

2008

William Judson and Donna Judson, husband and wife v. Wheeler RV Las Vegas, LLC, a Nevada foreign limited liability company, dba Wheeler's Las Vegas RV : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Judson v. Wheeler RV*, No. 20080688 (Utah Court of Appeals, 2008).
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IN THE UTAH COURT OF APPEALS

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs/Respondents,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant/Appellant.

Appellate Case No.: 20080688-CA

APPEAL

BRIEF OF APPELLANT

Utah Court of Appeals

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I.

JURISDICTIONAL STATEMENT

An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law. Utah Rules of Appellate Procedure, Rule 3.

II.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue #1: Did the trial court err in failing to set aside the default judgment against Defendant/Appellant Wheeler RV Las Vegas, LLC, pursuant to Utah Rule of Civil Procedure 60(b)(4), due to the judgment being void for want of personal jurisdiction over Defendant/Appellant?

Standard of Review: De novo. Kamdar & Co. v. Laray Co., 1991 UT App LEXIS 102, ¶3, 815 P.2d 245. Franklin Covey Client Sales v. Melvin, 2000 UT App 110, ¶8, 2 P.3d 451.

This issue was preserved in the trial court. See pp. 30-33 of the record.

Issue #2: Did the trial court err in failing to set aside the default judgment against Defendant/Appellant Wheeler RV Las Vegas, LLC, pursuant to Utah Rule of Civil Procedure 60(b)(1), due to the judgment being obtained through mistake, inadvertence, surprise, and/or excusable neglect?

Standard of Review: Abuse of discretion. Salt Lake Hardware Co. v. Neilson Land & Water Co., 1913 Utah LEXIS 80, ¶6, 134 P. 911.

This issue was preserved in the trial court. See pp. 30-33 of the record.

Issue #3: Did the trial court err in failing to set aside the default judgment against Defendant/Appellant Wheeler RV Las Vegas, LLC, as such failure is contrary to Utah's strong policy of adjudicating matters on the merits, as opposed to the default process?

Standard of Review: Abuse of Discretion/Clear Error. Swallow v. Kennard, 2008 UT App 134, ¶19, 183 P.3d 1052.

This issue was preserved in the trial court. See pp. 30-33 of the record.

III.

STATEMENT OF THE CASE

In or around December 2002, Plaintiffs/Respondents (hereinafter, "Plaintiffs") purchased a Recreational Vehicle (hereinafter, "RV") from Wheelers RV Las Vegas from Defendant/Appellant's (hereinafter, "Defendant") predecessor in interest. (See pg. 2 of the record, ¶ 7.) In or around December 2004, Defendant acquired the assets, but not the liabilities for prior sales, of Wheelers RV Las Vegas. (See pg. 121 of the record, ¶ 3.) In the Fall of 2007, Defendant was served with a Complaint. (See pp. 1-15 of the record.) Plaintiffs allege that the RV sold to them was a "manufacturer's buyback" with a "history of problems". (See pg. 2 of the record, ¶ 7.) Further, Plaintiffs allege that, although they were able to sell the subject RV, following that sale, the subject RV was found to be a "manufacturer's buyback" with a "history of problems", and that Plaintiffs were then obligated to re-purchase the RV, sustaining monetary damages. (See Pg. 3 of the record, ¶¶ 12-16.)

Plaintiffs' counsel, without prior notification to general counsel for Defendant, and *via mail*, dispatched a Notice of Application for Entry of Default on or about November 27, 2007. (See pg. 38 of the record, ¶ 7.) Counsel for Defendant received that document on December 5, 2007. (See pg. 38 of the record, ¶ 8.) By that time, Plaintiffs had already taken a Default Judgment against Defendant. (See pg. 38 of the record, ¶ 10.) On or about February 29, 2008, within the time period set forth by Utah Rule of Civil Procedure 60, filed a Motion to Set Aside Default, objecting specifically to personal jurisdiction, and thus, not consenting to jurisdiction. (See pg. 30-33 of the record generally.) The Court had the matter for oral argument in May 2008, and the Court denied the motion in June 2008. (See pp. 68-74, 85-101, and 102-103 of the record generally.)

IV.

STATEMENT OF FACTS

Upon receipt of Plaintiffs' Complaint, Defendant provided a copy to its general counsel, Sharon Nelson, in Nevada. (Ex. 3 generally, included in the Addendum to this Brief.) Ms. Nelson began a dialogue with Plaintiffs' counsel, in which numerous issues were raised; namely, that a misjoinder of parties had occurred due to the transfer of the ownership of the dealership in December 2004. (See pg. 38 of the record, ¶¶ 4-7.) Based upon this exchange and others, Plaintiffs' counsel granted Defendant an open extension of time in which to file an Answer to the Complaint. (See pg. 38 of the record, ¶ 5.)

Dialog continued between Defendant's general counsel in Nevada and Plaintiffs' counsel in Utah. (See pg. 38 of the record, ¶¶ 4-7.) During that time, various documents were provided by Defendant's counsel to Plaintiffs' counsel. (See pg. 38 of the record, ¶ 5.) Each time

documents were provided, Plaintiffs' counsel requested additional documentation. (See pg. 38 of the record, ¶¶ 4-7.) Plaintiffs' counsel requested one particular document, the purchase and sale agreement, without redactions pertaining to the financial condition of the parties to the purchase of the Wheelers RV Las Vegas, LLC dealership, despite the fact that the financial condition of the parties was wholly irrelevant. (See pg. 38 of the record, ¶¶ 5-6.) In an effort to cooperate with Plaintiffs' counsel, Defendant was willing to provide the document in its entirety if Plaintiffs' counsel would sign a confidentiality agreement to keep the proprietary and private information pertaining to financial condition confidential. (See pg. 38 of the record, ¶ 6.) Plaintiffs' counsel refused to sign the agreement, and continued to insist upon the unredacted document. (See pg. 38 of the record, ¶ 6.)

Plaintiffs' counsel and general counsel for Defendant continued to attempt to work through their concerns via correspondence, mainly via facsimile. (See pg. 38 of the record, ¶¶ 4-7.) Plaintiffs' counsel, without prior notification to general counsel for Defendant, and *via mail*, without any phone call or email, dispatched a Notice of Application for Entry of Default on or about November 27, 2007, knowing that the document would be subject to out-of-state mailing during a peak holiday mailing period, and with an intervening weekend. (See pg. 38 of the record, ¶ 7.) Counsel for Defendant did not receive the document until approximately December 5, 2007. (See pg. 38 of the record, ¶ 8.) By that time, Plaintiffs had already taken a Default Judgment against Defendant, despite the fact that Plaintiffs' counsel never notified general counsel for Defendant that the open extension of time in which to answer had been rescinded. (See pg. 38 of the record, ¶ 10.)

On February 29, 2008, within the time period set forth by Utah Rule of Civil Procedure 60, Defendant filed a Motion to Set Aside Default, objecting specifically to personal jurisdiction, among other things, and thus, not consenting to jurisdiction. (See pp. 30-33 generally.) The Court had the matter for oral argument in May 2008, and the Court denied the motion in June 2008. (See pp. 68-74, 85-101, and 102-103 of the record generally.)

V.

SUMMARY OF ARGUMENT

At the outset of this case, and in every subsequent pleading, Defendant has disputed in personam jurisdiction. By appearing via a 60(b) Motion, Defendant did not submit to the jurisdiction of Utah courts. Defendant's 60(b) Motion was a special appearance because in personam jurisdiction was disputed in first and all subsequent pleadings.

The Trial Court erred in failing to set aside the subject Default Judgment as it had no personal jurisdiction over Defendant to grant the Default Judgment in the first instance. At the time of its ruling on the subject Motion to Set Aside Default Judgment, the Trial Court still lacked personal jurisdiction over Defendant. In this regard, Defendant has never availed itself of the laws and benefits of the State of Utah. Further, Defendant has not had sufficient contacts with the State of Utah to warrant personal jurisdiction over it by Utah courts. Still further, Defendant is not the party who sold the RV to Plaintiffs. Defendant was acquired by its current owners approximately two years after the sale of the subject RV. Thus, any wrong committed by the sellers regarding the purchase and sale contract was committed, if at all, by some other person or persons. Thus, Plaintiffs

have sued the wrong party, and have failed to demonstrate a proper basis for personal jurisdiction.

Additionally, the Trial Court erred in failing to set aside the default judgment as the judgment was obtained through mistake, inadvertence, surprise, or excusable neglect. In this regard, sometime in Fall 2007, Plaintiffs' counsel granted Sharon Nelson, Nevada counsel for Defendant, an open-ended extension in which to answer the Complaint. Ms. Nelson understood the phrase "open-ended extension" to mean exactly that. However, Plaintiffs' counsel mailed an Application for Entry of Default against Defendant without first informing Defendant that its extension of time within which to answer was being rescinded. Thus, Defendant's failure to answer the Complaint is excused by mistake, inadvertence, surprise and/or excusable neglect.

Lastly, Utah has a strong policy of adjudicating matters on the merits, as opposed to the default process. Thus, the Trial Court erred when it denied Defendant's Motion to Set Aside Default Judgment.

VI.

ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 60(b)(4), BECAUSE THE JUDGMENT WAS VOID FOR WANT OF PERSONAL JURISDICTION OVER DEFENDANT

At the outset of this case, and in Defendant's Motion to Set Aside Default Judgment, Defendant disputed in personam jurisdiction for the reasons that follow. By appearing via a 60(b) Motion, Defendant has not submitted to the jurisdiction of Utah

courts. Defendant's 60(b) Motion was a special appearance because in personam jurisdiction was disputed in first and all subsequent pleadings. In the Affidavit of Sharon Nelson in Support of Defendant's Motion to Set Aside Default, Ms. Nelson indicated that Defendant operates its business in Nevada, while Plaintiffs reside in Utah. (See pg. 39 of the record, ¶ 16.) Further, Defendant does not purposefully avail itself to the benefits and laws of the state of Utah. (See pg. 39 of the record, ¶ 16.) As general counsel for Defendant, Ms. Nelson's affidavit is evidence of the lack of any activities or otherwise that would give rise to personal jurisdiction over Defendant.

On May 15, 2008, the Trial Court heard oral argument on Defendant's Motion to Set Aside Default Judgment. The Motion was brought on the grounds that the Trial Court lacked personal jurisdiction over Defendant, among other grounds. In June 2008, the Trial Court denied the Motion.

Personal jurisdiction over Defendant is lacking under the seminal cases of International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, Hanson v. Denckla (1958) 357 U.S. 235, 253, and Burger King v. Rudzewicz (1985) 471 U.S. 462, 478-482 and their progeny. Each of the aforementioned cases support Defendant's position that personal jurisdiction is lacking in this matter due to the lack of purposeful availing and significant contacts with the forum state. In other words, Defendant does not have a sufficient level of personal or business contacts with the State of Utah that it could reasonably expect to be sued there, nor has Defendant purposely availed itself of the resources or protection of the State of Utah. As will be shown below, the Trial Court's assertion of personal jurisdiction over Defendant in this

matter offends traditional notions of fair play and substantial justice. See generally, International Shoe Co. v. Washington, *supra*, 326 U.S. 310.

In World-Wide Volkswagen Corp. v. Woodson, Defendants World-Wide Volkswagen Corp., a regional distributor for Volkswagen, Inc. in New York, and Seaway Volkswagen, a dealership in New York, asked to be removed from the suit on the grounds that the forum state (Oklahoma) had no personal jurisdiction over them. The Court agreed, stating that because World-Wide and Seaway merely sold the vehicle in which the Plaintiff was injured, and they had done nothing to solicit the business of the out-of-state Plaintiff, the two corporations did not avail themselves of any of the privileges or benefits of Oklahoma law and thus, did not have minimum contacts in Oklahoma.

