

2003

Kalynn Ninnow v. Grand Staircase Land Company, a utah corporation, Willam Lowe and Augusta Rose : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KALYNN NINOW,

BRIEF OF APPELLANTS

Petitioner and appellee,
vs.

GRAND STAIRCASE LAND
COMPANY, a Utah corporation,
WILLIAM LOWE, AUGUSTA
ROSE, and ROBERT MORTENSEN,

Respondents and appellants,
vs.

Appeal No. 20030169-CA

RYAN PAHL, KALYNN NINOW,
RICHARD NINOW, and DOES I -V,

Third-party respondents.

Appeal from Third District Court, Salt Lake County, Home.

E. Medley.

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Clerk of the Court

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Jurisdiction.....	1
Issues Presented for Review.....	1
Rules Whose Determination is Determinative.....	1
Statement of the Case.....	2
Facts - The Corporation.....	3
Facts - The 3000 Shares Held by William Lowe.....	5
Facts - This Proceeding.....	7
Summary of Arguments.....	10
Argument- 1. <i>The Summary Judgment was final and appealable</i>	11
2. <i>An expired TRO cannot be violated</i>	18
3. <i>The record does not support the Summary Judgment</i>	21
4. <i>Inadmissible evidence was improperly considered</i>	35
5. <i>Faced with appellee's failure to meet her burden, the trial court entered a result-oriented Summary Judgment based on little more than raw power of incumbency upon the trial bench</i>	39
Conclusion.....	50
Addendum and Mailing Certificate.....	A

TABLE OF AUTHORITIES

CASES CITED

<u>Alta v. Ben Hame Corp.</u> , 836 P.2d 797 (Utah Ct. App. 1992).....	1, 19
<u>Aquagen Int'l, Inc. v. Calrae Trust</u> , 972 P.2d 411 (Utah 1998).....	28
<u>Brookside Mobile Home Park v. Peebles</u> , 2002 UT 48; 48 P.3d 968.....	19
<u>Dick Simon Trucking, Inc., v. State Tax Commission</u> , 2004 UT 11.....	1, 28, 33
<u>Heritage Bank & Trust v. Landon</u> , 770 P.2d 1009 (Utah Ct. App. 1989).....	15
<u>IKON Office Solutions, Inc., v. Crook</u> , 2000 UT App 217; 6 P.3d 1143.....	19, 21
<u>Kasco Servs. Corp. v. Benson</u> , 831 P.2d 86 (Utah 1992).....	29
<u>System Concepts, Inc. v. Dixon</u> , 669 P.2d 421 (Utah 1983).....	29

RULES OF EVIDENCE

URE 1002.....	36
URE 1004.....	36, 37
URE 1008.....	1, 10, 37, 38, 48

RULES OF CIVIL PROCEDURE

URCP 7.....	15
URCP 12.....	14
URCP 56.....	14, 39
URCP 60(b).....	16
URCP 65A(a)(2).....	1, 27, 32, 38, 45, 48
URCP 65A(b)(2).....	20, 21
FRCP 60(b).....	16

STATUTES

UCA Sec. 16-10a-724(6).....	7, 21, 49
UCA Sec. 75-3-106.....	16
UCA Sec. 76-9-406.....	15
UCA Sec. 78-2a-3(2)(j).....	1
UCA Sec. 78-32-11.....	19

OTHER AUTHORITIES

<i>Moore's Federal Practice 3rd</i> , Sec. 60.23.....	16
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STATEMENT OF JURISDICTION

Transfer from the Utah Supreme Court under UCA Sec. 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

1. Was it error to conclude a TRO had not dissolved at the time stated?

Standard of Review: Determining the availability of injunctive relief such as a TRO presents a question of law as to which no deference is given to trial court. Alta v. Ben Hame Corp., 836 P.2d 797, 804 (Utah Ct. App. 1992).

Where Preserved: Memorandum, R. 568.

2. Was it error to adjudge that Gary Pahl owned 6000 shares of stock in Pahl's Salt Palace Loan Office, Inc., at his death, instead of 3000 shares?

Standard of Review: "In reviewing a trial court's grant of summary judgment, we give no deference to its conclusions of law." "When we review a grant of summary judgment, we review the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Dick Simon Trucking, Inc., v. State Tax Commission, 2004 UT 11.

Where Preserved: Memorandum, R. 806; Motion to Strike, R. 813.

RULES WHOSE INTERPRETATION IS DETERMINATIVE

URCP 65A(a)(2) [saving certain "rights . . . to trial by jury"] [Addendum]

URE 1008 [document dispute "functions of court and jury"] [Addendum]

STATEMENT OF THE CASE

This is an appeal of an interlocutory order of contempt [R. 945] and of the final order of summary judgment [R. 1114-1116] in a probate proceeding.

In the order of contempt [R. 945], Judge Tyrone Medley concluded that William Lowe had violated a TRO by transferring \$7500 in corporate funds [R. 1114-1116], even though Mr. Lowe had pursued the strategy of waiting until the TRO had dissolved before taking any action to transfer those funds. [Affidavit of KaLynn Ninow, R. 523, Par. 3-4] And in the summary judgment [R. 1114-1116], Judge Medley ruled that all 6000 shares of a corporation were owned by Gary Pahl when he died on June 25, 2000, even though 3000 shares were transferred from Frank Pahl to Mr. Lowe on May 6, 1998, [R. 271] he held the 3000 shares until a transfer to Robert Mortensen and Augusta Rose on September 2, 2000, [R. 425] and facts and reasonable inferences related to Mr. Lowe's claim to the 3000 shares must all be viewed in the light most favorable to Mr. Lowe. The parties to this appeal are the appellee KaLynn Ninow, who is the divorced ex-wife of the decedent Gary Pahl who sought and accepted appointment as personal representative and submitted herself to the jurisdiction of the court in any proceeding related to the estate [R. 20] and who then later commenced this probate proceeding for

a formal order that all 6000 shares were in the estate. [R. 111-114] Appellants Augusta Rose and William Lowe were the only two surviving directors when Gary Pahl died on June 25, 2000. [R. 206] Appellant Grand Staircase Land Company, in an arms-length transaction for cash that factored-in a substantial [but mutually agreeable] litigation discount factor based on the fact that KaLynn was in the process of challenging the pre-death appointment of William Lowe and Augusta Rose as corporate directors, duly acquired the 3000 shares from Augusta Rose and Robert Mortensen. [R. 807 and 817]

FACTS - THE CORPORATION

1. Pahl's Salt Palace Loan Office, Inc., ("the corporation") [which is not a party to this proceeding], is a Utah corporation in the business of making loans on personal property and selling same after default. [R. 361]

2. Pahl's Salt Palace Loan Office, Inc., is also the sole surviving partner in a partnership that owns the land and buildings at 1588 and 1594 South State Street in Salt Lake City where the pawn business is conducted. [R. 387, Par. 54; R. 388, Par. 56; R. 390, Par 63-64; R. 392-393, Par. 69]

3. Pahl's Salt Palace Loan Office, Inc., has sole authority to manage that partnership [which is not a party to this proceeding], because it is the sole-surviving partner that has continued the partnership's business. The

estates of deceased partners have money claims, but no management rights.

[R. 387, Par. 54; R. 388, Par. 56; R. 390, Par 63-64; R. 392-393, Par. 69]

4. On January 19, 1999, Gary Pahl, who held 3000 shares, and William Lowe, who held the other 3000 shares, elected the following-three member Board of Directors of Pahl's Salt Palace Loan Office, Inc.: Gary Pahl [who was the divorced ex-husband of appellee KaLynn Ninow], William Lowe [a Pahl family member by marriage], and Augusta Rose [the close intimate and personal friend of Gary Pahl]. [R. 206] After Gary Pahl's death on June 25, 2000, KaLynn Ninow secured appointment as the personal representative in 2000 and initiated this proceeding [R. 111-114] in May of 2002, challenging the January 19, 1999, election of William Lowe and Augusta Rose to the Board of Directors [even though it was duly reflected in the filings by Gary Pahl with the Utah Division of Corporations]. [R. 206] She claims that, as a shareholder of only 3000 shares (50%), Gary Pahl could not unilaterally elect new directors [for want of a quorum] and that Frank Pahl [and not William Lowe] had the right to vote the other 3000 shares [even though Frank Pahl had transferred the 3000 shares to William Lowe on May 6, 1998, and Mr. Lowe held those certificates in 1999]. [R. 271] As her controlling contention, Ms. Ninow contended: "Simply stated, the appointment of Lowe and Rose

violated the bylaws of the corporation and were not authorized by the existing shareholders” and that “(i)f they were never legitimately directors of the corporation, then they had no authority to take the actions outlined in the minutes of their meetings . . .” and that “their decision to appoint Gary’s friend Robert Mortensen as a director following Gary’s death is also unauthorized and should be set aside.” [R. 484] In response, appellants contended that because Frank Pahl had transferred 3000 shares to William Lowe on May 6, 1998, [R. 271] and Mr. Lowe held 3000 shares on January 19, 1999, he and Gary Pahl could lawfully elect new directors, since they could convene a shareholder quorum, and that the 3000 shares held by Mr. Lowe were still held by Mr. Lowe when Gary Pahl died on June 25, 2000, with the other 3000 shares in Gary Pahl’s estate. [R. 417, 600-601, 718-725]

FACTS - THE 3000 SHARES HELD BY WILLIAM LOWE

5. The 3000 shares held by William Lowe when Gary Pahl died on June 25, 2000, were originally owned by Frank Pahl, one of the original founders who is currently a board member. [R. 271; Appellants’ Brief at 23]

6. On May 6, 1998, Frank Pahl transferred the certificates for the 3000 shares to William Lowe [R. 271], who held them until after Gary Pahl’s death and whose duties regarding the shares that he held underwent changes over

time as a result of various agreements, events, corporate actions, and share transfers. William Lowe continuously held the 3000 shares from the time they were transferred to him by Frank Pahl on May 6, 1998, [R. 271] until the time Mr. Lowe transferred them to Augusta Rose and Robert Mortensen on September 2, 2000, with complete and formal board approval. [R. 425]

7. The following agreements and transfers defined William Lowe's evolving duties prior to Gary Pahl's death regarding the 3000 shares he held: On May 6, 1998, Gary Pahl agreed to make payments to Frank Pahl for the shares that had been transferred to William Lowe and agreed that once this agreement to pay for the shares had been successfully completed, the shares held by William Lowe would belong to Gary Pahl. [R. 271] On December 28, 1998, Gary Pahl and William Lowe executed a superseding agreement that, "upon successful completion" of the May 6, 1998, agreement, the 3000 shares being held by William Lowe would "belong to the treasury of the Corporation, leaving a balance of 3,000 common shares outstanding." [R. 421] Once the May 6, 1998, agreement [R. 271] was successfully completed by payment in-full to Frank Pahl before Gary Pahl died, [R. 264] Gary Pahl transferred all of his rights and interest in the 3000 shares held by William Lowe into the corporation's treasury, doing all things necessary to effect and

document that transfer in corporate records maintained at 1588 and 1594 South State Street, and updated the corporation's shareholders list to reflect this transfer of 3000 the shares, facts known to William Lowe [R. 718] and Augusta Rose [R. 722], but of which Frank Pahl had no knowledge. [R. 637]

FACTS - THIS PROCEEDING

8. On March 18, 2002, KaLynn Ninow made a request to inspect the shareholder list of the corporation. [R. 343] A copy of that list was promptly provided to her on March 19, 2002. [R. 343] It showed she owned 3000 shares as personal representative [the 3000 shares listed for Gary Pahl's heir, subject to her probate claims and administration]. [R. 359] The list also showed the 1500 shares then owned by Robert Mortensen and the 1500 shares then owned by Augusta Rose. [R. 359] KaLynn Ninow decided the list was wrong and, on May 15, 2002, attempted to unilaterally vote-in new directors by claiming to be able to do so as the shareholder of all 6000 shares. [R. 210-211] The corporation duly rejected this vote pursuant to its express authority to do so under UCA Sec. 16-10a-724(6), because, *inter alia*, (1) it was contrary to the corporation's official shareholder list; and, (2) because, with only her 3000 shares, KaLynn Ninow could not unilaterally convene any quorum of shareholders or unilaterally conduct any shareholder business. See

affidavits of William Lowe and Augusta Rose at R. 718-725. No court of competent jurisdiction has ever ruled otherwise in a case or proceeding to which Pahl's Salt Palace Loan Office, Inc., was a party. [R. 718 - 725]

9. On or about May 20 or 21, 2002, KaLynn Ninow commenced this proceeding by filing an *ex parte* petition for a temporary restraining order to temporarily restrain William Lowe, Augusta Rose, and Robert Mortensen from, *inter alia*, accessing corporate records, papers, and documents. [The uncertainty about the date arises because the case file shows that the *ex parte* petition for a temporary restraining order was filed on May 21, 2002, but no TRO with a date stamp appears in the file. A copy of an alleged TRO does appear later in the record [R. 515-517] as an addendum to KaLynn Ninow's affidavit, but it does not contain a date stamp and was purportedly signed by Judge Sandra Peuler on May 20, 2002. [R. 517] Inexplicably, Judge Peuler did not restrain all sides from access to the corporate records, papers, and documents until a hearing could be held in which all sides participated. [R. 515-517] Instead, she entered an *ex parte* TRO that restrained only the members of the Board of Directors from accessing the pawnshop and the records, papers, and documents stored there, while leaving KaLynn Ninow and her confederates with free and unsupervised access to the pawnshop and

the records, papers, and documents stored there, [R. 515-517] which they took advantage of by entering the pawnshop and accessing the records, papers, and documents without court or Board of Directors supervision.

