

1993

# Zions First National Bank a national banking association, and 4447 Associates a Utah general partnership v. First Security Financial a Utah corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK, a  
national banking association,  
and 4447 ASSOCIATES, a Utah  
general partnership,

Plaintiff-Appellant,

v.

FIRST SECURITY FINANCIAL, a  
Utah corporation,

Defendant-Appellee.

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Case No. 930923-01

Priority No. 15

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BRIEF OF APPELLEE

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDGE  
DISTRICT COURT OF SALT LAKE COUNTY, Honorable Judge G. Noel

---

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UTAH COURT OF APPEALS  
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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK, a	:	
national banking association,	:	
and 4447 ASSOCIATES, a Utah	:	
general partnership,	:	
Plaintiff-Appellant,	:	Case No. 930923-CA
v.	:	Priority No. 15
FIRST SECURITY FINANCIAL, a	:	
Utah corporation,	:	
Defendant-Appellee.	:	

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BRIEF OF APPELLEE

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY, Honorable Frank G. Noel

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### STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-3(3)(j) and 78-2a-3(2)(k) (1992).

### STATEMENT OF THE ISSUES

I. Did the district court err in ruling that because First Security did not receive notification to the contrary, it was entitled to satisfy its obligations solely with Capitol, the original account creditor?

A. Did the district court err in holding that section 70A-9-318 governs this action and requires actual receipt of notification?

Standard of Review: In reviewing the legal conclusions of the district court, this court conducts a de novo review. Kennecott Copper Corp. v. Salt Lake County, 799 P.2d 1156 (Utah 1990).

B. Is the district court's factual finding that First Security did not receive notification clearly erroneous?<sup>1</sup>

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<sup>1</sup>4447 Associates states that the question is whether the district court erred "in ruling that First Security, after being put on notice of the collateral assignment of the Purchase Agreement to Zions, did not have a duty to obtain the consent of Zions prior to entering into the Settlement Agreement" with Capitol. Brief of Appellants at 4 (emphasis added). To phrase the issue in this way is misleading. The district court found that First Security was not put on notice of the assignment.

Standard of Review: Regarding the factual findings of the district court, the appellate court determines whether all of the evidence, as marshaled by the appellant, including all reasonable inferences drawn therefrom is insufficient to support the district court's findings.<sup>2</sup> Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

II. Did the district court err in ruling that, as a matter of law, the purchase price should be adjusted downward by \$1,000,000.00.

Standard of Review: This issue was decided by the district court on a motion for partial summary judgment. Accordingly, the appellate court reviews the facts in the light most favorable to the party opposing summary judgment and affirms a grant of summary judgment only if the moving party is entitled to judgment as a matter of law. First American Commerce

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<sup>2</sup>4447 Associates sets forth in its brief the standard of review for mixed questions of law and fact. It is unclear why 4447 Associates cites this standard because it does not argue anywhere in its brief that this appeal raises mixed questions of law and fact. "A mixed question of law and fact is one in which 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether . . . the rule of law as applied to the established facts is or is not violated.'" State v. Vigil, 815 P.2d 1296, 1299 (Utah Ct. App. 1991) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)). This is not the circumstance here.



Co. v. Washington Mut. Sav. Bank, 743 P.2d 1193, 1194  
(Utah 1987).

DETERMINATIVE STATUTORY PROVISIONS

I. Utah Code Ann. § 70A-9-318(3):

The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

II. Utah Code Ann. § 70A-1-201(26) (b):

A person "receives" a notice or notification when:

(i) it comes to his attention; or

(ii) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal is from the judgment of the Third Judicial District Court of Salt Lake County, Honorable Frank G. Noel. The lawsuit was instigated by Zions First National Bank ("Zions") on March 3, 1987, to collect amounts allegedly due to Zions under an agreement between First Security Financial ("First Security") and Capitol Thrift & Loan Company ("Capitol"). Capitol had

previously assigned, as collateral, its interest in the agreement to Zions. Capitol later entered into a settlement agreement with First Security extinguishing First Security's debt to Capitol under the agreement.

On February 23, 1990, First Security filed a motion for partial summary judgment. That motion was granted by the district court on May 24, 1990. (A copy of the Order of Partial Summary Judgment is attached as Addendum A.) The court found that, as a matter of law, the purchase price identified in the agreement between First Security and Capitol "shall be adjusted downward in the amount of One Million Dollars (\$1,000,000.00)." Record at 398.

In June 1990, Zions assigned its interest in the agreement to the appellant, 4447 Associates. 4447 Associates was subsequently substituted as the sole party plaintiff.<sup>3</sup>

On January 6 and 7, 1991, the remaining issues in the case were tried before the Honorable Frank G. Noel. On January 30, 1992, Judge Noel issued a memorandum decision holding that the plaintiff, 4447 Associates, "failed to prove that First Security received sufficient notice of the assignment, as required by law," to preclude it from satisfying its debt with the original creditor, Capitol. Memorandum Decision at 8 (a copy

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<sup>3</sup>The court reserved until after any appeal the issue of First Security's right to collect attorneys' fees in this matter from Zions, the original plaintiff. Record at 783.

of the Memorandum Decision is attached as Addendum B). On September 25, 1992, the court entered Findings of Fact and Conclusions of Law ("Findings"). (A copy of the Findings is attached as Addendum C.) Judgment was entered in favor of First Security on November 3, 1992. On December 2, 1992, 4447 Associates filed its notice of appeal from the district court's judgment.

## II. STATEMENT OF FACTS

After a two-day trial, the district court made the following findings of fact:

1. First Security Financial ("First Security") and Capitol Thrift & Loan Company ("Capitol") were parties to an Asset Purchase Agreement and a Closing Agreement dated December 10, 1982, and December 13, 1982, respectively. Findings (Addendum C) at ¶ 1. These two documents are collectively referred to by the district court and hereafter in this brief as the "Purchase Agreements."

2. Pursuant to the Purchase Agreements, First Security purchased certain assets from Capitol. The Asset Purchase Agreement provided that First Security would pay Capitol \$1,007,777.42 on December 13, 1985. The Purchase Agreements also provided for quarterly interest payments to be paid from First Security to Capitol in the amount of \$25,194.44. Findings at ¶ 2.

3. The Purchase Agreements also provided that the sum of \$1,007,777.42 due on December 13, 1985, was subject to an offset amount not to exceed \$1,000,000.00. Findings at ¶ 3.

4. Richard A. Christenson ("Christenson") was the president, chief operating officer, and a director of First Security from the time of its inception in December 1982 through November 1984. He was also president and chief executive officer of Capitol until June 1984. Findings at ¶ 4.

5. From December 1982 to and including September 27, 1984, First Security paid its quarterly interest installments to Capitol. Findings at ¶ 5.

6. In June 1984, the shareholders of Capitol, including Christenson, sold all of their Capitol stock to AFS Holding Company, an affiliate of the Bertagnole Investment Company. In June 1984, Christenson ceased, for a period of time, to have any ownership interests in Capitol, and ceased to function as an officer or director. Findings at ¶ 6.

7. In the summer of 1984, Capitol owed Zions First National Bank ("Zions") approximately \$870,000 on a revolving line of credit. This line of credit was unsecured. Findings at ¶ 7.

8. On or about September 28, 1984, Emanuel A. Floor, acting as president of Capitol, and Zions executed an Assignment and Security Agreement, giving Zions a security interest in Capitol's receivable owing on the Purchase Agreements and

directing Capitol to place First Security on notice of the Assignment and Security Agreement. This Assignment and Security Agreement ("Assignment") was given to secure a one-million-dollar note, dated September 28, 1984, which Capitol executed in favor of Zions. The purpose of this note was to refinance the \$870,000 obligation which was previously owed to Zions by Capitol.

Findings at ¶ 8.

9. Christenson personally guaranteed the September 28, 1984 Note up to \$870,000. Findings at ¶ 9.

10. For the purposes of giving notice to First Security concerning matters relating to the Asset Purchase Agreement, the only address provided to Capitol by First Security was:

First Security Financial  
P.O. Box 30006  
Salt Lake City, Utah 84130  
ATTN: Treasurer

Between December 1982 and July 1985, any mail sent to this address would have been delivered to Elmer Tucker. Findings at ¶ 10.

