1992

Bradford Group West, Inc. v. James F. Kern, I.N. Fisher, and Loran Corporation, a California corporation : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BRADFORD GROUP WEST, INC.,	)	
	)	
Plaintiff/Appellee,	)	Case No. 920104-CA
	)	
vs.	)	
	)	
JAMES F. KERN, I.N. FISHER, and LORAN CORPORATION, a California corporation,	)	Priority No. 16
	)	
	)	
Defendants/Appellants.	)	

BRIEF OF PLAINTIFF/APPELLEE

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, GRANTING PLAINTIFF'S/APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

District Court Civil No. 910900291 CV

HONORABLE LESLIE A. LEWIS, DISTRICT JUDGE

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RULES

STATUTES

Plaintiff/Appellee Bradford Group West, Inc. ("Bradford") hereby submits the following Brief of Plaintiff/Appellee.

JURISDICTION OF APPELLATE COURT

This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78-2a-3(j) and Utah Rule of Appellate Procedure 42. This case was poured-over to the Utah Court of Appeals by order of the Utah Supreme Court dated February 19, 1992.

STANDARD OF APPELLATE REVIEW

Plaintiff accepts Appellants' statement of the standard of review with respect to Appellants' challenge to the District Court's order granting summary judgment to plaintiff. The standard of review on appeal with respect to the trial court's decision regarding whether to allow defendants additional time to conduct discovery before ruling on plaintiff's Motion, however, is whether the trial court **abused its discretion.** See Sandy City v. Salt Lake County, 794 P.2d 482, 488 (Utah Ct. App. 1990), rev'd in part on other grounds, 1992 WL 14725 (Utah, Jan. 17, 1992), ("The trial court has discretion to determine whether the reasons stated in a Rule 56(f) affidavit are adequate."); Reeves v. Geigy Pharmaceuticals, Inc., 764 P.2d 636, 639 (Utah Ct. App. 1988) ("It is for the trial court, in the exercise of its sound discretion, to determine if the reasons stated in the Rule 56(f) affidavit are adequate.")

DETERMINATIVE PROVISIONS

No constitutional provision, statute, ordinance, rule, or regulation necessarily is determinative of this appeal. Utah Rule of Civil Procedure 56 applies, however, to the Court's appellate decision. That rule provides in relevant part:

> (a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by an adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) **Motion and proceedings thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . .

Utah Rule of Civil Procedure 56.

STATEMENT OF CASE

Nature of Case

In 1985, Bradford provided construction financing to an entity known as SLC Limited IV ("SLC") for a project known as the Center Pointe project. SLC is a California limited partnership whose general partner is Appellant Loran Corporation ("Loran").

Appellants James F. Kern ("Kern") and I. N. Fisher ("Fisher") are officers of Loran.

Following the making of the initial construction loan, the parties to this lawsuit and SLC made additional agreements relating to that loan. One of those agreements, which is more fully described in the Statement of Facts set forth below, involved the execution of a $100,000 promissory note (the "Note") by SLC in favor of Bradford. Loran, Fisher, and Kern guaranteed SLC's payment of the Note.[1]

After the Note matured and SLC failed to pay the Note, Bradford initiated this action to collect the amounts owed pursuant to Guarantors' written guarantees (the "Guarantees"). Guarantors each have admitted execution and non-payment of the Note and execution and nonperformance of the Guarantees. Guarantors contend, however, that by using the phrase "realty investment banker" on its stationary, Bradford improperly represented itself as a "bank" in violation of Title 7 of the Utah Code, which governs financial institutions. Guarantors claim that as a result of Bradford's purported violation of Title 7, they are absolved of their obligation with respect to the Note -- which Guarantors claim constitutes improper fees charged by Bradford in connection with the construction loan. Guarantors also allege that Bradford failed

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[1] Defendants/Appellants Kern, Fisher, and Loran hereinafter collectively are referred to as the "Guarantors."

to make disclosures in connection with the construction loan, although that loan is not at issue in this case. Guarantors filed a counterclaim against Bradford based on the same legal theories that were raised in defense to Bradford's Complaint.

Course of Proceedings Below

Bradford commenced this action in January, 1991. Some two months after Bradford filed its Complaint, Guarantors filed an Answer and Counterclaim. Several days later, Guarantors served a set of interrogatories and document requests on Bradford. Bradford thereafter filed a motion for summary judgment (the "Motion"), pursuant to which Bradford sought judgment in its favor against the Guarantors and dismissal of the Guarantors' Counterclaim. Shortly thereafter, Bradford served upon Guarantors its responses to Guarantors' discovery requests.

Unable to deny that they had executed and failed to perform pursuant to their Guarantees, Guarantors argued that the Guarantees should not be enforced because Bradford had not complied with Title 7 of the Utah Code, and that Bradford had failed to make certain disclosures relating to the earlier construction loan. Guarantors also attempted to delay a ruling by Judge Lewis on Bradford's Motion for summary judgment by contending that additional time for discovery was needed. In response, Bradford marshalled the uncontested facts, which established Bradford's right to summary judgment and demonstrated that further discovery

was not warranted or useful. Briefing by the parties with respect to Bradford's Motion was completed in April of 1991.

A hearing on Bradford's Motion was not conducted until August 14, 1991.[2] At the close of the hearing, during which Judge Lewis heard oral argument from counsel for the respective parties, Judge Lewis ruled that there were no genuine issues of material fact and that Bradford was entitled to summary judgment as a matter of law. Guarantors' appeal is from that order.

STATEMENT OF FACTS

The following facts are supported by the record, are the same facts that were relied on by Bradford in seeking summary judgment at the District Court level, and were accepted as undisputed by the Guarantors and by the District Court.[3] [See

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[2] During the more than four months between completion of briefing and the hearing on Bradford's Motion, Guarantors did not conduct any further discovery.

[3] The trial court found that the seventeen paragraphs upon which plaintiff relied in seeking summary judgment and which are set forth herein were "not denied by defendants, and are therefore admitted, and no genuine issues of material fact exist." See Order Granting Plaintiff's Motion for Summary Judgment and Dismissing Defendant's [sic] Counterclaim , ¶ 3 at p. 2 [R. 231].

During oral argument on the Motion, the following exchange between the trial court and counsel for Guarantors reflects the undisputed nature of the facts upon which Bradford relied in seeking summary judgment:

> THE COURT: Let me ask you one additional question. Under the rules, I think it's quite clear, counsel, that where you have not specifically admitted or denied the facts set forth in the memo in support of motion for

Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Support of Plaintiff's Motion to Dismiss Counterclaim, Statement of Undisputed Material Facts, ¶¶ 1-17 (R. 44-50)].[4]

1. Bradford provided construction financing to SLC in relation to a project known as the Center Pointe project. The construction loan was evidenced by a Trust Deed Note in the amount of $2,200,000.00, dated December 4, 1985, and various other documents including Guarantors' Guaranties. In connection with the construction loan, SLC executed a "Second Mortgage Endorsement to Construction Loan Commitment", a copy of which is attached to the Affidavit of J. Clawson, Sr. as Exhibit B, in which SLC and Fisher, Kern, and Loran agreed to pay a $100,000 fee, payable on the earlier of the sale or refinance of the Center Pointe project, or

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summary judgment, that the court must deem them admitted. Can I get you to respond to that?

MR. ANDERSON [Counsel for Guarantors]: You mean the facts as they stated them?

THE COURT: Yes.

MR. ANDERSON: We don't dispute the facts, Your Honor. We don't dispute the facts . . . .

Transcript of Hearing on Motion for Summary Judgment, August 14, 1991, at p. 21 [R. 254].

[4] ("R. ___" refers to the record on appeal).

the maturity of the construction loan. [Affidavit of J. Clawson, Sr. at ¶ 14 (R. 65-66)].[5]

2. In 1988, SLC refinanced the Center Pointe project and obtained permanent financing from First Security Bank. The First Security permanent loan did not provide enough money to pay the entire construction loan and fees owed to Bradford. In order to allow the permanent loan to be placed, Bradford agreed to release its lien on the Center Pointe project and to accept from SLC a note for the $100,000 shortfall. That is the Note which is the subject of the Guarantees involved in this lawsuit. [Affidavit of J. Clawson, Sr. at ¶ 15 (R. 66)].[6]

3. SLC, for valuable consideration, made, executed, and delivered the Note to Bradford on October 7, 1988. [See R. 7-10]. Under the terms of the Note, SLC promised to pay Bradford $100,000.00 plus interest thereon. [Answer at ¶ 3 (R. 28)].

4. On or about October 7, 1988, for valuable consideration, Kern made, executed and delivered to Bradford his Unconditional Guaranty (the "Kern Guarantee") by which Kern guaranteed payment of the Note owed by SLC to Bradford. A copy of

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[5] For the Court's convenience, a copy of the Second Mortgage Endorsement to the Construction Loan Commitment is set forth in the Addendum hereto as Exhibit "E."

