

1989

LMV Leasing Inc. v. Roy W. Mallory, Val Conlin, Barbara Conlin, Tubber T. Okuda, Mary Y. Okuda : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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KFU IN THE COURT OF APPEALS OF THE STATE OF UTAH

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DOCKET NO. 890504-CA
LMV LEASING, INC.,

Plaintiff/Respondent,

v.

ROY W. MALLORY, VAL CONLIN,
BARBARA CONLIN, TUBBER T.
OKUDA, MARY Y. OKUDA,

Defendants/Appellants

TUBBER K. OKUDA, MARY Y.
OKUDA, VAL J. CONLIN, and
BARBARA CONLIN,

Third-Party Plaintiffs,

v.

MAUREEN MALLORY,

Third-Party Defendant.

Case No. 890504-CA

No. 14b

BRIEF OF THE RESPONDENT

Appeal from a Judgment and Ruling
of the Third Judicial District Court
In and For Salt Lake County, State of Utah
Honorable Pat B. Brian, Judge

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LMV LEASING, INC.,
Plaintiff/Respondent,

v.

ROY W. MALLORY, VAL CONLIN,
BARBARA CONLIN, TUBBER T.
OKUDA, MARY Y. OKUDA,

Defendants/Appellants

Case No. 890504-CA

No. 14b

TUBBER K. OKUDA, MARY Y.
OKUDA, VAL J. CONLIN, and
BARBARA CONLIN,

Third-Party Plaintiffs,

v.

MAUREEN MALLORY,

Third-Party Defendant.

INTRODUCTION

This case arises out of a lease agreement between LMV Leasing, Inc. (hereafter "LMV", "Plaintiff" or the "Lessor") and the lessee, M.C.O., Inc., (hereafter "MCO") which was personally guaranteed by each of the defendants, Roy W. Mallory, Val Conlin, Barbara Conlin, Tubber T. Okuda, and Mary Y. Okuda. MCO, Inc., was not made a defendant in this case because of the automatic stay arising from its filing for bankruptcy. Roy W. Mallory is not a party to this appeal as a result of Mallory's filing for bankruptcy relief.

Defendants Val Conlin, Barbara Conlin, Tubber T. Okuda, and Mary Y. Okuda (hereafter collectively referred to as "Defendants") appeal the summary judgment obtained against them.

JURISDICTION

Respondent's brief is filed in response to the appeal taken to the Utah Supreme Court by Defendants Conlins and Okudas pursuant to Utah Code Ann. §78-2-2(3)(j) (Supp. 1989). The Utah Supreme Court subsequently assigned this appeal to the Utah Court of Appeals under Rule 4A, Rules of the Utah Supreme Court. The trial court certified this case for appeal under Rule 54(b), Utah Rules of Civil Procedure, leaving only the third-party complaint against Maureen Mallory for later disposition.

NATURE OF PROCEEDINGS

Defendants appeal a summary judgment granted against them as guarantors of a lease contract in default. LMV, a Pennsylvania corporation, as Lessor, originally signed a lease agreement with MCO, a Utah corporation, doing business as American International Rent-A-Car, in order to provide MCO with a fleet of cars for its business. The lease contract was personally guaranteed by each of the Defendants. MCO defaulted in its lease payments and, a few months later, after notice to all parties, LMV repossessed and sold the cars. LMV then initiated this action to recover as damages the

amount due under the lease less interest of six (6) percent and less the net proceeds from the car sales.

LMV prevailed on a Motion for Summary Judgment on the issue of liability. The Court directed the parties by telephone conference to submit the issue of damages by affidavit. Both parties submitted affidavits without comment or objection as to form of disposition. Defendants' motion to strike LMV's affidavit concerning attorney fees was denied. The trial court thereafter awarded LMV damages and attorney fees and certified the judgment for appeal pursuant to Rule 54(b), Utah Rules of Civil Procedure. The only issue remaining in the trial court involves the third-party complaint against Maureen Mallory.

LMV contends that the issue of liability is clear in this case -- that regardless of whether the agreement is termed a true lease or a security agreement, the guarantors are liable for payment of the remaining lease payments. The remaining issues, LMV contends, all go to the issue of damages and mitigation of damages, including such issues as whether the cars were sold in a commercially reasonable manner, whether there was impairment of the collateral, and whether there were any remaining material factual issues as to mitigation of damages.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. IS IT NECESSARY TO DECIDE WHETHER THE TRANSACTION WAS A LEASE OR A SECURITY AGREEMENT IN ORDER TO DETERMINE WHETHER THE DEFENDANTS ARE LIABLE AS PERSONAL GUARANTORS?
2. DID THE TRIAL COURT CORRECTLY DECIDE UNDER THE AFFIDAVITS PRESENTED BEFORE IT THAT THE VEHICLES HAD BEEN SOLD IN A COMMERCIALY REASONABLE MANNER PURSUANT TO UTAH CODE ANN. § 70A-9-504(3)?
3. DID THE TRIAL COURT CORRECTLY DECIDE ACCORDING TO THE AFFIDAVITS PRESENTED BEFORE IT THAT THE VEHICLES HAD BEEN SOLD IN A COMMERCIALY REASONABLE MANNER PURSUANT TO THE LEASE?
4. DID THE DEFENDANTS PROPERLY RAISE BEFORE THE TRIAL COURT THE ISSUE OF IMPAIRMENT OF COLLATERAL?
5. DID THE TRIAL COURT CORRECTLY AWARD DAMAGES AFTER REVIEWING THE PARTIES' AFFIDAVITS AS TO MITIGATION OF DAMAGES?
6. ARE THE DEFENDANTS PROCEDURALLY BARRED FROM RAISING THEIR OBJECTION TO DECIDING THE QUESTION OF DAMAGES AND ATTORNEY FEES BY MEMORANDA AND AFFIDAVITS BY THEIR FAILURE TO RAISE THIS OBJECTION WITH THE TRIAL COURT?
7. DID THE TRIAL COURT CORRECTLY DENY THE DEFENDANTS' MOTION TO STRIKE THE PLAINTIFF'S ATTORNEY'S AFFIDAVIT AS TO ATTORNEY FEES?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Utah Code Ann. § 70A-1-201(26), (38) (1981).
2. Utah Code Ann. § 70A-9-501(1), (3) (1981).
3. Utah Code. Ann. § 70A-9-504(3) (1981).
4. Utah Code. Ann. § 70A-9-507(2) (1981).
5. Utah Code. Ann. § 78-2-2(3)(j) (Supp, 1989).
6. Rule 4A, Rules of the Utah Supreme Court.
7. Rule 4-501(5), Utah Code of Judicial Administration.
8. Rule 4-505(1), Utah Code of Judicial Administration.
9. Rule 54(b), Utah Rules of Civil Procedure.
10. Rule 56(c), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Nature of the Case:

This case involves a deficiency action filed against the Defendants as personal guarantors of a lease contract. (Record, at 13). The primary obligor under the contract, MCO, defaulted in the agreed payment under the contract, and the Defendants failed to pay any of the remaining lease payments. (Record, at 251-54).