[“And the state of the pawn shop (sic.) as it existed demonstrates that these pawn records . . . were laying scattered over the counters.”] [“There’s very strong evidence that corporate records have been destroyed.”] [Admissions by attorney for KaLynn Ninow, Preliminary Injunction Hearing, May 31, 2002, at T. 42, first full paragraph; T. 51, first paragraph/first full paragraph.]

10. William Lowe waited until the TRO dissolved at 11:00 a.m. on May 30, 2002, and at 12:12 p.m. transferred \$7500 from a bank account used in connection with the corporation’s activities as the partner in the land and building owning partnership. [Affidavit of KaLynn Ninow, R. 523, Par. 3-4]

11. On September 5, 2002, Judge Medley concluded that William Lowe had violated Judge Peuler’s TRO by making this transfer, held him in contempt of court for violating the TRO, and ordered him to pay \$7500 plus attorney fees and costs to KaLynn Ninow, which he timely did. [R. 945]

12. On May 1, 2003, Judge Medley entered summary judgment that Gary Pahl owned all 6000 outstanding shares at death. [R. 1114-1116] A notice of appeal was thereafter timely filed May 23, 2003. [R. 1147-1148]

SUMMARY OF ARGUMENTS

1. Since KaLynn Ninow admitted “(t)here’s very strong evidence that corporate records have been destroyed” [Admission by attorney for KaLynn Ninow, Preliminary Injunction Hearing, May 31, 2002, T. 51, first paragraph and first full paragraph], it was error to grant summary judgment, because a dispute over the existence of and the contents of missing records is something that is specifically reserved for the jury and cannot be placed before the court by way of KaLynn Ninow’s summary judgment affidavit. See URE 1008.

2. Since the TRO dissolved at 11:00 a.m., May 30, 2002, it was error to hold William Lowe in contempt of court for his conduct shortly after that.

3. Since Frank Pahl transferred the certificates for his 3000 shares to William Lowe on May 6, 1998, and Mr. Lowe still held them on January 19, 1999, he and Gary Pahl [who held the other 3000 shares] could jointly elect Gary Pahl, Augusta Rose, and William Lowe as the Board of Directors, and Mr. Lowe still held them when Gary Pahl died, based on facts and reasonable inferences that must all be viewed in the light most favorable to Mr. Lowe.

4. KaLynn Ninow’s argument that Gary Pahl could not unilaterally elect any new directors on January 19, 1999, with only his 3000 shares [for lack of a quorum] supports the rejection of her own May 15, 2002, attempt.

ARGUMENT

POINT ONE

The May 1, 2003, order was final and appealable. Any additional real estate issues KaLynn Ninow wishes to litigate in this probate cannot be litigated in this proceeding and must be litigated in a new separate proceeding independent of this proceeding under UCA Sec. 75-3-106.

The trial court's May 1, 2003, "Order Granting Summary Judgment" [R. 1114-1116] was timely appealed via a Notice of Appeal filed on May 23, 2003 [R. 1147-1148]. In pre-briefing motion practice, the Utah Court of Appeals ruled as follows: [1] the trial court's interlocutory order of contempt against William Lowe had been timely appealed by Mr. Lowe by properly waiting to appeal until it appeared that a final order had been entered; and, [2] the parties, in their appellate briefs, should address the issue of whether the May 1, 2003, summary judgment order was final and appealable order. [Appellate Docket, October 28, 2003, Defer for Plenary Consideration Order]

Appellants contend that this appeal is from a final and appealable order. KaLynn Ninow contends that the Order Granting Summary Judgment entered on May 1, 2003, is not a final and appealable order because there are real estate issues that she still wishes to litigate in this proceeding that she

claims were not resolved by that grant of summary judgment. [Appellate Docket, June 4, 2003, Response to Motion for Summary Disposition]

KaLynn Ninow filed her “Motion for Summary Judgment” in the trial court on July 26, 2002. [R. 683-685] That motion for summary judgment is not styled as a motion for “partial” summary judgment, nor does it indicate in its text that any real estate issues are being reserved for future consideration. [R. 683-685] Indeed, the “Memorandum in Support of Motion for Summary Judgment” [R. 686-705] states “the present motion and memorandum are directed at protecting Ryan’s interests in the Loan Office and the real estate mentioned above” [R. 687] [emphasis added] and does not reserve any real estate issues for future consideration beyond that summary judgment motion.

The May 1, 2003, order grants KaLynn Ninow’s Motion for Summary Judgment. [Order Granting Summary Judgment, May 1, 2003, R. 1114-1116]

That order does not indicate in its heading or in its text that it is a grant of “partial” summary judgment, neither does it indicate that real estate issues are being reserved for future trial court litigation and decision. [R. 1114-1116]

From and after May 1, 2003, KaLynn Ninow has made no discernible effort to litigate any real estate issues as part of this proceeding and has not pursued discovery or filed motions in this proceeding on real estate issues

since that date through the present. [R. 1114- 1390] Nor did she make any discernible effort to litigate such issues from and after the time she filed her petition initiating this probate proceeding on May 21, 2002. [R. 111-114]

KaLynn Ninow argued that determination of an alleged issue regarding ownership of shares of stock in Pahl's Salt Palace Loan Office, Inc., ["the Loan Office"] via a summary judgment would resolve virtually every other issue pled below: "Resolution by this Court of one crucial issue will resolve virtually every secondary petition and frivolous filing aimed at creating a smokescreen and confusing the real issues in this case. The issue is **whether or not Gary G. Pahl owned 6,000 shares of stock in Pahl's Salt Palace Loan Office, Inc., when he passed away on June 25, 2000.** This issue is ripe for determination on summary judgment." [R. 698] [emphasis in original]

The following summarizes relevant filings leading to the final order:

May 21, 2002 - KaLynn Ninow initiates this formal proceeding within an informal probate by filing an *ex parte* petition. [R. 111-114]

July 11, 2002 - Augusta Rose files her Answer, Counterpetition, Third Party Petition, and Demand for Jury Trial. [Ryan Pahl and Does I - V are named as the third-party respondents. Richard Ninow is not named as a third-party respondents in this pleading.] [R. 643-649]

July 26, 2002 - KaLynn Ninow files her Motion for Summary Judgment and a supporting memorandum [R. 683-705] that are both expressly “directed at protecting Ryan’s interests in the Loan Office and the real estate mentioned above.” [R. 687] [emphasis added]

August 1, 2002 - KaLynn Ninow, in her capacity as the personal representative and as the court-appointed guardian and conservator for Ryan Pahl, files a motion to dismiss under URCP 12. [R. 755-757]

September 17, 2002 - Augusta Rose, pursuant to URCP 15, amends her pleading as “once as matter of course” and files an Amended Counterpetition, Third Party Petition, and Demand for Jury Trial. [Richard Ninow is named for the first time together with Ryan Pahl and KaLynn Ninow as a third-party respondent. Richard Ninow was not previously a named party to this proceeding.] [R. 984-990]

September 19, 2002 - A deputy constable personally serves Richard Ninow with a Summons and the Amended Counterpetition, Third Party Petition, and Demand for Jury Trial. [R. 1011-1012]

October 23, 2002 - Default Certificate entered as to Richard Ninow. [R. 1060-1061] [The URCP 56 motion for summary judgment filed July 26, 2002, and the URCP 12 motion to dismiss filed August 1,

2002, were not URCP 7 “pleadings” that cutoff Augusta Rose’s right to amend “once as a matter of course” under URCP 15. A “motion” is not the same as a “pleading” and the failure to draw this distinction in word usage is sometimes encountered in court when “pleadings” is not correctly used as a term of art and is incorrectly applied to court filings that are not pleadings. The failure to draw such a distinction is directly contrary to controlling authority. Heritage Bank & Trust v. Landon, 770 P.2d 1009 (Utah Ct. App. 1989) (A motion to dismiss is not a responsive “pleading” that would preclude an opponent from amending a prior pleading “once as a matter of course” pursuant to URCP 15.)]

February 6, 2003 - A Default Judgment is entered in favor of Augusta Rose and against Richard Ninow finding that Richard Ninow is violating or has violated the provisions of Part 9 of Title 76 of the Utah Code and which permanently enjoins Richard Ninow from a continuance thereof, and which awards Augusta Rose \$766.00 in costs and attorney fees under UCA Sec. 76-9-406. [R. 1078-1079]

February 20, 2003 - A Withdrawal of Unadjudicated Probate Petitions and Motions is filed in the trial court. [R. 1084]

May 1, 2003 - Summary judgment is entered. [R. 1114-1116]

Based on the foregoing history, the May 1, 2003, Order Granting Summary Judgment [R. 1114-1116] was a final and appealable order. It was timely appealed on May 23, 2003. [R. 1147-1148] Further, on May 6, 2003, a URCP 60(b) motion to set aside was filed by Richard Ninow through the attorneys who represent both KaLynn Ninow and Richard Ninow. [R. 1132-1133] Such a URCP 60(b) motion may be properly filed only after a final and appealable order is entered. URCP 60(b) is identical to FRCP 60(b) and *Moore's Federal Practice 3rd*, Sec. 60.23, states: "The standard test for whether a judgment is 'final' for Rule 60(b) purposes is usually stated to be whether the judgment is sufficiently 'final' to be appealed." The attorneys for KaLynn Ninow and Richard Ninow should not be heard to argue on appeal that no final order was ever entered while also filing a Rule 60(b) motion to set aside an order that is required be "sufficiently 'final' to be appealed."

Assuming *arguendo* that there are some real estate issues between the parties to this proceeding that are in need of adjudication [a proposition which appears doubtful to the appellants], KaLynn Ninow must pursue them by first initiating a new and separate formal proceeding within this informal probate that is independent from this proceeding. Under UCA Sec. 75-3-106, which is entitled "Scope of proceedings -- Proceedings independent" and which is

applicable to this formal proceeding within this informal probate, “(1) Unless supervised administration as described in Part 5 of this chapter is involved:

(a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate; (b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this chapter, no petition is defective because it fails to embrace all matters which might then be the subject of a final order.” Clearly, any requests for relief as to real estate may not be combined with this proceeding, since combining them with this proceeding would violate the statute by preventing the relief that has been granted in this proceeding by the trial court from being “finally granted without delay.” A new and separate proceeding that is “independent of any other proceeding involving the same estate” must be initiated to address any real estate issues KaLynn Ninow wishes to address. It does not matter that either this proceeding [currently on appeal] or any such new and separate independent proceeding that KaLynn Ninow must initiate in the trial court if she wishes to address real estate issues “fails to embrace all matters which might then be the subject of a final order.” KaLynn Ninow’s argument that

the May 1, 2002, order granting her summary judgment was not a final and appealable order is contrary to the statutory mandate that a final order must be entered without delay and that requests for relief may be combined into one proceeding only if this does not cause delay in entering the final order.