11. Elmer Tucker was the treasurer of First Security from its inception through and beyond July 10, 1985. Findings at ¶ 11.

12. Emanuel A. Floor in his capacity as president of Capitol executed a Notice of Assignment on or about September 28,

1984. That Notice of Assignment was mailed to First Security but was never received by First Security.<sup>4</sup> Findings at ¶ 12.

13. Elmer Tucker never received the notice signed by Mr. Floor, and was never made aware of the Assignment until 1986. Findings at ¶ 13.

14. No individual representing or authorized to act on behalf of First Security received written notice of the Assignment prior to 1986. Findings at ¶ 14.

15. No one acting on behalf of Zions sent written notice of the Assignment to First Security prior to 1986, nor did Zions communicate with First Security regarding the Assignment at any time between September 8, 1984, and July 10, 1985. Findings at ¶ 15.

16. Zions never received written acknowledgment from First Security that First Security had received notice of the Assignment or notice of any purported obligation to pay any monies under the receivable to Zions. Findings at ¶ 16.

17. On September 28, 1984, Christenson was president, chief executive officer, and a director of First Security Financial. At that same time, he was not an officer, director,

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<sup>4</sup>The testimony at trial was that Mr. Floor did not actually mail the notice himself. Rather, he signed the document "and then someone else took care of delivery." Transcript at 138. No testimony was offered at trial concerning the identity of the individual who actually mailed the document, nor that the document was in fact mailed.

or employee, nor had he any ownership interests in Capitol. Findings at ¶ 17.

18. To the extent that Allen Potts ("Potts"), an employee of Zions, discussed with Christenson the Assignment, the discussions were primarily of an intent by Zions to enter into the agreement, all of which discussions preceded execution of the Assignment by Capitol and Zions. Findings at ¶ 18.

19. Capitol did not default on its obligations secured by the Assignment until at least December 1985. Findings at ¶ 19.

20. The Assignment and Security Agreement, and the Notice of Assignment signed by Mr. Floor both stated that First Security was obligated to make all payments owing under the receivable payable jointly to Capitol and Zions during the entire term of the Purchase Agreement.<sup>5</sup> Zions never received directly from First Security any of the quarterly interest payments it claims to have been entitled to under the Assignment. Findings at ¶ 20.

21. Zions received interest and principal payments on the Capitol loan directly from Bertagnole individuals or entities. Findings at ¶ 21.

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<sup>5</sup>With regard to the Notice of Assignment, the district court found that First Security did not receive the Notice. Findings at ¶ 12. With regard to the Assignment and Security Agreement, First Security was not a party to that agreement and there was no testimony at trial that Christensen was aware of the specific terms of the agreement.

22. Zions never attempted to collect any amounts from First Security under the Assignment until after December of 1985. Findings at ¶ 22.

23. Prior to July 1985, Christenson delivered on two separate occasions his personal financial statements to the president of First Security, Bud Cummings. Paragraph 3 of each of those financial statements reads as follows:

This represents my portion of the ownership of Capitol Thrift & Loan based on the contract amount I have with First Security Financial. This receivable has been pledged to Zions First National Bank.

Findings at ¶ 23.

24. A third financial statement containing the identical paragraph 3 referenced above was delivered by Christenson's attorney to First Security's attorneys prior to July 1985. Findings at ¶ 24.

25. On or about July 10, 1985, First Security, Christenson and Capitol entered into that certain Settlement Agreement, Mutual Release, and Covenant Not To Sue, whereby First Security's obligations to Capitol were satisfied in full. See Findings at ¶ 25.

26. In late 1986, 4447 Associates borrowed over three million dollars from Zions, and used those proceeds to purchase, among other things, a participation interest in the Capitol note, which included a security interest in the collateral for the note, First Security's receivable. In June 1990, Zions assigned



to 4447 Associates all of its ownership interests in the Capitol loan and the First Security receivable. Findings at ¶ 26.

#### SUMMARY OF ARGUMENT

- I. THE DISTRICT COURT PROPERLY RULED THAT BECAUSE FIRST SECURITY DID NOT RECEIVE NOTIFICATION TO PAY ZIONS, IT WAS ENTITLED TO SATISFY ITS OBLIGATIONS SOLELY WITH CAPITOL, THE ORIGINAL CREDITOR.

The district court expressly found that First Security did not receive notification of the assignment and the instruction to make payments to Capitol's assignee, Zions. The court applied the proper legal standard, and its factual findings are not clearly erroneous. Therefore, this court should affirm the district court's judgment. Given the finding that First Security did not receive notification, First Security was entitled by statute to satisfy its obligation with the original account creditor, Capitol.

- II. THE DISTRICT COURT CORRECTLY HELD THAT THE PURCHASE PRICE MUST BE ADJUSTED DOWNWARD BY \$1,000,000.

Even if First Security were liable to 4447 Associates, the district court correctly held that the purchase price must be adjusted downward by one million dollars according to the plain language of the Purchase Agreements.<sup>6</sup> The argument put forth by 4447 Associates is contrary to the unambiguous language of the Purchase Agreements and to common sense.

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<sup>6</sup>This court needs to address this issue only if it determines that the judgment of the district court must be reversed on the issue of notification.

## ARGUMENT

- I. THE DISTRICT COURT PROPERLY HELD THAT BECAUSE FIRST SECURITY DID NOT RECEIVE NOTIFICATION TO PAY ZIONS, IT WAS ENTITLED TO SATISFY ITS OBLIGATIONS SOLELY WITH CAPITOL, THE ORIGINAL CREDITOR.

The district court held:

The court is of the opinion that under the circumstances of this case it was necessary for First Security to actually receive notice of the pledge of the collateral before it could be burdened with a legal obligation to make payments under the Asset Purchase Agreement to the assignee, that is Zions. The notice must be sufficient so that someone in the position of First Security must rely with some degree of certainty on the notice to begin making payments under the contract to someone other than the obligee. First Security was obligated to make payments to someone. To make those payments to someone other than the original obligee would put them at risk and may eventually result in their having to pay twice under the contract. Therefore, some vague notice that the contract had been pledged as collateral was not, in the Court's opinion, sufficient notice. In addition, a pledge of collateral may mean at least one of two things. It may mean that the payments under the contract at the time of the assignment were to be made to the assignee, or it may mean that an effort to collect on the contract by the assignee would not be made until the assignor defaulted on it's [sic] obligation. First Security cannot be left to guess as to whom they must make their payments.

. . .

It is worth noting again that a pledge of a note as collateral does not necessarily mean that the obligor is obligated to immediately begin making payments under the obligation to the assignee of the obligation. Indeed the conduct of the parties clearly demonstrates

to the Court that Zions did not intend to receive payments under the Asset Purchase Agreement from First Security until Capitol defaulted on the loan.

Memorandum Decision (Addendum B) at 3-4, 7. The district court specifically held that "it was necessary for First Security to actually receive notice of the pledge of the collateral before it could be burdened with a legal obligation to make payments under the asset purchase agreement to the assignee, that is Zions." Id. at 3. 4447 Associates had the burden of proof at trial. The district court held that 4447 Associates had not met this burden and had failed to prove that First Security received notification of the assignment. Id. at 8.

As set forth below, the decision of the district court should not be overturned. First, the district court applied the proper legal standard. Second, its factual findings are accurate, or at the very least cannot be shown to be clearly erroneous.

A. The District Court Properly Held That Section 70A-9-318 Requires Actual Receipt of Notification.

The district court properly held that this case is governed by section 70A-9-318 of the Utah Code. That statute provides:

The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee.

Utah Code Ann. § 70A-9-318(3) (1990) (emphasis added). In this case, First Security was the account debtor. Under the plain language of section 70A-9-318, First Security was entitled to pay its creditor, Capitol, until it received notification of two things: (1) that Capitol had assigned the contract to Zions, and (2) that payment was to be made to the Zions. Id. The district court did not err in ruling that the plain language of this statute applies here.