Defendants appeal the trial court's grant of summary judgment on the issue of liability because, they argue, whether the agreement was a lease or a security arrangement is a disputed material fact. LMV responds that whether the agreement was a lease

or a security agreement is immaterial because the suit concerns guarantor liability only and all other issues go to damages and mitigation of damages. LMV asserts that, whether or not the Utah U.C.C. governs this case, a duty to conduct a commercially reasonable sale existed because that duty was explicitly provided in the lease contract. (Record, at 23, para. 19). Furthermore, LMV asserts that it conducted the sale of the vehicles in a commercially reasonable manner after giving adequate notice to Defendants. LMV denies that any impairment of the collateral occurred.

LMV further asserts that the trial court correctly ruled that there remained no material issue of fact precluding judgment as a matter of law on the issue of damages. Plaintiff also asserts that the Defendants waived all rights to object to the trial court's decision by affidavit because the Defendants failed to raise their objection with the court below.

Course of Proceedings and Disposition:

The trial court granted the Plaintiff's Motion for Summary Judgment on the issue of liability. (Record, at 514-15). The Court then requested the parties to submit memoranda and affidavits on the issue of damages. (Record, at 515-16). The record contains no indication of Defendants' objection to this procedure. Defendants did object to the Plaintiff's affidavit regarding attorneys' fees and moved to strike that affidavit. (Record, at

531). The trial court denied the Defendants' Motion to Strike and awarded the Plaintiff attorneys' fees and damages representing the remaining unpaid lease payments less six (6) percent interest and less the net proceeds from the sale of the cars. (Record, at 550-51). The trial court did not award LMV liquidated damages as provided in the contract. (Record, at 538, 540).

Facts Relevant to the Issues Presented:

Val Conlin, President of MCO, entered into an agreement with LMV, as Lessor, to have LMV lease to MCO motor vehicles to be rented to MCO's car rental customers. (Record, at 13). The agreement was formalized in a lease contract entitled The Preferred Vehicle Lease Agreement (hereafter the "Lease") on December 29, 1986. (Exhibit F; Record, at 13-31). In compliance with the Lease, the Lessor delivered to MCO fourteen (14) motor vehicles. (Record, at 324). Section 4 of the Lease provided that MCO would make monthly lease payments to LMV as rent for each of the motor vehicles. (Record, at 15). Section 4.1 of the Lease stated that a late charge would be assessed to MCO for late or missed payments equal to two percent (2%) per month of the lease payment amount past due. (Record, at 15). The Lease further stated that MCO was responsible for payment of titling, registration, licensing, and all inspections of the motor vehicles leased from LMV (Record, at 17, para. 7); that in the event of default by MCO in payment of the monthly rental amount LMV could declare all unpaid future rentals

immediately due and payable (Record, at 22, para. 18.1); that MCO agreed to pay for any and all expenses LMV incurred in exercising its remedies and rights as outlined under the Lease, including attorneys' fees, legal expenses, and court costs incurred in collecting all amounts due under the Lease. (Exhibit G; Record, at 23, para. 18.2).

On January 26, 1987, Defendants Val and Barbara Conlin, in their individual capacities, executed an unconditional and irrevocable guarantee of payment, in which they agreed to guarantee the performance and prompt payment of all sums and other obligations of MCO which had become due or which thereafter would become due to LMV, which sums included all titling fees and liquidated damages due to LMV by MCO pursuant to MCO's default under the terms of the Lease. (Exhibit G; Record, at 111). On February 11, 1987, Defendants Tubber and Mary Okuda, in their individual capacities, executed an unconditional and irrevocable guarantee of payment, the provisions of which were identical to the guarantee document signed by the Conlins. (Exhibit H; Record, at 113).

MCO defaulted under the terms of the Lease by failing to make any monthly payments to LMV after September 1987. (Record, at 325; Defendants' Brief, at 10). On January 26, 1988, LMV's Pennsylvania counsel notified the Defendants Conlin and the Defendants Okuda by mailing a notice to the said Defendants' last known address and

notifying them that MCO was in default under the terms of the Lease with LMV. (Record, at 112, 114). All Defendants in this action failed to respond to the notice sent by LMV. (Record, at 253).

Pursuant to the explicit remedies of LMV under the Lease, LMV repossessed the vehicles in March of 1988 and placed those vehicles with Nate Wade Subaru, a local new and used car dealer, to be sold for LMV. (Record, at 325; Defendants' Brief, at 10). Mr. Edward McCracken, an agent of LMV, mailed a Notice of Sale by certified mail, and by regular mail, to each of the Defendants and to MCO on April 4, 1988, to notify them that the motor vehicles would be sold. (Record, at 325). The Notice of Sale indicated that MCO had defaulted under the Lease, that LMV would sell the vehicles, pursuant to the terms of the Lease, after April 13, 1988, what the terms of the sale would be, that the vehicles were located at the Nate Wade Subaru car lot at 1207 South Main Street, Salt Lake City, Utah, and that the motor vehicles would be sold in the same fashion and manner as other used vehicles at that location (Exhibit I; Record, at 328-32). None of the regularly mailed notices were returned and no written or oral response from the Defendants regarding the notices was received. (Record, at 326).

The motor vehicles were sold from the lot at Nate Wade Subaru within a one (1) month period, with the first vehicle being sold on May 10, 1988, and the last vehicle being sold on June 10, 1988. (Record, at 326). All Defendants admit that they have failed and

refused to make any payments at any time to LMV. (Record, at 370, 385). At the time this action was commenced, MCO was a debtor in a case under the United States Bankruptcy Code and therefore was not a defendant in this case. (Record, at 367, 379).