KaLynn Ninow cannot sit supinely by for almost two years of inaction and belatedly claim she pled some additional real estate issues in her May 29, 2002, petition [R. 471-477] that were not adjudicated by the Order Granting Summary Judgment entered on May 1, 2003, [R. 1114-1116] especially since her motion for summary judgment and supporting memorandum filed on July 26, 2002, [R. 683-705] were “directed at protecting Ryan’s interests in the Loan Office and the real estate mentioned above.” [R. 687] [emphasis added]

POINT TWO

It was error to hold William Lowe in contempt for violating the TRO because all relevant conduct occurred after the TRO had dissolved.

Rather than seeking to have the TRO dissolved by order of the court, William Lowe adopted the “appropriate and efficient strategy” of opposing the preliminary injunction and allowing the TRO to dissolve by its own terms.

The TRO dissolved while he was opposing the entry of a preliminary injunction. He then made a \$7500 transfer as an authorized check signer.

He was, thus, not in contempt because the order he was alleged to have disobeyed had already dissolved. The after-the-fact result-oriented effort by the trial court to extend the TRO beyond its deadline in order to hold William Lowe in contempt constituted error in conflict with controlling case authority.

Opposing a motion for a preliminary injunction [instead of seeking to have the court dissolve the TRO] is an “appropriate and efficient strategy” because in “using this strategy, the temporary restraining order will dissolve, either by its own terms or by order of the court.” IKON Office Solutions, Inc., v. Crook, 2000 UT App 217; 6 P.3d 1143. [emphasis added]

Determining the availability of injunctive relief presents a question of law as to which no deference is given to the trial court. Alta v. Ben Hame Corp., 836 P.2d 797, 804 (Utah Ct. App. 1992). The after-the-fact extension of the TRO should be reviewed *de novo* on appeal and reversed. The order of contempt should be reversed, all sums William Lowe was required to pay to KaLynn Ninow to purge himself of the contempt should be fully restored to William Lowe, and, since attorney fees were awarded under UCA 78-32-11, Mr. Lowe should be awarded his reasonable attorney fees in opposing the contempt motion in the trial court and on appeal. See, e.g., Brookside Mobile Home Park v. Peebles, 2002 UT 48; 48 P.3d 968. [“This court has

interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them.” (internal citations omitted.)]

Such a reversal of the contempt order would be consistent with the plain language of URCP 65A(b)(2), which provides that a TRO “ shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.” [emphasis added] The trial court never extended the TRO “within the time so fixed” [before it dissolved]. [R. 1391] It erroneously relied on foreign cases where trial courts had duly extended a TRO within the time so fixed, but had failed to adequately enter the reasons for the extension in the record. Those cases, even if they were controlling Utah decisions [which they are not], do not apply here, because the TRO here was not “extended within the time so fixed” as required under URCP 65A(b)(2). This is not a case where a court timely extended the TRO “within the time so fixed” but then failed to enter adequate “reasons for the extension” in the record. This was a case where there was a complete failure to extend the TRO “within the time so fixed” before it dissolved. The trial

court's *ex post facto* effort to apply it after it dissolved [in order to find William Lowe in violation of the order] was unauthorized under URCP 65A(b)(2) and contrary to IKON Office Solutions, Inc., v. Crook, *supra*.

POINT THREE

It was error to grant Summary Judgment that Gary Pahl owned 6000 shares in Pahl's Salt Palace Loan Office, Inc., at his death, since the inference that 3000 shares were held by William Lowe for the benefit of the corporation's treasury can be reasonably drawn when the facts in the record are viewed in the light least favorable to the Summary Judgment.

The Summary Judgment is limited in scope. It simply adjudges that Gary Pahl owned 6000 shares at death, not just 3000 shares. [R. 1114-1116]

This was error and contrary to the official shareholder list of Pahl's Salt Palace Loan Office, Inc., which was never made a party to this proceeding.

Since corporate governance is in the hands of a Utah corporation's board of directors, not its shareholders or the courts, it was error to enter this order without joining the corporation as a party. See, *inter alia*, UCA 16-10a-724(6): "Corporate action based on the acceptance or rejection of a vote, consent, waiver, proxy appointment, or proxy appointment revocation under this section is valid unless a court of competent jurisdiction determines otherwise." Because its shareholder records show that KaLynn Ninow owns only 3000 shares [less than a quorum, which would require 3001 or more

shares], the corporation has rejected all of her attempts to unilaterally vote her shares for want of a quorum, since not enough shareholders were ever present to allow shareholder business to be conducted any time she attempted to do so. [Special Appearance and Affidavit of Pahl's Salt Palace Loan Office, Inc., at R. 1342-1371] ["Pahl's Salt Palace Loan Office, Inc. . . .has rejected all attempts by KaLynn Ninow to vote-in new officers and directors. This rejection of votes still stands, since no court of competent jurisdiction (in a proceeding or civil case to which Pahl's Salt Palace Loan Office, Inc., is a party) has ordered otherwise."] Since no one person or entity owns a quorum of shares [a majority of shares] [see Article III Clause (b) at R. 422] there has been no shareholder action since Gary Pahl's death due to lack of a quorum at any shareholder meeting. Augusta Rose and William Lowe, the surviving directors at the time of Gary Pahl's death, have continued to serve because no successors have been elected and qualified. [see Article IV Section 2 at R. 422] ["Each director shall hold office for the term for which he is elected and until his successor shall be elected and qualified."] The vacancy on the board of directors created by Gary Pahl's death was duly and lawfully filled by the two remaining directors, Augusta Rose and William Lowe, when they duly

appointed Robert Mortensen. After Mr. Mortensen's resignation, they appointed Frank Pahl to fill the vacancy on the Board of Directors. [see Article IV Section 3 at R. 422] ["Any vacancy occurring in the Board of Directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the Board of Directors."] Frank Pahl is one of the original founders of the business which was incorporated as Pahl's Salt Palace Loan Office, Inc., and originally owned the 3000 shares which KaLynn Ninow erroneously claims belonged to Gary Pahl at death.

The failure to join Pahl's Salt Palace Loan Office, Inc., as an indispensable party to this proceeding is fatal to the summary judgment, which should be reversed. [This failure to join indispensable parties was raised below. See Answer and Jury Demand of Grand Staircase Land Company and William Lowe at R. 595-596 and Answer, Counterpetition, Third Party Petition, and Demand for Jury Trial. of Augusta Rose at R. 643-649] ["Petitioner has failed to join parties indispensable to this proceeding."]

Even if Pahl's Salt Palace Loan Office, Inc., had been joined as a party, and the court below thereby had had competent jurisdiction to adjudicate the rejection of KaLynn Ninow's votes by the corporation for want of a quorum,

it can be reasonably inferred, when viewing the case record in the light least favorable to the Summary Judgment, that Gary Pahl owned only 3000 shares at death, and that the other 3000 shares [that had originally belonged to Frank Pahl], were legally held by William Lowe for the benefit of the corporation's treasury. On May 6, 1998, Frank Pahl entered into a bill of sale agreement regarding his 3000 shares under which he agreed to sell the shares to Gary Pahl. He conveyed the 3000 shares to William Lowe at the time of that May 6, 1998, bill of sale agreement. [See affidavit of Frank Pahl, R. 637 - 638] [“At the time I sold those shares to Gary Pahl, I conveyed the shares to William Lowe.”] On December 28, 1998, Gary Pahl and William Lowe signed three copies of a second bill of sale agreement appearing, *inter alia*, at R. 421. That second bill of sale agreement cites board action to authorize it and states that “the 3,000 shares of common stock originally owned by Frank Pahl will be purchased back into the treasury.” It states that Pahl's Salt Palace Loan Office, Inc., “will assume the balance due to Frank Pahl, per the Bill of Sale dated May 6, 1998, at the same terms and conditions as outlined therein. Therefore, upon successful completion of this agreement [the May 6, 1998, Bill of Sale Agreement], Frank Pahl's 3000 shares will belong to the treasury of the Corporation, leaving a balance of 3000 shares outstanding.”

Under plain English usage, “this agreement” in the second sentence refers to the May 6, 1998 bill of sale agreement that is referenced in the first sentence. This means that once the May 6, 1998, bill of sale agreement was successfully completed prior to Gary Pahl’s death [which is undisputed], the 3000 shares held by William Lowe belonged to the treasury. At the time of his death, Gary Pahl owned only the 3000 shares duly issued and outstanding.

After his death, the Board of Directors conveyed the corporation’s ownership interest in the 3000 treasury shares [which William Lowe still held] to William Lowe. The corporation and William Lowe redistributed these 3000 shares to Augusta Rose and Robert Mortensen with unanimous approval of the Board of Directors. [See R. 424-425]. After these actions, there were a total of 6000 common voting shares duly issued and outstanding.

KaLynn Ninow lacked standing to raise or to litigate any dispute over these transactions without joining Pahl’s Salt Palace Loan Office, Inc., which was a party to the transactions and was indispensable to this proceeding.

Subsequent arms-length conveyances of these 3000 shares for cash by Augusta Rose and Robert Mortensen to Grand Staircase Land Company took place. These arms-length transactions involved a bargain purchase price of a dollar because of discount for the prospect of future litigation over the shares.

It is important to note that while Robert Henry Copier represented Grand Staircase Land Company in these purchases, he did not represent either Robert Mortensen or Augusta Rose at the time of these purchases.

He has never represented Robert Mortensen and he agreed to enter into an attorney-client relationship with Augusta Rose only after the sales were made. These were arms-length purchases that involved no attorney conflicts.

Later, 1500 of the shares were conveyed to Diamond Fork Land Company, which is represented by Robert Henry Copier in other matters, but which was never made a party to this proceeding. See the Notice Regarding Transfer of Corporate Shares of Stock, July 5, 2002, at R. 634-636, which lays out certain stock transfers so that they would be part of the record. It should be noted that William Lowe, as a director, gave this notice to the court in connection with summary judgment litigation. It should also be noted that in addition to failing to cause Pahl's Salt Palace Loan Office, Inc., to be duly joined as a party, the trial court entered an injunction that severely limited and chilled the officers and directors of that corporation in protecting the interests of that corporation and displayed a willingness to impose orders of contempt upon those directors under legal theories having no Utah precedent. No due process was granted to Pahl's Salt Palace Loan Office, Inc., due to all this.

It was also error for the trial court to base its summary judgment on KaLynn Ninow's arguments that corporate documents were incomplete and irregular, that corporate formalities such as holding the annual shareholder meeting had been ignored, and that some of the directors lacked credibility.

The absence of annual shareholder meetings was/is of no practical consequence, since the owners of the 3000 shares formerly owned by Frank Pahl could and can preserve the *status quo* [and keep the Board of Directors in place] by declining to attend shareholder meetings and thwarting a quorum.

The trial court found [after the preliminary injunction hearing] that the corporate document appearing at R. 420 contains a forged signature. It was error to use this as a basis for finding that corporate documents were irregular for summary judgment purposes. A finding made for preliminary injunction purposes does not create an undisputed fact for summary judgment purposes and does not even establish a fact for a jury trial. URCP 65A(a)(2) ["This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury."] Appellants have the right to have a jury decide whether or not R. 420 contains a forged signature and whether corporate documents are irregular. At this stage, they have the right to have the murky allegation of a forgery resolved in the light most favorable to them.

Without joining Pahl's Salt Palace Loan Office, Inc., as a party, and because it was using its injunctive and contempt powers to discourage that corporation's officers and directors from pursuing due process on its behalf, the trial court could not enter a summary judgment that involved agreements to which Pahl's Salt Palace Loan Office, Inc., was a party and over which its Board of Directors had corporate governance authority over rejecting votes.

In construing the agreements, appellants have a right to have the court construe agreements, and reasonable inferences drawn from them, in the light most favorable to them. Dick Simon Trucking v. Tax Commission, *supra*.

It was also error to base the grant of the Summary Judgment on the absence of corporate documents in the light of the unorthodox *ex parte* TRO in which Judge Sandra Peuler gave KaLynn Ninow surprise unlimited access to corporate documents while at the same time excluding all of the corporate officers and directors from protecting those documents. If the appellate court first makes an initial threshold determination that the TRO was available as a matter of law, then step two of the two-part analysis is set forth in Aquagen Int'l, Inc. v. Calrae Trust, 972 P.2d 411, 412-413 (Utah 1998): ““The trial court's discretion must be exercised consistently with sound equitable principles, “taking into account all the facts and circumstances of the case.”””

[quoting Kasco Servs. Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (quoting System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983))].

