

2016

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

Utah Court of Appeals

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**Recommended Citation**

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**IN THE UTAH COURT OF APPEALS**

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FAR WEST BANK, a division of  
America West Bank, now Banner  
Bank

Appellee/Plaintiff,  
vs.

MIKE L. ROBERTSON,

Appellant/Defendant

**REPLY BRIEF OF APPELLANT**

**Appellate Case No. 20150513**

**District Ct. No. 110402516**

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**FILED**  
**UTAH APPELLATE COURTS**  
**AUG 01 2016**

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## **ARGUMENT**

### **I. THE 2006 AND 2007 NOTES THAT WERE CONSOLIDATED INTO THE 2009 NOTE AND 2009 LOAN AGREEMENT DID NOT EXIST IN A VACUUM AND WERE ASSOCIATED WITH THE ACH LINE AND WERE NOT INTEGRATED.**

The Bank would have the Court believe that the 2006(R11, 24) and 2007(R28) Notes which were consolidated into the 2009 Note(R42) and Business Loan Agreement(R48) all occurred outside of, and exclusive of, the ACH services provided by the Bank. Indeed, the District Court took this position in its summary judgment ruling in favor of the Bank. This was not the case and shows the existence of a material fact that should have precluded summary judgment.

In July 2006 the Bank and Robertson commenced a business relationship with the opening of the InstaPolyPay checking account to process ACH transactions. One month later the 2006 Revolving Credit Deed of trust was issued in conjunction with the ACH account. All funds from the revolving credit line were accessed by a draft issued through the InstaPolyPay checking account. The same thing occurred with the 2007 Revolving line of Credit. One did not exist without the other. (R281-283) The funds from the loans were used in creating software to set up and run the InstaPolyPay web site and process transactions. Robertson also used the funds to travel to trade shows and conventions to solicit jewelers to sign up for and promote the service. They bore a strong relationship one with another.

The Bank points to the Integration clause in the 2009 Note and Loan Agreement as proof that these were the only documents and they were integrated that reads:

FINAL AGREEMENT. Borrower understands that this Agreement **“and”** the related loan documents are the final expression of the agreement between Lender and Borrower and may not be contradicted by evidence of any alleged oral agreement. (R 393) (emphasis added)

What the Bank leaves out are the definitions given in that Agreement that state:



Agreement. The word "Agreement" means this Business Loan Agreement, as this Business Loan Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to the Business Loan Agreement from time to time. (R392) (emphasis added)

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental arrangements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements, and documents, whether now or hereafter existing, executed in connection with the loan. (R 393) (emphasis added)

This not only contemplates but anticipates other documents or agreements that now exist or which may exist in the future and thus can't serve as the final expression of the agreements made between lender and borrower. That relegates these documents to simply memorandum by which part of the contract may be proved. To be an integration, the writings must be final and complete.

"Section 228, Restatement, Contracts, states:

An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted.

Comment a. of Section 228 explains that integrated contracts must be distinguished from written memoranda by which contracts may be proved. An essential element of an integration is that the parties shall have manifested assent not merely to the provisions of their agreement but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. Whether a document was or was not adopted as an integration may be proved by any relevant evidence." *Bullfrog Marina, Inc. v. Lentz*, 501 P. 2d 266 - Utah: Supreme Court 1972

These documents were not integrated and were not the final expression of the parties. There were continuing negotiations between Robertson and the Bank after these documents were prepared.(Addendum I) The final conclusion did not occur until the written agreement, drafted by the Bank, which came after Robertson requested the final terms of the negotiations be reduced to written form. Dan Brian provided that written response with the email containing the parties final expression. (Addendum II) This writing was part of the Related Documents executed in connection with the loan.

“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<sup>1</sup>

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<sup>1</sup> In Bullfrog the parties entered into two separate and distinct contracts at different times, the first, an employment contract, and the other a lease agreement on three houseboats. After the employment contract was terminated, Plaintiff urged that the lease was a separate and distinct agreement and that thereunder it was entitled to possession of the houseboats for two years and that defendant was liable in damages for the conversion of plaintiff's possessory interest. The issue of this action was whether the lease represented a final and complete expression of the agreement of the parties or was merely a written memorandum by which part of the contract could be proved. The court concluded that the lease and employment contract bore a relationship to one another and should be considered as one agreement.

