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**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**FIRST BANK OF LINCOLN,
A Montana Bank Corporation,**

Appellant,

v.

**DONALD TUSCHOFF and JANE DOE TUSCHOFF,
husband and wife and the marital community comprised thereof;
BANANA BELT GAMING, LLC;
JOHN DOES 1-IV, and all parties claiming right title or interest in
the subject real property in Asotin County Washington,**

Respondents.

APPELLANT, FIRST BANK OF LINCOLN'S REPLY BRIEF

MICHAEL A. ROOZEKRANS, WSBA# 25194
ERIKA BALAZS, WSBA# 12952
Attorneys for Appellant, First Bank of Lincoln

Michael A. Roozkrans, PLLC
US Bank Building, Suite 1330
422 West Riverside Avenue
Spokane, WA 99201
(509) 624-6200

Erika Balazs
3206 West Connaught Drive
Spokane, WA 99208-8459
(509) 999-6985

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I. INTRODUCTION

Banana Belt's entire case rests on the premise that the assignment of the Schwab debt to First Bank was conditional because it was given as collateral. But as will be shown, conditional assignments for security purposes are conditional because the assignor has intentionally retained title subject to performance. They are not conditional simply because they were given as collateral. In this case, the assignment of the debt was absolute when given and contained no limitation or conditions whatsoever on transfer. Thus, Banana Belt could not discharge the debt by paying Tuschoff when, at the time of payment, the debt was owned by First Bank. Banana Belt and its agents ignored the assignment at their peril.

II. REPLY TO STATEMENT OF THE CASE

The facts are undisputed. There are a few additional facts worth noting and a few facts worth repeating or clarifying.

First Bank of Lincoln lent the sum of \$440,000 to Donald Tuschoff and his daughter Laurie Parks in connection with their purchase of the Hotel Lincoln located in Lincoln, Montana. CP 60-61, 70-74. At the time the loan was made, there were not sufficient records to show the expected cash flow from the hotel. CP 61-62. In order to obtain the loan, Tuschoff offered to assign his rights to the Schwab Note and Deed of Trust. CP 61. The Bank accepted. CP 62. But Tuschoff had already assigned at least some part of his interest in the Schwab Note and Deed of Trust to Mrs. Humphrey. CP 62. The financial records reflected that Tuschoff would need a portion of the Schwab payments to make payments to Mrs. Humphrey until November 2013. CP 76. Therefore, as part of the transaction, First Bank also entered into a Subordination Agreement as to

Mrs. Humphrey. CP 62, 89-90. The Subordination Agreement was between Tuschoff, “owner of the note and deed of trust recorded on November 2, 1998” and First Bank, “*present* owner and holder of and assignment of Deed of Trust.” CP 89 (*Emphasis added*).

The language of the Assignment is critical therefore it is attached as **Appendix A**. Tuschoff assigned all right title and interest in the Schwab Note and all rights accrued under the Schwab Deed of Trust. CP 86 and Appendix A attached. Notably, the Assignment is not limited to the occurrence of a default. Indeed, the language of the Assignment is not conditioned in any way.

Tuschoff also signed a Security Agreement, attached as **Appendix B**, in which he granted First Bank of Lincoln a security interest in all instruments evidencing rights to the Schwab payments. CP 95. Paragraph 6 of the Security Agreement states that First Bank has the right to deal with the account debtors [Schwab’s] obligations “at your discretion.” CP 95. The Security Agreement also grants First Bank the power, “without limitation” “to demand payment and enforce collection from any Account Debtor or Obligor by suit or otherwise” and to “deal in all respects as the holder and owner of the Account Debtors’ obligation.” CP 95-96. As with the Assignment, the Security Agreement does not condition First Bank’s right to the assigned property to a default by Tuschoff.

III. ARGUMENT

A. **First Bank of Lincoln was Entitled to Payment at the Time of the Banana Belt Closing Because it was the Owner of the Schwab Note and Deed of Trust.** Banana Belt’s entire argument rests on a false

assumption: that the assignment by Tuschoff was a conditional assignment and as a result First Bank of Lincoln was not entitled to payment at the time of the Banana Belt closing. Banana Belt is wrong. First Bank of Lincoln had an absolute assignment as set forth in the documents. The fact the assignment was for collateral does not *ipso facto* make the assignment conditional. And the fact First Bank allowed Tuschoff to receive payments directly from Schwab does not alter the unconditional nature of the assignment.

1. **In Order to determine the nature of the assignment, one must consider the documents themselves.** Since Banana Belt's case turns on the nature of the assignment, the first place to look to determine the nature of the assignment would be the documents¹ themselves. DeBenedictis v. Hagen, 77 Wn. App. 284, 890 P.2d 529 (1995). There are two primary documents to consider: the Assignment of Deed of Trust and the Security Agreement, attached as Appendices A and B. CP 86-87, 95-97. As will be shown, under the terms of both documents, Tuschoff made an absolute assignment of the Schwab Note and Deed of Trust to First Bank.

The Assignment of Deed of Trust is very short. Its operative language provides that:

Donald Tuschoff, as beneficiary [of the Schwab Deed of Trust] ..., does hereby Assign, Sell, Convey and deliver to First Bank of Lincoln, ... all right title and interest in said Note and all Rights accrued under said Deed of Trust.

¹ Indeed, Banana Belt seems to acknowledge that the documents play a key role in the analysis in the first paragraph of its argument where it mentions "First Bank's actions, admission, and *documents*." Brief of Respondent, page 19 (emphasis added). Yet, Banana Belt never discusses the actual Assignment or Security Agreement.

CP 86. On its face, the assignment is absolute; it conveys all rights to the Note and Deed of Trust without limitation or qualification.² It does not condition the assignment on default by Tuschoff. It does not condition First Bank's rights in any way. Based on this document alone, the assignment was clearly an absolute assignment and Banana Belt's argument fails.

The second document, the Security Agreement, is entirely consistent with the first. It grants a security interest in the Schwab Note and Deed of Trust. It defines the rights and obligations of both parties with regard to the assigned property. Notably, in Paragraph 6, the Security Agreement grants First Bank the right to deal with the account debtor's [Schwab's] obligations "at your discretion." CP 95. Mr. Tuschoff granted First Bank the power, "without limitation" "to demand payment and enforce collection from any Account Debtor or Obligor by suit or otherwise" and to "deal in all respects as the holder and owner of the Account Debtors' obligation." CP 95-96. As with the Assignment, the Security Agreement does not condition First Bank's right to the assigned property on a default by Tuschoff. It, too, does not condition First Bank's rights in any way. CP 95-97. Quite the contrary, the Security Agreement grants First Bank the right to deal with the Schwabs "at its discretion." Thus, this document also proves that First Bank held an absolute assignment.

² At several points in its brief, Banana Belt comments that Tuschoff assigned "only his rights as beneficiary" or that he assigned his beneficial interest. *See, e.g.,* Brief of Respondent, page, 10, 19, and 21. Given the fact that Tuschoff's rights were his rights as beneficiary, it is difficult to understand what point Banana Belt is attempting to make.