[6] A copy of the Note is set forth in the Addendum hereto as Exhibit "A."

the Kern Guarantee is attached as Exhibit "B" to Bradford's Complaint (R. 11-12). [See Answer at ¶ 6 (R. 29)].[7]

5. On or about October 7, 1988, for valuable consideration, Fisher made, executed and delivered to Bradford his Unconditional Guaranty (the "Fisher Guarantee") by which Fisher guaranteed payment of the Note owed by SLC to Bradford. A copy of the Fisher Guarantee is attached as Exhibit "C" to Bradford's Complaint (R. 13-14). [See Answer at ¶ 9 (R. 29)].[8]

6. On or about October 7, 1988, for valuable consideration, Loran Corporation, executed and delivered to Bradford its Unconditional Guaranty (the "Loran Guarantee") by which Loran guaranteed payment of the Note owed by SLC to Bradford. A copy of the Loran Guarantee is attached as Exhibit "D" to Bradford's Complaint (R. 15-16). [See Answer at ¶ 11 (R. 29)].[9]

7. On August 9, 1990, after the Note had matured, SLC, by and through its general partner, Loran, entered into an Forbearance and Extension Agreement pursuant to which the maturity date of the Note was extended to December 31, 1990. The Forbearance and Extension Agreement was signed by Kern and Fisher

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[7] A copy of the Kern Guarantee is set forth in the Addendum hereto as Exhibit "B."

[8] A copy of the Fisher Guarantee is set forth in the Addendum hereto as Exhibit "C."

[9] A copy of the Loran Guarantee is set forth in the Addendum hereto as Exhibit "D."

as officers of Loran. [Affidavit of J. Clawson, Sr. at ¶ 11 (R. 65). A copy of the Forbearance and Extension Agreement is attached as Exhibit A (R. 68-71) to the Clawson Affidavit and is set forth in the Addendum hereto as Exhibit "F"].

8. The Forbearance and Extension Agreement states, in paragraph 6, as follows:

> Borrower hereby waives any defenses to payment or performance or rights of setoff it may have as of the date hereof relating to the Original Loan Documents.

[Affidavit of J. Clawson, Sr. at ¶ 12. (R. 65)].

9. On page 4 of the Forbearance and Extension Agreement, Fisher and Kern, in their individual capacities as guarantors of the Note, accepted and agreed to the terms of the Forbearance and Extension Agreement. [Affidavit of J. Clawson, Sr. at ¶ 13. (R. 65)].

10. The Note matured and became due and payable in full by its terms. SLC failed to pay the Note and therefore defaulted on its covenants and obligations under the Note, despite demands by Bradford that SLC pay the sums due and owing. [Answer at ¶ 4 (R. 28); Affidavit of J. Clawson, Sr. at ¶ 3 (R. 62)].

11. The amount due and owing on the Note from SLC to Bradford is as follows: principal in the sum of $100,000.00 with accrued unpaid interest to and including January 9, 1991, of $1,434.45, all interest accruing thereafter on the unpaid principal at the default rate of interest until all such principal is paid

in full, together with late charges in the amount of $4,500.00. Affidavit of J. Clawson, Sr. at ¶ 4 (R. 62).]

12. As a result of his execution of the Kern Guarantee, and the obligation of SLC to Bradford, as described herein, Kern became indebted to Bradford in the principal sum of $100,000.00 with accrued unpaid interest to and including January 9, 1991, of $1,434.45, all interest accruing thereafter on the unpaid principal at the default rate of interest provided in the Note until all such principal is paid in full, together with late charges in the amount of $4,500.00, together with Bradford's court costs and attorneys' fees. [Affidavit of J. Clawson, Sr. at ¶ 6. (R 63)].

13. As a consequence of his execution of the Fisher Guarantee, and the obligation of SLC to Bradford, Fisher became indebted to Bradford in the principal sum of $100,000.00 with accrued unpaid interest to and including January 9, 1991, of $1,434.45, all interest accruing thereafter on the unpaid principal at the default rate of interest provided in the Note until all such principal is paid in full, together with late charges in the amount of $4,500.00, together with Bradford's court costs and attorneys' fees. [Affidavit of J. Clawson, Sr. at ¶ 8 (R. 63 and 64)].

14. As a consequence of the execution of the Loran Guarantee, and the obligation of SLC to Bradford, Loran Corporation became indebted to Bradford in the principal sum of $100,000.00 with accrued unpaid interest to and including January 9, 1991, of

$1,434.45, all interest accruing thereafter on the unpaid principal, at the default rate of interest provided in the Note until all such principal is paid in full, together with late charges in the amount of $4,500.00, together with Bradford's court costs and attorneys' fees. [Affidavit of J. Clawson, Sr. at ¶ 10 (R. 64)].

15. Bradford is engaged in the real estate services business. On Bradford's stationery and business cards, Bradford uses the words "realty investment banker". Bradford is a member of the Mortgage Banker's Association of America. [Affidavit of J. Clawson, Sr. at ¶ 16 (R. 66)].

16. Bradford does not accept from the public deposits that are subject to withdrawal by check or similar instrument, nor is it authorized to engage in the business of accepting depository accounts. [Affidavit of J. Clawson, Sr. at ¶ 17 (R. 66)].

17. Bradford is not subject to regulation by the Utah Department of Financial Institutions. Bradford is not audited by, does not file any reports or statements with, and is not required to be licensed by or file reports with, that Department. [Affidavit of J. Clawson Sr. at ¶ 18. (R. 66)].

SUMMARY OF ARGUMENT

This Court should affirm the District Court's ruling and dismiss Guarantors' appeal. This Court can do so without reaching the merits of the appeal because Appellants have failed to cite in

their Brief to this Court admissible and proper record support and to marshall evidence in support of their claims as required by the Utah Rules of Appellate Procedure.

Even if this Court chooses to reach the merits of Guarantors' appeal, this Court still should affirm Judge Lewis' ruling for any of several independent reasons. First, the trial court properly ruled that the Financial Institutions Act (Utah Code Ann. § 7-1-101 et seq.) as a matter of law does not govern the transactions between Bradford and Guarantors. Use of the terms "mortgage banker" or "realty banker" does not violate the Financial Institutions Act. Second, even were Bradford subject to the Financial Institutions Act and assuming Bradford did violate the Financial Institutions Act, which Bradford did not, that would not void the Guarantors' obligations to Bradford. Third, even were Bradford subject to the Financial Institutions Act and even had it violated it, no private right of action exists that would permit the Guarantors to enforce violations of the Financial Institutions Act. Fourth, Guarantors clearly and unequivocally waived in writing any by their conduct claims or defenses arising prior to the execution of the Note, which include the Counterclaim and defense Guarantors asserted in the trial court. They also are estopped from asserting those defenses and Counterclaim.

Finally, the trial court did not abuse its discretion in connection with the Guarantors' Rule 56(f) request to conduct

additional discovery prior to the trial court ruling on Bradford's Motion. Guarantors had sufficient time to conduct discovery. Some seven months passed after Bradford filed its Motion until Judge Lewis ruled on the Motion. Over four months went by after Guarantors requested additional time to conduct discovery until the District Court conducted the hearing and ruled on Bradford's Motion. During that period, and despite Guarantors' purported need for additional discovery, Guarantors neither conducted nor attempted to conduct any discovery. Perhaps equally as important as their failure to conduct discovery, despite ample time to do so, is the fact that, in light of the legal nature of the matters at issue, additional discovery of the nature Guarantors desired to conduct as described in the Rule 56(f) affidavit of their counsel was unnecessary and irrelevant to the merits of Bradford's Motion.

ARGUMENT

I. THIS COURT NEED NOT REACH THE MERITS OF GUARANTORS' APPEAL BECAUSE GUARANTORS HAVE NOT SUPPORTED THE FACTS SET FORTH IN THEIR BRIEF WITH PROPER CITATIONS TO THE RECORD AS REQUIRED BY THIS COURT'S RULES.

On pages 8 through 11 of Appellants' Brief -- paragraphs 1 through 9, Guarantors purport to set forth facts relevant to the issues before this Court. Those facts, however, are not supported by admissible evidence in the record and may not be considered. Paragraphs 1 through 6 of the Guarantors' statement are a restatement of the facts stated in their memorandum in opposition

to Bradford's motion for summary judgment filed in the district court. [See R. 88-91]. Those statements, both at the lower court level and on appeal, are unsupported by any affidavit or other evidence in the record. Judge Lewis of the District Court properly ruled that those statements did not constitute a denial of the undisputed facts relied on by Bradford. [See Transcript of Hearing on Motion for Summary Judgment, August 14, 1991, at p. 21 (R. 254); id. at R. 254]. Paragraph 7 similarly is not supported by record citation.

There also is no record support for Guarantors' erroneous assertion set forth in paragraph 9 of Guarantors' Statement of Facts that "Plaintiff/Respondent admits that it used the word "bank" and "banker" on its stationary and business cards." Rather, Bradford acknowledged using the words "realty investment banker" in its business. [See R. 49]. Guarantors' citation to page 56 of the record apparently is in error inasmuch as that page provides no support for Guarantors' factual assertion.

In Trees v. Lewis, 738 P.2d 612 (Utah 1987), the Utah Supreme Court stated as follows:

> We need not reach the merits of this dispute for several reasons. First, [appellant] has not supported the facts set forth in his brief with citations to the record as required by Utah Rule of Appellate Procedure 24(a)(6) (Supp. 1986). In State v. Tucker, 657 P.2d 755, 757 (Utah 1982), we interpreted Utah Rule of Civil Procedure 75(p)(2)(2)(d), the forerunner of Utah Rule of Appellate Procedure 24(a)(6), and stated:

> This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.