Here, likewise, Defendant, a limited liability company, was formed in Minnesota, and is operated from a location in Nevada. Defendant was served with the Complaint at its business address in Nevada. Defendant conducts all of its business in the State of Nevada. The purchase and sale of the subject RV occurred in the State of Nevada. Defendant has never operated any retail or wholesale establishment in the State of Utah, nor did it solicit Plaintiffs' business via mail, television, radio, or any other manner in the State of Utah. Thus, as Defendant did not avail itself of the privileges of conducting business in the State of Utah, it does not have the requisite minimum contacts with Utah to give Utah courts personal jurisdiction over it in this matter.

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Additionally, Utah Rule of Civil Procedure 60(b)(4) states, in applicable part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void; The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.

Utah R. Civ. P. 60(b)(4). A denial of a motion to vacate a judgment under rule 60(b) is ordinarily reversed only for an abuse of discretion. Katz v. Pierce, 1986 UT LEXIS 862, ¶1, 732 P.2d 92; Russell v. Martell, 1984 UT LEXIS 757, ¶1, 681 P.2d 1193; Baker v. Western Sur. Co., 1988 UT App. LEXIS 112, ¶8, 757 P.2d 878. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, “the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs.” State of Utah Dep’t of Social Services v. Vijil, 1989 UT LEXIS 95, ¶6, 784 P.2d 1130. Here, the Trial Court’s denial of Defendant’s Motion to Set Aside Default Judgment is void due to its lack of personal jurisdiction over Defendant.

In or around December 2002, Plaintiffs purchased the subject RV from Defendant’s predecessor-in-interest. The current owner of Defendant acquired the assets of Defendant, from Defendant’s predecessor-in-interest, in or around December 2004. However, the purchase of those assets did not include the assumption of any liability for previous sales from the prior owners. Because Defendant did not own the subject dealership when Plaintiffs purchased the RV, any alleged wrongdoing by Defendant’s

predecessor-in-interest, including any liability for prior sales, is not attributable to Defendant. Thus, Plaintiff has sued the wrong party.

As the Trial Court's default judgment was rendered without personal jurisdiction over Defendant, it was void. Therefore, the Trial Court's failure to set aside that default judgment was in error.

B. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 60(b)(1), BECAUSE THE JUDGMENT WAS OBTAINED THROUGH MISTAKE, INADVERTANCE, SURPRISE, AND/OR EXCUSABLE NEGLIGENCE

The Motion to Set Aside Default Judgment was brought on the grounds that the default judgment rendered by the Trial Court was obtained through mistake, inadvertence, surprise, and/or excusable neglect, among other grounds. Utah Rule of Civil Procedure 60(b)(1) states, in applicable part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.... The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.

Utah R. Civ. P. 60(b)(1). Here, the Trial Court's denial of Defendant's Motion to Set Aside Default Judgment was in error as it was obtained based upon a mistake, surprise, and the excusable neglect of Defendant. Additionally, Defendant filed its Motion within three months after the Default Judgment was entered.

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Excusable neglect is “the exercise of ‘due diligence’ by a reasonably prudent person under similar circumstances.” Mini Spas, Inc. v. Industrial Comm’n, 1987 Utah LEXIS 643, ¶4, 733 P.2d 130. To demonstrate that a Default Judgment was due to excusable neglect, “[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.” Black’s Title, Inc. v. Utah State Ins. Dep’t, 1999 UT App 330, ¶10, 991 P.2d 607 (alteration in original) (quoting Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973)). In order to establish excusable neglect, “a party must provide the court with specific details that demonstrate due diligence in spite of uncontrollable circumstances.” Stevens v. LaVerkin City 2008 UT App 129, ¶27, 183 P.3d 1059.

As stated above, upon receipt of the Complaint, Defendant provided a copy to its general counsel in Nevada, Sharon Nelson. Ms. Nelson began a dialogue with Plaintiffs’ counsel in which numerous issues were raised; namely, that a misjoinder of parties had occurred due to the transfer of the dealership in December 2004. Based upon this exchange and others, in Fall 2007, Plaintiffs’ counsel granted Sharon Nelson an open-ended extension in which to answer the Complaint. Ms. Nelson understood the phrase “open-ended extension” to mean that Defendant did not yet have to answer the Complaint until the parties resolved the issue of who should have been sued, or at least, until Plaintiffs’ counsel notified her that the extension of time was no longer “open”.

Dialog continued between Ms. Nelson in Nevada and Plaintiffs’ counsel in Utah. During that time, various documents were provided by Defendant to Plaintiffs. Each time

documents were provided, Plaintiffs' counsel requested additional documentation.

Plaintiffs' counsel requested one particular document, the purchase and sale agreement, without redactions pertaining to the financial condition of the parties to the purchase of the Wheelers RV Las Vegas, LLC dealership, despite the fact that the financial condition of the parties was wholly irrelevant. In an effort to cooperate with Plaintiffs' counsel, Defendant was willing to provide the document in its entirety if Plaintiffs' counsel would sign a confidentiality agreement to keep the proprietary and private information pertaining to financial condition confidential. Plaintiffs' counsel refused to sign the agreement, and continued to insist upon the unredacted document.

Plaintiffs' counsel and Defendant's general counsel continued to attempt to work through their concerns via correspondence, mainly via facsimile. However, on or about November 27, 2007, without prior notification to Defendant's general counsel, and via mail only, Plaintiffs' counsel dispatched a Notice of Application for Entry of Default, knowing that the document would be subject to out-of-state mailing during a peak holiday mailing period, and with an intervening weekend. Defendant's counsel did not receive the document until approximately December 5, 2007. By that time, Plaintiffs had already taken a Default Judgment against Defendant, despite the fact that Plaintiffs' counsel never notified Defendant's general counsel that the open extension of time in which to answer the Complaint had been rescinded.

In Olsen v. Cummings 1977 UT LEXIS 1172, 565 P.2d 1123, the Court was asked to consider whether the trial court erred in denying a Motion to Vacate a default judgment, made under U.R.C.P. 60(b)(1), where the Motion was timely made. The Court

noted that Plaintiffs had granted an open-ended extension to Defendants to answer the complaint. Some time later, defense counsel unilaterally revoked the extension. Shortly thereafter, new defense counsel came into the case, and not knowing of the extension, and assuming prior defense counsel had answered the complaint, failed to file an answer. The Court vacated the default judgment and remanded the case to the trial court stating that “although a trial court is endowed with considerable latitude of discretion in granting or denying a motion to vacate a final judgment, it cannot act arbitrarily. . . . it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.” Citations. Olsen v. Cummings, *supra*, 1977 UT LEXIS 1172.

Here, similarly, an open-ended extension of time was granted to Defendant to answer the Complaint. However, in this case, that open extension was never revoked or rescinded. Instead, Plaintiffs’ counsel decided just to send to Defendant a Notice of Application for Entry of Default. Defendant was completely surprised by Plaintiffs’ counsel’s actions. (See pg. 39 of the record, ¶¶ 12-13.) However, Defendant timely filed its Motion to Set Aside Default Judgment on the grounds that its failure to answer the Complaint was excusable, and that the Default Judgment was obtained through surprise, and by the mistake of Defendant in believing that Plaintiffs’ counsel had truly granted it an open extension, as he had said. (See pg. 39 of the record, ¶ 14.)

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Plaintiff should have been estopped from entry of default due to the open extension of time granted to Defendant by Plaintiffs' counsel, and Plaintiffs' counsel's failure to timely advise Defendant, or to advise Defendant at all, of the rescission of his agreement to grant an open extension of time to answer the Complaint.

C. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT BECAUSE FAILURE TO DO SO WAS CONTRARY TO UTAH'S STRONG POLICY OF ADJUDICATING MATTERS ON THE MERITS, AS OPPOSED TO THE DEFAULT PROCESS

The Motion to Set Aside Default Judgment was brought on the grounds that the Default Judgment rendered by the Trial Court was in error as it was contrary to Utah's clearly-established policy of adjudicating matters on the merits, as opposed to the default process. At least as early as 1909 courts have stated that, although the matter of setting aside defaults is within the discretion of the trial courts, Utah's general rule is to bring about a judgment on the merits. Utah Courts are generally in accord with the doctrine that "the courts should be liberal in granting relief against judgments taken by default to the end that controversies may be tried on the merits." State of Utah v. Musselman, 1983 UT LEXIS 1086, ¶5, 667 P.2d 1053; Quealy v. Willardson, 1909 UT LEXIS 32, ¶11, 100 P. 930 ("In all doubtful cases the general rule of courts is to incline towards granting relief from the default and to bring about a judgment on the merits.").

The Quealy court stated further that, "while courts have a right to require all litigants to come into court and to present their claims and defenses in accordance with the law and rules of procedure, and in case of inexcusable neglect to refuse them a hearing, still these rules should be enforced so as to reflect justice between the parties to

the action and for the purpose of vindicating the law and maintaining the dignity of the court.” Quealy v. Willardson, *supra*, 1909 UT LEXIS 32, ¶¶15, 16. “Judgments by default are not favored by the courts nor are they in the interest of justice and fair play.” Heathman v. Fabian & Clendenin, 1962 UT LEXIS 250, ¶5, 14 Utah 2d 60.

Here, as stated above, Defendant’s failure to answer the complaint was excusable. Thus, even more reason was had to vacate the Default Judgment so as to “reflect justice between the parties” and to “[vindicate] the law and [maintain] the dignity of the court.”

The Trial Court’s failure to set aside the Default Judgment was in error as Defendant’s failure to answer the Complaint was excusable and Utah’s policy of granting relief from a default on such grounds mandated the setting aside of a Default taken under such conditions.

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VII.

CONCLUSION

The Trial Court erred in failing to set aside the subject Default Judgment as Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction in the State of Utah and have sued the wrong party. Additionally, the Default Judgment was obtained through mistake, inadvertence, surprise, and excusable neglect as Defendant's open extension in which to answer the Complaint was not timely rescinded by Plaintiffs. Finally, Utah has a strong policy of adjudicating matters on the merits, as opposed to the default process. Thus, the Trial Court erred when it denied Defendant's Motion to Set Aside Default Judgment.

Respectfully submitted,

Law Offices of Steven R. Bangerter

DATED: December 2, 2008

A handwritten signature in black ink, appearing to read "D. P. Wilde", written over a horizontal line.