A third document also sheds light on the parties' intentions. There was a Subordination Agreement in which First Bank subordinated its interests in the Schwab Note and Deed of Trust to those of Mrs. Humphrey. In that document, Tuschoff is referred to as "owner," while First Bank of Lincoln is referred to as "*present* owner and holder of assignment." CP 89 (*Emphasis added*). Thus, the Subordination Agreement reflects the understanding that First Bank had become the current owner of the Note and Deed of Trust. Banana Belt argues that the Subordination Agreement shows a conditional transfer because it refers to Tuschoff as "owner." Brief of Respondent, p. 25. However, Banana Belt ignores the fact First Bank was referred to as "present owner," and inexplicably omits the word "present" in its quotation from the Subordination Agreement. The word present is obviously critical and clearly supports First Bank's position that it is the current owner of the Note and Deed of Trust. Thus, rather than show a conditional assignment as suggested by Banana Belt, the Subordination Agreement reflects an absolute and present transfer by assignment to First Bank of Lincoln.

In summary, in order to determine the nature of the assignment, it is important to look at the documents that memorialize the agreement between the parties. In this case, the plain language of the documents clearly and unequivocally shows that Tuschoff made an absolute assignment of the Schwab Note and Deed of Trust to First Bank. Both the Assignment and the Security Agreement gave First Bank present and unconditional rights to the proceeds of the Schwab obligation. There is absolutely nothing in any of the documents that conditions First Bank's

rights to a default by Tuschoff. Thus, based on the documents, First Bank held an absolute Assignment of the Note and was entitled to payment on the Note at the time of closing.

2. **The fact that the Assignment was given as collateral does not make the assignment conditional.** Unable to find support for its position in the documents, Banana Belt contends that the assignment was *conditional* solely because it was given as *collateral*. First Bank does not deny that the assignment was received as collateral. However, the fact the assignment was given as collateral does not *ipso facto* make the assignment conditional. As will be shown, Banana Belt's reliance on Uni-Com Northwest, Ltd. v. Argus Publishing Company, 47 Wn. App. 787, 737 P.2d 304, *review denied*, 108 Wn.2d 1032 (1987) is misplaced. Uni-Com recognizes that assignments for collateral *may be* conditional; it does not hold that all assignments for collateral *are* conditional. Banana Belt fails to appreciate this distinction.

Uni-Com is a bit complicated, but it is necessary to review that case to appreciate the limitations of its holding. Simplifying somewhat, in 1981, Argus bought TMC from ADS. Id., at 306. At some point, Uni-Com became successor in interest to ADS. In April 1983, Uni-Com commenced an action against Argus for breach of the purchase contract. Id.

During this time, MPC provided printing services for Argus. Id. at 307. In the fall of 1983, MPC took a security interest in Argus' intangibles, personal property and accounts receivable to secure payment for services. Powell River supplied MPC with newsprint. Id. To provide

security for the payment for the newsprint, MPC assigned (among other things) its rights to the Argus accounts receivable to Powell. MPC retained its other security interests in Argus. Id.

In April 1984, Uni-Com added MPC and others to its suit against Argus. Id. That fall, MPC decided it needed to pursue its remedies against Argus and gave notice of its intent to do so to Powell. Id. Powell did not object. Id. Argus ceased operations and transferred its assets, including the accounts receivable, to MPC pursuant to its security agreement. Id. The Uni-Com suit proceeded to trial and one issue was the conflicting claims to Argus receivables between Uni-Com and MPC. Id. Uni-Com argued that MPC had assigned all its rights to the receivables to Powell therefore MPC (the assignor) did not have the right to foreclose on the receivables. Id., at 308. The trial court agreed. Id. The Court of Appeals disagreed, and held that even though there had been an assignment, the assignment had been conditional and MPC retained the right to foreclose on the accounts receivable as long as it was current in its obligation to Powell. Id. The Court also noted that Powell (assignee) had approved of the actions by MPC. Id. MPC prevailed over Uni-Com as to the accounts receivable. Id.

The Uni-Com decision does not address the right of the assignee, such as First Bank in this case. Rather, the Uni-Com case addresses the rights of the assignor (MPC) to deal with the defaulting party (Argus) directly. In the instant case, Tuschoff was the assignor. The Uni-Com decision should not be read in a way that would eliminate the rights of the *assignee*, (First Bank), in favor of a subsequent third party purchaser of

real property (Banana Belt). Furthermore, the Uni-Com decision did not address assignment of a Deed of Trust that was duly recorded with the County Auditor. Rather Uni-Com dealt with pledged account receivables.

The issue decided in Uni-Com was whether MPC, as assignor, had retained rights to the property it had assigned as security. It is oversimplistic however to suggest that all assignments for security are conditional assignments. The real issue, as discussed in Uni-Com and the cases it cites, is what was the parties' agreement regarding title. The Court of Appeals in Uni-Com states that "an assignment for security conditions transfer of title upon the assignor's default." Id., at 794. But the Court continues by quoting Miller v. Wells Fargo Bank Int'l Corp., 540 F.2d 548, 559 (2d Cir.1976):

Thus, the essential feature of a valid "conditional assignment for purposes of security" is that title to the collateral (e.g., an insurance policy) is retained by the assignor subject to his performance of an INDEPENDENT obligation owed to the assignee. The situation thus described is one where the debtor has the alternatives of (1) performing the condition and retaining the collateral or (2) not performing the condition and forfeiting the collateral.
(Emphasis in original)

Id. The Court of Appeals then reviewed the transaction between MPC and Powell, determined it was a conditional assignment and decided that MPC retained a right to pursue Argus. Critically, the nature of the assignment turned on the intent of the parties.

This is particularly clear if one examines the case of Miller v. Wells Fargo Bank Int'l Corp., 540 F.2d 548, 559 (2d Cir.1976), the case upon which the Uni-Com court relies. Miller was a bankruptcy case based on New York law and involved an effort by the appellant to show title to

certain property had been transferred to a third party to avoid a preference claim. The Court first explained that under New York law any act or words are sufficient, which show an intent to transfer the chose in action to the assignee, and divest the assignor of all control and right to cause of action acts as an assignment and usually transfers title. Miller, 540 F.2d at 557. The Court then explained an exception exists that allows the assignor to retain title when the transfer of a future right is conditioned on the assignor's default. Id., at 559. The critical fact is then that title be retained by the assignor. Id. The Court then examined each transaction in question and determined that none of the transactions qualified as an assignment, conditional or otherwise. Thus, Miller does not hold that *all* assignments for security are conditional. Rather, it holds that assignments for security *may be* conditional if that is the parties' intent.

The key then is to ask whether the assignor retained title. That question is answered in this case by looking at the Assignment and Security Agreement. As set forth above, the Assignment is simple, direct and absolute. It does not condition transfer on a default. Similarly, the Security Agreement gives First Bank of Lincoln the unconditional right to deal directly with the obligors. CP 95, Paragraph 6. Finally, even the Subordination Agreement refers to First Bank as the "present owner." CP 89. Thus, the parties' documents show an intention to effect an absolute and unconditional assignment. There is nothing that suggests the transfer was conditioned on any future event. The fact that the assignment was given as collateral does not alter the plain language and intent of the parties' written agreements.