LMV initiated this action on April 12, 1988, seeking to hold the Defendants liable as guarantors for payments due under the Lease which were not recovered through the sale of the collateral. (Record, at 2-12). In August of 1988, Plaintiff moved for Summary Judgment. The trial court denied the Motion for Summary Judgment on October 13, 1988. (Record, at 402-03). On February 13, 1989, Plaintiff moved for Summary Judgment as to liability only. (Record, at 448-50). The trial court notified all parties by telephone on March 1, 1989, that the trial court had granted Plaintiff's Motion for Summary Judgment on the issue of liability. (Record, at 473; Defendants' Brief, at 13). On March 14, 1989, the trial judge by telephone conference stated that the issue of damages would be determined by affidavits and memoranda to be submitted by Plaintiff and Defendants. (Defendants' Brief, at 13). Nothing in the record suggests that the defendant objected to this procedure at any time. Nor does Defendants' appellate brief suggest that they objected at any time. After submission of memoranda and affidavits from all parties, the Defendants moved to strike the Plaintiff's affidavit for attorney's fees on April 24, 1989. (Record, at 531-32).

On April 26, 1989, the trial court announced by telephone conference its decision on the issue of damages (Defendants' Brief, at 14). In its final judgment, dated May 4, 1989, the trial court denied the Plaintiff's request to calculate the damages on the basis of liquidated damages, and decided instead that the damages should be based on the unamortized balance of the lease payments owed, plus all unpaid and accrued monthly lease payments, late charges, and administrative fees, less the net proceeds from the sale of the motor vehicles, which resulted in a final assessment of damages less than the Plaintiff had requested. (Exhibit J; Record, at 547-49). The court awarded the Plaintiff \$50,500.00, which represents damages in the amount of \$37,000.00, plus interest thereon at the rate of ten percent (10%) per annum compounded annually, and attorneys' fees of \$13,500.00. (Record, at 551).

The trial court further concluded that "LMV acted in a commercially reasonable manner when it repossessed the motor vehicles and sold them on a used car lot through a private sale. This method of sale produced a greater amount of sales proceeds upon the sale of the motor vehicles than would have been produced by selling them at an auction to a used car dealer at substantially lower prices." (Record, at 550). The trial court's conclusions were based on uncontroverted and unopposed facts raised in Plaintiff's affidavits: The net proceeds from the sale of the motor vehicles totalled \$80,100.00, which is approximately ninety-

nine percent (99%) of the motor vehicles' wholesale values based on their wholesale book value as listed in Automotive Market Research, a weekly nationwide publication used by the fleet vehicle leasing industry as a benchmark for determining wholesale prices of automobiles. (Record, at 326). Pursuant to an effort to increase the amount of sale proceeds from the sale of the motor vehicles, LMV elected to sell the motor vehicles on a used car lot rather than selling them at an auction to a used car dealer at substantially lower prices. (Record, at 326). Mr. Ed McCracken, who, as controller for LMV, is "familiar with the underlying concepts and methods utilized in the disposition of used cars," (Record, at 511), attested that it is not unusual in the fleet vehicle leasing industry to sell repossessed vehicles through a used car dealership by placing the vehicles on a used car lot for sale. (Record, at 508-09). The trial court also denied the Defendants' Motion to Strike Affidavit for Attorney's Fees because the Plaintiff's affidavit substantially complied with the rules set forth in the Utah Code of Judicial Administration. (Record, at 550-51). Defendants subsequently filed a notice of appeal on June 1, 1989. (Record, at 553-54).

As to each of the factual propositions raised above, Defendants do not oppose the factual contentions therein by way of counter-affidavit. Instead, Defendants attempt to rebut the trial court's conclusion that the sale was conducted in a commercially

reasonable manner by raising affidavits purporting to say that offers were made to the Plaintiff which were ignored. The affidavit of Alma Egbert, dated August 31, 1988, asserts that he contacted officers of LMV and LMV's attorney, Weston Harris, and communicated his interest in purchasing or making other arrangements to retain the vehicles in MCO, that he requested information on numerous occasions regarding the status of the leases and the pay-off balance but was never provided information regarding the leased vehicles nor given a response to his "offer", and that he was financially capable of purchasing all the vehicles. (Record, at 283-85). Egbert's affidavit does not make any mention of specific offer terms such as price, but only states that Egbert contacted LMV's representatives on different occasions and expressed an interest or requested information.

Likewise the affidavit of Loren E. Weiss, dated August 18, 1988, states that as the attorney for the debtor in possession, MCO, he discussed the leases with Wes Harris, the attorney for the Plaintiff, and informed Mr. Harris that Mr. Egbert was willing to assume the leases or purchase the vehicles. (Record, at 286-88). No mention is made of any specific contract offer terms, such as price, financing, etc.

The affidavits of Val. J. Conlin, dated February 20, 1989, and March 18, 1989, state that Mr. Conlin was personally familiar with the conditions and mileage of each of the cars under the Lease.

(Record, at 489). Mr. Conlin stated that he received the notice of sale and sent representatives to inspect the vehicles to insure that the vehicles were in reasonable operating condition and that he would have purchased the vehicles for Allstate for sums substantially in excess of the prices received by LMV. (Record, at 468). He states that he requested that an associate, Ivar Blackner, inspect the cars. (Record, at 490). In Mr. Blackner's affidavit, dated September 27, 1988, he states that Mr. Conlin had requested him to inspect the repossessed vehicles held at Nate Wade Subaru in preparation for submitting bids. Mr. Blackner said he went to the used car lot for this purpose but was not allowed to see the cars, that he went back twice more and again was not permitted to inspect the vehicles. (Record, at 393-94). Mr. Blackner does not state any reason as to why he was denied permission to examine vehicles on a public car lot. None of the Defendants' affidavits state that any bid or offer, written or oral, was ever communicated to the Plaintiff, or that any specific price or financing was ever discussed. Nor does Mr. Conlin in his affidavit assert that his willingness to purchase the vehicles for some substantial sum in excess of prices received by LMV Leasing was ever communicated to anyone.