DANIEL P. WILDE
Attorney for Defendant/Appellant,
WHEELER RV LAS VEGAS, LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellate Brief was mailed, postage prepaid on December 2, 2008 to the following:

Gary G. Kuhlmann
GARY G. KUHLMANN & ASSOCIATES, PC
113 East 200 North, Suite 1
P.O. Box 910387
St. George, UT 84791


Abbie Thorpe

ADDENDUM

- Exhibit 1: Complaint - filed in or about August 2007
- Exhibit 2: Defendant's Motion to Set Aside Default Judgment and Request for Hearing – filed February 29, 2008
- Exhibit 3: Affidavit of Sharon Nelson in Support of Defendant's Motion to Set Aside Default Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure – filed February 29, 2008
- Exhibit 4: Affidavit of William E. Frazier in Support of Defendant's Motion to Set Aside Default Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure – filed February 29, 2008
- Exhibit 5: Plaintiffs' Proposed Findings, Conclusions and Order regarding Defendant's Motion to Set Aside Default Judgment, which was ultimately the Court's final ruling – Filed June 25, 2008
- Exhibit 6: Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g) – filed on July 25, 2008
- Exhibit 6(A): A true and correct copy of Defendant's [Proposed] Order regarding its Motion to Set Aside Default Judgment which was filed on February 29, 2008, but was subsequently discarded by the Court because the Court used Plaintiffs' [Proposed] Order instead
- Exhibit 6(B): Plaintiffs' Proposed Findings, Conclusions and Order regarding Defendant's Motion to Set Aside Default Judgment, which was ultimately the Court's final ruling – Filed June 25, 2008
- Exhibit 7: Defendant/Appellant's Certificate of Non-request of Transcripts or Proceedings Pursuant to Utah Rule of Appellate Procedure 11(e)(1) – filed on July 25, 2008
- Exhibit 8: Defendant/Appellant's Request for Stay of Default Judgment and Determination of Amount Payable to Court for Security Purposes in Lieu of Supersedeas Bond Pursuant to URCP 62, or in the Alternative, Request for Supersedeas Bond, and Request for Hearing – filed October 2, 2008

Exhibit 9: Defendant's [Proposed] Order Granting Defendant's Request for Stay of Execution of Default Judgment, Determination of Amount Payable for Security Purposes in Lieu of Supersedeas Bond Pursuant to URCP 62, or in the Alternative, Request for Supersedeas Bond – filed October 2, 2008

Exhibit 10: Affidavit of Brent Moody in Support of Defendant's Request for Stay of Execution on Default Judgment and Determination of Amount Payable to Court for Security Purposes in Lieu of Supersedeas Bond Pursuant to URCP 62, or in the Alternative, Request for Supersedeas Bond – filed October 2, 2008

Exhibit 10(A): Defendant's Financial Operating Report to support Defendant's Request for Stay of Execution of Default Judgment, Determination of Amount Payable for Security Purposes in Lieu of Supersedeas Bond Pursuant to URCP 62, or in the Alternative, Request for Supersedeas Bond

Tab 1

GARY G. KUHLMANN & ASSOCIATES, PC
Gary G. Kuhlmann (#4994)
Attorney for Plaintiffs
113 East 200 North, Suite 1
P.O. Box 910387
St. George, Utah 84791
Telephone: (435) 656-6156

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs,

v.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant.

COMPLAINT

Civil No.

Judge

Plaintiffs, for their Complaint against the Defendant, complain and allege as follows:

1. Plaintiffs are residents of Washington County, Utah.
2. Defendant is a Minnesota limited liability company doing business as Wheeler's Las Vegas RV in Clark County, Nevada.
3. This Court has subject matter jurisdiction, personal jurisdiction and venue over this matter
4. During 2002, the Plaintiffs met with the Defendant to discuss purchasing a 2000 Journey RV, VIN No. 4UZ6XFBC8YCG43267 (the "RV").

5. After such discussion, the Plaintiffs entered into an agreement with the Defendant to purchase the RV for the sum of \$124,527.50.

6. As part of the purchase of the RV, the Plaintiffs traded in another recreational vehicle with which resulted in a net trade-in allowance of \$21,597.00. Plaintiffs also paid to Defendant a down payment of \$7,500. Based thereon, Plaintiffs were required to obtain a loan of \$95,900.00 for the remaining purchase price for the RV. Documents evidencing the purchase of the RV by Plaintiffs are attached hereto as Exhibit A and by reference incorporated herein.

7. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant inform the Plaintiffs that there was any history of problems with the RV nor that the RV had been a manufacturer's buyback vehicle.

8. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant execute or deliver to the Plaintiffs a written disclosure of the buyback status of the RV as required by state and federal law, nor obtain the Plaintiffs' acknowledgment of such notice.

9. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant deliver to the Plaintiffs a written disclosure that the title to the RV would be permanently inscribed with the notation "Lemon Law Buyback" as required by state and federal law.

10. At no time did the Defendant place a decal on the left doorframe of the RV stating that the RV was a "Lemon Law Buyback" as required by state and federal law.

11. As part of the purchase of the RV, the only document which the Defendant presented to the Plaintiffs, without discussion or disclosure, was a limited warranty for repurchased vehicles, a true and correct copy of which is attached hereto as Exhibit B. However,

the Defendant did not disclose to the Plaintiffs the fact that the RV was a manufacturer's buyback, nor did the Defendant execute the dealer portion of the limited warranty.

12. After several years, the Plaintiffs decided to sell the RV and placed the same on consignment with Hurricane Valley Auto Mall in Hurricane, Utah.

13. The RV was subsequently sold from the Hurricane Valley Auto Mall lot. At the time of such sale, the Plaintiffs were required to pay the sum of \$6,000.00 to pay the remaining lien on the RV and provide clear title.

14. Shortly after the sale of the RV from the Hurricane Valley Auto Mall lot, demand was made upon Hurricane Valley Auto Mall to repurchase the vehicle since the fact that the RV was a manufacturer's buyback had not been disclosed at the time the RV was sold under the consignment.

15. Based upon such notice and demand, Hurricane Valley Auto Mall demanded that the Plaintiffs repurchase the RV from Hurricane Valley for the same amount which Hurricane Valley was required to pay to repurchase the RV. This was the first time the Plaintiffs were ever informed of the status of the RV as a manufacturer's buyback.

16. In order to repurchase the RV, the Plaintiffs were required to pay a down payment of \$6,100.00 and obtain a loan in the sum of \$84,700.00. Based upon such loan, the Plaintiffs have been required to make monthly payments of \$849.62 since December 2006.

FIRST CAUSE OF ACTION
(Breach of Contract)

17. Plaintiffs incorporate the allegations of paragraphs 1 through 16 above as if fully set forth herein.

18. Under the terms of the agreement between the parties, Defendant was to deliver to Plaintiffs clean title to the RV to the Plaintiffs

19. Defendant breached its express and implied obligations under the agreement by acting in bad faith, not disclosing the defects in the title for the RV and not providing the Plaintiffs with a clean title to the RV.

20. Defendant's breach of the agreement has caused damage to the Plaintiffs in an amount to be proven at trial, and including the lost value of the Plaintiffs' trade-in vehicle, amounts paid by Plaintiffs for the loan on the RV, payment to sell the RV through Hurricane Valley, costs to finance the repurchase of the RV, monthly payments made by the Plaintiffs due to the Defendant's breach, and costs and attorney fees incurred by the Plaintiffs in an amount of no less than \$147,274.08.

SECOND CAUSE OF ACTION
(Fraudulent Misrepresentation)

21. Plaintiffs incorporate the allegations of paragraphs 1 through 20 above as if fully set forth herein.

22. As a material part of the negotiations between the parties, Defendant represented to the Plaintiffs that the title to the RV was not branded.

23. At the time of the representations, Defendant knew or had reason to know that such statements were false, or had complete disregard for whether the representations were true or not.

24. The representations made by Defendant to the Plaintiffs were made by Defendant in order to deceive the Plaintiffs and cause them to enter into the transaction with Defendant.

25. The Plaintiffs reasonably relied on Defendant's misrepresentations and entered into the agreement with Defendant based thereon.

26. Due to the misrepresentations, and in order to protect their interests, Plaintiffs have been required to incur indebtedness and make payments thereon substantially in excess of the actual value of the RV and have been required to retain an attorney to seek damages caused by the Defendant's misrepresentations. This has caused Plaintiffs damages and increased expenses in an amount to be proven at trial, but in an amount of no less than \$147,274.08.

THIRD CAUSE OF ACTION
(Negligent Misrepresentation)

27. Plaintiffs incorporate the allegations of paragraphs 1 through 26 above as if fully set forth herein.

28. As a material part of the negotiations between the parties, Defendant represented to the Plaintiffs that the title to the RV was not branded.

29. The Plaintiffs reasonably relied on Defendant's misrepresentations and entered into the agreement with Defendant based thereon.

30. Due to the misrepresentations, and in order to protect their interests, Plaintiffs have been required to incur indebtedness and make payments thereon substantially in excess of the actual value of the RV and have been required to retain an attorney to seek damages caused by the Defendant's misrepresentations. This has caused Plaintiffs damages and increased expenses in an amount to be proven at trial, but in an amount of no less than \$147,274.08.

FOURTH CAUSE OF ACTION
(Violation of State and Federal Law)

31. Plaintiffs incorporate the allegations of paragraphs 1 through 30 above as if fully set forth herein.

32. State and federal law requires that in the sale of a vehicle which qualifies as a manufacturer's buyback, the dealer must:

a. execute and deliver to the purchaser at the time of sale a notice that the vehicle being sold is a manufacturer's buyback and obtain the purchaser's acknowledgment of such notice;

b. deliver to the purchaser and have the purchaser execute a written disclosure regarding the manufacturer's repurchase of the vehicle and notifying the purchaser that the title for such vehicle will be permanently inscribed with the notation "Lemon Law Buyback;" and

c. affix a deal to the left front doorframe specifying that the certificate of title for the vehicle is inscribed with the notation "Lemon Law Buyback."

33. Defendant failed to comply with any of these requirements in connection with the sale of the RV to the Plaintiffs.

34. Defendant's failure to comply with its statutory obligations has damaged Plaintiffs in an amount to be proven at trial, and no less than \$147,274.08.

FIFTH CAUSE OF ACTION
(Punitive Damages)

35. Plaintiffs incorporate the allegations of paragraphs 1 through 34 above as if fully set forth herein.

36. Despite Defendant's obligations to do otherwise, Defendant failed to comply with the terms of the parties' agreement, fraudulently misrepresented facts to the Plaintiffs in order to induce them into an agreement with Defendant, and failed to comply with statutory requirements.

37. As a direct and proximate result of Defendant's willful, malicious, reckless, and blatant disregard for the rights and interests of the Plaintiffs, Plaintiffs have incurred and will continue to incur damages.

38. Defendant should be ordered to pay punitive damages to the Plaintiffs in an amount reasonable in the premises.

WHEREFORE, Plaintiffs pray that the Court enter a judgment in favor of Plaintiffs and against Defendant as follows:

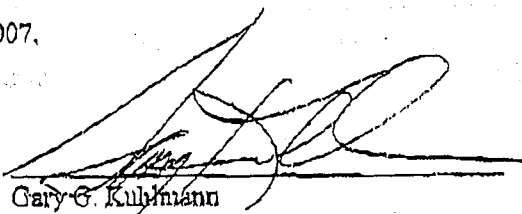
1. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's breach of contract.

2. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's fraudulent misrepresentations.

3. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's negligent misrepresentations.

4. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's failure to comply with statutory requirements.
5. For punitive damages in an amount reasonable under the circumstances.
6. For Plaintiffs' costs and attorney fees incurred herein; and
7. For such other and further relief as the Court deems just.

DATED this 15th day of August, 2007,



Gary G. Kuhlmann
Attorney for Plaintiffs

Plaintiffs' address:
30 Red Bluff Drive
Hurricane, Utah 84737

EXHIBIT A

08/18/2007 10:59 FAX 1702914

WHEELER'S LV RV & WALTER

0004

RETAIL BUYER'S ORDER

Birth Date
GVW

13175 LAS VEGAS BLVD. 9D. • LAS VEGAS, NV 89124

(702) 898-9000 • FAX (702) 898-9001

18066

Sales
Order

WHEELER'S RV

Block No. 4919

Deliver PRIOR CUSTOMER

Salesperson JC

Date 05/19/02

Phone 35-879-2001

Purchased WILLIAM F. HUDSON & DONNA HUDSON

Address 20 RED BLUE DR.