3. **The Understanding Between Tuschoff and First Bank of Lincoln as to who would receive the Payments from Schwab Does Not Alter the Unconditional Nature of the Assignment.** Banana Belt places great reliance on the fact Tuschoff continued to receive the payments on the Schwab note directly from Schwab, and further reliance on the fact that First Bank did not inquire as to the status of the Schwab Note of Deed of Trust until January 2014. Banana Belt suggests this meant that First Bank “knew” it had no right to demand direct payment. As will be shown, such reliance is misplaced. The Security Agreement between First Bank and Tuschoff had clear provisions as to the allocation of the funds and the allocation was perfectly logical in view of other factors. First Bank did not inquire as to the status of the Schwab contract until January 2014 because its loan to Tuschoff matured in February 2014 and it was investigating renewal options. CP 64. Until that time, the Bank relied on the recorded Assignment and filed UCC Financing Statement to protect its interests against subsequent purchasers. CP 86, 100-103.

Again, when discussing the parties’ relative rights, it is critical to look to the actual agreement between the parties. The Security Agreement spells out the parties’ rights to the future payments. As between First Bank and Tuschoff, it was agreed Tuschoff could continue to receive payments in the ordinary course from the account debtors. CP 95, Paragraph 5D. Tuschoff was to avoid commingling the proceeds with his other property and was to provide an accounting to the Bank. *Id.* In other words, the parties simply agreed to allow Tuschoff for administrative convenience to receive the payments until such time as First Bank directed

otherwise. First Bank's rights to direct payment were not conditioned on a default but were left within its complete discretion. CP 95, Paragraph 6.

Tuschoff received \$9,794 per month from the Schwabs. CP 76. Tuschoff owed money to Mrs. Humphrey, and he had previously assigned an interest in the Schwab Note to her. CP 293-296. A portion of what Tuschoff owed Mrs. Humphrey was paid from the First Bank loan proceeds and the monthly amount from Tuschoff owed to Humphrey was approximately \$995. CP 62, 76, 92-93. Tuschoff's monthly payment to First Bank was \$3,155.33. CP 71. It was far simpler for the bank to allow the Schwab payments to be made to Tuschoff, who would then use the proceeds to pay Mrs. Humphrey and First Bank of Lincoln and a portion for ancillary business or personal expenses. By allowing Tuschoff to handle the Schwab payments directly, the Bank simplified accounting for the funds and paying Schwab. Irrespective, the parties internal administrative agreements do not bear on the character of the assigned interest one way or the other.

Thus, the record simply does not support Banana Belt's assertion that First Bank "knew" it could not demand direct payments. Rather, the Schwab payments were made to Tuschoff because that was as the parties agreed and this arrangement allowed Tuschoff to pay Mrs. Humphrey. According to the Security Agreement, First Bank had the unconditional right to demand payment from Schwab at any time; it chose not to for its convenience and the convenience of its customer.

Nor can Banana Belt fault First Bank for waiting until January 2014 to inquire as to the status of the Schwab Note and Deed of Trust.

Contrary to Banana Belt's assertion at page 19 of its brief, First Bank did not "know" in May 2013 that Tuschoff could not satisfy his obligation. Rather, Kenneth A. Martin, president of First Bank of Lincoln stated in his declaration that in May 2013, he knew that Tuschoff could not satisfy the outstanding debt *from the cash flow of the Hotel Lincoln* and thus the Bank would continue to rely on the funds from the Schwab Note, as it had done from the time it first made the loan. CP 64, paragraph 12. Since Tuschoff was current on his loan payments to First Bank at that time, it was entirely reasonable for First Bank to continue to allow Tuschoff to receive the Schwab payments directly as he was obviously applying them to his obligation to First Bank.

As further explained by Mr. Martin, First Bank began the process of reviewing the loan for renewal in January of 2014 because the loan was scheduled to mature in February 2014. CP 64. He then called Land Title about the Schwab Note and Deed of Trust and he then learned that the property had been sold and the funds disbursed to Tuschoff even though Tuschoff had assigned his rights to First Bank. Id. Prior to that time, First Bank had no reason to inquire about the Schwab Note and Deed of Trust because it was receiving its payments from Tuschoff in a timely manner and knew its interest was protected from third parties by its recording.

In summary, First Bank's conduct was entirely consistent with its documents and with normal banking practices. It obtained an Assignment of its borrower's rights to a Note and Deed of Trust and recorded the Assignment. It obtained a Security Agreement in the same Note and Deed of Trust and properly perfected that interest by filing with the Washington

Department of Licensing. It subordinated its interests in the payments in favor of Mrs. Humphrey. It allowed its borrower to receive the payments directly because it was permitted by the agreements and useful in the circumstances. First Bank was entitled to rely on the recording and filing to protect its interest as to subsequent purchasers. Banana Belt and its closing agents were not entitled to ignore the Assignment and pay the entire balance to Tuschoff. Nor was Banana Belt entitled to ignore the perfected security interest filed with the Washington Department of Licensing.

4. Payment to Tuschoff did not discharge the debt because Tuschoff had Assigned his rights to payment to First Bank of Lincoln.

It is undisputed that Tuschoff assigned his rights to the Schwab Note and Deed of Trust, that the Assignment was properly recorded, and that Banana Belt and its closing agents had actual as well as constructive notice of the Assignment when it received its preliminary title report.³ CP 196-197, 273-274 (207-220 Title Commitment). As demonstrated above, that Assignment was absolute. It is further undisputed that Tuschoff granted a security interest in the Note and Deed of Trust, that the UCC-1 Financing Statement was properly filed and that the security agreement provided that Tuschoff was only to receive payments made in the ordinary course. CP 100-103, 95 paragraph 5D. It is undisputed that Banana Belt had constructive knowledge of the UCC Filings as a matter of law. How then, can Banana Belt assert that it discharged the obligation assigned to First Bank by paying Tuschoff? It does so only by ignoring the

³ As set forth in footnote 4, this same title report was provided to the Schwabs and the closing agent, giving them actual knowledge of the assignment before payout as well.

assignment and ignoring the existence and purpose of the recording and filing statutes.

5. Recording and Filing put Banana Belt on Notice of the Assignment. The purpose of the recording act is to provide a place and method whereby one can ascertain the state of title to real property. Ellingsen v. Franklin County, 117 Wn.2d 24, 28, 10 P.2d 910 (1991). The purpose of recording an assignment is “to put parties who subsequently purchase an interest in the property on notice as to which party owns the debt secured by the property.” Corales v. Flagstar Bank, FSB, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011) citing RCW 65.08.070; In re United Home Loans, 71 B.R. 885, 891 (W.D. Wash. 1987) affirmed 876 F.2d 897 (9th Cir. 1989). The purpose of UCC filings is to give notice of a secured party and invite further inquiry. Hobart Corp. v. North Central Credit Services, Inc., 29 Wn. App. 302, 305, 628 P.2d 842 (1981). It is undisputed that Banana Belt and its closing agent were fully aware of the recorded interest. CP 196, 274. Had they simply reviewed the recorded Assignment or called First Bank of Lincoln, they would have learned that Tuschoff was not entitled to receive payoff of the Schwab Note. They have utterly failed to explain why they could ignore the Assignment and UCC filing and claim the debt was discharged by paying the wrong person.