Trees, 738 P.2d at 612-13.

In Mountain States Broadcasting Co. v. Neale, 783 P.2d 551 (Utah Ct. App. 1989), this Court observed:

> In order to challenge a trial court's findings of fact, a party "must marshall the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them clearly erroneous.'" In re Bartell, 776 P.2d 885, 886 (Utah 1989) (emphasis added) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). See also, e.g., Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah Ct. App. 1988), Appellants often overlook or disregard this heavy burden. When the duty to marshall is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid." (Citations omitted).

Mountain States Broadcasting Co., 783 P.2d at 553 (emphasis added).

Utah Rule of Appellate Procedure 24(a)(7) presently provides that "[all] statements of fact and references to the proceedings below shall be supported by citations to the record." Rule 24(a)(9) states that the appellant's "argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on." Appellants' Brief not only is inadequate with respect to citations to the record, it also fails

to marshall relevant, admissible evidence in support of Guarantors' arguments.

Because Guarantors have failed to comply with the applicable rules of this Court, this Court should refuse to consider the merits of this appeal and should assume the correctness of Judge Lewis' Order granting summary judgment to Bradford and dismissing Guarantors' Counterclaim.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING GUARANTORS' RULE 56(f) REQUEST.

Judge Lewis of the District Court did not abuse her discretion when she ruled on Bradford's Motion without delaying to allow Guarantors more time to conduct additional discovery. In response to Bradford's Motion, Guarantors submitted the Affidavit of Gary Anderson wherein Mr. Anderson stated that additional discovery was needed concerning the relationship between Bradford and the Guarantors, the relationship of Bradford to other lending institutions from which Bradford may have obtained money, and the representations, if any, made by Bradford concerning its "banking status." See Affidavit of Gary J. Anderson [R. 147-150]. None of these requested discovery matters are relevant to the disposition of Bradford's Motion. Even if they were, however, Guarantors

conducted discovery on those issues[10] and had ample time to conduct additional discovery had they so chosen.

A. Rule 56(f) Determinations are Left to the Sound Discretion of the Trial Court.

To delay a summary judgment ruling in order to conduct discovery, a party must make an appropriate showing demonstrating a need and right to such discovery. Such a showing normally requires that party seeking the delay file a Rule 56(f) affidavit setting forth reasons for the delay. See Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988), rev'd in part on other grounds, 1992 WL 14725 (Utah, Jan. 17, 1992); Utah Rule of Civil Procedure 56(f). The trial court then must determine whether the reasons stated in the affidavit are adequate, whether additional discovery might make any difference to the Court's decision on the pending summary judgment motion, or whether the movant is simply delaying or on a "fishing expedition." This determination is left to the sound discretion of the trial court and should not be disturbed absent an abuse of that discretion. See Sandy City v. Salt Lake County, 794 P.2d 482, 488 (Utah Ct. App. 1990) ("The trial court has discretion to determine whether the reasons stated in a Rule 56(f) affidavit are adequate."); Reeves, 764 P.2d at 639 ("It is for the trial court, in the

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[10] See Bradford's Answers to Interrogatories and its Response to Request for Production of Documents set forth in the Addendum to Appellants' Brief.

exercise of its sound discretion, to determine if the reasons stated in the Rule 56(f) affidavit are adequate.").

B. The District Court Did Not Abuse Its Discretion.

Judge Lewis of the District Court did not abuse her discretion when she ruled on Bradford's Motion for Summary Judgment without allowing further delay for additional discovery by Guarantors.

1. Guarantors had adequate time to conduct discovery.

Guarantors had adequate time to conduct discovery and in fact had conducted discovery on the issues stated in the Rule 56(f) affidavit. Guarantors filed their Answer and Counterclaim in this case on February 27, 1991. [R. 28-34]. Four days later, Guarantors initiated discovery by serving their First Set of Interrogatories and their Request for Production of Documents. [R. 35]. In their Interrogatories, Guarantors requested information concerning the original construction loan made by Bradford to SLC, Bradford's corporate structure, Bradford's filings and approvals with government agencies, Bradford's use of the word "bank," and the SLC loan history. In their Request for Production of Documents, Guarantors requested production of all documents relating to the original construction loan and all documents relating to "monies [Bradford] obtained to finance said loan from Dime Bank, any other banks including banks specifically located in

Idaho."[11] On March 19, 1991, Bradford responded to these requests by answering the interrogatories and agreeing to produce non-privileged documents at any mutually convenient time and place. [See R. 84-87; Addendum to Appellants' Brief.] Thereafter, Guarantors conducted no further inquiry.[12]

Bradford filed its Motion on March 22, 1991. [R. 42-43]. The Motion had been fully briefed and was submitted for decision on April 23, 1991. [R. 176-78].[13] The court initially set the motions for hearing on July 12, 1991, [R. 189], which would have allowed Guarantors approximately three additional months to conduct discovery. Subsequently, at the Guarantors' request, the hearing was continued another month, until August 14, 1991. [R. 195].

Some seven months passed between the date Bradford filed its Complaint and the date of the hearing on Bradford's Motion.

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[11] See Addendum to Appellants' Brief.

[12] Guarantors' assertion at the bottom of page 15 of Appellants' Brief regarding the purported inadequacy of Bradford's discovery responses is unfounded. If Guarantors believed that Bradford's discovery responses somehow were deficient, they should have notified Bradford of such belief and requested that the purported deficiencies be corrected. Or Guarantors should have filed a motion seeking to compel "proper" responses. Guarantors did neither.

[13] Bradford also filed a Motion to Strike the Affidavits of I. N. Fisher and Gary J. Anderson and to Strike Defendants' Statement of Undisputed Material Facts. [See R. 169-175].

An Amended Notice to Submit for Decision was filed with the trial court on April 25, 1991. [R. 179-181].

Four months passed between the date Guarantors submitted a Rule 56(f) Affidavit seeking time for additional discovery and the date of the hearing. During those time periods, Guarantors had the opportunity to review Bradford's documents and pursue any other discovery that they desired. They failed to do so. Accordingly, Judge Lewis acted well within her sound discretion when she ruled on Bradford's Motion in August, 1991 without delaying further her decision on the Motion.

2. Guarantors failed to demonstrate the need or relevancy of any additional discovery.

In addition to having adequate time to conduct discovery, thus making unnecessary a grant of additional time for Guarantors to conduct discovery, Guarantors failed to show a need for additional discovery. The undisputed facts in this case make clear that Bradford is not a financial institution subject to the provisions of the Financial Institutions Act.[14] Even if Bradford were subject to the Financial Institutions Act and somehow violated it, which Bradford is not and did not, as set forth below there is no legal basis for a finding that such violation would absolve Guarantors of their obligations to Bradford pursuant to their

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[14] Indeed, paragraph 17 of Bradford's Statement of Undisputed Facts of its memorandum filed in the trial court in support of Bradford's Motion stated that "Bradford is not subject to regulation by the Utah State Department of Financial Institutions." [R. 50]. As previously noted, Guarantors did not controvert any of the facts upon which Bradford based its Motion.

Guarantees. Additionally, Guarantors expressly waived any defenses and claims arising prior to August 9, 1990. Guarantors' purported desire to conduct discovery regarding events transpiring prior to that date is irrelevant. Because Guarantors failed to demonstrate a need for the additional discovery, Judge Lewis properly chose not to further delay a ruling on Bradford's Motion.[15]

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[15] Guarantors complain that the trial court failed to make appropriate findings on the discovery issue. This argument is curious in light of the fact that, although given the opportunity to do so, counsel for Guarantors failed to present Guarantors' 56(f) argument during oral argument before the trial court. [See R. 234-266].

Guarantors do not assert that the trial court's failure to make findings regarding the discovery issue constitutes error. They imply that it may, however, by stating that "This Court and the Court of Appeals have ruled in a long line of cases that a case will be reversed or remanded where findings were inadequate to support the conclusions," [Appellants' Brief at 16-17], and by citing three cases: Sanderson v. Tryon, 739 P.2d 623 (Utah 1987); Smith v. Smith, 726 P.2d 423 (Utah 1986); and Marchant v. Marchant, 743 P.2d 199 (Utah Ct. App. 1987). Each of those cases involved child custody determinations, which require written findings of fact and conclusions of law by the trial court, that bear no relevance to the 56(f) issue in this case.

The District Court adequately set forth in its Order Granting Plaintiff's Motion for Summary Judgment and Dismissing Defendant's [sic] Counterclaim" the basis for its ruling. [See R. 230-31]. Judge Lewis found that the facts upon which Bradford relied in seeking summary judgment had been admitted by Guarantors, that Bradford is not a bank or financial institution, and that, even if Bradford were a bank or financial institution, it had not violated the Utah Financial Institutions Act. [R. 221]. By ruling that summary judgment was proper, the trial court necessarily ruled that additional discovery was not necessary and/or appropriate.

Even if the District Court had failed to make any statement regarding the reasons for its grant of summary judgment, such failure would not have been improper. In Neerings v. Utah

III. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AND DISMISSAL OF GUARANTORS' COUNTERCLAIM WAS PROPER.

