the mortgage or deed of trust is exercised. Enter "D" in box 6 to report this identifiable event.

5. A cancellation or extinguishment making the debt unenforceable under a probate or similar proceeding. Enter "E" in box 6 to report this identifiable event.

6. A discharge of indebtedness under an agreement between the creditor and the debtor to cancel the debt at less than full consideration (for example, short sales). Enter "F" in box 6 to report this identifiable event.

7. A discharge of indebtedness because of a decision or a defined policy of the creditor to discontinue collection activity and cancel the debt. A creditor's defined policy can be in writing or an established business practice of the creditor. A creditor's established practice to stop collection activity and abandon a debt when a particular nonpayment period expires is a defined policy. Enter "G" in box 6 to report this identifiable event.

8. The expiration of non-payment testing period. This applies only to entities described in numbers 1, 2, 3, or 4 under *Who Must File*, earlier. This event occurs when the creditor has not received a payment on the debt during the testing period. The testing period is a 36-month period ending on December 31, plus any time when the creditor was precluded from collection activity by a stay in bankruptcy or similar bar under state or local law. Enter "H" in box 6 to report this identifiable event.

The creditor can rebut the occurrence of this identifiable event if:

a. The creditor (or a third party collection agency on behalf of the creditor) has engaged in significant bona fide collection activity during the 12-month period ending on December 31, or

b. Facts and circumstances that exist on January 31 following the end of the 36-month period indicate that the debt was not canceled.

Significant bona fide collection activity does not include nominal or ministerial collection action, such as an automated mailing. Facts and circumstances indicating that a debt was not canceled include the existence of a lien relating to the debt (up to the value of the security) or the sale or packaging for sale of the debt by the creditor.

9. Other actual discharge before identifiable event. Enter "I" in box 6 if there is an other actual discharge before one of the identifiable events listed above.

Exceptions

You are not required to report on Form 1099-C the following.

1. Certain bankruptcies. You are not required to report a debt discharged in bankruptcy unless you know from information included in your books and records that the debt was incurred for business or investment purposes. If

you are required to report a business or investment debt discharged in bankruptcy, report it for the later of:

- a. The year in which the amount of discharged debt first can be determined, or
- b. The year in which the debt is discharged in bankruptcy.

A debt is incurred for business if it is incurred in connection with the conduct of any trade or business other than the trade or business of performing services as an employee. A debt is incurred for investment if it is incurred to purchase property held for investment (as defined in section 163(d)(5)).

2. Interest. You are not required to report interest. However, if you choose to report interest as part of the canceled debt in box 2, you must show the interest separately in box 3.

3. Nonprincipal amounts. Nonprincipal amounts include penalties, fines, fees, and administrative costs. For a lending transaction, you are not required to report any amount other than stated principal. A lending transaction occurs when a lender loans money to, or makes advances on behalf of, a borrower (including revolving credit and lines of credit). For a nonlending transaction, nonprincipal amounts are included in the debt. However, until further guidance is issued, no penalties will be imposed for failure to report these amounts in nonlending transactions.

4. Foreign debtors. Until further guidance is issued, no penalty will apply if a financial institution does not file Form 1099-C for a debt canceled by its foreign branch or foreign office for a foreign debtor, provided all the following apply.

- a. The financial institution is engaged in the active conduct of a banking or similar business outside the United States.
- b. The branch or office is a permanent place of business that is regularly maintained, occupied, and used to carry on a banking or similar financial business.
- c. The business is conducted by at least one employee of the branch or office who is regularly in attendance at the place of business during normal working hours.
- d. The indebtedness is extended outside the United States by the branch or office in connection with that trade or business.
- e. The financial institution does not know or have reason to know that the debtor is a U.S. person.

5. Related parties. Generally, a creditor is not required to file Form 1099-C for the deemed cancellation of a debt that occurs when the creditor acquires the debt of a related debtor, becomes related to the debtor, or transfers the debt to another creditor related to the debtor. However, if the transfer to a related party by the creditor was for the purpose of avoiding the Form 1099-C requirements, Form 1099-C is required. See section 108(e)(4).

6. Release of a debtor. You are not required to file Form 1099-C if you release one of the debtors on a debt as long as the remaining debtors are liable for the full unpaid amount.

7. Guarantor or surety. You are not required to file Form 1099-C for a guarantor or surety. A guarantor is not a debtor for purposes of filing Form 1099-C even if demand for payment is made to the guarantor.

8. Seller financing. Organizations whose principal trade or business is the sale of non-financial goods or non-financial services, and who extend credit to customers in connection with the purchase of those non-financial goods and non-financial services, are not considered to have a significant trade or business of lending money, with respect to the credit extended in connection with the purchase of those goods or services, for reporting discharge of indebtedness on Form 1099-C. See Regulations section 1.6050P-2(c). But the reporting applies if a separate financing subsidiary of the retailer extends the credit to the retailer's customers.

