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Walter E. Heller Western Incorporated, a California corporation v. US Rock Wool Company, Inc., a Utah corporation; V. Ross Ekins; S.O. Ekins : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Appellant, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S. O. EKINS; Respondents.	88-0071-CA Case No. 860322

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Respondents are not dissatisfied with appellant's Statement of Issues, but would state the case somewhat differently, as is set out below.

STATEMENT OF THE CASE

This is an action originally brought by a factoring company (Heller) to foreclose on its security interest in the accounts receivable, inventory, equipment, and other assets of its client U.S. Rock Wool Company, Inc. (Rock Wool), and to foreclose a subordinated trust deed that the guarantors V. Ross Ekins and S. O. Ekins (the Ekins) had given on their residence to

secure their Guaranty (R. 2-14). This action was, as to all defendants, premature since it was commenced during an agreed and unexpired extension of time, and was, as to the Ekins, filed in direct violation of a written agreement of Heller that it would take no such action until the Valley Bank seven (7) year trust deed installment loan was paid in full. Also, the Complaint sought an amount which the trial court found to be unconscionably excessive (Finding 9, Addendum 1).

Some ten months after it filed the foreclosure Complaint, Heller filed an Amended Complaint and for the first time pleaded a claim for judgment against the Ekins personally on their written Guaranty (Amended Complaint, R. 303-339). The Ekins defended against this latter claim on the grounds, among others, that they had long since been entirely exonerated from their Guaranty as a matter of California law by Heller's intentional or negligent conduct impairing the security to which the Ekins looked for protection against loss on their Guaranty. The Ekins took the position that the California law provided that they were wholly released by Heller's impairment of its security, and that even if the Court were to conclude that their release was only pro tanto, the obligation of the Ekins under their Guaranty had, nonetheless, been fully satisfied by the amount by which they were exonerated. The Ekins also claimed that Heller had itself breached the contract first, having breached the covenant of good faith which is, by statute in California, a part of every contract; had failed to pursue in a commercially

reasonable manner collection of the accounts receivable it had taken over and foreclosed, and was thus barred from looking to Rock Wool or the Ekins for a deficiency; and that Heller was, under California law, liable to the Ekins for their attorneys fees and expenses. Heller's form agreements provide that the law of California is to be controlling, which provides for reciprocity with respect to collection expenses and attorneys fees.

The trial court found the issues in favor of the Ekins and against Heller; made findings that Heller had, without the consent of the Ekins, impaired its security for the Rock Wool obligation (1) by negligently or intentionally failing to perfect its security interest in the motor vehicles, (2) taking action which impaired the accounts receivable, and (3) by causing the going business value of the inventory to be lost; that the values lost by Heller's impairment of the security was $110,249.00; that Heller undertook to collect the accounts receivable, but failed to do so in a commercially reasonable manner; that Heller so conducted itself as to breach the implied covenant of good faith which was a part of the Guaranty and the other contracts; that Heller, in order to pressure the Ekins, had brought the foreclosure action in breach of the Subordination Agreement which barred it from taking action against the Ekins home; had failed to establish what amount, if any, was due and unpaid from Rock Wool; and was, under the contract provisions and the California law, obligated to pay the Ekins their attorneys fees, costs, and

expenses. The trial court stated its conclusions of law and entered judgment that the Ekins Guaranty had been released as a matter of law by the conduct of Heller; that the trust deed on the Ekins residence was also released; and that the Ekins recover of Heller their pre-judgment and post-judgment attorneys fees, costs and expenses (R. 1080-83). These findings, conclusions, and judgment are set out in full as Addenda 1 and 2 hereto. Heller moved for a new trial (R. 1103-35). The trial court re-examined its decision and the record supporting it and denied the motion (R. 1185-86).

REMEDY SOUGHT ON APPEAL

Respondents seek to have the judgment affirmed and their post-judgment attorneys fees, costs, and expenses determined and awarded.

STATEMENT OF FACTS

Some of the facts are correctly recited by Heller in Appellant's Brief; some are not. In many instances Heller has recited its preferred version of conflicting evidence as if factual, despite a plethora of evidence supporting the trial court's findings; and in other instances has simply ignored the record, or absence of record.

Such of Heller's statements of fact as are material to the questions presented in this appeal will be discussed below; such as are merely provocative will be discussed only when

essential to an understanding of the trial court's holding and the factual premise for such holding.

1. The Facts Surrounding the Origination of the Loan to Rock Wool and the Duty to Perfect the Security. On October 8 or 9, 1979, Jay Johnson, the Utah agent for Heller, met with V. Ross Ekins, president and principal owner of Rock Wool, to discuss factoring the accounts receivable of Rock Wool (Tr. 1560-62). Rock Wool was in the business of subcontracting the insulation work on construction projects and of selling insulation products and services. After discussing the terms, Ekins told Johnson that he had some concerns about what it would do if Rock Wool's customers knew their accounts were being factored to Heller, and Johnson told him that Rock Wool's customers were not advised of the factoring arrangement (Tr. 1562). Ekins' testimony about this meeting and a later meeting was bolstered by the notes he had made at those meetings. He had the original notes present at the trial for reference while testifying and for examination by opposing counsel. At the meeting he showed Johnson the Rock Wool financial statements and indicated that the net worth of Rock Wool was substantial (Tr. 1564). Johnson took the Rock Wool financial statements, the Ekins financial statements, the accounts receivable aging schedule, and an accounts payable aging, put them in a package and sent it to Heller in the hope that Heller would make the deal and he would get a commission for placing the business (Tr. 1567).

Some two or three weeks later James Hillman, Heller's assistant vice president, went to the Rock Wool office and met with Ekins. Hillman explained in detail the arrangement that would be involved; that there would have to be a physical audit by Heller's auditors; that Heller would have to have a security interest in all of Rock Wool's assets, including its vehicles, blowing machines, power tools, etc.; and that a personal guaranty would be required from the Ekins (Tr. 1569-71). When the discussion turned to the personal guaranty and to requiring a mortgage on the Ekins home to secure the guaranty, Ekins objected, noted that the maximum credit to be extended would be $125,000, that Rock Wool's assets were three or four times that amount, and that he did not want to put up his home. Hillman said the trust deed and personal guaranty were conditions of the loan. Ekins was still concerned about protecting his home. Hillman told Ekins that there were so many assets of Rock Wool supporting the loan that the risk of loss was minimal. The evidence on that point and the importance of the security to Ekins shows clearly in the following:

> "EKINS: I was still concerned at that point. And we talked about it further, and he gave me some assurance that made it acceptable to me. He said before we would go after your home, all of these assets of the corporation, the accounts receivable, the inventory, the equipment, we record and secure our interest in those so that nobody else can get to them before we do. Therefore those then are between us and our having to come to you for any personal guaranty or for action against your home. Now, this is what he told me, and I believed him. And on that basis I

> felt that the risk was very minimal, and that's when I went home and told my wife, the time I asked her to sign the document." (Tr. 1573.)

It should be noted here that the Ekins have not claimed and do not claim that Heller was bound by oral covenant to proceed against the other security before proceeding against their home. The testimony above goes to the point that Heller promised to perfect the security and that Ekins relied upon the security to stand between him and ultimate loss.

There is no question but that Rock Wool's motor vehicles (described in detail in later testimony), are among the items set out in the Chattel Mortgage between Rock Wool and Heller (Exhibit "D"), as well as in the Financing Statement and UCC-1 (Exhibit "E") which was filed to perfect the security interest in the assets listed in the Chattel Mortgage. On the second page of the Chattel Mortgage Rock Wool covenants that all of the mortgaged property is free and clear of liens except for "liens on trucks, blowing machines, and other equipment financed through banks," and under the U.C.C. in both California and Utah the term "equipment" includes motor vehicles used primarily in business. California Civil Code, Sections 9103(3), 9109(2); U.C.A., Sections 70A-9-103(3), 70A-9-109(2).

Heller admits that it did nothing to perfect its security interest in the vehicles beyond filing the Combined Security Agreement and UCC-1. Mr. Hillman stated that he had intentionally failed to perfect Heller's security interest in the

vehicles--(under the law of both Utah and California this would have required the Heller lien to have been entered upon the titles of the motor vehicles)--and claimed that he had omitted perfecting the interest in the vehicles at Ekins' request. Ekins flatly denied making any such request and the trial court held that Mr. Ekins was the one who was telling the truth. Mr. Ekins' testimony on that point is:

"TANNER: Directing your attention, Mr. Ekins, to the matter of the mortgaged vehicles. You heard Mr. Hillman testify that you said to him in effect that the mortgaged vehicles were encumbered and would he please leave them out of the security. Was that said by you to him?

EKINS: Absolutely not.

TANNER: Did you request at anytime in the conversation with Mr. Hillman that the mortgaged vehicles be left out of the security and that the interest in them be not perfected:

EKINS: Absolutely not."

Failure to perfect the security in the motor vehicles was a matter of real significance because the total value of the motor vehicles in which Hillman failed to perfect Heller's security interest was some $122,650 (Tr. 1591-92).

At the time of the transaction the Ekins did not know what steps were required to perfect Heller's security interest in the vehicles and equipment, and relied on Heller to take care of perfecting the security because "he [Hillman] told me they would" (Tr. 1597, 1599):

"TANNER: What did he tell you with respect to who would do the perfecting on the - -

EKINS: He (Hillman) said Heller would."

Ekins further testified that he read the documentation including the UCC-1's, supposed they perfected the security in all the Rock Wool assets including the vehicles, and wanted them to do so because the security given Heller by Rock Wool was what stood between him and having to take a loss on the personal Guaranty he and Mrs. Ekins had signed, a consideration which was vital to his signing the documents (Tr. 1607-09).

2. The Ekins Personal Guaranty. The Guaranty signed by the Ekins is especially important to this appeal, because its contents are the sole basis for Heller's contention that the trial court erred in finding that the Ekins had not consented to impairment of the security. In that regard it should be noted that the copy of the Guaranty appended to Appellant's Brief as "Appendix ii" is not a true copy of the document signed, instead it is a copy of Exhibit "G" which was offered by Heller and was refused admission into evidence because it contains underlining which was not present on the document at the time of its signing. A copy of the Guaranty without extraneous writing or underlining was admitted in evidence as Exhibit "F." A copy of the Guaranty which was admitted as Exhibit "F" is appended hereto as Addendum 3. Presumably Heller's switch of these exhibits is inadvertent. Nonetheless, it is important to note that there was no underlining on the Guaranty when it was signed.

3. The Valley Loan and Heller's Subordination

Agreement. In 1981 the Ekins were called on a mission for their church which would require them to be away for three years, so they needed to get their financial affairs in order. They had an existing short-term loan at Walker Bank with a balance of $67,000.00 that came due in full every 60-90 days. It was secured by a mortgage on the Ekins home which was prior to the Heller Trust Deed. Valley Bank agreed to lend the Ekins the $67,000.00 on a seven (7) year loan payable at $1,351.74 per month (Exhibit EE) if and only if Heller would subordinate and agree not to foreclose its lien on the home until the installment loan was paid in full (Tr. 1614-19). It was vital to the Ekins that their home be protected so long as their payments were current. They negotiated with Hillman to get the Subordination Agreement; transmitted it to Valley Bank and relied on it to safeguard their home while they were gone (Tr. 1636-37).

Although the Ekins did not sign the Subordination Agreement--there was neither a place for them to sign nor a need for their signature--they obtained it, were understood by all to be the beneficiaries of it, and justifiably relied upon it.

It should also be noted that the copy of the Subordination Agreement appended to Appellant's Brief as "Appendix iii" is not a true copy of the document signed and admitted into evidence as Exhibit DD. It contains pencil underlining and circling which was not on the document signed. A copy of the Subordination Agreement which was admitted as Exhibit DD is appended hereto as Addendum 4. Presumably Heller's switch

of these exhibits is also inadvertent.

4. Rock Wool's Financial Deterioration and Eventual Bankruptcy. There was substantial discussion and testimony respecting Rock Wool's financial condition in 1982. In his testimony Ross Ekins pointed out that the financial statements showed the assets at historical cost and not at the then present market value (Tr. 1747-49) and that in order to have an understanding of Rock Wool's financial condition, the difference between market value and book value must be considered.

In mid-January, 1983, Heller changed the rules by which it determined which accounts were qualified accounts for purposes of lending and threw the Rock Wool account into such a negative security position as to assure that the obligation was beyond Rock Wool's ability to bring current. Thereafter, Heller sent notices to all of Rock Wool's customers which had stale balances on them, even though Heller knew or is charged with the knowledge that it would receive a list of the current balances within the next two or three days. The effect of those notices and of Heller's use of outdated account balances in their preparation was to shut off the payments by the existing customers and to cause the contractors to cease to deal further with Rock Wool as an insulating subcontractor. The precise references to the record are contained in Point II of the Argument below.

The trial court found that the conduct of Heller was the cause of the eventual destruction of Rock Wool as an

operable business concern and that Heller knew its conduct would cause Rock Wool's debtors "to stop or slow down the payment of their accounts and quit doing business with Rock Wool" (Finding No. 5; Addendum 1).

Thereafter, on March 30, 1983, Heller commenced suit to foreclose the Ekins home, claiming that $116,700.43 was due from Rock Wool to Heller (R. 3) and was the amount of the lien on the Ekins house. In fact the amount then due according to Heller's own books and records was some $62,000.00 (Tr. 1789), and even that figure erroneously overcharged Rock Wool by some $8,279.00 (Tr. 1638 et seq.). The trial court found Heller's demand to be unconscionably excessive (Finding 9).

In the same suit in which Heller sought to foreclose on the Ekins home, it foreclosed on the accounts receivable, inventory, equipment, and all other assets of Rock Wool described in the security agreements and UCC-1. After making valiant efforts to try to pay off the Heller account, Rock Wool was finally forced to file bankruptcy in December, 1983, some nine (9) months after Heller's foreclosure suit, at which time the trustee in bankruptcy took the position that it, not Heller, was the owner of the vehicles because the Heller security interest was not perfected in the manner required by law. Some time after Rock Wool filed in bankruptcy Heller filed an Amended Complaint seeking personal judgment against the Ekins under their Guaranty. The Rock Wool bankruptcy case was still open at the time of the trial and judgment below, and will apparently remain

open pending this appeal.

In the case at bar Heller failed to establish the amount, if any, owed it by Rock Wool (Finding 13). Heller has not appealed from that Finding and is, therefore, bound by it.

Further facts will be discussed under the respective issues.

ARGUMENT

Introduction

The alleged errors on which Heller bases its appeal fall into natural groupings as follows:

1. There were reversible errors in law. Heller claims the trial court erred in its decisions as to the law governing the case in that (a) it failed to conclude that the language of the Guaranty waived or consented to impairment of the collateral; (b) the Ekins position as Rock Wool's controlling shareholders precludes them as a matter of law from claiming to be discharged from the Guaranty; and (c) the controlling shareholders of Rock Wool had an affirmative duty to see that Heller perfected the security interest in Rock Wool's vehicles.