The basis for Guarantors' defenses to Bradford's Complaint as well as for their Counterclaim is that Bradford improperly held itself out as a "bank" in violation of the provisions of Utah's Financial Institutions Act. Based on the undisputed facts before it, Judge Lewis properly rejected Guarantors' baseless defenses and Counterclaim and correctly granted summary judgment as requested by Bradford.

A. The Financial Institutions Act Does Not Govern the Transactions Between Bradford and Guarantors.

Guarantors' reliance on the Financial Institutions Act as the basis for its defenses and Counterclaim in the District Court is misplaced.

1. Bradford is not governed by the Financial Institutions Act.

The Financial Institutions Act does not apply to Bradford because Bradford is not a "financial institution" as defined by the Financial Institutions Act. The Act gives the Utah State Department of Financial Institutions responsibility for executing all laws relating to financial institutions and other persons subject to Title 7. See Utah Code Ann. § 7-1-201. The Financial

State Bar, 817 P.2d 320, 323 (Utah 1991), the Utah Supreme Court observed that "[w]hile it may be instructive for the trial court to inform the litigants of the legal basis for its decision, we are not persuaded that failure to do so constitutes reversible error."

Institutions Act defines a "financial institution" as "any institution subject to the jurisdiction of the department because of this title". Utah Code Ann. § 7-1-103(13). An "institution subject to jurisdiction of the department" is defined as any institution described in Article 5 of the Act (which lists banks, savings and loans, and similar entities) "except to the extent those institutions or persons are engaged solely in making or soliciting loans to residents of this state or loans secured by real property located in this state." Utah Code Ann. § 7-1-103(21).

The Financial Institutions Act is designed to regulate deposit-taking activities, not loan making. For example, under the Act, all "banks" are subject to the jurisdiction, supervision, and examination of the Department of Financial Institutions. See Utah Code Ann. § 7-1-501. A "bank" is defined as an institution authorized by law "to accept deposits from the public". Utah Code Ann. § 7-1-103(1) and § 7-3-3(1)(a).

It is undisputed that Bradford is not authorized to accept from the public deposits that are subject to withdrawal by check or similar instrument. [See R. 49 at ¶ 16]. It likewise is undisputed that Bradford is not authorized to engage in the business of accepting depository accounts. [Id.] Judge Lewis properly concluded based on the undisputed facts before her that the Financial Institutions Act does not apply to Bradford and thus

summary judgment was appropriate with respect to Guarantors' defenses and Counterclaim.

Under a definition of financial institution similar to that found in the Financial Institutions Act, the federal district court in Texas held that a mortgage company in the business of originating and servicing mortgage loans and selling interests in mortgage loan pools was not a "state bank", because it did not have the power to accept deposits. See In re Central Mortgage & Trust Co., 50 B.R. 1010 (D. Tex. 1985).[16]

The banking statutes relied upon by Guarantors regulate deposit-taking activities and are not applicable to Bradford's business or to the transactions that are the subject of this lawsuit. Judge Lewis properly made this determination and correctly granted summary judgment to Bradford. This Court should affirm Judge Lewis' decision.

2. Use of the term "realty investment banker" does not violate the Financial Institutions Act.

There is no dispute that Bradford has used the term "realty investment banker" in identifying itself to the public.

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[16] Similarly, a mortgage company which does not accept deposits does not fall within the federal definition of a bank. Flintridge Station Assocs. v. American Fletcher Mortgage Co., 761 F.2d 434 (7th Cir. 1985); see also In re Republic Financial Corp., 77 B.R. 282, 285 (N.D. Okla. 1987) (an entity without the power to receive general deposits is not a bank) and First Bancorporation v. Board of Governors of Fed. Reserve System, 728 F.2d 434, 436 (10th Cir. 1984) ("bank" is an institution that accepts deposits that the depositor has a legal right to withdraw on demand).

Use of this term, however, which is synonymous with the term "mortgage banker," does not violate the Financial Institutions Act. Indeed, the terms "investment banker" and "mortgage banker" are common in the commercial world and have commonly understood meanings completely apart from the traditional use of the word "bank" that is proscribed in the Financial Institutions Act. Those terms do not imply any deposit-taking function, which is the activity regulated by the Act. Black's Law Dictionary, 5th Edition, provides the following definitions:

> **Bank.** A bank is an institution, usually incorporated, whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, known as bank notes.
>
> **Mortgage banker.** A person or firm engaged in the business of dealing in mortgages including their placement and refinancing. Normally such banker uses its own funds as opposed to a commercial or savings and loan bank which uses primarily funds of depositors. While some mortgage bankers do provide long term (permanent) financing, the majority specialize in short term and interim financing.
>
> **Investment banker.** An underwriter, the middleman between the corporation issuing new securities and the public. The usual practice is for one or more investment banks to buy outright from a corporation a new issue of stocks or bonds. The group forms a syndicate to sell the securities to individuals and to sell the securities to individuals and institutions. Investment bankers also distribute very large blocks of stocks or bonds-perhaps held by an estate. Thereafter the market in the security may be over-the-counter or on a stock exchange.

In arguing that Bradford's use of the phrase "mortgage banker" or "realty investment banker" is a violation of the

Financial Institutions Act, Guarantors ignore the common sense application and intent of the Act. The Financial Institutions Act allows such use of the word "bank," where use of the word is not likely to cause confusion:

> Notwithstanding any other restriction in this section, the prohibition of the use of specific names and words in subsections (2), (3), (4), (5), and (6) does not apply if the effect of the use of the name or word would not likely lead any person to reasonably believe that a person or his place of business is a financial institution, or is conducting a business subject to the jurisdiction of the department.

Utah Code Ann. § 7-1-701(8)(a) (emphasis added).[17]

There is no evidence, or even assertion, in this case to the effect that Guarantors ever believed or reasonably could have believed that Bradford met the statutory requirements of a "business subject to the jurisdiction of the department" -- i.e., that Bradford was taking deposits, could accept deposits, or wanted to be a depositary institution for Guarantors. Bradford never has operated as a "bank" or held itself out as a "bank" for purposes of the Financial Institutions Act. Guarantors admitted this in the

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[17] For this reason, use of terms such as "blood bank", "food bank," "realty investment banker," and other such usage of the word "bank" obviously does not subject the user to the provisions of the Financial Institutions Act.

trial court. [See paragraphs 16 and 17 of the Statement of Facts set forth above].[18]

3. Even if Bradford were in violation of the Financial Institutions Act, that would not void Guarantors' obligations.

There is no legal basis for a finding that a violation of the Utah Financial Institutions Act by Bradford would absolve Guarantors of their clear obligations under their Guarantees.

a. The basis for Guarantors' defenses and Counterclaim previously has been addressed and rejected.

The theory raised by the Guarantors -- i.e., that violation of an act such as Utah's Financial Institutions Act absolves an obligor of some or all of his obligations -- previously has been addressed and rejected. For example, in Shepherd v. Finance Assocs. of Auburn, 316 N.E.2d 597 (Mass. 1974), the borrower argued that notes and mortgages made by the borrower were void because the lender was conducting a "banking business" in violation of state law. The court rejected this argument and ruled that any violation of state law was irrelevant to the borrower's liability:

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[18] Those facts establish that Bradford does not accept from the public deposits which are subject to withdrawal by check or similar instrument, nor is it authorized to engage in the business of accepting depository accounts. Bradford is not subject to regulation by the Utah State Department of Financial Institutions. Bradford is not audited by that Department, does not file any reports or statements with that Department, and is not required to be licensed by or file reports with that Department.

> Even so, the plaintiff is afforded no basis for relief. Chapter 167 [the State Banking law] affords a specific remedy for its violation, beginning with an examination by the Commissioner of Banks and culminating in possible fines, assessment of expenses and injunctive orders . . . No mention is made of any effect on the public transactions entered into by an offending corporation. We are unwilling to assume that the legislature intended to effect such a forfeiture of private contractual rights.

Id. at 601.

The same conclusion properly is drawn from the Utah statutes. The Financial Institutions Act makes no mention that any violation of its provisions voids the private obligations of note makers and guarantors. Rather, the statute gives exclusive and extensive enforcement powers to the Commissioner of the Utah Department of Financial Institutions. The Commissioner is allowed to inspect corporations, to take possession of financial institutions, to issue cease and desist orders, and to collect the debts owed to seized institutions. See Utah Code Ann. § 7-2-1 et seq. The Guarantors may not avoid their private, contractual obligations by alleging that Bradford may be subject to some future enforcement action brought by the Utah Department of Financial Institutions.[19]

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[19] Utah Courts have on various occasions reiterated that parties are free to make their own contracts and that courts will not make a better contract for a party than what the parties have agreed. See, e.g., Ted R. Brown & Assocs. v. Carnes Corp., 753 P.2d 964, 970 (Utah Ct. App. 1988) (Court cannot make better contract for a party than what parties have agreed to); Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

In Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983), the Utah Supreme Court observed that "with few exceptions, it is still axiomatic in contract law that 'persons dealing at arm's length are entitled to contract on their own terms without the interference of the courts for the purpose of relieving one side or the other from the effects of a bad bargain'". As expressly admitted by Guarantors, the parties in this case agreed to certain interest rates and fees in connection with the construction loan. [See Paragraph 1 of Bradford's Statement of Facts]. Later, when the construction loan was refinanced, $100,000 of the loan remained unpaid. Plaintiff agreed to accept the Note and the Guarantees for the remaining balance. The agreement to pay interest and fees was valid at the time it was made, and the subsequent execution of the Note and Guarantees reaffirmed the validity. [See Statement of Facts set forth above, Paragraphs 2-14].

b. The cases Guarantors cite do not support Guarantors' defenses or Counterclaim.

