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Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence, and Wayne Wong v. Intermountain Inc. dba Intermountain Isuzu v. Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence, Wayne Wong, and Victor Lawrence : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, CINDY LAWRENCE and  
WAYNE WONG,

Plaintiffs,

vs.

INTERMOUNTAIN, INC., dba  
INTERMOUNTAIN ISUZU,  
Defendant, Counterclaimant,  
Third-party Plaintiff, and  
Appellee,

vs.

WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, CINDY LAWRENCE,  
WAYNE WONG and VICTOR LAWRENCE,  
Counterclaim Defendants,  
Third-Party Defendant, and  
Appellants.

**BRIEF OF APPELLANTS VICTOR  
LAWRENCE AND CINDY  
LAWRENCE**

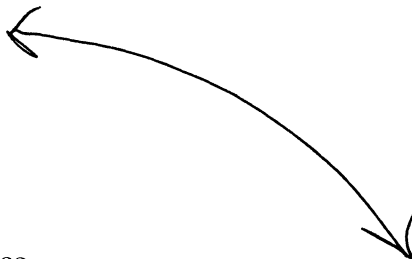
Case No. 20080835

Appeal from the Third Judicial District Court  
In and for Salt Lake County, State of Utah

Judge Denise Lindberg  
Civil No. 000904217

Oral Argument Requested

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OCT 13 2009

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## **Addenda**

- A. Findings of Fact, Conclusions of Law, Judgment and Order, entered August 13, 2007
- B. Supplemental Findings of Fact, Conclusions of Law, and Judgment, entered June 25, 2008
- C. Letter from cSave.net to Intermountain Isuzu, dated March 29, 2000. Plaintiff's Exhibit No. 10
- D. Relevant Portions of the Trial Transcript
- E. cSave.net application for Employer Identification Number, Plaintiff's Exhibit No. 15
- F. Plaintiff's Exhibit 61
- G. Relevant portions of Plaintiff's Exhibit 37

### **STATEMENT OF RELATED CASES**

There are no related cases.

### **STATEMENT OF JURISDICTION**

The Utah Supreme Court has jurisdiction in this matter pursuant to UTAH CODE ANN. §78A-3-102 (3)(j). The Utah Supreme Court has transferred this appeal to the Utah Court of Appeals pursuant to UTAH CODE ANN. §78A-3-102(4). The Utah Court of Appeals has jurisdiction pursuant to UTAH CODE ANN. §78A-4-103(2)(j).

### **IDENTIFICATION OF THE PARTIES**

Appellants Victor Lawrence (“Mr. Lawrence”) and Cindy Lawrence (“Ms. Lawrence”) (collectively, the “Lawrences”) were married during the times relevant to this action but have since divorced. Although Ms. Lawrence has remarried and changed her name, this brief will refer to her as “Ms. Lawrence” for the sake of convenience. Appellee is Intermountain, Inc. (“Intermountain”).

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

- Whether the trial court erred in finding the Lawrences liable for conspiracy to defraud, while simultaneously finding Intermountain failed to prove the Lawrences committed fraud where the trial court could not “identify any affirmative misrepresentations made directly by Mr. [or Ms.] Lawrence to Intermountain.” (R. 2578).
- Whether the trial court erred in basing its finding that Ms. Lawrence had requisite knowledge of a conspiracy entirely on a judicial admission, where Ms. Lawrence had no actual knowledge, did not retain the attorney who made any judicial admission, did not know of or review the complaint in which was found the claimed judicial

admission, and only ratified, if at all, “the cause of action ... asserted,” but not any particular factual allegation in the complaint. (R. 2578).

- Whether the trial court erred in imputing knowledge of any alleged scheme to Mr. Lawrence based upon his marriage and cohabitation with Ms. Lawrence.
- Whether the trial court erred in holding the Lawrences liable for conversion and determining the period of conversion, when Intermountain lacked any right to possession of the vehicle before January 31, 2001, and the Lawrences did not have possession of the vehicle after that date.
- Whether the punitive damages awarded by the trial court were in excess of the constitutional limits set forth in *State Farm Ins. Co. v. Campbell* and the principles set forth in *Crookston v. Fire Ins. Exchange*.

### **STANDARD OF REVIEW**

The appellate court reviews the district court’s findings of fact for clear error and conclusions of law de novo. *See Buckner v. Kennard*, 99 P.3d 842, 846 (Utah 2004).

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS**

Amendment XIV of the United States Constitution: “... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....”

Section 7 of the Utah Constitution provides: “No person shall be deprived of life, liberty or property, without due process of law.”

**STATEMENT OF THE CASE**  
**(Course of Proceedings, Disposition in Trial Court)**

The Lawrences' appeal is from the trial court's written Findings of Fact ("FF") and Conclusions of Law ("CL") (Addendum "A") following a four-day bench trial, entered on August 13, 2007, finding the Lawrences liable for conspiracy to defraud and conversion, and from the trial court's Supplemental Findings of Fact, Conclusions of Law and Judgment ("SF") (Addendum "B") following a two-day bench trial on punitive damages, entered on June 25, 2008, awarding punitive damages against the Lawrences.

**STATEMENT OF FACTS**

1. Intermountain, Inc. is a licensed motor vehicle dealer and Isuzu franchisee. (FF ¶2.)

2. A. Paul Schwenke ("Mr. Schwenke") was a business client of Mr. Lawrence, an attorney, who established a business entity named cSave.net, LLC ("cSave.net" or the "LLC"). On November 4, 1999, Mr. Lawrence prepared Articles of Organization and an Operating Agreement for cSave.net. Wayne Wong ("Mr. Wong") was a managing member of the LLC. (FF, ¶¶ 3-4.)

3. On or about March 2000, Mr. Schwenke determined to lease certain vehicles for personal use by his wife Wilma and his daughter Tania. According to Mr. Lawrence, Mr. Schwenke also intended to lease a vehicle for the Lawrences' personal use as partial payment for legal services rendered by Mr. Lawrence. (FF, ¶6).

4. On March 29, 2000, Mr. Schwenke sent, on cSave.net letterhead, an inquiry to Intermountain regarding leasing three vehicles. (Plaintiff's Exhibit 10,

hereinafter “Ex.,” attached hereto as Addendum “C”).

5. Only Mr. Wong signed the leases for the three vehicles on or about March 31, 2000. Mr. Schwenke was present when the three leases were signed. (FF, ¶¶ 8, 11).

6. Part of the information Mr. Schwenke and Mr. Wong gave to Intermountain in applying for the three leases was cSave.net’s application for an employer identification number. (Trial Transcript, Volume I., p.29, lines 1-8, hereinafter “Trans., Vol.”) (Relevant portions of the Trans. are attached hereto as Addendum “D,” see also Ex. No. 15, attached as Addendum “E”).

7. Mr. Schwenke agreed to pay Mr. Wong \$10,000 to sign the leases. (FF, ¶8).<sup>1</sup>

8. Mr. Lawrence issued a personal check to Intermountain to cover the down payment for each of the three vehicles. Mr. Lawrence was subsequently reimbursed by Mr. Schwenke for that expenditure. (FF, ¶12) (Trans. Vol. IV, p. 359).

9. Following Mr. Wong's signing of the leases, the Lawrences took possession of a black Isuzu Rodeo (the "Black Rodeo"). (FF, ¶19). Two other Isuzu Rodeos (the “Green Rodeo” and the “Silver Rodeo”) were possessed by Mr. Schwenke’s wife and daughter. The Lawrences never had possession of the Green and

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<sup>1</sup> The trial court found the plaintiffs in the underlying action, including Ms. Lawrence, had knowledge of the \$10,000 payment to Mr. Wong. (FF, ¶8). The trial court imputed that knowledge to Ms. Lawrence because of a judicial admission. (FF, ¶9). The trial court also imputed knowledge to Mr. Lawrence because he was married to Ms. Lawrence. As argued herein, Ms. Lawrence did not have actual knowledge of any inducement, did not commit an unlawful act and the trial court should not have found a judicial admission. Further, any knowledge by Ms. Lawrence may not be imputed to Mr. Lawrence solely by their marriage.

Silver Rodeos. (FF, ¶19).

10. When they took possession, Mr. and Ms. Lawrence understood the leases would be paid for by cSave.net. (Trans., Vol. I, p. 193, lines 20 & 21; Trans., Vol. I, p. 194, line 20 through p., 195, line5 ; Trans., Vol. I, p. 199, lines 9 -17; & Trans., Vol. II, p. 220, lines 1-6).

11. Intermountain sold the lease for the Silver and Green Rodeos to Isuzu Motors Acceptance Corporation. (FF, ¶ 20).

12. Intermountain sold the lease for the Black Rodeo to Bank of America, N.A. (FF, ¶ 20).

13. Neither cSave.net nor Mr. Wong made any payments on the leases. (FF, ¶¶21, 24).

14. A complaint (the “Complaint) was filed against Intermountain for breach of contract.<sup>2</sup> (R. 1).

15. On January 31, 2001, Bank of America assigned all of its rights, title and interest in the Black Rodeo to Intermountain in exchange for \$35,278.24 - \$28,974.24 representing the vehicle pay off and \$6,331 in attorney fees and costs. (FF, ¶25).

16. Intermountain repurchased the Black Rodeo on January 31, 2001 from Bank of America, N.A. (FF, ¶¶ 25, 28; see also Ex. 61, attached hereto as Addendum “F”).

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<sup>2</sup> The Complaint names Ms. Lawrence as a Plaintiff. As set forth below, Ms. Lawrence had no knowledge the Complaint had been filed. She did not retain the attorney who filed it, let alone



17. On January 31, 2001, the same day Intermountain repurchased the lease, Intermountain tried to repossess the Black Rodeo. Mr. Lawrence intervened and said he would not turn over the vehicle without a court order. After being called to the scene, the police allowed Mr. Lawrence to leave the scene with the Black Rodeo. (FF, ¶28).

18. Immediately after the attempted repossession, Mr. Lawrence turned the Black Rodeo over to Mr. Schwenke because he understood cSave.net, of whom Mr. Schwenke was the owner, to be the lessee of the vehicle. (FF, ¶ 29, Trans., Vol. II, p. 229, lines 1-20).

19. Intermountain obtained a writ and order of replevin on the Black Rodeo on October 5, 2001. (Ex. 81).

20. Mr. Schwenke returned the Black Rodeo to Intermountain in 2002. When Mr. Schwenke returned the vehicle, it had been totaled in an accident (FF, ¶34).

21. The trial court found the Lawrences were not liable for fraud, because the trial court could not “identify any affirmative misrepresentations made directly by Mr. [or Ms.] Lawrence to Intermountain,” but were liable for conspiracy to defraud and for conversion. (CL, ¶¶ 59, 61 & 65).

22. The trial court calculated Intermountain’s monetary damages as follows: Intermountain paid \$32,202.08 to repurchase the lease on the Silver Rodeo, and \$28,272.13 to repurchase the lease on the Green Rodeo. (FF, ¶ 23). Intermountain was required to repurchase the lease on the Black Rodeo for \$35,278.24, including attorneys fees and costs. (FF, ¶ 25). The total amount Intermountain expended to

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review it before filing.

repurchase the three Rodeos was \$95,752.45. (FF, ¶ 35). The trial court added \$8,000 in expenses, then subtracted out \$23,408.98 (the amount for which Intermountain resold the three vehicles) to reach a net loss of \$80,412.87. (FF, ¶35).<sup>3</sup>

23. The trial court found the Lawrences jointly and severally liable for conspiracy to defraud in the amount of \$80,412.87. (CL, ¶ 69).

24. The trial court found the Lawrences jointly and severally liable for conversion of the Black Rodeo from April 1, 2000, until January 31, 2001, in the amount of \$3,625.40, plus prejudgment interest. (CL, ¶ 69).

25. The trial court also found Mr. Lawrence separately liable for conversion of the Black Rodeo from April 1, 2000, until July 10, 2003, in the amount of \$34,282.20, plus prejudgment interest. (CL, ¶¶ 66, 69).

26. The trial court found Mr. Lawrence's conduct caused Intermountain to sustain financial damages that, with prejudgment interest, amounted to \$138,267.25 as of August 13, 2007. The court concluded that punitive damages, to be awarded in favor of Intermountain and against Mr. Lawrence, should be in the amount of \$484,000. (SF, p. 37).

27. The trial court found Ms. Lawrence's conduct caused Intermountain to sustain financial damages that, with prejudgment interest, amounted to \$138,267.25 as of August 13, 2007. The court concluded that punitive damages, to be awarded in favor of Intermountain and against Ms. Lawrence, should be in the amount of \$99,999.99. (SF, p.41).

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<sup>3</sup> The trial court's calculation is off by \$69.40.

## **SUMMARY OF THE ARGUMENT**

The trial court found the Lawrences liable for conspiracy to defraud despite finding no liability for direct fraud. The trial court could not “identify any affirmative misrepresentations made directly by Mr. [or Ms.] Lawrence to Intermountain.” (FF, ¶¶ 60, 64). In order to be liable for conspiracy to defraud, the plaintiff must prove all the elements of the underlying fraud. Because Intermountain failed to prove the Lawrences liable for direct fraud, the conspiracy to defraud ruling should be reversed as a matter of law. There were no unlawful, fraudulent acts directly committed by the Lawrences and a finding of fraud against a codefendant cannot be imputed to them.

The trial court erred in imputing knowledge of a conspiracy to Ms. Lawrence on the basis of a judicial admission, when the uncontroverted evidence at trial showed Ms. Lawrence had no actual knowledge of a conspiracy, and where any judicial admission, if one is found, relates only to ratification of the “cause of action” asserted, not as to any particular factual allegation. Further, the trial court erred in imputing knowledge of a conspiracy to Mr. Lawrence by reason of his marriage to and cohabitation with Ms. Lawrence.

Despite only having possession of the Black Rodeo for a period of 10 months, the trial court found Mr. Lawrence liable for conversion for a period of years, including time when the vehicle was in possession of other persons. Further, the trial court erroneously found the Lawrences liable for conversion months before Intermountain had any right to this vehicle, which was not assigned by Bank America until January 31, 2001, and months before Intermountain obtained a writ of replevin.

Finally, the trial court entered punitive damages against the Lawrences for Intermountain's loss of three vehicles, even though they only had possession of one of those vehicles for a period of 10 months. The trial court's punitive damage award also exceeds the constitutional limits set forth in *State Farm Ins. Co. v. Campbell* and the principles set forth in *Crookston v. Fire Ins. Exchange* for the following reasons, among others: the trial court included pre-judgment interest and attorney fees to determine the amount of punitive damages; the punitive damage award could not be based on conspiracy to defraud because the trial court erred in finding the Lawrences liable for such a conspiracy; and the amount of time the Lawrences could be liable for any conversion was erroneously determined.

### **ARGUMENT**

#### **POINT 1. UTAH LAW PRECLUDES FINDING A PARTY CONSPIRED TO DEFRAUD WHERE THE ELEMENTS OF THE UNDERLYING FRAUD ARE NOT PROVEN**

##### *A. Conspiracy to Defraud Requires Proof of the Underlying Fraud*

The Utah Supreme Court has held “conspiracy to defraud requires proof of the underlying fraud.” *Gildea v. Guardian Title*, 970 P.2d 1265, 1271 (Utah 1998). Under Utah law, conspiracy to defraud is defined as “fraud committed by two or more persons who share an intent to defraud another.” *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1358 (Utah 1994). In order to prevail on a claim of conspiracy to commit fraud, the plaintiff must prove by clear and convincing evidence the elements of fraud. *Gildea*, 970 P.2d at 1271. An action for conspiracy to defraud falls within the ambit of secondary claims that require proof of the underlying tort. *See Colores v. Sabey*, 79 P.3d 974, 983 (Utah Ct.

App. 2003) (holding that in order to sufficiently plead a secondary claim based on fraud, a plaintiff needs to sufficiently plead fraud).

Here, the trial court stated, with respect to both Lawrences, “the Court cannot conclude that Intermountain established by clear and convincing evidence that Mr. [or Ms.] Lawrence’s actions satisfy the elements of fraud.” The trial court could not “identify any affirmative misrepresentation made directly by Mr. [or Ms.] Lawrence to Intermountain.” CL, ¶¶ 60 & 63. Despite these conclusions, the trial court determined the Lawrences are liable for conspiracy to defraud. See CL, ¶¶ 61 & 65 (“Although the Court does not hold that Mr. [and Ms.] Lawrence directly committed fraud, the Court concludes that Mr. [and Ms.] Lawrence conspired to defraud Intermountain”). Such a finding is inconsistent with Utah law requiring the establishment of the elements of fraud in order to find a conspiracy to defraud. *Gildea*, 970 P.2d at 1271. Because Intermountain failed to establish the Lawrences committed civil fraud, the trial court was precluded from finding the Lawrences were liable for conspiracy to commit fraud and such finding should be reversed.

*B. Conspiracy to defraud requires overt participation in the primary fraud*

The trial court found Mr. Wong liable for fraud because he knowingly made material misrepresentations to Intermountain, including: (a) signing the leases for the three Rodeos as the lessee with no intention of making any payments on the vehicles; (b) committing to maintain insurance with no intention of doing so; (c) agreeing to terms that obligated him to maintain control of the vehicle when he had no intention to do so; and

(d) failing to disclose that he was promised \$10,000 in exchange for his signature on the leases. (CL, ¶ 54).

The trial court did not find either Mr. or Ms. Lawrence participated in any of these misrepresentation. To the contrary, the trial court stated it could not find any affirmative misrepresentations made directly by the Lawrences to Intermountain and, for that reason, could not find the Lawrences liable for fraud. (CL, ¶¶ 60 & 64). Further, none of the acts by the Lawrences, as discussed more fully below, related to Mr. Wong's overt acts, which were made when he executed the leases. These acts were not material to the formation of any conspiracy.

The trial court, nevertheless, found the Lawrences liable for conspiracy to defraud, although their acts were committed at times other than the execution of leases. The trial court, CL ¶¶ 59, 61 & 65, found the Lawrences liable for conspiracy to commit fraud based only on the following:

1. With respect to Ms. Lawrence:
  - a. Approximately one month before Ms. Lawrence obtained possession of the Black Rodeo, West Valley Dodge repossessed a Durango from the Lawrences that had been leased by Mr. Schwenke under a similar arrangement. (CL, ¶ 61).

To suggest the filing of the West Valley Dodge case merits a finding that there was a pattern of filing claims against automobile dealers by Ms. Lawrence in order to receive a vehicle for use and not pay for it is pure conjecture and speculation, contrary to the instructions of *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 793 (Utah Ct. App. 1987) (“The evidence must do more than merely raise a suspicion-it must lead to belief that the

conspiracy existed.”). The West Valley Dodge complaint is for unlawful repossession, not breach of contract, as in the instant case. There is no evidence in the record of a “similar arrangement.” Further, even assuming the West Valley Dodge case was frivolous, of which there is no probative evidence, it is not unlawful. The filing of a frivolous claim is not a form of fraud. *Gildea v. Guardian Title Co.*, 970 P.2d 1265, 1270 (Utah 1998). In the words of Judge Posner, “[S]ince when is a frivolous claim a form of fraud?” *Oxford Clothes XX v. Expeditors Intern*, 127 F.3d 574, 577 (7<sup>th</sup> Cir. 1997).

- b. Ms. Lawrence participated in the \$10,000 offered to Mr. Wong to induce him to sign the leases from which she would benefit by receiving and using one of the vehicles. (CL, ¶ 61).

The trial court based this conclusion entirely on a judicial admission by Ms. Lawrence found in the Complaint she had never read, prepared by an attorney she never retained. As argued below, the trial court erred in relying on a judicial admission. Even if the judicial admission stands, there is nothing unlawful about paying someone to be a credit facilitator in a lease transaction. The trial stated it could not “conclude that Ms. Lawrence had an affirmative duty to disclose that inducement to Intermountain, or that her failure to disclose the inducement constituted a misrepresentation by material omission.” (FF, ¶60, n. 15).

- c. Ms. Lawrence was present at the time the leases were negotiated and signed, and she was generally aware of the anticipated financial terms. (CL, ¶ 61)

Ms. Lawrence was not a signatory to the lease and was not bound by the terms thereof. Non-parties to a contract cannot be bound by the terms thereof. *See, e.g., Metropolitan Alloys Corp. v. State Metals Indus., Inc.*, 416 F.Supp. 561 (E.D. Mich.

2006). Likewise, Ms. Lawrence's general awareness of the payment terms was not unlawful and did not bind her to the lease.

- d. Ms. Lawrence took possession of the Black Rodeo with no intention or expectation of making any payments on the vehicle, nor did she make any effort to ensure payments would be made. (CL, ¶ 61).

Again, Ms. Lawrence was not a signatory to the lease and was not contractually bound to make payments. She neither had a duty to make the payments nor to ensure payments were made. Although she had possession of a vehicle, she understood cSave.net to be making payments. (Trans., Vol. I. Page 199, lines 10-12).

- e. Ms. Lawrence lent her name to a lawsuit designed to impede Intermountain's efforts to recover the vehicle she was using without lawful claim. (CL, ¶ 61).

Ms. Lawrence did not know a lawsuit had been filed on her behalf and did not retain the attorney who filed the lawsuit. (Trans., Vol. I, p. 195, lines 11-14, Vol. III. p. 342, lines 3-5). Even if the lawsuit was frivolous, it was not unlawful, as Judge Posner noted. *Oxxford Clothes XX*, 127 F.3d at 577 (7<sup>th</sup> Cir. 1997). As soon as the Lawrences learned Intermountain was attempting repossession of the vehicle, Mr. Lawrence returned it to Mr. Schwenke, owner of cSave.net, the company he understood had leased the vehicle. (CL, ¶66). There is nothing unlawful in this conduct.



2. With respect to Mr. Lawrence:

- a. Approximately one month before Mr. Lawrence obtained possession of the Black Rodeo, West Valley Dodge repossessed a Durango from the Lawrences that had been leased by Mr. Schwenke under a similar arrangement. (CL, ¶ 64).

See foregoing response to subsection (a) of the trial court's finding with respect to Ms. Lawrence.

- b. Shortly thereafter, Mr. Lawrence assisted Mr. Schwenke in his efforts to secure a new vehicle by contacting a Bountiful dealership, and attempting to negotiate a new set of leases. (CL, ¶ 64).

There is nothing unlawful in these actions. "Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other transactions. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into." *Holland v. Columbia Iron Mining Co.*, 293 P.2d 700, 702 (Utah 1956). If the object of the alleged conspiracy or the means used to attain it is lawful, even if the damage results to plaintiff or defendant acted with malicious motive, there can be no civil action for conspiracy. "If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected." *Gildea*, 970 P.2d at 790 (internal citation omitted).

- c. Mr. Lawrence was present at the negotiations the day Mr. Wong signed the leases and knew the general financial terms of the leases. Mr. Lawrence even testified at one point he told Mr. Schwenke to go back to the Bountiful dealership if Intermountain could not meet the terms offered by that dealership. (CL, ¶ 64).

There is nothing unlawful in the above actions. Again, participation in routine business dealings cannot form the basis for liability for civil conspiracy. *Holland*, 293 P.2d at 702; *Gildea*, 970 P.2d at 790.

- d. Mr. Lawrence provided the down payment for each of the three Rodeos. (CL, ¶ 64).

Intermountain accepted down payments from Mr. Lawrence, who was not the lessee. There is nothing unlawful in this action. *Holland*, 293 P.2d at 702. Also, it undercuts Intermountain's argument it would not have leased the vehicles to Mr. Wong if it thought someone else was going to drive the vehicles. Mr. Wong leased three vehicles. Intermountain knew or should have known others were going to drive at least two of those vehicles.

- e. Mr. Lawrence took possession of the Black Rodeo with no intent or expectation to pay for the vehicle, and without ensuring that payment would be made. (CL, ¶ 64).

See foregoing response to subsection (d) of the trial court's finding with respect to Ms. Lawrence.

- f. Because Mr. and Ms. Lawrence were married and cohabiting at the time Ms. Lawrence participated in the inducement to Mr. Wong, it is reasonable to infer that Mr. Lawrence was also aware of that inducement. (CL, ¶ 64).