2. There were errors in factual determinations. Heller claims the evidence in the record is not sufficient to sustain certain of the trial court's findings of fact;

3. There was an error in admitting an appraisal. Heller claims the trial court erred in admitting Robert Berman's appraisal of the value of certain motor vehicles which Berman had

never seen;

4. There was an error in the ruling on attorneys fees. Heller claims the trial court should not have awarded attorneys fees to the Ekins; and

5. Heller did not receive a fair trial. Heller claims that there were ex parte communications between the Ekins attorney and the trial judge which prevented Heller from getting a fair trial.

All of the points advanced on appeal by Heller were carefully briefed and extensively argued in the trial court and rejected as lacking merit. Accordingly, the record contains extensive briefing which deals with some of the arguments in greater detail than is possible within the confines of the Appellate Briefs. Those trial level memoranda will be referred to in connection with the appropriate issues and cited as to their location in the trial record for such use as supplemental material as the Court may desire.

POINT I

The Guaranty neither waives the Ekins right to claim exoneration by Heller's impairment of the security given by Rock Wool nor consents to impairment.

In summary, the Ekins argue under this point that:

1. The portion of the second paragraph of the Guaranty that relieves Heller of the duty of exhausting, or even pursuing, its collateral before calling on the guarantors (Ekins) for

payment does not constitute a consent to the release or impairment of collateral; and

2. The second sentence of the second paragraph of the Guaranty waives "notice . . . of the release of security," but does not waive or consent to either the release or the impairment of security.

The precise portions of the Guaranty (see Addendum 3 for full text of Guaranty) involved in the interpretation issues read as follows:

> "The undersigned also waive notice of any consents to the granting of indulgence or extension of time payment, the taking and releasing of security in respect of any said receivables, agreements, obligations, indebtedness or liabilities so guaranteed hereunder, or your accepting partial payments thereon or your settling, compromising or compounding any of the same in such manner and at such times as you may deem advisable, without in any way impairing or affecting our liability for the full amount thereof; and you shall not be required to prosecute collection, enforcement or other remedies against the Debtor or against any person liable on any said receivables, agreements, obligations, indebtedness or liabilities so guaranteed, or to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on us for payment; nor shall our liability in any way be released or affected by reason of any failure or delay on your part so to do."

In the course of the trial and the motion for a new trial Heller argued that the second sentence of the second paragraph of the Guaranty should be interpreted as consenting to the "release" of security, and, therefore, under the doctrine of this Court in the recent case of Continental Bank v. Utah

Security Mortgage, 701 P.2d 1095 (Utah 1985), which held that a consent to release is also a consent to impairment. The Ekins consented to impairment. The trial court held that the Ekins did not consent (Finding 1). Therefore, the trial court rejected Heller's contention that the language constituted a consent to release. As set forth more fully in the Memorandum filed by the Ekins below (R. 677-89), and adopted by implication by the trial court, the language cited does nothing more than waive "notice" of extension of time, taking or releasing security, accepting partial payment, etc.--which notice is, unless waived, required under California law (Sumitomo Bank of California v. Iwasaki, 447 P.2d 956, 958 (Cal. 1968). Waiver of such "notice," does not constitute waiver or consent to impairment of the security.

In its brief on appeal, Heller has apparently accepted that portion of the trial court's ruling, but now contends that the portion of the second paragraph of the Guaranty which provides that Heller need not proceed against the collateral before proceeding against the Ekins has the legal effect of consenting to the impairment of collateral. Such consent would, if given, bar the Ekins from access to the exoneration provisions of Section 2819, C.C.C. However, no such consent to release, and thus, by implication, to impairment is included in the Heller-drafted Guaranty, and the suggestion that Continental Bank, supra, holds that a provision that simply waives the requirement that the creditor first pursue its collateral constitutes a consent to release or impairment is a perversion of

the teaching of Continental Bank.

As Heller contends, the interpretation of the provisions of the Guaranty is a matter of law on which the Supreme Court, under certain circumstances, need not give any particular weight to the trial court's interpretation. But this is true when, and only when, the facts constituting the background against which the contract is to be considered are agreed or undisputed. Such is the case here. Those facts are:

1. The law of California is the governing law and the California Civil Code, as proven factually by Exhibit 1, includes the following sections which have application to this issue:

> "Section 2787. [Former distinctions abolished: Surety or guarantor defined: Guaranties of collection: Continuing guaranties]
> The distinction between sureties and guarantors is hereby abolished. The terms and their derivatives, wherever used in this code or in any other statute or law of this State now in force or hereafter enacted, shall have the same meaning, as hereafter in this section defined. A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general.
>
> "Section 2845. [Surety may require creditor to proceed against principal: Effect of neglect to proceed]
> A surety may require the creditor,

subject to Section 996.440 of the Code of Civil Procedure, to proceed against the principal, or to pursue any other remedy in the creditor's power which the surety cannot pursue, and which would lighten the surety's burden; and if the creditor neglects to do so, the surety is exonerated to the extent to which the surety is thereby prejudiced.

"Section 2819. [Acts operating to exonerate generally]
A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

"Section 2848. [Subrogation of surety to creditor's rights]
THE SURETY ACQUIRES THE RIGHT OF THE CREDITOR. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they become such."

2. The Guaranty is Heller's usual and required form, and Heller's staff was, as to all of its printed material, the scrivener.

3. At the time the Guaranty was signed, Heller was a very large national financing institution; Rock Wool was a small local company; and the Guaranty form was presented to the Ekins on a take-it-or-leave-it basis.

Given the presence of these elements, any lack of clarity, ambiguity, or uncertainty of meaning is Heller's responsibility; the terms must be construed most favorably to the Ekins; and since the elements of a contract of adhesion are present and Heller contends that the record is such as to make the interpretation a matter of law only, untainted by dispute or issue of fact, the rule of strictissimi juris should apply.

The dispute before this Court is whether, interpreted in light of the above circumstances, the Guaranty, by necessary import of its terms, contains the consent of the Ekins that Heller may impair the security or waives the Ekins right to claim the protection of the California Civil Code provision (C.C.C., Section 2819) that a guarantor is released if the creditor impairs the security given for the obligation guaranteed.

The Ekins claim they are entitled to have the Guaranty construed most favorably to them because Heller is the scrivener and because the relationship of the parties is such as to make the Guaranty a contract of adhesion, thus requiring application of the rule of strictissimi juris.

The background against which any guaranty agreement is to be construed must include the economic realities common to all such relationships. Any reasonable person contemplating a guaranty of the obligations of another must, as Ross Ekins' testimony directly and by reasonable implication shows he did, consider these questions:

1. Are the assets given by the principal debtor to

secure the debt adequate to liquidate the debt even if the principal debtor becomes bankrupt? If so, the credit will be paid in full from liquidation of the security.

2. Where, as in California, the guarantor can, absent waiver, require the creditor to look to its security before looking to the guarantor, and the Guaranty Agreement waives that right, what is the effect? Under California Law (C.C.C., Section 2848, supra), the guarantor is subrogated to the creditor's position in the security if the guarantor pays the debt. For that reason it is vital that the security not be released or impaired. The economic difference when the creditor is not required to pursue the collateral first is that the guarantor may have to foreclose on the security instead of the creditor doing so. Where an attorneys fee provision is present, guarantor recovers both the amount he had to pay the creditor and his costs of foreclosing and, so long as the security has not been impaired, still has the protection for which he bargained in the first place.

What, then, of the pivotal problem, interpreting the Guaranty Agreement? As Heller points out on pages 20 and 21 of its Brief, the Ekins have waived the requirement of the California Code that Heller proceed against the security before calling on the Guaranty. Under Section 2845, supra, such a waiver permits Heller to proceed against the Ekins without first foreclosing the security and thus permits Heller to require the Ekins to invoke the protection of the security by way of their

statutory subrogation. However, in the case at bar Heller did not take advantage of this right, instead Heller took control of the receivables, started the present suit, foreclosed on Rock Wool's assets, and tried to foreclose on the Ekins home. Nine months later, Heller went against the Ekins on the Guaranty, and now Heller contends that the language giving it power to avoid the requirement of Section 2845 has a dark and sinister side effect--that it has the effect in law of a consent that Heller is free to release, impair, or otherwise diminish or do away with the security which is the only corpus available to the Ekins for reimbursement.

Heller cites Heller v. Cox, et al., 343 F. Supp. 519 (S.D.N.Y. 1972) for the proposition that the wording of the Ekins Guaranty constitutes consent to impairment of collateral. The Cox case is inapposite. It is a New York Federal District Court case and there is no reason to suppose that the law of New York is the same as California's. The issue in Cox was whether there was res judicata; in Cox Heller had not impaired any of the collateral, and the discussion of the scope and nature of the claimed waiver and consent was dicta.

Heller v. Wilkinson, 627 P.2d 773 (Colo. 1983), also does not stand for the point for which Heller cites it. This becomes apparent when the rest of the sentence truncated by Heller is supplied. Wilkinson is dead-on-point favorable to the Ekins claim that once Heller took over collection of the accounts receivable in early 1983, it had to collect them in a

commercially reasonable manner. The trial court, in a finding not challenged by Heller, found that Heller did not proceed in a commercially reasonable manner (Finding 8, Addendum 1). This has the effect in both Utah and California of releasing Rock Wool either totally or pro tanto from liability for a deficiency. If Rock Wool is released, the Ekins Guaranty is automatically reduced, either totally wiped out or reduced pro tanto to the extent of $41,649.00 (see Finding 6).

Had Heller quoted the entire sentence from Wilkinson, the affirmance of the Ekins argument would have been clear. The complete sentence is:

> "Hence, under the terms of the agreement, the defendants could not compel Heller to go against the security, but once Heller elected to do so, he was required to do so in a commercially reasonable manner."

Nothing could be more abundantly clear than the fact that Heller with its long business experience and staff of attorneys could have said simply, shortly, and directly that the guarantor consented to the impairment of security or waived its right to enforce the provisions of Section 2819, if it intended that its Guaranty form have that effect. In California there is no need for the reader to be put to a determination of whether the fancy and complex language permitting Heller to go against the guarantor without having first exhausted its security is by some implication, projection, rationalization, or contortion also a consent or waiver of the protection of Section 2819. Nor is there any need for the reader to have to worry about the possible

implications of the waiver provision of the Guaranty's second paragraph, does it waive notice or does it waive release?. Had Heller wanted the Guaranty to be construed as containing a waiver of Section 2819, it could have said so in plain and simple words, but it didn't.

Heller cites American Security Bank v. Clarno, 199 Cal. Rptr. 127, 151 Cal. App. 3d 874 (Cal. App. 1984), in support of its position. However, a close reading of the case reveals that the reason the guarantors involved there were not released under Section 2819 was not that their guarantee was absolute and unconditional or because it did not require the creditor to proceed against the collateral, but rather was that the guarantors had waived their rights under Section 2819 when they had "consented" to the "substitution, exchange, or release of all or any part of the collateral." Supra at 131. It was because the guarantors had consented to the release of collateral and that they could not raise the impairment of collateral defense; it was not because they had signed an "unconditional guaranty."

As the Ekins did not consent to a release or other impairment of collateral, Clarno is distinguishable and does not support the proposition that the Ekins cannot assert Section 2819 as a defense to liability in the case at bar. For a more extended discussion of the issues raised by Clarno refer to the Memorandum at R. 674-677.

POINT II

The record contains adequate evidence to sustain each of the trial court's findings which is challenged by Appellant. However, even if the challenged findings were deleted, the remaining findings sustain judgment for the Ekins.

Before considering whether the findings that are challenged are supported by the record, it should be observed that the findings which are not challenged are sufficient by themselves to require judgment in favor of the Ekins. The Findings and Conclusions are set out in full as Addendum 1 at the end hereof, and the Judgment as Addendum 2. The trial court found that Heller had impaired its security by three acts or omissions:

1. Heller failed to perfect its security interest in the motor vehicles, which failure materially impaired that security (Finding 4, Addendum 1).

2. Heller impaired its rights and remedies [security interest] in the accounts receivable (Finding 5).

3. Heller impaired its security interest in the inventory (Finding 5).

Any one of these impairments, each of which is material as is shown by Finding 6, is sufficient under Section 2819, California Civil Code, supra, to exonerate the Ekins from their Guaranty. It only takes one. As to the value of the vehicles lost to the Ekins as security by Heller's impairment, Heller has claimed that the Berman appraisal is inadmissible. This claim is

without merit; however, even if Heller were correct the trial court could not have concluded that the value of those vehicles was so insubstantial as to render the impairment immaterial.

The portion of Finding 5 that finds that Heller impaired the accounts receivable and of Finding 6 establishing the amount of that impairment as being $41,649.00 are sufficient standing alone to require judgment for the Ekins under California law unless this Court finds that the very terms of the Guaranty constitute consent to such impairment.

Nonetheless, appellant argues that certain of the trial court's findings of fact are erroneous and that argument, which is fallacious, must be answered. The findings Heller disputes are (1) those acts and omissions found to constitute a breach of Heller's obligation of good faith (Appellant's Argument V), and (2) that Heller impaired Rock Wool's inventory in the amount of $25,000.00 or any other amount (Appellant's Argument VI).

The legal standard for determining the sufficiency of evidence to sustain a finding is stated somewhat differently in different decisions of this Court. In Bennion v. Hansen, 699 P.2d 758 (Utah 1985), the standard is said to be:

> "On appeal, the findings of the trial court will not be disturbed unless there is no substantial record evidence to support them. See, e.g., Litho Sales, Inc. v. Cutrubus, Utah, 636 P.2d 487, 488 (1981). In reviewing the evidence, we view it in the light most favorable to the trial court. See, e.g., Hardy v. Hendrickson, 27 Utah 2d 251, 254, 495 P.2d 28, 29 (1972)."

In Union Pacific Railroad Company, 649 P.2d 48 (Utah

1982), the standard is described in this fashion:

> "As we have frequently stated, in a non-jury trial it is the trial judge's prerogative to find facts--including judging the credibility of witnesses, weighing the reliability of other evidence, and drawing fairly derived and reasonable inferences therefrom. On appeal this Court reviews the evidence in a light most favorable to the trial court findings. Where there is competent evidence to support the findings this Court must sustain them (citing cases.)"

It follows that the challenged findings will not be disturbed on appeal unless the record contains no evidence to support the finding, or the evidence is insubstantial, or the evidence is incompetent. In the case at bar, the record contains an abundance of competent, compelling evidence, often unrebutted, to support each of the findings of fact objected to by Heller. We will discuss the challenged findings of fact in the order of their presentation in Heller's Brief:

1. The findings respecting bad faith. These findings are contained in Finding 9 which reads as follows:

> "9. The California Civil Code imposes on all parties to a contract an obligation of good faith in its performance or enforcement. Heller has breached this obligation in its enforcement of the contracts on which it claims the Ekins are liable (a) by changing the operating rules on Rock Wool unilaterally and creating an insuperable negative balance of accounts receivable security; (b) by giving notice to Rock Wool's customers which were taken from an obsolete customer list known by Heller to contain obsolete balances, and doing so at a time when Heller knew it would receive in a day or two the regular monthly updated list from Rock Wool containing current information; and (c) by attempting to coerce the Ekins by filing suit without notice or demand at a time Heller knew the Ekins' were

gone from Utah on a multi-year assignment, by claiming an unconscionably excessive amount, and by seeking the immediate appointment of a receiver to take possession of Ekins' home and having it sold at a sheriff's sale, all at a time when Heller was bound by contract not to take action against the Ekins' home."