Robertson stressed that the course of dealing and the final expression of the parties and applying the law tied the ACH line and business loan agreement together and that the respective rights and interest of the parties were to be construed together. (R519) If you take full consideration of the entire transaction and the Agreement and Related Documents definitions, there can be no other conclusion than that the documents the parties entered into were not an integration, but simply written memoranda by which part of the contract could be proved.

Never the less, 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. The Bank insists it was and requested application of the parol evidence rule. (R335-338) A finding of fact should not have been decided in summary judgment and thus should be reversed for the fact finder to make a determination of fact.

## **II. THE ACH LINE WAS PLEDGED AS CONSIDERATION BY THE BANK FOR ROBERTSON'S ACCEPTANCE OF AND ENTERING INTO THE 2009 CONSOLIDATION AGREEMENT.**

In July of 2006, Robertson and the Bank entered into an agreement to provide Robertson's new company, InstaPolyPay with an ACH line.<sup>2</sup> In relation to

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<sup>2</sup> The ACH line is the ability to process an electronic check instead of a paper check. It is not an unsecured line of credit. The terms of the line were that

that line the Bank and Robertson entered into two different Revolving Lines of Credit in 2006 and 2007 to facilitate growth of that business. Access to funds in these lines of credit was obtained by checks or drafts drawn upon through the InstaPolyPay ACH account. On or about August 1, 2008 the parties fell out of agreement when the Bank informed Robertson that they would no longer accept monthly payments on the Revolving Credit lines and requested payment in full. On October 14, 2008, while the parties were in disagreement, the Bank required that Robertson enter into a written agreement to continue ACH services. That agreement was made in connection with the reformation discussion of the existing loans. That agreement did allow either party the right to terminate the ACH services on a 10 day written notice. On April, 20, 2009 the Bank terminated those services by written notice as agreed. (R1361 P16-17) On or about April 21, 2009, the Bank and Robertson had a meeting to discuss their differences and to work out a settlement. They came to an Oral agreement and the Bank was to then draft an agreement along those lines. On April 23, the Bank presented Robertson with a

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Robertson could deposit up to \$75,000 per day of these electronic checks from dealers into his account if he so had them. These would be credited 2 days after they were processed. If there was a problem with a transaction, Robertson was notified on that second day instead of the amount being deposited into his account. The line also allowed Robertson to send out up to \$75,000 each day of electronic checks into other dealers accounts. But before he could do so, he had to already have in excess of the funds required to be sent in his account. This also had to be in his account before 8:00am the day he was to send them. This is all the ACH line entailed. The Bank agreed simply to process these electronic checks for Robertson.

copy of the consolidation agreement for the 2006 and 2007 Revolving Credit Lines. Robertson responded back that they were not the same as the terms discussed previously. They also did not include the ACH services. After more negotiation, an understanding between the parties was reached on April 30, 2009. These included that if Robertson would accept the terms of the new loan agreement drafted April 23, 2009, they would reinstate the ACH Line. (Addendum II)

Robertson required the ACH line to enter into that agreement because of substantial changes the Bank had asked for from the previous agreements they had made. The monthly payments on the 2006 and 2007 Revolving lines were approximately \$2655 a month total and had been paid for exclusively by income from the ACH line previously. The new agreement requested Robertson to pay an upfront payment of \$100,000 that would need to come from the assets of other business interests, and the new loan payment would be \$4842 a month and income from two different companies would be required to make this payment. All the income from the ACH line plus an addition of approximately \$2000 from other business interest would be required. It was imperative that the income from the ACH line be available to make those payments as it was not possible for Robertson to do so without them.

**A. The E-mail from Dan Brian was Included in the Documents Executed in Connection with the Loan as Anticipated by the 2009 Note and Business Loan Agreement.**

Robertson requested the Bank put in writing that final agreement before he would enter into the 2009 consolidation agreement. The Bank responded to that request with a simple document that they drafted that read: “Mike, upon completion of the new loan documentation, we will reinstate your ACH line. Thanks, Dan Brian.” (R297)(Addendum II) The Bank now contends this was not a binding agreement. Robertson disagrees.