HURRICANE

State 84737

Enter my order for the vehicle, accessories and insurance as listed below under the terms and conditions set forth below and on reverse side.

NEW ☐ USED ☒ COLOR

Approximate Delivery Date

CASH SELLING PRICE

Year 2000 Make JOURNEY Color 36L Model

224527.50

Serial No.

4UZE6F8G8YGG42267

MILES

43183

DEALER INSTALLED

DELIVERY AGREEMENT

Delivery of this vehicle is accepted by purchaser subject to credit approval by a financing institution, and in the event of a credit report unacceptable to the financing institution, the purchaser will return the vehicle within 10 business days to the dealer.

Signature

DISCLAIMER OF WARRANTIES

THE SELLER, WHEELER'S LAS VEGAS RV, HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND WHEELER'S LAS VEGAS RV HEREBY DISCLAIMS ANY AUTHORITY ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE.

DEALER FEE INCLUDES, BUT NOT LIMITED TO, 600 FEE, WALK THRU, OUT CERTIFICATE, PUMP, FULL TANK OF PROPANE, BATTERY PACKAGE, WASH GUYS, CLEAN INSIDE, LABOR, MAINTENANCE, AND LEGAL DOCUMENTS OF THE ASSIGNED UNIT.

DEALER REMOVED

CASH PRICE OF

RV AND ACCESSORIES \$24527.50

DEALER PREP \$ 440.00

SALES TAX \$ N/A

SALES TAX CREDIT \$

TOTAL CASH PRICE \$24967.50

NET TRADE IN \$22507.00

CASH DEPOSIT \$7500.00

CASH ON DELIVERY \$

TITLE FEE 20.00

TOTAL DOWN PAYMENT \$

UNPAID BALANCE ON CASH PRICE \$2907.00

SERVICE CONTRACT \$

TOTAL UNPAID BALANCE \$

FINANCE CHARGE \$

CONTRACT BALANCE \$

ANNUAL PERCENTAGE RATE

CONTRACT BALANCE PAYABLE IN

INSTALLMENTS AS FOLLOWS:

\$ on 20 \$ on 20

and monthly installments of \$ each,

beginning on the day of 20

YEAR 74 MAKE PONTIAC MODEL 34

TRADE-IN ALLOWANCE \$5000.00 LESS PAY-OFF \$3403.00

PAY-OFF TO

In the event that the payout quoted by the purchaser is not correct and is greater than the amount shown in this order, the purchaser hereby agrees to pay the excess on demand. If the purchaser is unable to pay the excess on demand, the dealer is hereby permitted to add the excess amount to the contract in event the vehicle is financed.

I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. Entire agreement is expressed herein in writing. No other terms or conditions, oral or written, will be recognized. All used vehicles sold "AS IS" and without guarantee as to condition, mileage, year or model, unless otherwise specified in writing. Salesperson cannot accept this order or obligate seller in any manner whatsoever. Order is not binding to Seller until accepted in writing by authorized representative of Seller and until Purchaser's credit has been approved. I certify that I am of legal age, have read the foregoing order in full and agree to sign a Contract of Conditional Sale covering this order by my signature below.

I/We hereby voluntarily choose

as Agent or Broker to procure the insurance listed above. The choice of above Agent or Broker was not made a condition precedent to this sale.

The name of Agent or Broker must be filled in by Purchaser in his own handwriting.

NOTICE TO BUYER: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) Under the law you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligation under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

RECEIPT OF A FILLED-IN COPY OF THIS AGREEMENT IS HEREBY ACKNOWLEDGED BY PURCHASER.

Accepted: (Seller) WHEELER'S LAS VEGAS RV

Purchaser's Signature

By

08/19/2006 11:02 FAX 1702914

WEBSTER'S LV RV & WATER

0007

Buyer Name: WILLIAM F. JORDAN	Seller Name: WEBSTER'S LAS VEGAS RV
Buyer Address: 1000 W. WASHINGTON ST.	Seller Address: 1750 N. LAS VEGAS BLVD.
City: HENDERSON, NV	City: LAS VEGAS, NV
State: NV	State: NV
Zip: 89134	Zip: 89134
Phone: 702-251-1031	Phone: 702-251-1031

SECTION B: DISCLOSURE OF INFORMATION CONCERNING THE FINANCIAL STATEMENT

ANNUAL PERCENTAGE RATE	10.99%
FINANCE CHARGE	\$1,154.30
Amount Financed	\$9,500.00
Total Payments	\$10,654.30
Total Sales Price	\$21,091.00

SECTION C: STATEMENT OF WORK AND ACCEPTANCE

This contract is made by and between the undersigned parties, who agree to the terms and conditions of this contract, and to the fact that the undersigned parties are not making any representation or warranty as to the condition of the goods or services sold or provided, and that the undersigned parties are not making any representation or warranty as to the condition of the goods or services sold or provided, and that the undersigned parties are not making any representation or warranty as to the condition of the goods or services sold or provided.

Manufacturer: [Blank]

Model: [Blank]

Year: [Blank]

Color: [Blank]

Options: [Blank]

Comments: [Blank]

08/18/2000 11:03 FAX 17028140

WHEELER'S LV RV & FALTER

Ex. 10.

[illegible]

005

AN S, BETHLEHEM

Business Insurance Company

45583

Not a member of any religious organization. I am a member of the American Legion, Post 1234, and the Elks Lodge, Chapter 5678. I am also a member of the United Way and the Red Cross.

(f) I hereby certify that to the best of my knowledge the information resulting reflects the amount of releases in excess of the mechanical limit.

☐ (2) I hereby certify that the information received is NOT the actual release. WARNING: DO NOT ENTER INFORMATION.

NAME	HEIGHT	BOOTS TYPE	WEI	YEAR
JOURNEY	36L	CLASS A MOTO	40Z6XFHC8YCG41367	2000

AR 5, JETZUN

Transferor's (Seller's) Name (Printed)

13175 S. Las Vegas Blvd. Las Vegas N.V. 89124

Вопросы и ответы

X

Y **General Requirements**

10 MAY 1961

WILLIAM A. JUDSON AND/OR POSSEY
SHERMAN AND NEHRU
STANDARD
CITY OF
INDIANA

WILLIAM (B) JUDSON AND/OR DONNA JUDSON

Approved by the City Clerk (Signature)

THE UNIVERSITY OF CHICAGO

ADULT CARE / BSV 30208581104

EXHIBIT B

LIMITED WARRANTY FOR REPURCHASED VEHICLES WARRANTY REGISTRATION FORM

Vehicle Identification Number:

Winchango Industries Serial Number:

This Warranty is authorized by:

Winchango Representative:

AARON STEEN

(Type or Print Name)

4	U	Z	G	X	F	B	C	8	Y	C	6	4	3	2	6	7
1	0	P	8	7	A	2	9	6	3	9	4					

Signature

1-27-02

Date

Customer Identification (To Be Completed by Selling Dealer)

Name: DANA JO PULSON

Address: 30 RED BLUFF DR

City: HURON

State: MI

Zip: 49737

The Customer hereby acknowledges that the provisions of the attached Limited Warranty for Repurchased Vehicles are understood and accepted. This Limited Warranty becomes effective from the date and mileage indicated on this form.

Effective Date of Warranty (Selling Dealer)

5-20-02

5-20-02

Customer Reading (Selling Dealer)

4 3 3 9 8

5-20-02

Dealer Identification (To Be Completed by Selling Dealer)

Dealer Code:

Dealership Name:

City:

State:

Phone:

The dealer certifies that the vehicle identified herein has been inspected and any services or repairs that may have been necessary were performed, and further certifies that its call be later and deliver the subject vehicle to the retail customer recorded on this form.

The dealer also certifies that he has communicated to the retail customer material facts relating to the history of this vehicle, such as the fact that the vehicle was repaired from a prior owner dissatisfied with it, or that it was repaired under a State's Lemon Law.

(Authorized Dealer Signature)

(Date)

NOTE TO DEALER: Complete all the information on this form and mail the white registration copy, notice - resale disclosure of vehicle and warranty copy to:

Winchango Industries, Inc., P.O. Box 152, 603 West Crystal Lake Road, Forest City, Iowa 50501
Attn: Legal Dept.

White: Warranty Registration Copy Pink: Dealer Copy Green: Customer Copy

Tab 2

FILED

FEB 29 2008

FIFTH JUDICIAL DISTRICT
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant.

MOTION TO SET ASIDE DEFAULT
JUDGMENT AND REQUEST FOR
HEARING

Civil No.: 070501867

Judge: Eric A. Ludlow

COMES NOW Defendant, WHEELER RV LAS VEGAS, LLC, by and through its attorneys, Law Offices of Steven R. Bangertter, and moves the court to set aside the default judgment entered against it on or about December 5, 2007.

This Motion is brought pursuant to Rule 60(b)(1) and 60(b)(6) of the Utah Rules of Civil Procedure. This motion is supported by the attached affidavits of Sharon Nelson and William E.

Frazier, the Memorandum of Points and Authorities below, the court filings to date, and any oral argument pertaining to this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S

MOTION TO SET ASIDE DEFAULT

I.

**SETTING ASIDE THE DEFAULT IN THE INSTANT CASE IS PERMISSIBLE UNDER
RULE 60(B) OF THE UTAH RULES OF CIVIL PROCEDURE**

Rule 60(B) of the Utah Rules of Civil Procedure sets forth, in pertinent part:

(b) On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) *mistake, inadvertence, surprise, or excusable neglect*; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based **has been reversed or otherwise vacated**, or it is no longer equitable **that the judgment should have prospective application**; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Here, as set forth in the Affidavit of Sharon Nelson in Support of this Motion, the subject judgment was issued subsequent to mistake, inadvertence, surprise, and excusable neglect. The Affidavit of Sharon Nelson is hereby

incorporated by reference. Pursuant to Rule 60(b), this Motion is brought within three months of entry of judgment, which occurred on or about December 5, 2007.

Rule 60(B) has been consistently interpreted by the Utah Supreme Court and Court of Appeals to permit judge's, in their discretion, to grant relief from default judgments in instances where there has been no undue delay, the judgment was a result of mistake or inadvertence, and the interests of justice would be served by granting the requested relief. "The rule that the courts will incline towards granting relief to a party who has not had the opportunity to present his case, is ordinarily applied at the trial court level." *State of Utah v. D. John Musselman and Linda Ann Coram* (1983) 667 P.2d 1055 and Hn1; 1983 Utah LEXIS 1086.

"Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party." *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor* (1975), 544 P.2d 876.

Here, the interests of justice would be met by granting this Motion to Set Aside Default. The evidence will show that Plaintiffs have sued the wrong party. Defendant attempted to demonstrate this to Plaintiffs' counsel, but Plaintiffs' counsel proceeded with securing a default judgment anyway. Defendants did not

own the subject dealership when Plaintiffs purchased the recreational vehicle.

Further, Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction. Defendant will be able to demonstrate that it is not the proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable under the seminal cases of *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, *Hanson v. Denckla* (1958) 357 U.S. 235, 253, and *Burger King v. Rudzewicz* (1985) 471 U.S. 462, 478-482 and their progeny. Each of the aforementioned cases support Defendant's position that personal jurisdiction is lacking in this matter due to the lack of purposeful availment and significant contacts with the forum state.