In an effort to convince this court to reverse the judgment of the district court, 4447 Associates argues that "Zions was not required to provide actual notice to First Security to make all future payments to Zions." Brief of Appellants at 22. 4447 Associates goes so far as to argue that "Section 70A-1-201(25-27), rather than Section 70A-9-318, governs the manner of giving notices of assignments of contract rights." Id. at 26 (emphasis added). As demonstrated below, both of these arguments are frivolous and should be rejected by this court.

1. In the Absence of Receipt of Notification, First Security Was Entitled To Satisfy Its Obligation To Its Original Creditor, Capitol.

4447 Associates makes the argument that "Zions was not required to notify First Security where or to whom it should pay money under the Purchase Agreements." Brief of Appellants at 24. See also id. at 22. 4447 Associates argues that notice was not required because the assignment granted Capitol the right to

continue to collect the balance due.<sup>7</sup> This is precisely the point relied upon by First Security and by the district court. Because, as 4447 Associates points out, "Capitol had the right to continue to collect the balance due," First Security was entitled to deal with Capitol in extinguishing its debt until it received notification to the contrary.

Under the express terms of the Utah statute, until First Security received notification to make the payments to Zions, First Security was entitled to satisfy its obligations with Capitol, the original creditor. Zions failed to do so at its peril. In a similar case, the Utah Supreme Court held that "absent notice, it is to be noted that the claims of the Bank, as assignee, were subject to any defense the Church, as account debtor, had against Cook, as assignor, 70A-9-313(1)(a)." Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints, 534 P.2d 887, 891 (Utah 1975). In this case, First Security entered into a settlement agreement

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<sup>7</sup>4447 Associates even cites the case of Jack B. Parson Cos. v. Nield for the proposition that when an assignment is made for purpose of security only (as this one was), the assignment has "no significance whatever once the loan was paid." 751 P.2d 1131, 1133 (Utah 1988) (quoting Jefferies v. Citizens Fin. Co., 319 P.2d 858, 858 (Utah 1958)). See Brief of Appellants at 23. 4447 Associates points out that this case does not involve the assignment of real estate, as does Jack B. Parson Cos. Id. at 24, n.68. However, if the Jack B. Parson Cos. case applies at all, it establishes that the assignment in this case should be "treated as a mortgage" and that the assignment has "no significance whatever" now that the debt has been paid. Jack B. Parson Cos., 751 P.2d at 1133.

with Capitol that fully extinguished First Security's debt. Absent receipt of notification by First Security prior to the time the settlement agreement was entered into, 4447 Associates, as the successor in interest to Zions, is subject to the defense that the debt has been completely satisfied.

The district court's decision in this case is supported not only by the clear language of the statute, but by sound public policy. It is fundamentally unfair to require First Security to pay its debt twice when Zions took no steps to ensure that First Security received notification that payments should be made to Zions. There was testimony at trial that the practice "normally" followed by Zions when sending notice of an assignment was to "send [the debtor] a letter and ask for their acknowledgement." Transcript at 106. Mr. Potts of Zions testified that "when you got [the acknowledgement] back that's when you decided to sign it." Id. This testimony makes clear that the rule of law contained in the UCC and followed by the district court does not impose an undue burden upon assignees. Indeed, the rule, if followed, avoids the very type of dispute now before the court in which an assignee is contending that a debtor should have to pay a debt twice. The UCC is based upon the sound public policy that the debtor must actually receive notification of the assignment and the duty to pay the assignee.

It is an easy matter for the assignee to ensure that receipt is received. For example, the assignee can send the

letter by registered mail, or it can follow the practice "normally" followed by Zions in requesting an acknowledgment.

In this case, the court found that Zions not only failed to send a notice by registered mail or to request an acknowledgement, but that Zions did not send any kind of a written notification. Findings (Addendum C) at ¶ 15. The district court found further that Zions did not even communicate with First Security regarding the assignment between the time the assignment was executed and the time First Security settled its debt with Capitol. The court found: "[N]or did Zions communicate with First Security regarding the Assignment at any time between September 8, 1984 [a date prior to the Assignment] and July 10, 1985 [the date of the Settlement Agreement]." Id. Given the lack of notification or communication from Zions during the relevant time period, First Security was free--as a matter of law-- to satisfy its obligation with its original account creditor.

2. By Statute, the Determinative Question Is Not Whether Zions Gave Notice But Whether First Security Received Notification.

4447 Associates spends much of its brief arguing that Zions gave notice to First Security of the Assignment. First, as noted above, the district court found that precisely the opposite is true. As quoted above, the district court found: "No one acting on behalf of Zions sent written notice of the assignment to First Security prior to 1986, nor did Zions communicate with

First Security regarding the Assignment at any time between September 8, 1984 and July 10, 1985." Findings at ¶ 15. Second, as set forth below, even if the district court's factual finding that notice of the assignment was not given is clearly erroneous, the judgment in favor of First Security must be affirmed. As a matter of law, the question is not whether Zions gave notice of the assignment but whether First Security received notification. Furthermore, it is not enough for First Security to receive notification of the assignment alone. By statute, First Security must receive notification of both (1) the assignment and (2) the duty to pay Zions.

4447 Associates argues that "evidence that a notice is sent, regardless of some evidence of non-receipt, is sufficient to comply with section 70A-2-201(26)." Brief of Appellants at 26 n.76. 4447 Associates cites as support for this argument the case of Chrysler Dodge Country, USA v. Curley, 782 P.2d 536 (Utah Ct. App. 1989). As pointed out by 4447 Associates, the Utah Court of Appeals held in Chrysler Dodge that "it is not necessary that the debtor actually receive notice, merely that the notice is sent to an address where the creditor can reasonably expect to reach the debtor." Id. at 541. However, what 4447 Associates fails to tell this court is that the Chrysler Dodge case involves a completely different section of the UCC than the one governing this case. Chrysler Dodge dealt with the question of whether sale of a repossessed truck had been handled in a commercially



reasonable manner. Section 70A-9-504(3) governs the disposition of collateral and states:

[U]nless collateral is perishable or threatens to decline speedily in value or is of type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.

Because the statute in the Chrysler Dodge case required that notice "shall be sent," that case has no applicability to the case before this court. In this case, the UCC requires not that notice be sent, but that notification be received. 4447

Associates stipulated before trial, and the district court found, that First Security had not received the Notice of the assignment executed by Mr. Floor. Nor did First Security receive any other notification from Zions.

Even though 4447 Associates stipulated that the Notice itself was not received, 4447 Associates argues that certain circumstances should have put First Security on sufficient notice of the assignment. In particular, 4447 Associates argues that First Security's president, Richard Christenson, had notice of the assignment. First, any notice Christenson had was not received by him in his capacity as an officer or director of First Security but in his individual capacity in his business dealings with Zions. Thus, even assuming knowledge on Christenson's part, that knowledge would not be imputed to First

Security. Second, the district court found that the discussions involving Christenson were primarily of an intent to enter into an assignment. Third, the financial statements of Richard Christenson (which he provided to First Security) contain no notice that payments should be made to Zions. Findings at ¶ 18. Thus, at the most, any notice that Christenson had went only to the first of the two requirements in section 70A-9-318(3). There was no evidence at trial that First Security received notification of the duty to pay Zions.

As shown below, awareness of an intent to enter into an assignment--whether obtained through Christenson or otherwise--is not sufficient to prevent First Security from dealing with its original creditor. Further, even notification of an actual assignment is not sufficient--a debtor must also receive notification that it is to pay the assignee.

a. Knowledge of an Anticipated Assignment Does not Impose any Duty on First Security.

4447 Associates repeatedly argues that First Security was aware of the Assignment. However, as the district court noted, these discussions "were primarily of an intent by Zions to enter into the Agreement, all of which discussions preceded execution of the Assignment by Capitol and Zions." Findings at ¶ 18 (emphasis in original). Thus 4447 Associates failed to meet its burden of proof.