In support of their argument that a violation of the Financial Institutions Act voids the Note owed to Bradford,

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In Utah, any private party can contract to lend money, and in doing so, the parties can agree to any interest rates and fees. The general usury laws in Utah were repealed in 1969 (see former U.C.A. § 7-1-2 and § 7-1-2a). In commercial transactions, parties may agree on any interest in exchange for a loan of money. See Utah Code Ann. § 15-1-1.

Guarantors cite to three older decisions from New York. One of these cases involved a usurious promissory note that was held void. See Koven v. Cline, 280 N.Y.S. 814 (N.Y. App. 1935). The other two cases involved the exercise of banking powers in violation of the New York banking statute. In each case, the contract that was voided had arisen directly out of an illegal act. Those decisions rely on an express provision in the New York statute that declared such instruments void. See Voluntary Ass'n v. Goodman, 244 N.Y.S. 328, 330 (N.Y. Mun. Ct. 1930). The Utah statute contains no similar provision, and in fact implies just the opposite by giving power to the commissioner to seize and collect assets of institutions (such as notes payable to the institution). See Utah Code Ann. § 7-2-1 et seq.

In Dinkenspeel v. O'Day, 47 Utah 18, 151 P. 344 (1915), the plaintiff leased a building from O'Day for the purpose of operating an illegal gambling house. When O'Day was facing foreclosure, the plaintiff loaned money to O'Day to preserve the gambling operation. The loan was secured by a mortgage on the property. O'Day subsequently defaulted on the loan owed to the plaintiff, and the plaintiff sued to enforce the note and foreclose the mortgage. O'Day argued that the note was void because it was made for the purpose of furthering the illegal gambling activities. In enforcing the note, the Utah Supreme Court explained:

> As already pointed out, there was nothing illegal or immoral in lending the money, or in executing the note evidencing the loan, or in giving the mortgage to secure it. What the defendant complains of lies back of that transaction and has no necessary connection with it.

Id. at 346.

In this case, the Note and Guarantees are not illegal in any sense, nor is there any allegation that would make them or any aspect of any of the transactions relevant to this case illegal. The lending of money, with interest and fees to be charged, is a lawful act by any person or entity. Guarantors may not avoid their valid obligations by alleging a violation of a state statute that does not regulate this transaction and that, even if it did, would not void it.

B. No Private Right of Action Exists to Enforce the Financial Institutions Act.

Even if Bradford's use of the term "realty investment banker" in its correspondence were a violation of the Financial Institutions Act, that violation would not provide a defense to payment of Guarantors' obligations. Enforcement of the Financial Institutions Act is the exclusive responsibility of the Department of Financial Institutions. See Utah Code Ann. §§ 7-1-201 and 7-1-321. Guarantors' defenses and Counterclaim, which erroneously presuppose that an implied private right of action exists to enforce the Act, therefore must fail as a matter of law. Indeed,

Guarantors cite no case implying a private right of action under Utah's Financial Institutions Act or under any similar act.

Under Utah law, a private right of action is not implied from a violation of a state statute that does not clearly provide for such private right of action.[20] Indeed, the Utah Supreme Court has observed in this regard that courts should refrain from fashioning such a remedy. Rather, "it is a matter best left to the legislature." Milliner v. Elmer Fox and Co., 529 P.2d 806 (Utah 1974) (decided after Cort v. Ash). See Shepard v. Finance Assocs. of Auburn, 316 N.E.2d 597, 601 (Mass. 1974) ("We are unwilling to assume that the legislature intended to effect . . . a forfeiture of private contractual rights" as a result of a violation of state banking laws.)[21]

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[20] Guarantors' implied private right of action analysis fails, among other reasons, because it deals with implied private rights of action under federal statutes and fails to address implied rights of action under Utah law.

[21] Even applying the Cort v. Ash analysis that Guarantors advance, Guarantors cannot establish that a private right of action for violation of the Financial Institutions Act should be implied.

Guarantors contend that the first prong of the Cort v. Ash analysis (i.e., that the plaintiff is "one of the class for whose especial benefit the statute was enacted -- that is, does the statute create a federal right in favor of the plaintiff?") is satisfied because the public is the primary party for whose benefit the statute was passed and Guarantors are members of the public. Appellants' Brief at 29. This broad brush analysis is flawed. The clear purpose of the Financial Institutions Act is to protect depositors of state regulated banks. Guarantors are not a member of that class. Furthermore, under Guarantors' overly simplistic approach, a private cause of action would be implied under all

Even if Guarantors were able to show that a private right of action did exist under the Financial Institutions Act, Guarantors' claims still would fail because they have alleged no damage arising out of or caused by Bradford's use of the term

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public laws -- at least with respect to the first prong of the analysis. Such is not the case. Even if the general public were the class for whose especial benefit the Financial Institutions Act was intended, the fact that the Act exists to protect the general public -- and not specified classes, would weigh heavily in favor of not implying individual rights of action under the statute. Moreover, the Supreme Court in Ash noted specifically that the question is whether the statute creates a federal right in favor of the plaintiff. The state law at issue in this case clearly does not imply a federal right.

The second prong -- whether there is any indication of legislative intent to create or deny such a remedy -- makes clear that a private right of action should not be implied under the Financial Institutions Act. Indeed, Utah Code Ann. § 7-1-102(1)(a) expressly provides that "It is the purpose of this title to expand and strengthen the duties, powers and responsibilities of the Department of Financial Institutions and to place under its jurisdiction all classes of institutions and other businesses engaged in furnishing financial services to the people of this state, ..." (Emphasis added).

The final prong of the analysis ("is the cause of action one traditionally relegated to state law, in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law?) likewise demonstrates that a private cause of action should not be implied under the Financial Institutions Act. This prong demonstrates the impropriety of attempting to apply the Cort v. Ash analysis to the state law at issue. The Financial Institutions Act is not only relegated to state law, it is state law and the concern of the State.

Thus, even were this Court to apply the Cort v. Ash analysis to the Financial Institutions Act in determining whether a private right of action under the Act should be implied, that analysis makes clear that a private right of action should not be implied under the Act.

"bank". Guarantors' only allegations concerning damage are that Guarantors have paid interest, costs, and fees under the loan documents. As shown above, interest, costs, and fees can be charged by any private party, according to contract, and do not constitute recoverable damages to which Guarantors are entitled.

C. Guarantors Have Waived Any Defenses and Claims Arising Prior to the Execution of the Note.[22]

The undisputed evidence in the District Court makes clear that Guarantors have waived their defenses to Bradford's Complaint as well as any right to assert their Counterclaim.

1. Guarantors expressly waived their claims and defenses.

Guarantors waived in writing their defenses and Counterclaim that were asserted in the District Court. After entering into the construction loan commitment pertaining to the Center Pointe protect in 1985, Guarantors in 1988 executed a document entitled "Second Mortgage Endorsement to Construction Loan Commitment," which modified the terms and conditions of the

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[22] Although the District Court did not specifically address Bradford's waiver argument in its ruling granting summary judgment and dismissing Guarantors' Counterclaim, this Court properly may do so. See, e.g., Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988) (Appellate court "may affirm trial court's decisions on any proper ground(s), despite the trial court's having assigned another reason for its ruling."); Bagshaw v. Bagshaw, 788 P.2d 1057, 1060 (Utah Ct. App. 1990) ("[T]his court may affirm 'if the trial court's decision can be sustained on any proper legal basis.'" (quoting Taylor v. Estate of Taylor, 770 P.2d 163, 169 (Utah Ct. App. 1989)).

construction loan commitment. [See Guarantor's Memorandum of Points and Authorities in Opposition to the Plaintiff's Motion for Summary Judgment and to Dismiss Counterclaim ¶ 2, at 2 (R. 89) and Exhibit B thereto (R. 118-119)]. In that Second Mortgage Endorsement to Construction Loan Commitment, Guarantors agreed to pay a "'$100,000 additional fee' . . . due and payable upon the sale of the property in question, the refinancing of the loan, or at loan maturity as extended, whichever comes first."[23] Guarantors have admitted that the $100,000 loan fee was drawn against the loan proceeds on or about November 28, 1986, [id.], and have acknowledged that the proceeds of their loan from First Security Bank ($2,100,000) were insufficient to pay the $2,200,000 principal balance of the loan from Bradford and that Guarantors therefore executed in favor of Bradford the Note, a trust deed, the Guarantees, and a security agreement in favor of Bradford for the amount of the shortfall -- $100,000 -- together with interest. [See Guarantors' "Memorandum of Points and Authorities in Opposition to the Plaintiff's Motion for Summary Judgment and to Dismiss Counterclaim" ¶¶ 5-6, at p.3 (R. 90) and Exhibits E and F to that memorandum (R. 122-126; R. 127-140)].