By contrast Mr. Conlin admits that he received the notice of sale. (Record, at 468). The notice of sale states that MCO had defaulted under the Lease, that LMV would sell the vehicles,

pursuant to the terms of the Lease, after April 13, 1988, what the terms of the sale would be, where the motor vehicles were then currently located, and that the motor vehicles would be sold in the same fashion and manner as other used vehicles at that location. (Record, at 328-32). The affidavit of Mr. McCracken states that the net proceeds from the sale of the motor vehicles totalled \$80,100.00, after subtracting the cost of refurbishing the vehicles, preparing them for sale, and the costs of the sale itself; that the net proceeds of \$80,100.00 represent approximately ninety-nine percent (99%) of the motor vehicles' wholesale values based on their wholesale book value as listed in Automotive Market Research, a weekly nationwide publication used by the fleet vehicle leasing industry as a benchmark for determining wholesale prices of automobiles. (Record, at 509-10). These sworn statements are unopposed by Defendants' affidavits. Mr. McCracken further states that it is not unusual in the fleet vehicle leasing industry to sell repossessed vehicles through a used car dealership by placing the vehicles on a used car lot for sale. (Record, at 326-27). This statement is also unopposed by Defendants. Mr. McCracken's affidavit of April 13, 1989, further asserts that, prior to his review of Mr. Egbert's petition for relief, Amended Chapter 13 Plan, and the Order of Dismissal, Mr. McCracken had never received any documents, correspondence, or other material from or regarding Mr. Egbert concerning his financial condition, any proposed sale

of the motor vehicles, or any documentation outlining any proposal of any party to assume the Lease. (Record, at 512). This statement also goes unopposed.

SUMMARY OF ARGUMENTS

1. The trial court correctly granted summary judgment on the issue of liability because the Defendants' liability as personal guarantors is clear regardless of whether the agreement was a lease or a security agreement.

2. The trial court correctly granted summary judgment on the issue of damages because Plaintiff complied with the requirements of a commercially reasonable sale under the Utah Uniform Commercial Code and Defendants failed to raise a genuine issue of material fact.

3. The trial court correctly granted summary judgment on the issue of a commercially reasonable sale because Plaintiff complied with the requirement of a commercially reasonable sale under the Lease.

4. Defendants are barred from raising the issue of impairment of collateral because they failed to raise this issue in opposition to the motions for summary judgment and now raise this issue by reference to an unverified pleading.

5. The trial court correctly granted summary judgment on the issue of damages because Defendants have not raised any genuine issues of material fact before the trial court.

6. The Defendants are barred from raising the issue of the trial court's decision based upon affidavits on the issue of damages because Defendants waived any rights they may have had by failing to raise this issue with the trial court and by awaiting the trial court outcome before raising the issue on appeal.

7. The trial court correctly denied Defendants' motion to strike the affidavit on attorney's fees because the affidavit substantially complied with the requirements of Rule 4-505(1) of the Utah Code of Judicial Administration and applicable case law.

ARGUMENT

POINT I. THE TRIAL COURT CORRECTLY GRANTED THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY BECAUSE DEFENDANTS WERE LIABLE AS GUARANTORS OF THE CONTRACT REGARDLESS OF WHETHER THE AGREEMENT WAS ONE FOR SECURITY OR WAS A LEASE.

The standards for granting or denying summary judgment are clear. Although the trial court, on a motion for summary judgment, is obligated to view the evidence in the light most favorable to the defendants, Briggs v. Holcomb, 740 P.2d 281, 283 (Utah Ct. App. 1987), the trial court may grant summary judgment where there is no genuine issue of material fact or where, according to the facts as contended by the losing party, the moving party is entitled to

judgment as a matter of law. Rule 56(c), Utah Rules of Civil Procedure. All material facts set forth in a movant's affidavit which remain uncontroverted are deemed to be true for the purpose of summary judgment. Rule 4-501(5), Utah Code of Judicial Administration. Where factual contentions of the non-moving party are not supported by specific evidentiary facts, summary judgment is appropriate. Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985).

Defendants assert that the Lease between LMV and MCO is not a true lease, but a lease intended for security, and therefore there is a disputed, material fact that could not be resolved by summary judgment.

However, the issue of whether the Lease is a true lease or a lease intended for security does not control the issues of guarantor liability or the total amount of damages LMV is entitled to recover under the terms of the Lease.

If the Lease is one intended as security, it is treated as any other security agreement under Utah's Uniform Commercial Code. In Utah Code Ann. § 70A-9-501(1) (1981), it states in pertinent part:

When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement.

(Emphasis added). Subsection (3) of § 70A-9-501 deals with accounting for surplus of proceeds from the sale of collateral, disposition of the collateral, acceptance of the collateral in return for discharge of the obligation, provisions for redemption of the collateral, and the secured party's liability for failing to comply with this section of the Uniform Commercial Code.

The Lease in this case is explicit in outlining the cumulative and non-exclusive remedies available to LMV upon default by MCO. The trial court awarded damages to the Plaintiff with the Lease provisions and formulas in mind. (Record, at 535-42). None of the enumerated provisions in subsection (3) of § 70A-9-501 are contrary to the damages provisions of the Lease and therefore do not have the effect of limiting the Lease provisions. Nor have Defendants alleged such at trial or on appeal. Therefore, even if the Lease is a lease intended for security, as Defendants contend, the damages provisions in the Lease are still enforceable under Utah's Uniform Commercial Code and therefore, Defendants are liable to LMV for the total amount of damages under the Lease.

Furthermore, the issue of guarantor liability is not affected by whether the Lease is a lease or a security agreement. Recently, the Utah Court of Appeals decided a case with issues similar to those presented in the case at hand. In First Security Financial v. Okland Ltd., Inc., 750 P.2d 195 (Utah Ct. App. 1988), the trial court granted a summary judgment against the defendant based on the

defendant's breach of an equipment lease agreement. The Court of Appeals reviewed the lower court's decision and found that the damages provided in the lease agreement and awarded by the local court were proper. In responding to the defendant's contention that the lease was a security agreement and therefore the damages provided for under the lease could not be recovered, the Court stated:

Furthermore, Okland has not asserted any specific defenses or counterclaims as a debtor under Article 9. Given that failure, it makes no difference if the contract at issue is viewed as a lease agreement or a sales agreement. The monthly payments required are either lease payments or installment sales payments. However denominated, monthly payments and any other damages designated in the contract as payable upon default, are recoverable as a basic matter of contract law in this case.

