

2015

**Far West Bank, a Division of America West Bank, Appellee/
Plaintiff, vs. Mike L. Robertson, Appellant/Defendant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FAR WEST BANK, a division of
America West Bank,

Appellee/Plaintiff,
vs.

MIKE L. ROBERTSON,

Appellant/Defendant

BRIEF OF APPELLANT

Appellate Case No. 20150513

District Ct. No. 110402516

BRIEF OF APPEALANT

Nature of the proceeding: APPEAL

Trial Court and Judge: Appeal from the 4th District Court, Provo, case No. 110402516, the Honorable David Mortensen presiding.

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UTAH APPELLATE COURTS

SEP 08 2015

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this matter pursuant to §§ 78A-3-102(4), 78 A-4-103(2)(j), UCA (1953).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The following issues are presented on appeal:

Appellant's Issue No. 1:

Did the trial court err in its interpretation of the agreement the parties entered into when it failed to consider the final and complete expression of their bargaining as a contract? Did it err in granting summary judgment for Appellee?

Standard of Review for Issue No. 1:

"We accord a trial court's interpretation of a contract no deference and review it for correctness." The interpretation of a written contract is first a question of law determined by the words of the agreement. . . . Accordingly, whether an ambiguity exists is also a question of law to be decided by the trial court before considering extrinsic evidence." *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 294 (Utah Ct. App. 1994) We review a grant of summary judgment for correctness, with no deference to the trial court. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600

Supporting Authority:

In accordance with Utah's well-settled principles of contract interpretation, the interpretation of a contract is controlled by the intentions of the parties. *Central Florida Investments, Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12, 40 P.3d 599. We determine the intentions of the parties by first looking within the four corners of the agreement. *Id.* Provided that the language within the four corners of the agreement is unambiguous, we look no further than the plain meaning of the contractual language. *Id.* We consider extrinsic evidence of the parties' intentions only if the contractual language is ambiguous. *Id.* We find ambiguity in the language only if it is reasonably susceptible to more than one interpretation. *Id.* (internal citations omitted)

Generally, formation of a contract requires an offer, an acceptance, and consideration. *Cea v. Hoffman*, 2012 UT App 101, ¶ 24, 276 P.3d 1178. An offer is a "manifestation of willingness to enter into a bargain, so made as to justify

another person in understanding that his assent to the bargain is invited and will conclude it.” *Id.* “For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous.” *Id.* The obligations of the parties must be “set forth with sufficient definiteness that [the contract] can be performed.” *Id.* “An acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made.” *Id.* “Consideration is present when there is an act or promise given in exchange for the other party’s promise.” *Id.* “Thus, ‘there is consideration whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.’” *Id.* (internal citations omitted)

In order [f]or the terms of another document to be incorporated into the document executed by the parties, the reference must be clear and unequivocal, and must be called to the attention of the other party, [the party] must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties . . . *Interwest Const. v. Palmer*, 886 P.2d 92, 97 n.8 (Utah Ct. App. 1994) (quoting 17A C.J.S. Contracts ' 299 (1963)).

Preservation of Issue No. 1:

This issue was preserved in Robertson’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, (R176)

Robertson's Declarations, (R283) and Robertson's Memorandum in Support of Defendant's Motion for a New Trial. (R1109)

Appellant's Issue No. 2:

Did the trial court err in granting summary judgment in favor of FWB after FWB cancelled the ACH line without cause? Did that make the consideration promised an illusory promise? Did the trial court err in not considering the breach of good faith and fair dealing in regards to the new loan documents entered into?

Standard of Review for Issue No. 2:

A trial court may properly grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c) In an appeal from the grant of summary judgment, "[a]n appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn there from in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 "Summary judgment must be supported by evidence, admissions, and inferences which when viewed in the light most favorable to the losing side establish that `there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Rose v. Allied Dev. Co., 719 P.2d 83, 84 (Utah 1986)

Supporting Authority:

“following the rule of law that where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other.” Bullfrog Marina, Inc. v. Lentz, 501 P. 2d 266 - Utah: Supreme Court 1972

“first breach” rule “a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform.” Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972). “He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.” *Id.*

[f]or the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties. When there exists only the facade of a promise, i.e., a statement made in such vague or conditional terms that the person making it commits himself to nothing,

the alleged "promise" is said to be "illusory." An illusory promise, neither binds the person making it, nor functions as consideration for a return promise. Peirce v. Peirce, 2000 UT 7, ¶ 21, 994 P.2d 193

Preservation of Issue No. 2:

This issue was preserved in Robertson's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, (R176) Robertson's Declarations, (R283) and Robertson's Memorandum in Support of Defendant's Motion for a New Trial. (R1110, 1111)

Appellant's Issue No. 3:

Did the trial court err when it failed to consider the issues of whether the requirements under Utah Code Title 57, Chapter 1, in regards to foreclosures had been complied with and if the language of the required notice was responsible for confusion, causing a cooling of the bidding process?

Standard of Review for Issue No. 3:

"We review a [trial] court's interpretation of a statute for correctness." O'Dea v. Olea, 2009 UT 46, ¶ 15, 217 P.3d 704.

"Because we resolve only legal issues in reviewing a summary judgment, we give no deference to the [district] court's view of the law; we review it for correctness."

Franco v. Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 32, 21 P.3d

198

Supporting Authority:

“In reviewing a grant of summary judgment, we determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact.” Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395,400 (Utah 1998) (internal quotation marks omitted).

“Our primary objective when interpreting statutes is to give effect to the legislature’s intent.” State v. Harker, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks omitted). To discern legislative intent, we begin by examining a statute’s plain language and construing it “in harmony with other statutes in the same chapter and related chapters.” *Id.* (internal quotation marks omitted).

Defects in the notice of foreclosure sale that will authorize the setting aside of the sale must be those that would have the effect of chilling the bidding and causing an inadequacy of price. The remedy of setting aside the sale will be applied only in cases which reach unjust extremes.” Concepts, Inc. v. First Sec. Realty Serv., Inc., 743 P.2d 1158, 1159 (Utah 1987)

Preservation of Issue No. 3:

This issue was preserved in Robertson's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, (R179-180) and Robertson's Declarations. (R285-286)

Appellant's Issue No. 4:

Did the trial court err in granting summary judgment for the Appellee on the issue of breach of contract when the Appellant presented a prima facie case for breach of contract which should have been sufficient for summary judgment as a matter of law for Appellant?

Standard of Review for Issue No. 4:

We review a grant or denial of summary judgment for correctness, affording the trial court no discretion, and we view all the facts and reasonable inferences in the light most favorable to the nonmoving party. See *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600. Whether a contract exists between parties is ordinarily a question of law, reviewed for correctness. See *Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582, 583 (Utah Ct. App. 1992).

Supporting Authority:

The elements of a prima facie case for breach of contract are “(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages” Bair v. Axiom Design, L.L.C., 2001 UT 20 ¶ 14, 20 P.3d 388

The formation of a contract is spelled out in Cea v. Hoffman, 2012 UT App 101, ¶ 24, 276 P.3d 1178. Generally, formation of a contract requires an offer, an acceptance, and consideration. Id. An offer is a “manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it.” Id. “For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous.” Id. The obligations of the parties must be “set forth with sufficient definiteness that [the contract] can be performed.” Id. “An acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made.” Id. “Consideration is present when there is an act or promise given in exchange for the other party’s promise.” Id. “Thus, ‘there is consideration whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.’” Id. (internal citations omitted)

The effects of a failure of consideration are spelled out in Aquagen Int’l, Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998) The formation of a contract

"requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Id. Consideration sufficient to support the formation of a contract requires that "a performance or a return promise must be bargained for." Id. ("Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."). Id. When one party to a valid contract commits an "uncured material failure" in its performance of the contract, the non-failing party is relieved of its duty to continue to perform under the contract. Id. This general rule is based on the principle: that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party. Id. We have unequivocally held in the past that "[e]vidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable." Id. In fact, it is entirely permissible for a party to rescind a contract based on a failure of consideration. Id. "Failure of consideration [as opposed to lack of consideration] exists wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect

the agreed exchange for that performance.'" If a failure of consideration occurs, the contract ceases to exist. *Id.* (Internal citations omitted)

Preservation of Issue No. 4:

This issue was preserved in Robertson's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, (R176) Robertson's Declarations, (R283) and Robertson's Memorandum in Support of Defendant's Motion for a New Trial. (R1109-1113)

Appellant's Issue No. 5:

Did the trial court err in granting summary judgment for the Appellee on the issue of breach of the covenant of good faith and fair dealing when Appellant presented evidence that Appellee impeded his performance and made it difficult or impossible for him to further perform under the covenant? Appellee's interference with and failure to cooperate in Appellant's performance was in bad faith. This is a clear breach under the covenant of good faith and fair dealing and Appellant should have been granted summary judgment as a matter of law.

Standard of Review for Issue No. 5:

We review a grant or denial of summary judgment for correctness, affording the trial court no discretion, and we view all the facts and reasonable inferences in

the light most favorable to the nonmoving party. See Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600.

Supporting Authority:

The implied covenant of good faith and fair dealing (the covenant) inheres in every contract. Markham v. Bradley, 2007 UT App 379, ¶ 18, 173 P.3d 865 As distinguished from a contract's express terms, the covenant "is based on judicially recognized duties not found within the four corners of the contract." *Id.* "Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract." *Id.* Furthermore, the "covenant . . . should prevent either party from impeding the other's performance of his obligations [under the contract]; and . . . one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Id.* (Internal citation omitted)

[T]he question of whether parties who retain express power or discretion under a contract can exercise that power or discretion in such a way as to breach the covenant of good faith and fair dealing. We believe that they can. Our courts have determined that a party must exercise express rights awarded under a contract reasonably and in good faith. Olympus Hills Shopping Center, Ltd. v. Smith's Food

& Drug Centers, Inc., 889 P.2d 450 (Utah Ct. App. 1994), courts have determined in a variety of contexts that a contracting party can exercise a retained contractual power in bad faith. Id.