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[23] See Guarantors' memorandum filed in opposition to Bradford's Motion at ¶ 2 (R. 89) and Exhibit B to that memorandum (R. 118-119); see also Exhibit "F" of the Addendum to this Brief].

After the Note matured in 1990, SLC entered into an Forbearance and Extension Agreement pursuant to which the maturity date of the Note was extended to December 31, 1990. The Forbearance and Extension Agreement was signed by Kern and Fisher as officers of Loran and was accepted and agreed to by Kern and Fisher as Guarantors of the Note. [See Forbearance and Extension Agreement (R. 65, ¶ 13; R. 68-71), a copy of which is set forth in the Addendum hereto as Exhibit "F"]. The Forbearance and Extension Agreement contained an express waiver to claims and defenses relating to Bradford's enforcement of the Note and Guarantees:

> Borrower hereby waives any defenses to payment or performance or rights of setoff it may have as of the date hereof relating to the original loan documents.

[See Affidavit of J. Clawson, Sr. at ¶ 12 (R. 65); see also R. 68-71].

It is undisputed that Guarantors' defenses to enforcement of the Note and Guarantees, as well as the basis for their Counterclaim, arose prior to the time that the executed the Forbearance and Extension Agreement. It also cannot be legitimately disputed that Guarantors knew of those claims and defenses when they signed the agreement. Because Guarantors expressly waived any and all defenses they otherwise might have had, the District Court's decision in granting summary judgment and dismissing Guarantors' Counterclaim was correct. This Court should affirm that decision and dismiss Guarantors' appeal.

2. Guarantors' conduct resulted in a waiver of their defenses and Counterclaim.

In addition to waiving claims and defenses in writing, Guarantors waived their claims and defenses by their conduct. Waiver results when a party, with knowledge of an existing claim, relinquishes that claim by actions or conduct. See B.R. Woodward Marketing, Inc. v. Collins Food Serv., Inc., 754 P.2d 99, 101 (Utah App. 1988).

In Woodward, this Court affirmed a summary judgment ruling that a party had waived its right to certain commissions when the party failed to demand the commissions during the term of its employment. Woodward's principal testified: "I felt that asking for more money, or . . . even questioning the commission situation, might jeopardize my standing in the company and cause them to want to cancel my contract. So I just kind of rolled over and played dead." Id. at 103.

This Court refused to accept Woodward's argument that it never intended to waive its commissions, finding that Woodward's actions constituted a waiver of its right to seek the commissions Woodward claimed it was owed:

> We agree that Woodward, by its conduct, waived its right to incentive commissions under the Sales Agreement with Collins. The evidence is uncontroverted that Woodward was aware of the existence of its right to receive compensation . . . and that it knew such a claim had to be documented by a daily sales report and submitted monthly. Nonetheless, Woodward decided to "roll over and play dead" as it was "more than willing

> to settle for $45,000 a year." It was not until after the relationship was terminated that Woodward sought what it knew it was entitled to receive during the entire course of its employment. Such conduct, notwithstanding whatever unexpressed subjective intent Woodward's principal had, unequivocally evidenced an intent to waive its right to claim the incentive commissions.

Id. at 103-04.

The Woodward decision is consistent with the Idaho Supreme Court case of First Security Bank of Idaho, N.A. v. Gaige, 155 Idaho 172, 765 P.2d 683 (1988). In Gaige, First Security Bank of Idaho extended a series of loans to a company called A.J. Gaige Associates. The loans were secured by the guarantee of Mr. Gaige and by other collateral. After several unprofitable years, Gaige decided to liquidate the company. In connection with the liquidation, Gaige, the company, and First Security entered into a "loan workout agreement" in July of 1984 in which First Security allowed Gaige a four-month period to liquidate the company. Absent the agreement, First Security immediately could have sought to foreclose on its collateral.

When the liquidation failed to satisfy the debt, First Security brought action against Gaige on the guaranty. Gaige responded with defenses and a counterclaim alleging breach of contract, fraud, negligence, breach of duty, and rescission. The trial court granted summary judgment in favor of First Security and the Idaho Supreme Court affirmed. Id. at 686. The court held that by expressly ratifying his guaranty in connection with the

subsequent loan modification, Gaige waived any claim based on fraudulent inducement. Id.

Similarly, Guarantors in this case waived any right to assert claims and/or defenses arising in connection with the construction loan. The undisputed facts in this case show that Guarantors caused Bradford to release the construction loan and security in return for the Note and Guarantees. Later, Guarantors obtained an extension of the maturity of the Note and Guarantees, thereby again affirming the validity of the Guarantees. Under such circumstances, the law is clear that Guarantors have waived any right to assert the Counterclaim and defenses Guarantors asserted in the District Court.[24] See Leavitt v. Blohm, 11 Utah 2d 220, 357 P.2d 190, 194 (1960) (right of rescission lost where party made no claim for return of money until filing of her counterclaim); McKeller Real Estate & Investment Co., et al. v. Paxton, 62 Utah 97, 218 P. 128, 132 (1923) (waiver found where defendants treated the contract as in force until the institution of legal proceedings).

Because Guarantors have waived their defenses and Counterclaim, Judge Lewis' grant of Bradford's motion for summary

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[24] Although the question of waiver is generally one of fact, "it is perhaps more accurate to view the ultimate conclusion whether waiver has occurred, given particular facts, as a question of law." Woodward, 754 P.2d at 101.

judgment, including dismissal of Guarantors' Counterclaim, was proper and should be affirmed by this Court.[25]

CONCLUSION

Judge Lewis properly granted summary judgment in favor of Bradford and correctly dismissed Guarantors' Counterclaim. This Court should affirm that ruling.

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[25] Guarantors' Counterclaim and defenses also are barred by the doctrine of estoppel. In Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979), the Utah Supreme Court set forth the following elements necessary to establish an estoppel:

> (1) an admission, statement or act [or silence] inconsistent with the claim afterwards asserted,
>
> (2) action by the other party on the faith of such admission, statement or act [or silence], and
>
> (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act [or silence].

Id. at 694. The same facts that establish waiver also establish estoppel. As previously discussed, despite knowledge of the Counterclaim and defenses they now assert, Guarantors represented the validity of the Note and Guarantees at issue. Bradford granted extensions of time and took other action in reliance on Guarantors' acknowledgements and in reliance on Guarantors' failure to assert their claims. Having relied on Guarantors' statements, acts, and silence, injury to Bradford would result were Guarantors now allowed to contradict or repudiate their representations and unequivocal conduct.

DATED this 2nd day of April, 1992.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

Mark F. James

Scott F. Young, Esq.
Mark F. James, Esq.
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 1992, I mailed by U.S. mail, first class postage prepaid, four (4) true and correct copies of the foregoing APPELLEE'S BRIEF to the following:

Gary J. Anderson, Esq.
Westpark
750 North Freedom Blvd., Suite 102
Provo, Utah 84601

Mark F. James

Scott F. Young, Esq.
Mark F. James, Esq.

Brad.brf

IN THE UTAH COURT OF APPEALS

BRADFORD GROUP WEST, INC.,	)	
	)	
Plaintiff/Appellee,	)	Case No. 920104-CA
	)	
vs.	)	
	)	
JAMES F. KERN, I.N. FISHER, and LORAN CORPORATION, a California corporation,	)	Priority No. 16
	)	
Defendants/Appellants.	)	

ADDENDUM TO BRIEF OF PLAINTIFF/APPELLEE

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, GRANTING PLAINTIFF'S/APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

District Court Civil No. 910900291 CV

HONORABLE LESLIE A. LEWIS, DISTRICT JUDGE

Tab A

PROMISSORY NOTE

Loan Number: _____ October 7, 1988
$100,000.00 Salt Lake City, Utah

FOR VALUE RECEIVED, in installments and at the time hereinafter stated, SLC LIMITED IV, a California Limited Partnership ("Maker") promises to pay to the order of the BRADFORD GROUP WEST, INC., a Utah Corporation, its successors and assigns ("Holder"), at Salt Lake City, Utah, or at such other place as the Holder hereof may from time to time designate in writing, in lawful money of the United States of America, the principal sum of One Hundred Thousand Dollars ($100,000.00) with interest on the unpaid principal balance from time to time outstanding as follows:

a) From the date hereof the rate of interest per annum shall equal at all times a variable rate which at all times is two and one-half percent (2½%) above the then quoted base interest rate for loans charged and published by The Idaho First National Bank (The "Base Rate"), calculated and applied on the basis of a 365-day year, increases or decreases in such Base Rate being effective concurrently with the effective date of each such change. Any changes in the principal interest rate under this Note are effective without prior notice.

For credit to be allowed on the day funds are received, such collected funds must be received by the Holder on or before 2:00 p.m. that same day. Interest shall be due and payable on the first (1st) day of each month throughout the term of this Note or any extension hereof, with the first such payment due on November 1, 1988. If not previously paid, the entire principal balance of this Note, plus all accrued and unpaid interest, shall be due and payable in full on or before October 7, 1989.

Unless otherwise provided herein, this Note may be prepaid in whole or in part at any time without penalty.