II.

CONCLUSION

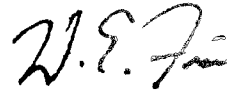
Based on the foregoing, Defendant respectfully requests that the Default Judgment entered against it on or about December 5, 2007 be set aside, due to mistake, inadvertence, excusable neglect, and surprise. Defendant has legitimate and valid legal defenses, including misjoinder and lack of personal jurisdiction. This motion is made in accordance with Rule 60(B), and the case law spawned thereby.

REQUEST FOR HEARING

Defendant hereby requests a hearing be scheduled on this Motion to Set Aside Default Judgment.

DATED this 29th day of February, 2008.

LAW OFFICES OF STEVEN R. BANGERTER



William E. Frazier
Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

Tab 3

FILED

FEB 29 2008

**FIFTH DISTRICT COURT
WASHINGTON COUNTY**

Steven R. Bangerter (State Bar No. 10051)
William E. Frazier (State Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 S. River Rd., Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

Attorney for Defendant,
WHEELER RV LAS VEGAS, LLC

**IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH**

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

WILLIAM JUDSON and DONNA JUDSON,
husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a Nevada
foreign limited liability company, dba
WHEELER'S LAS VEGAS RV,

Defendant.

**AFFIDAVIT OF SHARON NELSON IN
SUPPORT OF DEFENDANT'S MOTION
TO SET ASIDE DEFAULT PURSUANT
TO RULE 60(B) OF THE UTAH RULES
OF CIVIL PROCEDURE**

Civil No.: 070501867

Judge: Eric A. Ludlow

I, SHARON NELSON, DECLARE AS FOLLOWS:

1. I am an attorney in good standing in the State of Nevada. I am general counsel for
WHEELER RV LAS VEGAS, LLC in Nevada.
2. I have personal knowledge of the contents of this affidavit, and if called as a witness,
could testify competently thereto.

- 1 3. It is my understanding that the subject complaint was served upon WHEELER RV LAS
2 VEGAS, LLC sometime in late 2007.
- 3 4. Sometime in the fall of 2007, I contacted Plaintiffs' counsel to inform him that the
4 company he sued was not the company from which his clients purchased their
5 recreational vehicle, explaining that the dealership had changed ownership.
- 6 5. Based upon our conversation, certain documentation was requested by Plaintiffs' counsel,
7 which I provided. During the exchange of documentation, it was understood that
8 WHEELER RV LAS VEGAS, LLC would be given an open extension to answer.
- 9 6. Despite the fact that the amount of money involved in the exchange between the prior
10 dealership group (from which Plaintiffs purchased their recreational vehicle) and the new
11 ownership group (Defendants) is wholly irrelevant to this proceeding, Plaintiffs' counsel
12 demanded this information, and refused to sign a confidentiality agreement to cover any
13 unredacted portions of documents pertaining to amounts paid for the dealership.
- 14 7. Despite the fact that I continued to speak with Plaintiffs' counsel regarding the confusion
15 of identities of the proper Defendant, Plaintiffs' counsel mailed an Application for Entry
16 of Default against WHEELER RV LAS VEGAS, LLC.
- 17 8. I did not receive the Application for Entry of Default until approximately December 5,
18 2007, due to an intervening weekend and out-of-state mailing.
- 19 9. Immediately upon my receipt of the Application for Entry of Default, I endeavored to
20 retain Utah counsel, eventually locating the Law Offices of Steven R. Bangerter.
- 21 10. Unfortunately, I learned that Default was entered against WHEELER RV LAS VEGAS,
22 LLC in the short period of time between the Application for Entry of Default Judgment
23 and my retention of the Law Offices of Steven R. Bangerter.
- 24 25
26
27
28

1 11. The evidence in this matter will show that the present owners of WHEELER RV LAS
2 VEGAS, LLC did not acquire liabilities such as the claim of Plaintiffs, and that the
3 proper Defendants are the prior owners of the dealership.

4 12. The Default entered against WHEELER RV LAS VEGAS was surprising, given the
5 ongoing nature of conversations I had with Plaintiff's counsel regarding the issue of
6 joinder of proper parties.
7

8 13. I believed that the issue would be resolved short of litigation due to the fact that Plaintiffs
9 purchased their recreational vehicle in 2002, and the sale of the dealership occurred at the
10 end of 2004.

11 14. Default was entered against WHEELER RV LAS VEGAS as a result of a
12 misunderstanding between myself and opposing counsel, inadvertence, mistake, and/or
13 surprise.
14

15 15. I have been advised by Utah counsel that valid legal defenses exist; namely, problems
16 related to the joinder of the proper Defendant. It is anticipated that this deficit will be
17 addressed through a 12(b) Motion to Dismiss.
18

19 16. I am also advised that there are significant personal jurisdictional issues as well; namely,
20 Plaintiffs have not demonstrated with sufficient particularity the basis for personal
21 jurisdiction. Defendant operates its business in Nevada, while Plaintiffs reside in Utah.
22 Defendant does not purposely avail itself to the benefits and laws of the state of Utah. As
23 such, a 12(b) Motion to Dismiss on this subject is anticipated in the event that the default
24 is set aside.
25

26 17. I sincerely apologize to the court for misunderstanding the intent of Plaintiffs' counsel. I
27 acted as quickly as possible upon receipt of notification that Plaintiffs' counsel intended
28

1 to seek a Default Judgment. Due to delays with the mail, and the nature of out-of-state
2 mail mailed from St. George, Utah, by the time I received the Application for Entry of
3 Default Judgment and retained counsel, the Judgment was entered.

4
5 Dated: 2/28/08

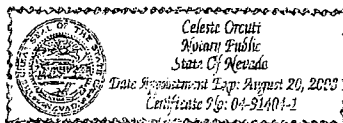
Signed: 

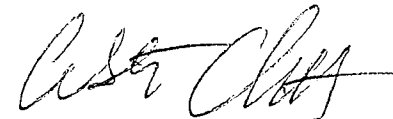
SHARON NELSON

7
8 State of Nevada

9 County of Clark

10
11
12 Sharon Nelson, appeared before me this 28th day of February, 2008, and proved
13 to me her identity in the form of a Driver's License. After being sworn and while under oath,
14 Sharon Nelson stated that she had read this document, understood the contents, and that the contents
15 were true of her own personal knowledge. Sharon Nelson then signed this document in my
16 presence.
17



22 

Notary Public

Tab 4

Steven R. Bangerter (State Bar No. 10051)
William E. Frazier (State Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 S. River Rd., Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

FILED

FEB 29 2008

**FIFTH DISTRICT COURT
WASHINGTON COUNTY**

Attorney for Defendant,
WHEELER RV LAS VEGAS, LLC

**FIFTH DISTRICT COURT
WASHINGTON COUNTY**

**IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH**

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

WILLIAM JUDSON and DONNA JUDSON,
husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a Nevada
foreign limited liability company, dba
WHEELER'S LAS VEGAS RV,

Defendant.

**AFFIDAVIT OF WILLIAM E. FRAZIER
IN SUPPORT OF DEFENDANT'S
MOTION TO SET ASIDE DEFAULT
PURSUANT TO RULE 60(B) OF THE
UTAH RULES OF CIVIL PROCEDURE**

Civil No.: 070501867

Judge: Eric A. Ludlow

I, WILLIAM E. FRAZIER, DECLARE AS FOLLOWS:

1. I am an attorney in good standing in the State of Utah. I was retained in mid-December 2007 to represent WHEELER RV LAS VEGAS, LLC.
2. I have personal knowledge of the contents of this affidavit, and if called as a witness, could testify competently thereto.

- 1 3. After I was retained, I contacted Plaintiffs' counsel. After some delay in connecting with
2 him, I learned in January 2008 that he had in fact secured a default judgment against
3 Defendant.
- 4 4. I discussed the possibility of setting aside the default judgment via stipulation due to the
5 apparent misjoinder of parties, explaining the nature of transfers between the prior owner
6 of WHEELER RV LAS VEGAS and the new owners.
- 7 5. Plaintiffs' counsel indicated that he required unredacted documents demonstrating a non-
8 transfer of liability, including all financial details of the transfer.
- 9 6. During my conversation with Plaintiffs' counsel, he indicated that he did not want to sign
10 the confidentiality agreement originally proposed by Attorney Sharon Nelson to keep the
11 financial details of the transaction confidential.
- 12 7. I contacted the office of Plaintiffs' counsel again on February 27, 2008, offering to
13 provide a redacted agreement regarding the non-transfer of liability and proceeding to set
14 aside this default by stipulation. I have received no response to my call.
- 15 8. A review of the file indicates that substantial valid legal defenses exist, including
16 misjoinder and lack of personal jurisdiction, among others.

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

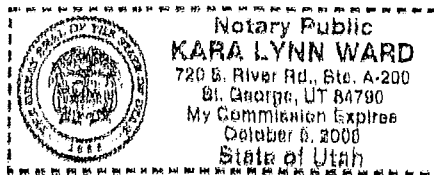
1 9. Based upon my review of the file and correspondence, it appears that the timing of the
2 events of this matter, and the discussions between Plaintiffs' Nevada counsel, as well as
3 delays in the receipt of the Application for Entry of Default Judgment, resulted in a
4 Default Judgment that was the result of inadvertence, mistake, surprise, and excusable
5 neglect.
6

7
8 Dated: 2/28/08 Signed: W.E. Frazier
9 WILLIAM E. FRAZIER

10 State of UTAH

11 County of ~~Utah~~ WASHINGTON
12

13
14 William E. Frazier, appeared before me this 28 day of February, 2008, and
15 proved to me his identity in the form of a UT DL. After being sworn and while under
16 oath, William E. Frazier stated that ~~he~~ had read this document, understood the contents, and that the
17 contents were true of his own personal knowledge. William E. Frazier then signed this document in
18 my presence.
19
20



25
26
27
28

Kara Lynn Ward
Notary Public

Tab 5

FILED
FIFTH DISTRICT COURT
2008 JUN 25 PM 3:04

FILED
FIFTH DISTRICT COURT
2008 JUN 13 PM 4:42

GARY G. KUHLMANN & ASSOCIATES, PC
Gary G. Kuhlmann (#4994)
Attorney for Petitioner
107 South 1470 East, Suite 105
P.O. Box 910387
St. George, Utah 84791-0387
Telephone: (435) 656-6156

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs,

v.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant.

PLAINTIFFS' ~~PROPOSED~~ FINDINGS,
CONCLUSIONS AND ORDER

Civil No. 070501867

Judge Eric A. Ludlow

The plaintiffs hereby submit their proposed Findings of Fact, Conclusions of Law and Order regarding the defendant's Motion to Set Aside Default Judgment and respectfully request that the Court adopt such findings, conclusions and order.

PROPOSED FINDINGS, CONCLUSIONS AND ORDER

This matter came before the Court for hearing on May 15, 2008, on defendant's Motion to Set Aside Default Judgment. The Court reviewed the motion, the opposition thereto, the affidavits supporting the motion and opposition, and the file herein. The Court also heard and

considered the arguments of counsel at the hearing on May 15, 2008. Based thereon, the Court now makes the following:

FINDINGS OF FACT

1. A Complaint in the above-captioned matter was filed on August 16, 2007, and was served upon the defendant on August 30, 2007.
2. The Complaint was served upon the defendant on August 20, 2007.
3. During September, 2007, plaintiffs' counsel was contacted by Sharon Nelson, attorney for the defendant. Ms. Nelson requested an extension of time to answer the Complaint.
4. During such conversation, Ms. Nelson informed plaintiffs' counsel that the dealership at issue had changed ownership and that the defendant was not responsible for the plaintiffs' claims in this case.
5. Plaintiffs' counsel agreed to grant Ms. Nelson an extension to allow her a short time to provide plaintiffs' counsel with evidence that the defendant was not the proper party in this case.
6. After not hearing from or receiving information from Ms. Nelson for some time, plaintiffs' counsel's office contacted Ms. Nelson's office by phone on October 15, 2007, and demanded that the requested information be provided or an Answer filed.
7. On October 30, 2007, plaintiffs' counsel received a fax from Ms. Nelson containing only a Bill of Sale which was apparently part of a larger contract.