The formation of a contract is spelled out in Cea v. Hoffman, 2012 UT App 101, ¶ 24, 276 P.3d 1178.<sup>3</sup> 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.

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<sup>3</sup> The question in *Cea v. Hoffman* was if a letter constituted a valid offer and contract. The court concluded that it was.

“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)

All of the terms of a valid offer are included in the Dan Brian Email. The email promises the restoration of the ACH line to Robertson if he will enter into the new loan agreements prepared on April 23<sup>rd</sup>. It is a written document, signed by an officer of the Bank, and presented to Robertson at the end of the formal negotiations the parties had been participating in and after Robertson requested the offer be put in writing. The Bank invited the offer. Robertson accepted the offer and entered into its terms. A consideration was paid by Robertson. The Bank’s pledged consideration was to reinstate the ACH line.

The formation of a contract "requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."  
*Restatement (Second) of Contracts*, § 17(1) (1981)

While there may be a question as to if the term “reinstate” was a return to the ACH line as it existed before the parties were in disagreement or to the latter written document prepared and entered while they were in disagreement, it really does not matter. Since the Bank’s promised covenant was to reinstate the ACH line as their consideration, that consideration and covenant had to continue until the end



of the parties agreement to be valid consideration for Robertson's covenant to enter into the 2009 consolidation agreement and perform the conditions contained therein.

The Bank now contends that Robertson argues for the first time that the ACH line had to have the same terms as the 2009 note. (Appellee brief at P21) That is not the case. Robertson argued that point in the Motion for Summary Judgment in at least five places, (R1361, P28, 29, 31, 33, and 49) Quoting from page 31 we read:

“But what Mr. Robertson was almost certain of, since the bank put the note out five years, the ACH would go concurrently for five years, that's what - - that's what he surely understood or was- - was almost certain would happen or else he wouldn't have come up with the hundred thousand and jumped through all the hoops and said, but the ACH needs to be in writing and reinstated.” (R1361, P31)

Robertson also argued this in the Motion for a New Trial under arguments VII, VIII and IX. This issue was well preserved before the appeal and timely brought before the court for your consideration.

These documents were also prepared in connection with the loan documents and falls under the definition of “Related Documents” as contained in the 2009 Loan Agreement that reads:

Related Documents. The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, environmental arrangements,



guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements, and documents, whether now or hereafter existing, executed in connection with the loan. (R 393) (emphasis added)

## **B. The District Court Erred in Interpreting the Loan Documents.**

The Bank represented to the district court that the 2006, 2007 and 2009 loan documents were integrated. The bank also represented to the district court that the 2008 ACH agreement was the beginning of the ACH line with Robertson and had no relationship with the loan agreements. (R1361, P45-46-47) Robertson contended that the documents were not integrated and were simply memoranda with which the contact could be proved. (R1361, P 37) Robertson also represented that the ACH line had existed from the beginning of the relationship with the Bank and should be read together as determining the respective rights and interests of the parties. The district court erred when it made its ruling as stated:

“Even assuming, as you stated, I’m going to assume that that’s true what you’ve told me, is - - that there was ACH allowed prior to there even being a written agreement, that doesn’t change the fact that ultimately, there wasn’t a written agreement that has an unambiguous integration clause.

Further, even if I were to consider parol evidence of the transaction 2009, there’s nothing anywhere that I’ve reviewed that indicates any negotiation statement otherwise by anyone that the ten-day right to terminate provision was going to be taken out. And I believe that’s substantiated by the language “reinstate,” you’re going to “reinstate” what we had before, what they had

before was a ten day right of termination, what they have afterwards still included a ten-day right of termination and there's no agreement that the Court can find of - - of something simply in perpetuity. That could have been written into the agreement, could have been negotiated, but it wasn't.

Had the bank shut off the ACH with 24 hours of 48 hours notice, I think you would have a pretty viable claim. Given the fact that they far in excess of ten days and Mr. Robertson's own affidavit established that during that time he went to other lending institutions, seeing if he could find a substitute, leads the Court to the conclusion that number one, summary judgment must be granted on the breach of contract claim.