Preservation of Issue No. 5:

This issue was preserved in Robertson's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, (R176-178) and Robertson's Memorandum in Support of Defendant's Motion for a New Trial. (R1113-1114)

Appellant's Issue No. 6:

Did the trial court err when it excluded evidence the Appellant attempted to produce for impeachment?

Standard of Review for Issue No. 6:

First, to the extent the issue on appeal required the trial court "to interpret rules of civil procedure, it `presents a question of law which we review for correctness.'" Harris v. IES Assocs., Inc., 2003 UT App 112, ¶ 25, 69 P.3d 297 (citation omitted)

Two standards of review exist for reviewing questions regarding the admissibility of evidence. See Utah Dep't of Transp. v. 6200 South Assocs., 872

P.2d 462, 465 (Utah Ct.App.1994). "With respect to the trial court's selection, interpretation, and application of a particular rule of evidence [or procedure], we apply a correction of error standard. When the rule ... requires the trial court to balance specified factors to determine admissibility, `abuse of discretion or reasonability is the appropriate standard.'" *Id.* (citation omitted);

Supporting Authority:

Rule 26(a)(4) states: "A party shall provide to other parties the following information regarding the evidence that it may present at trial other than *solely for impeachment*." Utah R. Civ. P. 26(a)(4) (emphasis added). Impeachment of a witness is defined as the act of "discredit[ing] the veracity of a witness." *Black's Law Dictionary* 768 (8th ed.1999) (parentheses omitted). Similarly, "impeachment evidence" is defined as "[e]vidence used to undermine a witness's credibility." *Id.* at 597. Thus, by the rule's plain meaning, witnesses need not be disclosed if the sole purpose of their testimony is to call into question the "veracity" or "credibility" of another witness. *Glacier Land Co. v. Claudia Klawe & Assocs., LLC* ¶29, 154 P.3d 865 (2006)

"[b]efore a trial court can impose discovery sanctions under rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, . . .

fault, or persistent dilatory tactics frustrating the judicial process." Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1997)

Preservation of Issue No. 6:

This issue was preserved in Robertson's Memorandum in Support of Defendant's Motion for a New Trial. (R1105-1108)

CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS

57-1-23 UCA

57-1-24 UCA

57-1-25 UCA

57-1-26 UCA

57-1-27 UCA

57-1-31.5 UCA

26 URCP

56(c) URCP

STATEMENT OF THE CASE

Nature of the case:

This case stems from an agreement entered into by the parties on or about May 1, 2009. It concerns their rights and obligations under the contract and their duty to act in good faith towards each other. Both parties contend the other party breached their agreement. Many of the questions here are about the actions of the parties after the alleged breach.

Course of proceedings:

Appellee filed complaint 08/23/2011.

Appellant filed answers and counter claim 10/11/2011

Motions for summary judgment were considered on 03/21/2013 and granted for Appellee, denied for Appellant.

Trial held on issues of amount owed and value of the property on date of the foreclosure on 07/02/2013.

Rule 59(a) Motion for New Trial oral arguments held on 12/09/2013 and denied.

Disposition of trial court:

In the trial court the final Order Denying Defendant's Motion for New Trial was entered May 27, 2015. (Memorandum I)

RELEVANT FACTS

In April of 2006, Appellant (Robertson) approached Zions Bank with the idea of processing payments using electronic checks for those in the jewelry industry. Robertson was informed about National Automated Clearing House Association transactions (referred to as ACH). Robertson applied for these services with Zions Bank. (R280)

Jay Knight was an officer of Zions bank and had discussions with Robertson about them while employed there. When Knight left Zions Bank and became employed as an officer of Appellee, Far West Bank (FWB), he contacted Robertson and solicited his business with the offer that FWB could provide the ACH (electronic check) services quicker than Zion's Bank would if he would move his account over to them. Relying on that promise, Robertson moved his banking services to FWB in July 2006. (R281)

FWB agreed to provide ACH services for Robertson which started on July 26, 2006. (R281)

Shortly thereafter, FWB agreed to provide a line of credit to Robertson in the amount of \$230,000 (R11) to help in establishing the business known as Instapolypay and securing the ACH line. Robertson began utilizing these services and created a business based on them. (R281)

In October 2006, the line of credit was increased to \$500,000. (R24) On September 12, 2007, an additional line of credit in the amount of \$250,000 was established. (R28)

Pursuant to the agreement, Robertson timely made each and every required payment. (R282)

On August 15, 2008, the relationship began to break down. FWB, without cause, informed Robertson that it no longer wished to continue the business lines of credit and requested that the loans be paid off in full. Robertson informed FWB that he did not have the means to pay them off in full and negotiations on a repayment method commenced. (R282)

On October 14, 2008, Robertson signed an ACH Origination agreement prepared and demanded by FWB. (R458-460)

On February 19, 2009, a formal demand letter was sent from FWB for Payment in full on both lines of credit. (R289-291)

On April, 20, 2009, FWB terminated the ACH Origination Agreement entered into on October 14, 2009 according to its terms by written letter. (R1129)

The parties had a meeting on April 22, 2009 and terms for restructuring the debt and ACH were discussed. (R283)

On April 23, 2009 a new business loan and note were presented to Robertson for his consideration. Robertson declined to sign advising FWB by email that the terms on the new agreement were not in accordance with the discussions held the previous day. (R293) (Addendum II)

Further negotiation took place by email (R293, 295) (Addendum II)

On April 30, 2009, Robertson requested the terms of the current negotiation be placed in writing. (R295) (Addendum II) FWB then presented Robertson with a final signed and written agreement that said, "Mike, Upon completion of the new loan documentation, we will reinstate your ACH line. Thanks, Dan Brian." (R297) (Addendum III)

With that assurance and promise, Robertson agreed to the terms and signed the new business loan and note documentation on May 1, 2009. (R46-51)

Robertson performed on that agreement and timely made every payment required, including the September 2010 payment. (R176) (R283) Far West stipulated that this was correct. (R1361, P12)

On September 22, 2010 FWB again terminated the ACH processing services provided to Robertson by letter. (R299)

As FWB anticipated and desired, without the income provided by the ACH service, Robertson was unable to perform on the business loan and note and failed to make any additional payments after that time. (R301)

Far West, in continuing with their plan, then commenced a foreclosure action. (R303-304) The Notice of Default and Notice of Sale included a metes and bounds legal description encompassing all four parcels of property but also included the phrase, "The Real Property tax identification number is 23-051-0004". This was only one of the four parcels (R59-60, 62-63, 65, 69-70).

The Utah County Recorder only recorded a Notice of Default upon this single parcel before the sale and failed to record it on the other three parcels (R311-314)

More than two weeks before the sale Robertson requested a written payoff as provided under Utah Code 57-1-31.5 but never received one (R308-309).

The property was sold at foreclosure on June 1, 2011 to FWB for a credit bid of \$135,000 and \$268,000. (R6)

Later, this deficiency action was commenced. (R1-80) Robertson filed a response listing several defenses and also filed a counter action including breach of contract and breach of the covenant of good faith and fair dealing. (R84-107)

A hearing was held on March 21, 2013 to obtain rulings on FWB's Motion for Partial Summary Judgment and Robertson's Motion for Summary Judgment. (R1361)

The Court ruled that the contract between FWB and Robertson was simply a return to the previous October 14, 2008 agreement and its later cancelation was in keeping with the terms of that agreement. (R1361, P49-50)

The Court also addressed the claim by Robertson as to issues with Utah code 57-1 and simply concluded that the legal description was the legal description. (R1361, P49) The Court dismissed Robertson's counter claim and granted FWB's Motion for Partial Summary Judgment (R1361, P50-51) and set a trial date to resolve the issues of the amount owed on the day of the sale and the value of the property on the date of the sale. (R1361, P51)

A trial was held on July 2, 2013 on these issues. Robertson had filed a motion to reconsider that had been fully briefed but the Court refused to consider the motion because it had not been submitted for a decision before trial. (R1362, P10-11)

Robertson asked for clarification in opening arguments about what he would and would not be able to present and the Court informed him that as to the matters

of amounts and values he could “present all the evidence you want”. Robertson did not object to the presentation of evidence by FWB, believing the Court’s instruction that he would be able to put on all the evidence he wanted. (R1362, P11-12)

When FWB presented their expert witness, Travis Reeves, to establish a value of the property on the date of the sale, Robertson attempted to present impeachment evidence. FWB objected under URCP 26(a)(3)(c) and the Court sustained that objection. (R1362, P77) Robertson was unable to present the facts and obtain equal justice even though URCP 26 provided that the evidence he tried to introduce was proper and should have been allowed. (Addendum V)

Robertson made a Rule 59 Motion for a New Trial on September 12, 2013. (R1102) That motion was denied on December 9, 2013. (R1363) The final order was signed and entered May 27, 2015. (R1317) (Addendum I) Robertson now appeals the district court’s decision.

SUMMARY OF ARGUMENTS

The trial court erred in its interpretation of the agreement the parties entered into and also when it granted summary judgment to Appellee. There were many facts on the record that attest to the true nature of the agreement and what

constituted the final expression of the parties. The Appellee exercised bad faith when they terminated the consideration they had promised and caused great harm to the Appellant and impeded his performance. These facts merit summary judgment in favor of the Appellant rather than the Appellee.

The trial court also erred in issues with interpretation of statutes and rules and in applying the relevant law. The correct interpretation of these should have favored Appellant rather than disadvantaged him.

ARGUMENT

1 THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE WRITTEN CONTRACT AND ITS SUMMARY JUDGMENT DETERMINATION THAT THERE WAS NO MATERIAL FACT IN DISPUTE AS TO BREACH OF CONTRACT

In determining whether to grant summary judgment, it is inappropriate for the district court to weigh disputed material facts and make credibility determinations. See *Pigs Gun Club, Inc. v. Sanpete Cnty.*, 2002 UT 17, ¶ 24, 42 P.3d 379 (“A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists.”); *Martin v. Lauder*, 2010 UT App 216, ¶ 14, 239 P.3d 519 (“[W]eighing credibility and assigning weight to conflicting evidence is not part of the district court’s role in determining summary judgment.”).