That the California law imposes a duty of good faith in all contracts has not been disputed by Heller. The trial court found Heller to have breached that covenant in three respects. Does the record support this? Yes, as follows:

a. That Heller changed its rules and created an insuperable negative balance is supported by:

(1) The testimony of David Ekins (Tr. 1775-82) so stating. The following extracts are on point:

"TANNER: "With respect to that subject, will you tell us what happened and whether it is a matter of any significance in the course of the operation of this business?

. . .

EKINS: There's a great deal of significance.

TANNER: First, explain to us what happened.

. . .

EKINS: On Exhibit D-9, report number 673, I had a telephone call from Jim Hillman, Walter E. Heller Western, who informed me that -- that they have been ever since the beginning of the agreement miscalculating apparently or misinterpreting rather our accounts receivable aging such that I needed to change the hold-out figure which is shown on line 6 to $171,000. This had the formula effect of having our loan availability a minus $52,196.96.

. . .

TANNER: Had Heller given you any notice or

knowledge prior to the time of the telephone call to which you just referred that there would be the change made to which you just referred?

EKINS: None whatsoever.

. . .

TANNER: Was the interpretation which Heller had utilized up to and including the time shown in Exhibit 8 different from the interpretation which is embodied in Exhibit 9? I'm speaking of Heller's interpretation of the accounts receivable and those which were qualified and not qualified to be considered.

EKINS: Their interpretation prior to that time was the same as ours.

. . .

TANNER: And were you -- would you be able -- did you expect that you would be able to operate effectively under the interpretation of the aging schedules that was reflected in Mr. Hillman's message to you and in Exhibit S?

TANNER: After the change?

EKINS: Yes.

TANNER: No."

(2) The testimony of James Hillman (Heller's vice president) explaining the effect of the change in accounting requirements and the significance to Rock Wool. This testimony is set out in the copy of Tr. 1417-19 attached hereto as Addendum 5, which is entirely consistent with the David Ekins testimony and establishes that Heller knew what effect the change would have on Rock Wool.

(3) The testimony of V. Ross Ekins (Tr. 1685) as

follows:

"EKINS: You want me to tell you what the factors were that caused us to [file bankruptcy]?

ANDERSON: Yes, sir.

EKINS: I would love to.

. . .

EKINS: The straw that broke the camel's back, and we had a lot of other troubles, was when Heller changed their formula for arithmetically determining the figure they always gave to us each month, telling us what the unqualified accounts receivable were which had the net effect of putting us into a deficit position, as has been testified to here, by some $55,000 which turned off cash flow, positive cash flow, over night which virtually -- "

b. That Heller sent notices to Rock Wool's customers demanding that they pay Heller incorrect amounts which Heller had taken from a stale list when a new and current list was expected by Heller and coming from Rock Wool in the next few days is established by:

(1) The date the notices were prepared and sent (see Exhibit T, exemplar of notice, attached hereto as Addendum 6).

(2) Hillman's testimony that on February 7, 1983, he instructed his staff to send the notices to Rock Wool's customers (Tr. 1343) and didn't know what accounts aging list he had on hand or when Heller usually received its monthly update from Rock Wool, but that current accounts receivable aging lists were supposed to be in Heller's hand by the 10th of each month

(Tr. 1315-18).

(3) David Ekins testimony that he sent Heller an updated accounts receivable aging list between February 10th and 15th, as was his custom (Tr. 1787-88).

(4) When the notices were sent out Rock Wool began getting angry calls from debtors who said the accounting information was incorrect, which was true, and the contractors held off payment (Tr. 1784-85).

c. That Heller attempted to coerce the Ekins into paying the Rock Wool debt (i) by suing to foreclose on their home, (ii) without prior notice, (iii) while the Ekins were away on a long-term assignment, (iv) by claiming an unconscionably excessive amount and seeking appointment of a receiver, and (v) all at a time when Heller was bound by contract not to foreclose on the Ekins home is established by:

(1) Heller's Subordination Agreement (Exhibit DD and Addendum 4 hereto), which, paragraph 10 of the Findings shows, precluded Heller from foreclosing on the Ekins home until the Ekins had paid off the Valley Bank trust deed (some seven (7) years from May, 1981) or had defaulted in making their payments to Valley Bank. Heller started its foreclosure action on March 30, 1983 (Tr. 2, showing filing date of Complaint) even though the Ekins had never defaulted in their payments to Valley Bank.

(2) That the Ekins were on a three (3) year church assignment in Tennessee from June, 1981 until June, 1984 is acknowledged by all parties.

(3) In the March, 1983 foreclosure action Heller claimed $116,700.43 to be due from Rock Wool (Tr. 4, page 3 of the Complaint) when Heller's books showed only between $57,000.00 and $62,000.00 to be due from Rock Wool.

(4) The Complaint sought an immediate receivership for the Ekins home (R. 5 and 10).

(5) Mr. Hillman's testimony that the purpose of these actions was to put pressure on the Ekins to pay Rock Wool's debt to Heller (Tr. 1380-84, copy attached as Addendum 6).

2. The finding that Heller impaired the security consisting of inventory by $25,000.00. Finding 6 finds that Heller impaired the motor vehicles in the sum of $43,600.00, the accounts receivable in the amount of $41,649.00, and the inventory by $25,000.00. In this appeal Heller challenges the admission of the Berman appraisal of the vehicles, but offered no rebuttal testimony as to value; does not challenge the accounts receivable figure; and does challenge the inventory loss.

Query, is there any competent evidence establishing the $25,000.00 figure? Yes, David Ekins, the manager of Rock Wool, was asked whether he would have received any more for the inventory on a going business basis than was received in liquidation, and Ekins testified he would have received $25,000.00 more. On further examination Ekins reiterated and supported his prior testimony (Tr. 1820-21). This testimony was elicited from the person directly in charge of the operation, and was neither objected to by Heller nor made subject of a motion to

strike.

Since there is an overwhelming preponderance of evidence, mostly unrebutted, supporting the only findings of fact Heller challenges in this appeal, this Court must, by its own rules, affirm the trial court's findings in their entirety, the challenged and the unchallenged. Thus sustained, they compel affirmance of the conclusions of law and judgment.

POINT III

The Berman appraisal of Rock Wool motor vehicles was properly admitted. Even if it had been an error, the error was harmless.

In its Argument VI Heller attacks the appraisal of Rock Wool vehicles made by Robert Berman and admitted in evidence below. Heller contends that an appraiser is by definition an expert witness; that Rule 703, U.R.E. governs the admissibility of his opinion; and the Ekins did not lay a proper foundation for admission of the appraisal. This evidence was admitted over Heller's objection.

Missing from Heller's argument is any claim that the outcome of the suit would have been affected in any fashion if the Berman appraisal had not been admitted. Absence materiality and prejudice an error in an evidentiary ruling does not constitute reversible error. In the case at bar, the trial court held the Ekins to have been released from their Guaranty by virtue of Heller's impairing its security interest in Rock Wool's vehicles, in the accounts receivable, and in the inventory--any

one of which, standing alone, would have triggered the mechanism of Section 2819, C.C.C., and fully released the guarantor. At a minimum Berman's appraisal showed that whether the guarantors were released ab initio, or at the time of the Heller foreclosure action, or at the time the vehicles were sold, or at some other time, the vehicles had a substantial value sufficient to make the impairment of security a material impairment. Had the trial court erred and held that the effect of Section 2819, C.C.C., was a pro tanto exoneration of the sureties (guarantors), the exact dollar value would have been necessary to show the dollar value of the offset. However, the trial court properly concluded that any material impairment of security exonerates in full. Had Berman's testimony of value been excluded, the outcome would still have been adequately supported by Heller's impairment of the other two parts of the security.

The particular alleged error in an evidentiary ruling would not, even if made, have warranted reversal. But no error was made. A careful and adequate foundation for Berman's appraisal appears in the record. He was qualified as an expert in vehicle appraisal (Tr. 1483-4) who had appraised some 10,000 vehicles. He was given a full description of the vehicles (long since sold or disposed of) that Rock Wool had as of March 30, 1983 (Exhibit 6). As a practical matter, a description was all that could have been given to any expert--the cars were unavailable. Using the written description as the factual premise, he stated his opinion of the value of each vehicle.

Rule 703 is broader than former Rule 56 and allows an expert to base his opinion on facts or data not admissible in evidence if of a type reasonably relied upon by experts in the field. For example, a psychiatrist testifying as to defendant's sanity could base the opinion on conversations he had with others who had dealt with the defendant. The Court notes that the expert is fully capable of judging what is or is not a reliable basis for his opinion, United States v. Sims, 514 F.2d 1476, 149 (9th Cir. 1975). And, contrary to Heller's contentions, Mr. Berman did not indicate that it was unusual for him to render an appraisal without seeing the vehicle (Tr. 149).

Even under the more restrictive Rule 56, an expert was able to testify as to value even though his conclusions were based entirely upon hearsay evidence. United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952); United States v. Sowards, 339 F.2d 401, 402 (10th Cir. 1964).

There was no other basis to establish value. David Ekins was present to be cross examined.

Had Heller actually felt there was error in the Berman appraisal of the value of the vehicles, it could have called its own appraiser, given him the very description given Berman, and put his appraisal in evidence. This could have been done during discovery or during trial. No such rebuttal was offered. Where, as here--and as in the case of many, perhaps most, opinion evidence--the opinion must be premised on facts related to the expert by others, the opinion is not rendered inadmissible

because the observer of the facts does not have the same background and perception as the expert.

POINT IV

That the Ekins were the controlling stockholders of Rock Wool does not preclude them from claiming to be released from their Guaranty, nor does it, under the facts of this case, require them to ensure that Heller perfect its security interest in the Rock Wool assets.

In Argument IV of Appellant's Brief Heller contends that the Ekins cannot assert a discharge based on Heller's negligence because they are controlling shareholders. This Heller contends is established law and is supported by numerous cases. For authority Heller cites the Court to six cases. Of the six cases, two, Rushton and Kruger, are not on point; in fact, they do not even deal with the issue for which they are cited. With regard to the other four, they are the only cases that can be found to support Heller's proposition. Thus, while there is some support for Heller's position, it can hardly be considered "established law" or "widely recognized." In truth, the law is just the opposite.

Heller's argument essentially is that this Court should not even consider the merits of the Ekins defenses because they are controlling shareholders and officers of U.S. Rock Wool. The following is a list of cases where guarantors who were also controlling shareholders, officers, or directors of the principal were permitted to raise suretyship defenses. In most of the

cases cited, the guarantors did not prevail on their defenses. However, it was on the merits that they failed, i.e., the Court found that they had consented to an impairment, an issue that would have been moot if control, shareholding, or directorship precluded them from asserting the defense. The list is not exhaustive, even on the one suretyship defense. No doubt many other cases could be found if all suretyship defense cases were surveyed. The cited cases are:

American Security Bank v. Clarno, 151 Cal. App. 3d 874, 199 Cal. Rptr. 127 (1984).

American Bank of Commerce v. Covolo, 540 P.2d 1294 (N.M. 1975).

Union Bank v. Ross, 54 Cal. App. 296, 126 Cal. Rptr. 646 (App. 1976).

Executive Bank of Fort Lauderdale v. Tighe, 32 U.C.C. Rptr. 894, 445 N.Y.S. 2d 339 (Ct. App. 1981).

Etelson v. Suburban Trust Co., 9 U.C.C. Rptr. 1371, 283 A.2d 408 (Md. 1971).

Fireman's Fund Insurance Co. v. Biafore, 18 U.C.C. Rptr. 519 (3rd Cir. Ct. of App. 1975).

Commerce Bank of St. Louis v. Wright, 37 U.C.C. Rptr. 502, 645 S.W. 2d 17 (Mo. 1982).

Lawyer's Title Insurance Corp. v. Northeast Texas Development Co., 34 U.C.C. Rptr. 604, 635 S.W. 2d 897 (Tex. 1982).

Wilson v. Baxley State Bank, 29 U.C.C. Rptr. 1550 (Ga.

1980).

First Nat'l Bank v. Hangen Ford, Inc., 219 N.W. 2d 847 (N.D. 1974).

Peoples Bank v. Pied Piper Retreat, Inc., 209 S.E. 2d 573 (W.V. Sup. App. 1974).

First Bank & Trust Co. v. Post, 293 N.E. 2d 907 (Ill. App. 1973).

McHenry State Bank v. Y & A Trucking, 454 N.E. 2d 349 (Ill. App. 1983).

Peacock v. Farmers & Merchants Bank, 454 So. 2d 734 (Fla. App. 1984).

Walter E. Heller & Co., Inc. v. Wilkerson, 627 P.2d 773 (Colo. App. 1980).

Huey v. Port Gibson Bank, 390 So. 1009 (Miss. 1980).

In Argument IV Heller asserts that its position "is so widely recognized that one court has stated that it could find '. . . no reported case where a person who has an interest in the transaction can avail himself of this defense [discharge or release] where there has been a failure to file a financing statement.' Mikanis Trading Corp. v. Lowenthal, 22 U.C.C. Rptr. 1000 (N.Y. 1977)." Heller's claim is clearly in error as the above list of cases shows. In fact, the case cited as authority for that erroneous proposition, Mikanis, was later overruled by implication in Executive Bank of Fort Lauderdale v. Tighe, 411 N.Y.S. 2d 939 (Sup. Ct. 1978). Tighe involved a creditor which had failed to perfect its security interest and the guarantors

were officers and shareholders of the debtor. The Court recognized the Mikanis case and yet still permitted the guarantors to raise the defenses of a failure to perfect. The case was modified on appeal for other reasons. Executive Bank of Fort Lauderdale v. Tighe, 445 N.Y.S. 2d 425, 429 N.E. 2d 1054 (Ct. App. 1981).

Apart from the numerous cases which rebut its position, Heller's argument is theoretically flawed. It's argument would require this Court to ignore the corporate form and to attribute corporate actions to its shareholders and to require the shareholders to perform certain acts in order to protect their own non-corporate interests. To obtain that result requires a piercing of the corporate veil, which can be done only upon a finding that the corporate form was used to perpetrate fraud and that the corporate entity was a sham. Dockstrader v. Walker, 510 P.2d 526 (Utah 1973). Heller has not made such a showing. In fact, Heller's argument would require that all shareholder guarantors be treated as if their corporations were shams.

Heller's argument is also factually flawed. Heller contends that the Ekins had an affirmative duty to see that the security interest was perfected. This argument ignores the testimony of Ross Ekins that Heller's agent, Hillman, specifically told Ekins that he (Hillman) would do the perfecting (see pages 9 and 10 of Statement of Facts, supra). It also ignores the testimony of David Ekins (Tr. 1814) that another of Heller's agents, Mr. Arterberry, told him that filing the UCC-1

had perfected the security interest in the vehicles.

Heller is in the business of making secured loans; it should know what is required to perfect various types of security interests. It chose to have California law, not Utah law, be its standard. It claimed that it deliberately failed to perfect this valuable security and then sought to escape responsibility by lying about its reasons for doing so. The trial court found as a fact that Heller undertook responsibility for perfecting this security interest and held it responsible for the consequences.