Multiple Debtors

For debts of \$10,000 or more incurred after 1994 that involve debtors who are jointly and severally liable for the debt, you must report the entire amount of the canceled debt on each debtor's Form 1099-C. Multiple debtors are jointly and severally liable for a debt if there is no clear and convincing evidence to the contrary. If it can be shown that joint and several liability does not exist, a Form 1099-C is required for each debtor for whom you canceled a debt of \$600 or more.

For debts incurred before 1995 and for debts of less than \$10,000 incurred after 1994, you must file Form 1099-C only for the primary (or first-named) debtor.

If you know or have reason to know that the multiple debtors were husband and wife who were living at the same address when the debt was incurred, and you have no information that these circumstances have changed, you may file only one Form 1099-C.

Recordkeeping

If you are required to file Form 1099-C, you must retain a copy of that form or be able to reconstruct the data for at least 4 years from the due date of the return.

Requesting TINs

You must make a reasonable effort to obtain the correct name and taxpayer identification number (TIN) of the person whose debt was canceled. You may obtain the TIN when the debt is incurred. If you do not obtain the TIN before the debt is canceled, you must request the debtor's TIN. Your request must clearly notify the debtor that the IRS requires the debtor to furnish its TIN and that failure to furnish such TIN subjects the debtor to a \$50 penalty imposed by the IRS. You may use Form W-9, Request for Taxpayer Identification Number and Certification, to request the TIN. However, a debtor is not required to certify his or her TIN under penalties of perjury.

Statements to Debtors

If you are required to file Form 1099-C, you must provide a statement to the debtor. Furnish a copy of Form 1099-C or an acceptable substitute statement to each debtor. In the 2015 General Instructions for Certain Information Returns, see:

- Part M for more information about the requirement to furnish a statement to the debtor, and
- Part J for specific procedures to complete Form 1099-C for debtors in bankruptcy.

Truncating Debtor's identification number on payee statements. Pursuant to Treasury Regulations sections 301.6109-4, all filers of Form 1099-C may truncate a debtor's identification number (social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN)) on payee statements. Truncation is not allowed on any documents the filer files with the IRS. A creditor's identification number may not be truncated on any form. See part J in the 2015 General Instructions for Certain Information Returns.

Account Number

The account number is required if you have multiple accounts for a debtor for whom you are filing more than one Form 1099-C. Additionally, the IRS encourages you to designate an account number for all Forms 1099-C that you file. See part L in the 2015 General Instructions for Certain Information Returns.

Box 1. Date of Identifiable Event

Enter the date of the identifiable event. See *When Is a Debt Canceled*, earlier. However, if you actually cancel a debt before an identifiable event and you choose to report that cancellation, enter the date that you actually canceled the debt.

Box 2. Amount of Debt Discharged

Enter the amount of the canceled debt. See *Debt Defined* and *Exceptions*, earlier. The amount of the canceled debt cannot be greater than the total debt less any amount the lender receives in satisfaction of the debt by means of a settlement agreement, foreclosure sale, a short sale that partially satisfied the debt, etc.

Box 3. Interest if Included in Box 2

Enter any interest you included in the canceled debt in box 2. You are not required to report interest in box 2. But if you do, you must also report it in box 3.

Box 4. Debt Description

Enter a description of the origin of the debt, such as student loan, mortgage, or credit card expenditure. Be as specific as possible. If you are filing a combined Form 1099-C and 1099-A, include a description of the property.

Box 5. Check Here if the Debtor was Personally Liable for Repayment of the Debt

If the debtor was personally liable for repayment of the debt at the time the debt was created or, if modified, at the time of the last modification, enter an "X" in the checkbox.

Box 6. Identifiable Event Code

Enter the appropriate code to report the nature of the identifiable event. For more information about the code to use when reporting each identifiable event, see *When Is a Debt Canceled*, earlier, and Regulations section 1.6050P-1(b)(2). Also see Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*.

Box 7. Fair Market Value (FMV) of Property



FMV should include the appraised value of the property if the property is sold in a short sale.

If you are filing a combined Form 1099-C and 1099-A for a foreclosure, execution, or similar sale, enter the FMV of the property. Generally, the gross foreclosure bid price is considered to be the FMV. If an abandonment or voluntary conveyance to the lender in lieu of foreclosure occurred, enter the appraised value of the property.

Addendum No. 5

(Ruling)

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

FILED DISTRICT COURT
Third Judicial District

JAN 22 2016

SALT LAKE COUNTY

By _____

Deputy Clerk

ZIONS FIRST NATIONAL BANK,

Plaintiff,

vs.