In lieu of admitting it paid the wrong party, Banana Belt attempts to muddy the waters with two arguments. First, it seeks refuge in RCW 65.08.120. Second, it complains that First Bank never demanded payment from or otherwise delivered notice of the assignment to Schwab. As will

be shown, neither argument protects a third party purchaser who is given notice under the recording statutes.

a. **Banana Belt is not protected by RCW 65.08.120.**

RCW 65.08.120 is an exception to the general rule that filing provides notice to the world in the case of an assignment of a mortgage. It provides:

The recording of an assignment of a mortgage is not in itself notice to the mortgagor, his heirs, assigns or personal representatives, to invalidate a **payment made by any of them** to a prior holder of the mortgage. (*emphasis added*).

This statute is limited to payments made by the mortgagor, his heirs, assigns or personal representatives. The obvious reason for this statute is to allow a mortgagor to make monthly payments to its original holder until the mortgagor is given actual notice of a change so that the mortgagor is not obligated to conduct a title search each month to determine who to pay. It would be a ridiculous burden to require the mortgagor to do so.

In contrast, a third-party purchaser routinely conducts a title search at the time of purchase and would be fully informed about the recorded title. Third-party purchasers do not need the protection of RCW 65.08.120 because the title report gives them actual notice of the recorded interests. They then must either be sure those recorded interests are removed or take title subject to them. Banana Belt is a third-party purchaser. Banana Belt is not a “mortgagor, his heir[s], assign[s] or personal representative[s]. Thus, Banana Belt is not entitled to the protection of RCW 65.08.120. Having failed to assure that its payment was made to assignee rather than the assignor, it cannot claim it satisfied the obligation.

Banana Belt tries to take advantage of the statute and distinguish the facts from the analogous New York case, Brewster v. Carnes, 103 N.Y. 556, 561, 9 N.E. 323 (1886) (interpreting nearly identical statute). First, Banana Belt claims that it provided the money to the Schwabs and so “technically” the Schwabs, as mortgagors, paid off the debt and thus the statute applies. Such a contention is patently false. Banana Belt’s own brief acknowledges the fact that the funds were provided to Land Title by First American as payoff for the Schwab obligation. CP 338. The funds were not tendered by the Schwabs.

Banana Belt also argues that the case is different because unlike the New York statute, the Washington version also protects the mortgagor’s *assigns*. Banana Belt’s point is unclear since no one in this case has claimed to be an assignee of the Schwabs’ interests.

Finally, Banana Belt argues that the purchasers in Brewster purchased the equity of redemption and continued to make payments. Again, the point is unclear. The issue is still the effect of the statute on a subsequent purchaser.

In summary, Banana Belt has failed to show why it should benefit from RCW 65.08.120. Factually, the statute does not apply to Banana Belt. The obvious purpose of the statute is to protect mortgagors from subsequent parties. As a third party purchaser, Banana Belt is not entitled to such protection because third party purchasers ordinarily request a title report so are put on notice of other claims and interests. In this case a title commitment was prepared. CP 207-220. Banana Belt initialed below a sentence in the Escrow Instructions that it had read the Preliminary Title

Commitment referencing the Assignment and reflected Mr. Tuschoff's Assignment to First Bank. CP 274. Banana Belt's closing agent, First American Title Company, admitted that it was aware the assignment existed. CP 196-197. Indeed, Banana Belt cannot deny that both it and its agent had actual knowledge of the assignment. It cannot hide behind RCW 65.08.120.

In summary, RCW 65.08.120 is inapplicable to the facts of this case or at the very least does not apply to Banana Belt.⁴ Banana Belt as a third party purchaser is not protected by RCW 65.08.120 and must make sure payments made at closing are made to the proper party. Tuschoff had assigned all his rights and thus payment to him did not satisfy the obligation.

b. Banana Belt cannot rely on the past payments to excuse its failure to make diligent inquiry. Banana Belt cannot claim it relied on the fact that First Bank never told the Schwabs to make direct payments and never took possession of the Note. As already discussed, the Security Agreement provided that Tuschoff could receive the Schwab

⁴ RCW 65.08.120 does not apply to the Schwabs the mortgagor in this case because the Schwabs in fact had actual knowledge of the Assignment. It is undisputed that as part of closing, the preliminary title report was provided to Rita Johnson who handled the distributions of the Schwab funds at Land Title. CP 240, 245. The existence of the assignment was specially noted with an arrow, directing her attention to this fact. CP 202. In addition, the Schwabs not only signed the Escrow Instructions, they also initialed the provision that stated that they had read the preliminary title report. CP 273-276. That preliminary report included reference to the assignment of the Deed of Trust. CP 207-220, specifically CP 216, last line of paragraph 23. Therefore, the Schwabs had actual notice of the assignment by virtue of reading the preliminary title commitment. CP 274. The Schwabs would not be entitled to the benefit of RCW 65.08.120 from the time they read the preliminary title commitment. *See also, Rodgers v. Seattle-First Nat. Bank*, 40 Wn.App. 127, 132, 697 P.2d104 (1985) (title report provides actual notice of assignment). Finally, First American was acting as a dual agent for Schwab and Tuschoff as the closing agent. It is undisputed that the Schwab's agent First American had actual knowledge of the Assignment. CP 196-197.

payments in the ordinary course. CP 95. This was a matter of agreement between Tuschoff and First Bank. Admittedly, First Bank would have no right to retrieve any payments made by the Schwabs prior to closing and in the ordinary course directly to Tuschoff. But the last payment was not made by the Schwabs and was not made in the ordinary course because it was a complete payoff of the obligation rather than a monthly payment. By recording its Assignment, First Bank informed all third parties it was entitled to receive any payments made by subsequent purchasers of the property. Corales v. Flagstar Bank, FSB, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011) (purpose of recording an assignment is to provide third parties notice of who owns the debt secured by the property). RCW 65.08.120 allows a mortgagor to rely on the status quo. But the third party purchaser is not a mortgagor as contemplated by the statute, and cannot be so complacent.

There is nothing unfair about this result. There is no evidence that Banana Belt or its closing agent, First American Title Company, were aware of the payment history, nor did either of them inquire about the payment history prior to disbursing funds to Tuschoff. There is no evidence Banana Belt or its agent, First American Title Company, relied on this course of conduct, even if such reliance could somehow excuse its failure to inquire further. It appears Banana Belt simply relied on its closing agent First American and that First American in turn relied on Land Title and no one properly ascertained the extent of First Bank of Lincoln's interest in this property. The issue for this Court is who must suffer the consequences of this failure.

This case is precisely why real property purchasers hire professionals to close real estate transactions and why they purchase title insurance to protect themselves. In a complicated transaction, the purchaser relies on the professionals to clear title. Indeed the Washington State Supreme Court has articulated the role title insurers play in making sure that liens and encumbrances are clear in connection with conveyance of real property as follows:

Generally, the role of the title insurer is relied upon by the lender, judgment creditor, and other lienors. Just as a lender relies on the title insurer to commit that title is vested in its borrower, subject only to known exclusions, judgment creditors and other lienors rely on title insurers to prevent a debtor from conveying real property without first satisfying a perfected lien.