Furthermore, even if Heller was correct in its assertion, it still must fail because the trial court found that it failed to collect the accounts receivable in a commercially reasonable manner (Finding 8). This failure, which is entirely outside the Ekins control, even under Heller's theory, would release the Ekins. Under Western Decor & Furnishings v. Bank of America, 154 Cal. Rptr. 287 (App. 1979), a creditor cannot obtain a deficiency judgment where it fails to collect the accounts receivable in a commercially reasonable manner.

POINT V

The trial court was required by California law to award the Ekins their attorneys fees and the determination of the proper amount is the sole province of the trial court.

As indicated in Appellant's Brief, the trial court awarded attorneys fees and costs to the Ekins on the basis of California Civil Code, Section 1717, which provides that where a

contract specifically provides for one party to recover attorneys fees and costs, the opposing party shall be awarded its attorneys fees and costs if it prevails.

In the principal action Heller first sought to enforce its various loan agreements and trust deed against the Ekins home and in connection therewith sought the entire sum claimed due from Rock Wool together with attorneys fees and costs incurred in foreclosing the Ekins Trust Deed which secured the Ekins Guaranty (R. 5 and R. 9). Clearly Heller claimed to be entitled to attorneys fees for its efforts in that enterprise. Under California law the Ekins would, therefore, also be entitled to recover their attorneys fees if they were the parties that prevailed in the foreclosure action.

When Heller later amended its Complaint (R. 303 et seq.) to include a count for a personal judgment against the Ekins, it again claimed all expenses, collection charges, court costs, and attorneys fees "incurred by Heller in the collection of monies advanced to Rock Wool under the Loan Agreement" (R. 00307) and "Attorneys fees as provided in the Guaranty Agreement;" and "costs and interest as provided by law" (R. 00314).

It is inconceivable that Heller, had it prevailed, would have sought against the Ekins anything less than its entire attorneys fees incurred in any and every aspect of the case. In fact, Heller in its invoices to Rock Wool (the very invoices on which it sought to recover against the Ekins under their

Guaranty) included all attorneys fees as they were incurred (Exhibit CC). Further, at the close of evidence Heller submitted its Affidavit respecting the attorneys fees it sought to recover and included all services of any and every kind incurred in any aspect of the cause (R. 751-94). The only justification for this kind of an award against the Ekins would necessarily have to be that Heller claimed the Ekins to be responsible for all Heller's costs, expenses, and attorneys fees in any way connected with the various agreements, including the Guaranty. When it thought it might prevail, Heller took the position that the Guaranty did provide for the award of all attorneys fees, costs, and expenses in any way connected with its enforcement, and when Heller did not prevail, has taken the opposite position. It should not be permitted to speak out of both sides of its mouth.

Even more compelling is the wording of the Guaranty itself, complex, detailed, interwoven with references intra se, and possibly less than totally clear about the scope of attorneys fees recoverable by Heller. Like the other provisions of the Guaranty, any unclear, obscure, or ambiguous provision must be construed most strongly in favor of the Ekins. Please note the following provisions of paragraph 1 of the Guaranty (Exhibit "F," copy appended hereto):

> " . . . we, the undersigned, for value received, do hereby jointly and severally unconditionally guarantee to you and your assigns the prompt payment in full at maturity and all times thereafter . . . of any and all indebtedness, obligations and liabilities of every kind or nature . . . now or at any time hereafter owing to you by the Debtor, . . . or

> contained in any other agreements, undertakings or obligations of the Debtor with or to you, of any kind or nature, and we also hereby jointly and severally agree on demand to reimburse you and your assigns for all expenses, collection charges, court costs and attorney's fees incurred in endeavoring to collect or enforce any of the foregoing against the Debtor and/or undersigned or any other person or concern liable hereon; for all of which, with interest at the highest lawful contract rate after due until paid, we hereby jointly and severally agree to be directly, unconditionally and primarily liable jointly and severally with the Debtor, and agree that the same may be recovered in the same or separate actions brought to recover the principal indebtedness."

It is inconceivable that Heller would have been willing to agree that this provision did not require that it be reimbursed its fees for enforcing the Guaranty had it prevailed below. As the record shows, Heller did claim its fees for such services (supra), thus proving that, until it lost the case, it interpreted the Guaranty the same way as did the trial judge.

The Ekins submit that the trial court was correct in entering judgment for attorneys fees, expenses, and other costs as determined by it, and providing for the supplemental award of such attorneys fees, costs, and expenses as may be incurred by the Ekins post-judgment. On remand the trial court should be asked to determine the amount of the further attorneys fees, costs, and expenses, and add them. Further discussion of this subject is found in the Memorandum of the Ekins filed at R. 1053 et seq.

POINT VI

The record is clear that there were no ex parte communications between the Ekins counsel and the trial judge respecting the merits of the case. Ex parte contact respecting procedural matters is encouraged by the rules of procedure below.

There is no question but that there were ex parte communications between the Ekins counsel and the trial judge (R. 878, et seq; App. iv to Appellant's Brief) and between Heller's counsel and the trial judge (R. 756, 2d line from end; R. 773, lines 8 and 9 from end; R. 788, lines 14 and 15). As is discussed below, the record is absolutely clear that there were no ex parte communications between the Ekins counsel and the trial judge other than communications respecting procedural matters such as ascertaining when the trial court could hear matters pending among the parties.

Heller has leaped from the premise that there were contacts between the Ekins counsel and the trial judge to the conclusion that such contacts involved the merits of the cause. It has made this assertion without any record or factual premise other than the existence of the contacts between Court and counsel, and Heller's wholly unwarranted suspicion that the Court and counsel were engaging in improper and unethical discussions. The trial record consists of the Affidavit of Tanner explaining each of the contacts listed in his time sheets (R. 1154-1161) and the statement of Judge Dee for the record in open court respecting the nature of those communications. Tr. 1926-1931,

the entire statement of Judge Dee on this matter, is appended hereto as Addendum 7. For reasons of its own Heller neglected to put pages 1926-1928 in the extract appended to its Brief..

Mr. Tanner's Affidavit (R. 1154) states under oath the occasion for and the contents of each contact cited by Heller. None is a breach of ethics or good faith, and none involved a discussion of the merits. A full copy of this affidavit is appended hereto as Addendum 8. Heller's counsel filed a counter-affidavit (R. 1147) which did not even purport to rebut the Tanner affidavit.

The trial court, after explaining the nature of and necessity for contacts between trial counsel and the Court, said (Tr. 1928):

> " . . . but I will assure you and your clients . . . that I was in no way backdoored by Mr. Tanner. He wouldn't and I wouldn't."

There is a total lack of factual premise upon which this Court could base a conclusion that either Mr. Tanner or Judge Dee violated the ethical principles to which they are bound by oath, or that Heller, whose counsel also made ex parte contacts with the Court, was deprived of a fair trial. For supplemental material, including a strong statement of counsel's view of what it considers to be scurrilous and irresponsible aspersions, see trial memoranda at R. 1139-44, Ekins' Motion in Opposition to Appellant's Motion for Summary Disposition, pp. 5-17, and the record of the oral argument of Heller's motion for a new trial (Tr. 1901-1931, particularly the argument on this

point at pages 1903-1906, 1913-1918, and 1924-1931).

Heller also failed to prove that the alleged misconduct was "prejudicial." Absent prejudice Heller could not be entitled to a new trial under Rule 61 U.R.C.P. Error insufficient to warrant a new trial is insufficient to warrant reversal on appeal. Appellant must show the existence of a reasonable likelihood that unfairness or injustice resulted from the alleged misconduct. Ewell & Son v. Salt Lake City Corp., 27 Utah 2d 188, 493 P.2d 1283 (1972). Nothing before the trial court sustains this burden. Even when the affidavits are viewed in a light most favorable to Heller, they do not show any likelihood of unfairness or injustice. The most they show is that there were several communications by the Ekins' counsel to the court more than one year prior to trial concerning matters unrelated to trial issues; and that one contact occurred during trial and related to when the trial was to reconvene.

However, Heller contends that any ex parte contact with the court, even if it is merely to deliver a courtesy copy of pleadings to the clerk, is sufficient to establish the requisite prejudice. In this Heller is mistaken. Where there is an allegation of attorney misconduct the Court must still determine whether it was sufficiently prejudicial to warrant a new trial. "The standard for making this determinatin is whether the errors were 'real and substantial and such as may reasonably be supposed would affect the result.'" Nelson, supra at 734, quoting Ivie v. Richardson, 9 Utah 2d 5, 13, 366 P.2d 781, 787 (1959). In other

words, even if it is assumed that the contacts between Ekins' counsel and the trial court were in fact irregularities, Heller must still show a reasonable likelihood that the contacts affected the result. Heller cannot show prejudice by merely alleging that ex parte contacts were prejudicial.

In Arellano v. Western Pacific Railroad Co., 5 Utah 2d 151, 298 P.2d 527 (1956), this court faced a similar argument. Plaintiff claimed she was entitled to a new trial because of jury misconduct. In support of her motion, plaintiff offered three affidavits which showed that a brother of one of the jurors was an attorney, that the attorney was heard to say that he knew all about the case because his brother was on the jury, and finally, that in jury deliberations the juror led the discussion. The plaintiff claimed that the juror had spoken with his brother about the case and had violated the rule dealing with separation of the jury. In that case this Court stated:

> "Let it be assumed . . . that it had been proved that the accused juror talked with his brother concerning the case. Such conduct violates Rule 47(k). Does such misconduct require the trial court to grant a new trial? It is doubted if such misconduct on the part of a juror, nothing more appearing than here, would justify the court in granting a new trial. Certainly the court did not commit error in refusing to grant the new trial.
>
> . . .
>
> " . . . The fact that a juror has a brother who is an attorney and that the juror takes the lead in the jury room is not sufficient proof of prejudice. Some further proof must be made that the juror actually conversed with his brother and that such conversation influenced the juror so as to prejudice the

> plaintiff's cause. There was no such showing in the instant case."
> Arellano, supra at 529-530 (emphasis added).

See also State v. Packett, 294 N.W. 2d 605 (Neb. 1980), which held that even where (unlike the case at bar) there were ex parte discussions on the merits, that alone was insufficient to warrant a new trial. In that case, the trial court's determination that the movant suffered no prejudice was upheld.

Because there is a presumption favoring the validity of the judgment, Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966), Heller must show prejudice or have its appeal denied. There has been no showing of misconduct and not even an attempt by Heller to show prejudice.

POINT VII

Heller is bound by the trial court's finding that Heller failed to establish the correct amount, if any, unpaid by Rock Wool under its contracts with Heller. This is fatal to Heller's appeal.

In the case at bar, as in every case seeking damages, the plaintiff must prove the amount of his loss or damage with sufficient certainty as to permit the trier of fact to determine the amount of damages. Failure to do so is fatal and the trial court must rule for the defendant.

In a suit on a guaranty, the limit of guarantor's obligation is to make up the amount or amounts due and unpaid the creditor by the principal debtor under the contract or contracts guaranteed. The evidence must permit the trial court to

determine the correct amount, or the plaintiff cannot be awarded judgment. In the case at bar there is another proceeding pending between Rock Wool and Heller in the bankruptcy court, but the case at bar is the only proceeding pending between the Ekins and Heller, and it was initiated by Heller. Rock Wool, a named defendant herein, agreed with Heller not to participate in this trial, but to defer to the bankruptcy court to resolve its account with Heller. The Ekins made no such agreement. Accordingly, Heller must have proved the amount of the liability of the Ekins or Heller cannot have been entitled to either a money judgment against the Ekins, or a judgment of foreclosure.

Finding 13 reads as follows:

> "13. Heller has failed to establish by a preponderance of the evidence or in any other fashion the correct amount, if any, remaining due and unpaid by Rock Wool under its contracts with Heller."

Since Heller has not challenged Finding 13 in its appeal of this case and cannot now be heard to complain of it, Heller has failed to establish an essential element of its cause and cannot, therefore, prevail in its appeal.

This point alone is dispositive of the Heller appeal. That the issues Heller did raise on appeal are without merit is only cumulative. Nonetheless, prudence requires that the Ekins respond to each point raised by Heller, and the Ekins have done so.

CONCLUSION

In the trial court the Ekins prevailed on four grounds, first, that under California law Heller's impairment of the security exonerated the Ekins from their Guaranty; second, that Heller was in breach of its contracts (the Guaranty and, by reference, the Mortgage and Security Agreements) with the Ekins, and therefore could not enforce the Guaranty; third, that Heller failed to pursue the accounts receivable in a commercially reasonable manner, thus releasing Rock Wool from liability for a deficiency, which automatically releases the Ekins; and fourth, that Heller failed to establish what amount, if any, Rock Wool owed Heller. The record below contains some competent substantial evidence to support each of the findings of fact and Heller has not even challenged Finding 8, that it failed to pursue the receivables in a commercially reasonable manner, or Finding 13, that it failed to prove the amount that Rock Wool owed Heller. Hence, the only theoretical possibility that this case could be reversed would be if this Court, against the unrefuted testimony of Judge Dee and Mr. Tanner, were to somehow conclude that they had lied, had in fact engaged in ex parte discussions respecting the merits, and that this conduct caused the trial to be unfair. There is nothing whatever in the record to sustain either misconduct or effect on the outcome.

On the first issue, impairment of security, this Court could, of course, view the Guaranty and the facts surrounding its promulgation and execution differently from the Ekins. However,

even if this Court should somehow conclude that the Guaranty should be interpreted as consenting to impairment, the judgment below would nonetheless have to be affirmed on three grounds, Heller's breach of contract, Heller's failure to pursue the receivables in a commercially reasonable manner, and Heller's failure to prove damages.

On the second issue, breach of contract, there is no question of law involved. Heller has not, either below or on this appeal, disputed the principle of law that there is an implied or statutory covenant of good faith in every contract controlled by California law. The only questions raised on this point are factual; i.e., did Heller do the things that the findings of fact determined? The Ekins have recited chapter and verse of abundant evidence sustaining each finding of Heller's breach of the covenant of good faith, and the whole structure is cemented into place by the testimony of Heller's vice president, Hillman, that he did those things "to pressure [the Ekins] into making payment."

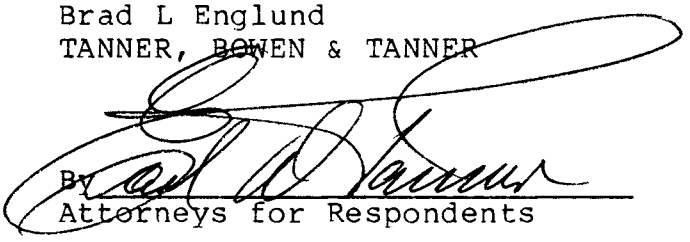
But even if this Court were to decide in favor of appellant on the first and second points, it still could not reverse. There are the unchallenged findings of fact that Heller failed to pursue the receivables in a commercially reasonable manner and that Heller failed to prove what amount, if any, was due from Rock Wool to Heller, thus failing to prove the amount that should be recovered of the Ekins if Heller did prevail. Absent proof of the amount due, Heller must fail below and on

this appeal. In the absence of a finding that it pursued the receivables in a commercially reasonable manner Heller must fail below and on this appeal.