8. On that same date, plaintiffs' counsel's office responded to Ms. Nelson's fax and informed her that to evaluate the matter, plaintiff's counsel would need to receive the entire agreement and other documents related to the alleged sale of the dealership.

9. On November 1, 2007, plaintiffs' counsel received a second fax from Ms. Nelson requiring that plaintiffs' counsel sign a confidentiality agreement before any further documents would be provided.

10. Plaintiffs' counsel refused to sign the confidentiality agreement since it was the defendant that was requesting that the defendant be dismissed from the case and because to do so could prejudice the plaintiff in using the information in the purchase documents in this case.

11. After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, plaintiffs' counsel advised Ms. Nelson that plaintiffs would be seeking the entry of default and default judgment.

12. An Application for Entry of Default, and Motion for Entry of Default Judgment were filed with the court on November 27, 2007.

13. A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007.

14. Despite having been advised that the plaintiffs would be seeking a default judgment and being provided with a copy of the Application for Entry of Default, the defendant's attorney took no action to prevent the entry of default.

15. On December 19, 2007, plaintiffs' counsel received a phone call from William Frazier, the new attorney for the defendant. Mr. Frazier asked plaintiffs' counsel if he would be

willing to stipulate to set aside the Default Judgment based upon his assertion that his client had purchased the business after the plaintiff's purchase of the motorhome at issue.

16. While plaintiffs' counsel refused to simply stipulate to set aside the Default Judgment without some additional evidence, plaintiffs' counsel informed Mr. Frazier of plaintiffs' counsel's continuing willingness to review any documents he would like to provide.

17. At the end of the conversation, Mr. Frazier informed plaintiffs' counsel that he would be obtaining, and would provide plaintiffs' counsel with, documentation to show that Mr. Frazier's client was not the proper defendant in this matter.

18. Despite being told again that plaintiffs' counsel would be provided certain documents by the defendant, plaintiffs' counsel received no further documents and had no further contact from the defendant's attorney until February 27, 2008.

19. On February 27, 2008, plaintiffs' counsel received a voice-mail message from defendant's counsel simply indicating that defendant would be filing a motion seeking to set aside the Default Judgment in this case.

20. The defendant's Motion to Set Aside Default Judgment was filed with the Court on February 29, 2008, four days shy of three months from the date of entry of the Default Judgment.

21. The defendant was afforded over three months to provide the plaintiffs with the documents requested by plaintiffs or to file an Answer in this case.

22. The only statements provided to the Court to demonstrate a meritorious defense to this action by the defendant are the conclusory statements of defendant's counsel that:

a. "The evidence will show that Plaintiffs have sued the wrong party." *See* Defendant's Memorandum of Points and Authorities in Support of Defendants' Motion to Set Aside Default Judgment at p. 3.

b. Defendants (sic) did not own the subject dealership when the Plaintiffs purchased the recreational vehicle." *Id.* at p. 4.

c. Defendant will be able to demonstrate that it is not that proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable. . . ." *Id.*

From the foregoing, the Court now makes the following:

CONCLUSIONS OF LAW

1. To be relieved from the Default Judgment, defendant must show: (a) that the motion for relief from the judgment was filed within three months of the entry of the judgment; (b) that mistake, inadvertence, surprise or excusable neglect were present; and (c) that the defendant has a meritorious defense to the action. *See* URCP 60(b).

2. "Excusable neglect" is "the existence of 'due diligence' by a reasonably prudent person under similar circumstances." *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 27.

3. To show excusable neglect "the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control. . . . [A] party must provide the court with specific details that demonstrate due diligence in spite of uncontrollable circumstances" *Id.*

4. "A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered.

Defendant must therefore do more than merely dispute or deny the truth of plaintiff's allegations; he must set forth specific facts showing meritorious defenses to those allegations in order to have the default judgment set aside." *State vs. Musselman*, 667 P.2d 1053, 1057 - 1058 (Utah 1983).

5. Defendant has asserted no basis for finding the existence of mistake or inadvertence in this case but rather relies on the claims of excusable neglect and surprise.

6. Defendant did not exercise due diligence in this matter since an answer could have been filed by the defendant at anytime during the more than three months between that date the Complaint was served and the date the default was entered. Nothing prevented the defendant from filing such Answer and there were no circumstances outside the control of the defendant which rendered the defendant unable to file an Answer. An Answer was not filed simply because the defendant chose not to do so. Based thereon, the defendant has failed to show the existence of excusable neglect in this case.

7. The defendant has further failed to establish the existence of surprise. Defendant's counsel was told that only a short time would be given to provide the documents requested by plaintiffs' counsel and defendant failed to provide such documents. Further, the defendant was informed that the plaintiff was seeking a default and a copy of the Application for Entry of Default was provided to defendant's counsel. Nevertheless, no action was taken by defendant to prevent or overcome a default being entered until almost three months after the default judgment was entered.

8. The defendant has failed to provide the Court with any "specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one


entered." Thus, even if the Court were to find the existence of a mistake, inadvertence, excusable neglect or surprise, the defendant's motion is deficient and should be denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following:

ORDER

1. The defendant's Motion to Set Aside Default Judgment is denied.
2. The plaintiffs are awarded their costs and reasonable attorney fees incurred in responding to the defendant's motion, with such amount to be established by affidavit of plaintiffs' counsel.

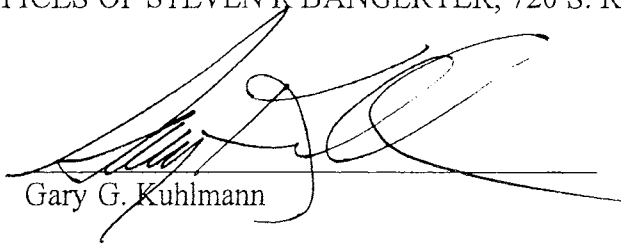
Dated this 24 day of June, 2008.



Honorable Eric A. Ludlow
District Court Judge

Certificate of Service

I hereby certify that on this 13th day of June, 2008, I mailed a true and correct copy of the foregoing to: William E. Frazier, LAW OFFICES OF STEVEN R BANGERTE, 720 S. River Rd., Suite A-200, St. George, UT 84790.



Gary G. Kuhlmann

Tab 6

FILED
FIFTH DISTRICT COURT
2008 JUL 25 AM 10:50
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

BY _____

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife
(RESPONDENTS),

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV
(APPELLANT),

Defendant.

DEFENDANT/APPELLANT'S
STATEMENT OF EVIDENCE
PURSUANT TO UTAH RULE OF
APPELLATE PROCEDURE 11(G)

Civil No.: 070501867

Judge: Eric A. Ludlow

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangerter, provides the following Statement of Evidence, pursuant to Utah Rule of Appellate Procedure 11(g).

In addition to the Complaint filed by Plaintiffs, the Motion to Set Aside Default filed by Defendants, and opposition papers related thereto, there were competing Proposed Orders filed after the conclusion of oral argument on Defendant's Motion to Set Aside Default. Based upon conversations with court personnel, it was discovered that Defendant's Proposed Order was discarded by the court when it opted to sign Plaintiffs' Proposed Order. As such, a true and correct copy of Defendant's Proposed Order is attached hereto as "Exhibit A."

The oral argument on Defendant's Motion to Set Aside Default under Utah Rule of Civil Procedure 60 *et seq* came for hearing on May 15, 2008. There exists no transcript of the oral argument, as a court reporter was not present. During the hearing, counsel for Defendant asserted that the Default Judgment was procured by Plaintiff via mistake, surprise, inadvertence, or excusable neglect; namely, due to the rescission of Plaintiffs' counsel's agreement to provide Defendant's prior counsel with an open extension to answer the complaint without timely notifying Defendant's prior counsel of his intention. Plaintiffs' counsel did not fax, call, or email Defendant's former counsel, but rather, mailed documents seeking entry of default with knowledge that the mailing was destined for an out-of-state address with an intervening weekend.

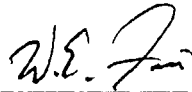
Further, it was argued that the trial court had no jurisdiction over Defendant. As briefed, Defendant has no meaningful or significant contacts with the state of Utah, and does not purposefully avail itself to the benefits of the laws of the state of Utah. Defendant does not advertise or otherwise maintain a presence in the state of Utah.

Finally, Defendant argued that Plaintiffs' Default Judgment against Defendant should be set aside under traditional principles of equity and estoppel. Plaintiffs should have been estopped from the entry of a default judgment due to the agreement between Plaintiffs' counsel and former counsel for the defense that an open-extension was granted. Such agreement was not rescinded in a manner that gave Defendant reasonable time to file a responsive pleading to the complaint. Additionally, the state of Utah has a long-standing preference to have matters adjudicated on the merits, as opposed to via default; especially in light of the fact that the trial court had no personal jurisdiction over Defendant, and Defendant raised this issue in its first court submission.

The court took the matter under submission and requested proposed orders from both parties. Defendant's proposed order is attached hereto as Exhibit "A." Plaintiff's proposed order, which was eventually signed by the court, is attached hereto as Exhibit "B."

DATED: July 25, 2008

Law Offices of Steven R. Bangerter, PC



By: WILLIAM E. FRAZIER, ESQ.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **DEFENDANT/APPELLANT'S STATEMENT OF EVIDENCE PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 11(G)**

was mailed, postage prepaid on July 25, 2008 to the following:

Gary G. Kuhlmann
GARY G. KUHLMANN & ASSOCIATES, PC
113 East 200 North, Suite 1
P.O. Box 910387
St. George, UT 84791


Abbie Thorpe

Exhibit A

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant.

[PROPOSED] ORDER

Civil No.: 070501867

Judge: Eric A. Ludlow

Defendant, WHEELER RV LAS VEGAS, LLC's Motion to Set Aside Judgment, came
for hearing on May 15, 2008 before the Honorable Eric A. Ludlow. After consideration of the
pleadings, court file, and oral arguments thereon, the Court rules as follows:

///

///

///

Defendant's Motion to Set Aside Default is **GRANTED**.

Defendant demonstrated, through the Affidavit of Sharon Nelson, that this Default was taken as a result of surprise, mistake, and inadvertence. Based upon the grant of an open extension given by Plaintiffs' counsel, and the ongoing communication between Defendant Wheelers by and through their representative Sharon Nelson and Plaintiffs' counsel, there was no rescission of the open extension to answer the complaint. The first notice that Defendant had of such rescission, by Plaintiffs' mailed Application for Entry of Default, was not received until December 5, 2007 due to an intervening weekend and out-of-state mailing. Plaintiffs' counsel could have faxed or telephoned Defendants to rescind his open extension to answer, but failed to do so. As such, by the time that Defendants learned of the rescission of the open extension to answer, a Default Judgment had already been taken.