SHAYNE D. CRAPO,

Defendant.

**ORDER GRANTING THE
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Case No.: 140907019

Judge: Barry G. Lawrence

Plaintiff asserts a deficiency claim against the Defendant for the amount due and owing under a note – \$250,000 plus interest, costs and fees. Discovery has closed, and both parties have filed cross-motions for summary judgment. Plaintiff argues that the facts are undisputed that \$250,000 remains due and owing from the Defendant and seeks a judgment against him in the amount of \$289,069.86 through May 31, 2015, plus interest of \$18.77 per day thereafter.¹ In response, Defendant does not dispute that he has failed to pay the amount due under the note, but asserts defenses based on the Plaintiff's alleged discharge of the obligation. Defendant primarily argues that by virtue of the Plaintiff issuing a 1099-C tax form to him for the 2013 tax year, the Plaintiff is deemed to have discharged his debt and/or is barred by the doctrines of waiver and estoppel from pursuing its claims.

¹ Those amounts were supported by the Affidavit of Rex Goodwin and were not disputed by Defendant.

Accordingly, the principal question for the Court is this: What effect does the issuance of the 1099-C have on Plaintiff's claims? On one hand, Plaintiff argues that the 1099-C is simply a tax reporting tool and does not effectuate a discharge of the indebtedness, and thus Defendant's defense are unsupported and summary judgment is warranted.² On the other hand, Defendant initially seemed to argue that the 1099-C precludes Plaintiff from asserting a claim as a matter of law. However, even the cases Defendant relies upon suggest that the 1099-C form only constitutes *some evidence* of a discharge, creating a question of fact for the jury; it does not in and of itself create a legal bar to collection. The Court concludes – based on the applicable tax rules, I.R.S. authorities, and persuasive majority of the case law – that the 1099-C does not effectuate or otherwise constitute evidence of a discharge. That, plus the dearth of any other evidence supporting an alleged discharge by Plaintiff, supports summary judgment in favor of Plaintiff.

I. The 1099-C Form and Pertinent Regulations

It is undisputed that Defendant failed to make any payments to Plaintiff beginning in 2010. In early 2014, Plaintiff issued a Form 1099-C to Defendant for the 2013 tax year. That form, entitled “Cancellation of Debt” (“Form”), stated \$250,000 as the “amount of debt discharged.” Notably, the reason given for the code was signified as “Identifiable Event Code ‘H’.” The instructions on the face of the Form provided the following guidance to the Defendant:

You received this form because a Federal Government agency or an applicable financial entity (lender) *has discharged (canceled or forgiven) a debt you owed or because an identifiable event has occurred* that either is or is deemed to be a discharge of a debt of \$600 or more. . . . *If an identifiable event has occurred but the debt has not actually been*

² Plaintiff also argues that there could not have been a discharge because any discharge would constitute a “credit agreement” subject to the statute of frauds, Utah Code Ann. § 25-5-4(1)(f). Defendant counters that only a “note or memorandum of the agreement,” is required (*id.*), which is satisfied by the 1099-C Form and the Charge Off request. Because the Court concludes that there was no evidence of a discharge, it need not address this argument.

discharged, then include any discharge debt in your income in the year that it is actually discharged, unless an exception or exclusion applies to you in that year.

(Def.'s Mem. In Supp. of Summ. J. Ex. A2 (Cancellation of Debt)) (emphasis added.)

This cancellation process was done pursuant to 26 C.F.R. § 1.6050P-1. That regulation sets forth the reporting requirements for a lender as follows:

(a) Reporting requirement—(1) In general. Except as provided in paragraph (d) of this section, any applicable entity (as defined in section 6050P(c)(1)) that discharges an indebtedness of any person (within the meaning of section 7701(a)(1)) of at least \$600 during a calendar year must file an information return on Form 1099-C with the Internal Revenue Service. Solely for purposes of the reporting requirements of section 6050P and this section, *a discharge of indebtedness is deemed to have occurred*, except as provided in paragraph (b)(3) of this section, *if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, whether or not an actual discharge of indebtedness has occurred* on or before the date on which the identifiable event has occurred.

Id. (emphasis added.) Thus, consistent with the Form itself, two things are clear: First, that the purpose of this regulation and document is to effect I.R.S. tax reporting requirements. Second, that a discharge of indebtedness for tax purposes includes *both* actual discharges as well as other events that are *not actual* discharges.