It follows that there is no basis for reversing the judgment below and it must, therefore, be affirmed; that this case should be remanded to the trial court to determine the balance of the post-judgment expenses and attorneys fees incurred by the Ekins; and that the trial court should be instructed to add to the judgment the sum thus determined.

RESPECTFULLY SUBMITTED this 1st day of December, 1986.

Earl D. Tanner
Earl D. Tanner, Jr.
Brad L Englund
TANNER, BOWEN & TANNER

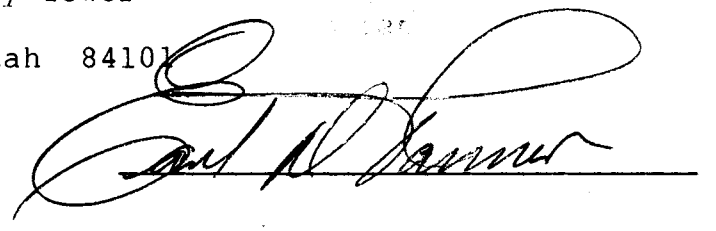


By
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 1986, four true and correct copies of the foregoing instrument were hand delivered to the following:

Cary D. Jones, Esq.
John T. Anderson, Esq.
HANSEN & ANDERSON
Attorneys for Appellant
Sixth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101



EARL D. TANNER #3187
BRAD L ENGLUND #4478
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36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins
and U.S. Rock Wool Defined
Benefit Trust

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S. O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, a Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. C-83-2368 Judge David B. Dee

This matter came on regularly for trial before the Court on the 25th day of November, 1985, the Honorable David B.

Dee presiding. Plaintiff was represented by its attorneys, John T. Anderson, Esq. and Cary D. Jones, Esq., of Hansen & Anderson; and defendants V. Ross Ekins and S. O. Ekins were represented by their attorneys, Earl D. Tanner, Esq. and Brad L Englund, Esq., of Tanner, Bowen & Tanner. On December 6, 1983, defendant U.S. Rock Wool Company, Inc. (Rock Wool), filed a Petition in Bankruptcy which case is still pending in the bankruptcy court. Through their attorney of record, Anna S. Drake of Nielsen & Senior, Rock Wool and defendant U.S. Rock Wool Defined Benefit Trust (the "Trust") advised the Court that they would be bound by the determination of such issues as were before this Court, as distinguished from the bankruptcy court, without the presence of their counsel of record. Defendant American Savings & Loan Corporation has been determined to be the first lienholder on the premises here involved; First Interstate Bank has been heretofore dismissed by stipulation; and defendant Valley Bank & Trust Company, a Utah banking corporation (Valley Bank), has stipulated with plaintiff that the issues involving Valley Bank remaining undetermined after this trial, if any there be, are reserved for trial at a later date. The matter was fully presented, argued and submitted, and the Court having considered the same and being fully advised in the premises and having made and entered its Memorandum Decision herein, finds the facts, makes its conclusions of law, and directs entry of judgment as follows:

FINDINGS OF FACT

1. On December 6, 1983, Rock Wool filed a petition in the Bankruptcy Court at Salt Lake City, Utah for a Chapter 11 reorganization, which was later converted to a Chapter 7 proceeding, which is still pending in the Bankruptcy Court and which makes Heller's claims for replevin moot so far as this suit is concerned.

2. The agreements involved in this suit specify that they shall be governed as to validity, interpretation and effect, and in all other respects by the laws and decisions of the state of California.

3. The documents constituting the agreements which are the subject of this action consist of Heller's usual printed forms which were provided by Heller and had been prepared by Heller. They were signed on or about December 27, 1979. One of those agreements was a Chattel Mortgage covering, inter alia, Rock Wool's motor vehicles.

4. Heller undertook to perfect its security interest in all of the security, but negligently or intentionally failed to properly perfect its security interest in the motor vehicles. Said failure to perfect impaired that security, was material, and was not the result of any act, omission, or statement of either of the Ekins'.

5. Heller impaired its remedies and rights against the

accounts receivable and inventory of Rock Wool, both of which were part of the security for the debt referred to in the Ekins' Guaranty, by cutting off the cash available to Rock Wool and by giving notice to the account debtors at a time and in a fashion which it knew would cause the account debtors to stop or slow down the payment of their accounts and quit doing business with Rock Wool, which eventually destroyed Rock Wool as an operable going concern.

6. The only evidence of the values lost by the impairment of the said security was furnished by the Ekins' and showed that the security was impaired in the following amounts:

Motor Vehicles	$43,600.00
Accounts Receivable	$41,649.00
Inventory	$25,000.00

7. The Ekins' did not consent to Heller impairing its rights against Rock Wool or the security for the Rock Wool debt, nor did they waive their right to complain of such impairment.

8. California law provides that when a UCC creditor undertakes to collect accounts receivable security, it has the burden of proving that it pursued collection in a commercially reasonable manner. This Court finds that the only actions taken by Heller to effect collection was to send out the February notice, which by its own admission it realized would impede collection, and to send certain unidentified accounts to an

attorney in Tucson, Arizona. There is no evidence as to what, if anything, the attorney did to effect collection. This is not sufficient to meet Heller's burden and the Court finds that Heller did not proceed in a commercially reasonable manner to collect the accounts receivable.

9. The California Civil Code imposes on all parties to a contract an obligation of good faith in its performance or enforcement. Heller has breached this obligation in its eforcement of the contracts on which it claims the Ekins' are liable (a) by changing the operating rules on Rock Wool unilaterally and creating an insuperable negative balance of accounts receivable security; (b) by giving notice to Rock Wool's customers which were taken from an obsolete customer list known by Heller to contain obsolete balances, and doing so at a time when Heller knew it would receive in a day or two the regular monthly updated list from Rock Wool containing current information; and (c) by attempting to coerce the Ekins' by filing suit without notice or demand at a time Heller knew the Ekins' were gone from Utah on a multi-year assignment, by claiming an unconscionably excessive amount, and by seeking the immediate appointment of a receiver to take possession of the Ekins' home and having it sold at a sheriff's sale, all at a time when Heller was bound by contract not to take action against the Ekins' home.

10. Heller made a Subordination Agreement with Valley

Bank at the time the Ekins' were refinancing a short-term note for $67,000.00 which was ahead of Heller's Trust Deed on the Ekins' home. The Subordination Agreement provided that Heller could not demand, receive, accept or otherwise realize on the Ekins' home, or take any direct or indirect action to foreclose the Ekins' home or to realize upon its security interest in that home until such time as the Valley Bank trust deed had been paid in full. There was no provision in the Subordination Agreement entitling Heller to acquire or otherwise satisfy the Valley Bank loan ahead of its due date and thus accelerate its right to proceed against the Ekins' home.

11. Heller's tender of a Cashier's Check in the sum of $55,000.00 was defective and unauthorized, and Valley Bank's refusal to accept the tender was not wrongful.

12. The contracts involved in this case provide for payment of attorney's fees to Heller in the event of default. Under California law, if a contract so provides, then the prevailing party is entitled to reasonable attorney's fees in addition to costs of suit. In the instant cause each of the Ekins' is, as to Heller, the prevailing party.

13. Heller has failed to establish by a preponderance of the evidence or in any other fashion the correct amount, if any, remaining due and unpaid by Rock Wool under its contracts with Heller.

CONCLUSIONS OF LAW

1. The transactions involved in all of the causes between Heller on the one side and the Ekins' or Rock Wool on the other, except those relating to the Subordination Agreement, are governed as to their validity, interpretation and effects, and in all other respects, by the laws and decisions of the state of California.

2. The Ekins' have been exonerated from liability to Heller under the Guaranty, and the Guaranty should be declared to have been terminated.

3. The Ekins' are entitled to a decree that the obligation secured by the Heller Trust Deed has been terminated and is at an end; that the property subject to the Heller Trust Deed should be reconveyed to the Ekins' free and clear of any claim or interest of Heller; and the Heller Trust Deed on their home be released and terminated.

4. The Ekins' are entitled to be awarded their attorneys' fees, costs and necessary disbursements which have been incurred in this action in an amount to be set by this Court upon notice and motion and taxed as costs herein. Said award may be supplemented upon notice and motion if post-judgment services are required of said defendants' attorneys.

5. The Ekins' have established grounds for liability on the part of Heller under their Counterclaim herein, but in

light of the determination that they are exonerated and released from liability under the Guaranty, have not sustained costs and expenses as a result of Heller's conduct other than those attorney's fees, costs, and expenses which are compensated elsewhere herein. Accordingly, judgment of no cause of action should be entered on the Counterclaim.

6. Defendant U.S. Rock Wool Defined Benefit Trust is entitled to judgment of no cause of action.

7. As to the defendant U.S. Rock Wool, which had filed a Chapter 11 proceedings in bankruptcy on December 6, 1983 and was a debtor-in-possession until December 10, 1984, at which time the proceedings were converted to a Chapter 7 proceedings and a trustee in bankruptcy appointed, said defendant and Heller treated the matter of the amount, if any, due from Rock Wool to Heller, or from Heller to Rock Wool under its Counterclaim as an issue which need not be determined herein except to the extent necessary to resolve the issue of whether and to what extent the Ekins' have been released from their guaranty, leaving said issue to be determined, as between themselves, in the bankruptcy proceedings. Accordingly, the issues between Rock Wool and Heller insofar as they relate to the amounts, if any, which should be awarded to one or the other, and title and right to possession of the personal property of Rock Wool, are held to be the province of the bankruptcy court, and not precluded by the

judgment herein. Subject to the foregoing, each should be granted judgment of no cause of action.

DATED this 29TH day of April, 1986.

BY THE COURT:

/s/ DAVID B. DEE
District Judge

Approved as to form
this _____ day of April, 1986.

HANSEN & ANDERSON

By_____
Attorneys for Plaintiff

ADDENDUM 2

EARL D. TANNER #3187
BRAD L ENGLUND #4478
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins
and U.S. Rock Wool Defined
Benefit Trust

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, a Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	JUDGMENT Civil No. C-83-2368 Judge David B. Dee

This matter came on regularly for trial before the Court the 25th day of November, 1985, the Honorable David B. Dee

presiding. Plaintiff was represented by its attorneys, John T. Anderson, Esq. and Cary D. Jones, Esq., of Hansen & Anderson; and defendants V. Ross Ekins and S. O. Ekins were represented by their attorneys, Earl D. Tanner, Esq. and Brad L Englund, Esq., of Tanner, Bowen & Tanner. All other defendants remaining in the action were represented or otherwise before the Court by stipulation as set forth in the Findings, defendant First Interstate Bank having been dismissed. The matter was fully presented, argued and submitted, and the Court having considered the same and being fully advised in the premises and having made and entered its Memorandum Decision herein and its Findings of Fact and Conclusions of Laws;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Deed of Trust by and between defendants V. Ross Ekins and S. O. Ekins as trustors, and Walter E. Heller Western, Inc. as beneficiary, respecting that certain real property in Salt Lake County, Utah, described as "Lot No. 408, Mount Olympus Park No. 4," which was recorded at Pages 538, 539, and 540 of Book 5020 of the records of the Salt Lake County Recorder (hereafter "the real property") be, and the same hereby is, terminated and released, and the above-described real property is hereby reconveyed to V. Ross Ekins and S. O. Ekins free and clear of any obligation to, or claim or encumbrance of,

plaintiff Walter E. Heller Western, Inc. and its successors or assigns.

2. That defendants V. Ross Ekins, S. O. Ekins, and Valley Bank & Trust Company have judgment of no cause of action on the claims set forth in the Amended Complaint herein.

3. That plaintiff have judgment of no cause of action on the claims set forth in the Counterclaim of defendants V. Ross Ekins and S. O. Ekins herein.

4. That defendant American Savings & Loan Corporation have judgment that its interests in the real property are those of a first lienholder, and defendant U.S. Rock Wool Company Defined Benefit Trust have judgment that its interests, if any, in the real property are superior to the interests of plaintiff and are subordinate to the lien of the defendant American Savings & Loan Corporation.

5. That defendants V. Ross Ekins, S. O. Ekins, and Valley Bank & Trust Company have judgment against plaintiff for their costs herein, which costs shall, as to defendants V. Ross Ekins and S. O. Ekins, include such attorney's fees, costs, and necessary disbursements as shall be determined by this Court upon notice and motion.

6. That defendant U.S. Rock Wool Company, Inc. have judgment of no cause of action against plaintiff on the Amended Complaint and plaintiff have judgment of no cause of action

against said defendant on its Counterclaim; subject, however, to the right of each of said parties to take such further action in the United States Bankruptcy Court for the District of Utah, Central Division, Bankruptcy No. 83A-03213, as either party may deem appropriate to determine the amounts, if any, which either of said parties may be entitled to recover from the other, and the title and right to possession of the personal property of the bankrupt, U.S. Rock Wool Company, Inc.

Made and entered this 29 day of April, 1986.

BY THE COURT:

Judge

H. DIXON HINDLEY
CLERK

By
Deputy Clerk

GUARANTY

ADDENDUM 3

EXHIBIT F

To WALTER E. HELLER WESTERN, INCORPORATED

Date December 27, 1971

Gentlemen:

To induce you to purchase or otherwise acquire from U. S. Rock Wool Co., Inc. (hereinafter called "Debtor") accounts receivable, conditional sale or lease agreements, chattel mortgages, drafts, notes, bills, acceptances, c receipts, contracts or other obligations or choses-in-action (herein collectively called "receivables"), or to advance moneys or extend credit to Debtor thereon, or to factor the sales or finance the accounts of the Debtor (either according to any present or future existing agreement or cording to any changes in any such agreement or on any other terms and arrangements from time to time agreed upon with the Debtor, her consenting to and waiving notice of any and all such agreements, terms and arrangements and changes thereof) or to otherwise directly or directly advance money to or give or extend faith and credit to the Debtor, or otherwise assist the Debtor in financing its business or as (without obligating you to do any of the foregoing) we, the undersigned, for value received, do hereby jointly and severally unconditiona guarantee to you and your assigns the prompt payment in full at maturity and all times thereafter (waiving notice of non-payment) of any a all indebtedness, obligations and liabilities of every kind or nature (both principal and interest) now or at any time hereafter owing to you the Debtor, and of any and all receivables heretofore and hereafter acquired by you from said Debtor or in respect of which the Debtor has may become in any way liable, and the prompt, full and faithful performance and discharge by the Debtor of each and every one of the ter conditions, agreements, representations, warranties, guaranties and provisions on the part of the Debtor contained in any such agreement or rangement or in any modification or addenda thereto or substitution thereof, or contained in any schedule or other instrument heretofore hereafter given by or on behalf of said Debtor in connection with the sale or assignment of any such receivables to you, or contained in any oc agreements, undertakings or obligations of the Debtor with or to you, of any kind or nature, and we also hereby jointly and severally agree demand to reimburse you and your assigns for all expenses, collection charges, court costs and attorney's fees incurred in endeavoring to col or enforce any of the foregoing against the Debtor and/or undersigned or any other person or concern liable thereon; for all of which, w interest at the highest lawful contract rate after due until paid, we hereby jointly and severally agree to be directly, unconditionally and prima liable jointly and severally with the Debtor, and agree that the same may be recovered in the same or separate actions brought to recover principal indebtedness.

