

1997

# Larry H. Miller Leasing Group v. Karl E. Jorgenson : Brief of Appellee

Utah Court of Appeals

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Jeffrey W. Shields; Jones Waldo Holbrook & McDonough; Attorney for Plaintiff/Appellee.

John L. McCoy; Attorney for Defendant/Appellant.

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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LARRY H. MILLER LEASING COMPANY,  
a corporation,

Plaintiff / Appellee

vs.

KARL E. JORGENSEN,

Defendant / Appellant

**Appeal No. 970445**

(Civil No. 970000647CV)

Priority No. 15

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**BRIEF OF APPELLEE**

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APPEAL FROM SUMMARY JUDGMENT ORDER OF THE THIRD JUDICIAL DISTRICT  
COURT OF SALT LAKE COUNTY, DIVISION II, STATE OF UTAH,  
THE HONORABLE L. A. DEVER, DISTRICT JUDGE

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John L. McCoy  
Attorney for Defendant/Appellant  
310 South Main Street, Suite 1314  
Salt Lake City, Utah 84101  
Telephone: (801) 355-6400

Jeffrey Weston Shields (USB #2948)  
JONES, WALDO, HOLBROOK &  
MCDONOUGH, P.C.  
Attorney for Plaintiff/Appellee  
1500 Wells Fargo Plaza  
170 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 521-3200

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Appellee/plaintiff Larry H. Miller Leasing Company (“LHM”), by and through its undersigned counsel of record, hereby files this Brief in opposition to the appeal filed by defendant Karl E. Jorgenson (“Jorgenson”) in the above-captioned matter.

### **JURISDICTION**

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

### **STATEMENT OF ISSUES PRESENTED AND STANDARD FOR REVIEW**

This appeal presents the following issue for resolution by this Court:

Whether the trial court erred in entering its “Order Granting Summary Judgment” on August 13, 1997 determining that Jorgenson is liable to LHM, as a matter of law, for a deficiency judgment following the disposition of a repossessed automobile leased by LHM to Jorgenson following Jorgenson's default.

This issue is a legal issue that this Court reviews for correctness without deference to the summary judgment ruling of the trial court. Salt Lake City Corporation v. Cahoon and Maxfield Irrigation Company, 879 P.2d 248, 251 (Utah 1994); Don Houston, M.D., Inc. v. Intermountain Health Care Inc., 933 P.2d 403, 406 (Utah Ct. App. 1997).

### **DETERMINATIVE STATUTORY AUTHORITIES**

The following provisions, statutes, ordinances, rules or regulations are determinative of this appeal or are of central importance to this appeal:

1. Utah Code Ann. §70A-9-504 (reproduced in full text at Addendum A to this Brief);
2. Utah Code Ann. §70A-9-507 (reproduced in full text at Addendum B to this Brief);
3. Utah Rules of Civil Procedure, Rule 56 (reproduced in full text at Addendum C to this Brief).

### **STATEMENT OF THE CASE**

#### 1. NATURE OF THE CASE

Jorgenson's appeal seeks to vacate the Order Granting Summary Judgment entered by the District Court against Jorgenson and in favor of LHM on August 13, 1997 and to remand the case to the District Court for trial on the issue of whether LHM is entitled to a deficiency judgment against Jorgenson resulting from the disposition of a vehicle leased by LHM to Jorgenson following Jorgenson's default on the lease contract and repossession of the vehicle as a result of the default.

#### 2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

After repossession and disposition of an automobile leased by Jorgenson from LHM, LHM commenced suit in the Third Judicial District Court of the State of Utah, Division II, on January 22, 1997 seeking to recover a deficiency in the sum of \$6,160.17. On February 27, 1997, Jorgenson filed his Answer to LHM's Complaint admitting the execution of the lease agreement and denying the remaining allegations of the Complaint. Record on Appeal ("R") at 7-8. Jorgenson's Answer also interposed the following statutory affirmative defenses: that the

default clause of the lease agreement is “unconscionable” in violation of Utah Code Ann. §70A-2a-108; and that LHM’s lease agreement violates the provisions of 15 U.S.C. Sections 1667a, 1666 and 1667(d) and 12 CFR §713.4 *et seq.* R. at 7.