Judge Peuler's found that corporate records and papers of Pahl's Salt Palace Loan Office, Inc., were vulnerable to destruction and/or removal and that such destruction or removal would cause irreparable harm. [R. 526-528]

Judge Peuler's *ex parte* TRO barring respondents from access to the papers and records while granting KaLynn Ninow immediate uncontrolled access to those papers and records [instead of barring both sides from access until a court hearing could be held with all sides present] failed to prevent KaLynn Ninow from causing the very harm to Pahl's Salt Palace Loan Office, Inc., papers and records that Judge Peuler had identified as irreparable in her own findings of fact in the *ex parte* TRO. Judge Peuler's *ex parte* exercise of her judicial power in granting the one-sided *ex parte* TRO was judicial power that was not "exercised consistently with sound equitable principles, 'taking into account all the facts and circumstances of the case.' " [See TRO at R. 526-528, including a finding that KaLynn Ninow was "justly apprehensive that additional key documents will be shredded or destroyed."] In some comparable SEC civil litigation in which the undersigned counsel has served as special trial counsel in the United States District Court, District of Utah,

the practice has been to bar the defendants, the government, as well as the court-appointed receiver from access to corporate premises and the papers secured therein unless counsel for all sides are present. It was inconsistent with “sound equitable principles” to bar some parties from the pawnshop instead of barring all parties with a constable’s padlock pending a hearing.

Certainly, if the federal courts deem it inappropriate for the government [and even court-appointed receivers] to access documents and premises that are secured by a TRO unless counsel for all sides are present, it certainly was very inconsistent with “sound equitable principles” to allow the embittered divorced ex-wife of the late Gary Pahl unfettered access to corporate papers to which she had no access after their marriage ended. Once she had such unfettered one-sided access to these documents, any alleged absence of corporate documents was no longer dispositive because of uncertainty over whether any documents had been destroyed and which side destroyed them.

Obviously, none of this could be raised prior to the entry of the *ex parte* TRO, because respondents had no notice until after it was entered.

On the *de novo* review of the summary judgment on appeal, this court should reverse the summary judgment as improperly based on the absence of board minutes, stock certificates, stock transfer ledgers, and related papers.

The absence of corporate documents is not dispositive on summary judgment based on the functions reserved to the jury under URE 1008, which is useful here due to the unorthodox *ex parte* TRO of which Mr. Lowe and Ms. Rose had no notice until it was too late to protect corporate documents from KaLynn Ninow's unfettered access. The appellate court should view, in the light most favorable to the appellants, both the documents that have been located and the institutional corporate memory possessed by Mr. Lowe and Ms. Rose as reflected on their filings in the record, since they alone have any knowledge of what transpired before Gary Pahl's death. No other witness or party has such knowledge other than Frank Pahl, who has some knowledge, and whose affidavit confirms his May 6, 1998, conveyance of 3000 shares to Mr. Lowe: "At the time I sold those 3000 shares to Gary Pahl, I conveyed the shares to William Lowe. I do not know everything that Gary Pahl and/or William Lowe did with or concerning those 3000 shares." [R. 637-638]

KaLynn Ninow [R. 117-244], Jay Taylor [R. 245-248], Ryan Pahl [R. 249-261], Harold Pahl [R. 277-341], and Rachel Pierce [R. 342-259] provide no undisputed evidence as to the transactions involving shares of stock that were entered into between Pahl's Salt Palace Loan Office, Inc., Gary Pahl, and William Lowe, and provide no undisputed evidence as to board actions.

The error inherent in using disputed documents to establish undisputed material facts calls to mind the insight of scholar/statesman Henry Kissinger, who observed that by a selective presentation of documents, one can prove anything. Bootstrapping the disputed findings from the preliminary injunction hearing into “undisputed facts” for summary judgment violated respondents’ right to have URCP 65A “construed and applied” in a manner that preserved their right to have document disputes decided by a jury. [URCP 65A(a)(2)]

The practical effect of the court’s error in accepting KaLynn Ninow’s arguments regarding disputed documents without submitting the matter to a jury can be illustrated by using the case record as an example, since the TRO in this case appears irregular in the context of the case record and on its face.

In the case index and case file, there is no record of the TRO being entered on May 20, 2002, or May 21, 2002, and it does not appear between pages 111-410, where one would expect it to appear. Instead, it appears as an exhibit to an affidavit filed on June 7, 2002. [R. 526-528] That copy contains no court date stamp. That copy of an alleged TRO appears to be irregular in that the handwriting on R. 528 was done by two different people, with “5/30” being written in a style and ink different from “May 30th” five lines down. Because the appellants are unwilling to indulge in the kind of

wild speculation and reckless accusations indulged in by KaLynn Ninow, appellants do not contend that the TRO was not signed by Judge Peuler on May 20, 2002. They simply point out, for purposes of illustration, that if the case file is subjected to the kind of disputes over documents to which KaLynn Ninow subjected corporate documents, the case file is fertile ground for similar disputes that could not be resolved through a summary judgment finding the case file to be irregular and incomplete. While the trial court wished to fully disregard corporate documents presented by the directors of the corporation as irregular and incomplete, it could not do so via a summary judgment, due to the requirements of URE 1008 and URCP 65A(a)(2) and the standard of review in Dick Simon Trucking v. Tax Commission, *supra*.

While Pahl's Salt Palace Loan Office, Inc., was never joined as an indispensable party to this proceeding, it did make a special appearance:

"Pahl's Salt Palace Loan Office, Inc., by and through its directors and officers, William Lowe and Augusta Rose, has rejected all attempts by KaLynn Ninow to vote-in new officers and directors. This rejection of votes still stands, since no court of competent jurisdiction [in a proceeding or civil case to which Pahl's Salt Palace Loan Office, Inc., is a party] has ordered otherwise." [From Special Appearance and Affidavit at R. 1342-1371]

The following special appearance affidavit testimony is in the record:

“ . . . Gary Pahl obtained the funds used to pay Frank Pahl from Pahl’s Salt Palace Loan Office, Inc., and the contentions made by KaLynn Ninow concerning records she claims to have reviewed [but has never produced, and has continued to refuse to produce], are simply false and inconsistent with what actually took place, as the funds used to pay Frank Pahl were generated by pawn shop operations and paid-in capital.” “Once Frank Pahl was fully paid and gave up all of his interest in the shares prior to Gary Pahl’s death, Gary Pahl expressly transferred them into the corporation’s treasury, having been himself fully paid for the shares by the corporation when its funds were used by Gary Pahl to accelerate payments to Frank Pahl for the 3000 shares purchased.” “Based on William Lowe’s personal knowledge . . . all of the actions regarding shares in the corporation after the death of Gary G. Pahl were fully authorized by the corporation’s board of directors who took all such official actions as were necessary to bring those actions regarding shares into full compliance with the corporation’s articles of incorporation and bylaws, and no actions were taken by directors that were required to be taken by shareholders.” [From Special Appearance and Affidavit at R. 1353 -1371]

POINT FOUR

It was error to base summary judgment on affidavit testimony proffered by KaLynn Ninow by which she attempted to prove the content of documents without producing any of the original documents or copies.

A pivotal assertion made by KaLynn Ninow in her affidavit [R. 710-714] in support of her motion for summary judgment [[R. 683-685] was: “In reviewing the financial and other records of the corporation and the private financial records of Gary Pahl, it is clear that the corporation did not and has not reimbursed Gary or his estate for the purchase of the shares acquired from Frank Pahl back into the treasury of the corporation pursuant to document entitled Bill of Sale Agreement dated December 29 (sic.), 1998. Additionally, when the payment schedule to Frank was accelerated in the spring of 2000, the money to pay Frank in full came from Gary’s personal funds, and not the (sic.) funds of the corporation. None of the requirements or conditions precedent of the December 28, 1998 Bill of Sale Agreement which would have transferred Gary’s shares into the treasury of the corporation have ever been met. No corporate stock transfer ledger or certificates or any kind of document purporting to track transfers of the corporation’s stock have been provided by Lowe, Rose or Mortensen. Despite diligent searches of the offices and records located at Pahl Salt Palace Loan Office, no such

document or ledger has been located.” [R. 711-712] This does not constitute affidavit testimony that would be admissible in evidence, as required under URCP 56. It violates URE 1002, which provides: “Requirement of original. To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.” The content of “financial and other records of the corporation and the private financial records of Gary Pahl” cannot be placed into evidence with this kind of affidavit of KaLynn Ninow without requiring production of the documents themselves. And her claim that certain documents have not been located, despite diligent searches, does not create an undisputed material fact, since Judge Peuler’s TRO and Judge Medley’s injunction have placed all corporate premises and the records therein in the control of KaLynn Ninow, which means that under URE 1004, the “original is not required, and other evidence of the contents of a writing, recording, or photograph [including the affidavit testimony of William Lowe and Augusta Rose herein] is admissible” since all “originals are lost or have been destroyed” and it has never been established as an undisputed fact that any respondents “lost or destroyed them in bad faith” [or at all]. KaLynn Ninow had unfettered access to them.

A motion to strike [R. 802- 821] KaLynn Ninow's affidavit was timely filed at the time respondents filed their opposition to her motion for summary judgment. That motion pointed out that she was attempting to place facts in the record that would not be admissible in evidence and also referred to the problems created by Judge Peuler's one-sided *ex parte* TRO. To the extent that KaLynn Ninow's affidavit attempts to demonstrate that no records exist showing that the funds which were used to pay Frank Pahl in-full for his shares came from the corporation or to demonstrate that no stock transfer ledgers or other records exist showing the transfer of 3000 shares to the treasury [and satisfaction of all conditions precedent to that transfer] prior to Gary Pahl's death, that is a jury question that cannot be decided via summary judgment, pursuant to URE 1008: "Functions of court and jury. When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the

contents, the issue is for the trier of fact to determine as in the case of other issues of fact.” Since the “trier of fact” in this case is a jury, Judge Medley had no authority under URE 1008 to decide as an undisputed summary judgment fact KaLynn Ninow’s assertion that missing papers never existed or whether or not other evidence presented correctly reflected the contents of the missing papers. This is expressly made a jury question under URE 1008.

Since all of the corporate papers at the corporate premises were placed under the control of KaLynn Ninow by the TRO and injunction herein, it was proper for Augusta Rose and William Lowe to testify by affidavit that: “Prior to his death, Gary Pahl placed 3000 shares of stock of the said corporation under the control of the board of directors as treasury stock . . .” [R. 718-725] pursuant to URE 1004 (1) and (3), since the relevant documents within the corporate premises were under the control of KaLynn Ninow and she had fair notice from the affidavits themselves that the contents of transfer documents pertaining to the transfer of 3000 shares into the treasury prior to Gary Pahl’s death was the subject of proof in this matter. Since a timely filed motion to strike was filed, and since the standard of review of a summary judgment is *de novo*, giving no deference to the trial court, summary judgment should be reversed as being improperly grounded upon inadmissible affidavit testimony.

POINT FIVE

Movant did not identify all of the material facts and show they were undisputed and she also failed to show entitlement to judgment as a matter of law. The Summary Judgment was a result-oriented order based on little more than the power of incumbency upon the trial bench.

Because summary judgment is a procedural tool that deprives one's adversary of a jury trial, a movant is required to show both that there is no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law. [URCP 56] Abraham Lincoln is said to have studied geometry so its proofs would polish his power to perceive logical links as a lawyer. In modern summary judgment practice under URCP 56, a movant must identify all of the facts logically linked to the relief sought and then show that all these material facts are undisputed. The requirement that there be "no genuine dispute as to any material fact" [URCP 56] is not met when the material facts listed by the movant do not include all of the material facts.

That was the case here. The relief sought by movant was rather narrow and limited [a "hearing to determine the ownership interests of the individuals asserting ownership in the stock of the corporation"] [Petition at R. 476-477] ["summary judgment upon the claims asserted by the Personal Representative pertaining to ownership interests in shares of stock in Pahl's

Salt Palace Loan Office, Inc., held by Gary G. Pahl at the time of his death.”] [Motion at R. 683] As grounds for the motion, movant claims that only two facts are material and undisputed: [“It is undisputed that Gary G. Pahl acquired 3,000 shares of stock in the corporation from his father, and the remaining from his uncle Frank Pahl pursuant to a Bill of Sale Agreement dated May 6, 1998. It is further undisputed that Gary Pahl had completely satisfied the requirements of the Bill of Sale and had paid Frank Pahl in full as of April 17, 2000, more than two month’s prior to Gary’s death.”] [Motion at R. 683-684] The memorandum in support of the motion lists 36 additional allegedly undisputed material facts. [R. 688-697] [copy annexed hereto]

The two allegedly undisputed material facts stated in the motion and the 36 additional allegedly undisputed material facts in the memorandum, taken as a whole, are incomplete and inadequate. KaLynn Ninow has failed to identify and list all of the material facts logically linked to [and necessary for a grant of] the relief sought. She is not entitled to summary judgment.