26 C.F.R. § 1.6050P-1 subpart (b)(2) lists the eight recognized “identifiable events;” seven of which appear to reflect *actual* discharges, including: 1) a discharge in bankruptcy, *id.* at sec. 1.6050P-1(b)(2)(A); 2) a “cancellation or extinguishment” for various reasons, *id.* at 1.6050P-1(b)(2)(B), (C), (D) and (E); and 3) “a discharge of indebtedness” based on an agreement or based on the creditor’s decision to discharge the debt.” *Id.* at sec. 1.6050P-1(b)(2)(F) and (G). The eighth identifiable event, stated in sub-paragraph H, allows a lender to identify the reason for the issuance of the 1099-C where there has not been an *actual* discharge:

(H) In the case of an entity described in section 6050P(c)(2)(A) through (C), *the expiration of the non-payment testing period*, as described in § 1.6050P-1(b)(2)(iv).

26 C.F.R. § 1.6050P-1(b)(2)(H)(emphasis added.). The Form Plaintiff issued in this case clearly and unambiguously reflects “Identifiable Event Code ‘H’,” referring to the expiration of a “testing period,” as opposed to an *actual* discharge, cancellation or extinguishment.

II. Case Law Interpreting the Form 1099-C

Each party has cited to case law supporting their position. Plaintiff asks the Court to adopt the majority position, the lead case for which is *F.D.I.C. v. Cashion*, 720 F.3d 169 (4th Cir. 2013). There, also on summary judgment, the court addressed the issue whether “the introduction into evidence of the 1099–C Form create[d] a genuine issue of material fact as to whether the Note had been cancelled or assigned.” *Id.* at 177. The court concluded:

The plain language of the regulation leads us to conclude that filing a Form 1099–C is a creditor’s required means of satisfying a reporting obligation to the IRS; it is not a means of accomplishing an actual discharge of debt, nor is it required only where an actual discharge has already occurred.

* * *

The IRS, the administrative agency charged with the obligation of implementing IRC § 6050P through its regulations, thus treats the Form 1099–C as a means for satisfying a reporting obligation and not as an instrument effectuating a discharge of debt or preventing a creditor from seeking payment on a debt. Moreover, as the IRS correctly noted in the foregoing Information Letters, nothing in the relevant statute or regulations prohibits collection following the filing of a Form 1099–C.

Id. at 179 (emphasis added).

In *Cashion*, the debtor argued, just as the debtor argues here, that the 1099-C Form constitutes prima facie evidence of an intent to discharge the loan, and that it would be up to the lender to demonstrate a contrary intention, thereby creating a factual dispute. The court in *Cashion* rejected that view, which it referred to as the view of “a small minority of the lower courts.” *Id.* at 178.

Notably, the court in *Cashion* also relied on the IRS’s own interpretation of the regulations as manifested in two IRS Information Letters:

In the first, the IRS addressed a creditor’s concern that filing the Form 1099–C would constitute a written admission that it had discharged the debt and would therefore make debtors unwilling to pay on their obligations. Citing subsection (a) of the regulations discussed above, the IRS responded that it “does not view a Form 1099–C as an admission by the creditor that it has discharged the debt and can no longer pursue collection.” I.R.S. Info. 2005–0207. In the second letter, the IRS assured a concerned creditor that filing a Form 1099–C satisfies the reporting requirements of statute and implementing regulations, neither of which “prohibit collection activity after a creditor reports by filing a Form 1099–C.” I.R.S. Info. 2005–0208.

Id. at 179.

This Court, having reviewed the IRS regulations, the language of the IRS letters, and the Form 1099–C and its underlying procedure, agrees with and adopts the rule adopted by *Cashion*. See also *Hart v. Credit Serv. Co., Inc.*, 2014 WL 5293600, *3 (D. Colo. 2014) (“Plaintiff’s mere receipt of a 1099–C form did not constitute extinguishment of his underlying debt.”); *Mennes v. Capital One, N.A.*, 2014 WL 1767079, at *6 (W.D. Wis. 2014) (“Given that the regulation requires the filing of Form 1099–C regardless whether the debt has actually been discharged, and that actual discharge of the debt is only one of the identifiable events that triggers the filing of a 1099–C form, I find the IRS interpretation persuasive and agree with the majority of courts addressing this issue that without additional evidence, the filing of a 1099–C form does not by itself evidence debt cancellation as a matter of law.”); *Ware v. Bank of Am. Corp.*, 9 F. Supp. 3d 1329, 1341 (N.D. Ga. 2014) (“Plaintiff has failed to point the court to any documentary or testamentary evidence, or binding or even persuasive legal authority to support his claim that the 1099–C extinguished his obligation to pay the debt, or that Defendant cancelled or forgave his debt..”); *United States v. Reed*, 2010 WL 3656001, at *2 (E.D. Tenn. 2010) (“However, a Form 1099–C, as a matter of law, does not operate

to legally discharge a debtor from liability on the claim that is described in the form.”); *Capital One, N.A. v. Massey*, 2011 WL 3299934, at *3 (S.D. Tex. 2011)(“With respect to the first issue, a 1099–C is issued to comply with IRS reporting requirements. I.R.S. Ltr. Rul.2005–0207, 2005 WL 3561135 (Dec. 30, 2005). The IRS does not view a 1099–C as a legal admission that a debtor is absolved from liability for a debt. *Id.* The IRS’s interpretation of regulations over which it has authority are given great deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, this court adopts the view that a 1099–C does not discharge debtors from liability. Therefore, the fact that Plaintiff issued a 1099–C in relation to the Borrowers’ indebtedness is irrelevant and does not raise a genuine issue of material fact in this suit.”)