On March 13, 1997, LHM filed its Motion for Summary Judgment, R. at 35-37, Memorandum of Points and Authorities in Support of Motion for Summary Judgment, R. at 18-35, and Affidavit of Michael E. Stewart, R. at 9-17. LHM’s Motion for Summary Judgment and supporting pleadings addressed all of Jorgenson’s statutory affirmative defenses as well as LHM’s right to a deficiency judgment as a matter of law. R. at 18-34.

On April 28, 1997, Jorgenson filed his Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, R. at 43-47, supported by the Affidavit of Gary Giffin. R. at 41-42. Jorgenson’s responsive pleadings abandoned his affirmative defenses premised upon unconscionability (Utah Code Ann. §70A-2a-108) and the federal consumer leasing regulations (15 U.S.C. Sections 1667a, 1666 and 1667(d) and 12 CFR §713.4 *et seq.*), and argued only that LHM’s disposition of the repossessed vehicle by sale through the Utah Auto Auction was not “a commercially reasonable *public* sale pursuant to Utah Code Ann. §70A-9-504.” R. at 43. (Emphasis added).

On June 10, 1997, LHM filed its Reply Memorandum in Support of Plaintiff’s Motion for Summary Judgment. R. at 48-56.

On June 13, 1997, the District Court granted LHM’s motion without hearing and awarded attorneys’ fees subject to submission of an appropriate affidavit by LHM and directed LHM’s counsel to prepare an order and judgment. R. at 60.

On August 6, 1997, LHM filed its Affidavit Concerning Attorneys’ Fees, R. at 61-



67, and submitted its suggested “Order Granting Summary Judgment” to the court. The District Court signed and entered the Order Granting Summary Judgment on August 13, 1997. R. at 68-70.

### **STATEMENT OF FACTS**

1. On April 26, 1994, Jorgenson executed and delivered to LHM that certain “Vehicle Lease Agreement-Closed-End” (“Lease”) under the terms of which Jorgenson leased one 1994 Plymouth Voyager Van (“Vehicle”) for a term of 60 months. R. at 2, 7, 10, and 16-17.

2. The Lease provides that in the event of default, the entire payoff on the Lease as defined in the Lease is due and immediately payable. R. at 17. The Lease also provides that

“the loss of any final disposition [of the Vehicle] shall be the difference between the *wholesale value* as determined by the highest *wholesale* cash offer received by [LHM] and the lease payoff described in item 10 of this agreement, plus any other lease fees, applicable taxes, any monthly lease payments due, insurance premiums due, excess mileage charges, vehicle damage, any early termination fees in paragraph 10, late charges, additional interest due to late payments and any other costs paid by [LHM]. . . .”

R. at 17. (Emphasis added).

3. Jorgenson defaulted under the terms of the Lease and, consequently, the Vehicle was repossessed for LHM by Mark II Recovery Service on November 6, 1996. R. at 12.

4. The Lease had originally been sold by LHM to First Security Bank of Utah on a full recourse basis. Upon default, LHM was compelled to repurchase the Lease at the accelerated payoff balance, which, at the time of repossession, was \$16,955.43. LHM paid that

amount to First Security Bank with a check dated December 2, 1996. R. at 12.

5. LHM then sent Jorgenson a written “Intent to Make Private Sale” notifying him of the intended disposition of the Vehicle. R. at 44.

6. The Vehicle was sold through the Utah Auto Auction on November 27, 1996 for the sum of \$11,675. The sales fee was \$125 and LHM received net proceeds of \$11,550 from the sale. R. at 5.

7. A letter detailing the sale of the Vehicle and the fact that a deficiency of \$6,160.17 had been incurred by LHM was sent to Jorgenson on December 10, 1996. Jorgenson failed to respond to that letter in any way. R. at 13.

8. LHM filed its Complaint in the Third District Court, Division II on January 21, 1997 seeking to recover from Jorgenson the amount of the deficiency plus interest, costs, and attorneys' fees. R. at 1-3.

9. On October 27, 1997, Jorgenson filed his Answer, admitting the execution of the Lease and denying the remaining allegations of the Complaint. Jorgenson also asserted certain statutory affirmative defenses of “unconscionability” in violation of Utah Code Ann. §70A-2a-108 and violations of federal consumer lease law, particularly premised upon 15 U.S.C. §1667a, 1666, and 1667(d) as well as 12 CFR §713.4 *et seq.* R. at 7.