Conspicuously absent from this presentation of a total of 38 allegedly undisputed material facts is the fact that Frank Pahl’s 3000 shares were all conveyed to William Lowe by Frank Pahl contemporaneously with the May 6, 1998, agreement and that William Lowe “never conveyed those shares to

Gary Pahl before Gary Pahl's death" ["Disputed Issues of Material Fact" Fact No. 1 from Memorandum in Opposing KaLynn Ninow's Motion for Summary Judgment" filed by Grand Staircase Land Company, William Lowe, and Augusta Rose at R. 807 and 817] and the shares were still held by William Lowe [for the corporation as treasury shares] at the time of Gary's death. Also conspicuously absent from movant's 38 facts is the fact that Gary Pahl conveyed his interest in the 3000 shares to the corporation and placed those 3000 shares under the full control of the corporation's board as treasury stock and that William Lowe continuously held the shares for the corporation before and after Gary Pahl's death until the corporation's board of directors granted him all of the corporation's rights to the shares and then joined him in transferring the shares to Augusta Rose and Robert Mortensen. ["Gary Pahl conveyed 3000 shares to the corporation and placed those 3000 shares under the full control of the corporation's treasury as treasury stock and the board never voted to convey those treasury shares to Gary Pahl before his death or to KaLynn Ninow after Gary Pahl's death."] ["Disputed Issues of Material Fact" Fact No. 2 from Memorandum in Opposing KaLynn Ninow's Motion for Summary Judgment" filed by Grand Staircase Land Company, William Lowe, and Augusta Rose at R. 807 and 817] Also conspicuously absent from

movant's 38 facts is the fact that the official shareholder list of Pahl's Salt Palace Loan Office Inc., which was not a party to this proceeding, showed that, at the time of her motion, KaLynn Ninow owned only the 3000 shares of stock owned by Gary Pahl at the time of his death and also showed that the 3000 treasury shares held by William Lowe for the corporation at the time of Gary Pahl's death now belonged to another party to this proceeding [Grand Staircase Land Company - 1500 shares] and to an owner that was not a party to this proceeding [Diamond Fork Land Company - 1500 shares] ["Disputed Issues of Material Fact" Fact No. 3, 4, and 5 from Memorandum in Opposing KaLynn Ninow's Motion for Summary Judgment" filed by Grand Staircase Land Company, William Lowe, and Augusta Rose at R. 807 and 817].

Some important distinctions have been blurred by KaLynn Ninow.

She has blurred the distinction between the material fact that Gary Pahl conveyed his interest in the 3000 shares to the corporation's treasury prior to his death [R. 807 and 817] with the question of whether or not he was still owed money for those shares after he made the transfer that is still due. ["The corporation did not and has not reimbursed either Gary or his estate for the purchase of the shares acquired from Frank Pahl back into the treasury of the corporation."] [Movant's "undisputed material fact" No. 30, R. 695-696] A

claim for money damages against the corporation does not give KaLynn Ninow voting rights or ownership of the 3000 shares that were being held by William Lowe for the corporation's treasury on the date of Gary Pahl's death.

She has also blurred the important distinction between the material fact that Gary Pahl conveyed his interest in the 3000 shares to the corporation's treasury prior to his death [R. 807 and 817] with the question of whether or not he should have done so ["None of the requirements or conditions precedent of the December 28, 1998, Bill of Sale Agreement which would have transferred Gary's shares into the treasury of the corporation have ever been met."] [Movant's "undisputed material fact" No. 30, R. 695-696]. It is clear from movant's own description of the December 28, 1998, agreement between the corporation and Gary Pahl that the agreement contemplates the transfer of "shares into the treasury" but she blurs the fact the he executed the transfer before his death with the question of whether there were "conditions precedent" [R. 696] and "requirements" [R. 696] that would have allowed him to delay the execution transfer if he had elected to do so [which he did not do]. [R. 807 and 817] And, since the condition precedent stated in the December 28, 1998, agreement [the successful completion of the May 6, 1998, agreement] had been fulfilled, Gary Pahl's execution of the transfer of

3000 shares prior to his death [after Frank Pahl had been paid and the May 6, 1998, agreement with him had been successfully completed] was in harmony with the December 28, 1998, agreement, as all “conditions precedent” and “requirements” had been satisfied. [“It is further undisputed that Gary Pahl had completely satisfied the requirements of the Bill of Sale and had paid Frank Pahl in full as of April 17, 2000, more than two month’s prior to Gary’s death.”] [KaLynn Ninow’s Motion for Summary Judgment at R. 683-684]

KaLynn Ninow also blurs the distinction between the fact that Gary Pahl conveyed his interest in the 3000 shares to the corporation’s treasury prior to his death [R. 807 and 817] and the simple fact that the parties to the December 28, 1998, agreement [Gary Pahl and the corporation] had the right to go ahead and execute the transfer of the 3000 shares [which they did] [R. 807 and 817] regardless of whether or not the “requirements” and “conditions precedent” in the agreement had been met. While KaLynn Ninow apparently wishes he would have waited longer to make that transfer [so that the transfer had not been executed and completed prior to his death], and claims that she has a good faith argument that he should not have made that transfer [based on “requirements” and “conditions precedent” that are apparently discernible only by her when she reads the December 28, 1998, agreement], that does

not establish as an “undisputed material fact” that, after Frank Pahl had been paid in-full for the 3000 shares, Gary Pahl did not execute the transfer of his interest in these shares to the corporation prior to his death. [R. 807 and 817]

KaLynn Ninow fails to draw the distinction between the “undisputed fact” that a judge made a finding after a contested preliminary injunction evidentiary hearing with the fact that such a finding is not an “undisputed fact” for summary judgment purposes. She includes the following in her “Statement of Undisputed Facts”: “Seven documents were attached to the aforementioned Response to Order to Show Cause. The first document, entitled ‘Amendment of By-Laws of Pahl’s Salt Palace Loan Office, Inc.’ and purportedly signed by Gary Pahl and William T. Lowe, was found by the Court to be a forgery and a fraud based upon the testimony of George Throckmorton. (Findings of Fact, issued orally May 31, 2002)” [Movant’s “undisputed material fact” No. 30, R. 695-696]. Judge Medley’s finding [and George Throckmorton’s opinion] on a disputed issue of fact do not establish an undisputed material fact for summary judgment purposes, since they were made and rendered during a preliminary injunction evidentiary hearing and involve something expressly reserved for later determination by a jury. See URCP 65A(a)(2). [“ This subdivision (a)(2) shall be so construed and

applied as to save to the parties any rights they may have to trial by jury.”] It was error to grant a summary judgment on this “undisputed material fact” that is expressly made the province of the jury and arose in an evidentiary hearing.

KaLynn Ninow also blurs the distinction between the fact that Gary Pahl conveyed his interest in the 3000 shares to the corporation’s treasury prior to his death [R. 807 and 817] and the fact that stock transfer ledgers, stock certificates, and other documents by which that transfer was executed and in which it was reflected and recorded are now apparently missing from the pawn shop premises and have apparently been lost or destroyed. Her penultimate and ultimate “undisputed material facts” are stated as follows:

“ 35. Section 5 of the By-Laws of Pahl’s Salt Palace Loan Office, Inc., reads as follows: ‘TRANSFER OF STOCK. The shares of the corporation shall be transferable only on the books of the corporation upon surrender of the certificate or certificates representing the same, properly endorsed by the registered holder or by his duly authorized attorney, such endorsement or endorsements to be witnessed by one witness. The requirement of such witnessing may be waived in writing upon the form or endorsement by the President of the corporation’ (By-Laws, Exhibit 2, Affidavit of KaLynn Ninow, May 16, 2002.)”

“36. No corporate stock transfer ledger or certificates or any kind of document purporting to give a history of transfers of the corporation’s stock have been provided by Lowe, Rose or Mortensen. Despite diligent searches of the offices and records located at Pahl’s Salt Palace Loan Office, no such document or ledger has been located. Additionally, no other corporate documents, certificates or records of any kind have been turned over by Lowe, Rose or Mortensen. (Affidavit of KaLynn Ninow in Support of Motion for Summary Judgment, paragraph 5)” [R. 697]

It should be noted that application of paragraphs 35 and 36 to the shares listed on the shareholder list of Pahl’s Salt Palace Loan Office, Inc., would actually vitiate the 3000 shares that KaLynn Ninow does own. The “undisputed facts” by which she attempts to establish the transfer of 3000 shares from Gunther Pahl to Beverly Pahl to Gary Pahl do not satisfy any of the requirements set forth in paragraph 35. [Movant’s “undisputed material facts” No. 5-8] [R. 686-690]. It is not the point of appellants that KaLynn Ninow does not necessarily own the 3000 shares that she claims came from Gunther Pahl, only that her right to those shares has documentary support that is weaker than the facts and reasonable inferences drawn therefrom that must all be viewed in the light most favorable to appellants, the legal principle that

shares held by Mr. Lowe at the time of Gary Pahl's death may only be challenged through the application of URE 1008 at a jury trial, and no "undisputed material facts" can be established through "missing" papers under the facts and circumstances of this case. Under URE 1008, the question of whether missing documents actually ever existed is specifically a question for the jury, and not for the judge, and it cannot be resolved via a summary judgment. The fact that "no such document or ledger has been located" [R. 697] does not establish as an "undisputed material fact" [for summary judgment purposes] that such documents never existed, since this is a matter expressly reserved for jury decision at a jury trial under URE 1008.

In grounding a summary judgment on the disputed contents of allegedly missing documents, instead of viewing the facts and reasonable inferences to be drawn therefrom in the light most favorable to the parties opposing the motion for summary judgment, the trial court's erroneous declaration that Gary Pahl owned 6000 shares of stock at death was not a logically principled application of correct law to undisputed material facts, but was an exercise of the raw power of incumbency upon the trial bench. The right to trial by jury as to the allegedly forged and missing documents under URE 1008 and URE 65A(a)(2) serves as a very important check upon the power of a trial judge.

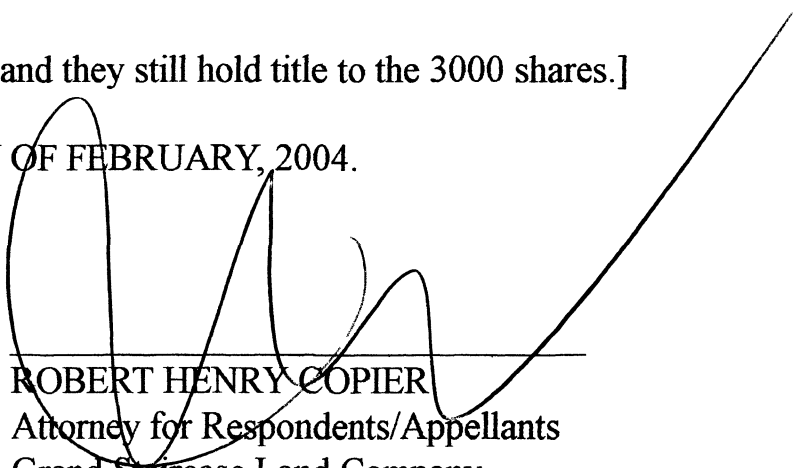
KaLynn Ninow also blurs the distinction between the fact that she attempted to unilaterally replace the board of directors and the fact that this attempt was duly rejected by the corporation, through its board of directors, and that this rejection [for want of a quorum] remains fully valid because no court of competent jurisdiction has ever determined otherwise. [UCA 16-10a-724(6)] [Pahl's Salt Palace Loan Office, Inc., was never joined as an indispensable party.] After formally requesting and receiving a copy of the corporation's shareholder list, KaLynn Ninow unilaterally decided for herself that the list was wrong and attempted to vote-in new directors all by herself. [See Movant's "undisputed material facts" No. 20-21] [R. 693] Besides being improperly laced with legal conclusions, these "undisputed material facts" are incomplete because they fail to address the corporation's authority to regulate shareholder voting affairs, subject to judicial review by a court of competent jurisdiction. [UCA 16-10a-724(6)] Since the motion for summary judgment was narrowly limited in the relief sought, and merely sought a court determination that all 6000 shares are a part of Gary Pahl's estate based on KaLynn Ninow's claim that Gary Pahl owned all 6000 shares at his death, the undisputed fact that she jumped the gun and attempted to vote all 6000 shares without awaiting a judicial determination is not particularly material or useful.