The regulation and the Form are both clear and unequivocal – the issuance of the 1099-C signifies *either* an actual discharge *or* some other identifiable event. It is a “means of satisfying a reporting obligation to the IRS; it is not a means of accomplishing an actual discharge of debt.” *Cashion*, 720 F.3d at 179; *see also* 26 C.F.R. § 1.6050P-1. The Form does not, in and of itself, effectuate a discharge, nor does it constitute evidence of a discharge, *especially* in this case where the form made clear that the reason for the issuance of the Form was due to “Identifiable Event ‘H’,” which signified the “expiration of the non-payment testing period” and not an actual discharge, cancellation or extinguishment. *Compare* 26 C.F.R. § 1.6050P-1(b)(2)(H) to 26 C.F.R. § 1.6050P-1(b)(2)(A)-(G).

Defendant relies on the minority view – that the Form constitutes *some evidence* of a discharge. At oral argument, Defendant acknowledged that the only case of which he was aware that similarly involved a sub-part H identifiable event, is *Amtrust Bank v. Fossett*, 224 P.3d 935 (Ariz. Ct. App. 2009). There, the court concluded that the “issuance of the Form 1099–C is *prima facie*

evidence that it had discharged their debt within the meaning of Arizona law.” *Id.*, at 937. This Court rejects that case and the minority view, for two reasons. First and foremost, that conclusion is at odds with the plain language and meaning of the IRS regulations and procedures. Second, in *Amtrust Bank*, that court addressed a specific provision of Arizona law governing discharges.

Defendant also relies heavily upon *In re Reed*, 492 B.R. 261 (Bankr. E.D. Tenn. 2013). There, however, the court expressly *excluded* the subpart H identifiable event provision from its analysis: “Subsections (b)(2)(i)(H) and (b)(2)(iv) concern a non-payment testing period consisting of a minimum of 36 months, increased by any months during which a creditor is precluded from engaging in collection activity due to bankruptcy or other applicable law, *and has no bearing on the court’s determination.*” *Id.* at 267 (emphasis added.) So, that case does not provide support for Defendant’s position here.

The bottom line is that the majority view is consistent with the IRS regulations and reporting scheme; the minority view is not. This is especially so in this case – where the noted reason for the Form is *not* an actual discharge, extinguishment or cancellation, 26 C.F.R. § 1.6050P-1(b)(2)(A)-(G), but for an altogether different reason. 26 C.F.R. § 1.6050P-1(b)(2)(H). Accordingly, the Court agrees with the majority view and rejects the notion that the issuance of the Form effectuated a discharge, or otherwise resulted in a discharge of Defendant’s obligation, or that the issuance of the Form constitutes any evidence of a discharge.

III. Analysis of Other Evidence to Determine Whether a Discharge Occurred

Having concluded that the issuance of the Form itself did not effectuate a discharge, and is not, standing alone, evidence of Plaintiff’s discharge, the Court must now determine whether there are any other facts from which a fact-finder could conclude that Plaintiff has discharged Defendant’s

debt and/or given up the right to collect on the amount owed from Defendant. *See Cashion*, 720 F.3d at 181 (noting that its holding is limited to cases “where the 1099–C Form is the only evidence of debt discharge before the Court.”) Defendant relies on three pieces of evidence: 1) the written-in language on the Form; 2) Plaintiff’s internal charge off request; and 3) Plaintiff’s alleged inaction.

Plaintiff disputes that any of these three facts constitute any evidence of a discharge or an intent to discharge. Plaintiff has submitted a declaration (Goodwin Decl.), and supplemental declaration from Rex Goodwin, its Vice President of Consumer Loan Servicing. (Pl.’s Combined Reply, Ex. A, Goodwin Supp. Decl.). Mr. Goodwin stated, among other things, that “Zions issued the 1099-C solely for purposes of complying with applicable tax laws and had no intent to waive its claims against Crapo.” Goodwin Decl. at ¶ 15. And, that “Zions has never at any time taken any action to grant an actual release forgiveness or discharge of Crapo’s debt to Zions.” (Pl.’s Combined Reply, Ex. A, Goodwin Supp. Decl. . at ¶ 8). Mr. Goodwin also declared that none of the actions at issue here were ever *intended* to waive Plaintiff’s right to collect against Defendant. *Id.*, at ¶¶ 6-8. Defendant has failed to rebut any of Goodwin’s testimony with any other evidence, aside from the three facts they rely upon, and so those facts are deemed admitted, unless any of the other pieces of evidence controverts that testimony. *See* U.R.C.P. 56(a)(4). Each will be addressed.