The trial court's holding of "guilt by association" subjects husbands and wives everywhere to liability for the unlawful acts of their spouses. As argued below, such a

holding is contrary to established law. Also, because Ms. Lawrence did not have knowledge of any inducement to Mr. Wong at the time of the leases, she could not have imparted that knowledge to Mr. Lawrence.

*C. Mr. Wong's Liability for fraud cannot serve as the basis for finding the Lawrences conspired to defraud*

Although another party in this matter, Mr. Wong, was found liable for fraud, his fraud cannot serve as the basis for finding the Lawrences conspired to defraud. In order to find the Lawrences liable for conspiracy to defraud, the trial court must find the elements of fraud were met with respect to the Lawrences themselves, and not with respect to a co-defendant. *See Debry*, 879 P.2d at 1358 (“A conspiracy to defraud is *fraud committed* by two or more persons who share an intent to defraud another”) (emphasis added). If neither Lawrence committed a fraud because, among other elements, they made no affirmative misrepresentation, they cannot be found liable for conspiracy to defraud, even if Mr. Wong was found to have committed civil fraud. Stated differently, the gist of conspiracy is the agreement. *See Pinkerton v. United States*, 328 U.S. 640 (1948). There is no evidence the Lawrences entered into any agreement with Mr. Wong, whether it was for Mr. Wong not to pay for the leases, maintain insurance or otherwise. There is no evidence the Lawrences ever even spoke with Mr. Wong.

Intermountain acknowledged at trial its claim for conspiracy to defraud was not aimed at Ms. Lawrence. Counsel for Intermountain stated, during the course of arguing the Lawrences' motion to dismiss after the close of Plaintiff's evidence, “There is also a conspiring to defraud ... and that really goes more to [Mr. Lawrence] than it does to [Ms.

Lawrence]. We'll concede that fact.” (Trans., Vol. II, p. 293, lines 12-14; Addendum “D”). This underscores Intermountain’s claims against the Lawrences were derivative of direct fraud committed by others. Such secondary claims cannot be proved without proving the underlying fraud.<sup>4</sup>

This case, then, is similar to *Colores* in the following respect. In *Colores*, the court stated:

Our affirmance of the dismissal of this claim, at least as against the Ganter defendants, should come as no surprise to Plaintiffs. At oral argument, Plaintiffs' counsel stated Plaintiffs' position as follows: “For the most part, this is not a case based upon the Ganter defendants' direct liability or participation directly in these frauds. Rather, their liability is based upon principles of secondary liability as control persons under Utah securities laws as well as conspiracy and aiding and abetting principles.” Counsel went on to say that it was principally Mr. Degenhardt who had committed the primary fraud offenses.

The court’s reasoning should have come as no surprise in that case, then, because the Plaintiffs themselves acknowledged, at least with respect to the Ganter defendants, the case was about an alleged secondary fraud, not a primary fraud. The court in *Colores*, thus, was bound to dismiss the secondary claims, at least as against the Ganter defendants, as not having a basis in an underlying tort, even where there was an allegation of fraud against a separate defendant. Similarly, here, Intermountain’s counsel acknowledged the claim for conspiracy went more to Mr. Lawrence than Ms. Lawrence. Further, no direct fraud was entered against either Mr. Lawrence or Ms. Lawrence. The conspiracy finding cannot be upheld.

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<sup>4</sup> The elements of a judicial admission are discussed more fully below. However, if Ms. Lawrence is bound by a judicial admission, then Intermountain should also be bound by this judicial admission, thereby relieving Ms. Lawrence from any liability for a conspiracy

This point was apparently recognized by Intermountain at the end of the trial when it brought a motion to amend the pleadings to bring a claim against the Lawrences for aiding and abetting fraud. See CL, ¶ 63. During closing argument, counsel for Intermountain set forth the elements of aiding and abetting fraud and then moved to amend Intermountain's complaint to add the claim. The claim of aiding and abetting fraud would not require Intermountain to prove the Lawrences committed the underlying tort, but only that they had knowledge of it. There are no Utah cases recognizing this tort.<sup>5</sup> Courts adopting this cause of action recognize three elements of aiding and abetting fraud: (1) the existence of a fraud; (2) a defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. See, e.g., *JP Morgan Chase Bank v. Winnick*, 406 F.Supp. 2d 247, 252 (S.D.N.Y. 2005).

The distinction, then, between "conspiracy to defraud" and "aiding and abetting fraud" is a defendant must have been an active participant in the fraud in order to be found liable for conspiracy, whereas a defendant may be found liable for aiding and abetting based merely on knowledge of the underlying fraud and some sort of assistance. Intermountain thus recognized finding the Lawrences liable for conspiracy to defraud would require overt participation in the fraud, and aiding and abetting fraud would not require overt participation. Intermountain's counsel stated during closing argument:

I would hope the Court finds that both Cindy and Victor Lawrence were overt participants in the fraud, but an alternative finding that even if Victor Lawrence

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to defraud.

<sup>5</sup> In *Colores*, the Court declined to address the question of whether aiding and abetting fraud is a cognizable claim under Utah law.

did not overtly participate in the fraud, he very clearly aided and abetted it, and therefore would be liable.” (Trans., Vol. IV, p.490, lines 1-6).

The trial court denied Intermountain’s motion to amend its Complaint to add a claim for aiding and abetting fraud. See CL, ¶ 63. Intermountain was, therefore, required to prove, by clear and convincing evidence, that the Lawrences directly committed fraud.

A finding of fraud is a necessary condition for a finding of conspiracy to defraud. The Lawrences were found not liable for fraud and therefore cannot be found liable for conspiracy to defraud and such findings should be reversed.

**POINT 2. THE DISTRICT COURT ERRED IN FINDING MS. LAWRENCE LIABLE FOR CONSPIRACY TO DEFRAUD WHEN HER ‘KNOWLEDGE’ OF THE CONSPIRACY WAS ERRONEOUSLY BASED ON A JUDICIAL ADMISSION, AND WHERE THE EVIDENCE CLEARLY INDICATES SHE HAD NO ACTUAL KNOWLEDGE**

The trial court’s finding Ms. Lawrence knew of Mr. Wong’s fraud is based upon a single found conclusion: a claimed judicial admission she knew of the payment of a \$10,000.00 inducement to Mr. Wong. Ms. Lawrence repeatedly testified she did not retain the attorney who filed the Complaint (Trans., Vol. I, p. 195, lines 12-14; Vol. III. Page 342, lines 3-5); did not know she was a party in the case (Trans., Vol. III. p. 342, lines 11-12); did not authorize a complaint to be filed in her behalf (Trans., Vol. I, p. 195, lines 18-20; Vol. III. p. 342, lines 13-15); did not have any input with respect to interrogatories (Trans., Vol. III. p. 342, lines 21-23); did not negotiate the leases (Trans., Vol. III. p. 343, lines 1-9); and did not know who Mr. Wong was on the day the leases were signed or on the day the Complaint was filed. (Trans., Vol. III. p. 343, lines 15-23).

Ms. Lawrence’s lack of actual knowledge of any inducement to Mr. Wong or any scheme

was undisputed in the trial court. Rather, her “knowledge” was ascribed to her on the basis of an allegation in the Complaint that she had not read nor even knew was filed.

Ms. Lawrence was asked at her deposition:

So even though you have never seen this complaint before as testified, this would have been *the cause of action* you would have asserted and in fact would have supported and consented for; is that correct? (Trans., Vol. III., p. 349, lines 18-25) (reading deposition transcript into the record) (emphasis added).

Ms. Lawrence replied “Yes.” (*Id.*)

The “cause of action” to which she would have assented had she known about it was a breach of contract action against Intermountain. She did not give ratification to each specific factual allegation in the Complaint, but only to the cause of action, *i.e.*, that “matter for which an action may be brought.” *Cantonwine v. Fehling*, 582 P.2d 592, 596 (Wyo. 1978). Ms. Lawrence did not ratify the allegation in paragraph 41 of the Complaint Mr. Wong was promised \$10,000 to sign the leases. She did not know about the inducement.

Nevertheless, the trial court found as follows:

At paragraph 41 of the complaint that initiated this case, Ms. Lawrence, as one of the plaintiffs, stated: “[I]n order to induce plaintiff Wayne Wong to sign on the leases, plaintiffs agreed to pay him \$10,000.00.” See [Addendum F]. Notwithstanding this judicial admission, at trial Ms. Lawrence denied any knowledge of, or participation in, the payment offered to Mr. Wong. Although there was disputed evidence concerning when Ms. Lawrence actually saw the complaint in which she participated as a plaintiff, it is clear that at her deposition in 2002 she ratified the claims of the original complaint without qualification. (FF, ¶ 9).

A judicial admission is a deliberate, clear, unequivocal statement by a party about a concrete fact within that party’s knowledge. *Estate of Rennick*, 692 N.E.2d 1150, 1156

(Ill. 1998). “An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it. However, this rule is not absolute. The trial court may relieve a party from the consequences of a judicial admission.” *Baldwin v. Vantage Corp.*, 676 P.2d 413, 415 (Utah 1984). Unsigned or unverified pleadings are, in some jurisdictions, inadmissible. *See Fidelity and Deposit Co. v. Redfield*, 7 F.2d 800 (9<sup>th</sup> Cir. 1925); *Estate of Nicholas*, 177 Cal. App. 3d. 1071 (3<sup>rd</sup> Dist. 1986). Further, when a pleading signed by an attorney is not authorized by the client, it does not constitute a valid judicial admission. *Malpica v. Sebastian*, 425 N.E.2d 1029 (Ill. 1<sup>st</sup> Dist. 1981). The doctrine of judicial admission should be applied with caution. CJS Evidence § 397 (1990).

The evidence at trial was undisputed Ms. Lawrence had no knowledge of any participation in the payment of Mr. Wong. Because Ms. Lawrence had no actual knowledge of the filing of the Complaint in this matter, let alone the substance of the allegations found therein, the trial court should not have relied on those allegations as a judicial admission of fact. It is not in the interest of justice to ascribe liability to a person on the basis of statements made by someone she did not retain as her attorney, which statements she did not read, review or sign. Intermountain’s counsel at trial even conceded the conspiracy allegation was brought more against Mr. Lawrence than Ms. Lawrence (Trans., Vol. II, p. 293, lines 12-14). The facts established at trial are: Ms. Lawrence went to Intermountain to help pick out a vehicle she understood was being paid for by cSave.net (Trans., Vol. I. p. 199, lines 10-12) and she drove it one time (Trans., Vol. I. p. 193 lines 11-15). For these actions, Ms. Lawrence now faces a judgment of



\$238,267.24. Further, as noted above, she only ratified the “cause of action,” not every factual allegation in the Complaint.

**POINT 3. THE DISTRICT COURT ERRED IN IMPUTING KNOWLEDGE OF AN ALLEGED CONSPIRACY TO MR. LAWRENCE BASED UPON HIS MARRIAGE TO MS. LAWRENCE**

The trial court held:

Because Mr. and Ms. Lawrence were married and cohabiting at the time Ms. Lawrence participated in the inducement to Mr. Wong, it is reasonable to infer that Mr. Lawrence was also aware of the inducement. The Court thus concludes that on the day Mr. Wong signed the leases at Intermountain, Mr. Lawrence was fully aware of, and intentionally participated in, the scheme to obtain and use vehicles without the intent to pay for their use. (FF, ¶65).

If the trial court’s holding stands, all married persons must take note: if your spouse is participating in a conspiracy, you will automatically be liable as well. The trial court’s holding amounts to “guilt by association.” Surely such holding falls far short of determining by clear and convincing evidence that an individual participated in a conspiracy. Guilt by association, even the association of marital bonds, is contrary to standards our system of justice. *See, e.g., United States v. Mellen*, 393 F. 3d 175, 188 (C.A.D.C. 2004) (“Such a finding threatens to turn all spouses into co-conspirators because of their agreement to marry-not because of their agreement to participate in a particular conspiracy. We require more specific evidence of guilt ....”) (J. Henderson, dissenting in part). In other contexts, such as the filing of tax returns, an innocent spouse cannot be penalized for the acts of his/her spouse, of which the innocent spouse had no knowledge. *See, e.g., Mlay v. IRS*, 168 F.Supp. 2d 781, 785-86 (S. D. Ohio 2001).

**POINT 4. THE DISTRICT COURT ERRED IN FINDING THE LAWRENCES LIABLE FOR CONVERSION BECAUSE INTERMOUNTAIN HAD NO RIGHTS TO THE BLACK RODEO BEFORE JANUARY 31, 2001, DID NOT OBTAIN A WRIT OF REPLEVIN UNTIL OCTOBER 5, 2001, AND BECAUSE THE LAWRENCES RELINQUISHED POSSESSION ON JANUARY 31, 2001**

Conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. *Phillips v. Utah State Credit Union*, 811 P.2d 174, 179 (Utah 1991). See CL, ¶ 47. The trial court's finding the Lawrences liable for conversion to Intermountain fails because Intermountain was not entitled to the Black Rodeo from April 1, 2000 until January 31, 2001. During that time period, the vehicle was owned by Bank of America. (Ex. 61, attached hereto as Addendum "F"). Therafter, Intermountain could not repossess the vehicle if doing so caused a breach of the peace. It wasn't until October 5, 2001, that Intermountain obtained a writ of replevin.

A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. *Allred v. Hinckley*, 328 P.2d 276 (Utah 1958). To prove conversion, Intermountain was required to establish that: (1) it had a right to the property; (2) it had an absolute and unconditional right to the immediate possession of the property; (3) it had made a demand for possession; and (4) the Lawrences wrongfully and without authorization assumed control, dominion, or ownership over the property.

Moreover, essential to the doctrine of conversion is that the plaintiff have title or possession of the item allegedly converted. The general rule is that an action for

conversion is not maintainable unless the plaintiff, at the time of the alleged conversion, is entitled to immediate possession of the property. An interest in the property which does not carry with it a right to possession is no sufficient; the right to maintain the action may not be based upon a right to possession at a future time. *Benton v. State Div. of State Lands and Forestry*, 709 P.2d 362, 365 (Utah 1985).

Intermountain was not entitled to absolute and unconditional right to the immediate possession of the Black Rodeo until January 31, 2001. Thereafter, its right was conditioned by self help without breach of the peace. A breach of the peace occurred and, thus, it was not even entitled to conditional possession on January 31, 2001. The courts are uniform a breach of the peace occurs when physical confrontation ensues. Thus, if there is threat of immediate physical confrontation or physical confrontation ensues, Intermountain was required to cease any further self-help procedure at that time. To proceed with self-help procedures when confronted with a breach of the peace is a violation of the self-help remedy under Utah Uniform Commercial Code, UTAH CODE ANN. § 70A-9a-609(2)(b). By even orally protesting the repossession, many cases hold that a debtor prohibits the creditor's right to possess the collateral. White & R. Summers, Uniform Commercial Code § 26-6, p. 110-11 (2d ed. 1980).

The facts establish the Lawrences had physical possession of the black Rodeo from March 31, 2000 until January 31, 2001, a period of 10 months. (FF, ¶¶ 19, 28-19). On January 31, 2001, Intermountain attempted to repossess the Black Rodeo, but was unsuccessful. (FF, ¶28). Following Intermountain's attempted repossession, Mr. Lawrence returned the Black Rodeo to Mr. Schwenke, who was the owner of cSave.net,

which company Mr. Lawrence understood to be the lessee of the Black Rodeo. (FF, ¶ 29). The trial court, however, found the Lawrences liable for conversion for the time period of March 31, 2001 until January 31, 2001. CL, ¶ 62 & 66. The trial court also found Mr. Lawrence liable for conversion for the time period from March 31, 2001 until July 10, 2003, the point in time at which Intermountain was able to sell the vehicle, after it had been recovered. See CL, ¶ 66.

Neither Lawrence was a signatory to the lease. Contractual terms are not binding upon non-parties to the contract. See, e.g., *Metropolitan Alloys Corp. v. State Metals Indus., Inc.*, 416 F.Supp. 561 (E.D. Mich. 2006). Likewise, although the Lawrences generally knew of the monthly payment amount, there is no evidence in the record either Lawrence was aware of the any lease term prohibiting possession.

The trial court's basis for finding Mr. Lawrence liable for a greater period of time was his entry of appearance as counsel for the plaintiffs and an attempted removal of the case to federal court. The trial court found by these actions, he "knowingly and intentionally acted to frustrate Intermountain's attempt to recover the vehicle, and that he deprived Intermountain of its ability to derive its expected financial benefit from the vehicle." *Id.*

Mr. Lawrence entered his appearance on behalf of plaintiffs and began prosecuting their claims and defending against Intermountain's counterclaims in 2001. FF, ¶31. "A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Phillips*, 811 P.2d at 179. Defense of a claim for conversion, during which time the

defendant maintains control or use of the property, cannot form the basis for conversion, or conspiracy to defraud, because a defense is not unlawful. Parties are allowed to prosecute claims and make defenses, even if the claims or defenses are ultimately denied. Even if the claims are frivolous, bringing such claims is not unlawful. *Oxford Clothes XX*, 127 F.3d at 577.

Following January 31, 2001, and at the time of his entry of appearance, Mr. Lawrence did not have physical control or custody of the Black Rodeo, nor did he ever have physical control or custody of the Green or Silver Rodeos. Rather, physical control and custody was had by Paul Schwenke and his family members.

Further, on January 31, 2001 and at the later time Mr. Lawrence entered his appearance, rightful custody of the subject vehicles had not yet been established, but was in litigation. Mr. Lawrence did not have custody or control of the Black Rodeo after January 31, 2001 but, even if he did, it would not have been unlawful for him to keep possession of this vehicle until the court's order to remit it to Intermountain was entered in October 2001. Likewise, it was not unlawful for his clients to retain possession of the vehicles prior to October 2001 because Utah law requires Intermountain to cease self-help procedures when a breach of the peace occurred. See UTAH CODE ANN. § 70A-9a-609(2)(b).

## **POINT 5. THE PUNITIVE DAMAGES AWARDED BY THE DISTRICT COURT ARE EXCESSIVE**

### *A. Background of the Trial Court's Findings with respect to Damages*

The trial court calculated the total amount of monetary damages caused by the Lawrences to Intermountain to be \$138,267.15. (SF, p. 36). The trial court reached this number by holding Mr. Wong, Mr. Lawrence and Ms. Lawrence jointly and severally liable for fraud or conspiracy to defraud in the amount of \$80,412.87. (CL, ¶69). The trial court reached this latter number by calculating the amount Intermountain was forced to pay to repurchase the leases of three vehicles (\$95,752.45), adding Intermountain's expenses in recovering the vehicles and selling them (approximately \$8,000), and subtracting out the amount at which it was able to ultimately resell the three vehicles (\$23,408.98). (CL, ¶ 35). The trial court then added pre-judgment interest (\$57,854.38) to reach the total of \$138, 267.15 as the base amount. (SF, p. 36).

### *B. Because Utah precludes finding the Lawrences liable for conspiracy to defraud when they were found not liable for fraud, the punitive damages award cannot be based on any alleged conspiracy to commit fraud*

As argued above, the Lawrences cannot be found liable for conspiracy to defraud, when Intermountain failed to prove the Lawrences engaged in any direct fraud. The trial court expressly based its award against the Lawrences for \$138,267.25 on the finding of liability for conspiracy to defraud. (FF, ¶69). The trial court also concluded the monetary damage caused to Intermountain by the conversion of the Black Rodeo was \$3,625.40. (FF, ¶ 69). If liable at all, the Lawrences should not be held liable to Intermountain for monetary damages greater than this amount. Although the Lawrences argue no punitive

damages should be awarded, if such damages are awarded, they should be based off the monetary damage amount of \$3,625.40.

*C. The court erred in basing its punitive damage award against the Lawrences on the loss of three vehicles, when they were found liable for conversion of only one vehicle*

A court may not base its award of punitive damages on acts of the tort-feasor outside the scope of those acts upon which liability is premised. *See State Farm Ins Co. v. Campbell*, 538 U.S. 408, 422 (2003) (“A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”). Here, the finding of the Lawrences’ liability for conversion was based upon conversion of a single black Rodeo, not three. (CL, ¶ 62). (“The Court concludes that Ms. Lawrence willfully interfered with Intermountain’s possession of *the Black Rodeo* .... By her actions, she deprived Intermountain of its ability to derive financial benefit from *the vehicle*. Thus, she is liable for conversion of *the Black Rodeo* ....”) (emphasis added).

Even though the district court held the Lawrences liable for conversion to just one vehicle and not three, it nevertheless based its damages award against the Lawrences, both compensatory and punitive, on Intermountain’s alleged deprivation of three vehicles, not one. The trial court thus punished the Lawrences for acts committed by third parties. Punitive damages may not be used to punish a party for the acts of another, or even for that party’s dissimilar acts. *State Farm Ins. Co. v. Campbell*, 538 U.S. 408 at 422, 423 (2003). Even if the finding of conspiracy on the part of the Lawrences were allowed to stand, the Lawrences only had benefit of one vehicle, not three.

*D. The court erred in basing its monetary and punitive damage award against Mr. Lawrence for the loss of the Black Rodeo from March 31, 2000 to July 10, 2003, when Mr. Lawrence only had possession of the Black Rodeo from March 31, 2000 to January 31, 2001*

It was specifically found at trial that Mr. Lawrence, after learning of Intermountain's claimed ownership of the Black Rodeo, immediately returned it to Mr. Schwenke. (FF, ¶29). The trial court found, "Mr. Lawrence turned the Black Rodeo over to Mr. Schwenke ...." (FF, ¶ 29). Mr. Lawrence understood cSave.net to be the lessee. (Trans., Vol. II, p. 229, lines 1-20). Mr. Lawrence, on January 31, 2001, asked to see a court order during the repossession attempt. (FF, ¶ 28). Such court order was not issued until October 5, 2001. Merely asserting rights, which rest upon a good faith belief, is no reason to ascribe punitive damages. There is nothing reprehensible in such conduct. *See R&R Sails, Inc. v. Insurance Co. of State of Pa.*, 610 F. Supp. 2d 1222 (S.D. Cal. 2009); *Williams v. Younginer*, 851 N.E. 2d 351 (Ind. App. 2006) (proof that a tort was committed does not necessarily establish the right to punitive damages; punitive damages may be awarded only if there is clear and convincing evidence that defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing). By even orally protesting a repossession, many cases hold that a debtor prohibits the creditor's right to possess the collateral. *White & R. Summers*, Uniform Commercial Code § 26-6, p. 110-11 (2d ed. 1980).



*E. The trial court erred in including pre-judgment interest and attorney fees as a component of monetary damages to determine the ratio between actual and punitive damages*

The appropriate ratio of punitive damages should not be affected by the time elapsed between the filing of a complaint and the trial of the action. In *Campbell v. State Farm Ins. Co.*, 98 P.3d 409 (Utah 2004), the Utah Supreme Court concluded that attorney fees and costs should not be included as part of the ratio to determine the appropriateness of the amount of punitive damage. Similarly, pre-judgment interest should not be a component used to determine the ratio of compensatory to punitive damages. “Under our general practice, the issues of whether attorney fees are available to a party and the reasonableness of the requested fees are reserved for determination by the judge after the conclusion of the trial or other proceedings.” *Id.* Similarly, the issue of pre-judgment interest, under Utah trial practice, cannot be determined until liability and the basis therefore is found by the trier of fact. If this case were tried to a jury under our bifurcated system, prejudgment interest would not be part of the jury’s deliberation because the issue of prejudgment interest calculation and its award may be contested issues and are ruled upon by the court long after a jury has determined punitive damages and the appropriate ratios. Why the ratio should be different in a case tried to the bench is difficult to justify.<sup>6</sup>

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<sup>6</sup> In candor to the Court, the Court in *Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991), appears to have included the pre-judgment interest amount in its analysis of the appropriate ratios of actual to punitive damages. However, the appropriateness of such inclusion was not contested or argued by the parties.

*F. The punitive damage award violates the due process considerations set forth in State Farm v. Campbell*

“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). “The reason is that elementary notion so fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Id.* at 417 (internal citation omitted). To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” *Id.* “The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Id.* at 419. The Supreme Court has instructed courts:

to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.* (internal citations omitted).