Id. at 198-99 (emphasis added).

Likewise, Defendants in this case assert no defenses or counterclaims as to the issue of guarantor liability. As to damages, Defendants assert the defense of inadequate mitigation of damages stemming from the requirement of a commercially reasonable sale of the collateral. However, this requirement is no different than required by the Lease itself. Furthermore, Defendants have not asserted any other specific defenses based on the provisions of the Utah U.C.C. Therefore, it makes no difference whether the Lease is a true lease or a lease intended for security because, under either scenario, there is an explicit requirement of a commercially reasonable sale of the collateral, and defendants

assert no other explicit U.C.C. defense in their brief or in the record below. Furthermore, the Utah U.C.C. makes explicit provision for finding damages according to the provisions of the security agreement. Therefore, even if the agreement was one for security, LMV is entitled to judgment as a matter of law.

POINT II: THE TRIAL COURT CORRECTLY RULED ON THE ISSUE OF DAMAGES BECAUSE THE DEFENDANTS' AFFIDAVITS DO NOT RAISE ANY GENUINE ISSUE OF MATERIAL FACT SUFFICIENT TO OPPOSE A FINDING THAT THE VEHICLES WERE SOLD IN A COMMERCIALLY REASONABLE MANNER UNDER THE UTAH U.C.C.

Defendants argue in one place in their brief that this Court should rule, as a matter of law, that the Plaintiff did not dispose of the vehicles in a commercially reasonable manner (see Defendants' Brief, at 33), yet in another place they argue merely that there are unresolved issues of fact precluding summary judgment. (See Defendants' Brief, at 15). LMV argues that under either scenario the trial court should be affirmed.

A. Plaintiff Complied With The Notice Requirements Of The Utah Uniform Commercial Code.

LMV asserts that the Lease entered into between it and MCO is a true lease. However, even if the Lease were found to be a sales transaction rather than a lease, LMV's notification to the Defendants regarding the sale of the vehicles was done in a commercially reasonable manner.

In Utah's Uniform Commercial Code, § 70A-9-504(3), Utah Code Ann. (1981), it states:

...reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor....

Sections 70A-1-201(26) and 70A-1-201(38), respectively, provide that:

A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it....

"Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed....

LMV provided reasonable notification of the sale of the vehicles by sending the notices by certified mail, return receipt requested, and by regular mail to the Defendants and MCO at the addresses the Defendants had provided to LMV. (Record, at 325-26). The steps LMV took in notifying the Defendants in the ordinary course by properly addressing and depositing the notices in the mail were in strict compliance with the above statute. Finally, the notice itself provided the Defendants with the necessary information to protect themselves by permitting them to bid at the sale or "arrange for interested parties to bid, and to otherwise assure that the sale is conducted in a commercially reasonable manner". FMA Financial Corp. vs. Pro-Printers, 590 P.2d 803, 807 (Utah 1979).

Furthermore, Defendants do not assert in their affidavits or memoranda to the trial court nor in their appellate brief that LMV's Notice of Default or the subsequent Notice of Sale do not meet the requirements of the Utah U.C.C. Nor do Defendants oppose LMV's affidavit attesting to the service of any of the notices and the adequacy of the contents thereof. Therefore, LMV complied with the notice requirements of the Utah Uniform Commercial Code.

B. The Sale Of The Vehicles Itself Was Reasonable Under Utah's Uniform Commercial Code.

Utah Code Ann. § 70A-90-507(2) (1981) provides:

If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

(Emphasis added). Further, the Utah Supreme Court, in Security State Bank v. Broadhead, 734 P.2d 469, 472 (Utah 1987), held that selling a repossessed vehicle without newspaper advertisement through a used car lot is commercially reasonable if doing so is an accepted commercial practice.

LMV sold the vehicles in strict conformity with the above statute. The vehicles LMV repossessed from MCO were used vehicles. After their repossession, the vehicles were placed on a used car lot. The vehicles were sold by a used car dealer in the same manner as other used cars on the lot, in the same market as the other used cars on the lot, and in conformity with the dealer's

practice of selling used cars. (Record, at 508-09). In addition, selling repossessed vehicles in this fashion is an accepted commercial practice in the fleet vehicle leasing industry to which LMV belongs. (Record, at 508-09). Defendants' affidavits do not assert any facts which controvert any of LMV's affidavits as to whether the actual sale was executed in the usual manner or was in conformity with commercial practices among used car dealers.

Defendants cite the Utah case of Pioneer Dodge Center, Inc. v. Glaubensklea, 649 P.2d 28 (Utah 1982), for the proposition that, in general, an automobile dealer should advertise a repossessed car in a newspaper of general circulation for a reasonable period of time and in a manner consistent with which other used cars are advertised. (Defendants' Brief, at 21). However, Defendants do not disclose the fact that Pioneer Dodge was a public auction case. By contrast, the present case did not involve a public auction, where advertising is presumably essential to obtain competitive bids. While Pioneer Dodge makes advertising a legal prerequisite to a reasonable public sale, that case defines "public sale" as "one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold." Id. at 30 (citing Restatement of Security § 48 comment (1941)). Thus, the requirement of advertising is inextricably intertwined with the concept of a public sale by auction. However, in the present case, the commercially reasonable practice among local used car dealers

not selling at auction is to sell in the same manner and same fashion as other used cars sold at the Nate Wade Subaru lot. Defendants do not oppose the affidavit of Ed McCracken, a businessman familiar with the usual methods of disposition of used cars, attesting to the fact that auction sales net "substantially lower prices" than typical used car lot sales, and that it is not unusual in the fleet vehicle leasing industry to sell repossessed vehicles through a used car dealership by placing the vehicles on the used car lot for sale. (Record, at 326, 508-09, 511-12).