There are several disputed material facts that the district court weighed in granting summary judgment to FWB. The court erred in doing so.

I. WAS THE WRITTEN EMAIL FROM DAN BRIAN A CONTRACT OR SIMPLY AN ORAL AGREEMENT

Robertson presented evidence that the parties were not in agreement prior to April 30th, 2009. (R293, 295)(addendum II) The previous ACH Origination agreement was cancelled on April 20th, 2009. (R1129)A new business loan and note were prepared by FWB and presented to Robertson on April 23rd, 2009. (R42-51) Robertson did not agree to these and questioned their terms. An email exchange took place discussing terms, amounts, fees and the ACH agreement. (R293, 295) (Addendum II) Finally, on April 30, 2009, Robertson requested FWB put in writing the final agreement and Robertson could then either accept it, or reject it. (R295) Robertson received back a written offer from FWB that was signed by Dan Brian. This written and signed agreement consisted of a single sentence, yet constituted everything the parties had bargained for that read:

“Mike, Upon completion of the new loan documentation, we will reinstate your ACH line. Thanks, Dan Brian.” (R297) (Addendum III)

Robertson accepted the offer and completed the new loan documentation the following day, accepting all the terms contained therein, and tendered a check in the amount of \$100,461.58, (R1127) as his consideration. Far West pledged to

reinstate the ACH line as their consideration. The terms are definite and the obligation of both parties, as stated, can be performed. Any reasonable person is justified in understanding that a fully enforceable contract has been made. (R283) (R518-519) (R1361-P25-31) (Addendum III)

An integrated agreement is defined as "a writing or writings constituting a final expression of one or more terms of an agreement." Restatement (Second) of Contracts § 209 (1981).

Robertson's understanding was that this agreement contained the final expression of the parties and the Business Loan Agreement and Promissory Note was simply memorandum by which part of the contract could be proved and should be read and construed together so far as determining the rights and interests of the parties.

"following the rule of law that where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other." *Bullfrog Marina, Inc. v. Lentz*, 501 P. 2d 266 - Utah: Supreme Court 1972

FWB contended that this written and signed document was simply an oral agreement and inconsistent with the Loan Documents and the Utah Statue of Frauds. (R335-339)

Whether the writing was intended by the parties to be an integration is a question of fact.

A trial court's determination as to whether a contract is integrated is a question of fact. See Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶11, 142 P.3d 140

The district court weighed the evidence and made a finding of fact that the terms of the written document were simply parol evidence, and that what the parties intended was a return to a previous agreement. (R1361, P49-50)

II. There was a question of material fact as to the intentions of the parties and the nature of their agreements and if they were integrated

Robertson stated in his affidavit that FWB had promised ACH services in the beginning of their relationship in 2006. His whole reason for leaving his banking relationship with Zions bank was because of FWB's promise to provide this service. Robertson stated that this service started in July of 2006 and continued throughout the whole course of their relationship until it was terminated by FWB on September 22, 2010. (R299) He also stated that the loan agreements of 2006, 2007, and 2009 were all tied to the ACH agreement. (R281-283) Robertson argued that the course of conduct showed this and likened it to planting an orchard. The bank agreed to supply the water and he planted all the trees with the loan and now they are cutting off the water but still expect to get paid by the fruit. Once you cut off the water, (ACH), the trees die. (R1361, P29)

“following the rule of law that where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read

and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other.”
Bullfrog Marina, Inc. v. Lentz, 501 P. 2d 266 - Utah: Supreme Court 1972

Robertson stressed that the course of dealing and applying the law tied the ACH and business loan agreement together and that the respective rights and interest of the parties were to be construed together. (R519)

FWB claimed that the ACH started in 2008 well after the 2006 and 2007 loans were made. (R1361, P14) They also argued that “There is no written agreement that contains language that supports any claim linking the Loan Documents with the ACH Origination Agreement or any claim that the written documents were modified”. FWB insisted that the writings were an integration and asked to apply the parol evidence rule. (R337-338)

Whenever a litigant insists that a writing that is before the court is an integration and asks the application of the parol evidence rule, the court must determine as a question of fact whether the parties did in fact adopt a particular writing or writings as the final and complete expression of their bargain. In determining the issue of the completeness of the integration in writing, evidence extrinsic to the writing itself is admissible. Parol testimony is admissible to show the circumstances under which the agreement was made and the purpose for which the instrument was executed. *Id.*

Robertson contended that the present matter was very similar to this matter in Bullfrog and disputed that the loan documents FWB cited were an intergration and also cited Novell, Inc. v. Canopy Group, Inc., 2004 UT App 162, ¶ 14, 92 P.3d

768. and Cantamar, LLC v. Champagne, 2006 UT App 321, ¶ 11, 142 P.3d 140
(R1361,P37)

It was error on the part of the district court to resolve these issues in summary judgment.

III. The district court erred when it determined that the final agreement the parties came to was simply a return to a previous document

After much deliberation, (Addendum II) FWB offered a new agreement to Robertson that simply stated: “Upon completion of the new loan documentation, we will reinstate your ACH line.” (R297) (Addendum III) Robertson accepted this new agreement and completed the new loan documentation. The district court determined that what was meant was a return to a previous document the parties had entered into and placed the burden on Robertson to negotiate out terms of the old document. (R1361, P49-50) Robertson believed that the new document supplanted the old. (R1361, P31)

“[R]egardless of whether the parties may have had preliminary agreements about a given subject during the course of negotiations, we will assume that a writing dealing with the same subject was intended by the parties to supercede any prior or contemporaneous agreements.”

Novell, Inc. v. Canopy Group, Inc., 2004 UT App 162, ¶ 14, 92 P.3d 768.

No where contained in this writing, prepared and signed by FWB, does the agreement notify Robertson that the terms of the prior document are to apply.

While that does not mean that parties can't incorporate another document by reference, whether the simple term "reinstate" was sufficient to do so, as ruled by the district court, is also in question.

Admittedly, parties may incorporate the terms of another document by reference into their contract. Consolidated Realty Group v. Sizzling Platter, Inc., 930 P.2d 268, 273 (Utah Ct. App. 1996). Yet, the terms of another document cannot be incorporated by reference without specific language. Rather, "the reference must be clear and unequivocal," and alert the non-drafting party that terms from another document are being incorporated. *Id.* Additionally, the party "must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Id.*

There are no documents showing consent to the terms of the old agreement by Robertson. The only documents Robertson signed and entered into were the new loan documents which say nothing of the ACH line and were the addendum to this final agreement that proved the contract. If the term "reinstate" is ambiguous, Robertson, as the non-drafting party, should have the benefit of defining the term. Could an independent third party consider the phrase, "we will reinstate your ACH line" to mean a return to the position the parties were in before their disagreement began? This was the meaning Robertson gave the term and thus there was no reason to negotiate out a right of termination, because none existed before their disagreement.

Even if you took the district court's opinion that the writing was intended to include the previous document, it could only do so for the intended purpose stated.

“if a written contract refers to another writing for a particularly designated purpose, the other writing becomes a part of the contract only for the purpose specified,” 17A C.J.S. Contracts §402(Westlaw database updated Mar. 2015);

The only purpose specified was to reinstate the ACH line.

IV. Could the previous ACH agreement even serve as consideration for an executory contract

The October 14, 2008 written ACH agreement contains this clause: “This Agreement may be terminated on a ten day written notice by either party” (R214) thus giving FWB an arbitrary right to terminate the contract.

The promisor, by reserving an arbitrary right to terminate the contract, can unilaterally negate his promises. Thus, a negatable promise does not constitute consideration for a return promise for an executory contract. *Resource Management Co. v. Weston Ranch*, 706 P. 2d 1028 - Utah: Supreme Court 1985

The district court acknowledged that Robertson believed the consideration promised in entering into the new agreement was the reinstitution of the ACH. (R1361, P25) If FWB could negate that promise at any time, it can not constitute consideration. This case is similar to the one in *Aquagen International v. Calrae Trust*, 972 P.2d 411 (1998) in the Utah Supreme Court.

When one party to a valid contract commits an "uncured material failure" in its performance of the contract, the non-failing party is relieved of its duty to continue to perform under the contract. *Id.* This general rule is based on the principle:

that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party. *Id.*

We have unequivocally held in the past that "[e]vidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable." *Id.* In fact, it is entirely permissible for a party to rescind a contract based on a failure of consideration. *Id.*

"Failure of consideration [as opposed to lack of consideration] exists wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance." *Id.* If a failure of consideration occurs, the contract ceases to exist. *Id.* (internal citations omitted)

This case is also similar to *Peirce v. Peirce*, 2000 UT 7, ¶ 19, 994 P.2d 193;

We have stated that "courts endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract." *Id.* In addition, we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract. *Id.* Moreover, where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it. *Id.*

We have held that[f]or the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties. When there exists only the facade of a promise,

i.e., a statement made in such vague or conditional terms that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory." An illusory promise, neither binds the person making it, nor functions as consideration for a return promise.[5] *Id.* It has also been noted, however, that [t]he tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that the parties intended a contract. Through a process of interpretation, in the absence of express restrictions, courts find implied promises to prevent a party's promise from being performable merely at the whim of the promisor. *Id.* (Internal citations omitted).

Thus, under the district court's interpretation of the agreement, no consideration existed upon which to create an enforceable contract. FWB would retain an unlimited right to decide later the nature or extent of their performance. If they could terminate their consideration simply with a written 10 day notice, there is no promise. Their promise to the contract is an illusory promise and attacks the very contract itself.

V. Was there a modification of terms in the new agreement

Even if the district court was correct and the parties were to return to the previous written agreement, there is a question as to if those terms were modified by the new agreement.