A. The Form 1099-C

Defendant argues that even under the holding from *Cashion*, the Form evidences a discharge because in the “Debt Description” box, Plaintiff stated: “FORGIVEN DEBT AMT 3 YRS NO PAYMENT.” Defendant argues that Plaintiff was only required to provide the type of indebtedness – i.e., “consumer debt” – and that by using the term “forgiven” indicates an intent to discharge.

The Court is not persuaded by this argument. That document, taken as a whole, is simply

a reporting mechanism to the IRS. *See supra*. It reflects an accounting procedure that is not intended to be a means whereby a creditor can extinguish a debt or whereby a debtor may be exonerated from all payment. When viewed in the totality – given the general purpose of the form, along with the fact that it references an identifiable event (H) that excludes an extinguishment, cancellation or discharge – this document cannot be construed as evidence of Plaintiff’s discharge of defendant’s debt or of Plaintiff’s intent to waive its right to collect from Defendant; nor can any specific language in the Form be construed to constitute evidence of a discharge. *See supra*.

Again, the Court notes that the majority view of the reported cases is that even where the “Identifiable Event” is noted to be “a discharge, extinguishment or cancellation” that does not effectuate a discharge, and does not result in a lender’s loss of collection rights. *Cashion, supra*. If a lender reports a “discharge, extinguishment, or cancellation” through a 1099-C form, and that does not create a factual dispute of a discharge, neither can the use of the word “forgiven” on that same Form. Moreover, although the notation on the Form uses the phrase “forgiven debt,” it references “3 yrs,” which is a reference to the testing period in Identifiable Event Code H. See Goodwin Supp. at ¶7 (wherein he stated that the “forgiven debt” language was used “not because of an actual forgiveness, but simply as another description of the expiration of the 36 month testing period without receiving a payment.”)

In sum, the use of the phrase “forgiven debt” – in the context of a document that is intended to be an IRS reporting tool, and on which the “identifiable event” references something other than an *actual* discharge – simply does not result in the cancellation or discharge of the debt, nor did it deprive Plaintiff of its right to pursue a claim against Defendant.

B. The Charge Off Request

Plaintiff next points to the “Charge Off Request” (“Charge Off”) form dated January 6, 2011. (Def.’s Mem. In Supp. Ex C). That is an internal Zions document that was not communicated to Defendant at the time. The plain language of Plaintiff’s internal document, however, does *not* provide evidence of a discharge, or an acknowledgment by Plaintiff that it was giving up its right to collect a deficiency from Defendant. In fact, that document expressly states just the opposite:

[Defendant] has indicated he wants to repay the loan but does not have the financial means to do so at this time. *It is recommended this loan be charged off due to a lack of collateral and transferred to Recovery Department for further collection efforts.* An asset search will be completed to determine if assets exist to attach to a Judgment.

Id. (Emphasis added.)

The Charge Off document makes clear that although Plaintiff may “charge off” the loan for purposes of internal accounting, it had every intention of trying to collect on the loan, after ascertaining whether collection efforts would be fruitful or futile. The Charge Off document does not provide any evidence supporting an actual discharge; nor does it convey an intent, by Plaintiff, to relinquish its right to collect from Defendant.

C. The Alleged Period of Delay

Finally, Defendant argues that Plaintiff’s delay supported an intent to discharge. Plaintiff’s last communication with Defendant to collect on the loan was in 2010, and it internally issued the Charge Off in January, 2011. There was a period of inactivity for approximately three years – from January 2011 until the Form was issued in early 2014. Plaintiff filed this lawsuit in October, 2014. Defendant cites no authority that supports their position – which effectively would shorten Plaintiff’s 6-year statute of limitations governing this contract action.