10. On March 13, 1997, LHM filed its Motion for Summary Judgment supported by the Affidavit of Michael E. Stewart. R. at 9-37. The Motion for Summary Judgment addressed each of Jorgenson’s statutory defenses, arguing that the statutes either did not apply to this case by their own terms or that the Lease, on its face, complied with the statutory mandates. R. at 23-30.

11. Although Jorgenson's Answer did not affirmatively plead or mention any defense that the disposition of the Vehicle was not commercially reasonable, R. at 7-8, LHM's Motion for Summary Judgment nevertheless detailed the precise means of disposition of the Vehicle through the affidavit of its collection manager, Michael E. Stewart. R. at 9-16. Mr. Stewart, who has considerable experience in disposition of motor vehicles, testified in his affidavit that the "Utah Auto Auction is a commonly used method of disposition of repossessed vehicles and is widely accepted in the industry as an effective, commercially reasonable and good faith means of disposing of repossessed vehicles." R. at 13.

12. On April 28, 1997, Jorgenson filed his Memorandum in Opposition to the Motion for Summary Judgment supported by the Affidavit of Gary Giffen. R. at 41-47. In his opposition pleadings, Jorgenson abandoned the statutory defenses affirmatively plead in his Answer and opted instead to defend the motion solely on the ground that the disposition of the Vehicle was not commercially reasonable such that LHM's deficiency was barred as a matter of law under the terms of Utah Code Ann. §70A-9-504. Id. Although LHM had, following the repossession, given Jorgenson a written notice of intent to make *private* sale, Jorgenson argued in his opposition to LHM's Motion for Summary Judgment that the deficiency claim should be barred because LHM had failed to conduct an appropriate *public* sale. R. at 43-44.

13. Mr. Giffen, Jorgenson's affiant, states that he is a licensed used automobile dealer in Utah and has been such for 16 years, and that he served as the general manager of a major automobile dealer in Utah for 9 years prior to that time. R. at 41. He concludes that "[i]n general, the commercial practices among new and used car dealers is to sell a used car by having it detailed and placing it on their lots for exposure to the general public." Id.

He also testifies that the “Salt Lake [sic] Auto Auction and all other auctions are wholesale markets that can only be attended by dealers, who usually will buy at wholesale prices or below.” Id.

14. Mr. Giffen conceded in his affidavit that “the Salt Lake [sic] Auto Auction is indeed a ‘recognized market’ for the sale of automobiles [although] it is in fact a ‘recognized market’ for the wholesale purchase of sale of automobiles--not for retail sales.” R. at 41-42. The Giffen Affidavit also conceded that there are justifiable reasons for selling a vehicle at auction such as when the vehicle does not sell from the dealers’ lot within 60-90 days, R. at 42, and if “the dealer is short of cash or didn’t want the vehicle, but took it in on a trade to accommodate a purchase.” Id.

15. On June 10, 1997, LHM filed its Reply Memorandum in Support of its Motion for Summary Judgment, R. at 48-56, noting Jorgenson’s abandonment of statutory defenses plead in his Answer and his concessions that he executed the Lease and defaulted on its terms, and arguing that LHM’s disposition of the Vehicle through the Utah Auto Auction was a commercially reasonable *private* sale. R. at 49-50. LHM cited authority that disposition through a dealers-only automobile auction is a “private” sale under Uniform Commercial Code Section 9-504 and that, under Uniform Commercial Code §9-507(2), an automobile auction is a “recognized market” for the sale of repossessed vehicles. R. at 51.

16. The District Court granted LHM’s Motion for Summary Judgment without argument, awarding LHM the deficiency requested plus costs and attorneys’ fees in accordance with LHM’s affidavit. R. at 68-70.

### SUMMARY OF ARGUMENT

LHM's disposition of the Vehicle through which it established a deficiency was commercially reasonable under the standards of Utah Code Ann. §70A-9-504 and was, based upon the record in this case, properly found to be so as a matter of law by the District Court.