Kim v. Lee, 145 Wn.2d 79, 91, 31 P.3d 665 (2001). In this matter, Banana Belt hired First American Title Company. In this case, Banana Belt's agent, First American made a mistake. It did not inquire adequately about a recorded Assignment and it did not perform a UCC search. Banana Belt and its agent, First American, paid the wrong party and now want to place that risk of loss on First Bank. But First Bank did what it was supposed to do. It recorded and filed correctly. It is entitled as a matter of law to rely on the recording law and be restored to its interest in the Schwab Note and Deed of Trust. Any other result would make the state's recording statutes a nullity and create great uncertainty in all real property titles and security in the state.

B. Banana Belt is liable for its agent, First American Title Company's actions. It is astounding that Banana Belt is taking the position that the closing agent, First American Title Company, was not its agent. (Respondent's Brief, p.21-22). Furthermore, Banana Belt asserts that if First American made a mistake or acted improperly Banana Belt is not liable for such mistake. (Respondent's Brief, p.22). In complete contradiction, at page 12 of Respondent's Brief, Banana Belt admits that First American was the closing agent citing to Tonya Hatcher's deposition testimony. CP 535. In the Escrow Instructions drafted by First American and signed by Banana Belt and the Schwabs it expressly states that First American "is acting as an escrow holder." CP 273-276. An escrow agent or escrow holder conducting a real estate closing is an actual agent of both the buyer and seller. National Bank v. Equity Investors, 81 Wn.2d 886, 910, 506 P.2d 20 (1973). Furthermore, the closing agent or escrow agent "owes a fiduciary duty to the parties to the escrow to conduct the transaction with scrupulous honesty, skill and diligence." Stryk v. Conerstone Investments, Inc., 61 Wn. App. 463,472, 810 P.2d 1366 (1991) (finding escrow agent liable because it failed to follow debt to appraised value ratio). A principal is liable for its agent's actions. Newton Ins. Agency & Brokerage Inc., v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 159-160, 52 P.3d 30 (2002) (principal vicariously liable for agent's actions).

Banana Belt's agent, First American made a mistake and did not direct payment to First Bank the owner of record of the Schwab Note and Deed of Trust. Banana Belt purchased title insurance coverage to cover

precisely this type of mistake.⁵ Banana Belt should look to its title insurance coverage issued by its agent, First American to cover the mistake made by its agent. Regardless, Banana Belt is vicariously liable as a matter of law for its agent's actions. Newton Ins. Agency, 114 Wn. App. at 159-160.

C. Banana Belt is Not a Bona Fide Purchaser of the Property because it had Notice that the Schwab Note and Deed of Trust was Assigned to First Bank, thus the Trial Court erred in Quieting Title to Banana Belt. Banana Belt contends that First Bank has attempted to complicate this matter by arguing that Banana Belt is not a bona fide purchaser. (Respondent's Brief, p. 21). Additionally, Banana Belt asserts that it was not claiming bona fide purchaser as a defense. Id. The bona fide purchaser doctrine is not limited to defense of claims. Rather, Washington Courts have consistently used the bona fide purchaser doctrine for quiet title determinations as well as competing lien interests in property and/or proceeds of the sale property. See Collings v. City First Mortg. Services, LLC, 177 Wn. App. 908, 932-939, 317 P.3d 1277 (2013) review denied 179 Wn.2d 1028 (2014); In re Trustee's Sale of the Real Property of Smith, 968 P.2d 904, 906-907, 968 P.2d 904 (1998). In Collings, the Court of Appeals affirmed the trial court's quiet title ruling in the homeowner's name. Id. at 932-939. The Court of Appeals concluded that before US Bank accepted the loan as part of a bulk

⁵ Banana Belt's lender, Columbia Bank sent a letter to Banana Belt's agent, First American, requesting that it issue a lender's title insurance policy with exception 23 from the Title Commitment removed. CP 222. Exception 23 contains the specific reference to Tuschoff's Assignment to First Bank. CP 216. First American removed exception 23 from the lender's title insurance policy and the owner's title insurance policy issued to Banana Belt. CP 162-176, 303-314.

purchase it should have discovered that the property was subject to a lease prohibiting refinancing and taking out credit lines, which indicated possession of the home by someone with a superior claim. *Id.*, at 935-939.

For the sake of brevity the bona fide purchaser analysis will not be repeated as it is set forth in pages 11-16 of First Bank's opening Brief. The trial court erroneously quieted title in Banana Belt's name because both Banana Belt and its closing agent, First American Title Company had sufficient information and notice of Tuschoff's assignment of the Schwab Note and Deed of Trust to First Bank. *See Collings*, 177 Wn. App. at 932-939. Accordingly, this Court should reverse the trial court's ruling quieting title in Banana Belt's name, and allow First Bank to proceed with foreclosure of the Schwab Note and Deed of Trust that Mr. Tuschoff absolutely and unconditionally assigned to First Bank.

D. First Bank seeks to recover as Owner, not as a secured party, and therefore Montana Anti-Deficiency Law does not Bar this action.

There are several reasons Montana anti-deficiency rules do not bar this action. First, this is not an action to recover on the Tuschoff debt; it is an action to establish the validity and continued existence of First Bank's rights to the Schwab Note and Deed of Trust as absolute owner. CP 1-4. Second, there is already an existing court decision to the contrary that states the anti-deficiency rules do not apply to this case. CP 713-718. Finally, Banana Belt is not entitled to rely on self-serving assumptions when seeking summary judgment.

Anti-deficiency statutes prohibit a creditor from seeking a deficiency judgment against its debtor or maintaining any other actions *on*

the secured note. Montana Code Ann. §71-1-317. In other words, if applicable, such a statute would preclude First Bank from pursuing further action against its debtor, Tuschoff. But this is not an action to collect from Tuschoff. CP 1-4. This is an action by First Bank to enforce its ownership rights to the Schwab Note against the Schwabs' purchasers.

As demonstrated in this brief, First Bank of Lincoln took an absolute assignment of the Schwab Note and Deed of Trust. It seeks to recover not as part of collection or foreclosure against its debtor Tuschoff, but against the current property owners. When Banana Belt took possession of the property, the Schwabs owed \$359,271.82 on the debt. CP 490. The sum of \$355,375.75 was sent to Tuschoff and the sum of \$3,896.07 was sent to Mrs. Humphrey. CP 280, 282, 512. As assignee, First Bank was the "present" and absolute owner of that debt and entitled to the amount owed on that note but First Bank was not paid at closing. Thus, as to First Bank, the Schwab Note is in default and it is that obligation, not the Tuschoff debt, which is the subject of this lawsuit. Since First Bank is not seeking a remedy against its debtor, the anti-deficiency rules simply do not apply.