As the district court noted, "First Security cannot be left to guess as to whom to make their payments." Memorandum Decision at 4. Notice of an intent to enter into an Assignment Agreement "alone would not be sufficient to put First Security on notice of the Assignment and to trigger the obligation of First Security to begin making payment to Zions." Id. at 6. 4447 Associates argues that Christenson, who was the president of First Security, had notice of the assignment and that Christenson's knowledge is imputed to First Security. However, as noted above, "the discussions were primarily of an intent by Zions to enter into the agreement." Findings at ¶ 18 (emphasis added). Furthermore, "all" of the discussions "preceeded execution of the Assignment by Capitol and Zions." Id. Mere knowledge of an anticipated assignment (which is the absolute most that 4447 Associates proved at trial) is, as a matter of law, insufficient under section 70A-0-318(3).

- b. Knowledge of An Assignment Alone Does Not Impose a Duty Upon First Security to Make Payments to Zions or to settle the debt with Zions.

Even assuming that Christenson's knowledge should be imputed to First Security and even assuming that Christenson knew that the intended assignment had actually been executed, knowledge of an actual assignment is insufficient. As 4447 Associates notes in its own brief, the Assignment in this case allowed Capitol to "continue to collect the debt owed by First

Security." Brief of Appellants at 24. 4447 Associates argues in its brief that to notify First Security "where or to whom it should pay money under the purchase agreements . . . would be contrary to the express terms of the purchase agreements and customary commercial practice."<sup>8</sup> Id. Thus, 4447 Associates tacitly acknowledges that Zions did not "require that payments be made to Zions." Accordingly, at the very most, First Security (including Christenson) had notice of the assignment. Even assuming that First Security was completely aware of the actual execution of the Assignment (and not just the intent to enter into the assignment, as the district court found), notice of the Assignment alone would not impose a duty upon First Security to begin making payments to Zions. There is no evidence that Christenson was aware of the actual terms of the assignment. He was not a party to it, and 4447 Associates--which had the burden of proof at trial--points to no evidence in the record that Christenson even saw or read the actual assignment document.

Throughout its brief, 4447 Associates repeatedly ignores the dual requirements of section 70A-9-318. Not only must First Security receive notification of the Assignment, it

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<sup>8</sup>4447 Associates' position is inconsistent. It argues that it would have been commercially unreasonable for Zions to give First Security notice, yet it argues that this is precisely what Zions did. Furthermore, even if Zions did not wish to notify First Security to make payments to Zions (because Zions had agreed to allow Capitol to continue to collect the payments), Zions should at least have notified First Security that First Security should not settle the debt with Capitol.

must receive notification of the duty to begin making payments to Zions. The statute provides that First Security was authorized to continue to pay its creditor until it received notification that the debt "ha[d] been assigned and that payment is to be made to the assignee." Utah Code Ann. § 70A-9-318(3) (1990). The district court's ruling on this point was correct and should be affirmed by this court.

As noted by the trial court, "First Security cannot be left to guess as to whom they must make their payments." Memorandum Decision at 4. This is the reason that the legislature has required actual receipt of notification. The rationale behind such a statutory rule has been explained by the Utah Supreme Court. In the case of Time Finance Corporation v. Johnson Trucking Company, 458 P.2d 1873 (Utah 1969), the supreme court quoted with approval the following language:

The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought home to the debtor with much exactness and certainty before he has paid the debt. The rule of notice to him is much more stringent than that which may defeat the title of a purchaser of a chose in action or of real estate. The latter is free to purchase or refuse to purchase as he chooses, and therefore it is his duty, before acting to trace out any reasonable doubt and to inform himself of the true facts as soon as anything arises to put him on inquiry. But the debtor is not so situated. He must pay to his original creditor when the debt is due unless he can establish affirmatively that someone else has a better right. The notice to him therefore must be of so exact and specific a

character as to convince him that he is no longer liable to such original creditor.

4447 Associates argues that the Time Finance case should be distinguished because it was decided in the context of the right to receipt of insurance proceeds. However, this is a distinction without a difference. 4447 Associates has offered no reason that the sound policies embodied in Time Finance do not apply in this context. More fundamentally, the language of section 70A-9-318 controls here and is clear: First Security was entitled to pay its original creditor until it "receive[d] notification" that (1) the assignment had been made and (2) payments were to be made directly to the assignee. Thus, the law applied by the district court is based on the Utah statute. Time Finance merely explains the policies behind a rule such as the one codified in the statute. Even if this court does as 4447 Associates requests and "entirely disregard[s] Time Finance," Brief of Appellants at 35, the court must affirm the decision of the lower court.<sup>9</sup>

3. The Definitions in Chapter One of the UCC Do Not Provide Substantive Rules of Law.

4447 Associates argues at length that notice was given to First Security as contemplated in section 70A-1-201 of the

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<sup>9</sup>4447 Associates argues that First Security had a duty to inquire. However, the statute imposes no such duty. The only duty is the duty of Zions to ensure that First Security "receives notification." Utah Code Ann. § 70A-9-318(3) (1990). This duty is easily discharged by sending notification by registered mail or by following the practice "normally" followed by Zions of requesting an acknowledgement. See Transcript at 106.

Utah Code. In fact, 4447 Associates goes so far as to argue that "Section 70A-1-201(25-27), rather than Section 70A-9-318, governs the manner of giving notices of assignments of contract rights." Brief of Appellants at 26 (emphasis added). This argument puts the cart before the horse. Section 70A-1-201 of the Utah Code is entitled "General Definitions." It is relevant only if terms that are defined in that section are used elsewhere in the Uniform Commercial Code. The definitions provide no independent substantive rules of law. Thus, this court does not even need to refer to section 70A-1-201 unless an applicable substantive provision contains a term that is defined in chapter one of the UCC.

In this case, the district court properly began its analysis by considering the substantive statutory provision. That provision is section 70A-9-318, which requires that First Security "receives notification."

Once a court has analyzed the applicable statutory provision (section 70A-9-318), then the court should look to the definitions contained in section 70A-1-201 for additional guidance as to the definition of terms used in section 70A-9-318. In this case, section 70A-1-201(26)(b) provides guidance as to the term "receives notification," which is used in section 70A-9-318. Section 70A-1-201(26)(b) provides:

A person receives a notice or notification  
when:

(i) it comes to his attention; or

(ii) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

This is the only definitional section that applies in this case. Under this definition First Security did not "receive[] notification" that the contract "has been assigned and that payment is to be made to the assignee." Utah Code Ann. § 70A-9-318 (1990). The notification neither came to First Security's attention<sup>10</sup> nor was it duly delivered to First Security's place of business. Furthermore, as set forth above, even if Christenson's knowledge of the anticipated assignment is imputed to First Security, the notification to pay Zions did not "come[] to his attention."

In a related argument 4447 Associates asserts at length that First Security had "notice" of the Assignment under the definition of notice in subsection 25 of section 70A-1-201. That section provides:

A person has "notice" of a fact when: (i) he has actual knowledge of it; (ii) he has received a notice or notification of it; or (iii) from all of the facts and circumstances to him at the time in question he has reason to know that it exists.

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<sup>10</sup>As pointed out above, there is no evidence that Christenson had any knowledge of the specific terms of the assignment.



First, as pointed out above, notice of an assignment alone does not impose any duty on First Security. Moreover, as a matter of law, the question in this case is not whether First Security (or Christenson) had notice of an assignment alone, but whether First Security received notification of both the assignment and the duty to make payments to Zions. Accordingly, the definitional sections relied upon so heavily by 4447 Associates simply do not apply in this instance. Subsection 25 provides a definition of when a person has notice. The district court correctly held that the question is not whether Zions gave notice but whether First Security received notification.

4447 Associates also repeatedly argues that First Security had "reason to know" of the Assignment and of Zions' interest in the agreement between First Security and Capitol. However, the "reason to know" standard does not apply in this case. The reason to know standard is contained in the definitional section of the UCC regarding notice quoted above. In that section, the legislature states that a person has notice of a fact if he has reason to know of it. As already established, the statute does not require the giving of notice but the receipt of notification. The definitional sections relied upon by 4447 Associates simply do not apply in this case.

#### 4. Summary.

In summary, the district court applied the proper rule of law. Section 70A-9-318 of the Utah Code is clear and

unequivocal. Unless First Security received notification that it was to pay money directly to Zions, it was free to settle its obligations with its original creditor, Capitol. This court should not reverse the legal determinations made by the lower court.