Likewise, because what you're really claiming with the breach of the covenant of good faith and fair dealing is something inconsistent with the express language of the contract, I can't sustain that. Summary judgment's granted there." (R1361, P49-50)

As argued in argument I. above, the documents of the parties were not integrated, but were simply memorandum upon which the contract could be proved. The district court erred in finding there was an "unambiguous integration clause" contained in the documents. There is nothing resembling an integration clause in the 2008 ACH agreement. The Bank points to the 2009 Note provision that states, NOTICE OF FINAL AGREEMENT. THE WRITTEN AGREEMENT AND CONTAINED IN THE LOAN DOCUMENTS IS A FINAL EXPRESSION OF THE AGREEMENT BETWEEN BORROWER AND LENDER AND MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY ALLEDGED ORAL AGREEMENT. (Appellee brief at P22) That final expression contains definitions that allow for changes by the parties to the agreement from time to time, so it does

not represent an integration, but it prevents the use of oral evidence to contradict the written evidence. I'm not sure where the Bank got the writing they present as the "Final Agreement" for the 2009 Loan Agreement in the Appellee brief at P22. I can't find those words anywhere. The correct language contained in the 2009 Loan Agreement reads: "FINAL AGREEMENT. Borrower understands that this Agreement and the related loan documents are the final expression of the agreement between Lender and Borrower and may not be contradicted by evidence of any alleged oral agreement". As previously pointed out, the agreement has provisions for modifications or amendments from time to time and the related documents definition has provisions for documents "whether now or hereafter existing" and thus can't be called an integration, but can prevent the use of alleged oral agreements. Thus, the district court erred in its interpretation of the documents as there is no unambiguous integration clause contained in any of the documents which it used to make its ruling. The court should have examined the final documents presented on April 30, 2009 for what they were, an offer and acceptance which was to be added to the other documents as the final negotiation as provided in the written terms. These are at least contested material facts.

The district court also determined in its ruling that what was meant by the final document produced by the Bank after the negotiation 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 the Bank, 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 were the new loan documents which do not reference the ACH Agreement and were the addenda to this final

agreement the parties entered into that proved the contract. The email offer pledging the ACH line simply states the Bank will reinstate the line.

These were questions of material facts that should have prevented summary judgment and the district court erred when it did so.

The Bank also argues *arguendo* that even if the separate document were to be read and construed together so far as determining the respective rights and interests of the parties, that the separate documents would not change the clear and unambiguous terms of those documents. Thus the secured 2009 Note would have a five year term and the ACH line would be subject to termination upon 10 days notice by either party. Robertson disagrees. Even assuming *arguendo* that the final email did not construe a contract of the parties, the other documents would also contain the covenant of Good Faith and Fair Dealing in their unambiguous terms. The covenant requires that neither party should make it difficult or impossible for the other party to perform. The cancelation of the ACH line and thus the cancelation of the income from that line made it difficult or impossible for further performance by Robertson. The Bank arguing that they were simply applying the terms of the agreement, Robertson arguing that a party can still be guilty of breach of the covenant when applying the express terms of that agreement if not done so reasonably. (R1361, P33-36)

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.* 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.*

[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." *Id.* [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.

**C. The Written ACH Agreement Provided that Both Parties Could Terminate the Agreement on Ten Days' Written Notice. The 2009 Negotiations Modified that Term.**

In 2008, while the parties were in disagreement, the Bank presented to Robertson a written ACH Agreement that incorporated all the terms the parties had worked under from 2006 on with the exception that there was also added ¶14 that provided that either party could cancel that agreement upon 10 days written notice. (R458)

In 2009, the parties were in negotiations to work out their disagreements. As part of those negotiations, the Bank drafted terms of a new note and agreement that removed Robertson's right to cancel that agreement under the negative covenants that read:

Continuity of Operations. "(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)

Robertson would thus be in default if he ceased operations of the ACH line.

Robertson initially did not agree with these terms and others in the agreement.