"Even though a binding contract is made before a contemplated written memorial is prepared and adopted, the subsequent written document may make a binding modification of the terms previously agreed to." Restatement (Second) of Contracts § 27 cmt. d (1981)

Robertson was required under the new business loan agreement, under the Continuity of Operations clause, to agree not to “(1) Engage in any business activity substantially different than those in which borrower is presently engaged, or (2) cease operations, liquidate, merge, transfer, acquire or consolidate with any other entity, change ownership, dissolve or transfer or sell collateral out of the ordinary course of business.” (R48) And under the promissory note, under Required Deposit Account; “Borrower agrees to maintain an active deposit account with American West Bank during the term of this agreement. Failure to do so shall be deemed a default of this agreement and subject to the default interest rate and annual percentage rate.” (R43) Thus any right Robertson may have had under the old agreement to terminate had been modified by the new agreement. Robertson believed FWB had pledged the ACH line as consideration for his entering into the new loan documentation that was to run at least as long as the new note and thus, any right to terminate the old agreement had also been modified.

These are all disputed questions of fact and should have been submitted to the fact finder and not resolved in summary judgment.

2 THE TRIAL COURT ERRED IN ITS SUMMARY JUDGMENT DETERMINATION THAT THERE WAS NO MATERIAL FACT IN DISPUTE AND SHOULD HAVE APPLIED AN OBJECTIVE STANDARD OF REASONABLENESS BEFORE REACHING A DECISION AS TO GOOD FAITH AND FAIR DEALING

The allegations of the foregoing paragraphs are incorporated herein by reference with the same force and effect as if set forth in full below.

“Whether party has breached covenant of good faith and fair dealing is generally factual issue to be determined by factfinder, not issue subject to resolution as matter of law.” Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 452, (Utah Ct. App. 1994) “question of whether party has acted in bad faith in connection with covenant of good faith and fair dealing is generally question of fact.” *Id.* “if dispute exists concerning duty of good faith as to why contractual parties did what they did, there is question of fact for jury.” *Id.* (internal citations omitted)

"whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law." Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 291 (Utah Ct. App. 1994).

The district court erred when it granted summary judgment in favor of FWB against Robertson's claim of the breach of good faith and fair dealing as a matter of law. There were several disputed issues of material fact in question.

Robertson cited Markham v. Bradley, 2007 UT App 379, ¶ 18, 173 P.3d 865 as a similar case to this one, and as to the determination of what legal duties each party has under the covenant of good faith and fair dealing. (R1361, P33-36)

The implied covenant of good faith and fair dealing (the covenant) inheres in every contract. *Id.* As distinguished from a contract's express terms, the covenant "is based on judicially recognized duties not found within the four corners of the contract." *Id.* "Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract." *Id.* Furthermore, the "covenant . . . should prevent either party from impeding the other's performance of his obligations [under the contract]; and . . . one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Id.* Generally, whether a party to a contract has acted reasonably "is an objective question to be determined without considering the [party's] subjective state of mind." *Id.* "[B]reach of the covenant of good faith and fair dealing is an objective question." *Id.* Typically, the duties imposed by the covenant, "unlike the duties expressly stated in the contract, are not subject to alteration by the parties." *Id.* the duty to perform contract in good faith cannot be waived by either party. *Id.* (internal citations omitted)

It is undisputed that on April 30, 2009, Dan Brian of FWB presented a written offer by email to Robertson. (R297) (Addendum III) It is undisputed that the following day Robertson complied with the terms of that offer and entered into the note and business agreement. (R42-51) The covenant of good faith and fair dealing would then adhere to each party of this agreement.

I. The cancelation of the ACH line deprived Robertson of the benefits of the contract

Robertson argued in his previous argument that the whole purpose for moving to FWB was to obtain ACH services for his business, Instapolypay. The course of

dealings show the benefit Robertson sought was the ACH service. The offer made by FWB to induce Robertson to enter into the new loan documents was the restoration of the ACH line. The cancelation of the ACH line on September 22, 2010 (R299) deprived Robertson of the benefit he had bargained for and thus breached the covenant. FWB argued that they had only exercised a contract right. Even if that was correct, they still had to exercise that right according to the covenant.

[T]his court held that even where a contract expressly provides a privilege to one party, the exercise of that right is subject to the covenant of good faith and fair dealing. *Markham v. Bradley*, 2007 UT App 379, ¶ 20, 173 P.3d 865 "[A] party must exercise express rights awarded under a contract reasonably and in good faith." *Id.* [A] party breaches the covenant if it fails to exercise all rights under the contract reasonably. *Id.* Where the contract allows discretion but does not provide any express standard for exercising that discretion, the covenant imposes an objective standard of reasonableness. *Id.* "[T]he degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms." (internal citations omitted)

[T]he question of whether parties who retain express power or discretion under a contract can exercise that power or discretion in such a way as to breach the covenant of good faith and fair dealing. We believe that they can. Our courts have determined that a party must exercise express rights awarded under a contract reasonably and in good faith. *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 450 (Utah Ct. App. 1994), courts have

determined in a variety of contexts that a contracting party can exercise a retained contractual power in bad faith. *Id.*

Thus the district court should have used an objective standard of reasonableness to determine if FWB violated the covenant when it terminated the ACH line. This is a contested question of fact.

II. The cancelation of the ACH line made it difficult or impossible for Robertson to perform on the note and business agreement

Robertson relied upon the funds generated from the ACH agreement to make payments on the 2009 Note and Business loan. (R301) FWB knew that without funds from this ACH agreement, Robertson could not make those payments. FWB acted in Bad Faith in terminating the ACH agreement without cause. *Markham* states that the covenant “should prevent either party from impeding the other's performance of his obligations” and “one party may not render it difficult or impossible for the other to continue performance” *Id.* FWB’s actions made it difficult or impossible for Robertson to perform on the loan without the income obtained by the ACH line thus impeding his performance. Summary judgment against Robertson was inappropriate.

3 THE COURT ERRED IN IT’S INTERPRETATION OF UTAH TITLE 57 CHAPTER 1 AND IN FINDING THAT THERE WAS NO MATERIAL FACT IN DISPUTE IN GRANTING SUMMARY JUDGMENT

The allegations of the foregoing paragraphs are incorporated herein by reference with the same force and effect as if set forth in full below.

Did Far West comply with all provisions of Utah Code Ann. Title 57 Chapter 1? (R524) FWB's complaint is based on this chapter. Robertson presented many questions of material fact in regards to compliance with the provisions of this chapter that were never addressed by the trial court in granting summary judgment.

I. Was there a valid default to invoke the power of sale

Robertson raised the question as to whether he was in default of the deed of trust after FWB breached their agreement. (R512-513,517)

"first breach" rule "a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform." Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972). "He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform." Id.

By canceling the source of repayment for the contract after promising to provide it in the agreement the parties entered into, FWB committed a material breach. This nullified any further performance by Robertson.

("The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party. Also, a party seeking to enforce a contract must prove performance of its own obligations under the contract." (citation omitted)); Bell v. Elder, 782 P.2d 545, 548 (Utah Ct. App. 1989)

Robertson is not and has never been in default under the agreement entered into after FWB's breach and FWB has not proved performance of its own obligations under the contract. The notice of default issued by the Trustee was in error and substantially affected and sacrificed the interests of the debtor. (R178) Because of this breach, the Trustee had no authority under Utah Code Ann. 57-1-23 through 57-1-28 (as amended) to sell the property. (R515)

II. FWB failed to properly notice the property and did so in a way to cause great confusion, which resulted in a cooling of the bidding process.

Robertson argued that the trust property contained four distinct parcels of property as contained in the trust deed. (R14, R102) FWB was aware of the fact that there were four distinct parcels. The Substitution of Trustee, (R53, 56) Notice of Default, (R59, 62) Notice of Trustee's Sale, (R65, 69) and publication of sale, (R179) all contained a single legal description which encompassed all four parcels along with the statement, "The Real Property tax identification number is 23-051-0004", the tax number of only a single parcel. (R102, 179) Most vacant property lacks an actual street address and the easiest way to identify a parcel is with the tax identification number. Robertson argued that this was a cause of confusion that had a dramatic cooling effect on the bidding process.

This would be similar to a borrower who owned four distinct houses that were contiguous and in default. If the trustee listed a single legal description

encompassing all four houses, but listed at the end of that legal description the address of the least valuable house at one end of the block and failed to list the street addresses of the other three, including the most valuable one at the other end of the block as part of the sale, it would have a tendency to cool the number of bidders who might want to participate in the sale.

The listing of this single tax identification number caused enough confusion that the county recorder, the expert on metes and bounds legal descriptions, only placed a Notice of Default upon this single parcel of property. (R285, 311-314) The Notice of Sale required to be posted by Utah code 57-1-25(1)(b)(ii) was also only posted on this single parcel. (R285)

Any reasonable person of ordinary prudence, with due diligence, who may have been looking for foreclosed property to buy, would only have been able to believe they could bid on the property with the tax ID 23-051-0004 from the information posted and published. If they would have searched the County property records further and found that Round Peak owned four contiguous parcels, they would have found that there was no record of a Notice of Default listed against the properties with tax ID 23-008-0020, 23-008-0021, or 23-008-0022. If they would have visited the property they would have found that the Notice of Sale was only posted on the property with tax ID 23-051-0004. (R179)

Defects in the notice of foreclosure sale that will authorize the setting aside of the sale must be those that would have the effect of chilling the bidding and causing an inadequacy of price. The remedy of setting aside the sale will be applied only in cases which reach unjust extremes.” Concepts, Inc. v. First Sec. Realty Serv., Inc., 743 P.2d 1158, 1159 (Utah 1987)

If the description FWB placed on these required notices was confusing enough to cause the county recorder to record the notice of default only on the single parcel, could it also have caused an ordinary person to likewise believe that only that single parcel was for sale and thus cause a chilling effect in the bidding process?

Could a reasonable jury conclude that the effect of placing a single tax identification number on the notice have caused a chilling effect on the bidding process? If so, summary judgment was inappropriate.