B. The Trial Court Properly Found That First Security Did Not Receive Notification As Required By Section 70A-9-318.

Inasmuch as the district court applied the correct rule of law, its judgment may be reversed only if its factual findings are clearly erroneous. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989). The district court found that First Security did not receive notification of the assignment and of the duty to make payments to Zions. This finding should not be overturned by this court for two important reasons. First, 4447 Associates has not marshaled the evidence as required when seeking to overturn the factual finding of a trial court. Second, even if 4447 Associates had marshaled the evidence, the district court's finding was not clearly erroneous.

1. 4447 Associates Has Not Marshaled the Evidence and Therefore the Factual Findings of the District Court Must Be Affirmed.

Utah Rule of Civil Procedure 52(a) provides:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Utah R. Civ. P. 52(a). A finding is clearly erroneous only if it is "against the clear weight of the evidence." Reed v. Mutual of Omaha Insurance Company, 776 P.2d 896, 899-900 (Utah 1989). The Utah Supreme Court has repeatedly noted that

As a prerequisite to an appellant's attack on findings of fact, appellant must marshal all the evidence in support of the findings and demonstrate 'that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings.'

Grayson Roper Limited v. Finlinson, 782 P.2d 467, 470 (Utah 1989). As the Utah Court of Appeals has noted:

The marshaling requirement provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal.

Robb v. Anderton, 225 Utah Adv. Rep. 22, 25 (Utah Ct. App. 1993).

If an appellant does not meet his marshaling burden but rather selects only evidence favorable to his position without presenting the evidence supporting the trial court's finding, the appellate court will affirm the finding of the lower court. Id.

In this case, 4447 Associates argues repeatedly that First Security received notice of its duty to pay Zions. This argument is contrary to the express findings of the trial court as supported by the evidence at trial, which is discussed in the next section of this brief. The court found that a notice was mailed to First Security by Mr. Floor on behalf of Capitol but that "Elmer Tucker [of First Security] never received the notice signed by Mr. Floor, and was never made aware of the Assignment

until 1986." Findings at ¶ 13. In addition, the court found that "[n]o individual representing or authorized to act on behalf of First Security received written notice of the Assignment prior to 1986." Id. at ¶ 14. Further, the court found that "no one acting on behalf of Zions sent written notice of the Assignment to First Security prior to 1986, nor did Zions communicate with First Security regarding the Assignment at any time between September 8, 1984, and July 10, 1985." Id. at ¶ 15. By arguing that First Security received notice, 4447 Associates is arguing that the district court's factual findings were clearly erroneous. However, 4447 Associates has cited to this appellate court only the portions of the evidence favorable to its position. Because 4447 Associates did not marshal the evidence, this court should affirm the factual findings of the district court.

2. The Factual Findings of the District Court are not Clearly Erroneous.

Even if 4447 Associates had marshaled the evidence as required, this court would have to affirm the lower court's decision because its findings of fact were not against the clear weight of the evidence. It is true, as 4447 Associates points out, that testimony was presented at trial that Mr. Potts, on behalf of Zions, had a notice mailed to First Security. However, the trial court rejected this testimony when it found that "[n]o one acting on behalf of Zions sent written notice of the

Assignment to First Security prior to 1986, nor did Zions communicate with First Security regarding the Assignment at any time between September 8, 1984, and July 10, 1985."<sup>11</sup> Id. at ¶ 14. The trial court's decision is adequately supported by the record. For example, although Mr. Potts testified at trial that he instructed his secretary to mail the notice, he had stated previously under oath that he did not mail the notice. Also, when asked at his deposition whether he recalled "mailing the notice" and whether he "personally deposit[ed] it in the mail," he responded: "Obviously, I can't remember what happened six years ago." Transcript at 65. In addition, Mr. Tucker of First Security stated unequivocally at trial that he never received the notice and that any notice sent to the address listed on the notice would have reached him under the normal routing policies of First Security.

The district court found Mr. Potts's trial testimony to be not credible for two reasons. First, there is no copy of the purported notice. Second, prior statements of Mr. Potts contradicted his trial testimony. The court held:

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<sup>11</sup>In its brief, 4447 Associates sets forth a list of facts that it alleges are "undisputed in the record from the trial court." Brief of Appellant at 6. 4447 Associates claims that it is undisputed that "Potts [an employee of Zions] mailed a copy of the Notice to First Security." Brief of Appellant at 11. However, as pointed out above, not only was this fact disputed at trial, but the district court specifically found that Potts did not mail the notice to First Security. Findings at ¶ 14.

Mr. Potts also testified that he recalled sending a written notice of the Assignment to First Security. There is, however, no copy of such notice and prior statements by Mr. Potts on this issue seemed to suggest otherwise. The court finds that First Security did not receive written notice of the Assignment from Zions, and further finds that written notice was not sent to First Security from Zions' employees.

In light of the clear testimony that First Security did not receive the notice and in light of Mr. Potts' prior statements suggesting that no notice was sent, it was not clearly erroneous for the district court to find that First Security did not receive notice. Accordingly, the judgment of the lower court must be affirmed.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PURCHASE PRICE MUST BE ADJUSTED DOWNWARD BY ONE MILLION DOLLARS

The second main point raised on appeal by 4447 Associates is that the district court erred in granting partial summary judgment in favor of First Security on the issue of whether the purchase price should be adjusted downward by \$1,000,000. As an initial matter, First Security notes that the court does not need to reach this issue if it affirms the decision of the district court on the issue of whether First Security received notification. Because First Security did not receive notification as required by the statute, it was free to settle its obligation with the original obligor. It is undisputed that First Security did in fact settle the obligation with Capitol. This is a complete defense to any collection

attempts by Zions or by its successor in interest, 4447 Associates.

If the court reverses the decision of the lower court and holds that First Security must be required to pay the debt to 4447 Associates even though it has satisfied the obligation already, then the amount due to 4447 Associates must be adjusted downward by one million dollars. 4447 Associates argues that the district court improperly interpreted the Closing Agreement and used the wrong date when it granted partial summary judgment in favor of First Security. However, 4447 Associates' argument is contrary to the unambiguous and express terms of the Closing Agreement.

In arguing that the district court misread the Asset Purchase Agreement, 4447 Associates does not quote the entire portion of the relevant part of the Asset Purchase Agreement. In particular, 4447 Associates leaves out the important first sentence. The entire paragraph reads:

At the end of the three (3) year period of deferral and prior to the payment of the principal amount of the deferred portion of the purchase price, the real estate and receivables of Capitol acquired by FS Financial shall be valued in the manner set forth below. In the event that (i) the aggregate value of the real estate is less than its book value as of the Closing Date and/or (ii) the actual and anticipated losses on the collection of the amount of the receivables as of the Closing Date exceeds the reserve for losses as of the Closing Date, the principal amount of the deferred portion of the purchase price shall be

adjusted downward in an equivalent amount. Further, the principal amount of the deferred portion of the purchase price shall also be adjusted downward in the amount of any liabilities of Capitol relating to the collection of receivables which were incurred in the normal course of business prior to Closing but were not disclosed on Capitol's balance sheet at Closing and which were assumed by FS Financial hereunder. The aggregate of such downward adjustments of the principal amount of the deferred portion of the purchase price shall in no event exceed One Million Dollars (\$1,000,000.00). Notwithstanding any such downward adjustments of the principal amount of the deferred portion of the purchase price, there shall be no adjustment of the amount of interest paid by FS financial under Paragraph 2(C) hereof during the three (3) year period.

(Emphasis added.)

This language is clear. The parties agreed that three years after the Closing Date, the parties would determine the actual and anticipated losses on the collection (as of the third anniversary of the Closing Date) of the receivables that existed on the Closing Date. In other words, three years after closing, the parties were to evaluate the collections that had been made on the receivables that existed on the closing date. 4447 Associates argues that the closing date for all purposes was in 1985. This is true. But the closing date is not the only relevant date.