Negotiation continued to take place until the Bank provided Robertson with a written promise that they would reinstate the ACH line as consideration for Robertson accepting the terms of the new note and agreement. This assured Robertson that the Bank also could not cancel their consideration upon 10 days notice and thus also modified the terms of ¶14. Robertson's reliance on Aquagen International v. Cabrae Trust, 972 P.2d 411 (Utah 1998) and Pierce v. Pierce, 2000 UT, ¶19, 994 P.2d 1930 are not misplaced and apply to the contract construction of the parties agreements.

### **III. ROBERTSON WAS NOT IN DEFAULT UNDER THE TRUST DEEDS AND THE FORECLOSURE WAS NOT CONDUCTED PURSUANT TO UTAH LAW.**

#### **A. The 2009 Note was not in Default.**

Robertson submitted evidence by affidavit that he had complied with all the terms of the 2009 agreement by making payments as required each and every month, on time, and was never late up to and including the September 5, 2010 payment. The Bank stipulated that this was correct. (R1361 P12) Robertson then admitted that after the Bank cancelled the ACH line that he did not make any further payments. This, in and of itself, does not constitute default.

"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)

Before the Bank could enforce the contract they had to prove their own performance. They readily admit they cancelled the ACH line which they had pledged as consideration for Robertson entering into the loan agreement. They also made it difficult or impossible and impeded Robertson's ability to perform the contract in violation of the covenant of good faith and fair dealing inherent in every contract. They can't prove their own performance. This relieves Robertson's performance as the nonbreaching party.

**B. The Notices of Default and Notice of Sale were Defective and a Single Legal Description of All the Properties as One was not Proper Notice.**

The property contained four distinct parcels of property which could have been sold separately which included one in the city, and three in the county.(R1361 P37) The Utah Supreme Court has said that to comply with Utah Code Ann 57-1-25,(Addendum III) when the property contains two or more parcels, in compliance with public notice, each parcel must be particularly described. (Blodgett v. Martsch, 590 P. 2d 298 - Utah: Supreme Court 1978) The notices posted by the Bank did not *particularly describe the property to be sold* as required by 57-1-25. The easiest way to describe those four separate and distinct properties would have been by the tax parcel Id number. The Bank did place a single tax parcel Id number

in their description, leaving off the other three, thus causing confusion and a chilling effect on the sale and failed to comply with the statute. The Bank could also have used other methods to describe the individual parcels if they so chose, but they did not. The court erred when it ruled;

“You’re right, Mr. Anthony, that the Court might say and the Court does say that the legal description is the legal description for the purpose of the sale. That’s consistent with the documents and most importantly, it’s consistent with Utah Law. Tax parcel numbers are not determinative.”(R1361 P49)

**C. Robertson Sent a Timely and Lawful Request for a Payoff Statement.**

Robertson and the Bank both agree that a lawful request for a payoff statement had to be received by the Trustee on or before Wednesday May 18, 2011. Robertson presented evidence that the payoff statement was mailed by priority mail to the trustee on May 16, 2011 and that a notice was placed in the P.O. Box ascribed to the Trustee on May 17, 2011 and that it was later picked up and signed for on May 18, 2011 and thus was received by the Trustee in a timely manner. (R1361, P32)(R253) The Trustee testified in his Affidavit that he did not receive it. Someone with access to the Trustee’s certified P.O. Box did in fact receive it and signed for it. Even if the Trustee was unaware, Notice of Service was imputed to him.

57-1-31.5(2)(a)(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;

The Trustee was also given notice at the time of the sale that a request had been sent and that he had not responded to that request. (R285)

The Bank now argues that the delivery by the United States Post Office by priority mail was not an “approved delivery method”. While the statute allows two delivery methods of certified or registered mail that are only available by the Post Office, it also allows for “or, a nationally recognized letter or package delivery or courier service operating in the state that provides a service for tracking the delivery of an item; or documenting that the item was received by the intended recipient”. The United States Post Office surely qualifies as a nationally recognized letter or package delivery or courier service operating in the state. Priority mail also allows for tracking the delivery of an item and is similar to other nationally recognized letter or package delivery services. The district court never addressed that issue raised or even made any mention of this controversy in its ruling, even though, by statute, the trustee’s only option was to postpone or cancel the sale.