Ms. Lawrence’s “knowledge” of an alleged conspiracy was based entirely on a judicial admission that she ratified the “cause of action” alleged by an attorney she had not retained. Is this conduct reprehensible? Ms. Lawrence signed no agreement with Intermountain, did not know Mr. Wong at the time he signed the leases and was informed cSave.net was paying the lease amounts. Is this conduct reprehensible? Ms. Lawrence drove the Black Rodeo one time during a period of ten months when it was in her family’s possession. Is this conduct reprehensible? Yet, the trial court imposed a liability

on Ms. Lawrence in an amount over \$238,000. Surely the punitive damage awarded against Ms. Lawrence does not come close to satisfying the constitutional standards set forth in *State Farm*.

Mr. Lawrence also had possession of the Black Rodeo for ten months. As soon as he learned Intermountain was attempting repossession, he returned it to cSave.net, who he thought was the rightful possessor. Is this conduct reprehensible? From that point forward, Mr. Lawrence did not have possession or control of the vehicle, Mr. Schwenke did. After Mr. Lawrence entered his appearance in the case, he defended the case on behalf of his clients, as he was entitled to do. Even though he was sanctioned \$1,500 for his removal to federal court, is this conduct reprehensible? Mr. Lawrence was not in control of the vehicle when the writ of replevin was issued. He was not obligated to do more than advise his client of the writ and inform his client of the consequences of disobeying the court order. Would acting in such a way be considered reprehensible? As the attorney, he cannot be punished for his client's refusal to obey a court order. To do so would subject attorneys everywhere to punitive damages every time their clients refused to obey court orders.

Neither Mr. Lawrence nor Ms. Lawrence's conduct constitutes a conspiracy to defraud. Indeed, neither of them can be found liable for conspiracy when Intermountain did not prove they participated in any direct fraud. The Lawrences can only be found liable, if at all, for conversion, and for a period of time when they actually had possession of one vehicle, the Black Rodeo. Any punitive damage award, to the extent one is called for, should be proportionate to the damages Intermountain suffered as a result of the

conversion of the Black Rodeo for a period of ten months. The Lawrences cannot be liable for damages incurred by Intermountain for loss of the Green and Silver Rodeos. The Lawrences never had possession of those vehicles and, as argued herein, did not conspire to defraud Intermountain of those vehicles.

*G. The Punitive Damages awarded are excessive pursuant to Crookston and BMW v. Gore*

*Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996) (and their progeny) are controlling in this matter. The Court should consider the following *Crookston* factors in determining whether the punitive damage award against the Lawrences was excessive, if merited at all.

1. The Nature of the Misconduct

While punitive damages may be awarded for a finding and conclusion of conspiracy to defraud, the imposition of an award so disproportionate to the actual damages suffered must be justified by more than the mere fact of a finding of fraud. Both the United States Supreme Court and the Utah Supreme Court have recognized that, within the broader class of actions that merit not only actual, but exemplary damages, there is a subset of particularly egregious behaviors that will attract more severe sanctions.

While the finding of conspiracy to defraud may support some award of punitive damages (if liability is presumed), the conduct found by the trial court lacks those

additional elements of blameworthiness that would sustain more substantial punitive damages.

As stated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996):

infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. *Id.* at 576 (citations omitted).

Here, the trial court held “there is no evidence that this instance impaired Intermountain’s ability to function or continue as a motor vehicle dealer.” (SF, p. 33). In fact, Intermountain, on p. 17 of the Dealer Agreement with Isuzu (Ex. 37, relevant portions of which are attached as Addendum “G”), is responsible to provide “written evidence that the vehicle is covered by an acceptable existing policy and that IMAC [Isuzu] has been named as an additional insured and loss payee.” If Intermountain had performed such a duty, the accident to the Black Rodeo would have been insured. Any conspiracy to defraud was not directed at vulnerable victims or otherwise in a manner sufficiently reprehensible to merit substantial punitive damages. *See Diversified Holdings, L.C. v. Turner*, 63 P.3d 686 (Utah 2002).

## 2. Facts and Circumstances Surrounding Defendants’ Misconduct

The next *Crookston* factor supplements the previous factor’s objective assessment of the defendants’ conduct with a more subjective inquiry into what the defendants knew and what was motivating their actions. The Lawrences obtained one vehicle for their use, which vehicle they thought was paid for by cSave.net. (Trans.,

Vol. I, p. 193, lines 20-21; Trans., Vol. I, p. 194, line 20 through p., 195, line5; Trans., Vol. I, p. 199, lines 9 -17; & Trans., Vol. II, p. 220, lines 1-6). When Intermountain attempted repossession, Mr. Lawrence immediately returned the vehicle to cSave.net. Such conduct is not so profoundly reprehensible, if at all, to merit substantial punitive damages. And, as the trial court found, there was no misrepresentations on the part of the Lawrences of any particular fact to Intermountain. CL, ¶¶ 60, 64.

At SF, p. 29, the trial court relied on the complaint against West Valley Dodge to conclude this conspiracy to defraud is more pernicious and evil because it is an on-going pattern of a larger scheme. As argued above, the West Valley Dodge Complaint is not probative of anything. To bootstrap that complaint into both a liability conclusion of law as well as an aggravating factor for punitive damages is to place too much strain on the bootstrap.

### 3. Effect of Defendants' Conduct on Plaintiffs and Others

The Lawrence's conduct also did not have the widespread effect on groups of vulnerable victims or a devastating impact on Intermountain that would justify a large punitive damage award. "The larger number of people affected, the greater the justification for higher punitive damages." *Campbell v. State Farm Ins. Co.*, 65 P.3d 1134 (Utah 2004). In this instance, only one entity was found to be injured by which an award of compensatory damages will make it whole.

Again, Intermountain's ability to function was not impaired and there is no evidence the economic loss was a financial hardship, affected its business dealings or that it was faced with ruinous bankruptcy. The fact that compensatory damages awarded

makes Intermountain whole and has not affected their business mitigates against a significant punitive damage award in this case.

4. Probability of Future Recurrence

Ms. Lawrence is now divorced from Mr. Lawrence and has remarried. Any belief that she will be involved in a reoccurrence is misplaced. As to Mr. Lawrence, the possibility of his recidivism is also unlikely and remote and is another mitigating factor against any substantial punitive damage award.

5. Relationship of the Parties

As the Supreme Court has noted, the greater the trust reposed in a defendant, the greater will be the justification for a more significant award of punitive damages. *Campbell*, 65 P.3d 1134. A breach of a relationship of trust and confidence may auger in favor of a substantial punitive damage award. Here, the entity claimed to be injured was a corporation, intimately familiar with the potential risks of automobile retail financing and whose sole injury will be made whole by the compensatory damage award. Intermountain certainly is not an inexperienced and vulnerable individual. Intermountain can and does verify the credit worthiness of a potential customer. (See Trial Ex. 16).

6. Ratio of Punitive to Compensatory Damages

The amount of punitive damages awarded against Mr. Lawrence is certainly above the guidelines announced in *Crookston*. In this case, the compensatory damage award was \$80,412.87 (exclusive of pre-judgment interest). The punitive damages awarded were \$484,000.00, a ratio of actual damages to punitive damages of almost 1 to 6. Where there are no significant aggravating factors, any award should be more closely aligned to


no more and probably less than a one-to-one ratio as referenced in *State Farm Ins. Co v Campbell*. Assuming liability for conversion, Mr. Lawrence should not have been found liable for damages above the fair rental rate of the Black Rodeo for approximately 10 months and punitive damages should be awarded accordingly. The previous factors enunciated in *Crookston* are mitigating factors.

### CONCLUSION

The Lawrences were presented use of a vehicle as compensation for Mr. Lawrence's work to Mr. Schwenke and cSave.net. The Lawrences had use of the vehicle only for a period of ten months, during which time they thought Mr. Schwenke's company was paying the lease. As soon as Mr. Lawrence learned of Intermountain's attempted repossession, he returned the vehicle to Mr. Schwenke. The Lawrences did not conspire to defraud. However, Ms. Lawrence now faces a judgment in excess of \$238,000 and Mr. Lawrence faces a judgment in excess of \$622,000. The trial court's finding should be reversed for the reasons set forth herein.

Respectfully submitted this 13 day of October, 2009.

WINDER & COUNSEL, P.C.

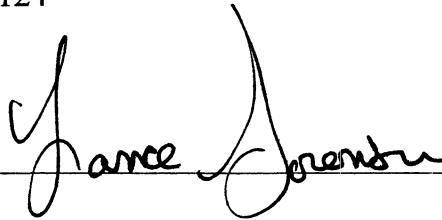
  
DONALD J. WINDER  
LANCE F. SORENSON  
Attorneys for Appellants Victor and  
Cindy Lawrence



**CERTIFICATE OF SERVICE**

I hereby certify that on the 13 day of October, 2009, two true and correct copies of the foregoing Appellants' Brief was mailed, postage prepaid, to the following:

Bryan Fishburn  
4505 S. Wasatch Blvd #215  
Salt Lake City, Utah 84124

  
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# **ADDENDUM A**

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT

AUG 13 2007

SALT LAKE COUNTY

Deputy Clerk

WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, CINDY LAWRENCE, and  
WAYNE WONG,

Plaintiffs,

vs.

INTERMOUNTAIN, INC., a Utah  
corporation doing business as Intermountain  
Isuzu,

Defendant, Counterclaimant  
and Third Party Plaintiff.

vs.

Wayne Wong, Wilma Schwenke, Tania  
Schwenke, Cindy Lawrence, Victor  
Lawrence, A. Paul Schwenke, and cSave.net.

Counterclaim Defendants,  
Defendants, and/or Third  
Party Defendants.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
JUDGMENT, and ORDER**

Civil No. 000904217

Judge Denise Posse Lindberg

¶1 On June 4, 2007–June 6, 2007, the Court conducted a bench trial on Intermountain, Inc.’s (“Intermountain”) 11 U.S.C. §523(a)(3)(B) claim against Wayne Wong, and Intermountain’s claims of fraud, conspiracy to defraud, and conversion against Victor and Cindy Lawrence.<sup>1</sup> P. Bryan Fishburn represented Intermountain. Christian Burrridge of Ford, Burrridge & Higbee represented Victor and Cindy Lawrence. Knute A. Rife represented Wayne

<sup>1</sup>The bench trial was limited to Defendant Intermountain’s counterclaims and third party claims against Mr. Wong and Mr. and Ms. Lawrence. Plaintiffs’ claims in the original complaint had been previously dismissed by the Court, and default judgments had also been entered against A. Paul Schwenke, Wilma and Tania Schwenke, and cSave.net for failure to respond to, and defend against, Intermountain’s counterclaims and/or third-party claims.

Wong. The Court heard and considered the testimony presented at trial, the arguments of counsel, and the various documents admitted into evidence. The Court now enters the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

¶2 Defendant and Counterclaimant Intermountain, Inc. is a licensed motor vehicle dealer and Isuzu franchisee with its principal place of business in Salt Lake County, State of Utah.

¶3 Plaintiff Victor Lawrence ("Mr. Lawrence") is an attorney licensed to practice in the State of Utah. Mr. Lawrence and plaintiff Cindy Lawrence ("Ms. Lawrence") were married at the time the events giving rise to this litigation took place, and have since divorced.

¶4 A. Paul Schwenke ("Mr. Schwenke") was a business client of Mr. Lawrence who established a business entity named cSave.net, LLC ("cSave.net" or the "LLC") on November 4, 1999. Mr. Lawrence prepared the Articles of Organization and Operating Agreement for cSave.net. According to the Articles of Organization, Wayne Wong ("Mr. Wong") was listed as a managing member of the LLC, although he testified that all he did for cSave.net was to "input information into the computer."

¶5 cSave.net's intended business objective was to operate an online grocery shopping business. According to Mr. Lawrence and Mr. Wong's testimony, however, cSave.net never operated in that capacity. The evidence also shows that cSave.net never had significant assets nor good credit.

¶6 On or about March 2000, Mr. Schwenke determined to lease certain vehicles for personal use by his wife Wilma and his daughter Tania. According to Mr. Lawrence, Mr. Schwenke also intended to lease a vehicle for Mr. and Ms. Lawrence's personal use as partial payment for legal services rendered by Mr. Lawrence.

¶7 Mr. Lawrence assisted Mr. Schwenke in his efforts by contacting Larry Miller Chrysler Jeep in Bountiful to explore leasing arrangements. Shortly after Mr. Lawrence's correspondence with the dealership in Bountiful, however, Mr. Schwenke contacted Intermountain to discuss leasing other vehicles. Ultimately, the vehicles were leased from Intermountain. Notably, however, Mr. Lawrence was present during some of Mr. Schwenke's negotiations with Intermountain, and at one point Mr. Lawrence advised Mr. Schwenke to return to the Bountiful dealership if Intermountain was not willing to meet the terms that the Bountiful dealership was offering.

¶8 Mr. Schwenke's initial contact with Intermountain was ostensibly on behalf of

cSave.net,<sup>2</sup> presumably as the prospective lessee. However, the negotiated leases were not signed on behalf of cSave.net. Rather, they were signed by Mr. Wong after Mr. Schwenke and the plaintiffs offered Mr. Wong \$10,000.00 if he (Mr. Wong) would use his credit-worthiness and sign the leases for three vehicles. Mr. Wong agreed to go to Intermountain and sign the leases.

¶9 At paragraph 41 of the complaint that initiated this case, Ms. Lawrence, as one of plaintiffs, stated: “[I]n order to induce plaintiff Wayne Wong to sign on the leases, plaintiffs agreed to pay him \$10,000.00.” See Plaintiff’s Exhibit 31. Notwithstanding this judicial admission, at trial Ms. Lawrence denied any knowledge of, or participation in, the payment offered to Mr. Wong. Although there was disputed evidence concerning when Ms. Lawrence actually saw the complaint in which she participated as a plaintiff, it is clear that at her deposition in 2002 she ratified the claims of the original complaint without qualification. Throughout the trial, Ms. Lawrence’s testimony was vague and inconsistent. As a result, the Court does not find Ms. Lawrence’s testimony credible.

¶10 Neither Mr. Schwenke, nor any of the plaintiffs, including Mr. Wong, disclosed to Intermountain that plaintiffs were paying Mr. Wong \$10,000.00 in exchange for his signature on the leases.<sup>3</sup> George Thomas Watkins (“Mr. Watkins”), owner and general manager of Intermountain, testified that had Intermountain been aware of this fact, it would not have leased the vehicles to Mr. Wong.

¶11 On or about March 31, 2000, Mr. Schwenke, Wilma, Tania, and Mr. and Ms. Lawrence each went to Intermountain’s offices for the purpose of selecting the three vehicles. Mr. Wong also went to Intermountain that day, during his lunch break and in a hurry, in order to sign the leases.

¶12 Although Mr. Schwenke appeared to have controlled most of the negotiations with Intermountain, the Court finds that Mr. and Ms. Lawrence also had some involvement in the lease negotiations—at least to the extent that both were aware that the monthly payments on each vehicle were supposed to be approximately \$360. Mr. Lawrence also issued a personal check to Intermountain in the amount of \$3000, which covered \$1000 cash down for each of the three vehicles. Mr. Lawrence was subsequently reimbursed for that expenditure, although the source of the reimbursement was not made clear at trial.

¶13 Mr. Wong, acting on the promise of receiving \$10,000.00, but with no present intention of making any of the lease payments on the three vehicles, nevertheless personally

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<sup>2</sup>Mr. Schwenke’s initial communication with Intermountain was a facsimile on cSave.net letterhead, dated March 29, 2000. See Plaintiff’s Exhibit 10. However, there was no evidence presented at trial that would explain why cSave.net would be paying for vehicles to be used by individuals with no business relationship to the LLC.

<sup>3</sup>Although promised a \$10,000.00 payment, Mr. Wong actually received two payments totaling \$7,500.00. See Plaintiff’s Exhibit 32.

signed each of the three leases as the lessee.

¶14 At trial Mr. Wong claimed that at the time he signed the leases, neither the monthly lease amount nor other terms had yet been filled in. According to Mr. Wong, he nevertheless went ahead and signed the leases in “blank,” relying on Mr. Schwenke’s representation that he (Mr. Schwenke) would make sure the lease forms were properly completed. Under questioning Mr. Wong admitted that Mr. Schwenke was not acting as his attorney in this transaction.

¶15 Mr. Wong also alleged and attempted to show at trial that he was not the lessee on the leases, but that cSave.net was the intended lessee and he was simply signing as a guarantor on the leases. Mr. Wong’s testimony throughout the trial was inconsistent and contradictory to his prior judicial admissions,<sup>4</sup> and as a result the Court does not find Mr. Wong’s testimony credible. In contrast, the Court credits Mr. Watkins’ testimony that the documentation Intermountain received regarding cSave.net was not consistent with cSave.net being the intended lessee. Beyond the Articles of Organization and Operating Agreement that were provided to Intermountain, Mr. Watkins testified that Intermountain would also have required tax returns for the LLC dating back several years, credit information on all officers of the LLC, and notarized documents showing that the signer had authority.<sup>5</sup>

¶16 The Court finds that cSave.net, as a start-up company with no significant assets or sufficient credit, could not have been the intended lessee. The Court finds it improbable that Mr. Schwenke and the plaintiffs would have offered Mr. Wong \$10,000.00 to front his credit had cSave.net qualified as the lessee. The Court thus finds that Mr. Wong was, in fact, the intended lessee on each of the three vehicles. Even if Mr. Wong had intended to sign only as the guarantor, as he claimed, Mr. Wong would nevertheless have been responsible for payment on the leases when neither the LLC nor those in possession of the vehicles made payments. Under either scenario, Mr. Wong knowingly obligated himself to answer for payment on the leases, but his testimony was that at the time he signed the leases he had no present intent to make any payments on that obligation.

¶17 In connection with the signing of the leases, Mr. Wong signed a credit application that misstated his gross annual income as \$450,000, when in fact his gross annual income was

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<sup>4</sup>For example, in Mr. Wong’s deposition dated September 1, 2000, Mr. Wong stated that he believed the drivers of the vehicles would be making the lease payments. In his testimony at trial, however, Mr. Wong insisted cSave.net would be making the payments. Additionally, Mr. Wong stated in his deposition that Mr. Lawrence was present at Intermountain the day he signed the leases. At trial, however, Mr. Wong insisted that his statements in the deposition were wrong and that Mr. Lawrence had not been present when he signed the leases.

<sup>5</sup>Mr. Watkins’ testimony suggested that the LLC related documents found in the “deal jacket” for the leases probably were provided because Mr. Wong was listed as a managing member of cSave.net.

about \$36,000.<sup>6</sup> See Plaintiff's Exhibits 11A and 18.

¶18 Also in connection with the signing of the leases, Mr. Wong signed a commitment to maintain insurance on the leased vehicles, and provided Intermountain his automobile insurance information and policy number with Hartford Insurance Company.<sup>7</sup> At some point in the next several months, however, Mr. Wong allowed his insurance coverage on each of the three leased vehicles to lapse.

¶19 Following Mr. Wong's signing of the leases, each of the original plaintiffs except Mr. Wong took possession of the vehicles. Mr. Schwenke and Wilma took possession of a silver Isuzu Rodeo (the "Silver Rodeo"), Tania took possession of a green Isuzu Rodeo (the "Green Rodeo"), and Mr. and Ms. Lawrence took possession of a black Isuzu Rodeo (the "Black Rodeo").

¶20 Sometime after the signing of the leases but before May 24, 2000, Intermountain sold the leases for the Silver and Green Rodeos to Isuzu Motors Acceptance Corporation and Isuzu LT. Intermountain sold the lease for the Black Rodeo to Bank of America, N.A.

¶21 None of the plaintiffs made any payments whatsoever on any of the three vehicles. Neither did Mr. Schwenke, cSave.net, nor Mr. Lawrence make any payments.

¶22 On or about September 2000, after no payments on the Silver and Green Rodeos had been made, Isuzu Motors Acceptance Corporation/Isuzu LT demanded in writing that Mr. Wong present the vehicles for inspection in accordance with the terms of the lease agreements. Mr. Wong received the letters but ignored Isuzu's demand. Instead, Mr. Wong gave the demand letter to Mr. Schwenke. Mr. Wong testified that he made no inquiries at all as to who was in possession of those vehicles, nor their status. Mr. Wong also made no demand that Mr. Schwenke or others produce the vehicles.

¶23 In October 2000, after Mr. Wong failed to present the Silver and Green Rodeos for inspection, and because payments had still not been made, Isuzu Motors Acceptance Corporation/Isuzu LT required Intermountain to repurchase the leases on the Silver and Green

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<sup>6</sup>The evidence regarding the credit application is unclear. Apparently, two separate credit applications were filled out, both purportedly signed by Mr. Wong but only one of which had Mr. Wong's genuine signature. Whether Mr. Wong actually filled out the terms of the credit application that contained his genuine signature was disputed.

<sup>7</sup>Although Mr. Wong denied giving his policy number in connection with signing the leases, the Court finds that denial not credible. Mr. Wong admitted that Hartford was his insurance carrier. Mr. Watkins testified credibly that before any leased vehicle is allowed to leave the dealership, Intermountain confirms insurance coverage. The Court finds it improbable that Intermountain would have been able to confirm insurance coverage if Mr. Wong had not personally provided that information.

Rodeos.<sup>8</sup> Intermountain paid \$32,202.08 to repurchase the lease on the Silver Rodeo, and \$28,272.13 to repurchase the lease on the Green Rodeo. See Plaintiff's Exhibits 43 and 57.

¶24 Beginning in May 2000 and thereafter each month for several months, Mr. Wong also received multiple notices from Bank of America that lease payments on the Black Rodeo were due, and that late fees were accruing. See Plaintiff's Exhibit 20. As he did with the demand letters on the Silver and Green Rodeos, Mr. Wong ignored the Bank of America notices and turned them over to Mr. Schwenke. Mr. Wong did not inquire into who had possession of the Black Rodeo, nor did he make any of the payments as demanded.

¶25 Because no payments had been made on the Black Rodeo by January 2001, Intermountain was required to repurchase the lease from Bank of America for \$35,278.24. See Plaintiff's Exhibits 61 and 62.

¶26 After repurchasing the leases and regaining ownership of the three Rodeos, Intermountain sought to repossess each of the vehicles.

¶27 In November 2000, pursuant to a Writ of Replevin issued by the Court, a sheriff repossessed the Silver Rodeo from Wilma and Mr. Schwenke's residence in Kanosh, Utah. At that time, Intermountain learned that the Silver Rodeo had been in an accident and sustained substantial damage. Intermountain repaired the damages and later sold the Silver Rodeo to a retail customer for \$13,898.00.

¶28 On January 31, 2001, the same day Intermountain had regained ownership of the Black Rodeo, Intermountain unsuccessfully attempted to repossess the Black Rodeo while it was parked in a parking garage outside Mr. Lawrence's office in Salt Lake City. Mr. Watkins was present at the attempted repossession and showed Mr. Lawrence documentation evidencing Intermountain's reacquired rights over the Black Rodeo. Mr. Lawrence said he would not turn over the vehicle without a court order. A confrontation between Mr. Watkins and Mr. Lawrence ensued, and the police were called to the scene. The police allowed Mr. Lawrence to leave the scene with the Black Rodeo.

¶29 Immediately after the attempted repossession, Mr. Lawrence turned the Black Rodeo over to Mr. Schwenke, notwithstanding Mr. Lawrence's knowledge that Intermountain was claiming ownership of the Black Rodeo. Upon receiving possession of the Black Rodeo, Mr. Schwenke gave permission to a family member to drive the Black Rodeo to California, where it was subsequently totaled in a single vehicle accident.

¶30 On May 23, 2001, because Intermountain did not know who had possession of the Green and Black Rodeos, Intermountain served Interrogatories and Requests for Production of Documents on the Schwenkes, Mr. and Ms. Lawrence, and Mr. Wong, to discover the location of those vehicles.

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<sup>8</sup>Mr. Watkins testified that under the terms of the dealership agreement with Isuzu, Intermountain was required to purchase back non-performing leases.