Second, a Montana court has already ruled that the anti-deficiency law does not apply to this case. CP 717. By order dated August 14, 2014, Judge James P. Reynolds of the Montana First Judicial District, Court, Lewis and Clark County, ruled that the Montana Code Annotated §71-1-317 did not apply to the Bank's pursuit of further recovery against Tuschoff because the statute did not apply to commercial loans. CP 713-719. Banana Belt improperly asks the Court to ignore this order. While doctrines of res judicata and collateral estoppel do not apply here because there is no evidence in the record that the case in which that order was

entered is final,⁶ the doctrine of comity should apply. The doctrine of comity simply requires that, where two courts have jurisdiction of a particular controversy, the first court to assume jurisdiction shall be permitted to completely dispose of it without interference from the other court. White v. Rhay, 65 Wn.2d 711, 723, 399 P.2d 522 (1965). This Court should refrain from making any decision on the merits of the deficiency issue and should decline to render an advisory opinion while the controversy is pending in a court of competent jurisdiction.

Finally, Banana Belt fails to demonstrate it would be entitled to a summary judgment on this issue because it lacks real evidence. Banana Belt's argument rests in part on an assumption it made that First Bank bid its entire debt at foreclosure of the Hotel Lincoln and that this would preclude further action, regardless of what amount First Bank actually recognized at a future sale of the Hotel Lincoln property. But when moving for summary judgment, the moving party must demonstrate there is no genuine issue of material fact and when reviewing the evidence, all evidence and inferences must be made in favor of the non-moving party. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Here, Banana Belt attempts to establish the amount of the bid by using an inference in its favor and against the non-moving party. In the letter, counsel demanded information and now argues the lack of a response allows it to assume the existence of a necessary fact. CP 632. Such "evidence" does not meet summary judgment standards because it infers a fact against the non-moving party. If Banana Belt

⁶ Res judicata and collateral estoppel both require final judgments. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Although not in the record, this trial court ruling is not final under Montana's Civil Rule 54(b) because other matters remain to be decided in that case.

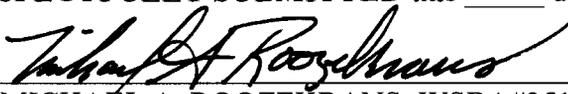
needed additional facts to make its Motion, it could have delayed hearing on its Motion and conducted appropriate discovery. CR 56(f). It failed to do so and cannot rely on assumptions made in its favor as the moving party. Thus, Banana Belt has failed to establish the amount of the bid and thus failed to show First Bank has fully recovered against its debtor. Banana Belt has failed to show the anti-deficiency rules should apply.

E. First Bank of Lincoln's arguments are not frivolous. Banana Belt asks for fees contending that First Bank's arguments are frivolous. Clearly, given the language of the Assignment and Security Agreement, it is hardly frivolous for First Bank to argue it holds an absolute assignment of the Note and Deed of Trust. The fee request must be denied.

IV. CONCLUSION

As has been shown, First Bank received an absolute assignment of the Schwab Note and Deed of Trust. At closing, the closing agents ignored or overlooked the Assignment and paid Tuschoff instead. But since Tuschoff had assigned all his interest in the note, such payment could not discharge the obligation. First Bank owns the debt and has not been paid. Thus, this Court should reverse the summary judgment in favor of Banana Belt and enter judgment in favor of First Bank of Lincoln, declaring that First Bank of Lincoln's security interests reflected in both the real property records and the UCC lien filings have not been satisfied, therefore First Bank is entitled to proceed with foreclosure against the property on the Schwab Note and Deed of Trust.

RESPECTFULLY SUBMITTED this 22nd day of July, 2015.

By: 
MICHAEL A. ROOZEKRANS, WSBA#25194
ERIKA BALAZS, WSBA#12952

APPENDIX “A”

Return to
First Bank of Lincoln
PO Box 9
Lincoln, MT 59639
2010807979

Inst: 323264 02/14/2011 3:57PM
Filed: ALLIANCE TITLE & ESCROW Fee Cd: A-02
Code: 006 Assgn D/T 15.00
Asotin County Auditor

ASSIGNMENT OF DEED of TRUST

Lancer Enterprises, Inc. and Donald C. Tuschoff and ~~Meredith B Tuschoff~~, as beneficiary under that certain Deed of Trust, dated October 22, 1998 and recorded November 2, 1998 as instrument no 237362, record of Asotin County, Washington, executed by Gene M Schwab, Ladene M. Schwab, James R. Schwab, Dianncy T. Huffaker, David C Prall, Kathy Prall, and David Shawn Prall, as grantors and Alliance Title and Escrow Company as trustee and Lancer Enterprises, Inc. and Donald C. Tuschoff and Meredith B Tuschoff as beneficiaries and given to secure payment of the promissory note therein described or referred to and the money due and to become due thereon with interest, has endorsed said Deed of Trust and Note and does hereby Assign, Sell, Convey and deliver to First Bank Lincoln whose mailing address is PO Box 9, Lincoln, MT 59639 all right title and interest in said Note and all rights accrued under said Deed of Trust.

Dated January 27, 2011

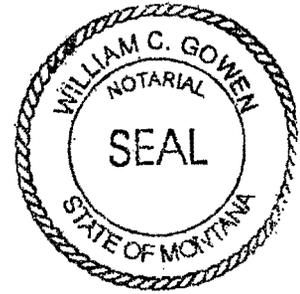
Lancer Enterprises, Inc., a dissolved corporation

By: Donald C Tuschoff, as President
Ann A Rife as Secy.

STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

This instrument was acknowledged before me on 1-27-2011, by Donald C Tuschoff in Law & Rife as President & Secy. of Lancer Enterprises, Inc., a dissolved corporation.

[Signature]
Notary Public for the State of Montana
WILLIAM C. GOWEN
Residing at _____ RESIDING AT HELENA
My Commission expires _____ COMM. EXPIRES 10-1-2011



Donald C. Tuschoff
Donald C. Tuschoff

~~Meredith B. Tuschoff~~

[Handwritten signature]

STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

This instrument was acknowledged before me on 1-27-2011, by Donald C. Tuschoff and ~~Meredith B. Tuschoff~~.

William C. Gowen
Notary Public for the State of Montana

Residing at _____
My Commission expires _____

WILLIAM C. GOWEN
RESIDING AT HELENA
COMM. EXPIRES 10-1, 2011



APPENDIX “B”

SECURITY AGREEMENT

DATE AND PARTIES: The date of this Security Agreement (Agreement) is January 27, 2011. The parties and their addresses are:

SECURED PARTY:
FIRST BANK OF LINCOLN
417 MAIN STREET
LINCOLN, MT 59639-0009

DEBTOR:
DONALD TUSCHOFF
619 B LAFRAY LANE
MISSOULA, MT 59801

The pronouns "you" and "your" refer to the Secured Party. The pronouns "I," "me" and "my" refer to each person or entity signing this Agreement as Debtor and agreeing to give the Property described in this Agreement as security for the Secured Debts.

Where the owner of the Property is different from the obligor or guarantor whose obligation this Agreement secures, "Debtor" refers to each person or entity who is an owner of the Property and "Obligor" or "Guarantor," as applicable, refer to such parties as designated in the SECURED DEBTS section.

1. SECURED DEBTS. The term "Secured Debts" includes and this Agreement will secure each of the following:

- Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, No. 6248, dated January 27, 2011, from DONALD TUSCHOFF and LAURIE A PARKS (Obligor) to you, in the amount of \$440,000.00.
- Sums Advanced.** All sums advanced and expenses incurred by you under the terms of this Agreement.