The third year anniversary of the closing date is the key date for valuing the collections. If the only relevant date were the closing date, there would be no need to evaluate the



collections on the receivables. If the court were to read the paragraph as 4447 Associates urges, the only adjustment would be for the few hours between the time the Agreement was signed and the end of the day on the Closing Date and would reflect only collections made on the Closing Date.

The district court properly held that the Agreement is unambiguous. Therefore, the only question before the court was the amount of the losses on collection. First Security came forward with admissible evidence that those losses exceeded \$2,000,000. Zions did not dispute those facts or offer any evidence that the losses were less than \$1,000,000.<sup>12</sup> Indeed, 4447 Associates does not argue even on appeal that the losses as of December 13, 1985, did not exceed one million dollars but only that the court used the improper date. Because the court used the proper date and because Zions did not produce any evidence to contradict the evidence of loss submitted by First Security, the district court properly entered partial summary judgment in favor of First Security.

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<sup>12</sup>4447 Associates argues for the first time on appeal that the methodology of First Security's expert was not sufficiently explained. 4447 Associates may not raise this new issue on appeal. Furthermore, Zions did not dispute the facts submitted by First Security as required by Rule 56 of the Utah Rules of Civil Procedure. Nor did Zions request additional time pursuant to Rule 56(f) to investigate the qualifications and methodology of First Security's expert. Accordingly, 4447 Associates may not raise these issues on appeal.

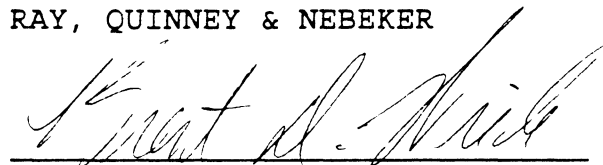
Finally, 4447 Associates argues that First Security did not present evidence as to the amount of the reserves on the Closing Date. This is an argument that was not raised before the district court. 4447 Associates may not raise this argument for the first time on appeal. Accordingly, this court should affirm the order of the trial court granting partial summary judgment in favor of First Security.

CONCLUSION

For the foregoing reasons, First Security Financial respectfully requests that this court affirm the decision of the district court in this case.

DATED this 7<sup>th</sup> day of December, 1993.

RAY, QUINNEY & NEBEKER



Craig Carlile  
Brent D. Wride

Attorneys for First Security  
Financial, Defendant-  
Appellee

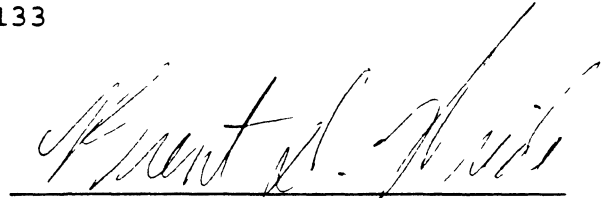
CERTIFICATE OF MAILING

I hereby certify that on the 14<sup>th</sup> day of December, 1993, two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid, to the following:

Jeffrey M. Jones  
J. Mark Gibb  
DURHAM, EVANS & JONES  
50 South Main  
Suite 850  
Salt Lake City, Utah 84144

and one copy was mailed, postage prepaid, to the following:

Randall D. Benson  
CALLISTER, DUNCAN & NEBEKER  
10 East South Temple  
Suite 800  
Salt Lake City, Utah 84133

A handwritten signature in cursive script, appearing to read "Kent D. Benson", is written over a horizontal line.

54254/bdw

Tab A

KENT H. MURDOCK (A2350)  
MARK O. MORRIS (A4636) of  
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FILED DISTRICT COURT  
Third Judicial District

MAY 24 1990

By *Deane K. Hinkins*  
Deputy Clerk

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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ZIONS FIRST NATIONAL BANK,  
a National Banking  
Association,

:

ORDER OF PARTIAL  
SUMMARY JUDGMENT

:

Plaintiff,

:

vs.

:

FIRST SECURITY FINANCIAL,  
a Utah corporation,

:

Civil No. C87-1578

:

Judge Frank G. Noel

Defendant.

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Defendant First Security Financial's motion for partial summary judgment came before this Court for regularly scheduled hearing on Friday, May 4, 1990, at 9:00 a.m. Defendant First Security Financial was represented by Mark O. Morris. Plaintiff Zions First National Bank was represented by Jeffrey M. Jones and Craig H. Christensen. After having reviewed the pleadings and other papers on file, and after having considered the arguments of counsel and the affidavit filed in connection therewith, this Court is of the opinion that the December 10, 1982 Asset

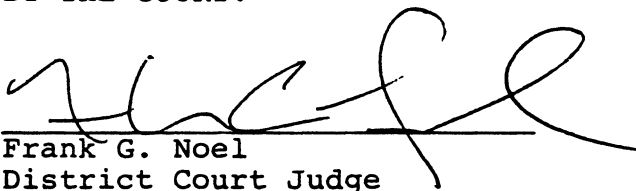
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Purchase Agreement and the December 13, 1982 Closing Agreement are unambiguous as to the relevant points raised by First Security Financial's motion, that there are no genuine issues of any material fact, and that defendant First Security Financial is entitled to partial summary judgment as a matter of law. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the principal amount of the deferred portion of the purchase price of Capital Thrift and Loan Company, as that principal amount of the deferred portion of the purchase price is identified in paragraph 2 of the December 10, 1982 Asset Purchase Agreement (attached as Exhibit "A" to plaintiff's Complaint) and in paragraph 3 of the December 13, 1982 Closing Agreement (attached as Exhibit "B" to plaintiff's Complaint) shall be adjusted downward in the amount of One Million Dollars (\$1,000,000.00).

DATED this 24 day of May, 1990.

BY THE COURT:

  
Frank G. Noel  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT was served upon the following by hand delivering a copy of the same this 9<sup>th</sup> day of May, 1990:

William G. Gibbs  
Bruce J. Nelson  
Jeffrey M. Jones  
Craig H. Christensen  
ALLEN, NELSON, HARDY & EVANS  
215 South State  
Suite 900  
Salt Lake City, Utah 84111



Tab B



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

-----

ZIONS FIRST NATIONAL BANK,	:	MEMORANDUM DECISION
Plaintiff,	:	Case No. 870901578 CV
vs.	:	JUDGE FRANK G. NOEL
FIRST SECURITY FINANCIAL,	:	
Defendant.	:	

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This matter was tried to the Court January 6, and 7, 1992. The Court heard testimony, received evidence, heard oral argument and now having taken the matter under advisement and being fully advised finds and rules as follows:

The Court will not endeavor a detailed description of the facts of this case. It will be sufficient to state the following:

On the 10th day of December, 1982 Capitol Thrift and Loan Company (Capitol) entered into an asset purchase agreement with First Security Financial (First Security) wherein First Security agreed to purchase substantially all of the assets of Capitol.

At that time Richard A. Christenson (Christenson) was the president and majority stockholder of Capitol. At about that same time Christenson became president and a director of First Security. In June of 1984 the shareholders of Capitol sold their stock to AFS Holding Company and Christenson ceased to have ownership interest in Capitol and ceased to function as an officer or director.

On or about September 28, 1984 the plaintiff Zions First National Bank (Zions) refinanced some of Capitol's pre existing debt to Zions in the form of a One Million Dollar (1,000,000.00) loan. Christenson personally guaranteed the note arising from this loan in an amount up to \$870,000.00. As collateral for the payment of this note Capitol pledged the receivable owing on the purchase agreement with First Security.

Christenson's relationship with First Security terminated shortly thereafter in November of 1984. Christenson thereafter reacquired an interest in Capitol. At around the time of Christenson's departure from First Security, a dispute arose between Christenson and First Security arising out of their employer/employee relationship. In addition, First Security claimed a breach of warranties, representations and guarantees made by Christenson under the asset purchase agreement. In resolution of these issues Christenson, Capitol and First Security entered into a "Settlement Agreement, Mutual

Release and Covenant Not To Sue" on July 10, 1985. By virtue of that agreement First Security was relieved by Capitol and Christenson from any further obligations due and owing under the asset purchase agreement. Subsequent to this agreement Capitol and other obligors defaulted on the note in favor of Zions. Zions then sought to collect on the asset purchase agreement which as indicated had been pledged as collateral for the payment of the note. The primary issue in this case is whether First Security received notice of Capitol's pledge of the asset purchase agreement so as to require them to make payments under the agreement to Zions or to refrain from doing anything that would impair the security. First Security claims it did not receive such notice and was therefore free to extinguish, by contract, it's obligations to Capitol under the asset purchase agreement.