Likewise, Defendant's Motion was made in accordance with Rule 60(B) of the Utah Rules of Civil Procedure, in that the Motion was filed less than three months after the Default Judgment was entered. Further, Defendant has provided facts demonstrating that legal and valid defenses exist; namely, lack of personal jurisdiction and misjoinder of parties.

"The rule that courts will incline towards granting relief to a party who has not had the opportunity to present his case, is ordinarily applied at the trial court level. *State of Utah v. D. John Musselman and Linda Ann Coram* (1983) 667 P.2d 1055 and Hn1; 1983 Utah LEXIS 1086. "Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless it appears that to do so would result in substantial

injustice to the adverse party.” *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor* (1975), 544 P.2d 876.

Here, Plaintiffs have not demonstrated that substantial injustice would result in Setting Aside the Default Judgment. Plaintiffs have presented no evidence regarding substantial prejudice would result in the event that this Motion were granted. Plaintiffs may amend their complaint to add parties should they so desire.

Defendant must file an Answer or other responsive pleading on or before _____.

DATED this ____ day of _____, 2008.

Honorable Eric A. Ludlow

Exhibit B

FILED
FIFTH DISTRICT COURT
2008 JUN 25 PM 3:04

FILED
FIFTH DISTRICT COURT
2008 JUN 13 PM 4:42
WASHINGTON COUNTY

GARY G. KUHLMANN & ASSOCIATES, PC
Gary G. Kuhlmann (#4994)
Attorney for Petitioner
107 South 1470 East, Suite 105
P.O. Box 910387
St. George, Utah 84791-0387
Telephone: (435) 656-6156

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA)	
JUDSON, husband and wife,)	
)	PLAINTIFFS' PROPOSED FINDINGS,
Plaintiffs,)	CONCLUSIONS AND ORDER
)	
v.)	
)	
WHEELER RV LAS VEGAS, LLC, a)	Civil No. 070501867
Nevada foreign limited liability company,)	
dba WHEELER'S LAS VEGAS RV,)	
)	
Defendant.)	Judge Eric A. Ludlow
)	

The plaintiffs hereby submit their proposed Findings of Fact, Conclusions of Law and Order regarding the defendant's Motion to Set Aside Default Judgment and respectfully request that the Court adopt such findings, conclusions and order.

PROPOSED FINDINGS, CONCLUSIONS AND ORDER

This matter came before the Court for hearing on May 15, 2008, on defendant's Motion to Set Aside Default Judgment. The Court reviewed the motion, the opposition thereto, the affidavits supporting the motion and opposition, and the file herein. The Court also heard and

considered the arguments of counsel at the hearing on May 15, 2008. Based thereon, the Court now makes the following:

FINDINGS OF FACT

1. A Complaint in the above-captioned matter was filed on August 16, 2007, and was served upon the defendant on August 30, 2007.
2. The Complaint was served upon the defendant on August 20, 2007.
3. During September, 2007, plaintiffs' counsel was contacted by Sharon Nelson, attorney for the defendant. Ms. Nelson requested an extension of time to answer the Complaint.
4. During such conversation, Ms. Nelson informed plaintiffs' counsel that the dealership at issue had changed ownership and that the defendant was not responsible for the plaintiffs' claims in this case.
5. Plaintiffs' counsel agreed to grant Ms. Nelson an extension to allow her a short time to provide plaintiffs' counsel with evidence that the defendant was not the proper party in this case.
6. After not hearing from or receiving information from Ms. Nelson for some time, plaintiffs' counsel's office contacted Ms. Nelson's office by phone on October 15, 2007, and demanded that the requested information be provided or an Answer filed.
7. On October 30, 2007, plaintiffs' counsel received a fax from Ms. Nelson containing only a Bill of Sale which was apparently part of a larger contract.

8. On that same date, plaintiffs' counsel's office responded to Ms. Nelson's fax and informed her that to evaluate the matter, plaintiff's counsel would need to receive the entire agreement and other documents related to the alleged sale of the dealership.

9. On November 1, 2007, plaintiffs' counsel received a second fax from Ms. Nelson requiring that plaintiffs' counsel sign a confidentiality agreement before any further documents would be provided.

10. Plaintiffs' counsel refused to sign the confidentiality agreement since it was the defendant that was requesting that the defendant be dismissed from the case and because to do so could prejudice the plaintiff in using the information in the purchase documents in this case.

11. After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, plaintiffs' counsel advised Ms. Nelson that plaintiffs would be seeking the entry of default and default judgment.

12. An Application for Entry of Default, and Motion for Entry of Default Judgment were filed with the court on November 27, 2007.

13. A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007.

14. Despite having been advised that the plaintiffs would be seeking a default judgment and being provided with a copy of the Application for Entry of Default, the defendant's attorney took no action to prevent the entry of default.

15. On December 19, 2007, plaintiffs' counsel received a phone call from William Frazier, the new attorney for the defendant. Mr. Frazier asked plaintiffs' counsel if he would be

willing to stipulate to set aside the Default Judgment based upon his assertion that his client had purchased the business after the plaintiff's purchase of the motorhome at issue.

16. While plaintiffs' counsel refused to simply stipulate to set aside the Default Judgment without some additional evidence, plaintiffs' counsel informed Mr. Frazier of plaintiffs' counsel's continuing willingness to review any documents he would like to provide.

17. At the end of the conversation, Mr. Frazier informed plaintiffs' counsel that he would be obtaining, and would provide plaintiffs' counsel with, documentation to show that Mr. Frazier's client was not the proper defendant in this matter.

18. Despite being told again that plaintiffs' counsel would be provided certain documents by the defendant, plaintiffs' counsel received no further documents and had no further contact from the defendant's attorney until February 27, 2008.

19. On February 27, 2008, plaintiffs' counsel received a voice-mail message from defendant's counsel simply indicating that defendant would be filing a motion seeking to set aside the Default Judgment in this case.

20. The defendant's Motion to Set Aside Default Judgment was filed with the Court on February 29, 2008, four days shy of three months from the date of entry of the Default Judgment.

21. The defendant was afforded over three months to provide the plaintiffs with the documents requested by plaintiffs or to file an Answer in this case.

22. The only statements provided to the Court to demonstrate a meritorious defense to this action by the defendant are the conclusory statements of defendant's counsel that:

a. “The evidence will show that Plaintiffs have sued the wrong party.” *See* Defendant’s Memorandum of Points and Authorities in Support of Defendants’ Motion to Set Aside Default Judgment at p. 3.

b. Defendants (sic) did not own the subject dealership when the Plaintiffs purchased the recreational vehicle.” *Id.* at p. 4.

c. Defendant will be able to demonstrate that it is not that proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable. . . .” *Id.*

From the foregoing, the Court now makes the following:

CONCLUSIONS OF LAW

1. To be relieved from the Default Judgment, defendant must show: (a) that the motion for relief from the judgment was filed within three months of the entry of the judgment; (b) that mistake, inadvertence, surprise or excusable neglect were present; and (c) that the defendant has a meritorious defense to the action. *See* URCP 60(b).

2. “Excusable neglect” is “the existence of ‘due diligence’ by a reasonably prudent person under similar circumstances.” *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 27.

3. To show excusable neglect “the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control. . . . [A] party must provide the court with specific details that demonstrate due diligence in spite of uncontrollable circumstances” *Id.*

4. “A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered.

Defendant must therefore do more than merely dispute or deny the truth of plaintiff's allegations; he must set forth specific facts showing meritorious defenses to those allegations in order to have the default judgment set aside." *State vs. Musselman*, 667 P.2d 1053, 1057 - 1058 (Utah 1983).

5. Defendant has asserted no basis for finding the existence of mistake or inadvertence in this case but rather relies on the claims of excusable neglect and surprise.

6. Defendant did not exercise due diligence in this matter since an answer could have been filed by the defendant at anytime during the more than three months between that date the Complaint was served and the date the default was entered. Nothing prevented the defendant from filing such Answer and there were no circumstances outside the control of the defendant which rendered the defendant unable to file an Answer. An Answer was not filed simply because the defendant chose not to do so. Based thereon, the defendant has failed to show the existence of excusable neglect in this case.

7. The defendant has further failed to establish the existence of surprise. Defendant's counsel was told that only a short time would be given to provide the documents requested by plaintiffs' counsel and defendant failed to provide such documents. Further, the defendant was informed that the plaintiff was seeking a default and a copy of the Application for Entry of Default was provided to defendant's counsel. Nevertheless, no action was taken by defendant to prevent or overcome a default being entered until almost three months after the default judgment was entered.

8. The defendant has failed to provide the Court with any "specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one

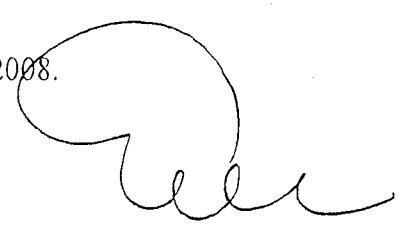
entered." Thus, even if the Court were to find the existence of a mistake, inadvertence, excusable neglect or surprise, the defendant's motion is deficient and should be denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following:

ORDER

1. The defendant's Motion to Set Aside Default Judgment is denied.
2. The plaintiffs are awarded their costs and reasonable attorney fees incurred in responding to the defendant's motion, with such amount to be established by affidavit of plaintiffs' counsel.

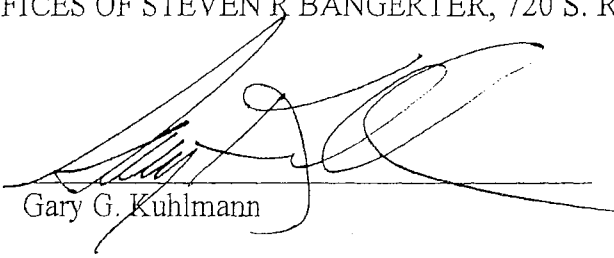
Dated this 24 day of June, 2008.



Honorable Eric A. Ludlow
District Court Judge

Certificate of Service

I hereby certify that on this 13th day of June, 2008, I mailed a true and correct copy of the foregoing to: William E. Frazier, LAW OFFICES OF STEVEN R BANGERTER, 720 S. River Rd., Suite A-200, St. George, UT 84790.



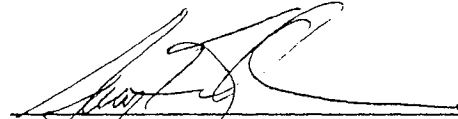
Gary G. Kuhlmann

GARY G. KUHLMANN & ASSOCIATES, PC
Gary G. Kuhlmann (#4994)
Attorney for Petitioner
107 South 1470 East, Suite 105
P.O. Box 910387
St. George, Utah 84791-0387
Telephone: (435) 656-6156

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA)	CERTIFICATE OF SERVICE
JUDSON, husband and wife,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 070501867
)	
WHEELER RV LAS VEGAS, LLC, a)	Judge Eric A Ludlow
Nevada foreign limited liability company,)	
dba WHEELER'S LAS VEGAS RV,)	
)	
Defendants.)	

The plaintiffs hereby certify that a signed copy of Plaintiffs' Findings, Conclusions and Order was mailed first class, postage prepaid, this 1st day of July, 2008, to: William E. Frazier, Law Offices of Steven R. Bangerter, 720 S. River Road, Suite A-200, St. George, UT 84790.



Gary G. Kuhlmann
Attorney for Plaintiffs

Tab 7

FILED
FIFTH DISTRICT COURT

2008 JUL 25 AM 10: 50

WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

BY _____

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife
(RESPONDENTS),

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV
(APPELLANT),

Defendant.