III. Plaintiff failed to follow the terms of Utah Code Ann. § 57-1-31.5

On May 16, 2011 a Payoff Statement Request was made to Steven W. Call, (R308-309) Trustee, by Robertson as to the total amount required in order to pay off the loan and a detailed description of all charges associated with the payoff as provided in Utah Code Ann. § 57-1-31.5. This request was made in a timely manner and no response was given. (R172)

Utah Code Ann. § 57-1-31.5 (Addendum IV) states in pertinent part:

(2)(a)(i) An interested party may submit a written request to a trustee for a statement of the amount required to be paid:

(A) to reinstate an obligation secured by a trust deed; or

- (B) to pay off a loan secured by a trust deed.
- (2) (c)(ii) If, after scheduling a trustee's sale, the trustee fails to provide a requested payoff statement within five business days after the request is received, the trustee shall:
 - (A) cancel the trustee's sale; or
 - (B) postpone the trustee's sale to a date at least 10 business days after the trustee provides the statement.

There are only two options the trustee has if he has not complied with the timely written request for a payoff. That is to (a) cancel or (b) postpone the sale.

On the date of the sale, the trustee made the following statement: "Is there anyone here who has any knowledge or objects to the proceeding of this sale on the basis that there has been a bankruptcy case commenced against the borrower or that the sale of this property is precluded by state or federal law, please speak now". (R285) Robertson informed the trustee that a payoff statement had been requested from him and had been delivered to his office over two week before and that no payoff statement had been provided. (R285) Nevertheless, the trustee continued to proceed with the sale knowing that the payoff statement required by Utah Code Ann. § 57-1-31.5 had not been provided.

IV. The Trustee failed to follow Utah Code § 57-1-27

Robertson argued that the trust property contained four distinct parcels of property as contained in the trust deed. (R14, R102) Utah Code § 57-1-27 (Addendum IV) states in pertinent part:

- (1)(a) The trustor, or the trustor's successor in interest, if present at the sale,

may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can be sold separately. The trustee or attorney for the trustee shall follow these directions.

Robertson questioned the trustee before the sale as to which parcel was being sold first and was assured it was the parcel with tax ID 23-051-0004. Robertson learned after the sale that the trustee had sold all four parcels as a single parcel and had not followed Robertson's directions. (R286) (R1361, P23)

**4 THE COURT ERRED IN NOT GRANTING ROBERTSON'S
MOTION FOR BREACH OF CONTRACT CLAIM AS A MATTER
OF LAW**

The allegations of the foregoing paragraphs are incorporated herein by reference with the same force and effect as if set forth in full below.

The elements of a prima facie case for breach of contract are “(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages” *Bair v. Axiom Design, L.L.C.*, 2001 UT 20 ¶ 14, 20 P.3d 388

It is undisputed that the parties were not in agreement on April 29, 2009. (R293, 295) (Addendum II) It is also undisputed that FWB made a written offer to Robertson on April 30, 2009 consisting of a single sentence that read:

“Mike, Upon completion of the new loan documentation, we will reinstate your ACH line. Thanks, Dan Brian”. (R297) (Addendum III)

A copy of this offer was also sent as a CC to Jeff Rounds and Brian Guevera of FWB, thus showing intent that this was a final expression of the parties and that at least three FWB officers knew of its existence. (R297) (Addendum III) It is also undisputed that Robertson, upon receiving this offer complied with the terms and completed the new loan documentation the following day, May 1, 2009, by signing the documents that had been prepared on April 23, 2009. (R42-51) Did this written agreement constituted the final expression of the parties?

An integrated agreement is defined as "a writing or writings constituting a final expression of one or more terms of an agreement." Restatement (Second) of Contracts § 209 (1981).

This was the last writing by FWB and the business loan and note are simply addendum with which the contract can be proved. This writing constituted the final expression of the parties. Does this offer then form a contract? The formation of a contract is spelled out in Cea v. Hoffman, 2012 UT App 101, ¶ 24, 276 P.3d 1178.

Generally, formation of a contract requires an offer, an acceptance, and consideration. Id. An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." Id. "For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous." Id. The obligations of the parties must be "set forth with sufficient definiteness that [the contract] can be performed." Id. "An acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made." Id. "Consideration is present when there is an act or promise given in exchange for the other party's promise." Id. "Thus, 'there is

consideration whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.”” Id. (internal citations omitted)

Thus the written offer presented by FWB complies with all of the terms of a valid contract as found in Cea. The offer pledged the ACH line if Robertson accepted the terms of the new loan documentation and entered into them. Both parties pledged consideration in the exchange of promises, just as they did in Cea.

Robertson agreed in these loan documents to provide an initial payment in the amount of \$100, 461.58 (R1129) and then make additional payments to Far West in the amount of \$4,842.15 beginning on June 5, 2009 and continue until May 5, 2014. (R42) Robertson entered into the agreement May 1, 2009 and paid the initial payment. (R1129) Robertson then made the June 2009 payment as agreed and subsequently made each and every payment up to and including the September 5, 2010 payment. Robertson was never delinquent on any payment or of any amount due during this time. (R176) Far West stipulated that this was correct. (R1361, P12)

FWB pledged the restoration of the ACH line. FWB provided those ACH services until September 22, 2010 when they withdrew the line. (R299, 462) It is undisputed that FWB did so. (R1361, P15-17) This was a breach of the offer made to Robertson and the contract the parties entered into.

Robertson was damaged when FWB terminated the ACH line. The processing of ACH transactions was bringing in a majority of the income Robertson used to pay FWB for the agreement the parties had entered into. (R301) (R1361, P28) When FWB stopped that service, the income ceased to exist. Robertson was no longer able to make payments to FWB. Instapolypay was no longer able to fulfill the needs of its clients and also went out of business.

This is a prima facie case of breach of contract. No matter how you look at it, FWB's claim that it simply exercised a provision in a previous agreement makes no difference, the promise made was to reinstate the ACH line. On September 22, 2010 the ACH line was no longer reinstated and was terminated. (R299) The consideration ceased to exist. The effects of a failure of consideration are spelled out in Aquagen Int'l, Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998)

The formation of a contract "requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Id. Consideration sufficient to support the formation of a contract requires that "a performance or a return promise must be bargained for." Id. ("Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."). Id.

When one party to a valid contract commits an "uncured material failure" in its performance of the contract, the non-failing party is relieved of its duty to continue to perform under the contract. Id. This general rule is based on the principle:

that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party. Id.

We have unequivocally held in the past that "[e]vidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable." Id. In fact, it is entirely permissible for a party to rescind a contract based on a failure of consideration. Id.

"Failure of consideration [as opposed to lack of consideration] exists wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance." If a failure of consideration occurs, the contract ceases to exist. Id. (Internal citations omitted)

Thus, the contract the parties entered into had been breached or ceased to exist when the ACH line was no longer reinstated.

If this court were to decide that the term "reinstate" in the contract was simply a return to the previous agreement with the arbitrary right of termination contained in it that would make the consideration pledged illusory. The effect of an illusory contract is spelled out in Peirce v. Peirce, 2000 UT 7, ¶19,21, 994 P.2d 193

We have stated that "courts endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract." Id. In addition, we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract. Id. Moreover,

where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only

where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it. Id.

Consideration may be found when there is any act or forbearance bargained for and given in exchange for the promise of another. Id. Whether an act or forbearance constitutes consideration for a contract is a question of law that we review for correctness. Id. We have held that

[f]or the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties. When there exists only the facade of a promise, i.e., a statement made in such vague or conditional terms that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory." An illusory promise, neither binds the person making it, nor functions as consideration for a return promise. Id. It has also been noted, however, that

[t]he tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that the parties intended a contract. Through a process of interpretation, in the absence of express restrictions, courts find implied promises to prevent a party's promise from being performable merely at the whim of the promisor. Id. (Internal citations omitted)

Robertson should have been granted summary judgment as a matter of law on the breach of contract claim.

5 THE COURT ERRED IN NOT GRANTING ROBERTSON'S MOTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING AS A MATTER OF LAW

The allegations of the foregoing paragraphs are incorporated herein by reference with the same force and effect as if set forth in full below.

Robertson cited Markham v. Bradley, 2007 UT App 379, ¶ 18, 173 P.3d 865 in determination of what duties each party has under the covenant of good faith and fair dealing. (R1361, P33-36)

The implied covenant of good faith and fair dealing (the covenant) inheres in every contract. *Id.* As distinguished from a contract's express terms, the covenant "is based on judicially recognized duties not found within the four corners of the contract." *Id.* "Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract." *Id.* Furthermore, the "covenant . . . should prevent either party from impeding the other's performance of his obligations [under the contract]; and . . . one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Id.* (Internal citation omitted)

As stated, both parties promise not to intentionally do anything to injure the other party or impede their performance or make it difficult or impossible for the other party to perform under the contract. It is undisputed that on September 22, 2010, FWB terminated the ACH line upon which Robertson generated funds to provide satisfaction for the payments under the 2009 Note and Business loan agreement. (R299) This injured Robertson's rights and impeded his performance and made it difficult or impossible for him to further perform. The ACH was under the total control of FWB. In limited circumstances, bad faith is so apparent that it is appropriate to decide the issue as a matter of law, as it is in this case.

Restatement (Second) of Contracts § 205 (1981) (noting that bad faith may be established by “interference with or failure to cooperate in the other party’s performance”).

FWB’s offer to reinstate the ACH line in their enticement to Robertson to enter into the agreement and then the later termination of the ACH was interference with and failure to cooperate in Robertson’s performance, making it difficult or impossible for him to perform, and was in bad faith. This is a clear breach under the covenant of good faith and fair dealing and Robertson should have been granted summary judgment as a matter of law.

6 THE COURT ERRED IN ITS INTERPRETATION OF UTAH RULES OF CIVIL PROCEEDURES AND ABUSED ITS DISCRETION IN APPLYING SANCTIONS

On July 2, 2013 a trial was held to determine the amount owed under the terms of the Note and Business Loan agreement entered into by Robertson on May 1, 2009 and the value of the property on the date of the foreclosure sale June 1, 2011. (R1362)

At the beginning of the trial, in opening arguments, Robertson asked for clarification as to what evidence he may present in regards to these two subjects. The district court instructed Robertson, “But as far as the issues that are remaining, the Court’s plenty willing to let you put on all the evidence you want.” (R1362, P11-12) Based upon the directions of the Court, Robertson did not object to any of the exhibits or the expert witness presented by FWB believing that he would be

allowed to present "all the evidence" he wanted to impeach those exhibits and the testimony of the witnesses. Robertson was greatly surprised when an attempt to do so was suppressed by the district court and Robertson was not allowed to present any of the evidence he had prepared in an effort to impeach.