¶31 Shortly after Intermountain served its Interrogatories, Mr. Lawrence entered an appearance as counsel on behalf of himself, Ms. Lawrence, the Schwenkes and Mr. Wong. Rather than answering Intermountain's Interrogatories, Mr. Lawrence delayed the proceedings by attempting to remove the case to federal court. The removal was denied and a \$1500 judgment for attorneys fees was jointly and severally entered against each of the plaintiffs, Mr. Lawrence, and cSave.net. Mr. Wong learned of the \$1500 judgment entered against him when he discovered that a lien had been recorded against his property. Mr. Wong subsequently paid the judgment in order to remove the lien.

¶32 The Court issued a Writ and Order of Replevin on the Black Rodeo on October 5, 2001 and a Writ and Order of Replevin on the Green Rodeo on January 10, 2002. Neither Order of Replevin resulted in the immediate return of the Black and Green Rodeos, however. Only after the Court entered an Order on February 26, 2006 finding the parties in contempt of court, did Mr. Lawrence finally answer the Interrogatories intended to ascertain the location of the Black and Green Rodeos.

¶33 On or about March 11, 2002, Mr. Schwenke finally returned the Green Rodeo to Intermountain, at which time Intermountain discovered that the Green Rodeo had also sustained substantial damage. Intermountain sold the Green Rodeo at auction a few months later for \$8,310.98, after attempting but being unable to sell it on the retail market.

¶34 Mr. Schwenke also eventually returned the Black Rodeo to Intermountain in 2002. When Mr. Schwenke finally returned the Black Rodeo, it was delivered on a flatbed truck having been completely totaled in an accident in California. Intermountain unsuccessfully attempted to sell what was left of the Black Rodeo to a wholesaler, but ended up selling the vehicle to one of its employees for \$1,200.00.

¶35 After repurchasing the leases from Bank of America and Isuzu Motors Acceptance Corporation/Isuzu LT for \$95,752.45, incurring approximately \$8,000.00 in expenses (not including attorneys fees) in recovering and preparing the vehicles for sale, and reselling the three vehicles for \$23,408.98, Intermountain was left with a net loss of \$80,412.87. See Plaintiff's Exhibit 66.

¶36 In September 2003, Mr. Wong filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. Instead of listing Intermountain as a creditor on his bankruptcy filing, as was his obligation under 11 U.S.C. §521(1), Mr. Wong listed Isuzu Motors Acceptance Corporation, Isuzu LT, and Bank of America as creditors.

¶37 Mr. Wong claimed at trial that he was unaware Intermountain had repurchased the leases and thus did not deliberately leave Intermountain off his list of creditors. However, Mr. Wong received actual notice of Intermountain's repurchase of the three vehicle leases at least two years before he filed for bankruptcy. First, Intermountain notified Mr. Wong's counsel immediately after repurchasing the leases that it was again the owner of the leases. See Plaintiff's Exhibit 67 and 68. Second, Mr. Wong received actual and personal notice in May 2001 when Intermountain filed its First Amended Answer, Counterclaim and Third-Party Complaint, which explicitly stated that it had repurchased the leases on each of the vehicles. See

Plaintiff's Exhibit 88. This First Amended Answer was served upon Mr. Wong at his home address.

¶38 Because Mr. Wong failed to list Intermountain on his list of creditors, Intermountain never received formal notice of Mr. Wong's bankruptcy. Intermountain did not become aware of Mr. Wong's bankruptcy until January 2005, when an Intermountain employee inadvertently opened a bankruptcy notice addressed to Isuzu Motors Acceptance Corporation but mailed to Intermountain's offices.

¶39 Because Mr. Wong failed to list Intermountain as a creditor, and the amount of time that had lapsed before Intermountain learned of the bankruptcy, Intermountain was time-barred under the bankruptcy Code from filing a non-dischargeability action against Mr. Wong.

¶40 Of significance, on March 30, 2000 (one day before Mr. Wong, Mr. and Ms. Lawrence and the other plaintiffs went to Intermountain to select, negotiate and sign the leases for the three Rodeos), Mr. Lawrence filed a lawsuit on behalf of Mr. Schwenke, Wilma Schwenke, Ms. Lawrence and others (but not Mr. Wong), regarding a similar although not identical deal with West Valley Dodge.<sup>9</sup>

¶41 In the case against West Valley Dodge, another Schwenke-controlled business entity, Bonneville Investment Group, arranged the leasing of two Dodge Durangos and one Dodge Ram. One of the vehicles, a green Durango, was given to Mr. and Ms. Lawrence for their personal use. The Lawrences never made payments on that leased vehicle, resulting in the vehicle being repossessed from their residence in Bountiful, Utah. The other Durango and Dodge Ram were likewise repossessed from the Schwenkes because of lack of payment.

¶42 In each case, shortly after receiving possession of the vehicles, Mr. Lawrence was involved in filing and/or prosecuting lawsuits against the dealerships on behalf of many of the same individuals who became plaintiffs in this case. In each case, the plaintiffs alleged breach of contract and other claims. Then, having filed suit against each dealership, the plaintiffs used the lawsuits as a basis for asserting a right to continue possessing and using vehicles for which they were making no payments. In each case, the dealerships were forced to take action to repossess the vehicles.

¶43 Less than one month after vehicles leased from West Valley Dodge were repossessed, Mr. and Ms. Lawrence, Mr. Schwenke, and the other plaintiffs in the present action went to Intermountain and in large measure attempted to replicate their transaction with West Valley Dodge. The Court finds that the two cases, involving many of the same parties and

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<sup>9</sup>The Court has no knowledge concerning the outcome of the case against West Valley Dodge, and makes no findings regarding that case. Rather, the Court is relying on allegations which Mr. Lawrence made on behalf of the plaintiffs (including Ms. Lawrence) in the complaint against West Valley Dodge. As judicial admissions by those plaintiffs, the statements in that complaint can be properly considered against those same individuals in this case as probative of a pattern of conduct.

occurring within weeks of each other, strongly suggest a pattern of knowing and intentional conduct on the part of several plaintiffs in this case, including Mr. and Ms. Lawrence.

### **CONCLUSIONS OF LAW**

¶44 Jurisdiction and venue are proper in this Court because the transaction at issue in this case, including the negotiating and signing of the leases, took place at Intermountain's offices in Salt Lake County.

#### **A. Applicable Legal Standards**

¶45 Fraud. Under Utah law, fraud is established when a party proves by clear and convincing evidence: "(1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representer either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 207-208 (Utah 2001).

¶46 Conspiracy to Defraud. "A conspiracy to defraud is fraud committed by two or more persons who share an intent to defraud another." *Debry v. Cascade Construction Co.*, 879 P.2d 1353, 1359 (Utah 1994). Conspiracy to defraud must be proven by clear and convincing evidence. *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978).

¶47 Conversion. "A conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. The full measure of damages of conversion is the full value of the property." *Phillips v. Utah State Credit Union*, 811 P.2d 174, 179 (Utah 1991). "Although conversion results only from intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right." *Id.* Conversion need only be proven by a preponderance of the evidence.

¶48 Motion to Amend Pleadings. Rule 15(b) of the Utah Rules of Civil Procedure states, in pertinent part, that "[s]uch amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."

¶49 Judicial Admissions. Though the rule is not absolute, generally "an admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it." *Baldwin v. Vantage Corp.*, 676 P.2d 413, 415 (Utah 1984) (citing *Yates v. Large*, 284 Or. 217, 585 P.2d 697 (1978)).

¶50 Bankruptcy Code 11 U.S.C. §521(a)(1)(A). Section 521(a)(1)(A) of the Bankruptcy Code imposes an affirmative duty on a debtor who has filed bankruptcy to file and

provide a list of creditors.<sup>10</sup>

¶51 Bankruptcy Code 11 U.S.C. §523(a)(2)(A). Section 523(a)(2)(A) makes nondischargeable a debt obtained by false pretenses, a false representation, or actual fraud.<sup>11</sup>

¶52 Bankruptcy Code 11 U.S.C. §523(a)(3)(B). A creditor may bring a Section 523(a)(3)(B) claim to declare a debt nondischargeable in cases where the debtor obtained a debt by fraud, and failed to give the creditor notice of the debtor's bankruptcy filing in time for the creditor to file a nondischargeability claim against the debtor under Bankruptcy Rule 4007(c). A section 523(a)(3)(B) claim requires: (1) proof of fraud; (2) proof that the debtor did not identify the creditor in his or her bankruptcy filing; and (3) proof that the creditor did not learn by other means of the debtor's bankruptcy in time to file a nondischargeability complaint for fraud.<sup>12</sup>

¶53 Punitive Damages. Utah Code Ann. §78-18-1(1)(a) states: "Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or

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<sup>10</sup>11 U.S.C. §521(a)(1)(A), "Debtors duties", states:

- (a) The debtor shall—
  - (1) file
    - (A) a list of creditors ...

<sup>11</sup>11 U.S.C. §523(a)(2)(A) states:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
  - (1) ...
  - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
    - (A) false pretenses, a false representation, or actual fraud...

<sup>12</sup>11 U.S.C. §523(a)(3)(B) states:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
  - (1) ...
  - (2) [see above] ...
  - (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
    - (A) ...
    - (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.” In addition, §78-18-1(2) states: “Evidence of a party’s wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.”

## **B. Wayne Wong**

¶54 The Court concludes that Mr. Wong committed fraud against Intermountain. Mr. Wong’s conduct satisfies the elements of fraud in that he knowingly made several material misrepresentations to Intermountain, intending that Intermountain rely upon those misrepresentations. Intermountain did, in fact, reasonably rely upon Mr. Wong’s misrepresentations to its detriment. Mr. Wong’s affirmative misrepresentations included: (a) signing the leases for the three Rodeos as the lessee with no intention of making any payments on the vehicles; (b) signing documents that committed him to maintain insurance on the leased vehicles when he had no intention of doing so; and (c) agreeing to lease terms that obligated him to maintain control of the leased vehicles (including restricting others from more than temporary possession) when he had no intention to use or possess the vehicles.<sup>13</sup> In addition, Mr. Wong also misrepresented his intentions to Intermountain through a material omission, that is, his failure to disclose to Intermountain that he was promised \$10,000.00 in exchange for his signature on the leases.

¶55 The Court concludes that these material misrepresentations and omissions by Mr. Wong were made knowingly and for the purpose of inducing Intermountain to act upon them and lease the three vehicles to him. As a result of Intermountain’s reasonable reliance upon Mr. Wong’s misrepresentations, Intermountain suffered substantial damages by later having to repurchase the leases and repossess the vehicles after they had been severely damaged. As Mr. Watkins testified, Intermountain would never have leased the vehicles to Mr. Wong if it had known the falsity of Mr. Wong’s representations.

¶56 Having satisfied the elements of fraud, the Court next concludes that Mr. Wong knowingly failed to identify Intermountain as a creditor when he filed for bankruptcy. Mr. Wong claimed that he did not list Intermountain as a creditor because he was not aware Intermountain was the owner of the leases. The Court concludes that this argument is without merit. As discussed at ¶37 above, both Mr. Wong and Mr. Wong’s attorney received notice that Intermountain had repurchased the leases on all three Rodeos. Mr. Wong had actual knowledge that Intermountain owned the leases on each of the three vehicles at least two years before he filed for bankruptcy.

¶57 Finally, the Court concludes that Intermountain did not learn of Mr. Wong’s

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<sup>13</sup>The Court has noted a discrepancy between the income amounts attributed to Mr. Wong as reflected in the credit application to Intermountain. See ¶17 and note 6, *supra*. Although that discrepancy could also be considered a material misrepresentation, there was no clear evidence of who provided the \$450,000 income figure. Because of unanswered questions surrounding the credit applications, the Court has not included that misrepresentation as a basis for its present conclusion.

bankruptcy in time to file a non-dischargeability action. Intermountain never received formal notice of Mr. Wong's bankruptcy. Rather, as discussed at ¶38 above, Intermountain happened upon the information by accident in January 2005, some sixteen months after Mr. Wong filed for bankruptcy. At that point, it was too late for Intermountain to protect its interests during the bankruptcy proceeding.

¶58 Based on the preceding analysis, the Court concludes that Mr. Wong is liable to Intermountain under 11 U.S.C. §523(a)(3)(B) and that the debt is non-dischargeable.<sup>14</sup>

### C. Cindy Lawrence

¶59 Cindy Lawrence's Motion to Amend Pleadings per Rule 15(b). At closing argument, Ms. Lawrence's counsel moved to amend the pleadings so as to alter the effect of her prior judicial admissions. Specifically, Ms. Lawrence sought to amend paragraph 41 of the original complaint that stated "[I]n order to induce plaintiff Wayne Wong to sign on the leases, plaintiffs agreed to pay him \$10,000.00." Under Rule 15(b), when issues not addressed in the pleadings are tried by express or implied consent, amendment may be made to conform to the evidence. Those circumstances are not applicable here. In this case, the pleadings expressly addressed the actions which plaintiffs, including Ms. Lawrence, had taken to induce Mr. Wong to sign the leases on their behalf. The Court rejects Ms. Lawrence's argument that all of the evidence presented at trial showed that she knew nothing of the \$10,000.00 promised to Mr. Wong. On the contrary, the undisputed evidence is that Ms. Lawrence ratified the original complaint without qualification when she was questioned during her deposition in 2002. Although she claimed not to have seen the complaint until after it was filed, Ms. Lawrence testified that she would have authorized her agent to file the complaint on her behalf.

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<sup>14</sup>On three separate occasions Mr. Wong challenged the ability of this Court to entertain a cause of action under 11 U.S.C. §523(a)(3)(B). Three separate judges ruled against Mr. Wong's argument that federal courts had exclusive jurisdiction. Most recently, this matter was heard on March 21, 2007. At that hearing the Court held that the state courts share concurrent jurisdiction with the federal district courts in determining whether a debt is excepted from discharge because the debt was obtained through fraud or false pretenses, and the creditor learns of the filing too late to challenge the discharge. The Court's decision was based on the reasoning in *In re Franklin*, 179 B.R. 913, 919-920 (Bankr. Ct. E.D. Cal. 1995) (holding that causes of action that exist solely because of federal law, such as §532(a)(3)(b), "arise under" Title 11 and both state and federal courts have jurisdiction to decide the issue. *See also* 28 U.S.C. §1334(b) ("...the [U.S.] district courts shall have original *but not exclusive* jurisdiction of all civil proceedings arising under Title 11 [the bankruptcy code], or arising in or related to cases under Title 11") (emphasis added). The *Franklin* court also held that because the creditor in that case did not have notice of the bankruptcy he was unable to comply with the sixty-day deadline and was therefore permitted to litigate the dischargeability of the fraud claim in state court "at any time." *In re Franklin*, 179 B.R. at 923-24. Based on this reasoning Intermountain's claim under 11 U.S.C. 523(a)(3)(B) was allowed to proceed to trial. The holding herein is based on the Court's prior determination and the facts adduced at trial.

Additionally, this case has been pending since 2000, yet it was not until the Court noted that the allegations in the complaint were judicial admissions admissible against Ms. Lawrence, that she sought to amend the complaint to eliminate the effect of that admission. Ms. Lawrence has been represented by counsel at every stage of these proceedings, and either she or her counsel knew, or should have known, that Intermountain was relying on that statement in the complaint as support for its claims against her. Notwithstanding that knowledge, Ms. Lawrence waited until the last possible minute to challenge this particular admission. For all these reasons, the Court denies Ms. Lawrence's motion to amend the pleadings.

¶60 Fraud. While there is substantial probative evidence supporting Ms. Lawrence's participation in the fraudulent scheme against Intermountain, the Court cannot identify any affirmative misrepresentations made directly by Ms. Lawrence to Intermountain.<sup>15</sup> As a result, the Court cannot conclude that Intermountain established by clear and convincing evidence that Ms. Lawrence's actions satisfy the elements of fraud.

¶61 Conspiracy to Defraud. Although the Court does not hold that Ms. Lawrence directly committed fraud, the Court concludes that Ms. Lawrence conspired to defraud Intermountain. The following facts point to Ms. Lawrence's knowing and intentional participation in the fraud: (a) Approximately one month before Ms. Lawrence obtained possession of the Black Rodeo, West Valley Dodge repossessed a Durango from the Lawrences that had been leased by Mr. Schwenke under a similar arrangement.<sup>16</sup> (b) Ms. Lawrence participated in the \$10,000.00 offered to Mr. Wong to induce him to sign the leases from which she would benefit by receiving and using one of the vehicles. (c) Ms. Lawrence was present at the time the leases were negotiated and signed, and she was generally aware of the anticipated financial terms. (d) Ms. Lawrence took possession of the Black Rodeo with no intention or expectation of making any payments on the vehicle, nor did she make any effort to ensure that payments would be made. (e) Ms. Lawrence lent her name to a lawsuit designed to impede Intermountain's efforts to recover the vehicle she was using without lawful claim. As a result of Ms. Lawrence's participation in this scheme, she benefitted personally to the detriment of Intermountain. Intermountain suffered actual and substantial financial damage from the fraudulent scheme. The Court believes and holds that the totality of the evidence establishes Ms. Lawrence's knowing and intentional participation as a conspirator to the fraud perpetrated by Mr. Schwenke and Mr. Wong.

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<sup>15</sup>Although Ms. Lawrence was present on the day of the signing and a participant in the inducement that had been offered to Mr. Wong, the Court cannot conclude that Ms. Lawrence had an affirmative duty to disclose that inducement to Intermountain, or that her failure to disclose the inducement constituted a misrepresentation by material omission.

<sup>16</sup>The close parallels between this case and the facts alleged in the case against West Valley Dodge (in which Ms. Lawrence is also a plaintiff), see ¶40–43 *supra*, strongly suggest that at the time plaintiffs recruited Mr. Wong to participate in the scheme to lease vehicles, and certainly by the time Mr. Wong signed those leases, Ms. Lawrence was fully aware of and consented to benefit from the use of those vehicles under terms that she had no intention of honoring.

¶62 Conversion. The Court holds that Ms. Lawrence is liable to Intermountain for conversion of the Black Rodeo from March 31, 2000 through January 31, 2001. Ms. Lawrence's possession of the Black Rodeo was never lawful under the terms of the lease. She was not the lessee on the vehicle, and the terms of the lease prohibited anyone other than the lessee to have extended possession of the vehicle. Although the trial testimony was that the plaintiffs always intended that the Black Rodeo be used primarily by Ms. Lawrence, she allowed Mr. Lawrence to turn over the vehicle to Mr. Schwenke after Intermountain attempted to repossess it on January 31, 2001. The Court concludes that Ms. Lawrence wilfully interfered with Intermountain's possession of the Black Rodeo, and that she did so without lawful justification. By her actions, she deprived Intermountain of its ability to derive its expected financial benefit from the vehicle. Thus, she is liable for conversion of the Black Rodeo for the period of March 31, 2000 through January 31, 2001, which represents the time that the vehicle was in possession of the Lawrences.

#### **D. Victor Lawrence**

¶63 Intermountain's Motion to Amend Pleadings per Rule 15(b). At closing argument, Intermountain moved to amend its pleadings to add the claim of aiding and abetting against Mr. Lawrence. Although Intermountain had ample opportunity to amend its complaint prior to trial, it, too, waited until the last possible moment to raise a new basis for asserting liability against Mr. Lawrence, informing the Court of its new theory at closing argument. The Court finds that such late amendment would unduly prejudice Mr. Lawrence and therefore denies the motion.

¶64 Fraud. As was the case with Ms. Lawrence, the Court cannot identify any affirmative misrepresentations made directly by Mr. Lawrence to Intermountain. As a result, the Court cannot conclude that Intermountain established by clear and convincing evidence that Mr. Lawrence's actions satisfy the elements of fraud.

¶65 Conspiracy to Defraud. Although the Court does not hold that Mr. Lawrence directly committed fraud, the Court concludes that Mr. Lawrence conspired to defraud Intermountain. The following facts point to Mr. Lawrence's knowing and intentional participation in the fraud: (a) Approximately one month before Mr. Lawrence obtained possession of the Black Rodeo, West Valley Dodge repossessed a Durango from the Lawrences that had been leased by Mr. Schwenke under a similar arrangement. (b) Shortly thereafter, Mr. Lawrence assisted Mr. Schwenke in his efforts to secure a new vehicle by contacting a Bountiful dealership, and attempting to negotiate a new set of leases. (c) Mr. Lawrence was present at the negotiations the day Mr. Wong signed the leases and knew the general financial terms of the leases. Mr. Lawrence even testified that at one point he told Mr. Schwenke to go back to the Bountiful dealership if Intermountain could not meet the terms offered by that dealership. (d) Mr. Lawrence provided the down payment for each of the three Rodeos. (e) Mr. Lawrence took possession of the Black Rodeo with no intent or expectation to pay for the vehicle, and without ensuring that payment would be made. (f) Because Mr. and Ms. Lawrence were married and cohabiting at the time Ms. Lawrence participated in the inducement to Mr. Wong, it is reasonable to infer that Mr. Lawrence was also aware of that inducement. The Court thus concludes that on the day Mr. Wong signed the leases at Intermountain, Mr. Lawrence was fully aware of, and



intentionally participated in, the scheme to obtain and use vehicles without the intent to pay for their use. As a result of Mr. Lawrence's participation in the scheme, he benefitted personally to the detriment of Intermountain. Intermountain suffered actual and substantial financial damage from this fraudulent scheme. The Court holds that Mr. Lawrence was also a knowing and intentional participant in the fraud perpetrated by Mr. Schwenke and Mr. Wong.

¶66 Conversion. The Court holds that Mr. Lawrence is jointly liable with Ms. Lawrence for conversion of the Black Rodeo from March 31, 2000 through January 31, 2001. The Court further holds that Mr. Lawrence is separately liable for conversion of the Black Rodeo from March 31, 2000 through the date the Black Rodeo was sold to an Intermountain employee for \$1,200.00. Mr. Lawrence's possession of the Black Rodeo was never lawful under the terms of the lease. He was not the lessee, and the terms of the lease prohibited anyone other than the lessee from having extended possession of the vehicle. Moreover, after Intermountain's attempt to repossess the Black Rodeo on January 31, 2001, Mr. Lawrence turned the vehicle over to Mr. Schwenke, thereby thwarting Intermountain's ability to recover the vehicle. Shortly thereafter, Mr. Lawrence entered his appearance as counsel on behalf of the plaintiffs and improperly attempted to remove the case to federal court, for which he was sanctioned. The Court concludes that Mr. Lawrence wilfully interfered with Intermountain's possession of the Black Rodeo, and that he did so without lawful justification. By his actions, the Court concludes that Mr. Lawrence knowingly and intentionally acted to frustrate Intermountain's attempt to recover the vehicle, and that he deprived Intermountain of its ability to derive its expected financial benefit from the vehicle. As a result, the Court holds Mr. Lawrence separately liable for conversion of the Black Rodeo from the time he turned over the vehicle to Mr. Schwenke on January 31, 2001, until the time the vehicle was recovered by Intermountain and sold to an employee on July 10, 2003.

#### **E. Punitive Damages**

¶67 In addition to compensatory damages, Intermountain has requested punitive damages from Mr. Wong and the Lawrences. The Court has already held that Mr. Wong and the Lawrences acted fraudulently or conspired to defraud Intermountain. At a minimum, the conduct of Mr. Wong and the Lawrences constitutes knowing and reckless indifference toward Intermountain. As a result, the Court concludes that punitive damages are appropriate in this case. Since no evidence regarding the wealth or financial condition of the parties was presented at trial, a Court hearing will be scheduled for that purpose.

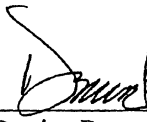
#### **JUDGMENT AND ORDER**

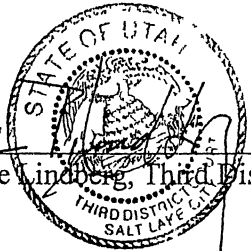
¶68 The Court holds that Wayne Wong fraudulently attempted to discharge his debt and knowingly failed to give timely notice of his bankruptcy filing to Intermountain. As a result, Intermountain was unable to protect its interest in a timely way before the bankruptcy court. Because of Mr. Wong's wrongful conduct, and pursuant to 11 U.S.C. §523(a)(3)(B), the Court holds that Mr. Wong's bankruptcy did not effect a discharge of the debt secured through fraud upon Intermountain. The Court further holds that Victor and Cindy Lawrence each committed conspiracy to defraud and conversion against Intermountain, for which Intermountain is entitled to recover.