Plaintiff's position is supported by the recent case of Security State Bank v. Broadhead, 734 P.2d 469 (Utah 1987). In Security State Bank, a bank repossessed a truck held as a purchase money security interest and sold the truck from a used car lot without newspaper or other public advertisement. Id. at 470-72. The debtor sought reversal of a deficiency judgment obtained against him, arguing, inter alia, that the sale of the truck through a used car lot without newspaper advertisement was commercially unreasonable as a matter of law. Rejecting this claim, the Utah Supreme Court stated:

Debtor insists that the sale was unreasonable as a matter of law because bank did not solicit bids through newspaper advertisement and received three bids on the truck. In support of his argument, debtor cites FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah 1979). Debtor's reliance on FMA Financial Corp. is misplaced. In that case, we merely commented that the creditor's failure to advertise the sale and its casual bid procedures were evidence that it had not

met its burden of establishing commercial reasonableness. Id. at 807. Whether a sale is commercially reasonable is a matter to be determined on a case-by-case basis according to the circumstances of the sale and the business context in which it occurred. Scharf, 700 P.2d at 1070-71. In this case, bank presented expert testimony indicating that selling repossessed vehicles through a used car lot was in conformity with usual commercial practice. The commercial reasonableness of the sale is also evidenced by the fact that debtor's own expert witnesses admitted that it is rare to recover substantially more than Blue Book value for a repossessed vehicle.

Id. at 472 (emphasis added). Although the present case is procedurally different, LMV supports its contention of a commercially reasonable sale by affidavit specifically stating that "[i]t is not unusual in the fleet vehicle leasing industry to sell repossessed vehicles through a used car dealership by . . . by selling them in the same manner and fashion as the other used cars on the lot." (Record, at 508-09). The affiant of the above statement attests that he is "familiar with the underlying concepts and methods utilized in the disposition of used cars" (Record, at 511). Defendants do not oppose these affidavits or produce any affidavits stating that it was the usual practice to sell repossessed vehicles on used car lots by newspaper advertisement. Rather, Defendants, in their brief, attempt to establish a requirement to advertise as a matter of law, using the Pioneer Dodge case as support. (See Defendants' Brief, at 21, 33). Security State Bank clearly refutes such an absolute legal

requirement. Since there is no legal requirement, the only question is whether Defendants have raised in their affidavits a factual issue as to the need to advertise by newspaper. Since they failed to do this, summary judgment was appropriate.¹

Defendants also claim that they were "prevented from bidding on the vehicles." (Defendants' Brief, at 22). However, the affidavit of Val Conlin, dated March 18, 1989, states that he "was personally familiar with conditions and mileage of each of the cars being leased from LMV Leasing." (Record, at 489). Conlin also states that he "would have purchased all of the vehicles repossessed." (Record, at 489). However, nowhere in Conlin's affidavits or in Ivar Blackner's affidavit is there any affirmative statement indicating any communication of, or attempt to communicate, a bid or offer subject to the condition of an inspection. Furthermore, it is strange that Conlin required such an inspection prior to communicating a conditional bid or offer to LMV because Conlin states that he had "personal knowledge" of the condition and mileage of each of the cars and "would have"

¹ Defendants cite also as support the case of Haggis Management, Inc. v. Turtle Management, Inc., 745 P.2d 442 (Utah 1985). However, Haggis is inapposite because it involved the private sale of a restaurant and liquor store without public advertisement. Private sale of such unique collateral without auction, public bidding or advertisement seems commercially unreasonable, unlike the common sales of used cars where there are established markets for resale and where sales prices are governed by objective pricing criteria.

purchased them. Rather, Defendants would impose an impossible standard on lessors trying to mitigate damages by requiring them to read the minds of prospective bidders who have failed to communicate their definite intentions to bid after adequate notice of sale. Therefore, summary judgment was appropriate because Conlin and Blackner failed, on the face of their affidavits, to communicate any bid or offer.

C. Plaintiff Obtained A Reasonable Price For The Sale Of The Repossessed Vehicles.

Section 70A-9-507(2), Utah Code Ann. (1953) states that:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.

Pursuant to the Lease, LMV repossessed the vehicles and prepared them for sale. In an attempt to increase the amount of potential proceeds from their sale, LMV sold the vehicles through a used car lot rather than auctioning them off to a used car dealer. (Record, at 326). The net proceeds from their sale totalled approximately ninety-nine percent (99%) of their combined wholesale value, based on the vehicles' wholesale value listed in Automotive Market Research, a weekly nationwide publication used by the fleet vehicle leasing industry to determine wholesale prices of automobiles. (Record, at 326). Defendants do not attempt to show by counter-affidavit that these prices were unreasonable.

Furthermore, Defendants' claim, that Conlin would have purchased the vehicles for sums substantially in excess of the prices received by LMV, is irrelevant because that intention was never communicated to LMV. Therefore, Defendants have failed to counter LMV's affidavits showing that the sales price was commercially reasonable and summary judgment was appropriate.

POINT III: THE TRIAL COURT CORRECTLY RULED ON THE ISSUE OF DAMAGES BECAUSE THE DEFENDANTS' AFFIDAVITS DO NOT RAISE ANY GENUINE ISSUE OF MATERIAL FACT SUFFICIENT TO OPPOSE A FINDING THAT THE VEHICLES WERE SOLD IN A COMMERCIALLY REASONABLE MANNER UNDER THE CONTRACT.

LMV asserts that the sale of the repossessed vehicles was also commercially reasonable as required under the Lease terms. However, the Defendants' brief assumes that the Lease requirement of a commercially reasonable sale "requires the same tests of commercial reasonableness that is required by the Uniform Commercial Code." (Defendants' Brief, at 23). Since Defendants raise no new arguments and adopt the arguments and citations advanced under their brief's previous heading, LMV adopts those arguments and citations found in Point II of LMV's brief relating to the requirements of a commercially reasonable sale under the U.C.C.

POINT IV: THE TRIAL COURT CORRECTLY RULED ON THE ISSUE OF DAMAGES BECAUSE THE DEFENDANTS DID NOT PROPERLY RAISE THE ISSUE OF IMPAIRMENT OF COLLATERAL BEFORE THE TRIAL COURT.

Defendants raise four contentions with respect to their argument that LMV was estopped from seeking recovery because of impairment of the collateral: (1) that LMV ignored the December 1987 offer of Alma D. Egbert; (2) that LMV permitted Roy Mallory and Alma D. Egbert to use the vehicles for rentals from December 1987 until March 1988; (3) that, after repossessing the cars, LMV failed to advertise the vehicles for sale; and (4) that LMV refused to permit Defendants to inspect the vehicles. (Defendants' Brief, at 23).