Jorgenson constructs a straw man by arguing that LHM conducted a *public* disposition of the Vehicle and then proceeds to knock the straw man down by pointing out that LHM did not conduct a *public* sale of the Vehicle in accordance with Utah decisional law prescribing the required steps for public sale of collateral. Jorgenson's entire argument can and should be disregarded by this Court because the Utah Uniform Commercial Code permits *either a public or a private* disposition of collateral and applicable decisional law prescribes differing requirements for a *private* sale to be considered "commercially reasonable" as a prerequisite to the right to deficiency. The sale of a motor vehicle through a dealers-only auction is a "private" sale under the Utah Uniform Commercial Code rendering Jorgenson's public sale analysis entirely inapplicable.

As Jorgenson's affiant, Gary Giffen, conceded, the Utah Auto Auction is a "recognized market" for wholesale disposition of motor vehicles; Utah decisional law generally recognizes wholesale auctions as "recognized markets" for sale of repossessed collateral. Consequently, disposition through the auto auction is deemed commercially reasonable under Utah Code Ann. §70A-9-507(2).

Jorgenson's fixation on the notion that the only commercially reasonable sale of a motor vehicle is one that results in obtainment of the *retail* instead of the wholesale value of the

vehicle is misplaced. Both Utah decisional law and the Utah Uniform Commercial Code provide no requirement or prohibition that the dealer must sell the vehicle at wholesale or retail, but only that the secured party obtains the best possible price under the circumstances.

Jorgenson's argument that the Giffen Affidavit injected genuine issues of material fact for trial into this record, thus rendering the District Court's entry of summary judgment inappropriate, is unavailing. Whether a fact is "material" is evaluated with reference to the substantive law. Because the only points raised by the Giffen Affidavit are that *retail* sales are the only commercially reasonable sales of motor vehicles and that wholesale auctions are presumably commercially unreasonable are overtaken by substantive law contradicting those points as a matter of law.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY CONCLUDED THAT LHM'S DISPOSITION OF THE VEHICLE WAS COMMERCIALY REASONABLE AS A MATTER OF LAW AND THAT LHM WAS ENTITLED TO A JUDGMENT OF DEFICIENCY AGAINST JORGENSEN.**

The essence of Jorgenson's opposition to LHM's Motion for Summary Judgment, both in the District Court and in this appeal, is the misplaced notion that a requisite commercially reasonable sale of a repossessed motor vehicle must be conducted under a *public* sale format, through means that ensure obtainment of a *retail* price, and that dealers-only auto auctions are presumptively commercially unreasonable markets for disposing of motor vehicles. These arguments are contrary to and overtaken by substantive law holding precisely to the contrary.

A. **LHM Conducted a Permissible *Private* Disposition of The Vehicle That Renders Jorgenson's Public Sale Analysis Inapplicable.**

Jorgensen constructs a straw man by arguing that LHM conducted a *public* sale of the Vehicle and proceeds to knock the straw man down by arguing that LHM's sale did not comply with Utah law concerning public disposition of repossessed collateral. However, his public sale discussion is irrelevant.

With respect to a secured party's right to dispose of collateral after default, the Utah Uniform Commercial Code concisely provides that "[d]isposition of the collateral may be by *public or private* proceedings. . . ." Utah Code Ann. §70A-9-504(3) (emphasis added). In the case of a "private" sale, the statute requires only that the secured party provide "reasonable notification of the time after which any private sale or other intended disposition is to be made. . . ." *Id.* The secured party need not provide even this degree of notice if the "collateral. . . is of a type customarily sold on a recognized market. . . ." *Id.*<sup>1</sup>

The analysis of whether a "public" or "private" disposition was made is abundantly simple: Where the general public was not informed of the date of the sale of a vehicle, and is not invited to attend and bid at the sale, the vehicle is necessarily disposed of in a "private" sale. Chrysler-Dodge Country v. Curley, 782 P.2d 536, 540 (Utah App. 1989) ("The 'public' was not informed of the date of the sale and was not invited to attend and bid at the sale.

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<sup>1</sup> As argued under subsection (b) of this point below, an automobile auction is a "recognized market" for disposition of motor vehicles, which clothes sales of repossessed vehicles through such an auction with a presumption of commercial reasonableness.

Thus, we conclude the truck was sold at a private sale”).<sup>2</sup> Because Jorgensen’s entire argument is premised on the irrelevant public sale analysis supported only by cases defining the requisites of a *public* sale, Jorgensen fails to argue, let alone even mention, whether a legally sufficient *private* sale was conducted, leaving LHM’s assertion of a properly conducted *private* sale untraversed.<sup>3</sup>

Courts outside of Utah that have considered the issue have held that a dealers-only automobile auction, when employed to dispose of repossessed vehicles, is a “private” sale under §9-504 of the Uniform Commercial Code. Daniel v. Ford Motor Credit Co., 612 So.2d 483 (Ala. App. 1992); and McMillian v. Bank South, N.A., 188 Ga. App. 355 (1988).