Under the language of Rule 26(a) of the Utah Rules of Civil Procedure that existed at the filing of this case, (Addendum V) Robertson falls under the exemption of (a)(2)(A)(vi) and so the requirements of subdivision (a)(1) and subdivision (f) do not apply to him. (R1106) The requirements for pretrial disclosure read,

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

This rule has an exception for evidence to which a party need not disclose to the other party prior to trial, and that is "other than solely for impeachment". The evidence Robertson was attempting to introduce was evidence solely for impeachment. Robertson fully believed that according to the language of this rule, he was not required to produce it and was only to present it in an effort to impeach at trial.

Rule 26(a)(4) states: "A party shall provide to other parties the following information regarding the evidence that it may present at trial ***other than solely for impeachment***." Utah R.Civ. P. 26(a)(4) (emphasis added). Impeachment of a witness is defined as the act of

"discredit[ing] the veracity of a witness." Black's Law Dictionary 768 (8th ed. 1999)(parentheses omitted). Similarly, "impeachment evidence" is defined as "[e]vidence used to undermine a witness's credibility." Id. at 597. Thus, by the rule's plain meaning, witnesses need not be disclosed if the sole purpose of their testimony is to call into question the "veracity" or "credibility" of another witness. Glacier Land Co. v. Claudia Klawe & Assocs., LLC, 2006 UT App 516, ¶ 29, 154 P.3d 852.

Under cross examination of FWB's expert witness, Travis Reeves, Robertson questioned the four properties used as comparable property sales as to their distant location from the subject property, stale sales dates and inferior nature. (R1362, P66-104) When asked if there were other property sales that were closer in time and location to these sales the witness stated, "Not that I'm aware of, no," (R1362, P71) Upon further questioning the witness admitted that the properties he chose were all inferior in location to the subject property. (R1362, P75) When asked if it would be better to have property sales to compare that were similar the witness answered "Yes" and when asked if he would like to see them answered "I would be interested in seeing the parcels." (R1362, P76) Robertson then attempted to present the evidence and FWB objected. The court asked "Was it in your disclosures?" to which Robertson stated it was not but was for impeachment purposes. (R1362, P77) After a discussion with FWB about the non disclosure the court ruled, "Okay, Well, I'm not allow—I'm not going to allow you to use it." (R1362, P78)

However, “[b]efore a trial court can impose discovery sanctions under rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, ... fault, or persistent dilatory tactics frustrating the judicial process.” Welsh v. Hospital Corp. of Utah, 2010 UT App 171, ¶ 9, 235 P.3d 791.

There was no ruling by the district court that Robertson was a part of any willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process before the Court imposed sanctions. Several times Robertson tried to present evidence to impeach the credibility and conclusions of the expert and each time was denied because of failure to disclose. (R1362, P79, 82, 83, 84, 97)

Sanctions are warranted when “(1) the party’s behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process. Kilpatrick v. Bullough Abatement, Inc., 2008 UT 82, ¶ 25, 199 P.3d 957

Robertson’s lack of disclosure was a direct result of the language of the discovery rules as he understood them. He felt he was in full compliance and thus Robertson had good cause and acted in good faith. Nevertheless, all of the materials Robertson attempted to present were materials available to anyone in the public domain. Nothing was privileged and FWB had already shown by the materials they had presented in discovery that they were well aware of this information before Robertson attempted to enter it. Moreover, the witness had a fiduciary duty to seek out this information in his capacity as an appraiser. If there

would have been any error, it would have been harmless. Robertson should have been allowed to present evidence of impeachment at trial. The district court abused its discretion when it imposed sanctions against Robertson.

CONCLUSION

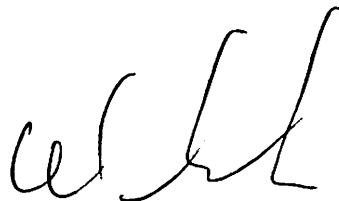
The trial courts grant of partial summary judgment to Appellee was unfounded. Appellant has presented many questions of material fact as to the nature of the contract, the circumstances under which it was made and the purpose to which the parties entered into it. Many times the Appellee changed the nature of their agreement over the course of their dealings and each time the Appellant performed as agreed and with exactness. The Appellee continually breached the covenant of good faith and fair dealing in their agreements for their own betterment at the expense of the Appellant, never considering the consequence of their actions upon the Appellant, and finally attempting to take away everything the Appellant ever had or hoped for by putting him out of business, taking away the rights to the property he had obtained, and obtaining a deficiency judgment for more than he had even borrowed.

Humbly, the Appellant petitions this Court that the trial court's grant of partial summary judgment in favor of the Appellee should be summarily reversed, and summary judgment granted in favor of the Appellant as a matter of law.

Furthermore, the Appellant asks that the foreclosure sale should be set aside. This would be the right and just thing to do under these circumstances. The Law is designed to be fair. The Law is to be tempered with justice and mercy. Wrong-doing should not be rewarded. It is never merciful to destroy an individual so that a company, who was underhanded and deceitful can prevail. Appellant's only desire is that the right thing be done. This court has the power to ensure that justice and mercy be accomplished.

Therefore, The Appellant asks that the Court reverse the partial summary judgment granted for the Appellee and grant summary judgment for the Appellant, or, in the alternative, that the Court grant the Appellant a right to a new trial in which the Appellant is allowed the right to present all the evidence for the district court to consider with which to make a decision.

Dated this 8 day of September, 2015

A handwritten signature in black ink, appearing to read 'Mike L. Robertson', written over a horizontal line.

Mike L. Robertson
Pro Se
Appellant/Defendant

ADDENDUM

ADDENDUM I
Order Denying Defendant's
Motion for New Trial

FILED

MAY 27 2015 ^{W6}

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Mike L. Robertson
544 N 880 E
Springville, UT 84663
Telephone (801)592-7674
Email megus@usa.com

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH, PROVO DEPARTMENT**

FAR WEST BANK, a division of
America West Bank,

Plaintiff and Counter-Defendant,
vs.

MIKE L. ROBERTSON,

Defendant and Counterclaimant.

**ORDER DENYING
DEFENDANT'S MOTION
FOR NEW TRIAL**

Case No. 110402516

Judge David Mortensen

Defendant Mike L. Robertson's (Robertson) Motion for New Trial came before the Court at a hearing on December 9, 2013 at 2:00p.m. Far West Bank, now known as American West Bank (American West), was represented by Jonathan A. Dibble and Steven W. Call of Ray Quinny & Nebeker P.C. Defendant Robertson appeared pro se.

The Court having considered the Defendant's Motion for New Trial and having heard the argument of Plaintiff's counsel and Defendant Robertson, hereby makes its findings and conclusions and order denying Defendant's Motion for New Trial as follows:

FINDINGS AND CONCLUSIONS

1. On September 11, 2013, the Court entered a money Judgment against Defendant Robertson in favor of American West after a one-day trial held July 2, 2013 pursuant to Utah Code Ann, § 57-1-32.
2. The Judgment entered against Defendant Robertson was based on a deficiency balance owing by Defendant Robertson on a consolidated commercial loan after the foreclosure of a parcel of land that secured the loan.
3. On September 12, 2013, Defendant Robertson filed his Motion for New Trial which was supported by a Memorandum in Support of Defendant's Motion for a New Trial. ("support memorandum").
4. Defendant Robertson's support memorandum was accompanied by the Second Declaration of Mike L. Robertson.
5. On September 30, 2013, American West filed a memorandum in opposition to Defendant Robertson's support memorandum.
6. On September 30, 2013, American West also objected to and moved the Court to strike or disregard the Second Declaration of Defendant Robertson on the grounds the post-trial declaration was inadmissible under the Utah Rules of Evidence and Rules of Civil Procedure on various grounds.
7. The Court read all of the pleadings and considered all the arguments and believed that a fair trial was had in this matter and that fair notice was given of the Court's expectations.
8. As to the motion to strike, it was granted in part and denied in part. It was granted insofar as the statement of Defendant Robertson could be construed as an attempt to supplement the record as to the initial summary judgment motion.

9. The Court found that Rule 59 is a proper procedural rule to ask a court after judgment's been entered to look at a motion for summary judgment as to a legal remedy and that an affidavit can be filed in support of a motion for a new trial under Rule 59.
10. The Defendant Robertson's Motion for New Trial was denied, both as it pertains to the summary judgment motion and the trial proceedings in this case.

ORDER

Based upon the foregoing findings and conclusions and other findings and conclusions placed upon the record, IT IS HEREBY:

ORDERED that Defendant Robertson's Motion for New Trial is DENIED, both as it pertains to the summary judgment motion and the trial proceedings.

Approved as to form by:

Steven W Call

Jonathan A Dibble

Ray Quinney & Nebeker P.C

Dated this ____ day of April, 2015

May 26, 2015

Judge David M. ...

ADDENDUM II
NEGOTIATION EMAILS

----- Original Message -----

From: "Brian Guevara"

To: "Mike Robertson"

Subject: Loan Extension

Date: Mon, 27 Apr 2009 13:02:38 -0700

Mike,

We are ready to get this extension signed. Let me know when you are available to sign. We can sign at the Provo office.

A few item:

We will need to get a copy of your entity papers for Round Peak.

The total amount needed in cash at the signing will be \$100,461.58

-\$80,000	Pay down
-\$9,713.43	Interest for loan 549
-\$7,137.15	Interest for loan 089
-\$3,382	Loan Fee
-\$79	Tax Tracking
-\$150	Doc Prep Fee
\$100,461.58	Total

Let me know if you have any question. Thanks. Brian

Brian Guevara

Commercial Lending

From: Mike Robertson [mailto:megus@usa.com]
Sent: Monday, April 27, 2009 3:42 PM
To: Brian Guevara
Subject: Re: Loan Extension

Brian,

How did we get \$5000. more interest in only a month???