LMV submits that all four contentions fail to raise issues of material fact going to the issue of impairment of collateral. The case authority cited by Defendants, Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105 (Utah Ct. App. 1987), speaks of a fiduciary relationship arising between a creditor and guarantor and that a guarantor may be partially or wholly discharged from liability "where a creditor's actions impair the value of collateral in its possession" Id. at 108 (emphasis added). Since questions of ignoring offers, failing to advertise, and refusing permission to inspect do not actually affect the value of the collateral, but arguably go instead to the reasonable disposition of collateral, the first, third, and fourth contentions

should be dismissed. Furthermore, the first and second contentions should be dismissed because the cars, prior to their repossession in March, 1987 (Defendants' Brief, at 10), were not in the possession of the creditor, as required in Valley Bank, thus giving rise to no fiduciary duties.

In addition to the above reasons, the issue of impairment of collateral should be dismissed because Defendants base their theory on a right of subrogation, a right that the Defendants' case authority concedes does not even arise until payment of the guaranteed obligation by the guarantor. (See Defendants' Brief, at 24-25). Since the defendants/guarantors in this case never made payment of the guaranteed obligation, no right of subrogation ever arose, and therefore no concurrent fiduciary duty arose.

Finally, in addition to all the above reasons, Defendants' argument that an estoppel arose based on impairment of the collateral should be rejected because this issue was never appropriately raised at the trial court. None of the Defendants' memoranda in opposition to the Plaintiff's motions for summary judgment specifically raised the issue now raised as to impairment of collateral. Matters not presented to the trial court may not be raised for the first time on appeal. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988) (quoting Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983)).

Furthermore, Defendants' second amended answer, which Defendants cite for having raised the issue, is not a verified pleading. (Defendants' Brief, at 23; Record, at 367-75). Under Utah case law, an unverified pleading will not substitute for an affidavit and therefore will not preclude summary judgment. See, e.g., Pentecost v. Harward, 699 P.2d 696, 698 (Utah 1985). For all of the above reasons, Defendants' argument that an estoppel arose because of Plaintiff's impairment of the collateral should be rejected.

POINT V: THE TRIAL COURT CORRECTLY DECIDED THE ISSUE OF DAMAGES BECAUSE THE DEFENDANTS' AFFIDAVITS DO NOT RAISE ANY GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THERE WAS MITIGATION OF DAMAGES.

It is well established that a non-breaching party to a contract is obligated to take reasonable steps to mitigate his damages. Pratt v. Board of Educ., 564 P.2d 294, 298 (Utah 1977).

Defendants assert that LMV failed to mitigate its damages by supposedly rejecting an offer made by Alma D. Egbert ("Egbert") to purchase the leased vehicles or assume the Lease from MCO. In support of this contention, an affidavit of Egbert was filed stating that he contacted LMV and "communicated his interest in purchasing the vehicles or in making other arrangements with LMV" regarding the Lease. (Record, at 284). In addition, an affidavit of Loren E. Weiss ("Weiss") was filed, stating that Weiss informed LMV's counsel that Egbert was "willing to assume the leases or purchase the vehicles from LMV." (Record, at 287). Defendants rely

on these vague contentions in the affidavits to form the basis for their defense that LMV rejected Egbert's "offer" which could have totally mitigated LMV's damages.

The Utah Supreme Court, in Pratt, held that "[m]itigation of damages is an affirmative defense. Although plaintiff is obligated to minimize his damages, the burden is upon the party whose wrongful act caused the damages to prove anything in diminution thereof." 564 P.2d at 298. Defendants have the burden of alleging facts sufficient to raise an issue as to whether there as an "offer" made by Egbert which would have substantially or totally mitigated LMV's damages as they claim it would.

Defendants fail to raise a material issue in their affidavits. First, Egbert's affidavit only attests to having communicated an "interest" in purchasing the car or assuming the Lease. There is no affirmative language in the affidavit asserting facts establishing an offer. There is only conclusory language in Paragraph 6 of the Egbert Affidavit that there was no "response to his offer and inquiry." (Record, at 284). The Utah Supreme Court has held that conclusory statements are insufficient to create a genuine issue of fact. Reagan Outdoor Advertising Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984). The mere conclusion in an affidavit that there was an offer, without alleging facts sufficient to conclude that some kind of offer was made, is insufficient and should not preclude summary judgment. Merely

communicating an "interest" in the vehicles does not allege facts sufficient to establish an offer. Second, neither Egbert's nor Weiss' affidavit contain any terms of an alleged "offer" to purchase vehicles or assume the Lease, the price Egbert was willing to pay for the vehicles, or how this "offer" would mitigate Plaintiff's damages. In short, nothing is presented that raises any genuine issues of material fact regarding how LMV could have mitigated its damages.

Furthermore, it is impossible for the Court, based upon the lack of material facts presented by Defendants, to determine whether an "offer" by Egbert to buy the vehicles or assume the Lease with LMV could have substantially or totally mitigated LMV's damages as Defendants contend.

Similar deficiencies lie in the affidavits of Conlin and Blackner. In Conlin's affidavit of March 18, 1989, Conlin represents that he "was personally familiar with conditions and mileage of each of the cars being leased from LMV Leasing." (Record, at 489). He also asserts that he "would have purchased all of the vehicles repossessed" (Record, at 489). However, in neither Conlin's affidavits nor in Blackner's affidavit is there any fact alleged as to any attempt to communicate any offer or bid, oral or written, to LMV personnel. Blackner's affidavit says that he was denied access to the used car lot by Nate Wade Subaru personnel but does not allege any specific facts beyond the

personal conclusion that he was denied access. (Record, at 393-94). The affidavit does not state the reason he was denied access, the dates on which he attempted to see the cars, or whether the cars at that moment were being held out for sale to the public. However, in light of the fact that Conlin was already "personally familiar with [the] conditions and mileage of each of the cars" and "would have purchased" them, it is strange that he did not simply make an offer subject to the condition of an inspection. Defendants hold LMV to the impossible standard of having to decipher the minds of potential bidders despite the fact that no prospective or conditional bids or offers were made.