¶69 The Court holds that Wayne Wong, Victor Lawrence and Cindy Lawrence are jointly and severally liable to Intermountain for fraud or conspiracy to defraud in the amount of \$80,412.87. Victor and Cindy Lawrence are jointly and severally liable to Intermountain for their conversion of the Black Rodeo in the amount of \$3,625.40 (representing fair rental value of the Black Rodeo from April 1, 2000 to January 31, 2001 at \$362.54 per month), plus prejudgment interest. Victor Lawrence is separately liable to Intermountain for his conversion of the Black Rodeo in the amount of \$34,284.20 (representing Intermountain's cost to recover and repurchase the Black Rodeo less the \$1,200.00 it recovered by selling it), plus prejudgment interest.

¶70 The Court will consider Intermountain's punitive damages claim after a Court hearing is held to determine the wealth and financial condition of Mr. Wong and Mr. and Ms. Lawrence. Counsel for Intermountain is directed to contact the Court's clerk to schedule the hearing. So Ordered.

Dated this 10<sup>th</sup> day of August, 2007. By the Court:

  
Denise Posse Lindberg, Third District Court Judge



## **ADDENDUM B**

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FILED DISTRICT COURT  
Third Judicial District

JUN 25 2008

SALT LAKE COUNTY

By WLB Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, CINDY LAWRENCE and  
WAYNE WONG,

Plaintiffs,

vs.

INTERMOUNTAIN, INC., dba  
Intermountain Isuzu,

Defendant, Counterclaimant  
and Third Party Plaintiff.

*Supplemental*  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND JUDGMENT

Case No. 000904217

Judge Denise Lindberg

ENTERED IN REGISTRY  
OF JUDGMENTS

DATE 09/08/08

This case was initially tried to the bench June 4 - June 6, 2007. The Court, on August 13, 2007, entered detailed Findings of Fact, Conclusions of Law, and a Judgment in favor of Intermountain, Inc., against Wayne Wong, Victor Lawrence, and Cindy Lawrence. The court found that Mr. Wong engaged in fraud, and that Cindy Lawrence and Victor Lawrence participated in a conspiracy to defraud Intermountain. The Court additionally found that Victor and Cindy Lawrence were liable to Intermountain for a conversion of the black Rodeo. In the

Supplemental Findings of Fact, Conclusions of Law, a



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pages:

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process, the court ruled that Intermountain, Inc. established that the defendants' conduct was such that it warranted an award of punitive damages. The court previously held:

E. Punitive Damages.

¶67 In addition to compensatory damages, Intermountain has requested punitive damages from Mr. Wong and the Lawrences. The Court has already held that Mr. Wong and the Lawrences acted fraudulently or conspired to defraud Intermountain. At a minimum, the conduct of Mr. Wong and the Lawrences constitutes knowing and reckless indifference toward Intermountain. As a result, the Court concludes that punitive damages are appropriate in this case. Since no evidence regarding the wealth or financial condition of the parties was presented at trial, a Court hearing will be scheduled for that purpose.

A second stage of trial was therefore scheduled for the purpose of receiving evidence concerning defendants' wealth and financial condition, and additional evidence relevant to the issue of punitive damages. This second phase of trial was held March 10-11, 2008. P. Bryan Fishburn, Esq. represented Intermountain, Inc. Knute Rife, Esq. represented Wayne Wong. Brent Stephens, Esq. represented Victor Lawrence and Cindy Lawrence.

FINDINGS OF FACT

The Court reiterates its earlier Findings of Fact and Conclusions of Law. Based on evidence received at the second phase of trial, the Court finds the following additional facts:

1. The Court previously found that a confrontation ensued between Mr. Lawrence and Mr. Watkins, Intermountain's owner, when Intermountain on January 31, 2001 unsuccessfully attempted to repossess the black Rodeo, which was in Mr. Lawrence's possession. Prior Findings of Fact, ¶28. In between the first and second stage of trial in this case, Victor Lawrence's claims

for assault and battery and other claims against Mr. Watkins were heard and decided in another proceeding, Lawrence v. Intermountain, Inc., Third Judicial District Court, Salt Lake County, case no. 020906142 (Iwasaki, J.). Following a bench trial on January 16, 2008, the court dismissed Lawrence's claim and made findings of fact, including that in the course of the attempted repossession on January 31, 2001, Mr. Lawrence, without cause or justification, attacked Mr. Watkins, seizing him and grabbing his head in a headlock, and that during this altercation, Watkins sustained a cut to his forehead and a bruise on his neck. See Plaintiff's Exhibit 106, setting forth Findings of Fact by Judge Iwasaki in case no. 070906142. This Court, in reliance on the doctrine of issue preclusion, see Brigham Young v. Tremco Consultants, Inc., 2005 UT 19 ¶27, adopts this finding and holds it applicable to this case.

2. As concerns the issue of financial wealth, Mr. Lawrence represented to the Court in his Trial Brief and in the course of the trial that he was financially destitute, or nearly so. Mr. Lawrence's Trial Brief stated:

As to Victor Lawrence, the anticipated testimony is expected to show that he also has no assets, has a negative net worth in excess of \$700,000 based on an IRS tax lien and notice of levy and currently has no income stream. While he may have had sustained earnings in previous years, he has none presently.

To the contrary, the court finds that Mr. Lawrence, at least from the early 2000's forward up to and including February, 2008, has been the recipient of considerable, regular income and owns at least one asset, in the form of intellectual property, that has extraordinary value.

3. In August 2000, Mr. Lawrence formed two limited liability companies, Lupus Lost, LC and Hawaiian Investments, LC. See Plaintiff's Exhibits 103 and 115.

4. Articles of Organization were filed with the state of Utah for Lupus Lost, LC on August 30, 2000. The Articles named three members: Victor Lawrence (managing member); Hawaiian Investments, LC (designating Cindy Lawrence as its manager); and PCP, LC (also with Cindy Lawrence as its manager). See Plaintiff's Exhibit 103.

5. Mr. Lawrence, when asked during the trial about Lupus Lost, testified that it never owned any assets. The court takes judicial notice that Lupus Lost is no longer in good standing with the State of Utah, its registration with the State of Utah having expired August 30, 2006.

6. Articles of Organization were filed with the state of Utah for Hawaiian Investments, LC on August 31, 2000, the day after Articles were filed for Lupus Lost, LC. The Articles named two members: Cindy Lawrence (who was again identified as the company's manager) and PCP, LC (with Cindy Lawrence again identified as its manager). The Articles designated Victor Lawrence as registered agent for the company. See Plaintiff's Exhibit 115.

7. Mr. Lawrence, from sometime in the late 1990s to at least June 23, 2004 was also the sole owner of a law practice that operated under the name of the Lexington Law Firm. See Plaintiff's Exhibit 100 (Petition filed by Victor Lawrence with the United States District Court, D. Utah at ¶2).

8. Mr. Lawrence during this period of time operated the Lexington Law Firm as a sole proprietorship. As the sole owner, Mr. Lawrence was entitled to all the net profits generated by the Lexington Law Firm.

9. Mr. Lawrence managed the Lexington Law Firm, which employed several attorneys including an attorney named John Heath, and a staff of other employees.

10. The focus of the Lexington Law Firm's practice was credit repair, i.e., assisting clients in repairing their credit. See Plaintiff's Exhibits 94, 95.

11. As much as 90% of Lexington's credit repair clients were drawn to Lexington by advertising on the internet. Lexington's advertising appears to have been extensive in its scope and nature.

12. Lexington drew its credit repair clients from across the United States. By mid-2004 when Mr. Lawrence, during the pendency of this case, purportedly sold all his interest in the Lexington Law Firm to his employee, John Heath, Lexington had approximately 45,000-55,000 active credit repair clients.

13. During the time period of Lawrence's sole ownership, the Lexington Law Firm charged those clients who came to it with credit repair concerns an initial fee of \$99 and, thereafter, a monthly fee of \$39. See Plaintiff's Exhibit 94.

14. The initial fee of \$99/client, times 45,000 active clients as of mid-2004, would have generated gross income to Lexington of approximately \$4,445,000, supplemented by an additional monthly income (based on 45,000 clients paying \$39/month) of about \$1.75 million. Assuming 55,000 active clients, the initial fees would have generated initial gross income to Lexington of \$5,445,000, plus supplemental monthly income of almost \$2.15 million.

15. Although entitled to all the net profit generated by the Lexington Law Firm, Mr. Lawrence chose to pay himself a variable wage which was based, at least in part, on a percentage of the income or profit generated by the Lexington Law Firm.



16. By June, 2004, Mr. Lawrence's earnings, derived principally from Lexington, exceeded \$30,000 a month. Plaintiff's Exhibit 92. In April, 2004, for example, Mr. Lawrence paid himself out of the Lexington Law Firm \$37,807.50. In May, 2004, he drew out of the Lexington Law Firm income in the amount \$39,938.00. See Plaintiff's Exhibit 92 at 22-23. According to papers Mr. Lawrence filed in his divorce case in June, 2004, he, as of that time, was "receiving income in excess of thirty thousand dollars (\$30,000) per month." Plaintiffs Exhibit 92 at 2, 11, 20-21, and 70. These figures establish Mr. Lawrence, as of mid-2004, was earning \$360,000 to \$450,000 a year.

17. Mr. Lawrence was paying at least a portion if not most of the monthly income he was drawing from Lexington to Lupus Lost, the limited liability company which he had formed in August, 2000. In fact, two account summaries introduced into evidence, that calculated Mr. Lawrence's pay for April and May, 2004 (Plaintiff's Exh. 92, pp. 22-23), were addressed to:

**Victor Lawrence**  
Lupus Lost

Five checks introduced into evidence showed payments by Lexington Law Firm to Lupus Lost between the dates of February 9, 2004 and June 7, 2004, which was during the period of Lawrence's ownership. These five checks to Lupus Lost totaled \$91,053.74. Plaintiff's Exhibit 127.

18. Mr. Lawrence also paid his wife Cindy Lawrence directly out of Lexington Law Firm. See Plaintiff's Exhibit 92 at 22.

19. According to a paper Lawrence filed in the United States District Court, D. Utah, he sold all his interest in Lexington to John Heath on June 23, 2004. According to other testimony it may have taken an additional couple of months for the sale and purchase to finally close.

20. The evidence concerning the amount Heath allegedly paid Lawrence for the multi-million law Lexington Law practice was inconclusive and inconsistent. Lawrence testified that he sold his interest in Lexington for approximately four months of the wages that he was otherwise drawing out of Lexington; about, he said, \$100,000 to \$120,000. Heath, too, recalled that Lawrence has sold his ownership of Lexington for four months wages, although he remembered that four months wages translated to about \$166,000. Heath recalled, though, that this “payment” for the business was out of Lexington’s proceeds, as a continued wage, rather than a payment by Heath to Lawrence. An Asset Purchase Agreement that Lawrence and Heath signed in April, 2004, provided, contrary to both Lawrence’s and Heath’s testimony, that the sale and purchase price for the Lexington law practice would be the amount of its accounts receivable as of the date of closing. Based on the testimony at trial, it is not entirely clear when the sale and purchase of Lexington closed. A financial statement for Lexington, as of June 2004, indicated accounts receivable that month of \$119,806.31.

Based on the testimony at trial, the Court finds that Lawrence received at least \$120,000 to \$166,000 for the sale of his interest, although it remains unclear to the court why Lawrence would sell his interest in Lexington for a mere four months of wages.

21. Although Lawrence testified that he received no consideration other than \$120,000 for the sale of his interest in Lexington, the evidence at trial indicated that he has derived ongoing and substantial income from his past association with Lexington.

22. The Lexington Law Firm after June 23, 2004 paid substantial sums to Lawrence or entities he owned or controlled. Lexington checks establish that after June 23, 2004 the Lexington Law Firm paid Victor Lawrence directly over \$65,000: \$13,445.85 by several checks paid after June 23, 2004 but in 2004, and \$51,650.00 by a single check on February 2, 2006. Lexington, on June 2, 2005, also paid \$2,585.90 to the Law Offices of Victor Lawrence.

Lexington Law Firm from August 8, 2004 through and including February 8, 2007, paid \$39,444.55 to Lupus Lost, LC.

Commencing July 1, 2005, Lexington Law Firm began making payments, in addition to the previously identified payments, to the North Church Law Firm, a solely owned limited liability company that Victor Lawrence organized in late March, 2005 (See Plaintiff's Exhibit 105). These additional payments by the Lexington Law Firm to Lawrence's North Church Law Firm totaled \$95,691.11.

The payments by Lexington to Victor Lawrence, the Law Offices of Victor Lawrence, Lupus Lost, LC, and the North Church Law Firm, all made after June 23, 2004 total \$202,817.41. These checks by Lexington to Victor Lawrence or business entities he controlled or solely owned establish that Lexington, whether or not the payments are tied to Lawrence's sale of Lexington, continued after June 23, 2004 to pay Victor Lawrence for consulting and possibly other services.

These continuing Lexington payments, furthermore, represented substantial income to Mr. Lawrence which he continued to receive until as recently as a year ago.

23. The Lexington Law Firm, after June 23, 2004, also made four monthly payments of \$2,500 each directly to Cindy Lawrence, totaling \$10,000.00. These post 6/23/04 Lexington payments directly to Cindy Lawrence spanned July 15 to November 5, 2004.

24. Mr. Lawrence owns certain “proprietary Law Firm Marketing Internet Software” which, commencing April 30, 2004, he leased to John Heath for a variable monthly sum, as specified in a separate Software License and Consulting Services Agreement that both Lawrence and Heath signed. This written agreement is a separate agreement, apart from the parties’ Asset Purchase Agreement. The Agreement clearly and unambiguously identifies Mr. Lawrence as the owner of the software.

25. Heath agreed to pay to Lawrence each month a licensing fee of \$9.75 for each account in which CRS activity was recorded during a usage month. CRS activity, according to Heath, referred to any computer entries relative to a client account which indicated activity by Lexington in working that account.

26. Lexington had 45,000 to 55,000 active clients when Heath bought the Lexington law practice. Furthermore, Lexington had, as of September 30, 2005, approximately one year later, “approximately 38,574 clients for its regular service.” Most of these 38,574 accounts would have had CRS activity during the month of September, 2005.

If, hypothetically, 35,000 accounts had CRS activity in September, 2005, then Lawrence’s and Heath’s Agreement specified that Heath was obligated to pay to Lawrence a

licensing/consulting fee of \$341,250 for that month alone. Even if just half the active accounts had CRS activity, royalties due Lawrence for September, 2005 alone would, according to the terms of his and Heath's contract, have amounted to \$188,048.

27. Heath or Lexington made payments directly to Victor Lawrence pursuant to Heath's and Lawrence's Software License and Consulting Services Agreement through at least January, 2006.

28. Lawrence and Heath amended their Software License and Consulting Agreement effective as of January 1, 2006. The amended agreement lowered the monthly usage fees by six cents per account in which there was CRT activity, but otherwise Heath's obligation to pay Lawrence licensing/consulting fees continued in effect.

29. Also about January, 2006, pursuant to another written agreement not introduced into evidence and at Lawrence's request, Lexington began making or directing those payments Heath was obligated to make per the Software License and Consulting Agreement directly to a company identified as Aspenwood, which Heath understood to be a creditor of Mr. Lawrence. Mr. Lawrence thus continued to derive an economic benefit from the monthly payments that Heath, at Lawrence's instruction, redirected to Aspenwood.

30. No evidence was introduced to the effect that Mr. Lawrence's and Mr. Heath's Software License and Consulting Services Agreement has been terminated. The Agreement itself identifies no fixed term after which payments will cease. In any event, the magnitude of Mr. Heath's acknowledged monthly obligations under the Agreement, and the duration of time over which he or Lexington continued payments either directly to Mr. Lawrence or others at his

direction, including to the current time, establish that Mr. Lawrence's ownership of the "Law Firm Marketing Internet Software" identified by the Agreements is an asset of considerable and substantial value.

31. No evidence was introduced that Lawrence has disposed of his ownership of the Law Firm Internet Software that he, in the course of his April, 2004 agreement with Heath, represented that he owned.

32. Mr. Lawrence testified that he never received royalty or other income from leasing software to Heath and that his agreement with Heath was that Heath would take over Lawrence's prior obligation to Aspenwood to pay it for having developed the software. The original, written agreement which Lawrence signed clearly represented, however, that Lawrence owned the software and that he would lease it to Heath. The evidence did not indicate a novation of a contract between Lawrence and Aspenwood, and no such proof was offered into evidence.

Heath, contrary to Lawrence's testimony, recalled that he or Lexington made royalty payments in accordance with the contract's terms and its mathematical formula, directly to Lawrence until January, 2006; and thereafter to Aspenwood at Lawrence's direction. Furthermore, had Lawrence, as he suggested, relinquished his ownership interest in the software in return Heath/Lexington assuming a prior obligation to Aspenwood, there would have been no reason for Lawrence to sign an Amended Software Agreement almost two years later, effective January 1, 2006. That Agreement between Heath and Lawrence amends the amount of the usage fee but does not negate John Heath's obligation to continue the payment of royalty fees to Victor Lawrence or his assignee.

33. Mr. Heath conceded that Lexington may very well have made payments to third parties other than Aspenwood, at Victor Lawrence's direction, that were not included in the Lexington checks that were produced by Heath at trial.

34. Victor Lawrence on June 7, 2004, filed a petition for divorce in Davis County in which he sought to terminate his marriage with Cindy Lawrence. The divorce was uncontested and Mr. and Mrs. Lawrence consented and stipulated to a division of property, which was memorialized in Findings of Fact and a Divorce Decree. Trial Exhibit 92. The Decree of Divorce was entered July 13, 2004.

35. The Decree of Divorce awarded Mr. Lawrence any and all interest in a World Mark Vacation Property ownership. Plaintiffs' Exhibit 92 at 76. When questioned about this asset, Mr. Lawrence contended he had not really been awarded the World Mark Vacation Property but that instead it had been at all times owned by one of his daughters. The Court finds Mr. Lawrence's explanation to be disingenuous, as there would have been no reason to identify the World Mark ownership as a marital asset to be awarded to one spouse or the other, if it was owned by one of the Lawrence's adult children. Victor and Cindy Lawrence identified the World Mark Property ownership as a marital asset and asked the court to award it to Mr. Lawrence, which the Court did. No testimony was elicited concerning the value of this asset. Nonetheless, it is an asset that the Davis County court in 2004 awarded to Mr. Lawrence.

36. The Decree of Divorce also awarded to Mr. Lawrence all interest in several companies he had “or may acquire an interest in,” including Far Cliffs Media, LLC and the Bobby Lawrence Karate Training Center.

37. Mr. Lawrence testified that Far Cliffs Media was one of Lexington’s vendors at the time he owned Lexington, but that he had not acquired an ownership interest in Far Cliffs Media at the time of his divorce and had not since acquired any interest.

38. Mr. Lawrence, however, in response to questioning on the first day of trial admitted that Far Cliffs Media and another company, RevGen, had paid him consulting fees over an unspecified period of time in the amount of \$25,000 - \$35,000 per month up through and including February, 2008. Lawrence testified, however, that Far Cliffs and RevGen had informed him that neither intended to make any additional payments after March 1, 2008.

39. Subpoenaed witness Mark Jensen testified on the second day of trial that the payments made by Far Cliffs Media and Rev Gen to Victor Lawrence for consulting services regularly amounted to \$35,000 a month. According to Mr. Jensen, Mr. Lawrence received \$35,000 in the month preceding the trial, February 2008: \$20,000 in the middle of the month and \$15,000 at the end of the month. Furthermore, according to Jensen, Far Cliffs and/or Rev Gen had paid to Mr. Lawrence about \$35,000 in January, 2008, in December, 2007 and in every preceding month back through and including all of 2005. Jensen furthermore recalled these regular monthly payments, including the payments in January and February 2008, being made to Lawrence’s solely owned North Church Law Firm and to Lupus Lost, LC.



40. Jensen was not aware that Far Cliffs, as Lawrence testified, had decided to cease its monthly payments to Lawrence effective March 1, 2008. Jensen, who is the person who prepares the checks each month, said that neither Far Cliffs or RevGen had instructed him to cease their monthly payments to Lawrence. Jensen expected in the next couple of days to receive instructions directing him to make to Mr. Lawrence the regular mid-month payment in the amount of \$20,000.

41. Mr. Jensen's testimony of regular monthly payments of \$35,000/month by Far Cliffs and RevGen to companies and former companies that Mr. Lawrence owns and controls belies and contradicts Mr. Lawrence's protestation to the court that he is bereft of income. Payments of \$35,000/month amount to \$420,000/year. Moreover, this is in addition to the aforementioned payments to Lawrence by Lexington.

42. Although some of the substantial sums of money paid by Far Cliffs and RevGen to the North Church Law Firm, a limited liability company, may have gone for expenses and thus not reached Mr. Lawrence's pockets, the court concludes most of it must have. Mr. Lawrence, first, introduced no evidence concerning his expenses that would have reduced North Church's income to which Lawrence, as its sole member, would be entitled. Furthermore, the evidence indicated that North Church has had only one client (Far Cliffs), has only one employee, and offices in a Bountiful apartment that Lawrence earlier identified as his residence. The overhead of the North Church Law Firm does not appear to be significant, which suggests that most of the monthly income from Far Cliffs or RevGen would be attributed as income to Mr. Lawrence.

43. Although Mr. Lawrence admitted that he had on occasion worked as an instructor at the Bobby Lawrence Karate studios, he claimed never to have been paid for his services and claimed to have derived no income from the studios. He also disclaimed ownership, contending that the Bobby Lawrence Karate studios were owned by members of his immediate family, apparently his children. The Court finds this explanation, too, to be disingenuous. First, the divorce decree awarded all ownership interest in the Bobby Lawrence karate studios to Mr. Lawrence and it seems most unlikely that the divorce papers, which Mr. Lawrence prepared, would have asked that he be awarded the interest in a business neither he or Cindy owned. Furthermore, a business name registration for “Bobby Lawrence Karate” filed with the state of Utah on March 15, 2005, which Mr. Lawrence prepared and signed, named as the applicant and owner of the business, Lupus Lost, LC. See Plaintiff’s Exhibit 104. Mr. Lawrence signed for Lupus Lost as its “managing director.” The address given for Lupus Lost, LC, furthermore, matches the address Lawrence gave for the Bountiful apartment in which he said he lives. For the purpose of assessing punitive damages, the Court finds that Lupus Lost, LC, for which Lawrence was its managing member, owned Bobby Lawrence Karate studios at least as of March 15, 2005. There was no evidence received that Lupus Lost subsequently sold its interest in the Bobby Lawrence Karate studios, for value or otherwise.

43. The business name registration for “Bobby Lawrence Karate,” plaintiff’s Exhibit 104, also contradicts Mr. Lawrence’s sworn statement that Lupus Lost, LC never owned any assets.

44. Mr. Lawrence and Cindy Lawrence sought to establish their impecuniosity by claiming that they owed the Internal Revenue Service over \$700,000, a debt they apparently

incurred because of their failure to timely file federal income tax returns (including for the time period that Mr. Lawrence owned and operated the Lexington Law Firm as a sole proprietorship).

45. Both Victor Lawrence and Cindy Lawrence testified as to efforts by the IRS to find and seize their income and assets. Cindy Lawrence testified that as a consequence of the IRS's collection efforts, she keeps no money in her bank accounts and cashes all checks she receives, including child support payments by Victor Lawrence, to keep the IRS from getting the money.

46. Mr. Lawrence expressed his willingness and intention to shut down his North Church Law Firm law practice in order to prevent the IRS from seizing the income flowing into that business.