**B. LHM Disposed of the Vehicle in a Commercially Reasonable Manner in a Private Sale Through a “Recognized Market” for Motor Vehicles.**

LHM’s disposition of the Vehicle was commercially reasonable as a matter of law

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<sup>2</sup> Indeed, Jorgensen’s first clue that a private rather than a public sale under Utah Code Ann. §70A-9-504(2) was being pursued by LHM was LHM’s written notice to Jorgensen after repossession titled “Intent to Make Private Sale,” R. at 44, notifying Jorgensen of the time after which a disposition of the Vehicle would occur. As Jorgensen aptly observes, the public was not going to be notified of the sale and invited to bid.

<sup>3</sup> It is for this reason that Jorgensen’s nearly exclusive reliance on Pioneer Dodge Center, Inc. v. Glaubenslee, 649 P.2d 28 (Utah 1982) is misplaced. See, Brief of Appellant at 13-15. This Court, in Chrysler-Dodge Country v. Curley, 782 P.2d at 539-40, cited to Glaubenslee for the definition of a *public* sale, which it contrasted with its finding that the dealer in Curley had conducted a *private* sale of the motor vehicle. Jorgensen’s citation to Glaubenslee is used to support the argument that Glaubenslee sets out the steps that must be taken to conduct any disposition in a commercially reasonable manner under the Utah Uniform Commercial Code. To the contrary, Glaubenslee simply defines the requisites of a commercially reasonable public sale *should the dealer choose a public sale instead of a private sale.*



because it was made by “private” sale through a “recognized market” for motor vehicles.<sup>4</sup>

This Court has recognized that the “Utah Uniform Commercial Code does not provide a statutory definition of commercial reasonableness.” Chrysler-Dodge Country v. Curley, 782 P.2d 536, 539 (Utah App. 1989). However, this Court also noted that “Utah Code Ann. §70A-9-507(2) delineates several non-exclusive (footnote omitted) circumstances which are *deemed to be commercially reasonable. . .*” Id. (emphasis added). That provision of the Utah Uniform Commercial Code provides, in relevant part, as follows:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. *If the secured party. . . sells the collateral in the usual manner in any recognized market therefore. . . he has sold in a commercially reasonable manner.*

Utah Code Ann. §70A-9-507(2) (emphasis added).

“The recognized market exception was included in [U.C.C. §9-507(2)] because of the presumption that collateral sold on such a market would be guaranteed to bring a fair price even though no notice of the sale was given to the debtor (citation omitted). A recognized market is one in which neutral market forces determine the price, as opposed to competitive bidding, and for prices paid in actual sales of comparable property are currently available by quotation.” Cottam v. Heppner, 777 P.2d 468, 473 (Utah 1989). Auctions can be “recognized markets” for certain types of collateral: Indeed, Cottam holds that a livestock auction can be a “recognized market” for livestock if the appropriate circumstances are present, and concluded

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<sup>4</sup> For this reason, LHM exceeded the requirements for conducting a commercially reasonable disposition of the Vehicle by providing to Jorgensen its Notice of Intent to Make Private Sale.

that under the facts of that case, the circumstances *were* present where a deficiency was claimed following sale of a cattle herd. Cottam, 777 P.2d at 473.<sup>5</sup> The “appropriate circumstances” referred to in Cottam include: whether the auctions had available information about prices for the particular items in all the major markets; whether the auction procedures were well advertised; and whether there was an appropriate degree of competitive bidding at the auction. Id. Jorgensen questions disposition through the Utah Auto Auction only on the basis that it attracts just automobile dealers, and that the auctions generally result in the realization of wholesale rather than retail prices. Consequently, Jorgensen fails to argue that the Utah Auto Auction does not and did not bear the requisite “appropriate circumstances” to function as a “recognized market” for motor vehicles. In fact, the Giffen Affidavit admits that the Utah Auto Auction is a “recognized market” for wholesale dispositions of motor vehicles. R. at 42.