In response, Plaintiff argues that a period of inaction does not constitute evidence of intent

to discharge and that the parties' contract expressly bars this argument. The Home Equity Line Credit Agreement and Disclosure ("Note"), (Def.'s Mem. In Supp. Ex. A1), contains the following provision:

Delay in Enforcement. We may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right. If we delay or waive our rights, we may enforce that right at any time in the future without advance notice. *For example, not terminating your account for non-payment will not be a waiver of our right to terminate your account in the future if you have not paid.*

Id. at 5 (emphasis added.)³ In response, Defendant argues that Plaintiff waived this provision, relying on *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, 245 P.3d 184, which involved a dispute between a lessor, Wolf Mountain, and lessee, ASCU. After ASCU sued Wolf Mountain in state court, and after a few years of litigation, Wolf Mountain moved to compel arbitration. ASCU argued that it waived the right to arbitrate, but Wolf Mountain relied on a no-waiver provision in the parties' lease, similar to the provision at issue here.⁴ The Court held that Wolf Mountain waived that provision – but not due to inaction or delay, but rather because its affirmative conduct in litigating for three years was “inconsistent with an intent to arbitrate.” *Id.*, ¶ 40.

Here, Defendant presents no facts to support a waiver of the “Delay in Enforcement” provision, other than the alleged delay itself. Allowing a party to avoid the consequences of a no

³ Plaintiff also argues that this provision bars *all* of Defendant's waiver and estoppel arguments because even if Plaintiff did something that could be construed to waive its right to collect from Defendant, they would nonetheless be excused from that waiver and could nonetheless “enforce that right at any time in the future.” *Id.* Although that is a plausible interpretation of that provision, that issue was not fully briefed, so the Court does not base its ruling on that provision alone.

⁴ That provision provided: “Failure of a party hereto to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such party to exercise at some future time said right or any other right it may have hereunder. *Id.*, ¶ 37.

delay provision by arguing inaction – as opposed to affirmative acts constituting a waiver as in *Wolf Mountain* – would render the provision meaningless. Stated differently, a provision that contemplates that a party may delay, and should not be penalized for a delay, cannot be nullified by a delay; such a result would be nonsensical and would render the provision meaningless. *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 28 (“In interpreting a contract, we look for a reading that harmonizes the provisions and avoids rendering any provision meaningless.”) The Court cannot, under the applicable rules of construction, interpret the parties’ contract as suggested by Defendant. *See id.*

In light of the clear and unambiguous contract provision permitting Plaintiff to delay enforcement, any delay on Plaintiff’s part cannot give rise to the fact or inference that Defendant was entitled to have his loan discharged. Here, where Defendant argues no other facts in support of his argument, the Delay in Enforcement provision trumps Defendant’s argument that Plaintiff’s alleged delay constitutes evidence of a discharge.

Accordingly, all of the facts before the Court, even when considered in the light most favorable to Defendant, does not support a discharge of Defendant’s obligation, and does not create a dispute of fact that can defeat Plaintiff’s Motion for Summary Judgment.

IV. Analysis of Crapo’s Defenses

Even though Defendant cannot demonstrate an actual discharge of his indebtedness, the Court must nonetheless determine whether either of Defendant’s affirmative defenses – waiver or estoppel – can defeat Plaintiff’s claim; or, at least whether there are questions of fact that preclude judgment at this time. The Court thus analyzes whether, based upon Plaintiff’s actions, it has waived its right to collect on the indebtedness owed, or is estopped from asserting that right.

A. Waiver

The touchstone of the doctrine of waiver is an *intent* to relinquish a known right. *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1073 (Utah 1991)(“We have stated that [a] waiver is the intentional relinquishment of a known right”) Here, Defendant argues that through Plaintiff’s actions, it intentionally relinquished its right to collect from Defendant. However, there is no evidence to support that Plaintiff *intended* to give up its collection rights viz-a-viz Defendant.

There is not one fact before this Court that demonstrates an *intent* by Plaintiff to waive its right; in fact the record is entirely to the contrary. First, Mr. Goodwin testified that Plaintiff never intended to waive its rights. Second, the Form does not constitute evidence of an intent to waive; it is an accounting document that is distinct from the legal determination of whether a discharge has occurred, and, in this case, references an event that is *not* an actual discharge. Third, the language on the Charge Off demonstrates just the opposite – that Plaintiff intended to pursue collection efforts against Defendant after it determined whether Defendant had assets to pay so that its efforts would not be futile. Finally, Plaintiff’s alleged period of inaction cannot support a waiver. *Id.* (“[m]ere silence is not a waiver unless there is some duty or obligation to speak.”)

In sum, there is *no* evidence demonstrating that Plaintiff intended to waive its right to collect the indebtedness owed from Defendant; conversely, there is ample evidence that Plaintiff intended NOT to waive that right.

B. Estoppel.

A party asserting an estoppel theory has to prove three elements: 1) a statement, admission, act, or failure to act by one party *inconsistent* with a claim later asserted; 2) *reasonable action* or inaction by the other party taken or not taken on the basis of the first party's statement, admission,

act or failure to act; and 3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. *Youngblood v. Auto Owners Ins. Co.*, 2007 UT 28, ¶ 14, 158 P.3d 1088.