Notice of acceptance of this guaranty, the giving or extension of credit to the Debtor, the purchase or acquisition of receivables, or the vancement of money or credit thereon, and presentment, demand, notices of default, non-payment or partial payments and protest, notice protest and all other notices or formalities to which the Debtor might otherwise be entitled, prosecution of collection or remedies against the Deb or against the makers, endorsers, or other person liable on any such receivables or against any security or collateral thereto appertaining, are he by waived. The undersigned also waive notice of any consents to the granting of indulgence or extension of time payment, the taking and releas of security in respect of any said receivables, agreements, obligations, indebtedness or liabilities so guaranteed hereunder, or your accepting part payments thereon or your settling, compromising or compounding any of the same in such manner and at such times as you may deem advisab without in any way impairing or affecting our liability for the full amount thereof; and you shall not be required to prosecute collection, enfor ment or other remedies against the Debtor or against any person liable on any said receivables, agreements, obligations, indebtedness or liabilit so guaranteed, or to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on us payment; nor shall our liability in any way be released or affected by reason of any failure or delay on your part so to do.

This guaranty is absolute, unconditional and continuing and payment of the sums for which the undersigned become liable shall be made you at your office from time to time on demand as the same become or are declared due, notwithstanding that you hold reserves, credits, collate or security against which you may be entitled to resort for payment, and one or more and successive or concurrent actions may be brought he on against the undersigned jointly and severally, either in the same action in which the Debtor is sued or in separate actions, as often as deem advisable. We expressly waive and bar ourselves from any right to set-off, recoup or counter-claim any claim or demand against said Debtor, against any other person or concern liable on said receivables, and, as further security to you, any and all debts or liabilities now or hereaf owing to us by the Debtor or by such other person or concern are hereby subordinated to your claims and are hereby assigned to you.

Each guarantor shall continue liable hereunder until you actually receive written notice from him by registered mail terminating the sa as to him; but the giving of such notice shall not terminate this guaranty as to any other guarantor, nor relieve the one giving such notice fre liability as to any debt, undertaking or liability incurred or undertaken prior to such time. The death of any of the guarantors shall not termina this guaranty as to his estate or as to the surviving guarantors, but the same shall continue in full force and effect until notice of termination given and received as hereinbefore provided and all of said indebtedness, liabilities or obligations created or assumed are fully paid

In case Bankruptcy or insolvency proceedings, or proceedings for reorganization, or for the appointment of a receiver, trustee or custodi for the Debtor or over its property or any substantial portion thereof, be instituted by or against the Debtor, or if the Debtor becomes insolve or makes an assignment for the benefit of creditors, or attempts to effect a composition with creditors, or encumber or dispose of all or a su stantial portion of its property, or if the Debtor defaults in the payment or repurchase of any of such receivables or indebtedness as the sa falls due, or fails promptly to make good any default in respect of any undertaking, then the liability of the undersigned hereunder shall your option and without notice became immediately fixed and be enforceable for the full amount thereof, whether then due or not, the same though all said receivables, debts and liabilities has become past due

This guaranty shall inure to the benefit of yourself, your successors and assigns. It shall be binding jointly and severally on the unde signed, their heirs, representatives and assigns, regardless of the number of persons signing as guarantors or the turn or order of their signin

This instrument shall be governed as to validity, interpretation, effect and in all other respects by the laws and decisions of the State California.

V. Ross Ekins

S. O. Ekins

4241 Park Terrace Dr.
Salt Lake City, Utah
Residence Address

P 150-C

2510 South State
Salt Lake City, Utah
84115

In consideration of the financial accomodations given or to be given or continued by Valley Bank and Trust Company ("Bank" hereafter) to V. Ross and Sonoma O. Ekins ("Borrower" hereafter) the undersigned agrees as follows:

Borrower has the following obligations owing to the undersigned:

A. Title of obligation or instrument Mortgage
B. Date of such obligation December 10, 1980
C. Due date of obligation December 10, 1988
D. Present balance owing $16,000.00
E. Security for obligation All of Lot 408, Mount Olympus Park No. 4

135
125

Borrower has or is proposing to obtain a loan from Bank dated _____ May 7, 1981, in the amount of $67,000.00 and secured by the same security or portions thereof as are presently pledged to undersigned and described in Paragraph E.

In consideration of the credit extended to Borrower by the Bank, the undersigned hereby subordinates its security interest in the described security to the above security interest of the Bank. The Bank may extend, modify or renew the so secured obligation without affecting this subordination. The undersigned agrees not to demand, receive, accept or otherwise realize on the security or the security interest or to take any direct or indirect action to obtain or realize such security until such time as Bank is paid in full. The undersigned agrees to pay and/or deliver to Bank immediately upon receipt any of the described security or proceeds thereof.

This Agreement shall inure to and be binding upon the parties and their successors, assigns and personal representatives.

IN WITNESS WHEREOF, the undersigned has executed this Agreement as of this 7th day of May, 1981.

U.S. Rock Wool Company
Defined Benefit Trust
By V. Ross Ekins
V. Ross Ekins, Administrator

KATIE L. DIXON
RECORDER
SALT LAKE COUNTY
UTAH
May 19 11 08 AM '81
REQUEST OF
$ FEE

ACCEPTANCE

The undersigned Borrower hereby consents to the foregoing Agreement and agrees to be bound by the terms and conditions thereof.

DATED this 7th day of May, 1981.

V. Ross Ekins Sonoma O. Ekins

ACKNOWLEDGMENT
(To be completed if real estate involved).

STATE OF UTAH)
: ss.
County of Utah

On the 7th day of May, 1981, personally appeared before me V. Ross & Sonoma O. Ekins, the Borrower, who duly acknowledged to me that he executed the above and foregoing Acceptance.

My Commission Expires:
3/29/84

Pat McCarthy
NOTARY PUBLIC
Residing at:

BOOK 5249 PAGE 256

A Yes, it was.

Q And then U.S. Rock Wool would just put that figure in Exhibit D-8 and 9 and similar reports?

A Right.

Q Now, that figure was determined by the age of the accounts on hand plus some other technical factors that you had negotiated with U.S. Rock Wool?

A Yes, it was.

Q Now, directing your attention to Exhibit 8, January 21st, 1983, will you tell us how much below the line or overdrawn, as the case may be, U.S. Rock Wool was on January 21st, 1983?

A Do you want line 10 or line 13?

Q Well, - -

A There are two.

Q I want the right one. Maybe we're in error.

A I think you want line 13.

May I explain the difference between the two?

Q Would you please?

A Line 10 indicates the amount of what I call over advance or negative availability prior to any borrowing that day.

Q Okay.

A Line 13 is a summation of the entire day's activity. So line 13 would give the final over advance or

negative availability.

Q So that there were - - there was the ability to draw or permission to draw even though they may have been overdrawn so long as the overdraft wasn't too big?

A That's right.

Q All right. Will you give us both the figure on the overdraft as you perceived it and then the overdraft plus the advances for the day, for January 21st?

A The overdraft prior to the advance was $2,900.82. After the advance of that day the overdraft went up to $3,827.84.

Q And at that time how many qualified receivables did Heller have on this account?

A $120,462.32.

Q Now, directing your attention to Exhibit 9, first I ask you wasn't Exhibit 9 the first report after you told U.S. Rock Wool that the amount of unqualified receivables was being changed?

A It appears to be, yes.

Q And will you tell us what you showed as the below the line figure after you had made that change?

A Prior to any advances for that particular day the negative figure was $51,716.48.

Q Were there any advances made that day?

A Yes, there was.

Q How much?

A $480.48.

Q So then below the line how much?

A Totally $52,196.96.

Q So before the corrected or altered perception of the unqualified accounts that took place, as you've designated heretofore, U.S. Rock Wool would have had to have collected about $4,000 worth of their outstanding receivables in order to get back in a positive position with you; is that correct?

A You mean prior to January 26th?

Q Yeah.

A That is correct, yes.

Q And after you told them of the change that had been made by you they would have had to come up with some $52,000 to get back in a positive position?

A That's correct.

Q Yeah. You expected that that difference would be a difference of some significance to you - - to U.S. Rock Wool when you told them about it, wouldn't it?

A Very definitely.

Q It's a lot higher amount to climb?

A That's correct.

Q Now, there was no alteration made in the Guaranty form with the Ekins, was there, over your usual form?

Walter E. Heller Western
INCORPORATED

EXHIBIT I

LEGAL NOTICE
(Notice to account debtor - pursuant to California Commercial Code section 9318.)

Date of this Notice: February 8, 1983

To: Schmidt Body & Paint
1229 So. 300 West
Salt Lake City, Utah 84101

The accounts of U.S. Rockwool Company have been assigned to Walter E. Heller Western Incorporated including your account in the amount of $ 1,219.85 as of January 31, 1983, as evidenced by the account card copy attached hereto.

You are requested to make all checks on this and any futur billigs payable to U.S. Rockwool Company and/or Walter E. Heller Western Incorporated, but mail directly to:

Walter E. Heller Western Incorporated
333 Market Street, Suite 240
San Francisco, Ca. 94105

PAYMENT TO ANYONE OTHER THAN HELLER WILL RESULT IN DOUBLE LIABILITY FOR THIS DEBT.

If any additional information is required, please contact us at (415) 777-2540.

WALTER E. HELLER WESTERN INCORPOR

By _____

courage to acknowledge that some problems occurred. And I would respectfully suggest the Court ought to grant the motion to avoid any suggestion later that this matter was decided in any way other than on the merits, on the basis of the evidence and in the context of regular proceedings. On the basis of this record, Your Honor, Heller could never be assured it had its fair shot. Myself as an advocate, perhaps I feel otherwise, but Heller doesn't know that, Your Honor.

Thank you.

THE COURT: Heller is going to have to take this Court's representation no acts were made with the Court which in any way influenced the Court's decision in this matter. And because in a jurisdiction like this where the County Clerk works to provide clerks to the courts at his leisure, or at his insistence, and the court heretofore is run with the County Clerk providing clerks who came over here, as soon as the judge left the bench, the clerks went back to the clerk's office, and the judge did all the answering in response to the questions. And as a matter of sheer fact the judges who preceded me in this function years way before I started practicing, and for the 35 years that I have been involved in the court system, Judges Croft and Ellett and others all answered the telephone because nobody else was here, or their

reporter did, and that's been the function. We are hampered by the fact that there hasn't been a statewide overseeing of this thing. We're trying to work in that direction. The legislature is busy trying to send money to pump the Great Salt Lake, so they are not going to take over the District Court. This is the only trial court of general jurisdiction which isn't a State function. The bailiff works for the Sheriff. The clerk for the County Clerk. They are both independently elected officials. And as the Court, to keep the business of the people of this State moving, we have to have someone answer the telephone, so the Court does. And I respond to questions about when are you going to rule on the motion for summary judgment; is this case going to go to trial; are you sure I can summon my out-of-state witnesses and be assured we are going to be going Monday morning; how do we get the other lawyer to withdraw; is there a piece of paper that's there that hasn't been signed. I respond to the same sort of questions that Mr. Willis does. If from that litigants assume that I am going to be talking about the merits of the case, they will just have to assume that in error. I can't do anything about their thinking. They might even, for reasons of their own, think that there's a lot of other things that go on here. They weren't present and they couldn't reach any reasonable decision about what went on. They are just

going to have to infer. And I think that's typical of losers. When they lose they try to think there must be something wrong with having tried the case before a judge that didn't have any hair or had blue eyes or something else. If that's what they want to do, they will have to reach that decision independently. And - - but I will assure you and your clients, and I respect your judgment in this matter as a good advocate, and I think you did an excellent job in this case, that I was in no way backdoored by Mr. Tanner. He wouldn't, and I wouldn't, and I think they are just going to have to accept that representation. Not to say that I didn't have conversations with him at which you were not present would be untrue. I did have conversation, and I did with you, as I did get letters from each of you. And I suppose that's viewed unilaterally even though the letters were copied to the adverse party. But as you recall Mr. Ekins at the time this was started was out of the State, and I kept trying to put Mr. Tanner's feet in the fire to move it along, as a matter of fact suggesting that he terminate his client's assignment out of the State on an LDS mission to get back, because this is a pretty important case, a pretty harsh rule for me to take. And I'm sure Mr. Ekins was smarting under that thinking, that he would have to quit his religious assignment to come out for this lawsuit. And

Mr. Tanner also said I was ruining his summer vacation, a lot of things like that, but I did do those things to try and move the case along. In all the conversations I had as far as I remember had to do with keeping this case moving. As you all acknowledge, this case grew like Topsy. What initially started out to be a collection matter, because of the posture of the defendants, that this was in some way aggregious conduct on the part of the collector, and because of the California law, it grew a lot. It grew a lot more than the money involved, but I can't help that. That's what you wanted to do. And I was mindful of that, and I was hoping someplace along the line because of the sum that started out to be collected that we could resolve the issue. It didn't happen. I made the decision on the law as I saw it and the facts and I saw them applied to the law, and I in no way got any input from Mr. Tanner and his office or Mr. Anderson and his office that reflected on my determination of law and fact.

Motion for a new trial is denied. The stay is denied except as agreed to between counsel without the posting of the appropriate bond as required by the rules.

Thank you, gentlemen.

MR. ANDERSON: Your Honor, I appreciate the Court's comments. Just one matter though.

One thing that concerns me is that if the Court is convinced that these conversations with Mr. Tanner took 20 or 30 seconds and was confined totally to scheduling matters, I'm at a loss to know how the Court can allow Mr. Tanner to recover for 12 minutes of time and why the Court - -

THE COURT: I can tell you - -

MR. ANDERSON: - - the fact that 20 seconds' conversation becomes 12 minutes of conversation on every time sheet that doesn't taint - -

THE COURT: That's an easy answer. I can give you a straight, easy answer. Frequently when I'm answering the telephone, because there are three lines, I have to put people on hold. Mr. Tanner says I'm holding, and that's at my client's expense. And somebody has got to pay for my time. That's the business I'm in.

I can certainly account for that. If in fact I said hold the phone while I get the file, which may be in Mrs. Renshaw's office, my court reporter, to see what you're talking about, or hold the phone while I pull out those documents that may be on my side bar for the purpose of specifically finding out where they are, I suppose if Mr. Tanner wants to charge his clients for that time while he's waiting, he can, but I don't keep time records. I'm just responding to the question. And this

was a complicated case. And I suppose when a piece of paper might have to do with the question being specifically asked, it may take me some time to get.

This may come as a surprise to you. This is not my only case.

MR. ANDERSON: I appreciate that.

THE COURT: I've other things I'm looking for, and if I can't find it right away I might put Mr. Tanner on hold for 15 minutes while I'm looking for what he wanted me to respond to. Independently I can't remember the length of that conversation, but I do have occasions when I do have lawyers on hold for some time to find out whether the documents they are talking about have in fact been received in this office or whether they are across the street in the County Clerk's Office, not atypical as what I have here today. I've got all your courtesy copies, and I don't have the file. And the reason I don't have the file is because one of you has asked Mrs. Renshaw, the court reporter, to transcribe the record, and she's got the file. So if you called and asked me what's in the file, I would have to find out where it is just today. And that might take me a little while, to find where Brad or Mrs. Renshaw has got it, and that would account for a lapse of time. And I can explain that.