**D. The Trustee Failed to Comply with Section 57-1-27 in Conducting the the Trust Deed Sales.**

Robertson argued that the trust property contained four distinct parcels of property as contained in the trust deed. (R14, R102) On the date of the sale, Robertson questioned the Trustee as to which parcel was being sold first and was assured it was the Parcel with Tax Id #23-051-0004.(R286) When that sale was over, Robertson discovered the trustee had sold all four parcels together, contrary to section 57-1-27(Addendum III) which required that the trustor; “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.” Utah case law also points out that the trustee has a fiduciary duty to the trustor to request which order the parcels are to be sold.

“The duty of the trustee under a trust deed is greater than the mere obligation to sell the pledged property in accordance with the default provision of the trust deed instrument, it is a duty to treat the trustor fairly and in accordance with a high punctilio of honor. Blodgett v. Martsch, 590 P. 2d 298 - Utah: Supreme Court 1978

a trustee named in a deed of trust to secure a loan sustains a fiduciary relation to the debtor as well as the creditor, *Id.*

The breach of duty by the dominant party in a confidential relationship may be regarded as constructive fraud. It is unnecessary for the plaintiff to show an intent to defraud; constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from breach of the obligations implicit in the relationship. *Id.*

As to Respondent Ashworth, his duty to the Blodgetts after he became trustee was to act with reasonable diligence and good faith on their behalf consistent with his primary obligation to assure the payment of the secured

debt. He had certain clear statutory duties with regard to (1) advertisement of the sale (Sec. 57-1-25) and (2) deference to the Blodgetts' preference as to the joint or sequential sale of the tracts (Sec. 57-1-27). It can hardly be said that Ashworth satisfied those obligations as a matter of law. The only evidence in the record is that he failed to post sale notices where required, that the posted notices misdescribed the tracts, and that he did not inquire as to the Blodgetts' preference about joint or sequential sale, let alone defer to that preference. *Id.*

As to the case at bar, the trustee failed in his statutory duties to identify in the advertisement of sale all four of the individual parcels, failed to post notice on all four parcels, failed to provide a payoff statement, and failed to follow the wishes of Robertson as to which parcels to sell when he indicated he was only selling the one in the city.

#### **IV. THE COURT ERRED IN DENYING ROBERTSON'S MOTION FOR SUMMARY JUDGMENT.**

##### **A. The District Court Failed to Consider the Final Agreement of the Parties as a Contract that Was Breached.**

The Bank asserts that the Dan Brian Email was merely a reminder that Robertson would not have his property foreclosed under the Loan Agreement if he brought his default current. Robertson disagrees. The facts, as presented in the email exchange, show a completely different understanding of the parties.

(Addendum I) The fact that Robertson asked the Bank to put the terms of their agreement in writing shows intent. Just because the Bank chose a very simple writing to show their final offer does not diminish the fact that they made an offer.

One that Robertson accepted. It was a written offer. It contains all the terms of the agreement. Just because the Bank failed to expand on it does not make it any less valid to Robertson or the Bank. The fact that the email was also CC'd to two other Bank officers shows that it was far more than simply a reminder. Robertson did not draft the agreement, but he did rely on it. The Bank made a representation that they would reinstate the ACH line. (Addendum II) While they did for a time, they cancelled that later, making their representation false. Dan Brian made the representation recklessly without knowledge if the Bank would continue the ACH line or not, for the purpose to get Robertson to enter into the new loan agreement. Robertson, relying upon the promise, so did act with its assurance, not knowing the promise was false, and was induced to act to his detriment, suffered injury and damage because of it.

**B. The District Court Erred in Dismissing Robertson's Claim Based Upon the Implied Covenant of Good Faith and Fair Dealing.**

The Bank cites to PDQ Lube Center, Inc v. Huber, 949 P.2d 792 that there is no violation when a party is simply exercising its contractual right. Robertson disagrees. They fail to acknowledge the clause just in front of that one that reads; ("Our courts have determined that a party must exercise express rights awarded under a contract reasonably and in good faith."). *Id.* Furthermore, in that ruling it also points out that; "To comply with his obligation to perform a contract in good

faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party. The purpose, intentions, and expectations of the parties should be determined by considering the contract language and the course of dealings between and conduct of the parties.”*Id.* Citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199-200 (Utah 1991) Robertson’s expectation that he would have the income from the ACH line to make the payments on the loans used in building the business was always present from the beginning of the relationship. The Banks expectation that Robertson would make the loan payments was also expected from the income produced by the ACH line. Even assuming *arguendo* that the Bank had the right to cancel, it was not reasonable that the Bank could expect to exercise that contractual right and eliminated that income and still expect the other party to perform without violating the Covenant of Good Faith and Fair Dealing.