Also, what interest rate are we talking?

I have the \$95,000 right now, I'll have to come up with the other \$5,000.

And I thought we were going to eliminate the fee?

Mike

----- Original Message -----

From: "Brian Guevara"
To: "Mike Robertson"
Subject: RE: Loan Extension
Date: Tue, 28 Apr 2009 07:34:31 -0700

Answers are below. Let me know if you have further questions. Brian

Brian Guevara

From: Mike Robertson [mailto:megus@usa.com]
Sent: Monday, April 27, 2009 3:42 PM
To: Brian Guevara
Subject: Re: Loan Extension

Brian,

How did we get \$5000. more interest in only a month???

-I am not sure when or what number you got. But your daily interest on each loan is below and the numbers are accurate.

Loan 089- \$29.5139

Loan 549- \$58.9955

Also, what interest rate are we talking?

-This is a 6% fixed rate as we discussed.

I have the \$95,000 right now, I'll have to come up with the other \$5,000.

And I thought we were going to eliminate the fee?

-We were able to lower the fee from 1% to ½%.

Mike

From: Mike Robertson [mailto:megus@usa.com]

Sent: Wednesday, April 29, 2009 11:17 AM

To: Brian Guevara

Subject: RE: Loan Extension

OK Brian, I can see the difference. Before, they were going to role the fees into the loan, your putting them up front.

That's the difference in the amount I was thinking.

On the interest rate though, we were talking 5.5% fixed or 5% variable in the meeting we had, why is it 6% now?

And I have another problem that has just come up and I talked to Dan about it a little. They are canceling my agreement to process ACH transactions on the 20th of next month. Dan said it was because I was in this delinquent category and they had to look at all aspects of my business dealings. Can we get an agreement to re-instate that at the same time we finalize this?

Mike

From:

"Brian Guevara" <BGuevara@farwestbank.com>

To:

"Mike Robertson" <megus@usa.com>

Date:

Apr 29, 2009 11:39:13 AM

On the rate. We did discuss the 5.5% fixed rate but said we would need to go back and plug in the numbers and see where it came out at. When I plugged in the numbers, 6% fixed was the lowest fixed rate we could do. I was under the assumption that you didn't want to go variable. But, if you want to, the rate would be P+2% (currently 5.25%) with a floor of 5.5%.

On the ACH issue... it is my understanding that we will be able to re-instate that for you at the time of closing.

Brian Guevara

Commercial Lending

----- Original Message -----

From: "Brian Guevara"

To: ""Mike Robertson""

Subject: Loan Extension

Date: Wed, 29 Apr 2009 13:47:35 -0700

Mike,

We are hoping to get this closed by month end. Is there a time tomorrow when we can get this signed? Thanks. Brian

Brian Guevara

Commercial Lending

From: Mike Robertson [mailto:megus@usa.com]

Sent: Thursday, April 30, 2009 10:53 AM

To: Brian Guevara

Subject: Re: Loan Extension

Brian,

Can we do it about 4:30 today? And can I get something in writing that we will re-instate the ACH service with the signing of this?

Mike

From:

"Brian Guevara" <BGuevara@farwestbank.com>

To:

""Mike Robertson"" <megus@usa.com>

Date:

Apr 30, 2009 1:18:49 PM

I am not able to meet this afternoon at 4:30. How about tomorrow morning sometime? Thanks.
Brian

Brian Guevara

Commercial Lending

From: "Brian Guevara" <BGuevara@farwestbank.com>
To: "Mike Robertson" <megus@usa.com>
Date: May 1, 2009 8:38:19 AM

Mike,

One more item I need you to bring to the closing today...partnership papers for Round Peak.
Thanks. I'll see you this afternoon. Brian

Brian Guevara

Commercial Lending

ADDENDUM III

AGREEMENT



Robertson ACH Line

From: "Dan Brian" <DBrian@farwestbank.com>
To: ""Mike Robertson"" <megus@usa.com>
Cc: "Brian Guevara" <BGuevara@farwestbank.com>, "Jeff Rounds" <JRounds@farwestbank.com>
Date: Apr 30, 2009 2:57:56 PM

Mike,

Upon completion of the new loan documentation, we will reinstate your ACH line.

Thanks,

Dan Brian

Far West Bank, *a division of AmericanWest Bank, Spokane, Wa.*

10757 South River Front Parkway, Suite 150

South Jordan, Utah 84095

Phone: 801-208-4079

Fax: 801-208-3486

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

ADDENDUM IV

UCA 51-1-23

UCA 51-1-24

UCA 51-1-25

UCA 51-1-26

UCA 51-1-27

UCA 51-1-31.5

57-1-23. Sale of trust property -- Power of trustee -- Foreclosure of trust deed.

The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

Amended by Chapter 236, 2001 General Session

57-1-24. Sale of trust property by trustee -- Notice of default.

The power of sale conferred upon the trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) may not be exercised until:

(1) the trustee first files for record, in the office of the recorder of each county where the trust property or some part or parcel of the trust property is situated, a notice of default, identifying the trust deed by stating the name of the trustor named in the trust deed and giving the book and page, or the recorder's entry number, where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of the trustee's election to sell or cause to be sold the property to satisfy the obligation;

(2) not less than three months has elapsed from the time the trustee filed for record under Subsection (1); and

(3) after the lapse of at least three months the trustee shall give notice of sale as provided in Sections 57-1-25 and 57-1-26.

Amended by Chapter 236, 2001 General Session

57-1-25. Notice of trustee's sale -- Description of property -- Time and place of sale.

(1) The trustee shall give written notice of the time and place of sale particularly describing the property to be sold:

(a) by publication of the notice:

(i) (A) at least three times;

(B) once a week for three consecutive weeks;

(C) the last publication to be at least 10 days but not more than 30 days before the date the sale is scheduled; and

(D) in a newspaper having a general circulation in each county in which the property to be sold, or some part of the property to be sold, is situated; and

(ii) in accordance with Section 45-1-101 for 30 days before the date the sale is scheduled;

(b) by posting the notice:

(i) at least 20 days before the date the sale is scheduled; and

(ii) (A) in some conspicuous place on the property to be sold; and

(B) at the office of the county recorder of each county in which the trust property, or some part of it, is located; and

(c) if the stated purpose of the obligation for which the trust deed was given as security is to finance residential rental property:

(i) by posting the notice, including the statement required under Subsection (3)(b):

(A) on the primary door of each dwelling unit on the property to be sold, if the property to be sold has fewer than nine dwelling units; or

(B) in at least two conspicuous places on the property to be sold, in addition to the posting required under Subsection (1)(b)(ii)(A), if the property to be sold has nine or more dwelling units; or

(ii) by mailing the notice, including the statement required under Subsection (3)(b), to the occupant of each dwelling unit on the property to be sold.

(2) (a) The sale shall be held at the time and place designated in the notice of sale.

(b) The time of sale shall be between the hours of 8 a.m. and 5 p.m.

(c) The place of sale shall be clearly identified in the notice of sale under Subsection (1) and shall be at a courthouse serving the county in which the property to be sold, or some part of the property to be sold, is located.

(3) (a) The notice of sale shall be in substantially the following form:

Notice of Trustee's Sale

The following described property will be sold at public auction to the highest bidder, payable in lawful money of the United States at the time of sale, at (insert location of sale) _____ on _____ (month\day\year), at ____m. of said day, for the purpose of foreclosing a trust deed originally executed by ____ (and ____, his wife,) as trustors, in favor of ____, covering real property located at ____, and more particularly described as:

(Insert legal description)

The current beneficiary of the trust deed is _____ and the record owners of the property as of the recording of the notice of default are _____ and _____.

Dated

_____ (month\day\year).

Trustee

(b) If the stated purpose of the obligation for which the trust deed was given as security is to finance residential rental property, the notice required under Subsection (1)(c) shall include a statement, in at least 14-point font, substantially as follows:

"Notice to Tenant

As stated in the accompanying Notice of Trustee's Sale, this property is scheduled to be sold at public auction to the highest bidder unless the default in the obligation secured by this property is cured. If the property is sold, you may be allowed under federal law to continue to occupy your rental unit until your rental agreement expires, or until 90 days after the date you are served with a notice to vacate, whichever is later. If your rental or lease agreement expires after the 90-day period, you may need to provide a copy of your rental or lease agreement to the new owner to prove your right to remain on the property longer than 90 days after the sale of the property.

You must continue to pay your rent and comply with other requirements of your rental or lease agreement or you will be subject to eviction for violating your rental or lease agreement.

The new owner or the new owner's representative will probably contact you after the property is sold with directions about where to pay rent.

The new owner of the property may or may not want to offer to enter into a new rental or lease agreement with you at the expiration of the period described above."

(4) The failure to provide notice as required under Subsections (1)(c) and (3)(b) or a defect in that notice may not be the basis for challenging or invalidating a trustee's sale.

(5) A trustee qualified under Subsection 57-1-21(1)(a)(i) or (iv) who exercises a power of sale has a duty to the trustor not to defraud, or conspire or scheme to defraud, the trustor.

Amended by Chapter 228, 2011 General Session

57-1-26. Requests for copies of notice of default and notice of sale -- Mailing by trustee or beneficiary -- Publication of notice of default -- Notice to parties of trust deed.

(1) (a) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed shall file for record a duly acknowledged request for a copy of any notice of default and notice of sale:

(i) in the office of the county recorder of any county in which the trust property or any part of the trust property is situated; and

(ii) at any time:

(A) subsequent to the filing for record of the trust deed; and

(B) prior to the filing for record of a notice of default.

(b) Except as provided in Subsection (3), the request described in Subsection (1)(a) may not be included in any other recorded instrument.