The Court is of the opinion that under the circumstances of this case it was necessary for First Security to actually receive notice of the pledge of the collateral before it could be burdened with a legal obligation to make payments under the asset purchase agreement to the assignee, that is Zions. The notice must be sufficient so that someone in the position of First Security may rely with some degree of certainty on the notice to begin making payments under the contract to someone other than the obligee. First Security was obligated to make

payments to someone. To make those payments to someone other than the original obligee would put them at risk and may eventually result in their having to pay twice under the contract. Therefore some vague notice that the contract had been pledged as collateral was not, in the Court's opinion, sufficient notice. In addition a pledge of collateral may mean at least one of two things. It may mean that payments under the contract at the time of the assignment were to be made to the assignee, or it may mean that an effort to collect on the contract by the assignee would not be made until the assignor defaulted on it's obligation. First Security cannot be left to guess as to whom they must make their payments. Neither does the Court feel that First Security had an obligation of inquiry upon being put on notice of an "assignment". This concept has been embraced by our Supreme Court in Time Finance Corporation v. Johnson Trucking Company, 458 p2d 1873 (Utah 1969) wherein the Court quoted as follows:

"The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought home to the debtor with much exactness and certainty before he has paid the debt. The rule of notice to him is much more stringent than that which may defeat the title of a purchaser of a chose in action or of real estate. The later is free to purchase or refuse to purchase as he chooses, and therefore it is his duty, before acting to trace out any reasonable doubt and to inform himself of the true facts as soon as anything arises to put him on inquiry. But the debtor is not so situated. He must pay to his original creditor when the debt is due unless he can establish

affirmatively that someone else has a better right. The notice to him therefore must of so exact and specific a character as to convince him that he is no longer liable to such original creditor,...."

Plaintiff claims that notice was given to First Security on the assignment in the following manner.

1. Zions claims that Emanuel Floor, President of Capitol in September of 1984, sent written notice to First Security of the assignment.

2. Zions claims that Allen L. Potts, an employee of Zions, called Christenson to inspect certain documents and discussed with him Zions intent to take the assignment.

3. Allen L. Potts testified that he also sent a written notice to First Security.

Zions argues that since Christenson was the president of First Security at the time of his conversations with Potts that these conversations put First Security on sufficient notice of the assignment. As to the written assignment prepared over the signature of Emanuel Floor, it should be noted that the notice was purportedly sent to the attention of First Security "Treasurer" at P. O. Box 30006 in Salt Lake City, Utah. Elmer Tucker was the treasurer at all relevant times and any mail directed to that address would have been delivered to Mr. Tucker. The parties in this case have stipulated through the pre trial order and the Court so finds that Mr. Tucker never did

receive a written notice and was never made aware of the assignment and security agreement until 1986, well after the time that First Security had extinguished it's liability to Capitol.

As to Mr. Potts' testimony regarding his conversations with Mr. Christenson it should be noted that these were primarily, according to Potts' testimony, statements by Potts of an intent by Zions to enter into the assignment agreement. This alone would not be sufficient to put First Security on notice of the assignment and to trigger the obligation of First Security to begin making payments to Zions. It should be noted that Mr. Christenson testified that he did have conversations with Mr. Potts around that period of time but does not recall conversations regarding the assignment of the asset purchase agreement. In fact the evidence is unclear as to when Christenson did learn of the pledge of the receiveable. The parties have stipulated that it occurred sometime prior to July 10, 1985 but plaintiff has failed to prove that notice was given through Christenson to First Security prior to the time that Christenson terminated at First Security in November of 1984.

*Mr. Potts also testified that he recalls sending a written notice of the assignment to First Security. There is however no copy of such notice and prior statements by Mr. Potts on this issue seemed to suggest otherwise. The Court finds that*

First Security did not receive written notice of the assignment from Zions, and further finds that written notice was not sent to First Security from Zions employees.

The plaintiff also refers the Court to certain financial statements that were given to First Security by Mr. Christenson and which contain language which suggests that the "receiveable" or asset purchase agreement had been pledged to Zions First National Bank. In the opinion of the Court this language clearly falls short of putting First Security on notice that they then had an obligation to begin making payments under the asset purchase agreement to Zions First National Bank. It is worth noting again that a pledge of a note as collateral does not necessarily mean that the obligor is obligated to immediately begin making payments under the obligation to the assignee of the obligation. Indeed the conduct of the parties clearly demonstrates to the Court that Zions did not intend to receive payments under the asset purchase agreement from First Security until Capitol defaulted on the note. Capitol did not default after December of 1985. And it was not until the first part of 1986 that Zions made any effort whatsoever to collect on the collateral. Of course by this time First Security and Capitol had entered into the release agreement extinguishing First Security's obligations under the asset purchase agreement.

In conclusion the Court finds that Christenson while he was president of First Security Financial did not receive notice that any amounts due or to become due under the asset purchase agreement had to be paid to Zions pursuant to an assignment agreement. The Court is of the opinion that plaintiff has failed to prove that notice of the assignment as required by law was given to First Security through Mr. Christenson or in any other way prior to the settlement agreement on July 10, 1985. The Court finds that plaintiff has failed to prove that First Security received sufficient notice of the assignment, as required by law, through any conversations that Mr. Christenson may have had in the latter part of September with Ronald K. Mitchell.

The Court therefore finds in favor of the defendant and against the plaintiff.


First Security has raised the defense of laches and the Court feels compelled to make a comment with regard to that defense. Defendant argues that from the time of the assignment until the date of the settlement agreement between defendant and Capitol, that is July 10, 1985, Zions set on it's rights under the assignment, to the prejudice of First Security and that therefore they are barred from making this claim based on the doctrine of laches. The Court finds that argument to be unpersuasive. The Court has already stated that it appears to



have been the intent of the parties that Zions would not attempt a collection on the receiveable until and unless there was a default by Capitol on the note. The Court is of the opinion that Zions proceeded in a timely manner to collect on the receiveable after Capitol and the other obligors were in default on the note.

Counsel for defendant is to prepare Findings of Fact, Conclusions of Law and a Judgment, and submit the same to opposing Counsel for approval as to form and then to the Court for signature.

DATED this 30<sup>th</sup> day of January, 1992.

  
FRANK G. NOEL  
DISTRICT COURT JUDGE



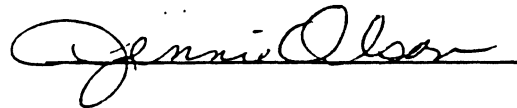
## MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 30 day of January, 1992:

Bruce J. Nelson  
Jeffrey M. Jones  
Craig H. Christensen  
ALLEN, NELSON, HARDY & EVANS  
Attorneys for Plaintiff  
215 South State Street, Suite 900  
Salt Lake City, Utah 84111

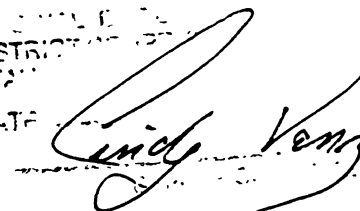
Kent H. Murdock  
Mark O. Morris  
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Salt Lake City, Utah 84145-0385

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Salt Lake City, Utah 84133



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THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

SEP 25 1992

Craig Carlile (A0571)  
RAY, QUINNEY & NEBEKER  
92 North University Avenue  
Provo, Utah 84601  
Telephone: (801) 226-7210  
Attorneys for Defendant

SALT LAKE COUNTY  
By Pat Jones  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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ZIONS FIRST NATIONAL BANK, a national banking association, and 4447 ASSOCIATES, a Utah general partnership,	:	
	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiffs,	:	
	:	
vs.	:	
	:	Civil No. 870901578CN
FIRST SECURITY FINANCIAL, a Utah corporation,	:	Judge Frank G. Noel
Defendant.	:	

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This matter came on before the Court for trial without a jury on January 6 and 7, 1992. The parties stipulated to reserve the issues of entitlement to and amount of attorneys' fees and costs until after entry of judgment. The plaintiffs were represented by Jeffrey M. Jones and the defendant was represented by Mark O. Morris. The Court having considered the evidence, pleadings and oral arguments submitted by the parties, and having entered a Memorandum Decision, the Court makes the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. First Security Financial ("First Security") and Capitol Thrift & Loan Company ("Capitol") were parties to an Asset Purchase Agreement and Closing Agreement dated December 10, 1982 and December 13, 1982, respectively. These two documents are collectively referred to hereafter as the "Purchase Agreements."