Loan Documents refer to all the documents executed in connection with the Secured Debts.

2. SECURITY INTEREST. To secure the payment and performance of the Secured Debts, I give you a security interest in all of the Property described in this Agreement that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products from the Property (including, but not limited to, all parts, accessories, repairs, replacements, improvements, and accessions to the Property). Property is all the collateral given as security for the Secured Debts and described in this Agreement, and includes all obligations that support the payment or performance of the Property. "Proceeds" includes cash proceeds, non-cash proceeds and anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

This Agreement remains in effect until terminated in writing, even if the Secured Debts are paid, and you are no longer obligated to advance funds to me under any loan or credit agreement.

3. PROPERTY DESCRIPTION. The Property is described as follows:

A. Accounts and Other Rights to Payment. All rights I have now or in the future to payments including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned, whether or not I have earned such payment by performance. This includes any rights and interests (including all liens and security interests) which I may have by law or agreement against any Account Debtor or obligor of mine.

B. Instruments, Documents and Chattel Paper. All instruments and rights I have now or in the future to payments including, but not limited to, rights to payment arising out of all present and future documents, instruments, tangible and electronic chattel paper, and loans and obligations receivable. This includes any rights and interests (including all liens and security interests) which I may have by law or agreement against any Account Debtor or obligor of mine.

C. Specific Property. DEED OF TRUST Chattel Paper Issued to DONALD C. TUSCHOFF by . . . and executed on October 22, 1998 in the amount of \$1,100,000.00, secured by LOT 12 IN BLOCK 'AA' OF VINELAND, ACCORDING TO THE OFFICIAL PLAT THEREOF, FILED IN BOOK A OF PLATS AT PAGE(S) 42 OFFICIAL RECORDS OF ASOTIN COUNTY, WASHINGTON, EXCEPT THE NORTH 270.00 FEET OF THE EAST 133.0 FEET THEREOF, ALSO EXCEPTING THE WEST 10 FEET OF THE EAST 143 FEET OF THE NORTH 270 FEET THEREOF, MEASUREMENTS BEING FROM THE CENTERLINE OF ADJACENT STREETS.

LOT 13 AND THE EAST 73.00 FEET OF THE NORTH 55.00 FEET OF THE SOUTH 280.00 FEET AND THE EAST 73.00 FEET OF THE SOUTH 205.00 FEET OF LOT 14; ALL IN BLOCK 'AA' OF VINELAND, ACCORDING TO THE OFFICIAL PLAT THEREOF, FILED IN BOOK A OF PATS AT PAGE(S) 42 OFFICIAL RECORDS OF ASOTIN COUNTY, WASHINGTON, MEASUREMENTS FROM THE CENTERLINE OF ADJACENT STREETS.

EXCEPT THAT PORTION LYING WITHIN THE ADJACENT STREETS. . . and additionally described: DEED OF TRUST DATED OCTOBER 22, 1998 AND RECORDED NOVEMBER 2, 1998 AS INSTRUMENT NUMBER 237362, RECORDS OF ASOTIN COUNTY, WASHINGTON, EXECUTED BY GENE M. SCHWAB, LADENE M. SHCWAB, JAMES R. SCHWAB, DIANNCY T. HUFFAKER, DAVID C. PRALL, KATHY PRALL, AND DAVID SHAWN PRALL.

4. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Agreement. The execution and delivery of this Agreement will not violate any agreement governing me or to which I am a party. My principal residence is located in Montana. I will provide you with at least 30 days notice prior to any change in my name or principal residence location.

A. Ownership of Property. I represent that I own all of the Property. Your claim to the Property is ahead of the claims of any other creditor, except as disclosed in writing to you prior to any advance on the Secured Debts. The collateral that is the subject of the chattel paper is perfected and preserved. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

5. DUTIES TOWARD PROPERTY.

A. Protection of Secured Party's Interest. I will defend the Property against any other claim. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these and make copies at any reasonable time. I will prepare any report or accounting you request which deals with the Property.

B. Use, Location, and Protection of the Property. I will keep the Property in my possession and in good repair. I will use it only for commercial purposes. I will not change this specified use without your prior written consent. You have the right of reasonable access to inspect the Property and I will immediately inform you of any loss or damage to the Property. I will not cause or permit waste to the Property.

I will keep the Property at my address listed in the DATE AND PARTIES section unless we agree I may keep it at another location. If the Property is to be used in other states, I will give you a list of those states. The location of the Property is given to aid in the identification of the Property. It does not in any way limit the scope of the security interest granted to you. I will notify you in writing and obtain your prior written consent to any change in location of any of the Property. I will not use the Property in violation of any law. I will notify you in writing prior to any change in my name or address.

Until the Secured Debts are fully paid and this Agreement is terminated, I will not grant a security interest in any of the Property without your prior written consent. I will pay all taxes and assessments levied or assessed against me or the Property and provide timely proof of payment of those taxes and assessments upon request.

C. Selling, Leasing or Encumbering the Property. I will not sell, offer to sell, lease, or otherwise transfer or encumber the Property without your prior written permission. Any disposition of the Property contrary to this Agreement will violate your rights. Your permission to sell the Property may be reasonably withheld without regard to the creditworthiness of any buyer or transferee. I will not permit the Property to be the subject of any court order affecting my rights to the Property in any action by anyone other than you. If the Property includes chattel paper or instruments, either as original collateral or as proceeds of the Property, I will note your security interest on the face of the chattel paper or instruments.

D. Additional Duties Specific to Accounts. I will not settle any Account for less than its full value without your written permission. Until you tell me otherwise, I will collect all Accounts in the ordinary course of business. I will not dispose of the Accounts by assignment without your prior written consent. I will keep the proceeds from all the Accounts and any goods which are returned to me or which I take back. I will not commingle them with any of my other property. I will deliver the Accounts to you at your request. If you ask me to pay you the full price on any returned items or items retaken by me, I will do so. I will make no material change in the terms of any Account, and I will give you any statements, reports, certificates, lists of Account Debtors (showing names, addresses and amounts owing), invoices applicable to each Account, and other data in any way pertaining to the Accounts as you may request.

6. COLLECTION RIGHTS OF THE SECURED PARTY. Account Debtor means the person who is obligated on an account, chattel paper, or general intangible. I authorize you to notify my Account Debtors of your security interest and to deal with the Account Debtors' obligations at your discretion. You may enforce the obligations of an Account Debtor, exercising any of my rights with respect to the Account Debtors' obligations to make payment or otherwise render performance to me, including the enforcement of any security interest that secures such obligations. You may apply proceeds received from the Account Debtors to the Secured Debts or you may release such proceeds to me.

I specifically and irrevocably authorize you to exercise any of the following powers at my expense, without limitation, until the Secured Debts are paid in full:

- demand payment and enforce collection from any Account Debtor or Obligor by suit or otherwise.