Based on the undisputed facts, Defendant cannot prove any of these elements. First, Plaintiff's current position – in seeking to collect from Defendant – is not inconsistent with its prior actions. As stated above, all of its prior actions demonstrated an *intent to collect* from Defendant; neither the Form, the Charge Off, nor Plaintiff's alleged delay⁵ is inconsistent with that intent. Stated differently, there is nothing in Plaintiff's course of conduct that would indicate that its decision to now pursue collection efforts against the Defendant is inconsistent with any of its prior actions.

Second, Defendant argues that he reasonably relied on Plaintiff's alleged "discharge" in the 1099-C Form to his detriment by paying taxes on his gain.⁶ However, it appears clear from the tax scheme – expressed in regulations and on the Form itself – that he was/is not required to pay taxes until the loan had been *actually discharged*, and that the Form did not do that. In fact, the I.R.S. instructions on the face of the Form clearly instruct taxpayers to pay taxes *not* when an "identifiable event has occurred but [when] the debt has . . . *actually* been discharged." (Def.'s Mem. In Supp. Of Summ. J. Ex. A2, Instructions for Debtor) ("If an identifiable event has occurred but the debt has not actually been discharged, than include any discharged debt in your income *in the year that it is*

⁵ *First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980) ("[I]n order for silence to work an estoppel, there must be a legal duty to speak, or there must be something willful or culpable in the silence which allows another to place himself in an unfavorable position by reason thereof." (citation and quotations omitted)).

⁶ Other than the 1099-C Form, there were no communications from Plaintiff to Defendant concerning the alleged discharge. Accordingly, that is the only representation that he could have relied upon to his detriment, and is the only communication that can form the basis of an estoppel.

actually discharged[.]” (emphasis added)). Accordingly, because the Form did not convey an actual discharge, Defendant was not required to pay taxes; and he is not required to so pay unless and until an actual discharge occurs. Thus, Defendant cannot argue that he relied on the Form, or any other action taken by Plaintiff, when the document presented to him plainly indicated to him that he should not have acted in that manner.

Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060 (Utah 1996), is instructive on the issue. There, the court held that a plaintiff could not rely on his belief, which was based on oral representations made by the defendant when he had “contrary written information” available to him. *Id.* at 1068. It follows that a person cannot rely on his mistaken subjective belief regarding his tax obligations, when the written form provided to him should have disabused him of such an obligation. Accordingly, Defendant’s mistake in paying his taxes appears to have been due to a mistake of law on his part; it was not caused by anything Plaintiff did. Thus, it follows that Defendant did not suffer to his detriment *as a result of* anything Plaintiff did.⁷ There is no basis for an estoppel.

V. **CONCLUSION AND ORDER**

To summarize, the Form did not discharge Defendant’s debt. Moreover, no other evidence submitted to the Court supports that Plaintiff discharged Defendant’s debt. Finally, Defendant has failed to prove that Plaintiff has waived its right to collect from him or is estopped from asserting that right. Thus, the amount of the note remains due and payable to Plaintiff and Plaintiff is entitled to summary judgment as a matter of law.


⁷ Moreover, Plaintiff argues that to the extent Defendant has paid taxes, he may seek a refund to undo any harm. The record was less than complete on this argument, and so the Court does not base its decision on that argument. Similarly, Defendant argues that it would be unfair to allow Zions to collect from Defendant after having received its own tax benefit by writing off the loan. However, there is no evidence in the record to support this contention.

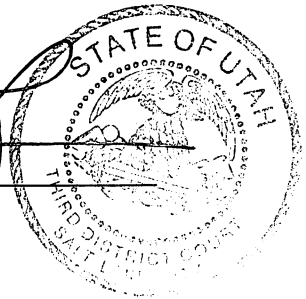
Accordingly, the Court ORDERS as follows:

1. Plaintiff's Motion for Summary Judgment is GRANTED.
2. Defendant's Motion for Summary Judgment is DENIED.
3. Plaintiff should draft and circulate a proposed Final Judgment to the Court in the amount of \$289,069.86 through May 31, 2015, plus interest of \$18.77 per day thereafter, as supported by Mr. Goodwin's Declaration.
4. Otherwise, no further order is required.

So ORDERED this 22ND day of January, 2016.

BY THE COURT:


Barry G. Lawrence
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140907019 by the method and on the date specified.

MANUAL EMAIL: RICHARD J ARMSTRONG rarmstrong@kmclaw.com

MANUAL EMAIL: JACOB A GREEN jgreen@kmclaw.com

MANUAL EMAIL: JOSHUA L LEE jlee@btjd.com

MANUAL EMAIL: JAMES K TRACY jtracy@btjd.com

01/22/2016

/s/ DENICE RICHARDS

Date: _____

Deputy Court Clerk