(c) The request described in Subsection (1)(a) shall:

(i) set forth the name and address of the one or more persons requesting copies of the notice of default and the notice of sale; and

(ii) identify the trust deed by stating:

(A) the names of the original parties to the trust deed;

(B) the date of filing for record of the trust deed;

(C) (I) the book and page where the trust deed is recorded; or

(II) the recorder's entry number; and

(D) the legal description of the trust property.

(d) The request described in Subsection (1)(a) shall be in substantially the following form:

REQUEST FOR NOTICE

The undersigned requests that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____(month\day\year), and recorded in Book ____, Page ____, Records of ____ County, (or filed for record _____(month\day\year), with recorder's entry number ____, _____ County), Utah, executed by ____ and _____ as trustors, in which ____ is named as beneficiary and ____ as trustee, be mailed to ____ (insert name) ____ at ____ (insert address) _____.

(Insert legal description)

Signature _____

(Certificate of Acknowledgement)

(e) If a request for a copy of a notice of default and notice of sale is filed for record under this section, the recorder shall index the request in:

- (i) the mortgagor's index;
- (ii) mortgagee's index; and
- (iii) abstract record.

(f) Except as provided in Subsection (3), the trustee under any deed of trust is not required to send notice of default or notice of sale to any person not filing a request for notice as described in this Subsection (1).

(2) (a) Not later than 10 days after recordation of a notice of default, the trustee or beneficiary shall mail a signed copy of the notice of default:

- (i) by certified or registered mail, with postage prepaid;
- (ii) with the recording date shown;
- (iii) addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default; and
- (iv) directed to the address designated in the request.

(b) At least 20 days before the date of sale, the trustee shall mail a signed copy of the notice of the time and place of sale:

- (i) by certified or registered mail, return receipt requested, with postage prepaid;
- (ii) addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default; and

(iii) directed to the address designated in the request.

(3) (a) Any trust deed may contain a request that a copy of any notice of default and a copy of any notice of sale under the trust deed be mailed to any person who is a party to the trust deed at the address of the person set forth in the trust deed.

(b) A copy of any notice of default and of any notice of sale shall be mailed to any person requesting the notice who is a party to the trust deed at the same time and in the same manner required in Subsection (2) as though a separate request had been filed by each person as provided in Subsection (1) except that a trustee shall include with a signed copy of a notice of default and the signed copy of a notice of sale the following information current as of the time the notice of default and the notice of sale is provided:

(i) the name of the trustee;

(ii) the mailing address of the trustee;

(iii) if the trustee maintains a bona fide office in the state meeting the requirements of Subsection 57-1-21(1)(b), the address of a bona fide office of the trustee meeting the requirements of Subsection 57-1-21(1)(b);

(iv) the hours during which the trustee can be contacted regarding the notice of default and notice of sale, which hours shall include the period during regular business hours in a regular business day; and

(v) a telephone number that the person may use to contact the trustee during the hours described in Subsection (3)(b)(iv).

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by the trustor has been recorded as provided in this section, no later than 15 days after the filing for record of the notice of default, a copy of the notice of default shall be:

(a) mailed to the address of the property described in the notice of default;
or

(b) posted on the property.

(5) The following shall not affect the title to trust property or be considered notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title or interest in, or lien or claim upon, the trust property:

(a) a request for a copy of any notice filed for record under Subsection (1) or (3);

(b) any statement or allegation in any request described in Subsection (5)(a); or

(c) any record of a request described in Subsection (5)(a).

Amended by Chapter 209, 2002 General Session

57-1-27. Sale of trust property by public auction -- Postponement of sale.

(1) (a) On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction to the highest bidder. The trustee, or the attorney for the trustee, may conduct the sale and act as the auctioneer. The trustor, or the trustor's successor in interest, if present at the sale, may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can be sold separately. The trustee or attorney for the trustee shall follow these directions. Any person, including the beneficiary or trustee, may bid at the sale. The trustee may bid for the beneficiary. Each bid is considered an irrevocable offer. If the highest bidder refuses to pay the amount bid by the highest bidder for the property, the trustee, or the attorney for the trustee, shall either:

(i) renounce the sale in the same manner as notice of the original sale is required to be given; or

(ii) sell the property to the next highest bidder.

(b) A bidder refusing to pay the bid price is liable for any loss occasioned by the refusal, including interest, costs, and trustee's and reasonable attorneys' fees. The trustee or the attorney for the trustee may thereafter reject any other bid of that person for the property.

(2) The person conducting the sale may, for any cause he considers expedient, postpone the sale. The person conducting the sale shall give notice of each postponement by public declaration, by written notice or oral postponement, at the time and place last appointed for the sale. No other notice of the postponed sale is required, unless the postponement exceeds 45 days. In that event, the sale shall be renoticed in the same manner as the original notice of sale is required to be given.

Amended by Chapter 236, 2001 General Session

57-1-31.5. Reinstatement or payoff statement -- Timeliness of request -- Trustee's duty to provide statement -- Statement to include accounting of costs and fees.

(1) As used in this section:

(a) "Approved delivery method" means delivery by:

(i) certified or registered United States mail with return receipt requested;

or

(ii) a nationally recognized letter or package delivery or courier service operating in the state that provides a service for:

(A) tracking the delivery of an item; or

(B) documenting:

(I) that the item was received by the intended recipient; or

(II) a refusal to accept delivery of the item.

(b) "Compensation" means anything of economic value that is paid, loaned, granted, given, donated, or transferred to a trustee for or in consideration of:

(i) services;

(ii) personal or real property; or

(iii) other thing of value.

(c) "Interested party" means a person with a right under Subsection 57-1-31(1) to reinstate an obligation secured by a trust deed.

(d) "Payoff statement" means a statement under Subsection (2) that an interested party requests in order to obtain the amount required to pay off a loan secured by a trust deed.

(e) "Reinstatement statement" means a statement under Subsection (2) that an interested party requests in order to obtain the amount required under Subsection 57-1-31(1) to reinstate an obligation secured by a trust deed.

(2) (a) (i) An interested party may submit a written request to a trustee for a statement of the amount required to be paid:

(A) to reinstate an obligation secured by a trust deed; or

(B) to pay off a loan secured by a trust deed.

(ii) (A) A request for a reinstatement statement is not timely unless the trustee receives the request at least 10 business days before expiration of the three-month period under Section 57-1-31 to reinstate an obligation.

(B) A request for a payoff statement is not timely unless the trustee receives the request at least 10 business days before the trustee's sale.

(iii) An interested party submitting a reinstatement statement or payoff statement to a trustee shall submit the statement to the trustee:

(A) at the address specified in the trust deed for notices to the trustee; or

(B) at an alternate address approved by the trustee for delivery of mail or notices.

(iv) A trustee is considered to have received a request submitted under Subsection (2)(a)(i) if:

(A) the interested party submitted the request through an approved delivery method; and

(B) documentation provided under the approved delivery method indicates that:

(I) the request was delivered to the trustee; or

(II) delivery of the request was refused.

(b) (i) A trustee who receives a written request under Subsection (2)(a) shall provide the statement to the interested party.

(ii) A trustee is considered to have provided the statement requested under Subsection (2)(a) on the date that the trustee deposits the statement with an approved delivery method:

(A) with all delivery costs prepaid; and

(B) addressed to the interested party at the address provided in the request.

(c) (i) If the trustee provides a requested reinstatement statement later than five business days after the request is received, the time to reinstate under Section 57-1-31 is tolled from the date of the request to the date that the trustee provides the statement.

(ii) If, after scheduling a trustee's sale, the trustee fails to provide a requested payoff statement within five business days after the request is received, the trustee shall:

(A) cancel the trustee's sale; or

(B) postpone the trustee's sale to a date at least 10 business days after the trustee provides the statement.

(3) A trustee shall include with each statement required under Subsection (2)(a):

(a) a detailed listing of any of the following that the trustor would be required to pay to reinstate or payoff the loan:

(i) attorney fees;

(ii) trustee fees; or

(iii) any costs including:

(A) title fees;

(B) publication fees; or

(C) posting fees; and

(b) subject to Subsection (4), a disclosure of:

(i) any relationship that the trustee has with a third party that provides services related to the foreclosure of the loan; and

(ii) whether the relationship described in Subsection (3)(b)(i) is created by:

(A) an ownership interest in the third party; or

(B) contract or other agreement.

(4) Subsection (3)(b) does not require a trustee to provide a trustor:

(a) a copy of any contract or agreement described in Subsection (3)(b);

(b) specific detail as to the nature of the ownership interest described in Subsection (3)(b); or

(c) the amount of compensation the trustee receives related to the foreclosure of the loan under a relationship described in Subsection (3)(b).

Amended by Chapter 24, 2010 General Session

ADDENDUM V

URCP 26

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(a)(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission

to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(b)(3) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon

its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) Trial preparation: Experts.

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under

which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(6) Claims of Privilege or Protection of Trial Preparation Materials.

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b)(6)(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the

court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall

file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

ADDENDUM VI

URCP 56

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 21 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse

party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

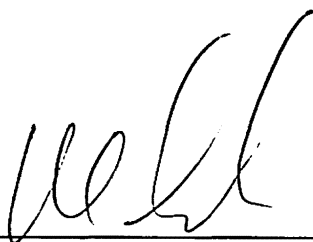
(g) **Affidavits made in bad faith.** If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELANT were hand delivered to the Appellee.

Steven W. Call
Jonathan A. Dibble
P.O. Box 45385
Salt Lake City, UT 84145-0385

DATED this ____ day of September 2015.



Mike L Robertson,
Pro Se

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P.

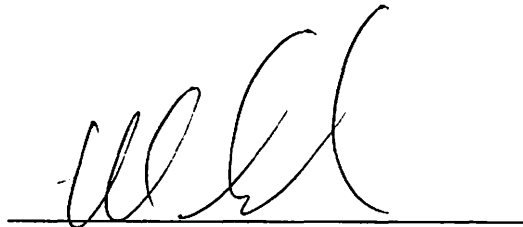
24(f)(1) because this brief contains 13,744 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.

27(b) because this brief has been prepared in a proportionally spaced typeface using

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Mike L Robertson

Pro Se