DONALD TUSCHOFF
Montana Security Agreement
MT74XJZARSK000000000821026012611N

Wolters Kluwer Financial Services ©1996, 2011 Bankers Systems™

Initials 
Page 1

- B. enforce any security interest, lien or encumbrance given to secure the payment or performance of any Account Debtor or any obligation constituting Property.
- C. file proofs of claim or similar documents in the event of bankruptcy, insolvency or death of any person obligated as an Account Debtor.
- D. compromise, release, extend, or exchange any indebtedness of an Account Debtor.
- E. take control of any proceeds of the Account Debtors' obligations and any returned or repossessed goods.
- F. endorse all payments by any Account Debtor which may come into your possession as payable to me.
- G. deal in all respects as the holder and owner of the Account Debtors' obligations.

7. **AUTHORITY TO PERFORM.** I authorize you to do anything you deem reasonably necessary to protect the Property, and perfect and continue your security interest in the Property. If I fail to perform any of my duties under this Agreement or any other Loan Document, you are authorized, without notice to me, to perform the duties or cause them to be performed.

These authorizations include, but are not limited to, permission to:

- A. pay and discharge taxes, liens, security interests or other encumbrances at any time levied or placed on the Property.
- B. pay any rents or other charges under any lease affecting the Property.
- C. order and pay for the repair, maintenance and preservation of the Property.
- D. file any financing statements on my behalf and pay for filing and recording fees pertaining to the Property.
- E. place a note on any chattel paper indicating your interest in the Property.
- F. take any action you feel necessary to realize on the Property, including performing any part of a contract or endorsing it in my name.
- G. handle any suits or other proceedings involving the Property in my name.
- H. prepare, file, and sign my name to any necessary reports or accountings.
- I. make an entry on my books and records showing the existence of this Agreement.
- J. notify any Account Debtor of your interest in the Property and tell the Account Debtor to make payments to you or someone else you name.

If you perform for me, you will use reasonable care. If you exercise the care and follow the procedures that you generally apply to the collection of obligations owed to you, you will be deemed to be using reasonable care. Reasonable care will not include: any steps necessary to preserve rights against prior parties; the duty to send notices, perform services or take any other action in connection with the management of the Property; or the duty to protect, preserve or maintain any security interest given to others by me or other parties. Your authorization to perform for me will not create an obligation to perform and your failure to perform will not preclude you from exercising any other rights under the law or this Agreement. All cash and non-cash proceeds of the Property may be applied by you only upon your actual receipt of cash proceeds against such of the Secured Debts, matured or unmatured, as you determine in your sole discretion.

If you come into actual or constructive possession of the Property, you will preserve and protect the Property. For purposes of this paragraph, you will be in actual possession of the Property only when you have physical, immediate and exclusive control over the Property and you have affirmatively accepted that control. You will be in constructive possession of the Property only when you have both the power and the intent to exercise control over the Property.

8. **DEFAULT.** I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

- A. Payments. I or Obligor fail to make a payment in full when due.
- B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding, under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Obligor, or any co-signer, endorser, surety or guarantor of this Agreement or any other obligations Obligor has with you.
- C. Death or Incompetency. I die or am declared legally incompetent.
- D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Agreement.
- E. Other Documents. A default occurs under the terms of any other Loan Document.
- F. Other Agreements. I am in default on any other debt or agreement I have with you.
- G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment. I fail to satisfy or appeal any judgment against me.
- I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change. I change my name or assume an additional name without notifying you before making such a change.
- K. Property Transfer. I transfer all or a substantial part of my money or property.
- L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.
- M. Insecurity. You determine in good faith that a material adverse change has occurred in Borrower's financial condition from the conditions set forth in Borrower's most recent financial statement before the date of this Agreement or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

9. **DUE ON SALE OR ENCUMBRANCE.** You may, at your option, declare the entire balance of this Agreement to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. However, if I am in default under this Agreement, I may not sell the inventory portion of the Property even in the ordinary course of business.

10. **REMEDIES.** After I default, you may at your option do any one or more of the following.

- A. Acceleration. You may make all or any part of the amount owing by the terms of the Secured Debts immediately due.
 - B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.
 - C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.
 - D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the Secured Debts.
 - E. Attachment. You may attach or garnish my wages or earnings.
 - F. Assembly of Property. You may require me to gather the Property and make it available to you in a reasonable fashion.
 - G. Repossession. You may repossess the Property so long as the repossession does not involve a breach of the peace. You may sell, lease or otherwise dispose of the Property as provided by law. You may apply what you receive from the disposition of the Property to your expenses, your reasonable attorneys' fees and legal expenses (where not prohibited by law), and any debt I owe you. If what you receive from the disposition of the Property does not satisfy the debt, I will be liable for the deficiency (where permitted by law). In some cases, you may keep the Property to satisfy the debt.
- Where a notice is required, I agree that ten days prior written notice sent by first class mail to my address listed in this Agreement will be reasonable notice to me under the Montana Uniform Commercial Code. If the Property is perishable or threatens to decline speedily in value, you may, without notice to me, dispose of any or all of the Property in a commercially reasonable manner at my expense following any commercially reasonable preparation or processing.
- If any items not otherwise subject to this Agreement are contained in the Property when you take possession, you may hold these items for me at my risk and you will not be liable for taking possession of them.
- H. Use and Operation. You may enter upon my premises and take possession of all or any part of my property for the purpose of preserving the Property or its value, so long as you do not breach the peace. You may use and operate my property for the length of time you feel is necessary to protect your interest, all without payment or compensation to me.
 - I. Waiver. By choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. **WAIVER OF CLAIMS.** I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

12. **PERFECTION OF SECURITY INTEREST AND COSTS.** I authorize you to file a financing statement and/or security agreement, as appropriate, covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining perfection or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code. I agree to pay all taxes, fees and costs you pay or incur in connection with preparing, filing or recording any financing statements or other security interest filings on the Property. I agree to pay all actual costs of terminating your security interest.

13. **APPLICABLE LAW.** This Agreement is governed by the laws of Montana, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law. In the event of a dispute, the exclusive forum, venue and place of jurisdiction will be in Montana, unless otherwise required by law.

DONALD TUSCHOFF
Montana Security Agreement
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Initials *DT*
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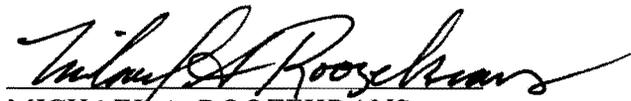
CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that on the 22 day of July, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

<input checked="" type="checkbox"/>	HAND DELIVERY	Mr. Thomas T. Bassett
<input type="checkbox"/>	U.S. MAIL	KL Gates, LLP
<input type="checkbox"/>	OVERNIGHT MAIL	618 West Riverside Suite, 300
<input type="checkbox"/>	FAX TRANSMISSION	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Mr. Donald C. Tuschoff
<input checked="" type="checkbox"/>	U.S. MAIL	101 Sleepy Hollow Drive
<input type="checkbox"/>	OVERNIGHT MAIL	Lincoln, MT 59369
<input type="checkbox"/>	FAX TRANSMISSION	
<input type="checkbox"/>	EMAIL	

DATED this 22nd day of July, 2015 at Spokane, Washington.


MICHAEL A. ROOZEKRANS