Arguments concerning the appropriateness of dealers-only automobile auctions as commercially reasonable channels for disposition of repossessed vehicles identical to those advanced by Jorgensen here were made to and rejected by the Supreme Court of Mississippi in Ford Motor Credit Co. v. Mathis, 660 So. 2d 1273 (Miss. 1995). In Mathis, Ford Motor Credit repossessed the borrower’s car and resold it through the Mississippi Automobile Auction. A deficiency was realized, and Ford Motor Credit sued to collect. The Mississippi court, based upon the Mississippi version of U.C.C. §9-507(2), recognized that “the testimony has indicated that the wholesale dealer auction is the usual manner of sale of repossessed automobiles, and that it is in conformity with the reasonable commercial practices among dealers in repossessed

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<sup>5</sup> Cottam v. Heppner also handily disposes of Jorgensen’s misplaced notion that wholesale auctions are presumptively commercially unreasonable.

automobiles. . . .” Id. at 1276. Consequently, the court held that “we cannot hold that the sale was commercially unreasonable.” Id.

Two other courts have held that the sale of repossessed vehicles through a dealers-only automobile auction is commercially reasonable if such sales are in conformity with the standard practice and procedure of the *lender*. McMillian v. Bank South N.A., 188 Ga. App. 355; Daniel v. Ford Motor Credit Co., 612 So.2d 483, 485 (Ala. App. 1992). The Affidavit of Michael E. Stewart, the collection manager of LHM, established, without objection, that at least LHM normally used the Utah Auto Auction; no evidence was presented, nor can an argument be made, that LHM did anything different or peculiar with respect to the Jorgensen repossession. Moreover, the Lease itself provides for *wholesale* disposition as a matter of contract. R. at 17.

The sale of the Vehicle through the Utah Auto Auction was commercially reasonable as a matter of law.

**C. The Vehicle Need Not Have Been Exposed to the Retail Market or Sold at a Retail Price for the Disposition to be Deemed Commercially Reasonable.**

Jorgensen’s most prominent, and most unavailing, argument is that LHM was obligated, in order to conduct a commercially reasonable sale, to “attempt to sell the vehicle at a higher *retail price*. . . .” Appellant’s Brief at 3 (emphasis added). Indeed, Jorgensen defines the core issue in this appeal as being whether “the sale of a repossessed vehicle at a dealers-only auto auction with no other attempt to sell the vehicle for a *higher retail value* is commercially reasonable within the meaning of the Motor Vehicles Act [sic].” Appellant’s Brief at 5 (emphasis

added)<sup>6</sup> The essence of the Giffen Affidavit is that there are steps LHM could have taken to expose the Vehicle to and sell it within the “retail” market.<sup>7</sup>

Utah law concerning commercial reasonableness in the disposition of repossessed motor vehicles is precisely and clearly to the opposite of the position taken by Jorgensen:

It is the duty of the secured party to obtain the best possible price for the benefit of the debtor. However, the secured party does not have to use extraordinary means (citation omitted). ***There is no requirement or prohibition that the dealer must sell at wholesale or retail but only that the secured party obtains the best possible price under the circumstances.***

Chrysler-Dodge Country v. Curley, 782 P.2d 536, 541-42 (Utah App. 1989) (emphasis added)..

Moreover, “[p]ublic advertising is not mandatory. . . .” Id. at 542. Jorgensen’s core “retail exposure” argument simply lacks any basis or support in Utah decisional law, and is spun from whole cloth in derogation of clear Utah authority to the contrary. Thus, the District Court properly found that the wholesale disposition was commercially reasonable as a matter of law.

**II. JORGENSEN’S PLEADINGS IN OPPOSITION TO LHM’S MOTION FOR SUMMARY JUDGMENT FAIL TO RAISE GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO PRECLUDE AWARD OF SUMMARY JUDGMENT.**

Jorgensen posits that “[t]he trial court’s Order Granting Summary Judgment was improper as [Jorgensen] had filed an affidavit of sufficient facts without objection in opposition

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<sup>6</sup> Jorgensen’s reference here to the “Motor Vehicles Act” appears to be an inadvertent error in lieu of citation to Utah Uniform Commercial Code §70A-9-504.