2. Pursuant to the Purchase Agreements, First Security purchased certain assets from Capitol. The Asset Purchase Agreement provided that First Security would pay Capitol \$1,007,777.42 on December 13, 1985. The Purchase Agreements also provided for quarterly interest payments to be paid from First Security to Capitol in the amount of \$25,194.44.

3. The Purchase Agreements also provided that the sum of \$1,007,777.42 due on December 13, 1985 was subject to an offset amount not to exceed \$1,000,000.00.

4. Richard A. Christenson ("Christenson") was the president, chief operating officer, and a director of First Security from the time of its inception in December, 1982, through November, 1984. He was also president and chief executive officer of Capitol until June, 1984.

5. From December, 1982 to and including September 27, 1984, First Security paid its quarterly interest installments to Capitol.

6. In June, 1984, the shareholders of Capitol, including Christenson, sold all of their Capitol stock to AFS Holding company, an affiliate of the Bertagnole Investment Company. In June, 1984, Christenson ceased, for a period of time, to have any ownership interests in Capitol, and ceased to function as an officer or director.

7. In the summer of 1984, Capitol owed Zions First National Bank ("Zions") approximately \$870,000 on a revolving line of credit. This line of credit was unsecured.

8. On or about September 28, 1984, Emanuel A. Floor, acting as president of Capitol, and Zions executed an Assignment and Security Agreement, giving Zions a security interest in Capitol's receivable owing on the Purchase Agreements and directing Capitol to place First Security on notice of the Assignment and Security Agreement. This Assignment and Security Agreement ("Assignment") was given to secure a \$1 million note, dated September 28, 1984, which Capitol executed in favor of Zions. The purpose of this note was to refinance the \$870,000 obligation which was previously owed to Zions by Capitol.

9. Christenson personally guaranteed the September 28, 1984 Note up to \$870,000.

10. For the purposes of giving notice to First Security concerning matters relating to the Asset Purchase Agreement, the only address provided to Capitol by First Security was:

First Security Financial  
P.O. Box 30006  
Salt Lake City, Utah 84130  
ATTN: Treasurer

Between December, 1982 and July, 1985, any mail sent to this address would have been delivered to Elmer Tucker.

11. Elmer Tucker was the treasurer of First Security from its inception through and beyond July 10, 1985.

12. Emanuel A. Floor in his capacity as president of Capitol executed a Notice of Assignment on or about September 28, 1984. That Notice of Assignment was mailed to First Security but was never received by First Security.

13. Elmer Tucker never received the notice signed by Mr. Floor, and was never made aware of the Assignment until 1986.

14. No individual representing or authorized to act on behalf of First Security received written notice of the assignment prior to 1986.

15. No one acting on behalf of Zions sent written notice of the assignment to First Security prior to 1986, nor did Zions communicate with First Security regarding the Assignment at any time between September 8, 1984 and July 10, 1985.

16. Zions never received written acknowledgement from First Security that First Security had received notice of the Assignment or notice of any purported obligation to pay any monies under the receivable to Zions.

17. On September 28, 1984 Christenson was President, Chief Executive Officer, and a director of First Security Financial. At that same time, he was not an officer, director or employee, nor had he any ownership interests in Capitol.

18. To the extent that Allen Potts ("Potts"), an employee of Zions, discussed with Christenson the Assignment, the discussions were primarily of an intent by Zions to enter into the agreement, all of which discussions preceeded execution of the Assignment by Capitol and Zions.

19. Capitol did not default on its obligations secured by the Assignment until at least December, 1985.

20. The Assignment and Security Agreement, and the Notice of Assignment both stated that First Security was obligated to make all payments owing under the receivable payable jointly to Capitol and Zions during the entire term of the Purchase Agreement. Zions never received directly from First Security any of the quarterly interest payments it claims to have been entitled to under the Assignment.

21. Zions received interest and principal payments on the Capitol loan directly from Bertagnole individuals or entities.

22. Zions never attempted to collect any amounts from First Security under the Assignment until after December of 1985.

23. Prior to July, 1985, Christenson delivered on two separate occasions his personal financial statements to the



president of First Security, Bud Cummings. Paragraph 3 of each of those financial statements reads as follows:

This represents my portion of the ownership of Capitol Thrift & Loan based on the contract amount I have with First Security Financial. This receivable has been pledged to Zions First National Bank.

24. A third financial statement containing the identical paragraph 3 referenced above was delivered by Christenson's attorney to First Security's attorneys prior to July, 1985.

25. On or about July 10, 1985, First Security, Christenson and Capitol entered into that certain Settlement Agreement, Mutual Release, and Covenant Not To Sue.

26. In late 1986, 4447 Associates borrowed over three million dollars from Zions, and used those proceeds to purchase, among other things, a participation interest in the Capitol note, which included a security interest in the collateral for the note, First Security's receivable. In June, 1990 Zions assigned to 4447 Associates all of its ownership interests in the Capitol loan and the First Security receivable.

#### CONCLUSIONS OF LAW

1. Utah Code Ann. §70A-9-318 applies to the Assignment and Security Agreement.

2. Pursuant to Utah Code Ann. §70A-9-318, First Security could not be held responsible to pay money to Zions under the Purchase Agreements absent receipt by First Security of actual

notice that the Assignment existed and that payments were to be made to Zions by reason of the Assignment; First Security never received such a notice.

3. Knowledge of the existence of the Assignment alone, if any such knowledge existed, did not impose a duty to inquire on First Security.

4. The pre-September 28, 1984, discussions between Allen Potts and Richard Christensen and the information concerning the Assignment contained in Mr. Christenson's financial statements were both insufficient to place First Security on notice that Zions claimed and expected that payments under the Purchase Agreements were to be made to Zions.

5. First Security never received adequate, legal notice of the Assignment sufficient to impose an obligation on First Security which would preclude First Security from satisfying its obligations under the Purchase Agreements directly with Capitol, the original account creditor.


6. The July 10, 1985 Settlement Agreement, Mutual Release, and Covenant Not to Sue signed by First Security, Christenson and Capitol relieved First Security of all obligations to pay any amount under the Purchase Agreements.

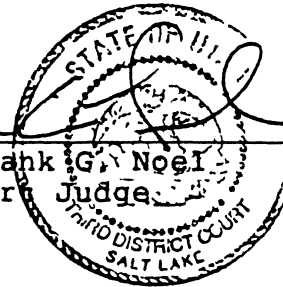
7. Entitlement to attorneys' fees and costs are reserved and may be raised at any time by motion after entry of judgment. The issue of attorneys' fees and costs are collateral issues that do

not affect substantive issues in this matter, and thus, the judgment shall be a final judgment, there being no just reason to delay entry of a final judgment.

DATED this 25<sup>th</sup> day of September, 1992.

BY THE COURT

  
Honorable Frank G. Noel  
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of September, 1992, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, to the following:

Bruce J. Nelson  
Jeffrey M. Jones  
Craig H. Christensen  
Allen, Nelson, Hardy & Evans  
215 S State St #900  
Salt Lake City UT 84111

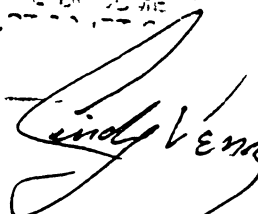
Randall D. Benson  
Callister, Duncan & Nebeker  
10 E South Temple #800  
Salt Lake City UT 84133



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DISTRICT COURT

DATE



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