CONCLUSION

This is an appeal from a final and appealable order. The order of contempt against William Lowe should be reversed, the money he paid to KaLynn Ninow should be restored to him by her, and he should be awarded his reasonable attorney fees in opposing contempt in the trial court and on appeal. The May 1, 2003, summary judgment order should be reversed.

Since civil litigation has been pursued in a separate case that divested KaLynn Ninow's title in 3000 shares and vested it in out-of-state owners who now hold title, a remand of the reversed summary judgment is unneeded as moot. [After Judge Robert Hilder divested title to 3000 shares from KaLynn Ninow and vested it in the out-of-state owners recognized by the corporation, pursuant to his authority to do so under URCP 70, he voided that judgment. URCP 70 gives him no authority to re-divest title from out-of-state owners who are not parties before him, and they still hold title to the 3000 shares.]

DATED THIS 6TH DAY OF FEBRUARY, 2004.



ROBERT HENRY COPIER
Attorney for Respondents/Appellants
Grand Staircase Land Company
William Lowe and Augusta Rose

ADDENDUM

URCP 65A [saving certain “rights . . .to trial by jury”]

URE 1008 [document dispute “functions of court and jury”]

Temporary Retraining Order [Expired “May 30th, 2002, at 11:00 a.m.”]

May 6, 1998 Bill of Sale [Lowe “is holding” the certificates until fulfilled]

Affidavit of Frank Pahl [“I conveyed the shares to William Lowe”]

December 28, 1998 Bill of Sale Agreement [“Frank Pahl’s 3,000 shares”]

Affidavit of William Lowe [“Prior to his death, Gary Pahl placed 3000 shares of stock under the control of the board of directors as treasury stock of the corporation and kept control of the other 3000 shares. . .]

KaLynn Ninow’s “Statement of Undisputed Facts”

URCP 65A. Injunctions.

(a)(2) Consolidation of hearing. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) (1) Notice. No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(b) (2) Form of order. Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

* * *

URE 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104.

However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH

**IN THE MATTER OF THE ESTATE OF
GARY G. PAHL**

Deceased.

**TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

**Civil No. 003901101
Judge Sandra Peuler**

Based upon the *ex parte* motion of Kalynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir (devisee) of Gary G. Pahl, and good cause appearing therefore, the Court finds that based upon the affidavits and the memorandum and exhibits submitted in connection therewith, irreparable harm and injury may occur if a temporary order is not issued without notice because it appears that the assets of the Loan Office are very liquid in nature, requested copies of records have never been provided, and all of the business records and all banking documents, accounts, etc., are in the complete control of the individuals named, and there appears to be a history of spoliation of corporate documents and records. If notice is given, movant

is justly apprehensive that additional key documents and records will be shredded or destroyed and that cash, records of accounts and other valuable items of property will disappear and prove impossible to trace. The potential injury to the movant outweighs any inconvenience which may be caused to the individuals subject to the order, the order is not adverse to public interest and based upon the affidavits and documents presented to this Court, it appears that movant is the owner of 100% of the shares of Pahl's Salt Palace Loan Office, Inc., and that there is a substantial likelihood that the movant will prevail on the merits of her claims. WHEREFORE, IT IS HEREBY ORDERED:

1. That William T. Lowe, Augusta Rose and Robert K. Mortensen are restrained and prohibited from entering the business premises occupied and owned by Pahl's Salt Palace Loan Office, Inc. ("Loan Office"), located at 1588 & 1594 South State Street in Salt Lake City, Utah.
2. William T. Lowe, Augusta Rose, Robert K. Mortensen and any of their agents, servants, employees, officers, directors, attorneys, and all those acting in concert with them, are ordered to immediately turn over to Ms. Ninow or her attorneys all documents, records, memoranda, inventory, keys to the premises, computer files, equipment, banking records, checkbooks, passbooks, and all other like items pertaining to the Loan Office or to the management of the real property located at 1588 & 1594 South State Street in Salt Lake City, Utah, and shall immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the aforementioned real estate
3. William T. Lowe, Augusta Rose and Robert K. Mortensen are expressly prohibited from

disbursing, dissipating, transferring, encumbering, or paying any monies to themselves or any person or entity from any account held publicly or privately by the Loan Office or any entity purporting to manage the real estate located at 1588 & 1594 South State Street, Salt Lake City, Utah.

4. Any peace officer of this into whose hands this Order may come, is directed to take any action reasonably necessary to enforce the above provisions of this Court's Order.

IT IS FURTHER ORDERED that William T. Lowe, Augusta Rose and Robert K. Mortensen are ordered to appear before this Court on 5/30, 2002 at 10:00^{AM} o'clock to then and there show cause, if any they have, why a preliminary injunction should not issue continuing the provisions of the Temporary Restraining Order in effect pending final determination of the shares of the corporation in probate proceedings.

This Temporary Restraining Order shall issue upon the filing of an undertaking in the amount of \$ 20,000 and shall expire on may 30th, 2002 at 11:00^{AM} o'clock unless prior to that time it is extended for good cause shown.

Entered this 20 day of May, 2002, at 11:00 AM

BY THE COURT


Third District Court Judge

BILL OF SALE

May 6, 1998

It is my desire to sell my full interest in Pahl's Salt Palace Loan Office, Inc. to Gary G. Pahl. My full interest consists of 3,000 shares. The total selling price shall be ninety six thousand dollars (\$96,000.00), payable as follows:

Forty six thousand dollars (\$46,000.00) down payment, payable on or before May 30, 1998 to Frank H. Pahl.

I, Frank H. Pahl, will carry a note in the amount of fifty thousand dollars (\$50,000.00) at three percent (3%) interest per annum starting on June 10, 1998. Gary G. Pahl agrees to pay Frank H. Pahl a sum of no less than one thousand dollars (1,000.00) per month, with interest being paid first, then the remaining amount being applied to principal, until the note is paid in full. Payments are to start on or before June 10, 1998 and due on the tenth of each month thereafter.

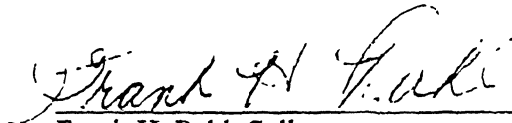
In the event of the premature death of Frank H. Pahl, each monthly payment is to be split equally between Frank H. Pahl's five natural children:

Mickey Frank Pahl
Julie Pahl Martinez
Alex George Pahl
Thomas Bruce Pahl
Robert Gordon Pahl

Each receiving no less than two hundred dollars (\$200.00) per month until this note is paid in full.

Upon successful completion of this Bill of Sale, my 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl. The three thousand shares amount to fifty percent (50%) of the business. William T. Lowe is holding the three thousand-share certificates until this Bill of Sale is fulfilled in whole.

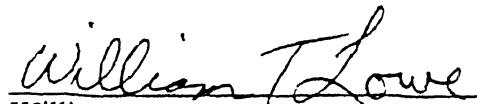
Three copies of this Bill of Sale were signed, dated and witnessed this 6th day of May 1998.



Frank H. Pahl, Seller



Gary G. Pahl, Buyer



William T. Lowe, Witness

EV-1

In the matter of the estate of **AFFIDAVIT OF FRANK PAHL**

Probate No. 003901101
Judge Tyrone E. Medley

Judge Tyrone E. Medley

[illegible]

1. I have read this affidavit and have been given a copy of it. The things that I say in this affidavit are true based on my own personal knowledge of them.

3. I never stated to KaLynn Ninow or her attorneys that my affidavit was

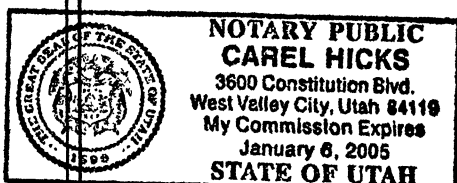
intended to convey those 3000 shares to her, it was never my intent to convey those 3000 shares to KaLynn Ninow when I signed the affidavit prepared by her attorneys that was handed to me for signature, nor was it my intent to state an opinion as to whether KaLynn Ninow now owns those 3000 shares. I had no ability to convey any shares to her and had and have no authority or knowledge to render an opinion on whether she now owns those 3000 shares, for these reasons:

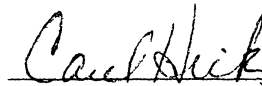
- At the time I sold those 3000 shares to Gary Pahl, I conveyed the shares to William Lowe. I do not know everything that Gary Pahl and/or William Lowe did with or concerning those 3000 shares.
- I have been fully paid for those 3000 shares.

DATED this 25th day of June, 2002.


FRANK PAHL

SUBSCRIBED AND SWORN TO before me, a Notary Public of the State of Utah, on this, the 25 day of June, 2002.




NOTARY PUBLIC

~~CERTIFICATE OF SERVICE~~

~~A copy of the foregoing was this day HAND DELIVERED to:~~

~~David C. Condie~~

~~Attorney at Law~~

~~32 Exchange Place, Suite 101~~

~~Salt Lake City UT 84111~~

~~DATED this _____ day of June, 2002.~~

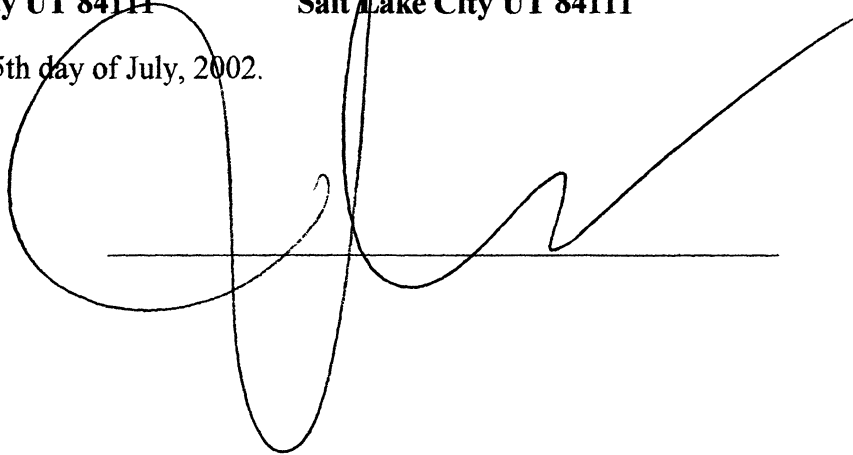
CERTIFICATE OF SERVICE

True copies of the Affidavit of Frank Pahl were this-day **MAILED** to:

David C. Condie
Attorney for KaLynn Ninow
32 Exchange Place, Suite 101
Salt Lake City UT 84111

James McConkie III
Attorney for Robert K. Mortensen
175 East 400 South, Suite 900
Salt Lake City UT 84111

DATED this 5th day of July, 2002.

A large, stylized handwritten signature in black ink, likely belonging to James McConkie III, is written over a horizontal line. The signature is fluid and cursive, with a large loop on the left side and a long, sweeping stroke extending to the right.

Bill of Sale Agreement

December 28, 1998

Whereas, the Board of Directors of Pahl's Salt Palace Loan Office, Inc. has voted to reduce the shares of outstanding common stock, from 6,000 shares down to 3,000 shares.

Therefore, the 3,000 shares of common stock originally owned by Frank Pahl will be purchased back into the treasury.

Therefore, the fifty-three thousand dollars (\$53,000.) paid to Frank Pahl by Gary Pahl will be reimbursed to Gary Pahl at the rate of seven hundred dollars (\$700.) per month, without interest, until the Corporation pays the total amount back to Gary Pahl. Payments to Gary Pahl to begin on January 10, 1999 and the same date each month until paid in full.