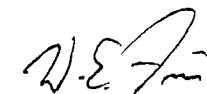
DEFENDANT/APPELLANT'S
CERTIFICATE OF NON-REQUEST OF
TRANSCRIPTS OR PROCEEDINGS
PURSUANT TO UTAH RULE OF
APPELLATE PROCEDURE 11(E)(1)

Civil No.: 070501867

Judge: Eric A. Ludlow

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangarter, does not request any transcripts of proceedings, as it is believed that no such transcripts exist.

DATED: July 25, 2008 Law Offices of Steven R. Bangarter, PC

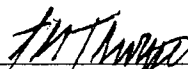


By: WILLIAM E. FRAZIER, ESQ.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing DEFENDANT/APPELLANT'S CERTIFICATE OF NON-REQUEST OF TRANSCRIPTS OR PROCEEDINGS PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 11(E)(1) was mailed, postage prepaid on July 25, 2008 to the following:

Gary G. Kuhlmann
GARY G. KUHLMANN & ASSOCIATES, PC
113 East 200 North, Suite 1
P.O. Box 910387
St. George, UT 84791



Abbie Thorpe

Tab 8

FILED
DISTRICT COURT
2022 OCT -2 PM 4:25
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

BY _____

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

COPY

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife
(RESPONDENTS),

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV
(APPELLANT),

Defendant.

REQUEST FOR STAY OF DEFAULT
JUDGMENT AND DETERMINATION
OF AMOUNT PAYABLE TO COURT
FOR SECURITY PURPOSES IN LIEU
OF SUPERSEDEAS BOND PURSUANT
TO URCP 62, OR IN THE
ALTERNATIVE, REQUEST FOR
SUPERSEDEAS BOND, AND REQUEST
FOR HEARING

Civil No.: 070501867

Judge: Eric A. Ludlow

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangerter, will move the Court, pursuant to Utah Rule of Civil Procedure 62 (i)(2) to permit the deposit of money in court in lieu of giving a Supersedeas Bond, or in the alternative, the filing of a Supersedeas Bond to stay attempts at executing upon the Default Judgment obtained by Plaintiffs in this matter.

Defendant/Appellant continues to assert that this Court has no jurisdiction over it, and therefore, nothing in this filing should be construed as assent to the exercise of *in personam* jurisdiction over Defendant.

I.

THE COURT HAS AUTHORITY TO PERMIT THE DEPOSIT OF A SUM OF MONEY WITH THE COURT IN LIEU OF A SUPERSEDEAS BOND PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 62(i)(2)

Utah Rule of Civil Procedure 62(i)(2) sets forth “Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a Supersedeas Bond under Subdivision (d).” URCP 62(i)(2). An appellant may, “by giving a Supersedeas Bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the Notice to Appeal. The stay is effective when the Supersedeas Bond is approved by the court.” URCP 62(d).

Here, Defendant/Appellant Wheeler RV Las Vegas, LLC filed a timely Notice of Appeal, and all other documents as set forth by the Utah Rules of Appellate Procedure. Plaintiffs have attempted to execute on the Default Judgment during the pendency of the Appeal, thus necessitating this Motion.

WHEELER RV LAS VEGAS, LLC is owned by Freedom Roads, LLC. WHEELER RV LAS VEGAS, LLC, acquired the assets of L.V.R.V., Inc., a Nevada corporation years after Plaintiffs acquired the recreational vehicle that is the subject of this litigation from L.V.R.V.,

Inc. Because the relevant financial inquiry for this Motion pertains to the present Defendant/Appellant, all assertions relate to Defendant/Appellant.

Rule 62 (j)(1) states, "...a court shall set the Supersedeas Bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the Appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including: (a) the judgment debtor's ability to pay the judgment; (d) the judgment debtor's likelihood of success on appeal. URCP 62(j)(1), *et seq.*

The presumptive amount of Supersedeas Bonds is set as the amount of compensatory damages plus costs and attorney fees plus three years of interest at the applicable rate. URCP Rule 62(j)(2)(a). As referenced earlier, the Court may, upon good cause shown, allow a deposit in lieu of a Supersedeas Bond. URCP 62(i)(2).

It is in the interests of both parties to preserve as much capital as possible to pay toward any judgment that may be affirmed by the Utah Appellate Courts. Here, if Defendant were required to post a bond, funds would be necessary to pay an appropriate surety. Further, Wheeler RV Las Vegas, LLC, as demonstrated in the Affidavit of Brent Moody filed herewith, is a fiscally solvent limited liability company capable of paying any judgment that may be eventually affirmed by an appeals court, with most recent financial reports revealing assets exceeding liabilities by over \$2,000,000 in the most recent financial report. Because Wheeler RV Las Vegas, LLC is adequately solvent to pay any eventual judgment, and has so demonstrated, it would be of little value for the Court to require a six-figure deposit of funds that would remain stagnant.

II.

PRAYER

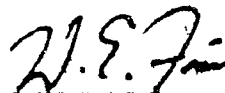
Defendant/Appellant respectfully requests an amount equal to ten (10) percent of all amounts set forth in compensatory damages and attorney fees obtained by Plaintiff to date, which total \$151,931.61. As such, Defendant/Appellant requests to file with the court the sum of \$15,193.16 for security, in lieu of a Supersedeas Bond.

In the alternative, appellant requests that an amount for a Supersedeas Bond be set in an amount below the presumptive amount in the interests of preserving capital for potential settlement negotiations during the pendency of the Appeal.

If the court is unable to grant any request contained herein, appellant requests that an amount be set for a Supersedeas Bond.

Respectfully Submitted,

DATED: October 2, 2008 Law Offices of Steven R. Bangerter, PC



By: WILLIAM E. FRAZIER, ESQ.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal was mailed,
postage prepaid on October 2, 2008 to the following:

Gary G. Kuhlmann
GARY G. KUHLMANN & ASSOCIATES, PC
113 East 200 North, Suite 1
P.O. Box 910387
St. George, UT 84791



Abbie Thorpe

Tab 9

STEVEN R. BANGERTER (Utah Bar No. 10051)
WILLIAM E. FRAZIER (Utah Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 South River Road, Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

Attorneys for Defendant,
WHEELER RV LAS VEGAS, LLC

COPY

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY
STATE OF UTAH

WILLIAM JUDSON and DONNA
JUDSON, husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a
Nevada foreign limited liability company,
dba WHEELER'S LAS VEGAS RV,

Defendant.

) [PROPOSED] ORDER GRANTING
DEFENDANT'S REQUEST FOR STAY
OF EXECUTION OF DEFAULT
) JUDGMENT, DETERMINATION OF
AMOUNT PAYABLE FOR SECURITY
PURPOSES IN LIEU OF SUPERSEDEAS
BOND PURSUANT TO URCP 62, OR IN
THE ALTERNATIVE, REQUEST FOR
SUPERSEDEAS BOND

Civil No.: 070501867

Judge: Eric A. Ludlow

Defendant, WHEELER RV LAS VEGAS, LLC's Request for Stay of Execution of
Default Judgment, Determination of Amount Payable for Security Purposes in Lieu of
Supersedeas Bond Pursuant to URCP 62, or in the alternative, Request for Supersedeas Bond
came for review and/or hearing. After consideration of the pleadings, court file, and oral
arguments thereon, and good cause having been shown therefor, the Court rules as follows:

//I

Defendant's Request to Stay Execution of execution of is GRANTED. Defendant, shall within thirty (30) days of this Order deposit/lodge the following with the Court (check one):

\$15,193.16 Payment for Security

Supersedeas Bond in the amount of \$_____

DATED this _____ day of _____, 2008.

Honorable Eric A. Ludlow

Tab 10

FILED
JUDICIAL COURT

2003 OCT -2 PM 4:26

WASHINGTON COUNTY

BY _____

Steven R. Bangerter (State Bar No. 10051)
William E. Frazier (State Bar No. 11447)
LAW OFFICES OF STEVEN R BANGERTER
720 S. River Rd., Suite A-200
St. George, UT 84790
Telephone: (435) 628-7004
Facsimile: (435) 673-1964

Attorney for Defendant,
WHEELER RVLAS VEGAS, LLC

COPY

IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

WILLIAM JUDSON and DONNA JUDSON,
husband and wife,

Plaintiffs,

vs.

WHEELER RVLAS VEGAS, LLC, a Nevada
foreign limited liability company, dba
WHEELER'S LAS VEGAS RV,

Defendant.

AFFIDAVIT OF BRENT MOODY IN
SUPPORT OF DEFENDANT'S REQUEST
FOR STAY OF EXECUTION ON
DEFAULT JUDGMENT AND
DETERMINATION OF AMOUNT
PAYABLE TO COURT FOR SECURITY
PURPOSES IN LIEU OF SUPERSEDEAS
BOND PURSUANT TO URCP 62, OR IN
THE ALTERNATIVE, REQUEST FOR
SUPERSEDIAS BOND

Civil No.: 070501867

Judge: Eric A. Ludlow

I, BRENT MOODY, DECLARE AS FOLLOWS:

1. I am the Executive Vice President of Business Development and General Counsel for
Freedom Roads, LLC, the parent company of Wheeler RV Las Vegas, LLC.

1 2. I have personal knowledge of the contents of this affidavit, and if called as a witness,
2 could testify competently thereto.

3 3. Wheelers RV Las Vegas, LLC acquired the assets of L.V.R.V., Inc., on or around
4 November 29, 2004.

5 4. I have personal knowledge of the financial condition of Wheeler RV Las Vegas, also
6 known as Las Vegas RV, based upon my position within the company and the parameters
7 of my oversight of the dealership.

8 5. For the calendar year ending December 31, 2007, the last year for which there is a
9 complete annual accounting, Las Vegas RV had total assets of \$16,316,650, with total
10 liabilities of \$13,984,514.

11 6. Attached hereto as Exhibit "A" is a true and correct copy of the most recent annual
12 accounting, depicting the figures set forth above.

13 7. I am intimately familiar with the finances of Las Vegas RV, and attest that there are
14 presently no defaults in financial obligations or plans for filing for any type of relief in
15 bankruptcy.

16 8. In the event that Defendant/Appellant is unsuccessful at all levels of available appeals,
17 Las Vegas RV, based on its current financial condition and my personal knowledge
18 thereof, would be able to satisfy the judgment that is the subject of the pending appeal.

19 Dated: 10/2/08

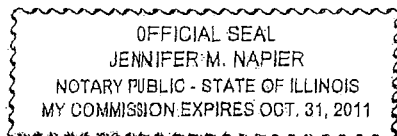
20 Signed: 

21 BRENT MOODY

1 State of Illinois

2 County of LaSalle

3
4
5 Brent Moody, appeared before me this 2nd day of October, 2008, and proved
6 to me his identity in the form of a Driver's License. After being sworn and while under oath,
7 Brent Moody stated that he had read this document, understood the contents, and that the contents
8 were true of his own personal knowledge. Brent Moody then signed this document in my presence.
9
10



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Jennifer M. Napier
Notary Public

Exhibit A

CONTACT		DEALER NAME LAS VEGAS RV		12/31/07 FINAL		PAGE 1	
DEALER		ADDRESS 13175 LAS VEGAS BLVD S.		MONTH		% SALES	
NUMBER		CITY & STATE LAS VEGAS, NV		YEAR-TO-DATE		% SALES	
FROM		BRANCH STORE LAS VEGAS		TOTAL INCOME & EXPENSE		TOTAL INCOME & EXPENSE	
THRU							