<sup>7</sup> It is on this basis that Jorgensen premises his second argument that the Giffen Affidavit raised genuine issues of material fact for trial such that the District Court should not have granted judgment to LHM as a matter of law. As demonstrated under Point II below, the fact that this assertion is overtaken by substantive law renders the facts stated in the Giffen Affidavit immaterial for summary judgment purposes.

to [LHM's] Motion for Summary Judgment and supporting Affidavit. Conflicting affidavits create a question of fact which must preclude summary judgment," Appellant's Brief at 10, citing, Amica Mutual Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989). Thus, he concludes, "one sworn statement under oath is all that is necessary to preclude the entry of summary judgment." Appellant Brief at 11, citing Schettler at 950.

When determining whether a grant of summary judgment in favor of a party is proper, the question the court must answer is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c).

In examining a motion for summary judgment, the court views the facts in the case in the light most favorable to the party opposing the motion. Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Schalk v. Gallemore, 906 F.2d 491, 494 (10th Cir. 1990).<sup>8</sup> However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis added).

Jorgensen fails to recognize that in determining what facts are material, the court must look to the *substantive law*. Anderson, 477 U.S. at 248. Thus, "[o]nly disputes over facts

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<sup>8</sup> Courts of this state may accord considerable weight to decisions that interpret federal procedural rules identical or substantially similar to the procedural rules of this state. Prowswood v. Mountain Fuel Supply, 676 P.2d 952, 958 (Utah 1984).

that might affect the outcome of the suit under the *governing law* will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id. (emphasis added). The substantive law applicable to this dispute renders Mr. Giffens’ statements, even to the extent they create factual disputes, immaterial. His statements that the Utah Auto Auction is open only to dealers and does not result in exposure of the Vehicle to the general public through which retail prices could be obtained is overtaken by the substantive law that the dealer is not obligated to sell at either retail or wholesale, and that auto auctions are “recognized markets” for disposition of motor vehicles that clothe such sales with a presumption of commercial reasonableness. Chrysler-Dodge Country, Inc. v. Curley, 782 P.2d 536 (Utah App. 1989); Cottam v. Heppner, 777 P.2d 468 (Utah 1989); Ford Motor Credit Co. v. Mathis, 660 So.2d 1273, 1276-77 (Miss. 1995).

Consequently, the District Court properly concluded that there were no genuine issues of material fact remaining for trial, notwithstanding the Giffen Affidavit, and that judgment in favor of LHM as a matter of law should enter.

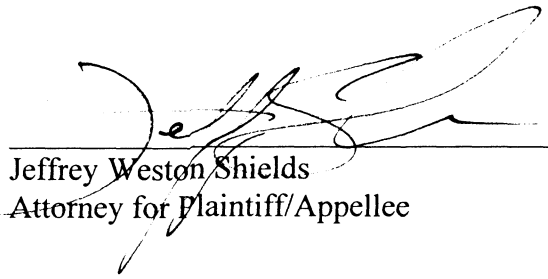
### **CONCLUSION**

Based upon the foregoing argument, LHM requests this Court to affirm the

District Court's Order Granting Summary Judgment dated August 13, 1997.

DATED this 22<sup>nd</sup> day of December, 1997.

JONES, WALDO, HOLBROOK &  
MCDONOUGH, P.C.



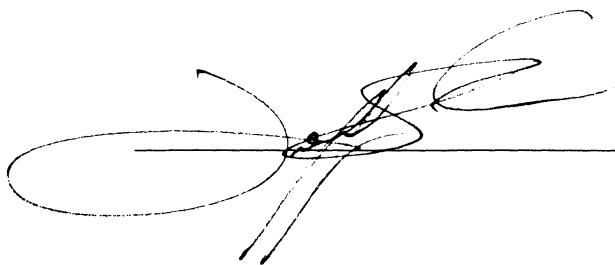
Jeffrey Weston Shields

Attorney for Plaintiff/Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of December, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to the following:

John L. McCoy  
Attorney for Defendant/Appellant  
310 South Main Street, Suite 1314  
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to be "JL McCoy", written over a horizontal line.



# **ADDENDUM A**

**70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.**

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the chapter on Sales (Chapter 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received

(before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

# **ADDENDUM B**

**70A-9-507. Secured party's liability for failure to comply with this part.**

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or, the time price differential plus ten per cent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

# **ADDENDUM C**

**Rule 56. Summary judgment.**

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.