All payments shall be applied under this Note as follows and in the order indicated, at the option of Holder: (1) to the repayment of sums advanced by Holder below to protect the property which secures this Note or any Guaranty of this Note, together with interest thereon at the default rate specified below; (2) to the payment of the Holder's attorneys fees and other expenses as provided herein; (3) to interest due; and (4) to the reduction of principal.

EXHIBIT A

If default be made in the payment of any sums due under this Note, or in any other term or condition hereof, or in any Trust Deed, Security Agreement, Guaranty, or any other agreement between Maker (or its Guarantors) and Holder pertaining to the indebtedness evidenced hereby, then, upon fifteen (15) days' written notice of such default from Holder and/or upon thirty (30) days' written notice of any non-monetary default, default interest shall accrue, at the option of Holder, at five percent (5%) per annum over the Base Rate, calculated and applied on the basis of a three hundred and sixty-five (365) day year, increases or decreases in such base rate being concurrent with the effective date of each such change.

Further, if default be made in the payment of any sums due under this Note, or in any other term or condition hereof or in any Trust Deed, Security Agreement, Guaranty, or any other agreements between Maker (or its Guarantors) and Holder pertaining to the indebtedness herein, then, upon written notice of default from Holder to Maker and Maker's failure to cure monetary defaults within fifteen (15) days and/or non-monetary defaults within thirty (30) days, at the option of Holder, Holder shall cause all of the unpaid principal of this Note, with interest accrued thereon, to become immediately due and payable. Unpaid accrued interest shall accumulate and be added to the then outstanding principal balance on the fifth day of each month during default.

In the event that any payment hereunder shall not be made within fifteen (15) days after the due date, a late charge of five cents ($.05) for each dollar ($1.00) so overdue may be charged by Holder for the purpose of defraying the expense incident to handling such delinquent payments. Such late charge represents the reasonable estimate of Holder and Maker of a fair average compensation for the loss that may be sustained by Holder due to the failure of Maker to make timely payments. Such late charge shall be paid without prejudice to the right of Holder to collect any other amounts provided to be paid or to declare a default hereunder or under the Trust Deed referred to below or any other agreement securing or guaranteeing this Note.

Notwithstanding anything to the contrary contained herein or in any other agreement pertaining to the indebtedness evidenced hereby, the total liability for payments in the nature of interest, additional interest and other charges shall not exceed the applicable limits imposed by the interest rate laws of the State of Utah. If any payments in the nature of interest, additional interest and other charges made hereunder or

under any other agreement pertaining to the indebtedness evidenced hereby, are held to be in excess, they shall be considered payment of principal hereunder and the indebtedness evidenced hereby shall be reduced by such amount so that the total liability for payments in the nature of interest, additional interest and other charges shall not exceed the applicable limits imposed by the interest rate laws of the State of Utah in compliance with the desires of Maker and Holder.

In the event suit be brought hereon, or an attorney be employed or expenses be incurred to compel payment of this Note or any portion of the indebtedness evidenced hereby, Maker promises to pay all such expenses and attorneys' fees, including fees on appeal.

The Maker, endorsers and guarantors of this Note, and each of them, hereby waive all homestead and/or exemption rights, diligence, presentment, protest and demand, notice of protest and demand, notice, notice of dishonor and/or non-payment and specifically consent to and waive notice of (1) any renewals or extensions of this Note, whether made to or in favor of Maker or any other person or persons, (2) release of all or any part of the security for the payment hereof, or (3) release of any party directly or indirectly liable for this obligation.

The terms of this Note apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and permitted assigns.

This Note is secured, without limitation, by a certain Trust Deed with Assignment of Rents of even date herewith (the "Trust Deed"), encumbering certain real property (the "Property") located in Salt Lake County, Utah. If the Trustor therein shall sell, convey, or alienate the Property, or any part thereof, or any interest therein, or shall be divested of its title or any interest therein in any manner or way, or should the composition of Trustor be substantially altered, either voluntarily or involuntarily, without the prior written consent of Holder, which consent shall not be unreasonably withheld, Holder may at its option, without notice, require the entire principal balance of this Note, with accrued interest and all other sums, to be immediately due and payable.

This Note is guaranteed by the Unconditional Guaranties of Loran Corporation, I. N. Fisher and James F. Kern.

This Note shall be governed by and construed in accordance with the laws of the State of Utah.

If this Note is signed by more than one Maker, the obligations of Maker hereunder shall be joint and several.

IN WITNESS WHEREOF, Maker has executed this Note as of the date first written above.

MAKER:

SLC LIMITED IV, a California Limited Partnership

By: Loran Corporation, its general partner

By _____
I. N. Fisher, President

By _____
James F. Kern, Vice President

SCMBDP321

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Tab B

UNCONDITIONAL GUARANTY

The undersigned, James F. Kern ("Guarantor"), hereby unconditionally guarantees to the Bradford Group West, Inc., its successors and assigns ("Holder"), the full, complete and prompt payment and performance of all obligations of SLC Limited IV, a California limited partnership ("Maker"), under that certain Promissory Note in the original principal amount of $_____, dated October __, 1988 (the "Note"). The Guarantor acknowledges and agrees that he is jointly and severally liable for the full amounts owing under the Note.

From default and until such time as the obligations of Maker and any guarantors under the Note and any guaranties are paid or satisfied in full, Holder may recover the amounts owed on the Note from the Maker and/or guarantors and/or the collateral. No action or inaction by the Holder to collect from one party or the collateral or any portion thereof shall be deemed a waiver of any right to proceed against any other party or collateral.

Guarantor waives any rights to an apportionment of liability, fault, or damages pursuant to Utah Code Ann. § 78-27-37 to 43 (1987, as amended), and any other rights to apportionment of liability, fault, or damages pursuant to other statutes, in equity, or at common law, it being expressly agreed that the liability and obligation of Guarantor under this Guaranty and any other documents executed in connection herewith, shall be joint and several with the Maker and any other guarantors. It is expressly agreed that Holder may, in its sole discretion, waive, release, modify, forego or forbear from exercising any or all rights it may have against the Maker or any guarantor pursuant to the terms of the Note, any guaranty, security agreement, trust deed or other document executed in connection with the note.

Guarantor further agrees that this Guaranty shall be interpreted in accordance with the laws of Utah, and expressly consents to jurisdiction and venue of any suit hereon in the District Court of Salt Lake County, Utah.

Guarantor agrees and acknowledges that Utah Code Ann. § 78-37-1 to -9 (1953), does not apply to any action hereon or liability created hereby, and that Holder may sue Guarantor hereunder and seek to collect from Guarantor personally without looking first, or at all, to any collateral or trust deed securing the note or any guaranty thereof.

This Guaranty is secured by Trust Deed with Assignment of Rents, dated October __, 1988, executed by Newport Investment Associates, a general partnership whose sole general partners are James F. Kern and I. N, Fisher, as Trustor, in favor of Nevada Title Company, as Trustee, and The Bradford Group West, Inc., as Beneficiary, relating to certain real property located in Clark County, Nevada (the "Collateral").

Guarantor represents and warrants that the Collateral is free and clear of any liens and encumbrances except as follows:

_____

_____

_____

Guarantor further represents and warrants that Newport Investment Associates has good and merchantable title to the Collateral and all necessary authority and right to pledge said Collateral to Holder.

DATED this 7th day of October, 1988.

James F. Kern

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Tab C

UNCONDITIONAL GUARANTY

The undersigned, I. N. Fisher ("Guarantor") hereby unconditionally guarantees to the Bradford Group West, Inc., its successors and assigns ("Holder"), the full, complete and prompt payment and performance of all obligations of SLC Limited IV, a California limited partnership ("Maker"), under that certain Promissory Note in the original principal amount of $100,000.00, dated October 7, 1988 (the "Note"). The undersigned acknowledges and agrees that he is jointly and severally liable for the full amounts owing under the Note.

From default and until such time as the obligations of Maker and any guarantors under the Note and any guaranties are paid or satisfied in full, Holder may recover the amounts owed on the Note from the Maker and/or guarantors and/or the collateral. No action or inaction by the Holder to collect from one party or the collateral or any portion thereof shall be deemed a waiver of any right to proceed against any other party or collateral.

Guarantor waives any rights to an apportionment of liability, fault, or damages pursuant to Utah Code Ann. § 78-27-37 to 43 (1987, as amended), and any other rights to apportionment of liability, fault, or damages pursuant to other statutes, in equity, or at common law, it being expressly agreed that the liability and obligation of Guarantor under this Guaranty and any other documents executed in connection herewith, shall be joint and several with the Maker and any other guarantors. It is expressly agreed that Holder may, in its sole discretion, waive, release, modify, forego or forbear from exercising any or all rights it may have against the Maker or any guarantor pursuant to the terms of the Note, any guaranty, security agreement, trust deed or other document executed in connection with the Note.

Guarantor further agrees that this Guaranty shall be interpreted in accordance with the laws of Utah and expressly consents to jurisdiction and venue of any suit filed in the District Court of Salt Lake County, Utah.

Guarantor agrees and acknowledges that Utah Code Ann. § 78-37-1 to -9 (1953), does not apply to any obligation hereof or liability created hereby, and that Holder may sue Guarantor hereunder and seek to collect from Guarantor personally without looking first, or at all, to any collateral or trust deed securing the note or any guaranty thereof.