47. Notwithstanding the IRS's liens, Victor Lawrence has assured Cindy that he will resolve and pay the liens.

48. Cindy Lawrence claims to have no income and claims to own no assets. She claims total ignorance concerning Victor Lawrence's past and present business dealings and financial condition. She claims to know nothing about Hawaiian Investments, LC or PCP, LC, even though she signed papers filed with the State of Utah in her capacity of managing member of both companies. She claims to know nothing about Lupus Lost, LC, even though Hawaiian Investments, LC and PCP, LC were both members of Lupus Lost and even though Lupus Lost received substantial income from the Lexington Law Firm, Far Cliffs Media, and RevGen, and even though she lived with Lupus' managing director until she and Victor divorced. Although Cindy Lawrence received from Victor Lawrence alimony of \$5,000/month for about a year after the divorce until she remarried, and was at the time of trial still receiving from Victor Lawrence

monthly child support payments, she claims never to have noticed on what bank accounts the checks she was given for alimony and child support were drawn. The Court finds these protestations of total unabated ignorance not credible and disingenuous.

49. Wayne Wong testified that he was retired, his prior employment by L-3 Communications having been terminated about two years ago. Wong claimed to have no employment income, and no earnings of any significance from other sources, except for rental income.

50. Wayne Wong owns residential property located at 7194 South 2370 West, West Jordan, Utah, in which he used to live. Mr. Wong estimated that the West Jordan property had a value of approximately \$250,000, against which he said is a mortgage in the amount of about \$200,000.

51. Wong rents out the West Jordan property, which generates a monthly income to Mr. Wong of about \$1600/month.

52. Despite that Mr. Wong filed bankruptcy in September, 2003, under Chapter 7, on April 26, 2006 he purchased a second home located at 14104 South Stone Canyon Drive, Draper, Utah, in which he and his wife, at the time of the trial, still lived.

53. Mr. Wong purchased the home at 14104 South Stone Canyon Drive for \$540,000. Plaintiff's Exhibits 108, 109.

54. Mr. Wong borrowed the \$540,000 purchase price. Plaintiff's Exhibits 111, 112.

55. Eight months later, in December, 2006, Wong refinanced the Stone Canyon Drive property, borrowing \$630,000, secured by two new trust deeds on the property. Plaintiff's

Exhibits 113, 114. The refinancing produced about \$50,000 cash to Mr. Wong, after the original first and second mortgages were paid, and after a prepayment penalty.

56. When examined by Intermountain concerning the Stone Canyon Drive property, Mr. Wong initially denied the he owned the property, denied that he, personally, had borrowed the \$540,000 purchase price, and denied that he had refinanced the property in December, 2006. Wong initially maintained that the Stone Canyon Drive property was owned by a limited liability company in which he had been promised a minority interest as consideration for his cooperation in helping a “Mr. Casey,” who he also identified as Casey Hall, purchase the property. Intermountain, however, entered into evidence a warranty deed clearly showing conveyance of the Stone Canyon Drive property by Robert J. Ryan to Wayne Wong on April 24, 2006. Plaintiff’s Exhibit 108. Wong subsequently acknowledged his signature on two trust deeds encumbering the property dated April, 2006 (Plaintiff’s Exhibits 111 and 112) and two subsequent trust deeds encumbering the property dated December, 2006 (Plaintiff’s Exhibits 113 and 114).

57. Wong explained that his involvement in the Stone Canyon Drive property was at the request of Mr. Casey, who asked him to sign whatever papers were needed in order for the limited liability company to buy the home. In return, Wong understood he would receive a minority interest in the company and that he and his wife could live rent free in the home. According to Wong, Mr. Casey or the limited liability company was supposed to make all the mortgage payments, which they for a while did by advancing the monthly mortgage payment to Wong, who then paid the lender.

58. Mr. Wong turned over to Mr. Casey the \$50,000 he took out of the Stone Canyon Drive property by refinancing it in December, 2006.

59. When Mr. Casey, about April 2007, stopped advancing the mortgage payments to Wong, the monthly mortgage payments to the lender ceased. Mr. Wong did not make them and perceived he had no personal obligation to make them. The mortgages Wong executed in December, 2006 are presently in default.

60. Mr. Wong is the owner of a business named "Ourmart Enterprises," which Mr. Wong about October 11, 2005 registered with the state of Utah as a "dba" that he and his wife, Maria, owned.

61. Mr. Wong, notwithstanding his initial denial, signed, in his personal capacity, a residential loan application when he refinanced the Stone Canyon Drive property in December, 2006. Plaintiff's Exhibit 121. In his application, Wong represented that he was self-employed, that he owned Ourmart Enterprises, that he had been employed by Ourmart for 15 years, and that Ourmart's address was 14104 South Stone Canyon Road, Draper, Utah. Wong furthermore represented to the lender that his monthly income from Ourmart was \$14,981.00.

62. Wong, in signing the application, certified that his representations were truthful subject to criminal penalties under federal law.

63. Assuming to be true Mr. Wong's representation that he had/has income of \$14,981.00 a month from Ourmart, that would translate to annual earnings of nearly \$180,000 a year. Such earnings would be probative in the court's decision of what amount to assess as punitive damages against Mr. Wong.

64. Mr. Wong, however, insisted that his representation concerning income, as stated in the Residential Loan Application, was untrue, that he had almost no earnings from Ourmart Enterprises. Mr. Wong explained that he did not provide the employment and earnings information in the residential loan application, that it was Mr. Casey who misrepresented his earnings to be \$14,981/month, that he did not read the residential loan application before signing it, and that he signed the application without reading it because Mr. Casey instructed him to sign it. Signing whatever documents Mr. Casey put before him to sign was, according to Wong, part of what he was expected to do in return for being permitted to live in the home and for a percentage in Mr. Casey's limited liability company.

65. Following the first stage of trial, the court entered an Order restraining Mr. Wong and Victor and Cindy Lawrence from conveying, without the court's permission, interests in real property. Notwithstanding this express Order, Intermountain introduced into evidence a "Warranty Deed to Trustee" signed by Wayne Wong, which was dated January 29, 2008 and recorded with the Salt Lake County Recorder on February 6, 2008. Plaintiff's Exhibit 120. The terms of the Warranty Deed to Trustee provided that Mr. Wong conveyed his interest in the Stone Canyon Drive property "unto Burntol, LC as Trustee and not personally under the provisions of a trust agreement dated the 29<sup>th</sup> day of January, 2008, known as the Wong Draper Family Land Trust . . ."

66. Mr. Wong, when initially questioned concerning his conveyance of real property in January or February, 2008, denied he had conveyed any real property. When shown his notarized signature on the warranty deed dated January 29, 2008, however, he acknowledged that the

signature was his. Even so, Mr. Wong claimed to have no recollection or knowledge of having been a party to a trust agreement known as the Wong Draper Family Land Trust dated January 29, 2008, no knowledge that he had conveyed the Stone Canyon Drive property to Burntol, LC as Trustee, and no knowledge or understanding why he did or would have done so. Wong explained that any and all documents he signed on January 29, 2008 were at someone else's, presumably Mr. Casey's direction. Even assuming Mr. Wong's explanation is true, his execution of the Warranty Deed and the resulting conveyance to Burntol, LC as Trustee violated the court's express order not to convey interests in real property absent notice to the court and its permission.

67. It is not clear what Mr. Wong was attempting to accomplish by his conveyance of the Stone Canyon Drive property, in large part because Mr. Wong either could not explain or refused to explain the purpose of the Wong Draper Family Land Trust that apparently was also created and established on January 29, 2008. In any event, Mr. Wong's execution of the warranty deed on January 29, 2008, the conveyance of property, and the recording of the deed on February 6, 2008, evidence and establish Mr. Wong's disrespect for this court's orders and his unwillingness to abide by them.

#### **LAW APPLICABLE TO THE FACTS**

1. Punitive damages are warranted in cases where "the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others." Utah Code Ann. §78-18-1(1).



2. The purpose of punitive damages is to punish and deter reprehensible, outrageous or malicious conduct, or conduct which manifests a knowing or reckless indifference toward and disregard of the rights of others, which is not likely to be deterred by other means. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 807 & 811 (Utah 1991); Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1112 (Utah 1985).

3. Punitive damages are appropriate in cases where defendants have been found liable for fraud. See e.g., Crookston v. Fire Ins. Exchange, 817 P.2d 789.

4. Punitive damages are also appropriate in cases where defendants have been found liable for conversion. See e.g., Mahana v. Onyx Acceptance Corp., 2004 UT 59; Bennett v. Huish, 2007 UT App 19.

5. A trial court, in determining the quantum of punitive damages to be assessed against a defendant should, according to Crookston v. Fire Insurance Exchange, 817 P.2d 789, 808 (Utah 1991), consider the following seven factors: (1) the relative wealth of the defendant; (2) the nature of the alleged misconduct; (3) the facts and circumstances surrounding such conduct; (4) the effect thereof on the lives of the plaintiff and others; (5) the probability of future recurrence of the misconduct; (6) the relationship of the parties; and (7) the amount of actual damages awarded.

6. No relative weights, however, are assigned or have been assigned to the seven factors identified by Crookston. Id. at 808. None of the factors are more conclusive or more important than another. Campbell v. State Farm Mutual Automobile Ins. Co., 2001 UT 89 ¶49, reversed and remanded, 538 U.S. 408 (2003).

7. The seven factors are guidelines and not elements to be proven, and the absence of one of the factors in a given case does not mean that punitive damages are unwarranted. See e.g., Hall v. Wal-Mart Stores, 959 P.2d 109 (Utah 1998) (plaintiff's failure to introduce any evidence concerning defendant's wealth did not preclude an award of punitive damages).

8. "Deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive support more substantial awards . . . , as do acts involving 'trickery and deceit.'" Smith v. Fairfax Realty, 2003 UT 41, ¶35 (quoting BMW of North America, Inc. v. Gore, 217 U.S. 559, 576, 579).

9. "Behaviors that undermine the efficiency and integrity of the judicial process may also be considered under the rubric of the second Crookston factor [nature of the alleged misconduct]." Smith v. Fairfax Realty, 2003 UT 41, n. 15; Diversified Holdings v. Turner, 2002 UT 129, ¶17; see Campbell v. State Farm Mutual Ins. Co., 2001 UT 89, ¶¶30-31. This principle of law is particularly germane to Victor Lawrence.

10. A cavalier, arrogant, or uncaring attitude exhibited by a defendant with regard to his wrongful conduct, or the damages he has caused a plaintiff may indicate that the defendant is likely to again engage in substantially similar conduct absent the deterrent effect of a punitive damage award. Diversified Holdings v. Turner, 2002 UT 129, ¶21. The Utah Supreme Court observed in the Campbell case, on remand from the United States Supreme Court, that "State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." Campbell v. State Farm Mutual Ins. Co., 2004 UT 34, ¶33.

11. Punitive damages should bear a reasonable relationship to actual damages. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 808 (Utah 1991).

12. The Utah Supreme Court in the Crookston case, based on a review of Utah case law up to that time, laid down a general guideline concerning the appropriate ratio of punitive to compensatory damages. Crookston, 817 P.2d at 810. According to Crookston, a ratio of more than 3 to 1 is presumptively excessive where the punitive damage award is less than \$100,000. Where the punitive damage award is in excess of \$100,000, the Supreme Court stated, “we have indicated some inclination to overturn awards having ratios of less than 3 to 1.” The Supreme Court noted that up to that point in time, it was seldom that it had been asked to review punitive damage awards greater than \$100,000.

13. Crookston, however, does not preclude an award of punitive damages in excess of the prior observed ratios, if warranted by the facts and circumstances in a particular case. In the Crookston case itself, the trial court on remand upheld an award of punitive damages in the amount of \$4 million, which exceeded compensatory damages by a factor of 5. Crookston v. Fire Ins. Exchange, 860 P.2d 937 (Utah 1993) (affirming trial court’s justification for awarding punitive damages 5 times the amount of compensatory damages). In Smith v. Fairfax Realty, 2003 UT 41, ¶¶ 44-48, the Supreme Court affirmed a trial court’s award of \$5.5 million in punitive damages, which exceeded compensatory damages by a factor of 5.5 to 1. In Campbell v. State Farm, the Utah Supreme Court, on remand by the United States Supreme Court, determined that punitive damages of just over \$9 million, equal to nine times compensatory damages, was appropriate. Campbell v. State Farm Mutual Auto Ins., 2004 UT 34.

14. A high ratio of punitive damages to compensatory damages is not by itself determinative of excessiveness. Diversified Holdings, LC v. Turner, 2002 UT 129 at ¶24.

15. Where, however, an award of punitive damages exceeds the presumptive guidelines observed in Crookston, a trial court judge “must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of law and the facts.” This articulation should generally be couched in terms of one or more of the aforementioned seven factors “unless some other factor seems compelling to the trial court.” Crookston, 817 P.2d at 811.

16. “An award that is presumptively excessive may be justified by an explanation of why the case is unique, usually in terms of one of the established seven factors.” Bennett v. Huish, 2007 UT App. 19 at n. 11.

17. “A defendant’s wealth can either be an aggravating or a mitigating factor in determining the size of a punitive damage award.” Diversified Holdings, LC v. Tuner, 2002 UT 129 ¶15, 63 P.3d 686.

18. If the punitive damages to be assessed against a particular defendant are under \$100,000, and are less than three times the amount of compensatory damages, it will be “presumed that the award of punitive damages is not excessive **and no evidence of relative wealth is required to sustain the award.**” Bennett v. Huish, 2007 UT App 19 at ¶38 (emphasis added); see also Hall v. Wal-Mart Stores, Inc., 959 P.2d 109, 113 (Utah 1998) (holding that a plaintiff’s failure to introduce any evidence concerning a defendant’s wealth does not preclude an award of punitive damages). This principle of law is particularly germane to Cindy Lawrence.

19. Victor and Cindy Lawrence direct the Court's attention to BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996), which established guidelines for deciding whether punitive damages awarded by a state court are so large that they violate the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution. In Gore, the United States Supreme Court announced three guideposts for determining whether punitive damages awarded in a particular case exceed that permitted by due process. The three guideposts identified by Gore include (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases.

20. Utah, since Gore, continues to use and apply the seven Crookston factors "recognizing that they substantially reflect the Supreme Court's directives and modifying them as necessary to fully meet the federal requirements." Campbell v. State Farm Mutual Auto Ins. Co., 2004 UT 34, ¶20.

21. The "reprehensibility" criterion corresponds to the second Crookston factor, "nature of defendant's conduct." Smith v. Fairfax Realty, 2003 UT 41, ¶35. This criterion is "the most important indicium of the reasonableness of a punitive damage award." State Farm Mutual Ins. Co. v. Campbell, 528 U.S. 408, 419 (2003). Fraud and deceit rank high on the federal, reprehensibility scale. BMW of North America, Inc. v. Gore, 217 U.S. 559, 576, 579 (1966).

22. Gore, like Crookston, holds that punitive damages must bear a reasonable relationship to compensatory damages. This second Gore criterion corresponds to the Crookston seventh criterion.

23. The third Gore criterion is unique to the federal analysis. Its application and interface with Utah law is discussed in detail by the Utah Supreme Court in Campbell v. State Farm Mutual Ins. Co., 2004 UT 34, ¶¶42-46. The most analogous civil penalty for a fraud claim, payable by a natural person, would likely be a \$2,500 fine. Utah Code Ann. §76-3-301(1)(c). As natural persons, though, Victor Lawrence, Cindy Lawrence, and Wayne Wong could also face jail time, on which is more difficult to place a monetary value for comparison purposes. This search for an analogous civil penalty also does not mandate a one-to-one correspondence. Even the U.S. Supreme Court, as the Utah Supreme Court noted in Campbell, 2004 UT 34, ¶43, implicitly endorsed a punitive damage award that exceeded the most analogous Utah civil penalty by a ratio of 100 to 1. The Utah Supreme Court, in Campbell, id., approved a punitive damage award that exceeded the most analogous civil penalty by a factor of 900 to 1, rejecting an argument that that ratio offended the 14<sup>th</sup> Amendment.

#### **APPLICATION OF THE LAW TO THE FACTS**

According to the Utah Supreme Court, a trial court charged with the task of awarding punitive damages should consider and weigh the seven factors identified in Crookston. The Court now considers those factors, as to each of the three defendants.

##### Victor Lawrence

##### (a). Relative wealth of the Defendant:

It is difficult to determine with any exactness Mr. Lawrence's wealth, measured by assets or income, for the very reason that he has tried hard over the past several years to disguise and hide the amount and sources of his income, including from the Internal Revenue Service. Mr. Lawrence has also been less than candid concerning his assets and income. In this trial, for example, he claimed that Lupus Lost had no assets, although it at least owned the Bobby Lawrence Karate Studio when it in 2005 filed a dba application for Bobby Lawrence Karate. Mr. Lawrence, for example, claimed he had never owned a World Mark vacation ownership, although he asked a Davis County Court in a divorce proceeding to award this marital asset to him.

Notwithstanding Mr. Lawrence's lack of candor, and notwithstanding his hollow protestations of poverty, it is apparent that he has since at least the early 2000s received substantial income, far and above what would be considered average annual income. In mid 2004, Mr. Lawrence's income approached \$40,000/month, derived primarily from his ownership of the Lexington Law Firm. Far Cliffs Media and RevGen have, since sometime in 2005 or before, regularly and faithfully paid Lawrence \$35,000 per month in consulting fees, which have continued at least through February, 2008. Lexington paid Lawrence additional sums for his consulting services, amounting to more than \$200,000 (or about \$50,000 per year on average) since Lawrence ostensibly sold Lexington to John Heath in June, 2004.

In addition, Mr. Lawrence also owns at least one significant asset, consisting of software, the licensing of which has generated huge if unspecified royalty income to Mr. Lawrence.

What is known about Mr. Lawrence's income and wealth, including his ownership of at least the one asset of substantial value, warrants a significant award of punitive damages.

(b) Nature of the Alleged Conduct, and

(c) Facts and Circumstances Surrounding such Conduct:

Victor Lawrence conspired with Paul Schwenke, Wayne Wong, and Cindy Lawrence to defraud Intermountain. Their purpose was to obtain the possession and use of vehicles without paying, with Wayne Wong fronting as the lessee in return for a payment to him in the amount of \$10,000. It was a scheme that the Schwenkes and Lawrences appear to have perpetrated before, against West Valley Dodge.

Fraud, or in the case of Victor Lawrence, conspiracy to defraud, is a particularly egregious form of wrongdoing, as it involves intentional deceit calculated to obtain a financial advantage over another. The goal of the conspiracy to defraud, in this case, was to acquire the free use of vehicles from a motor vehicle dealer and/or leasing company. Lawrence and the others engaged in conduct calculated to enable the conspirators to use the vehicles for as long as possible, to the extent even of ignoring court orders compelling discovery of their location and directing that the vehicles be returned to Intermountain.

Punitive damages are also warranted in cases of conversion. Mr. Lawrence and his family enjoyed the free use of the black Rodeo for almost nine months under circumstances where Mr. Lawrence, who is an attorney, knew he had no lawful right to possess or use it. Lawrence knew that Wayne Wong had leased the black and other Rodeos, but that he had not been making the monthly lease payments. Lawrence, knowing this, made none of the lease payments and paid



nothing for his and his family's use of the black Rodeo. He paid nothing for its use, even though his income from Lexington comfortably enabled him to purchase or lease a vehicle without resort to fraud and deceit. He continued to drive the black Rodeo and use it for free even though he knew that the leases between Intermountain's assignees and Wong had been in default almost half a year.

On Intermountain's repurchase of the black Rodeo from Bank of America, and its repurchase of the lease contract with Wayne Wong, Intermountain had the right to repossess the vehicle. Mr. Lawrence, as an attorney, knew this. Certainly, Lawrence knew that he had no right to possess the vehicle.

Intermountain attempted to repossess the black Rodeo on January 31, 2001, in a parking garage adjacent to the building in which Lexington's office was located. Lawrence, however, thwarted Intermountain's recovery of the vehicle. Not only did Lawrence object to Intermountain's effort to repossess the vehicle, he, without cause or justification, attacked and assaulted Intermountain's owner, G. Thomas Watkins, causing minor physical injury.

Having personally and intentionally thwarted Intermountain's repossession attempt, Lawrence turned possession of the black Rodeo over to Paul Schwenke. He did so, knowing that (1) Wayne Wong, not Schwenke had leased the black Rodeo; (2) that Wong had made no monthly lease payments; and (3) that the lease agreement on the black Rodeo was in default. Schwenke had no right to the black Rodeo. Lawrence knew that Schwenke had no right to possess and use the black Rodeo but turned the black Rodeo over to him anyway.

Schwenke had the black Rodeo driven to Southern California, where it was thereafter used and driven by Schwenke's relatives. Not surprisingly, Schwenke and his relatives adhered to their belief that they were somehow privileged to drive for free the vehicles leased from Intermountain. Schwenke's daughter, Tania, who unknown to Intermountain apparently resided in Las Vegas, continued to use and drive the green Rodeo. Schwenke's in-laws, once in possession of the black Rodeo, continued to drive it until Schwenke's brother-in-law totaled it in an accident.

This action was filed by Wong, Cindy Lawrence and Wilma Schwenke, Paul's wife. Their initial attorney, Jamis Johnson, withdrew as their counsel about February, 2001. Intermountain named Victor Lawrence as a defendant on a Third Party Complaint, filed in April, 2001. Notwithstanding that he had been named as a defendant, Mr. Lawrence entered an appearance on behalf of not only he and his wife, but also Wayne Wong and Paul, Wilma and Tania Schwenke. At the very least, his appearance on behalf of these multiple defendants, including himself, constituted a massive conflict of interest.

Once Mr. Lawrence undertook to represent all the counterclaim and third party defendants, he used his knowledge as an attorney and of the Rules of Civil Procedure in furtherance of the conspiracy to defraud Intermountain, and to stonewall Intermountain's effort to locate and retrieve the two remaining Rodeos.<sup>1</sup> He immediately, on the defendants' behalf,

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<sup>1</sup>Intermountain repossessed the silver Rodeo from Paul Schwenke's garage in Kanosh, Utah on Thanksgiving eve, 2000. The Millard County Sheriff repossessed the silver Rodeo pursuant to an ex parte writ of replevin signed by Judge Iwasaki in case no. 000909209, which was later consolidated with this case.

improperly removed this case to the United States District Court, which bought Tania Schwenke and Paul Schwenke's relatives another three months of free use. Defendants were sanctioned for their improper removal to federal court. Wayne Wong, who later paid the sanction, testified that Lawrence never informed him that the case had been removed or that sanctions had been assessed.

It appears that Victor Lawrence never told his clients and co-defendants (save maybe Paul Schwenke), that the Court had entered an Order compelling answers to Intermountain's Interrogatories, which sought to discover the location of the remaining two vehicles. Cindy Lawrence, to the limited extent her testimony may be believable, represented that Victor Lawrence had advised her that she need not answer the interrogatories because she was no longer a party.

Orders were entered in the Fall of 2001 ruling that Intermountain was entitled to immediate possession of the black and green Rodeos, that none of the defendants were entitled to possession of any of the Rodeos, and that defendants were ordered to immediately surrender and return the green and black Rodeos to Intermountain. Still, the remaining two vehicles continued to be used and driven, Intermountain continued to be kept in the dark about where they were, and Mr. Lawrence continued to represent members of the Schwenke family as well as Wong, his wife, and himself. No one, including Wong, made any lease payments. Only when an Order was entered holding all defendants other than Victor Lawrence in contempt of court, did Tania and Paul Schwenke drive the green Rodeo, beat up and damaged, to Salt Lake City. Only then did defendants surrender the vehicle to Intermountain. The black Rodeo was eventually returned to

Salt Lake City from Southern California, on a flat bed truck, inoperable, smashed and shorter than before.

Until they were facing jail time for contempt of court, Lawrence apparently made no effort to have his co-defendants and clients surrender the remaining Rodeos to Intermountain. Nor did he have them respond to delinquent discovery and Orders to compel discovery that sought the location of the remaining vehicles. Instead, he incorrectly told at least some of defendants that they had no obligation to respond.

Victor Lawrence's representation of his co-defendants transcended defending them, consistent with the Rules of Professional Responsibility. Lawrence used his knowledge of the court system to purposefully forestall Intermountain's effort to recover its vehicles, even after entry of the Orders that directed that the vehicles be surrendered to Intermountain.