Okay. Thank you.

ADDENDUM 8

EARL D. TANNER #3187
BRAD L ENGLUND #4478
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins
and U.S. Rock Wool Defined
Benefit Trust

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S. O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, a Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	A F F I D A V I T Civil No. C-83-2368 Judge David B. Dee

STATE OF UTAH)
: ss.
County of Salt Lake)

EARL D. TANNER, being duly sworn upon his oath, deposes and says:

1. That he has at all times since the commencement of the above action by the plaintiff been the principal attorney for V. Ross Ekins and S. O. Ekins, defendants therein, and knows whereof he speaks.

2. That he has not, at any time during the pendency of the above-entitled case, discussed the merits of said cause or of any of the claims of any of the parties thereto with the Honorable David B. Dee outside the presence of the opposing counsel.

3. That it is, and was, his understanding (1) that the Rules of Procedure of the Third Judicial District require ex parte contact with the Court, either the clerk or, as the case may be, the judge, with respect to setting the time when motions or other matters can be heard; and (2) that once a trial date has been set it cannot be vacated or changed except by the specific personal authorization of the judge before whom the trial has been set.

4. That your affiant has searched his files, the pleadings and correspondence, and his personal calendar for information respecting the reason for and the subject of each ex parte communication of which plaintiff complained, and has sought to refresh his recollection of the occasion referred to. The

following information respecting each occasion cited by plaintiff in its motion is, to the best of the information and recollection of your affiant, correct:

a. June 11, 1984.

1) The Background. Plaintiff had made a motion for partial summary judgment which was heard on May 3, 1984. On June 6, 1984 plaintiff's counsel transmitted to the Court and all counsel a proposed Order respecting the motion. Exhibit 1 hereto, a copy of the letter of transmittal, shows that this office received it on June 7, 1984.

2. The Occasion. Four days later, to-wit: on June 11, 1984, your affiant delivered to the Court a letter of transmittal and a courtesy copy of the Ekins Objections to the defective proposed Order (Exhibit 2 and Exhibit 3 hereto) so that the Court would be apprised that there were objections and would not sign and enter the proposed Order in the mistaken belief that all parties affected by it were in agreement with its terms. The pleadings were delivered to Judge Dee by leaving the same with his clerk at his courtroom. This was done while affiant was on his way to the office of Mr. Veasy, attorney for Valley Bank & Trust Company herein, for a pre-arranged conference. So far as your affiant is able to determine, no words were exchanged between him and Judge Dee on this occasion.

b. July 5, 1984.

1) The Background. On June 27, 1984, Ekins had filed a motion for partial summary judgment against plaintiff (Exhibit 4), which was noticed for hearing on July 12, 1984 (Exhibit 5).

2) The Occasion. On July 5, 1984, your affiant received a letter from LaVonne Williams, deputy clerk, indicating that her office had been unable to reach him and that the July 12 setting would have to be rescheduled (Exhibit 6). Upon receiving said letter, your affiant tried to contact either Ms. Williams or Judge Dee and was unable to reach them. On July 6, affiant was able to contact Ms. Williams in Judge Hansen's court and was instructed to re-notice the motion for partial summary judgment for hearing at 10:00 a.m. on July 27. Affiant's notes respecting these contacts and his efforts appear on Exhibit 6. On July 9, the re-notice of hearing (Exhibit 7) was served on all parties by mailing.

c. July 26, 1984.

1) The Background. By order of Judge Dee, over the vigorous opposition of the Ekins', the case had been set for trial on August 13, 1984. The Ekins' Motion for Partial Summary Judgment (Exhibit 4) which was served on all counsel on June 27, 1984 had been accompanied by a Memorandum. Despite the Court extending the time for hearing that motion from July 12 to July 27, Heller had not responded to the Ekins' Memorandum. However,

on July 26, the day before the dispositive motion was to be heard, Heller delivered a letter of transmittal (Exhibit 8) and its Memorandum to Judge Dee with a copy to your affiant.

2) The Occasion. After reviewing the Heller Memorandum, your affiant contacted Judge Dee by phone to determine whether he would permit an oral response to the Heller Memorandum inasmuch as the dispositive motion was set for the following morning and the case was to be tried some two and one-half weeks later. Your affiant told Judge Dee that if he would permit the oral response to the late filed memo, Ekins' would not move for additional time but would proceed with the argument on the following day. Judge Dee said that he would permit an oral response. On July 27, the motion was argued and taken under advisement. At the end of the hearing Judge Dee stated that he would make an early decision on the motion so the parties could tell what issues would be litigated and what witnesses would be called and could advise their clients.

d. July 31, 1984.

1) The Background. By the following Tuesday, July 31, no decision on the motion for partial summary judgment had been received. Less than two weeks remained before trial and the motion under consideration would, if granted, relieve the Ekins of the necessity of trial.

2) The Occasion. Affiant called the telephone

number of Judge Dee's court expecting to contact the clerk and ask him to remind the judge that time was short and counsel were concerned. Apparently the clerk was not in because Judge Dee answered the telephone himself. Your affiant said he had called because of the press of time and the needs of all of the parties to the case, and had expected to talk with the clerk and ask him to remind the Court of the need for early ruling. Judge Dee said he would look at the matter and to call his clerk that afternoon. Affiant did so and was advised that the Motion for Partial Summary Judgment had been denied.

e. August 1, 1984.

1) The Background. The Court had denied the Ekins' Motion for Partial Summary Judgment and the Ekins' had decided to seek an interlocutory appeal.

2) The Occasion. Your affiant contacted the clerk of the court to determine whether the trial setting would be vacated as a matter of course and was told that no change would be made in the trial setting except by Judge Dee himself. Thereafter your affiant contacted the other attorneys, Veasy and Anderson, and requested that they stipulate to setting over the trial date. Mr. Anderson flatly refused. Your affiant advised him that he would move to strike the trial setting and try to get a hearing as soon as possible, that afternoon if the Court would permit. Thereupon your affiant telephoned the clerk of the court

who said this was a matter Judge Dee would have to decide and put Judge Dee on the telephone. Your affiant apprised the Judge of the Ekins' intent to file an interlocutory appeal, of the failure of counsel to agree on vacating the trial setting, and of the motion to strike the trial setting which was then in the process of being prepared on behalf of the Ekins'. Judge Dee said he could hear the matter that afternoon at 3:00. Your affiant notified all other counsel of the hearing and caused its motion to strike (Exhibit 9) to be served by mail and took copies for the Court and all counsel who would be at the hearing that afternoon. Heller's counsel was fully aware of everything that was being done, since your affiant consulted him with respect to each step. He agreed that your affiant would contact Judge Dee to get a time for the hearing and would contact all counsel when the time was set. At the hearing, Heller's counsel made no objection or complaint. The trial setting was stricken.

f. December 2, 1985.

1) The Background. The first two days of trial had been held on the two days prior to Thanksgiving, 1985. The Court could not continue with this trial because of certain criminal matters which had a priority and at the close of the second day of trial requested counsel to contact the Court with respect to the time when the trial could reconvene. December 2, 1985 was the first working day after the Thanksgiving vacation.

2) The Occasion. Your affiant made two calls to the clerk of the Court who stated that he had not been advised by Judge Dee what his plans were with respect to scheduling. In each instance affiant was requested to call back later and see what the status was. On the third call the clerk passed the call through to Judge Dee who advised affiant when the trial would recommence. Per the Court's instruction and as a matter of courtesy affiant called Mr. Anderson and told him the time of reconvening. Mr. Anderson's notes show that he also talked with the Judge on this matter. The trial was reconvened on December 4.

DATED this 13th day of May, 1986.

EARL D. TANNER

Subscribed and sworn to before me this 13th day of May, 1986.

Notary Public
Residing in Salt Lake County
State of Utah

My Commission Expires:
Thursday Feb. 19, 1988

Hansen Jones Maycock & Leta
Twelfth Floor, Valley Tower Building
50 West Broadway
Salt Lake City, Utah 84101

Telephone Area 532-

J. Gordon Hansen
Cary D. Jones
John B. Maycock
David E. Leta
Robert C. Delahunty
Stuart A. Fredman
John T. Anderson
Jane F. Harrison
Michael N. Emery

RECEI
JUN 7

June 6, 1984

The Honorable David B. Dee
DISTRICT COURT JUDGE
City & County Building
Salt Lake City, Utah 84111

Walter W. Heller Western Incorporated v. U. S. Rock Wool Company, Inc., et al.
Civil No. C-83-2368

Dear Judge Dee:

Enclosed for your examination and signature, please find a proposed Order Respecting Partial Summary Judgment in the above case. The proposed Order has been drafted in conformity with a hearing held before you on May 3, 1984. Copies of the proposed Order have been provided to all counsel of record.

Thank you very much for your attention to this matter.

Very truly yours,

John T. Anderson

JTA:clm
Enclosure

cc Anna W. Drake, Esq.
Earl D. Tanner, Jr., Esq.
W. Jeffrey Fillmore, Esq.
Pamela T. Greenwood, Esq.
Ted Boyer, Esq.

TANNER, BOWEN & TANNER
ATTORNEYS AT LAW
1020 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111 U.S.A.

EARL D. TANNER, SR.
J. THOMAS BOWEN
EARL D. TANNER, JR.

AREA CODE
TELEPHONE 3

June 11, 1984

Clerk of District Court
P.O. Box 1860
Salt Lake City, UT 84111

Re: Heller vs. U. S. Rock Wool Company, et al

Dear Clerk:

Enclosed please find an Objection to Proposed Order f Partial Summary Judgment and Order Respecting Partial Summary Judgment, in the above-captioned matter, for filing with the Court.

Thank you for your assistance.

Very truly yours,

Earl D. Tanner, Jr.

EDTJR:wt
Enclosures
cc: John T. Anderson, Esq.
Theodore Boyer, Esq.
Pamela T. Greenwood, Esq.
W. Jeffrey Fillmore, Esq.
Anna Drake, Esq.

TANNER, BOWEN & TANNER
1020 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111
(801) 532-3333

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, A Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	OBJECTION TO PROPOSED ORDER FOR PARTIAL SUMMARY JUDGMENT Civil No. C83-2368 Judge David B. Lee

Defendants V. Ross Ekins and S. O. Ekins by and through their counsel, object to entry of the Order respecting partial summary judgment proposed by Walter E. Heller Western Incorporated in the above case. Said defendants object to the

proposed Order upon the grounds that it does not accurately reflect the stipulation presented to the Court.

Attached hereto as Exhibit "A" is an Order which more accurately reflects the aforesaid stipulation.

DATED this 11th day of June, 1984.

Earl D. Tanner
Earl D. Tanner, Jr.
TANNER, BOWEN & TANNER

BY: _____
Attorneys for V. Ross Ekins and G. O. Ekins

CERTIFICATE OF MAILING

I certify that on the 11th day of June, 1984, I mailed true and correct copy of the foregoing Objection to Proposed Order for Partial Summary Judgment, postage prepaid, to the following:

Anna Drake, Esq.
NEILSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

W. Jeffrey Fillmore, Esq.
59 W. Broadway
4th Floor
Salt Lake City, UT 84101

Pamela T. Greenwood, Esq.
175 S. Main
#200
Salt Lake City, UT 84111

Theodore Boyer, Esq.
CLYDE, PRATT, GIBBS & CAHOON
77 W. 2nd S.
#200
Salt Lake City, UT 84101

John T. Anderson, Esq.
50 W. Broadway
#1200
Salt Lake City, UT 84101

#63

EARL D. TANNER #3187
EARL D. TANNER, JR. #3188
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 583-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, a Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; CARY D. JONES, successor trustee; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFF Civil No. C83-2368 Judge David Dee

Defendants V. Ross Ekins and S. O. Ekins ("Ekins"), through their counsel, hereby move the court pursuant to Rule 56

Utah Rules of Civil Procedure, for the entry of partial summary judgment that the Trust Deed attached as Exhibit "A" to the Amended Complaint is void and unenforceable and that plaintiff i not entitled to attorney's fees incurred in connection with its attempted foreclosure.

This motion is based upon the subject Trust Deed, the accompanying Certificate of the Insurance Department of the Stat of Utah; the accompanying Certificate of the Executive Department, Office of Lieutenant Governor, State of Utah; the accompanying Memorandum of Points and Authorities; and the file herein.

Dated this 26th day of June, 1984.

EARL D. TANNER
EARL D. TANNER, JR.
TANNER, BOWEN & TANNER

By _____
Attorneys for Defendants
V. Ross Ekins and S. O. Ekins

CERTIFICATE OF SERVICE

I certify that on the 27th day of June, 1984, I serve the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFF by mailing a true and correct copy thereof, postage prepaid, to the following:

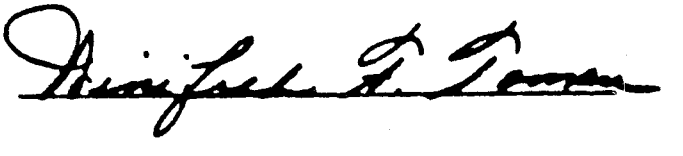
Cary D. Jones, Esq. and
John T. Anderson, Esq.
HANSEN, JONES MAYCOCK & LETA
Suite 1200, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101

Anna W. Drake, Esq.
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

W. Jeffrey Fillmore, Esq.
BIELE, HASLAM & HATCH
400 Valley Tower
Salt Lake City, Utah 84101

Pamela T. Greenwood, Esq.
175 South Main Street
Salt Lake City, Utah 84111

Ted Boyer, Esq.
CLYDE, PRATT, GIBBS & CAHOON
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101



EARL D. TANNER #3187
EARL D. TANNER, JR. #3188
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 583-2021

Attorney for Defendants
V. Ross Ekins and S. O. Ekins

IN THE THIRD JUDIICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, A Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	NOTICE OF HEARING Civil No. C83-2368 Judge David Dee

TO: THE ABOVE-NAMED PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that the Motion For Partial Summar Judgment Against Plaintiff of defendants V. Ross Ekins and S. Ekins will be heard before the Honorable David Dee on the 12th day of July, 1984, at 8:45 o'clock a.m. or as soon thereafter counsel may be heard at the Salt Lake County Courthouse, 240 E 400 South, Salt Lake City, Utah 84111.

DATED this 26th day of June, 1984.