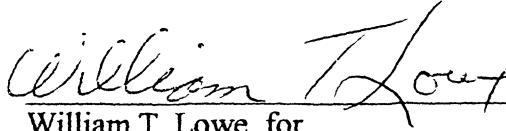
Also, the Corporation will assume the balance due to Frank Pahl, per the Bill of Sale dated May 6, 1998, at the same terms and conditions as outlined therein.

Therefore, upon successful completion of this agreement, Frank Pahl's 3,000 shares will belong to the treasury of the Corporation, leaving a balance of 3,000 common stock shares outstanding.

Three copies of this agreement were signed on this 28th day of December 1998.



Gary G. Pahl



William T. Lowe, for
Pahl's Salt Palace Loan Office

JUL 30 2002

SALT LAKE COUNTY

By _____

BR
Deputy Clerk

ROBERT H. COPIER, 727
Attorney for Respondents
Grand Staircase Land Company,
William Lowe, and Augusta Rose
200 Metro Place
243 East 400 South
Salt Lake City, Utah 84111-2803
Telephone 531-7923

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of

AFFIDAVIT OF WILLIAM LOWE

GARY G. PAHL,

Deceased.

Probate No. 003901101
Judge Tyrone E. Medley

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

WILLIAM LOWE, being first duly sworn, deposes and says:

1. I am both a director and an officer of Pahl's Salt Palace Loan Office,
Inc , a Utah corporation. On the date of Gary Pahl's death, the directors were:

1. *Gary Pahl*
2. *Augusta Rose*
3. *William Lowe*

2. Prior to his death, Gary Pahl placed 3000 shares of stock of the said
corporation under the control of the board of directors as treasury stock of the
corporation and kept control of the other 3000 shares, summarized as follows:

<i>Pahl's Salt Palace Loan Office, Inc. (treasury stock)</i>	<i>3000 shares</i>
<i>Gary Pahl</i>	<u><i>3000 shares</i></u>
<i>TOTAL SHARES ISSUED AND OUTSTANDING</i>	<i>6000 shares</i>

3. After Gary Pahl's death, the board of directors transferred all right, title, and interest to the 3000 shares of treasury stock to William Lowe. The 3000 shares were then transferred to Augusta Rose and Robert Mortensen, 1500 each.

4. I have received notice as an officer and director that Augusta Rose and Robert Mortensen subsequently sold their 3000 shares to Grand Staircase Land Company, a Utah corporation, for cash and that the following terms are included in the stock transfer documents signed by Augusta Rose and Robert Mortensen:

CONVEYANCE OF SHARES OF CORPORATE STOCK

For \$1.00 in good and valuable consideration, an amount which I have received and with which I am fully satisfied, I, hereby convey all 1500 of my shares in Pahl's Salt Palace Loan Office, Inc., a Utah corporation, to Grand Staircase Land Company, a Utah Corporation. There are no agreements or promises connected to this conveyance. I understand Robert H. Copier is director and secretary of Grand Staircase Land Company, a Utah Corporation. Robert H. Copier has at no time been my attorney in any capacity and he is not now my attorney.

5. I have received notice as an officer and director that Grand Staircase Land Company, a Utah corporation, subsequently transferred 1500 shares in Pahl's Salt Palace Loan Office, Inc., to Diamond Fork Land Company, a Utah corporation. I have not received notice of any other or further transfers of stock.

6. The current shareholders of Pahl's Salt Palace Loan Office, Inc., are:

<i>Grand Staircase Land Company</i>	<i>1500 shares</i>
<i>Diamond Fork Land Company</i>	<i>1500 shares</i>
<i>KaLynn Ninow</i>	<u><i>3000 shares</i></u>
<i>TOTAL SHARES ISSUED AND OUTSTANDING</i>	<i>6000 shares</i>

7. The board of directors never recognized KaLynn Ninow as owner of the 3000 shares transferred to William Lowe, then to Robert Mortensen and Augusta Rose, and then to Grand Staircase Land Company and Diamond Fork

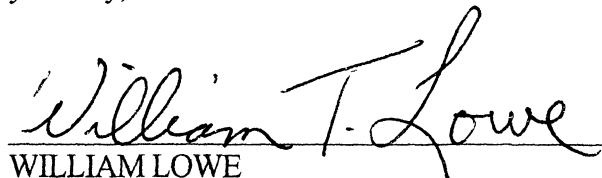
Land Company because (i) KaLynn Ninow never gave notice that she claimed to own these 3000 shares; (ii) her claim of ownership is contrary to the shareholder records of the corporation as of the date of Gary Pahl's death and as of the date that a temporary restraining order was entered herein and no court of competent jurisdiction has ever ordered a change in the records; (iii) the board of directors never voted to transfer these 3000 shares to Gary Pahl before his death or to KaLynn Ninow after Gary Pahl's death, and, (iv) there is no basis to her claim.

8. As to the 3000 shares controlled by Gary Pahl at the time of his death, the board of directors recognized KaLynn Ninow as owner of these 3000 shares based on her appointment as the personal representative of Gary Pahl's estate.

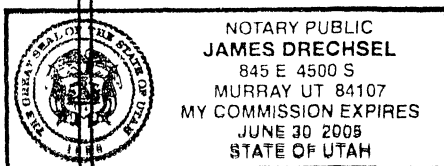
9. The board of directors never recognized KaLynn Ninow's unilateral attempt to elect new directors because (i) KaLynn Ninow never gave notice that she claimed to have elected new directors; (ii) KaLynn Ninow had no authority to elect new directors because her 3000 shares are not a majority and not sufficient to create the shareholder quorum needed to elect new directors; and, (iii) Augusta Rose and William Lowe have continued to serve as directors because successors have never been elected or qualified to replace them on the board of directors.


10. I have received no notice of any quorum of shareholders assembling since Gary Pahl's death for the purpose of transacting any shareholder business.

DATED this 29th day of July, 2002.


WILLIAM LOWE

SUBSCRIBED AND SWORN TO before me, a Notary Public of the State of Utah, on this, the 29th day of July, 2002.




NOTARY PUBLIC

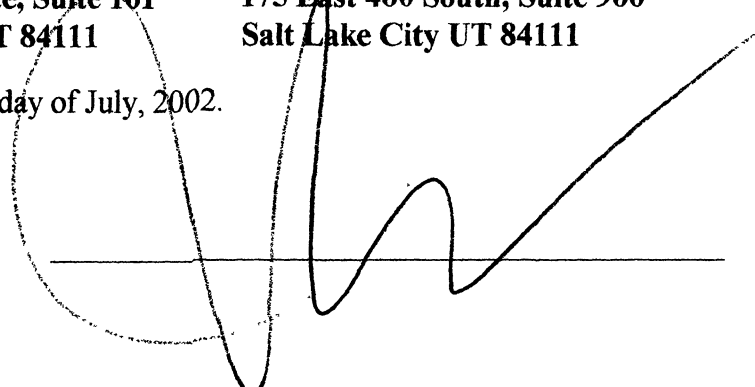
CERTIFICATE OF SERVICE

True copies of the foregoing were this-day **HAND-CARRIED** to:

David C. Condie
Attorney for KaLynn Ninow
32 Exchange Place, Suite 101
Salt Lake City UT 84111

James McConkie III
Attorney for Robert K. Mortensen
175 East 400 South, Suite 900
Salt Lake City UT 84111

DATED this 30th day of July, 2002.

A handwritten signature in black ink, appearing to be "James McConkie III", is written over a horizontal line. The signature is stylized with a large loop and a long, sweeping tail that extends to the right.

by reference. Additionally, the evidence presented during the course of the hearing held May 30-31, 2002, as well and the Findings of Fact and rulings made by the Court from the bench are all incorporated herein by reference as well. A transcript of the hearing is being prepared, and will be submitted as soon as it becomes available.

The affidavits and evidence presented at the Preliminary Injunction hearing, along with the other documentation and evidence on file, clearly establish that Ryan is the beneficial owner of all of the 6,000 shares of outstanding stock in Pahl's Salt Palace Loan Office, Inc.

STATEMENT OF UNDISPUTED FACTS

A. NUMBER AND CLASS OF OUTSTANDING SHARES

1. The Articles of Incorporation of the Loan Office (attached to Ninow Affidavit as Exhibit "1") provide for sixty thousand dollars of capital stock to be authorized and divide the sixty thousand dollars into six thousand shares of common voting stock with a par value of ten dollars per share. (See ART. OF INCORP. art. IV.)
2. Article II, Section 1 of the Bylaws of the Loan Office (Bylaws attached to Ninow Affidavit as Exhibit "2") attests to the same number and value of shares, stating, "The aggregate number of shares of Capital Stock is 6,000 shares with the par value of \$10.00 per share." Moreover, the shares cannot be divided into classes "and all stock of the corporation shall be of the same class and have the same rights." (ART. OF INCORP. art. IV.)
3. Shareholders also have no pre-emptive right to acquire additional shares of stock in the corporation. See ART. OF INCORP. art. V. Thus, only one class containing a maximum

number of six thousand shares of common voting stock in the Loan Office can be issued and outstanding. (See Ninow Affidavit at ¶ 5 ; see Affidavit of Frank H. Pahl (“Frank H. Pahl Affidavit”) at ¶ 2).

4. The Articles of Incorporation of the Loan Office have never at any time been amended to allow more than six thousand (6,000) shares of capital stock to be authorized. (See Ninow Affidavit at ¶ 6; see Frank H. Pahl Affidavit at ¶ 3).

B. CHAIN OF TITLE: 3000 SHARES FROM GUNTHER A. PAHL TO GARY G. PAHL

5. On March 3, 1984, a stock certificate (attached to Ninow Affidavit as Exhibit “3”) was issued to A. Gunther Pahl (“Gunther”) as holder of three thousand shares of the capital stock of Pahl’s Salt Palace Loan Office, Inc.
6. After Gunther’s death on February 24, 1996, his three thousand shares passed to his surviving wife, Beverly Jean Pahl, via their joint will (attached to Ninow Affidavit as Exhibit “4”). The will was executed on May 7, 1981, and stated in part, “We [A. Gunther and Beverly Pahl] give, devise and bequeath to each other, respectively, all of such right, title and interest as we respectively hold, possess and enjoy in and to our personal and real property which we own or may own, hereby giving and devising all of the personal and real property of the one who may die first to the survivor.” (See Ninow Affidavit at ¶ 7).
7. On June 22, 1996, Beverly Pahl assigned (attached to Ninow Affidavit as Exhibit “5”) Gunther’s three thousand shares to her son, Gary G. Pahl. In the letter of assignment, Beverly Pahl stated that it was the intent of the late A. Gunther Pahl to leave his full interest

in the shares to Gary G. Pahl. Beverly Pahl further stated that she received Gunther's three thousand shares instead of Gary G. Pahl via the joint will because Gunther Pahl never took the necessary measures to insure his intent would be legally carried out. In addition, Beverly Pahl stated that because "[i]t is also my desire for our son, Gary Gunther Pahl, to fully own the fifty percent (50%) interest in PAHL'S SALT PALACE LOAN OFFICE, INC., I hereby assign and transfer unto Gary Gunther Pahl, three thousand (3,000) shares represented by the attached certificate" (emphasis omitted). (See Ninow Affidavit at ¶ 8).

8. Five of Gary G. Pahl's sisters and Lowe signed as witnesses to the assignment. As drafter of the assignment and a witness, Lowe must have recognized Gunther Pahl as the owner of three thousand shares in the Loan Office at the time of his death, and that the shares had passed to Beverly Pahl via the joint will and then to Gary G. Pahl by assignment. (See Ninow Affidavit at ¶ 9).

C. CHAIN OF TITLE: 3000 SHARES FROM FRANK H. PAHL TO GARY G. PAHL

9. On May 6, 1998, Frank H. Pahl and Gary G. Pahl both signed a Bill of Sale (attached to Frank H. Pahl Affidavit as Exhibit "1") drafted by Lowe, which stated in part, "It is my [Frank H. Pahl's] desire to sell my full interest in Pahl's Salt Palace Loan Office, Inc. to Gary G. Pahl. My full interest consists of 3,000 shares Upon successful completion of this Bill of Sale, my [Frank H. Pahl's] 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl. The three thousand shares amount to fifty percent (50%) of the

business. William T. Lowe is holding the three thousand-share certificates until this Bill of Sale is fulfilled in whole." In addition to the signatures of Frank H. Pahl and Gary G. Pahl, Lowe signed the Bill of Sale as a witness. (Bill of Sale, Exhibit 1, Affidavit of Frank Pahl dated May 16, 2002.)