(d) Effect of Conduct on the Lives of Others

Victor Lawrence's, Cindy Lawrence's, and Wayne Wong's conduct caused Intermountain to sustain compensatory damages, exclusive of attorneys fees, in the sum of \$80,412.87. With prejudgment interest added, Intermountain's damages amounted to \$138,267.25 as of August 13, 2007. It is obvious that Intermountain has, in addition, incurred substantial attorneys fees, for which the court, given the status of the law on attorneys fees, has not awarded to Intermountain as damages. While defendants' conduct has without question caused Intermountain to absorb a significant financial hit, Intermountain has survived and there is no evidence that this instance impaired Intermountain's ability to function or continue as a motor vehicle dealer.

(e) The probability of future misconduct.

The evidence at trial strongly suggested that Lawrence and Schwenke had orchestrated a similar fraud before, involving a straw purchaser other than Wong. It was within thirty days after First Security Bank repossessed vehicles for nonpayment, including one in the possession of Victor and Cindy Lawrence, that Schwenke and the Lawrences offered Wong \$10,000 to sign leases for them and showed up at Intermountain to negotiate leases on replacement vehicles. In the First Security Case, a person other than Wong had signed several contracts as purchaser, although he was in possession of none of the vehicles. The incident with Intermountain was not a one time play.

Mr. Lawrence furthermore has exhibited no regret or remorse for his conduct in this case. He is wholly unrepentant. He denies that he has done anything wrong or improper.

According to Mr. Lawrence, he could not have acted other than as he did without breaching his fiduciary duty to Paul Schwenke. Mr Lawrence's justification for his conduct is unpersuasive and disingenuous. To the contrary, the Court concludes that Lawrence purposely engaged in a conspiracy to defraud, used a vehicle for free under circumstances where he had no right to its possession, and did everything he could for as long as he could in contravention of the court's orders to make sure Intermountain was not able to recover the remaining vehicles.

The evidence that surfaced in the March 10-11 phase of trial regarding Victor Lawrence's assets and income furthermore establish beyond doubt that Mr. Lawrence, as the owner and manager of the Lexington Law Firm, clearly had the resources to buy or lease a new Isuzu Rodeo. He did not need to resort to or participate in a fraudulent scheme in order to obtain a

vehicle to drive. But he did. His willing participation in such a scheme and his advancement of it once involved, greatly perplexes the court. The only explanation the Court can conceive for Mr. Lawrence's participation in and advancement of such a scheme, given his ownership of Lexington and the income that produced, is that Lawrence viewed the scheme as a game which he thought he and Paul Schwenke could win. This is precisely the kind of attitude that warrants punishment, to deter Mr. Lawrence from choosing to play a similar game in the future. Only by making the cost of the game potentially too expensive to comfortably bear, is Mr. Lawrence likely to be deterred from engaging in similar future conduct.

(f) Relationships of the Parties.

The heinousness of wrongful conduct is even more so when the victim of such conduct peculiarly trusting, vulnerable, perhaps even incapable of protecting himself. Intermountain is a corporation. As such, it is not as vulnerable to wrongdoing as, say, a medically incapacitated person might be. There was, in this case, no special relationship between Intermountain and defendants.

Even a corporation involved in an arms length transaction with natural persons, is not, however, fair game in the game of fraud that Victor Lawrence, Paul Schwenke, Wayne Wong, and Cindy Lawrence chose to play. Banks, lenders, and motor vehicle dealers, for example, justifiably rely on the presumed truth of statements made in credit applications and contracts in deciding to extend credit, or lease vehicles. In this case, Intermountain nonetheless checked Wayne Wong's credit history. It is not reasonable, however, to expect Intermountain to have asked Wong if he really intended to make the monthly lease payments that he said he would

make, or if he intended to give other persons the cars to drive - knowing all along that he intended to make none of the monthly payments. Certainly, Intermountain, even though it is a corporation, could not be expected to have known that the Schwenkes and Lawrences had promised Wong \$10,000 if he would permit them to use his good credit to lease multiple vehicles, for their use, in his name.

Intermountain's status as a corporation does not, as Victor and Cindy Lawrence argue, excuse the wrongfulness of their conduct or immunize them from punitive damages.

(g) The Amount of Damages Awarded.

The court previously found that Intermountain sustained compensatory damages in the amount of \$80,412.87, caused by the defendants' fraud, conspiracy to defraud, and/or conversion. Prejudgment interest added \$57,854.38 to that sum, as of August 13, 2007. See Minute Entry (September 20, 2007). The total compensatory damages awarded by the court thus totaled, as of August 13, 2007, \$138,267.15. Punitive damages should, as the court has previously noted, bear a reasonable relationship to actual damages commensurate with a party's wrongdoing, consistent with the seven factors identified by the Crookston decision.


Victor and Cindy Lawrence deny that they did anything wrong, but if the court thinks they did, argue that any punitive damages must bear a reasonable relationship to the benefit they received which they say is the free use of a single vehicle for eight months. That, however, is not the applicable relationship, which is the ratio of punitive damages to the harm they caused. The harm they caused, measured by monetary damages, is \$138,267.15. This is the figure to be used in the denominator in any calculation of ratios.

On this point, the court notes that Victor Lawrence could have significantly mitigated his and the other defendants' damages had he surrendered the black Rodeo to Intermountain on January 30, 2001, because at that point the vehicle was still in good condition and had value. Instead, he gave the black Rodeo to Schwenke, covered for Schwenke as long as he could, and when Intermountain finally retrieved the black Rodeo it had been totaled. In the condition Schwenke returned it, Intermountain was able to get only \$1,200 on its sale of the black Rodeo.

(h) Other Considerations.

When an attorney is admitted to practice law in this state, he takes an oath to uphold the law. Mr. Lawrence's conduct in this case was wholly inconsistent with that pledge. Mr. Lawrence's status as an attorney, in the court's view, makes much worse his participation in this matter and in a conspiracy to defraud.

(i) Award of Punitive Damages.

Victor Lawrence's conduct caused Intermountain to sustain financial damages that, with prejudgment interest but exclusive of attorneys fees and court costs, amounted to \$138,267.25 as of August 13, 2007. The court concludes that punitive damages, to be awarded in favor of Intermountain and against Victor Lawrence, properly should be in the amount \$ 484,000. 

Cindy Lawrence

(a) Relative Wealth

Cindy Lawrence is even more secretive and evasive concerning her assets than is her former husband. According to Cindy Lawrence, she is not employed, has no income and has no assets.



Cindy Lawrence admitted having a bank account, but says she cashes all checks she receives rather than depositing them to her account in order to keep the IRS from seizing proceeds in the account.

Cindy Lawrence claimed to have no knowledge concerning any of the businesses in which her former husband had or has an interest. Nonetheless, she signed papers presented to the state of Utah representing herself to be a member and manager of Hawaiian Investments, LC and PCP, LC, both of which were members in Lupus Lost, LC. The evidence at trial clearly established that Lupus Lost, over the years, has had income, and that it owned the Bobby Lawrence Karate studios. The income received by Lupus Lost is partly charged to Cindy Lawrence, as a member and the manager of Hawaiian Investments, LC and PCP, LC, both of which were members and owners of Lupus Lost.

Still, the issue of Cindy Lawrence's wealth remains speculative. In contrast to Victor Lawrence, no evidence was presented at trial to clearly establish ongoing or significant income. Still, the Court does not believe Cindy Lawrence's claim that she is penniless.

The lack of clear evidence concerning Cindy Lawrence's wealth does not, however, prevent this court from assessing punitive damages against her. In fact, Intermountain is not absolutely required to prove her wealth in order to establish a claim for punitive damages, provided those damages are less than \$100,000 and are not more than 3 times actual damages.

(b) Nature of Alleged Conduct.

Cindy Lawrence, as did Victor Lawrence, conspired with Paul Schwenke and Wayne Wong to defraud Intermountain. Her use of the black Rodeo for approximately nine months, all the while knowing that Wong had made no payments on the lease, constituted conversion.

(c) Facts and Circumstances Surrounding such Conduct.

Cindy Lawrence was a willing participant in the conspiracy to defraud Intermountain. She knew about and participated in the offer to pay Wayne Wong \$10,000 if he would sign lease agreements on three vehicles. She took delivery of the black Rodeo almost immediately after Wong signed the agreements. In fact, in answer to interrogatories posed early in the case, she identified the black Rodeo as her car. Plaintiff's Trial Exhibit 83. She, along with other family members, enjoyed its use for almost nine months. She knew that she and Victor were not making payments on the black Rodeo. The court concludes she knew that Wong also was not making payments.

Cindy, in contrast to Victor's conduct, did not thwart Intermountain's recovery of the black Rodeo. It was also Victor, not Cindy, who turned the vehicle over to Paul Schwenke.

Cindy Lawrence, however, ignored the court's Orders compelling discovery until found in contempt, and looking at jail time. In testifying at trial, Ms. Lawrence seemed to have little regard for the truth, in that her testimony contradicted statements she had made in her Complaint, her sworn statements in answers to interrogatories filed in September, 2001, her sworn testimony when deposed in 2002, and even testimony given during trial.

(d) Effect of Conduct on the Lives of Others.

See above comments made with regard to Victor Lawrence and this criterion.

(e) The Probability of Future Misconduct.

Cindy Lawrence was involved in the earlier incident with West Valley Dodge. Within a month after a Dodge Durango was repossessed from their driveway, Cindy Lawrence willingly participated in a scheme to acquire possession of a replacement vehicle, which she, her husband and family could drive for free until that vehicle, too, was taken away.

Cindy Lawrence's purposeful effort to cloak herself in total ignorance, combined with her lack of honesty and candor, convinces the court that she is and would be willing to engage in future wrongdoing for financial gain - if only she thought she could get away with it.

Cindy Lawrence also exhibits no regret or remorse for her conduct or the economic losses she caused Intermountain. She does not acknowledge that she did anything wrong or improper. Any wrongdoing, according to Cindy Lawrence, is someone else's fault.

One purpose of assessing punitive damages against Cindy Lawrence is to deter her from engaging in future similar conduct. This criterion warrants an award of punitive damages.


(f) Relationship of the Parties.

See above comments made with regard to Victor Lawrence and this criterion.

(g) The Amount of Damages Awarded.

See above comments made with regard to Victor Lawrence and this criterion.

(h) Award of Punitive Damages.

Cindy Lawrence's conduct caused Intermountain to sustain financial damages that, with prejudgment interest but exclusive of attorneys fees and court costs, amounted to \$138,267.25 as of August 13, 2007. The court concludes that punitive damages, to be awarded in favor of Intermountain and against Cindy Lawrence, properly should be in the amount \$ 99,999.99. 

Wayne Wong

(a) Relative Wealth of Defendant.

Wayne Wong's wealth, as measured by income, depends on whether one believes Mr. Wong's sworn testimony at trial or representations he made under penalty of perjury in the course of a December, 2006 residential loan application.

If the representations Wong made in a December 2006 residential loan application are true, then he had a monthly income of \$14,981 and, thus, an annual income of approximately \$180,000 generated by Ourmart Enterprises, a home based business that he owns. If his testimony at trial is to be believed, he makes nothing close to \$14,981/month, he does not have significant income from Ourmart Enterprises, and he misrepresented his income in December, 2006 in order to induce a lender to loan him \$630,000 with his Stone Canyon Drive home in Draper as collateral. Given Wong's contradictory statements and testimony, all under penalty of perjury, the Court is inclined to recognize Wong's stated income of \$14,981/month, or about \$180,000 a year, for the purpose of assessing punitive damages.

Whatever its worth, Mr. Wong owns a business called Ourmart Enterprises. Wong owns two homes, although he may be in danger of losing the home at 14104 Stone Canyon Drive. His

home in West Jordan presently generates rental income of \$1600/month. Based solely on Mr. Wong's testimony, the equity in Wong's West Jordan home is about \$50,000.

(b) Nature of the Alleged Conduct.

Wong engaged in fraudulent conduct. He willingly participated in a scheme to deceive and defraud Intermountain in return for promised compensation of \$10,000.00.

(c) Facts and Circumstances Surrounding the Conduct.

As detailed in the previous Findings, Wong signed lease agreements with no intention of ever making any of the monthly lease payments. He represented that he would and had insured the vehicles, then allowed the insurance to lapse as soon as the vehicles were in others' hands. He did not tell Intermountain that other persons, who really would be using the vehicles, had promised him \$10,000 to use his credit to lease the vehicles in his name.

As his lease agreements became in default, Wong turned a deaf ear to demands by the original lessors, Isuzu Motor Acceptance Corp. and Bank of America, for the return of their vehicles. He made no lease payments and recognized no personal obligation to make payments. He did not contact Paul Schwenke or Victor Lawrence to request that the leased vehicles be surrendered to the lessors, who owned the vehicles. He made no effort to even find out who had the vehicles or where they were. His only concern seems to have been, whether he would be paid the balance of the \$10,000 he had been promised.

(d) Effect of Conduct on the Lives of Others.

See above comments made with regard to this criterion and Victor Lawrence.

(e) Probability of Future Conduct.

In the course of the second phase of trial, it was quite clearly revealed that Wayne Wong has subsequently engaged in substantially similar conduct, in which he defrauded a mortgage lender. He participated in a scheme by which he would pose as the purchaser of a home, while hiding the fact that someone else was the real owner and would be making the loan payments. Wong signed loan documents, intending never to personally make any of the loan payments. In fact, he never did. As in this case, he signed whatever documents he was asked to sign, and misrepresented (even under penalty of perjury) whatever facts he was asked to misrepresent in return for a promise of modest financial gain.

Mr. Wong's subsequent willing participation in a second scheme to defraud, similar to the one perpetrated against Intermountain, including his willingness to act as a "straw man" purchaser in return for compensation, quite clearly establishes Wong's propensity and willingness to engage in these types of schemes.

Mr. Wong exhibits no regret or remorse for his conduct or the damages his conduct caused Intermountain. Nor does he exhibit any recognition that his deceit and participation in the scheme to defraud Intermountain was in any way wrongful.

A substantial award of punitive damages is appropriate in order to deter, or try to deter Mr. Wong from engaging in similar future conduct.

(f) Relationships of the Parties.

See above comments made with regard to Victor Lawrence and this criterion.


(g) The Amount of Damages Awarded.

See above comments made with regard to Victor Lawrence and this criterion.

(h) Other Considerations.

Mr. Wong's defiance of the Court's Order prohibiting him from conveying interests in real property is a factor appropriate to consider in assessing punitive damages. Wong's defiance was established by the recently executed and recorded warranty deed that Intermountain introduced into evidence. His initial denial of the conveyance, followed by his explanation that he dutifully signed the deed only because someone else asked him to, is not an excuse.


(i) Award of Punitive Damages.

Wayne Wong's conduct caused Intermountain to sustain financial damages that, with prejudgment interest but exclusive of attorneys fees and court costs, amounted to \$138,267.25 as of August 13, 2007. The court concludes that punitive damages, to be awarded in favor of Intermountain and against Wayne Wong, properly should be in the amount \$ 138,267.25. 

**JUDGMENT**

The Court supplements the judgment it previously entered as follows:

GOOD CAUSE APPEARING, the Court enters judgment in favor of Intermountain, Inc. against Victor Lawrence, Cindy Lawrence, and Wayne Wong as follows:

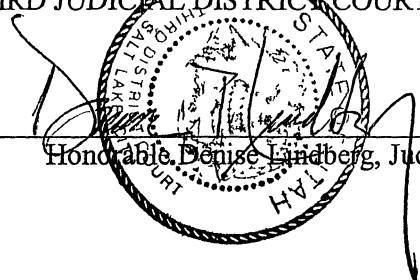
1. That Intermountain recover of Victor Lawrence punitive damages in the sum of \$ 484,000. 


2. That Intermountain recover of Cindy Lawrence punitive damages in the sum of \$ 99,999.99. 

3. That Intermountain recover of Wayne Wong punitive damages in the sum of  
\$ 138,267.25. *DK*

4. Each defendant's liability for punitive damages is personal and several, and is in addition to that defendant's joint and several liability for compensatory damages previously awarded by the Court.

*June*  
DATED: May 23, 2008.

THIRD JUDICIAL DISTRICT COURT  
By   
Honorable Denise Lindberg, Judge





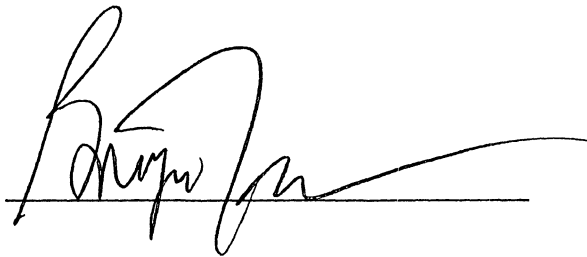
### **CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing [proposed] **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT** was mailed, postage prepaid, on this 30th day of May, 2008, to the following:

Knute Rife, Esq.  
P.O. Box 2941  
Salt Lake City, Utah 84110

R. Brent Stephens, Esq.  
6325 Loreen Place  
Salt Lake City, Utah 84121

Greg Brelsford, Esq.  
James H. Beadles, Esq.  
164 South 900 East  
Salt Lake City, Utah 84102

A handwritten signature in black ink, appearing to read "Greg Brelsford", is written over a horizontal line.

## **ADDENDUM C**

3

## **CSave.net, LLC**

220 S. 200 E., Suite 300  
Salt Lake City, Utah 84111  
Telephone: 801 364-7188, Fax 801 322-3412

### FAX MEMO

Date: March 29, 2000  
To: Angel Menedius  
Fax: 801 268-2833  
From: Paul Schwenke  
Pages: 9 including  
Subj: lease financing

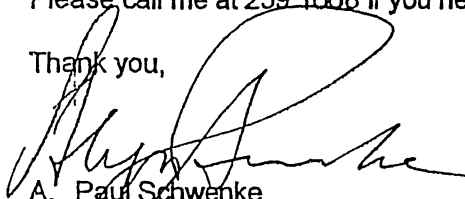
Faxed herewith is a copy of a financing request that we send to Larry Miller Bountiful Chrysler Jeep ("LMBCJ") which included the financial statement for the guarantor and those of our business. LMBCJ approved financing for 3 vehicles but they were not the ones we requested. LMBCJ proposed to lease us 3 Cherokee Sports at down payment and payment range were requested.

Since then, we have seen your company advertised lease specials on Izusu rodeos at \$299.00 per month without a down payment and Land Rovers Discovery at \$399 per month with \$2000.00 down.

Please see if we could obtain financing for 2 rodeos and 1 Land Rover.

We need to make a decision today, so I appreciate if you can expedite this matter. Please call me at 259 1668 if you need any additional information.

Thank you,



A. Paul Schwenke  
Manager.

# **ADDENDUM D**

WAYNE WONG, et al,

Plaintiff,

VS.

BANK OF AMERICA NA, et al,

Defendant.

**COPY**

Case No. 000904217 MI

(Volume I)

Bench Trial  
Electronically Recorded on  
June 4, 2007

BEFORE: THE HONORABLE DENISE P LINDBERG  
Third District Court Judge

APPEARANCES

For the Plaintiff:

Knut A. Rife  
HOLLAND & HART  
60 E. South Temple #2000  
SLC, UT 84111  
Telephone: (801) 595-7800

Christian Burrridge  
FORD BURRIDGE  
210 N. 1200 E. #200  
Lehi, UT 84043  
Telephone. (801) 331-7300

For the Defendant

P. Bryan Fishburn  
FISHBURN & ASSOCIATES  
4505 S. Wasatch Blve. #215  
SLC, UT 84124  
Telephone: (801)277-3445

Transcribed by. Beverly Lowe, CSR/CCT

1909 South Washington Avenue  
Provo, Utah 84606  
Telephone: (801) 377-2927

1 Q. Let me next direct you to Plaintiff's Exhibit No. 15.

2 Can you identify what that is?

3 A. It's an application for an employer identification  
4 number by C-Save.net, LC, and it was submitted to Intermountain.

5 Q. Was this found in Intermountain's business records?

6 A. Yes.

7 Q. Where?

8 A. In the deal jackets.

9 MR. FISHBURN: I'd move to admit Plaintiff's Exhibit  
10 No. 15.

11 THE COURT: Plaintiff's 15 will be admitted.

12 (Exhibit No. 15 received into evidence)

13 Q. BY MR. FISHBURN: Let me direct your attention next to  
14 Plaintiff's Exhibit No. 16. Can you identify what that is,  
15 please?

16 A. It's a three-page credit bureau report on Wayne Wong run  
17 by Intermountain.

18 Q. Where was this record located?

19 A. In the deal jacket.

20 MR. FISHBURN: I move to -- that Plaintiff's Exhibit  
21 No. 16 be received.

22 THE COURT: Plaintiff's 16 will be received.

23 (Exhibit No. 16 received into evidence).

24 Q. BY MR. FISHBURN: Mr. Wadkins, why would Intermountain  
25 have obtained a credit bureau report on Mr. Wong?

1 wasn't like it was the only form of transportation.

2 Q. Okay. At the time that the vehicle was leased, at least  
3 initially, you regarded this -- this was -- you understood this  
4 was going to be your car; is that right?

5 A. Well, it was a nice gesture, but I knew it would not be  
6 my vehicle, no.

7 Q. Why is it that you -- you smile and you say, "I knew it  
8 wouldn't be mine."

9 A. Because -- well, I don't know how your family is, but we  
10 share everything, so --

11 Q. All right. Well, where did you get the understanding  
12 initially -- whether or not you really believed it was going to  
13 happen -- that it would be your car?

14 A. Because I think Victor wanted to do something nice for  
15 me, but I don't -- you know, I mean --

16 Q. Okay.

17 A. If I say I made him dinner, it's for everybody.

18 Q. All right. Did Victor tell you that this was to be your  
19 car?

20 A. He said it was a car for the family. He said it was a  
21 Paul Schwenke trying to compensate for work that he had done.

22 Q. That Victor had done for Paul?

23 A. Right.

24 Q. Let me have you, Cindy, now look at Plaintiff's Exhibit  
25 No. 31, please.

1 A. This is not easy to negotiate.

2 Q. Yeah, it's not.

3 THE COURT: I'm sorry, but the exhibit again?

4 MR. FISHBURN: No. 31.

5 THE COURT: Thank you.

6 MR. FISHBURN: That would be the original --

7 THE COURT: The complaint.

8 MR. FISHBURN: -- plaintiff's verified complaint.

9 Q. BY MR. FISHBURN: Have you seen this document before?  
10 Are you familiar with it?

11 A. I'm not.

12 Q. To the best of your knowledge, have you not seen it?

13 A. To the best of my knowledge, I haven't.

14 Q. All right. By reference, this is the verified complaint  
15 that started this lawsuit, and I think it's dated May 24<sup>th</sup> of  
16 2000. It is. Now let me direct your attention to paragraphs 34  
17 and 35. In those two paragraphs there are references to, quote,  
18 "Cindy Lawrence's car," end of quote. Do you see those?

19 A. Uh-huh.

20 Q. Now did you -- at the date this complaint was filed,  
21 which is May 24<sup>th</sup> of 2000, did you conceive that there was one of  
22 these vehicles that was Cindy Lawrence's car?

23 A. No. I never thought it was just my car. I think Paul  
24 Schwenke's idea -- the whole initial idea that it was my car was  
25 Paul Schwenke thinking, "Cindy's probably really ticked off at



1 Victor because he's done a lot of work for me and I haven't paid  
2 him, so we're going to do this and appease this woman."

3 Q. Okay.

4 A. That's what I think it was. So no, I never thought it  
5 was my car. He never thought it was just my car. It was a gift.

6 Q. Incidentally, this complaint says that Mr. Johnson is  
7 the attorney for the plaintiffs. Do you see that on the first  
8 page?

9 A. On the -- back to the first page?

10 Q. Yes.

11 A. Yes.

12 Q. Did you retain Mr. Johnson to represent you in this  
13 case?

14 A. No, I did not. I think that Victor may spoken with him  
15 to do that. I didn't deal with any of this. Victor did all the  
16 dealings with finances and all this legal stuff. I don't think  
17 he wanted me upset in this.

18 Q. Do you recall before this complaint was filed reading  
19 the complaint to give your input or --

20 A. No, I did not.

21 Q. That's a definite no, you did not?

22 A. Yes. I did not.

23 Q. All right. Did you know it had been filed -- at the  
24 time did you know it had been filed on your behalf?

25 A. No, I did not.

1   drove it once, but during the time period that the black Rodeo  
2   was being used by Victor, were you making any lease payments on  
3   it?