TANNER, BOWEN & TANNER

BY: _____

Attorneys for V. Ross Ekins
and S. O. Ekins
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

CERTIFICATE OF MAILING

I certify that on the 22nd day of June, 1984, I mail a true and correct copy of the foregoing Notice of Hearing, postage prepaid, to the following:

Cary D. Jones, Esq. and
John T. Anderson, Esq.
HANSEN, JONES, MAYCOCK & LETA
Suite 1200, Valley Tower
50 West Broadway
Salt Lake City, UT 84101

Anna W. Drake, Esq.
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

W. Jeffrey Fillmore, Esq.
BIELE, HASLAM & HATCH
400 Valley Tower
Salt Lake City, Utah 84101

Pamela T. Greenwood, Esq.
175 South Main Street
Salt Lake City, UT 84111

Ted Boyer, Esq.
CLYDE, PRATT, GIBBS & CAHOON
200 American Savings Plaza
77 West 200 South
Salt Lake City, UT 84101

Jennifer F. Tomsic

RECEIVED

JUL 5 REC'D

TANNER & TANNER

JULY 3, 198

EARL D. TANNER
1020 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

DEAR MR. TANNER,

OUR OFFICE HAS BEEN UNABLE TO REACH YOU REGAURDING CASE NUMBER C83-2368, WALTER E. HELLER WESTERN INCORPORATED, VS. U.S. ROCK WOOL ET. AL., THE ABOVE NAMED CASE HAD PREVIOUSLY BEEN SCHEDULED BY YOUR OFFICE FOR MOTION FOR PARTIAL SUMMARY JUDGMENT ON JULY 12,1984 AT 8:45 A.M. BEFORE JUDGE DAVID B. DEE. BECAUSE OF THE BAR ASSOCIATION CONFERENCE ON JULY 12, AND 13, WE NEED TO RESHCEDULE YOUR MOTION. WE APPOLOGIZE FOR THE CONTINUANCE. WOULD YOU PLEASE CONTACT ME AT YOUR CONVENIENCE TO GET A NEW DATE FOR HEARING?

SINCERELY:

LAVONNE WILLIAMS

DEPUTY COURT CLERK

535-7506 OR 535 5111

v LaVonne 7/6

motion

.00 7/27

Hansen's Court
535-5677

001173

JULY 3, 1984

C 81-2168

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE COPY OF THE FOREGOING LETTER POSTAGE PRE PAID TO FOLLOWING COUNCEL:

EARL D TANNER
1020 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

CARY D. JONES, ESQ. AND
JOHN T. ANDERSON, ESQ.
SUITE 1200, .VALLEY TOWER
50 WEST BROADWAY
SALT LAKE CITY, UTAH 84101

ANNA W. DRAKE, ESQ.
1100 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

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PAUL VEASY
400 VALLEY TOWER
SALT LAKE CITY, UTAH 84101

PAMELA T. GREENWOOD
175 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111

TED BOYER, ESQ.
200 AMERICAN SAVINGS PLAZA
77 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101

DaVanne Williams

DATED THIS 3rd DAY OF JULY 1984

C0217

EARL D. TANNER #3187
EARL D. TANNER, JR. #3188
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 583-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, a Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; CARY D. JONES, successor trustee; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	RE-NOTICE OF HEARING Civil No. C83-2368 Judge David Dee

TO: THE ABOVE-NAMED PLAINTIFF AND ITS COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that the Motion for Partial Summary Judgment Against Plaintiff of defendants V. Ross Ekins and S. O.

C01176

Ekins scheduled for hearing before the Honorable David Dee on t
12th day of July, 1984, at 8:45 o'clock a.m., has been set over
at the instruction of the Court to the 27th day of July, 1984, a
10:00 a.m. or as soon thereafter as counsel may be heard, at th
Salt Lake County Courthouse, 240 East 400 South, Salt Lake City,
Utah 84111.

DATED this 9th day of July, 1984.

EARL D. TANNER
EARL D. TANNER, JR.
TANNER, BOWEN & TANNER

By _____
Attorneys for Defendants
W. Ross Ekins and S. O. Ekins

CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 1984, I served the foregoing RE-NOTICE OF HEARING by mailing a true and correct copy thereof, postage prepaid, to the following:

Cary D. Jones, Esq. and
John T. Anderson, Esq.
HANSEN, JONES MAYCOCK & LETA
Suite 1200, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101

Anna W. Drake, Esq.
NIELSEN & SENIOR
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W. Jeffrey Fillmore, Esq.
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Pamela T. Greenwood, Esq.
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Ted Boyer, Esq.
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J. Gordon Hansen
Cary D. Jones
John B. Maycock
David E. Leta
Robert C. Delahunty
Stuart A. Fredman
John T. Anderson
Jane F. Harrison
Michael N. Emery
Michael F. Jones

July 26, 1984

HAND-DELIVERED

The Honorable David B. Dee
DISTRICT COURT JUDGE
City & County Building
Salt Lake City, Utah 84111

Walter E. Heller Western Incorporated v. U. S. Rock Wool Company, Inc., et al.
Civil No. C-83-2368

Dear Judge Dee:

Enclosed for your consideration please find Plaintiff's Memorandum in Opposition to Defendant Ekins' Motion for Partial Summary Judgment. Hearing on that motion is presently set for Friday, July 27, at 10:00 a.m.

Thank you for your attention to this matter.

Very truly yours,

John T. Anderson

JTA:clm
Enclosure

cc Anna W. Drake, Esq.
Earl D. Tanner, Sr., Esq.
W. Jeffrey Fillmore, Esq.
Pamela T. Greenwood, Esq.
Ted Boyer, Esq.

TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 532-3333

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WALTER E. HELLER WESTERN INCORPORATED, a California corporation, Plaintiff, vs. U.S. ROCK WOOL COMPANY, INC., a Utah corporation; V. ROSS EKINS; S.O. EKINS; AMERICAN SAVINGS & LOAN CORPORATION, A Utah Savings & Loan corporation; VALLEY BANK & TRUST COMPANY, a Utah banking corporation; U.S. ROCK WOOL COMPANY DEFINED BENEFIT TRUST; and FIRST INTERSTATE BANK, formerly known as WALKER BANK & TRUST COMPANY, a Utah banking corporation, Defendants.	MOTION TO STRIKE TRIAL SETTING Civil No. C83-2368 Judge David B. Dee

Defendants V. Ross Ekins and S.O. Ekins, by and through their attorneys, move the Court to strike the setting of the above-entitled action for trial on August 13, 1984 pursuant to Rule 40(b) of the Utah Rules of Civil Procedure and Rule 4.3(a)

of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah.

Good cause for striking said trial date exists in that these defendants propose to petition the Supreme Court to grant an interlocutory appeal from the Court's denial of their Motion for Partial Summary Judgment. Minute entry of the denial was made on July 31, 1984 but the formal order has not yet been entered. Such a petition for interlocutory appeal is proper as demonstrated in the case of Foster v. Steed, 19 Utah 2d. 435, 432 P.2d 60 (1967).

Grounds for an appeal before final judgment exist in that resolution of this question of the authority of the successors to an unqualified initial trustee to foreclose a trust deed is fundamental to a substantial portion of this litigation If resolved in favor of defendants' position that such a trust deed is void ab initio or that such a trustee lacks power to foreclose; Valley Bank & Trust, American Savings and Loan, U.S. Rock Wool Company Defined Benefit Trust, and First Interstate Bank will not be necessary parties to this action; the effect of the Valley Bank subordination agreement upon Heller's ability to foreclose will not be an issue nor will associated problems of the single action rule; Heller's contested "tender" to Valley Bank will be moot; whether the trustee (Cary D. Jones, Esq.) is necessary party will be moot; and the propriety of Hansen, Jones Maycock & Leta's judicial foreclosure of a trust deed whose trustee is a member of their firm will be moot; and the validity

of the proposed foreclosure and sale of the Ekins' home will be determined in advance of judgment.

Equally important, the issue presented for appeal is on of general concern to the community. As the attached excerpt from Utah Land Title Association's ULTA Newsletter (April, 1983) shows, there is presently no authoritative answer to this common title problem. Resolution of this matter may remove uncertainty in many transactions by providing a needed title standard.

Dated this 1st day of August, 1984.

TANNER, BOWEN & TANNER

BY _____
Earl D. Tanner, Jr. (#3188)

CERTIFICATE OF MAILING

I certify that on the 1st day of August, 1984, I mail a true and correct copy of the foregoing Motion to Postpone Trial, postage prepaid, to the following:

Carey D. Jones, Esq.
John T. Anderson, Esq.
HANSEN, JONES, MAYCOCK & LETA
Suite 1200, 50 West Broadway
Salt Lake City, UT 84101

Anna W. Drake, Esq.
NIELSEN & SENIOR
1100 Benefical Life Tower
36 South State Street
Salt Lake City, UT 84111

W. Jeffrey Fillmore, Esq.
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Suite 400, Valley Tower
Salt Lake City, UT 84101

Pamela T. Greenwood, Esq.
175 South Main Street
Salt Lake City, UT 84111

Ted Boyer, Esq.
CLYDE, PRATT, GIBBS & CAHOON
200 American Savings Plaza
7 West Second South
Salt Lake City, UT 84101

Winfield F. Jones

BOWEN
INER
FICIAL

THE COMMISSIONER'S CORNER

now become better acquainted various punitive orders avail- om this office and used where late after administrative proce- olving a licensee. In sequence ity they include:

official letter of reprimand in- to carry some cumulative effect spect to later complaints but more severe penalty is not cur- arranted.

order imposing a fine, which is ke the imposition of a fine in matters. Such an order will also require license suspension ation if unpaid after a specified

order suspending a license for fied term.

order of license revocation.

elected to add an additional the Commissioner's repertoire of available case closing documents. The additional form is intended as the counterpart of the latter of reprimand and will be used as a letter of appreciation or compliment in those frequent cases where the complaint is inspired by misunderstanding, or sometimes even a vengeful desire to "stick the title company". I am very well aware of the predilliction of insureds and others to blame closing officers or agents generally for problems which really result from their own poor judgment. While I do not minimize our fiduciary or professional responsibility to buyers, sellers, lenders and borrowers generally, I also recognize their desire to consider us as effectual guarantors of the eternal happiness of each and every party to each and every transaction, however, laced with potential disaster for causes beyond the scope or control of the licensed agents.

I am delighted at my opportunities to make a more frequent use of the "thank you" type closing document than the four enumerated above. Stay out of "flaky" transactions. If the deal doesn't make sense to you it probably won't to the parties involved either. They will always assume you not only understand the details but also know it will be discharged without any complication. The careful escrow officer will use his "sixth sense" to detect in advance and avoid the inchoate law suit just looking for a place to light and the questionable closing which may well end up bearing the next Insurance Department file number.

Lewis S. Livingston
Title Market Conduct Examiner

[**Reminder**: Agents are to file financial statements by April 30, 1983, pursuant to section 31-25-25 (2)]

[redacted]

of us have been faced with the where we encounter a re- Deed of Trust that names, as a person or entity that is not to act as such under the terms § 57-1-21(1). It has been my and practice that by substitut- qualified Trustee, you could ceed to have the Substitute econvey the Deed of Trust or the power of sale given to qual- ifees by U.C.A. § 57-1-23.

er, a recent decision out of the rict Court in and for Box Elder eld that the Substitute Trustee situation cannot exercise the sale and that the Deed of Trust foreclosed as a Mortgage. BIDWAI, et. al. vs. W. BLAINE H, et. al. Civil Number 17472 Ct., Ut. March 4, 1983). The not disturb the priority of the eed of Trust in reaching its ion that the Deed of Trust foreclosed judicially as a

urt relied on the language of 57-1-22(1) which provides in

he time the Substitution is record, the new Trustee shall to all the power, duties, y and title of the Trustee the Deed of Trust and of any or Trustee."

original Trustee was unqual- under Utah Law, the succes- e acquires no power, duties y from the original Trustee

This particular decision is the opinion of one State District Court Judge and does not carry the weight or finality of a Utah Supreme Court Decision. However, the Court's reasoning is not faulty even if it does ignore the practical consequences, and we must develop appropriate policies to guide our businesses in dealing with this new issue.

Sincerely,

Rodney M. Pipella
Counsel, Security Title Co.

IN THE DISTRICT COURT OF BOX ELDER COUNTY, STATE OF UTAH

ARUN V BIDWAI ANIL V VIRKAR and BIDWAI and SHAIKH, a Utah Corporation

Plaintiffs,

vs.

W. BLAINE RUBARTH and CALIFORNIA ARTMETAL, INC.,

Defendants

MEMORANDUM DECISION

Civil No. 17472

On December 30, 1982 plaintiffs filed their Motion For Partial Summary Judgment requesting the court to determine:

1. The June 24, 1980, Trust Deed upon which the defendants counterclaimed and upon which defendants are attempting to exercise a Trustees Sale, was null and void ab initio, and

2. To enjoin plaintiffs (defendants) from selling the subject real property in non judicial proceedings. The Motion is supported by affidavits and initial memorandum and reply memorandum dated February 10, 1983. Defendants object to the Motion and support the objection with memorandum.

The basis of plaintiffs' Motion is that the Trust Deed when issued named "California Artmetal, Inc.", as both Trustee and as Beneficiary contrary to the provisions of Section 57-1-21(1) U.C.A. in that California Artmetal, Inc. could not qualify as a Trustee under any of the paragraphs thereof. And, further, that 57-1-21(2) precluded the Trustee from also being the beneficiary unless the beneficiary is qualified under Section 57-1-21(1). There is no dispute that California Artmetal, Inc. was not a Successor Trustee Mem. Realtors and Trustee, a professional corporation and recorded the same Notice of Default was recorded five minutes later by the Successor Trustee.

Plaintiffs argue that because the Utah Trust Deed Statutes provide an easy non judicial procedure for forfeiture of real property without right of redemption such statutory provisions must be strictly enforced. Defendants argue the appointment of a qualified Successor Trustee cures all defects, and that ordinary Trustee will not fail even for want of a Trustee. Further that in order to prevent others from profiting at a lender's expense, Courts generally enforce documents intended as security instruments even though some mistake or deficiency occurs in the documents, typical language being "equity will give effect to the intention of the parties".

Cases cited by both parties fail, in the opinion of the Court, to address the issue of the effect of another the remedy for appointment of an unqualified Trustee, still in any legislative history given it should seem, however, that the Legislature must have had some purpose in limiting Trustees to those meeting the requirements of Section 57-1-21. The Court notes further that 57-1-22 provides that "From the time the substitution is filed for record, the new Trustee shall succeed to all the power, duties, authority and title of the Trustee named in the Deed of Trust and of any Successor Trustee. The Court feels bound to give some effect to the language vesting Trustees and to the language limiting Successor Trustee's powers to those of the named Trustee.

Under the circumstances, the Court determines to treat the failure to appoint a qualified Trustee as terminating only the right to non-judicial foreclosure of the Trust Deed, and therefore, the Court denies plaintiffs' Motion to declare the Trust Deed void ab initio, but grants the Motion as to enjoining the defendants from a non-judicial Trustees sale. Either party to prepare the appropriate order.

Dated this 4th day of March, 1983.

BY THE COURT:

[redacted]

MAILING CERTIFICATE

Copy of the foregoing Memorandum Decision mailed this 4th day of March, 1983, to Gordon F. Esplin, 526 South 300 East, Salt Lake City, Utah 84111 and William B. Bohl, Tronn & Bohl, Attorneys for Plaintiffs, P.O. Box 1878, Salt Lake City, Utah 84110 and to Jeff R. Thorne of Morse, Hadfield & Thorne, Attorneys for Defendants, 80 North Main, P.O. Box "F", Brigham City, Utah 84302.

Jay R. Hirschi
Box Elder County Clerk

By Mary C. Heinemann