#### **V. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING ROBERTSON’S IMPEACHMENT EVIDENCE.**

The Bank seems to believe that Rule 26(a) of the Utah Rules of Civil Procedure that now exist apply to this action instead of those that existed at the time of the filing this case (Addendum IV), and thus their rebuttal arguments are moot.

They have not responded to Robertson’s contentions that it was error on the part of the court to exclude evidence Robertson personally attempted to introduce as

impeachment evidence which was not allowed and thus must concur with his arguments.

The Bank now argues a single point that the witness the court denied was proper. Robertson disagrees.

The witness Robertson had tried to introduce but was denied was not there to argue a value, but was there to present impeachment evidence that the Bank's expert witness had not complied with proper appraisal procedures and had failed to use comparable properties that were fresh, close to the subject, and similar in nature that existed at the time. She also would have testified that the equations used to alter the values on the inferior and stale properties that the expert had used were not in keeping with the appraisal standards of the industry and that the values were computed wrong. In preparing to do so, she had compiled what an accurate appraisal should have been with the properties available to compare, but that was not chiefly to establish a value. She would call into question the veracity and credibility of the witness. The rules that existed at the time should have allowed her testimony for impeachment purposes without prior disclosure.

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.

### CONCLUSION

Robertson now pleads with this Court to correct the many errors made by the district court that justice might be done. The Court should reverse the grant of summary judgment made for the Bank and grant summary judgment for Robertson on both his claim for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing. The Court should also set aside the foreclosure sale conducted by the Bank. Or in the alternative, the Court should allow Robertson's request for a new trial and allow him the opportunity to present evidence and witnesses for the impeachment of the Bank's expert witness as to the value of the property on the date of the sale.

**Dated** this 1<sup>st</sup> day of August, 2016

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

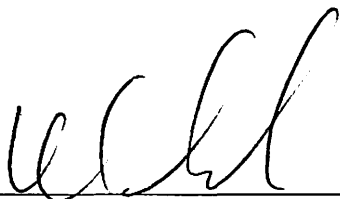
Mike L. Robertson

Pro Se

## CERTIFICATE OF SERVICE

I herby certify that on the 1<sup>st</sup> day of August, 2016, I served a copy of Appellant's Reply Brief via US Priority mail, postage pre-paid and an electronic mail copy to the following:

Steven W Call  
Jonathan A. Dibble  
Ray Quinney & Nebeker P.C.  
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Salt Lake City, UT 84145-0385  
Email: scall@rqn.com  
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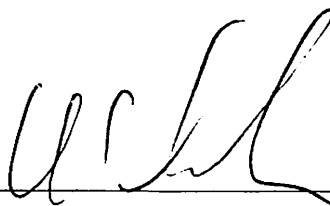
Mike L Robertson

## **Certificate of Compliance with Rule 24(f)(1)**

Certificate of Compliance with the Type-Volume Limitation, Typeface Requirement, and Type Style Requirements.

1. This Brief complies with the type-volume limitation of Utah R. App. P.24 (f)(1) because the brief contains 6957 number of words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This brief complies with the typeface requirement of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman font size 14.

Dated this 1<sup>st</sup> day of August, 2016

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

Mike L. Robertson  
Pro Se

**ADDENDUM I**  
**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
<b>\$100,461.58</b>	<b>Total</b>

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 II**

**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

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**ADDENDUM III**

**UCA 51-1-25**

**UCA 51-1-27**

**UCA 51-1-31.5**

**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

**57-1-27. 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 renounced 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 IV**

#### **URCP 26**

#### **THAT EXISTED AT TIME OF FILING**

## **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.