4       A.   No, I was not.

5       Q.   Was Victor making any lease payments on it?

6       A.   I don't know.

7       Q.   Did you even know who the lessee was?

8       A.   No.

9       Q.   Did you have an assumption as to who the lessee was?

10      A.   Not any at all. I was to the understanding that it  
11   was -- Paul Schwenke was doing this, that it was through his  
12   company. That's all that I was told.

13      Q.   All right. The basis for that understanding was what?

14      A.   The basis to that is that he owed Victor a bundle of  
15   money because Victor had done a lot of work for him, and in order  
16   to compensate for a portion of that, he was getting a vehicle  
17   that he could use through the company.

18      Q.   Okay. Paul told you that; is that right?

19      A.   No.

20      Q.   Oh, who told you that?

21      A.   Victor did.

22      Q.   Okay. Let me direct your attention next, if you will,  
23   to Plaintiff's Exhibit 67.

24      A.   Okay.

25      Q.   And I apologize, we have to turn through these pages.

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

WAYNE WONG, et al,

Plaintiff,

vs.

BANK OF AMERICA NA, et al,

Defendant.

**COPY**

Case No. 000904217 MI

(Volume II)

Bench Trial  
Electronically Recorded on  
June 5, 2007

BEFORE: THE HONORABLE DENISE P. LINDBERG  
Third District Court Judge

APPEARANCES

For the Plaintiff:

Knute A. Rife  
HOLLAND & HART  
60 E. South Temple #2000  
SLC, UT 84111  
Telephone: (801)595-7800

Christian BurrIDGE  
FORD BURRIDGE  
210 N. 1200 E. #200  
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Telephone: (801)331-7300

For the Defendant:

P. Bryan Fishburn  
FISHBURN & ASSOCIATES  
4505 S. Wasatch Blve. #215  
SLC, UT 84124  
Telephone: (801)277-3445

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue  
Provo, Utah 84606  
Telephone: (801) 377-2927

1       A.    Their understanding or my understanding from the  
2 conversation I had with them was that C-Save.net was entering  
3 this lease -- these leases, and Wayne Wong was simply the  
4 personal guarantor. My understanding was at some point later  
5 that after the leases were signed, I had been told that they were  
6 signed in blank.

7       Q.    Okay. What strategy did you disagree with?

8       A.    Well, I disagree with anytime anybody signs something in  
9 blank, number one, when they had done that. Then No. 2, when  
10 they brought Wilma and Tonya and Cindy into the picture, it was  
11 like, "No, wait a minute. They said Wayne signed these. Wayne's  
12 the one that's been defrauded here. It was supposed to be in the  
13 name of C-Save.net."

14       Q.    Okay. Now do you believe that -- did you tell your  
15 wife, Cindy, that -- at about this time that a lawsuit had been  
16 filed in her name?

17       A.    Yes.

18       Q.    Did you tell Wayne Wong that a lawsuit had been filed in  
19 his name?

20       A.    I don't know if I told him or if he was there. He  
21 was -- he spent a lot of time, like he said, up at C-Save doing a  
22 lot of the work trying to get that off the ground.

23       Q.    Okay. Now on the very day that this lawsuit was filed  
24 you and Cindy had possession of the black Rodeo; is that right?

25       A.    I had possession until I think that January 31<sup>st</sup> date,

1       A.    I knew Wayne Wong was being alleged to be the one that  
2       had signed the leases as his own vehicles. My understanding was  
3       it was C-Save's vehicle.

4       Q.    According to the complaint, it was Wayne Wong who had  
5       leased the vehicles, correct?

6       A.    Okay. My understanding it was C-Save's vehicle. If  
7       you're asking for what my understanding was, my understanding was  
8       that that vehicle and Wilma's vehicle were all C-Save's vehicles.  
9       Tonya's vehicle, Tonya was supposed to make the payments for it.

10      Q.    Let me ask you this, at this point in time based on your  
11      knowledge of the complaint and whatever else had happened in the  
12      months since, who did you understand was the owner of the  
13      vehicle?

14      A.    At what point in time?

15      Q.    January 31<sup>st</sup>, 2001.

16      A.    January 31<sup>st</sup> of 2001 I thought that there was a leaser  
17      relationship, and I didn't know who the leaser was because there  
18      were like seven different entities -- Bank of America, Isuzu and  
19      Intermountain -- and I thought the leasee was rightfully C-  
20      Save.net.

21      Q.    Okay. Now on June 4<sup>th</sup>, 2001 -- that's after this  
22      repossession attempt -- you entered an appearance on behalf of  
23      all of the original plaintiffs in this case, correct?

24      A.    Yes, sir.

25      Q.    And you also entered an appearance for yourself because

1 Cindy's car. One is Wilma's car. One is Tonya's car." The  
2 answers to interrogatories several months later, they were still  
3 identified the same way. They're still being identified as  
4 Tonya, Wilma and Cindy's cars.

5 Cindy testified that yes, she understood she was  
6 getting a car. Now Tonya and Wilma aren't here, so it's  
7 somewhat irrelevant. She didn't understand -- she didn't  
8 contemplate that she would be making any of the payments. So she  
9 was participating in it knowing that she was going to be getting  
10 a car, but not disclosing -- omitting to disclose that somebody  
11 else was going to be making the payments other than the lessee.

12 There is also a conspiring to defraud where one assists  
13 one to perpetrate the fraudulent scheme, and that really goes  
14 more to Victor than it does to Cindy. We'll concede that fact.

15 Mr. Lawrence has attempted to persuade the Court that he  
16 was totally uninvolved in the negotiations. Well, according to  
17 Mr. Schwenke, that's not true. I believe the evidence was that  
18 he made the down payment on the deal, so certainly he was  
19 involved then.

20 Although he is not the Counsel of record, he signed the  
21 complaint, so he knew at that point -- and I'm going to probably  
22 cross over to conversion here in a minute. He knew that the  
23 lessee was Wayne Wong because the complaint characterizes Wayne  
24 Wong as signing the leases. From that point on he and his wife  
25 had use of the car.

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

\_\_\_\_\_  
WAYNE WONG, et al,

Plaintiff,

vs.

BANK OF AMERICA NA, et al,

Defendant.  
\_\_\_\_\_

**COPY**

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) Case No. 000904217 MI  
)  
)  
) (Volume III)  
)  
)  
)

Bench Trial  
Electronically Recorded on  
June 6, 2007

BEFORE: THE HONORABLE DENISE P. LINDBERG  
Third District Court Judge

APPEARANCES

For the Plaintiff:

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Transcribed by: Beverly Lowe, CSR/CCT

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1 your attorney?

2 A. No, I did not.

3 Q. Did you feel you ever entered into an attorney/client  
4 relationship with him?

5 A. No.

6 Q. When this case was initiated, did you know that there  
7 was a lawsuit concerning the black Rodeo?

8 A. I knew there was something.

9 Q. How did you know that?

10 A. From Victor.

11 Q. Did you know that you were a party in this case?

12 A. No, I didn't.

13 Q. Did you authorize a complaint to be filed on your  
14 behalf?

15 A. No, I did not.

16 Q. Did Jamis Johnson ever contact you about the case?

17 A. Never.

18 Q. Did he ever -- did Jamis Johnson ever ask your input in  
19 answering any of the discovery in this case?

20 A. No, I never spoke to him about this case.

21 Q. Did you instruct him on how to answer in any way any of  
22 the interrogatories in this case?

23 A. No, sir.

24 Q. Now when you visited Intermountain on the original date  
25 that you went and looked at the vehicles, did you negotiate the



1 lease deal with Intermountain?

2 A. No.

3 Q. What do you believe negotiate means?

4 A. Deciding the final price.

5 Q. Do you believe asking questions about what prices are is  
6 negotiation?

7 A. No.

8 Q. Do you believe that looking at cars is negotiation?

9 A. No.

10 Q. Did you enter the building on Intermountain's lot on the  
11 date that you visited Intermountain?

12 A. No. I stood in the parking lot.

13 Q. Do you know who Wayne Wong is today?

14 A. Yes, I do.

15 Q. Now did you know who Wayne Wong was on the day that you  
16 visited Intermountain?

17 A. No.

18 Q. Did you know who Wayne Wong was when the complaint was  
19 filed in this case?

20 A. No, I did not.

21 Q. Did you know him when the interrogatories were filed in  
22 this case?

23 A. No.

24 Q. When did you finally meet Mr. Wong?

25 A. I met -- the first time that I ever met him or saw

1 Q Do you remember being asked whether or not you ratified  
2 the allegations in the complaint?

3 A I don't remember being asked that, no.

4 Q You have ratified them, is that --

5 A What does ratified mean?

6 Q It means you've accepted them as being yours Do you  
7 remember doing that?

8 A No, I don't, but if I did -- I'm not saying that I  
9 didn't, but --

10 Q Okay. Let me direct your attention to page 48.

11 A I'm there.

12 Q Okay. I'd like you to go down to line 21.

13 A Okay.

14 MR. FISHBURN: Your Honor, I'll represent to the Court  
15 that these were questions asked of Ms. Lawrence by Paul Schwenke,  
16 who was attending.

17 THE COURT: Okay.

18 Q BY MR. FISHBURN: Question:

19 Q So even though you have never seen  
20 this complaint before as testified, this would  
21 have been the cause of action you would have  
22 asserted and in fact would have supported and  
23 consented for, is that correct?

24 Your answer?

25 A Yes.

Defendant.

**COPY**

(Volume IV)

BEFORE: THE HONORABLE DENISE P. LINDBERG  
Third District Court Judge

P. Bryan Fishburn  
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1 fraudulent scheme to set forth a situation, provide a plausible  
2 excuse as to why these people could continue to drive the  
3 vehicles for free forever, despite demands, despite discovery,  
4 despite orders of the Court. There has been a perpetration of  
5 the fraud throughout the proceedings, using the proceedings,  
6 using the judicial process to hide the vehicles and make it more  
7 and more difficult.

8 Now Intermountain did not expressly plead aiding and  
9 abetting fraud. To that extent I would move under Rule 15(b)  
10 that the pleadings of Intermountain be amended to conform to the  
11 evidence in this case, because the evidence clearly indicates and  
12 supports a cause of action for aiding and abetting fraud against  
13 Victor Lawrence, if it's not conspiracy to defraud and if it's  
14 not direct overt fraud, which I think the evidence also supports.

15 Now I do need to direct the Court's attention to the  
16 case of Carols vs. Sabey, which is an appellate case, Utah 2003  
17 Utah Appellate 339, because in that case the Court of Appeals  
18 simply said, "We're asked to decide if Utah has ever recognized  
19 a cause of action for aiding and abetting fraud, and we're not  
20 going to decide that." What the Court said was, "You know, under  
21 this case plaintiff couldn't prove it anyway, so we're going to  
22 sidestep that."

23 But I think that Utah would recognize aiding and  
24 abetting fraud, first of all, because the Schwartz case indicates  
25 that the liability of a person can be based vicariously, even

1           So I guess what I am asking is if the -- I would hope  
2 the Court finds that both Cindy and Victor Lawrence were overt  
3 participants in the fraud, but an alternative finding that even  
4 if Victor Lawrence did not overtly participate in the fraud, he  
5 very clearly aided and abetted it, and therefore would be liable  
6 in any event, which is what I'm asking.

7           Then of course we would ask for the damages. We ask  
8 for punitive damages against Victor and Cindy Lawrence under the  
9 standard of Section 18-1-1. Of course, the law does provide that  
10 if there is a finding of punitive damages, we would have to take  
11 a bit more testimony on wealth and assets and earnings. That  
12 hasn't been gone into. That would be very short. It could be  
13 done either today or it could be later -- again, premised on the  
14 Court first making the finding that the punitive damages are  
15 warranted.

16           We only have, incidentally, one exhibit that goes to  
17 that issue that's been marked, and that's the papers filed in  
18 Mr. and Mrs. Lawrence's divorce, which address the assets that  
19 they had.

20           THE COURT: Okay. Who's going next?

21           MR. BURRIDGE: If there's one thing about the evidence  
22 in this case, your Honor, it is not clear. It's been said from  
23 the very beginning this has been a convoluted case. Counsel in  
24 this case hasn't always understood exactly what has been going  
25 on.

# **ADDENDUM E**

<b>Form SS-4</b> (Rev. February 1990) Department of the Treasury Internal Revenue Service		<b>Application for Employer Identification Number</b> (For use by employers, corporations, partnerships, trusts, estates, churches, government agencies, certain individuals, and others. See instructions.) ▶ Keep a copy for your records.		KF 11-139-99 EIN <b>22-3687869</b> OMB No. 1545-0003	
1 Name of applicant (legal name) (see instructions) <b>CSAVE.NET, LLC</b>					
2 Trade name of business (if different from name on line 1)					
3 Executor, trustee, "care of" name					
4a Mailing address (street address) (room, apt., or suite no.) <b>PO Box 3623</b>					
5a Business address (if different from address on lines 4a and 4b) <b>220 South 200 East, Suite 300</b>					
4b City, state, and ZIP code <b>Salt Lake City, UT 84110-3623</b>					
5b City, state, and ZIP code <b>SLC, UT 84111</b>					
6 Country and state where principal business is located <b>Salt Lake County, UT</b>					
7 Name of principal officer, general partner, grantor, owner, or trustee—SSN or ITIN may be required (see instructions) ▶					
8a Type of entity (Check only one box.) (see instructions) Caution: If applicant is a limited liability company, see the instructions for line 8a.					
<input type="checkbox"/> Sole proprietor (SSN) <input type="checkbox"/> Estate (SSN or decedent) <input checked="" type="checkbox"/> Partnership <input type="checkbox"/> Personal service corp. <input type="checkbox"/> Plan administrator (SSN) <input type="checkbox"/> REMIC <input type="checkbox"/> National Guard <input checked="" type="checkbox"/> Other corporation (specify) ▶ <b>LLC</b> <input type="checkbox"/> State/local government <input type="checkbox"/> Farmers' cooperative <input type="checkbox"/> Trust <input type="checkbox"/> Church or church-controlled organization <input type="checkbox"/> Federal government/military <input type="checkbox"/> Other nonprofit organization (specify) ▶ <input type="checkbox"/> (enter GEN if applicable) <input type="checkbox"/> Other (specify) ▶					
8b If a corporation, name (if applicable) where incorporated the state or foreign country State <b>UTAH</b> Foreign country					
9 Reason for applying (check only one box.) (see instructions) <input type="checkbox"/> Banking purpose (specify purpose) ▶ <input checked="" type="checkbox"/> Started new business (specify type) ▶ <b>Online Retail Business</b> <input type="checkbox"/> Changed type of organization (specify new type) ▶ <input type="checkbox"/> Hired employees (check the box and see line 12.) <input type="checkbox"/> Purchased going business <input type="checkbox"/> Created a pension plan (specify type) ▶ <input type="checkbox"/> Created a trust (specify type) ▶ <input type="checkbox"/> Other (specify) ▶					
10 Date business started (month, day, year) (see instructions) <b>November 4, 1999</b> 11 Closing month of accounting year (see instructions) <b>December</b>					
12 First date wages or other payments were paid or will be paid (month, day, year). Note: If applicant is a withholding agent, enter date income will first be paid to nonresident alien. (month, day, year) ▶ <b>N/A</b>					
13 Highest number of employees expected in the next 12 months. Note: If the applicant does not expect to have any employees during this period, enter -0-. (see instructions) Nonagricultural <b>0</b> Agricultural Household					
14 Principal activity (see instructions) ▶ <b>Online Retail Business</b>					
15 Is the principal business activity manufacturing? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "Yes," principal product and raw material used ▶					
16 To whom are most of the products or services sold? Please check one box. <input type="checkbox"/> Business (wholesale) <input type="checkbox"/> N/A <input checked="" type="checkbox"/> Public (retail) <input type="checkbox"/> Other (specify) ▶					
17a Has the applicant ever applied for an employer identification number for this or any other business? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Note: If "Yes," please complete lines 17b and 17c.					
17b If you checked "Yes" on line 17a, give applicant's legal name and trade name on prior application, if different from line 1 or 2 above Legal name ▶ Trade name ▶					
17c Approximate date when and city and state where the application was filed. Enter previous employer identification number if known. Approximate date when filed (mo., day, year) City and state where filed Previous EIN					
Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete.					
Name and title (Please type or print clearly) ▶ <b>David Felton, Managing Member</b>					
Signature ▶ <b>[Signature]</b> Date ▶ <b>11-4-99</b>					
Note: Do not write below this line. For official use only.					
Base leave blank ▶ Geo. Ad. Class. Size Reason for applying					

## **ADDENDUM F**



**ASSIGNMENT OF INTEREST IN LEASES  
AND LEASED VEHICLES**

This ASSIGNMENT OF INTEREST IN LEASES AND LEASED VEHICLES is entered into this 31<sup>st</sup> day of January, 2001 by BANK OF AMERICA, N.A. ("BofA") in favor of INTERMOUNTAIN, INC., dba Intermountain Isuzu.

WHEREAS, on or about March 31, 2000, Intermountain, Inc., as Lessor (the "Dealer") and Mr. Wayne Wong, as Lessee (the "Lessee"), entered into a Motor Vehicle Lease Agreement, No. 10-1371-06441 (the "Lease Agreement") for the lease to Lessee of a new 2000 Isuzu Rodeo LS, VIN 4S2DM58W7Y4302440 ("Vehicle No. 3," sometimes referred to herein as the "Leased Vehicle"), and

WHEREAS pursuant to its terms the Lease Agreement was assigned by the Dealer to BofA or its successors or assigns and payment was made therefor by BofA to the Dealer; and

WHEREAS disputes have arisen between the Lessee (as well as various third parties in possession of the Leased Vehicle), and the Dealer with respect to the validity of specific provisions of the Lease Agreement and the obligation of Mr. Wong to make the lease payments required under the Lease Agreement; and

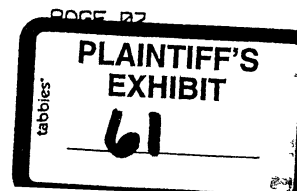
WHEREAS a civil action has been filed by Lessee and certain third parties, entitled *Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence and Wayne Wong v. Intermountain, Inc., Bank of America, N.A. et al.*, in the Third Judicial District Court for Salt Lake County, State of Utah as Civil No. 000904217 (the "Civil Action"), contesting the validity of the Lease Agreement and the Lessee's obligations thereunder; and

WHEREAS BofA has made demand on the Dealer to indemnify and hold BofA harmless from all allegations and expenses of the Civil Action, pursuant to the provisions of the Dealer Agreement entered into by and between the Dealer and BofA; and

WHEREAS, the Dealer has agreed to repurchase the Lease Agreement and all interest therein, as well as in the Leased Vehicle, from BofA in return for an assignment by BofA to the Dealer of all of BofA's right, title and interest in the Lease Agreement and the Leased Vehicle, and the parties are desirous to enter into such transaction;

NOW THEREFORE, based on the foregoing recitals and for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged by the respective parties, the parties hereto agree as follows:

1. Assignment of Interest in Lease Agreements and Leased Vehicles. BofA, for valuable consideration received from the Dealer, hereby assigns to the Dealer all of its right, title and interest in the Lease Agreement (including the right to receive attorneys' fees) and the Leased Vehicle, in an "as is" condition, without representation, warranty or recourse of any kind. BofA also assigns all of its rights as an insured or loss payee under a contract of insurance, if any, covering the Leased Vehicle.



2. Defense and Indemnification of BofA in the Civil Action. The Dealer hereby represents and warrants that it will, at its own expense, undertake and defend the interests of BofA in the Civil Action, and based on this Assignment, will use its best faith efforts to obtain an order of the Court dismissing BofA from the Civil Action with prejudice. The Dealer further agrees to indemnify and hold BofA completely harmless from and against any expenses of the Civil Action and any judgment which may be entered against BofA in the Civil Action.

3. Further Actions to be Taken. The parties hereby agree to cooperate with on another in good faith in taking such further actions as may be necessary to effectuate the terms of this Assignment, including the transfer of title to the Leased Vehicle from BofA to the Dealer.

4. Full Satisfaction. BofA agrees and accepts (i) payment in the amount set forth in Exhibit A hereto, and (ii) the indemnity and other obligations of the Dealer set forth herein, in full satisfaction of (a) the recourse/repurchase claim of BofA against the Dealer and (b) all liabilities of the Dealer to BofA under the terms of the Lease Agreement and the Dealer Agreement, insofar as such matters relate to the Civil Action.

DATED the first date written above.

For BOFA:

Bank of America, N.A.

By: P. Pelcher

Its: SVP

For the Dealer:

Intermountain, Inc., dba Intermountain Isuzu

By: Tom Watkins **TOM WATKINS**

Its: VP

**Exhibit A**  
**to**  
**ASSIGNMENT OF INTEREST IN LEASES**  
**AND LEASED VEHICLES**

Statement of final payoff amount for lease no. 10-1371-06441 through January 31, 2001:	\$28,947.24
Attorneys fees and costs:	\$6,331.00
Total:	\$35,278.24

DURHAM  
JONES  
PINEGAR

*Robert Alsop*

TO: ~~Penelope Filcher~~

Bank of America, N.A.

PH 02 FAX  
FAX: (602) 431-7415 602-431-7637

FROM: ~~Robert A. Alsop~~ *P. Filcher*

DATE: January 30, 2001

PAGES: CLIENT-MATTER Bank of America

RE:

MESSAGE: I'm transmitting the Assignment Agreement we discussed yesterday, together with a copy of the check we received from the dealer. Kindly sign this faxed copy and return it to me via fax so the Dealer can initiate repossession proceedings for the vehicle today. I will send the hard copy of the agreement to you for signature and return. I will send the check, and a copy of the agreement, to Pellie Brown. Many thanks. Bob Alsop

TELECOPY OPERATOR:

## FACSIMILE

**CONFIDENTIAL:** Information contained in this facsimile may constitute confidential and privileged communication. It is not intended for transmission to, or receipt by, any unauthorized persons. If received in error please notify the sender immediately.

A Professional Corporation  
Attorneys & Counselors at Law

111 East Broadway, Suite 900  
Salt Lake City, Utah 84111  
Telephone 801 415-3000  
Facsimile 801 415-3500

# **ADDENDUM G**

- **Capitalized Cost Reduction**

Capitalized cost reduction and payment period requirements should be competitive, and consistent with sound business practices, but will vary depending upon the type of vehicle to be financed, the customer's credit worthiness, and other considerations. Capitalized cost reduction means cash or cash equivalent that a customer actually pays to the Dealer at the time the lease is consummated. If a rebate is included in the capitalized cost reduction, the rebate must first have been disclosed on the credit application and must be fully disclosed as a rebate on the lease agreement. IMAC will furnish minimum acceptability requirements to the Dealer from time to time. *... down payment.*

- **Lease Payments**

Except under special circumstances, the customer's payment should be scheduled at monthly intervals. The first payment date should be one month from the date of the lease agreement. This date can be adjusted to coincide with the date on which the customer receives personal income but may not exceed 30 days.

- **Vehicle Insurance**

The IMAC Lease Program requires that customers provide, at their own expense, acceptable vehicle insurance, including liability, collision, comprehensive, fire, theft, and combined additional coverage, with or without deductibles, during the entire term of the lease.

It is essential that the vehicle be insured from the moment it is delivered to the customer. Each lease agreement submitted to IMAC must be accompanied by written evidence that the vehicle is covered by an acceptable existing policy and that IMAC has been named as an additional insured and loss payee. Dealer is responsible for obtaining and verifying accurate and complete information.

- **Lease Terms and Conditions**

*Lease Term* - The term of any lease shall be at least 24 months, but shall not exceed 60 months. IMAC also offers customized terms in three month intervals, for example, 27 months, 30 months and 33 months.

*Residual Values* - Residual Values will be specified periodically by IMAC.

*Mileage* - Standard Mileage limits are 15,000 miles per year (1,250 miles per month) but other mileage limits will be available from time to time.

*Security Deposit* - A security deposit is required, unless specified otherwise.