10. The purchase price for Frank Pahl's 3000 shares was \$96,000.00. (Bill of Sale, Exhibit 1, Affidavit of Frank Pahl dated May 16, 2002.)
11. The Bill of Sale called for a down payment of \$46,000.00 and Frank Pahl agreed to carry a note on the remaining \$50,000.00 which was to be repaid monthly at the rate of \$1,000.00. (Bill of Sale, Exhibit 1, Affidavit of Frank Pahl dated May 16, 2002.)
12. The Bill of Sale also indicates that "Upon successful completion of this Bill of Sale, my 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl." (Bill of Sale, Exhibit 1, Affidavit of Frank Pahl dated May 16, 2002.)
13. Gary Pahl did pay the \$46,000.00 down payment, and made monthly payments as required. The payment schedule was accelerated and completely paid in full as of April 17, 2000. (Affidavit of KaLynn Ninow in Support of Motion for Summary Judgment, paragraph 5)
14. Attesting to the fact that he had been paid in full for the 3,000 shares of stock, on March 13, 2002, Frank H. Pahl signed a Ratification of Payment for Bill of Sale Dated May 6, 1998 (attached to Frank H. Pahl Affidavit as Exhibit "2"), acknowledging and ratifying that said Bill of Sale was paid in full by Gary G. Pahl before his date of death. (See Frank H. Pahl Affidavit at ¶ 4).

15. The acceleration of the payment schedule took place because Frank H. Pahl entered into a subsequent Bill of Sale (attached to Frank H. Pahl Affidavit as Exhibit "3") dated September 25, 2000 to transfer Frank's interest in the buildings located at 1588 and 1594 South State Street, Salt Lake City Utah to the Loan Office. Before Frank would allow the sale of his interest in the buildings to go through, he insisted that Gary pay him in full for his stock in the Loan Office. To meet Frank's demands, Gary refinanced his home and obtained a \$10,000.00 loan from his mother, Beverly Pahl. The money from the refinancing and the loan was used to pay Frank in full for his stock. Therefore, pursuant to the terms of the May 6, 1998 Bill of Sale and its "successful completion", said three thousand shares belonged to Gary G. Pahl at the date of his death. (See Frank H. Pahl Affidavit at ¶ 5; see Ninow Affidavit at ¶ 10).
16. Frank H. Pahl has never at any time sold, transferred, devised, bequeathed or assigned any of his shares to any person other than to sell the said three thousand (3,000) shares to Gary G. Pahl via the said Bill of Sale referenced above. (See Frank H. Pahl Affidavit at ¶ 6).
17. Additionally, Frank H. Pahl has never at any time appointed or designated an agent or ratified any agent's actions to purportedly sell the said three thousand (3,000) shares to any other person. He is also unaware of any person ever attempting to claim that they have sold Frank's shares on his behalf or of any person attempting to claim that they have acquired Frank's shares either directly or through an agent or other transaction. (See Frank H. Pahl Affidavit at ¶ 7).

D. RYAN PAHL'S RIGHTS OF OWNERSHIP AS SOLE DEVISEE

18. As previously established, Gary G. Pahl passed away on June 25, 2000. On September 6, 2000, the Third Judicial Court appointed KaLynn Ninow Personal Representative of Gary G. Pahl's estate and decreed that Gary G. Pahl died intestate (attached to Ninow Affidavit as Exhibit "6").
19. Pursuant to the laws of intestacy under the Uniform Probate Code, all property in Gary G. Pahl's estate passed to his son Ryan B. Pahl, as sole heir (devisee). See U.C.A. § 75-2-106(2). (See Ninow Affidavit at ¶ 11; see Affidavit of Ryan B. Pahl ("Ryan B. Pahl Affidavit") at ¶ 2; see Frank H. Pahl Affidavit at ¶ 8).
20. On May 15, 2002, KaLynn Ninow, holding legal title to the 6,000 shares of common stock of the Loan Office executed a shareholder action by consent in accordance with Utah Code Annotated §16-10a-704, which was sent certified mail along with other documents to William T. Lowe, Augusta Rose and Robert Mortensen and Robert Copier on or about May 23, 2002. (Certificate of Service, filed May 23, 2002).
21. The action by shareholder consent removes Lowe, Rose and Mortensen as officers and directors and names Ryan Pahl, KaLynn Ninow and Richard Ninow as directors of the corporation. Ryan B. Pahl was subsequently elected/appointed as President and Treasurer, Richard Dean Ninow as Vice President, and KaLynn Ninow as Secretary. (Affidavit of KaLynn Ninow, paragraph 37, May 16, 2002)

**E. DOCUMENTS EVIDENCING AGREEMENTS EXECUTED BY GARY PAHL
PRIOR TO HIS DEATH**

22. On May 20, 2002, a Temporary Restraining Order was issued which required that
- “William T. Lowe, Augusta Rose, Robert K. Mortensen and any of their agents, servants, employees, officers, directors, attorneys, and all those acting in concert with them, are ordered to immediately turn over to Ms. Ninow or her attorneys all documents, records, memoranda, inventory, keys to the premises, computer files, equipment, banking records, checkbooks, passbooks, and all other like items pertaining to the Loan Office or to the management of the real property located at 1588 & 1594 South State Street in Salt Lake City, Utah, and shall immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the aforementioned real estate.” (Temporary Restraining Order, paragraph 2, May 20, 2002 on file in Court record.)
23. On May 23, 2002, William T. Lowe caused 35 pages of material to be turned over to Damian E. Davenport. A representative of Mr. Lowe indicated to Mr. Davenport that those 35 documents constituted “all that they had.” (Affidavit of Damian E. Davenport, paragraph 7.)
24. At the beginning of the hearing on KaLynn Ninow’s motion for Preliminary Injunction, Mr. Lowe again represented to the Court through his attorney, Robert Copier, that he had turned over all of the corporate documents which were in his possession.
25. Mr. Copier also made it clear that he did not represent Pahl’s Salt Palace Loan Office,

Inc., and that he only represented Mr. Lowe.

26. On May 27, 2002, William T. Lowe, Robert Mortensen and Augusta Rose each signed a “Response to Order to Show Cause” which also contained a brief “Argument in Opposition to Injunction.”(Response to Order to Show Cause, filed May 28, 2002)
27. Seven documents were attached to the aforementioned Response to Order to Show Cause. The first document, entitled “Amendment of By-Laws of Pahl’s Salt Palace Loan Office, Inc.” and purportedly signed by Gary Pahl and William T. Lowe, was found by the Court to be a forgery and a fraud based upon the testimony of George Throckmorton. (Findings of Fact, issued orally May 31, 2002.)
28. The second document attached to the Response to Order to Show Cause was entitled “Bill of Sale Agreement” and bore the date of December 28, 1998. Lowe, Mortensen and Rose indicate in their signed response that under the terms of this document “Gary G. Pahl sold, and Pahl’s Salt Palace Loan Office, Inc., purchased, the 3000 shares of common stock originally owned by Frank Pahl, leaving Gary G. Pahl with only 3000 shares at death.” (Id. Page 2; *see* “Bill of Sale Agreement” Petitioner’s Exhibit 1, from hearing on Preliminary Injunction, May 30,2002.)
29. According to the terms of the agreement, Gary had paid \$53,000.00 to Frank Pahl for the purchase. This amount was to be repaid to Gary by the corporation at the rate of \$700.00 per month beginning January 10, 1999 until paid in full. (Id.)
30. The corporation did not and has not reimbursed either Gary or his estate for the purchase

of the shares acquired from Frank Pahl back into the treasury of the corporation.

Additionally, when the payment schedule to Frank was accelerated in the spring of 2000, the money to pay Frank in full came from Gary's personal funds, and not the funds of the corporation. None of the requirements or conditions precedent of the December 28, 1998 Bill of Sale Agreement which would have transferred Gary's shares into the treasury of the corporation have ever been met. (Affidavit of KaLynn Ninow in Support of Motion for Summary Judgment, paragraphs 6-8.)

31. Minutes of alleged Board of Directors Meetings were also submitted, which purported to transfer the 3000 shares referred to in the preceding paragraph to William T. Lowe, who one week later purported to transfer said shares equally between Rose and Mortensen. (Id.; see Minutes dated August 25, 2000 and August 28, 2000.)
32. On June 4, 2002, following the issuance of the Preliminary Injunction referred to above, Robert Copier, attorney for William T. Lowe, filed with the Court a "Stock Transfer Notice and Request for Notice" purporting to transfer 3000 shares of stock in Pahl's Salt Palace Loan Office, Inc., (1500 transferred outright and 1500 held in escrow by William T. Lowe) to a Utah corporation known as "Grand Staircase Land Company, Inc." (See Court file and docket)
33. On July 5, 2002, Robert Copier filed another "Notice Regarding A Transfer of Corporate Shares of Stock" purporting to give notice that 1500 shares of stock in Pahl's Salt Palace Loan Office Inc., had been transferred from Grand Staircase Land Company to "Diamond

Fork Land Company.”(See Court file and docket.)

34. A “Certified Copy of the Entire File” from the Utah Department of Commerce, attached hereto as Exhibit A, demonstrates that Robert Copier is the only officer and the only director of both Diamond Fork Land Company, and Grand Staircase Land Company.

35. Section 5 of the By-Laws of Pahl’s Salt Palace Loan Office, Inc., reads as follows:

“Section 5. TRANSFER OF STOCK. The shares of the corporation shall be transferable only on the books of the corporation upon surrender of the certificate or certificates representing the same, properly endorsed by the registered holder or by his duly authorized attorney, such endorsement or endorsements to be witnessed by one witness. The requirement for such witnessing may be waived in writing upon the form or endorsement by the President of the corporation.” (By-Laws, Exhibit 2, Affidavit of KaLynn Ninow, May 16, 2002.)

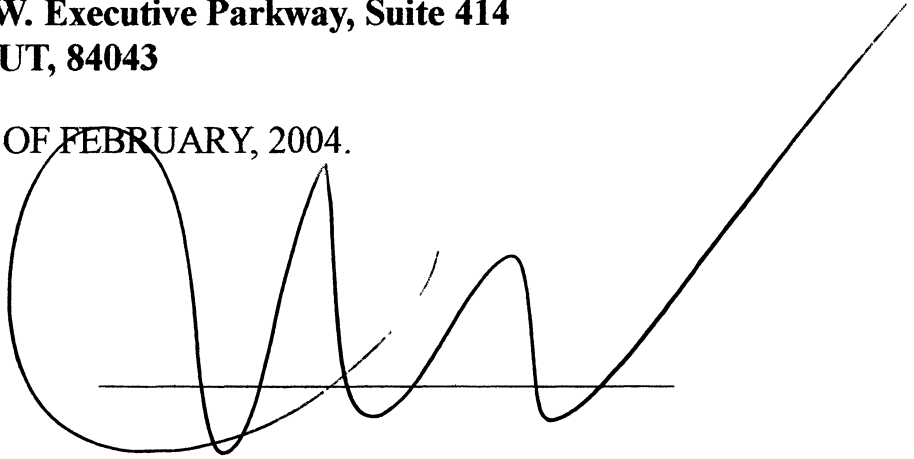
36. No corporate stock transfer ledger or certificates or any kind of document purporting to give a history of transfers of the corporation’s stock have been provided by Lowe, Rose or Mortensen. Despite diligent searches of the offices and records located at Pahl’s Salt Palace Loan Office, no such document or ledger has been located. Additionally, no other corporate documents, certificates or records of any kind have been turned over by Lowe, Rose or Mortensen. (Affidavit of KaLynn Ninow in Support of Motion for Summary Judgment, paragraph 5)

CERTIFICATE OF SERVICE

Copies of the foregoing were this-day **MAILED** to:

**Daniel F Van Woerkom
Sandra K. Weeks
Van Woerkom Reid & Weeks , L.C.
2975 W. Executive Parkway, Suite 414
Lehi, UT, 84043**

DATED THIS 6TH DAY OF FEBRUARY, 2004.

A large, stylized handwritten signature in black ink, likely belonging to Daniel F. Van Woerkom, is written over a horizontal line. The signature consists of several loops and a long, sweeping tail that extends towards the upper right corner of the page.