This Guaranty is secured by Trust Deed with Assignment of Rents, dated October 7, 1988, executed by Newport Investment Associates, a general partnership whose sole general partners are James F. Kern and I. N. Fisher, as Trustor, in favor of Nevada Title Company, as Trustee, and the Bradford Group West, Inc., as Beneficiary, relating to certain real property located in Clark County, Nevada (the "Collateral").

Guarantor represents and warrants that the Collateral is free and clear of any liens and encumbrances except as follows: (1) First Trust Deed in the original principal amount of $1,850,000 to County Savings Bank of Santa Barbara; and (2) Second Trust Deed in the original principal amount of $300,000 to Jerry King.

Guarantor further represents and warrants that Newport Investment Associates has good and merchantable title to the Collateral and all necessary authority and right to pledge said Collateral to Holder.

DATED this 7th day of October, 1988.

I. N. Fisher

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Tab D

UNCONDITIONAL GUARANTY

The undersigned, Loran Corporation ("Guarantor"), hereby unconditionally guarantees to the Bradford Group West, Inc., its successors and assigns ("Holder"), the full, complete and prompt payment and performance of all obligations of SLC Limited IV, a California limited partnership ("Maker"), under that certain Promissory Note in the original principal amount of $100,000.00, dated October 7, 1988 (the "Note"). Guarantor acknowledges and agrees that it is jointly and severally liable for the full amounts owing under the Note.

From default and until such time as the obligations of Maker and any guarantors under the Note and any guaranties are paid or satisfied in full, Holder may recover the amounts owed on the Note from the Maker and/or guarantors and/or the collateral. No action or inaction by the Holder to collect from one party or the collateral or any portion thereof shall be deemed a waiver of any right to proceed against any other party or collateral.

Guarantor waives any rights to an apportionment of liability, fault, or damages pursuant to Utah Code Ann. § 78-27-37 to 43 (1987, as amended), and any other rights to apportionment of liability, fault, or damages pursuant to other statutes, in equity, or at common law, it being expressly agreed that the liability and obligation of Guarantor under this Guaranty and any other documents executed in connection herewith, shall be joint and several with the Maker and any other guarantors. It is expressly agreed that Holder may, in its sole discretion, waive, release, modify, forego or forbear from exercising any or all rights it may have against the Maker or any guarantor pursuant to the terms of the Note, any guaranty, security agreement, trust deed or other document executed in connection with the Note.

Guarantor further agrees that this Guaranty shall be interpreted in accordance with the laws of Utah, and expressly consents to jurisdiction and venue of any suit hereon in the District Court of Salt Lake County, Utah.

Guarantor agrees and acknowledges that Utah Code Ann. § 78-37-1 to -9 (1953), does not apply to any action hereon or liability created hereby, and that Holder may sue Guarantor hereunder and seek to collect from Guarantor personally without looking first, or at all, to any collateral or trust deed securing the note or any guaranty thereof.

This Guaranty is secured by Security Agreement dated October 7, 1988, wherein the collateral is all of Loran Corporation's partnership interest in Las Vegas Investment Associates and Las Vegas Investment Associates II, both limited partnerships, and all accounts receivable and contract rights relating thereto or owing to Guarantor by Las Vegas Investment Associates and/or Las Vegas Investment Associates II, and all proceeds thereof (the "Collateral").

Guarantor represents and warrants that the above-described Collateral is free and clear of any liens and encumbrances and that Guarantor owns a 20% general partnership interest in both Las Vegas Investment Associates and Las Vegas Investment Associates II, subject to the terms of the limited partnership agreements thereof.

Guarantor further represents and warrants that it has good and merchantable title to the Collateral and all necessary authority and right to pledge said Collateral to Holder.

DATED this 7th day of October, 1988.

LORAN CORPORATION

By _____

Its PRESIDENT

SCMBDP318

Tab E

SECOND MORTGAGE ENDORSEMENT
TO CONSTRUCTION LOAN COMMITMENT

SLC Limited IV

RE: Construction Loan Commitment #85.17C

Gentlemen:

This endorsement modifies the terms and conditions of the above referenced commitment as set forth below:

1) Loan Amount

$2,200,000

TBGW shall have the right to structure the loan into a single loan or, at its sole option, to divide the loan into a First and Second Mortgage/Trust Deed in amounts to be determined solely by TBGW.

2) Revised Fee Schedule

Commitment	$ 22,000
Loan	22,000
Contingent	100,000
Total Fees	$144,000

NOTE: $10,500 of the commitment fee is payable upon acceptance of this commitment and is non-refundable except in the event that certain conditions required by this commitment are considered by TBGW to be beyond the Borrower's control. The loan fee shall be payable on/or before closing of the construction loan. The balance of the commitment fee and the loan fee shall be paid at closing of the construction loan. The contingent fee shall be due and payable upon the sale of the property, refinancing of the loan, or at the loan maturity as may be extended, whichever comes first.

3) [redacted]ding

[redacted] Second Mortgage shall be advanced on a last-in basis, [redacted]t is the proceeds from the First Mortgage shall be fully funded prior to the funding of the Second Mortgage.

4) Security

Evidence of indebtedness shall be secured by a First Mortgage/Trust Deed and at the sole option of TBGW, a

Second Mortgage/Trust Deed in the amounts to be determined by TBGW on the fee simple absolute title to the real property and the improvements thereto, subject only to encumbrances that shall be acceptable to TBGW and free of materialmen's liens or special assessments for work completed or under construction as of the date of closing.

5) Other Conditions and Terms

All conditions of the commitment and of the required security documents shall apply equally to both loans as if incorporated therein. However, the Second Mortgage shall be subordinate to the First Mortgage loan.

These changes constitute the only changes in the commitment and all other terms and conditions remain unchanged.

Sincerely,

John A. Clawson
President

The undersigned accept the terms and conditions of this loan commitment:

SLC LIMITED IV

By _____, V.P.

Loran Corporation

I. N. Fisher

James F. Kern

Tab F

FORBEARANCE AND EXTENSION AGREEMENT

This Forbearance and Extension Agreement is made by and between The Bradford Group West, Inc., a Utah Corporation ("Lender") and SLC Limited IV, a California limited partnership ("Borrower") this 23 day of August 1990.

WHEREAS, Lender loaned to the Borrowers $100,000.00 evidenced by a Promissory Note dated October 17, 1988 and secured by certain Deeds of Trust, Security Agreements and Assignments of Rent of even date therewith, and guaranteed by I.N. Fisher and James F. Kern, all of the above documents hereinafter referred to as the Original Loan Documents.

WHEREAS, the Note matured October 7, 1989, Borrower seeks Lender's forbearance from exercising its rights under the default provisions of the Original Loan Documents and desires to extend the note to December 31, 1990 upon the terms and conditions set forth below.

NOW, THEREFORE, it is agreed as follows:

1. The Borrower agrees to pay principal payments based on the following schedule:

August 1, 1990	$15,000,000 Plus Interest
September 1, 1990	15,000,000 Plus Interest
October 1, 1990	15,000,000 Plus Interest
November 1, 1990	15,000,000 Plus Interest
December 1, 1990	15,000,000 Plus Interest

EXHIBIT F

Any remaining principal plus accrued interest shall be paid in full on or before December 31, 1990.

2. Borrower shall (i) at signing pay any delinquent interest and (ii) pay interest in full on or before the 1st day of each month at the rate of interest per annum equal at all times to a variable rate which at all times is two and one-half percent (2 1/2%) above the then quoted base interest rate for loans charged and published by West One Bank (The "Base Rate"), calculated and applied on the basis of a 365-day year, increases or decreases in such Base Rate being effective concurrently with the effective date of each such change. Any changes in the principal interest rate under the Note are effective without prior notice. Failure to pay principal and interest on or before the first day of each month shall subject Borrower to late fees and penalties as provided in the Note. Failure to pay interest on or before the 30th day of each month, shall immediately terminate this Agreement and the Note shall become immediately due and payable and all default rates, fees and penalties shall apply.

3. In addition the parties agree as follows:

Borrower upon signing this agreement shall pay $644.52 late fee, interest due and all attorneys fees regarding this extension.

4. By entering into this Forbearance and Extension Agreement, Lender shall no way be considered to have waived any and all rights or remedies under the original loan documents by reason of the default existing at the time of this Agreement. Lender shall have full right to exercise all of said rights and remedies under the Original Loan Documents immediately upon the breach of any provision of this Forbearance and Extension Agreement.

5. Borrower hereby warrants and agrees that to the date hereof, Lender is not in breach of any of the terms and conditions of the Original Loan Documents.

6. Borrower hereby waives any defenses to payment or performance or rights to setoff it may have as of the date hereof relating to the Original Loan Documents.

"Lender"

The Bradford Group West, Inc.

By _____

"Borrower"
SLC Limited IV, a California Limited Partnership with Loran Corporation, a California corporation as its general partner

By _____
I.N. Fisher, President

By _____
James F. Kern, Vice President

Accepted and agreed to this 9th day of August 1990.

Guarantors

James F. Kern, Guarantor

I.N. Fisher, Guarantor