Finally, Defendants' Comparison Sheet, attached as an exhibit to their Memorandum of Damages (Record, at 498), comparing the prices at which LMV actually sold the vehicles to the average price of the Kelly Blue Book Retail and the Kelly Blue Book Wholesale, is misleading. Defendants compare the net sales proceeds of each car which LMV obtained to the gross sales price in the Kelly Blue Book average. (See Record, at 498). Even if most of the sales costs could be reduced by selling to Conlin, this factual issue is irrelevant where Defendants failed to communicate such bid or offer to LMV.

Therefore, the trial court's decision that no genuine issues of material fact remained on the issue of mitigation of damages should be affirmed.

POINT VI: THE DEFENDANTS WAIVED THEIR RIGHT TO OBJECT TO THE TRIAL COURT'S DECISION ON DAMAGES BY AFFIDAVIT WHEN THEY FAILED TO OBJECT AT THE TIME OF FILING THEIR MEMORANDUM ON DAMAGES OR AT ANY TIME UPON THE RECORD.

The Defendants' brief concedes that "[o]n March 14, 1989, Judge Brian by telephone conference stated the issue of damages would be determined by Affidavits and Memorandums to be submitted by plaintiff and defendants simultaneously." (Defendant's Brief, at 13). Nowhere in their brief do Defendants state that they objected to this procedure at the time of the telephone conference, nor do they cite any objection filed with the Court or entered at any time on the record. Defendants, however, do assert that they "did not agree or stipulate to this procedure nor were the parties asked if this procedure was acceptable." (Defendants' Brief, at 30). By this statement, the Defendants wish to place the burden of identifying error on the trial judge.

"It is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal." Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988) (quoting Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983)). See also, Hobelman Motors, Inc. v. Allred, 685 P.2d 544 (Utah 1984) (plaintiff's failure to raise issue of incorrectly notarized affidavit at time of summary judgment waived his right to raise this issue on appeal); Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983)

("For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon"). This rule has been applied even in cases raising issues of constitutional dimension. See, e.g., Salt Lake County v. Carlston, 776 P.2d 653 (Utah Ct. App. 1989). Furthermore, it is fair and just to apply this rule in this case because the Defendants should not be able to file a memorandum of damages without any objection at any time to the method of disposition, wait to see whether disposition is favorable or not, and then raise this objection on appeal.

The same rule should apply regardless of Defendants' argument that the simultaneous submission of memoranda and affidavits on damages had the effect of shifting the burden of proof to the Defendants. First, the burden of proof did not shift, as explained below. However, even if this argument is true, it was foreseeable prior to submission of the memoranda on damages. The Defendants, therefore, should have cured this defect at the trial level, and delay in raising this issue causes it to be waived. See Hobelman Motors, 685 P.2d at 546; Strange v. Ostlund, 594 P.2d 877, 880 (Utah 1979).

Simultaneous submission of documents does not have the effect of shifting the burden of proof because Defendants could have sought permission of the court to respond further to any of LMV's arguments or affidavits. The record shows that LMV submitted its

primary affidavit on damages on April 13, 1989 (Record, at 502-13), two weeks before the trial judge ruled, on April 26, 1989 (Defendants' Brief, at 14). Defendants could have acted during this period of time, as illustrated by their submission of a Motion to Strike Plaintiff's Affidavit on April 24, 1989. (Record, at 531-32). Furthermore, Utah precedent states that mitigation of damages is an affirmative defense and the burden is upon the party whose wrongful act caused the damages to prove anything in diminution thereof. Pratt v. Board of Educ., 564 P.2d 294, 298 (Utah 1977). Since, at the damages portion of the proceedings below, liability had already been established, showing that the Defendants had committed the wrongful acts giving rise to the damages, the burden should properly be placed at the feet of the Defendants. Where the Defendant has failed to sustain its burden, by producing competent evidence suggesting Plaintiff had not taken reasonable efforts to mitigate his damages, the trial court may properly determine that there was no factual issue concerning damages to submit to the jury. Id.

POINT VII: THE TRIAL COURT CORRECTLY DENIED THE DEFENDANTS' MOTION TO STRIKE THE AFFIDAVIT FOR ATTORNEY FEES BECAUSE THE AFFIDAVIT SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE UTAH CODE OF JUDICIAL ADMINISTRATION AND APPLICABLE CASE LAW.

Defendants correctly represent that the affidavit of Brett F. Wood stated the hours spent by each of LMV's attorneys on the case but does not specify the hourly rate of each of the four (4)

attorneys. The affidavit also specifies the number of hours and the rates per hour of the non-attorneys and the total bill charged for services by attorneys and non-attorneys. (Record, at 527-28). Defendants specifically complain that the affidavit should have stated the hourly rate of each attorney working on the case and because it did not so state, the trial court erred in denying the Defendants' Motion to Strike the affidavit.

Rule 4-505(1) of the Utah Code of Judicial Administration states:

Affidavits in support of an award of attorneys' fees must set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services. The affidavit must also separately state the hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

A plain reading of the provision clearly shows that the only hourly rate disclosure required is for non-attorneys. Attorneys are clearly not required to state their rate. Nevertheless, the average rate charged by LMV's attorneys may be determined by dividing the total attorney bill by the amount of attorney hours spent on the case. For example, subtraction of the costs of clerks and other firm personnel from the total requested bill of \$19,171.72 (Record, at 528) yields a total attorney fees bill of \$18,862.71. The total number of hours spent by LMV's attorney in

this case was 221.20, as calculated from the figures in the affidavit. (Record, at 528). This yields an hourly rate, when divided into the total fee amount, of \$85.27 per hour, which is a reasonable hourly rate for comparable services done in the local legal community. (Record, at 530).² Thus, Defendants could have arrived at the average fee rate by some simple arithmetic on a calculator.

The case of Talley v. Talley, 739 P.2d 83 (Utah Ct. App. 1987), cited as support by the Defendants, does not require explicit disclosure of attorney hourly rates. In fact, that case does not even deal with the specific issue raised by Defendants because the hourly rates of all those involved was explicitly disclosed in the contested exhibit on attorney fees. Id. at 84. Rather, Talley dealt only with the issue of the reasonableness of the disclosed fees in light of the difficulty of the case and the result accomplished. Id. Since the Defendants' Motion to Strike the affidavit dealt only with the issue of not explicitly stating the hourly rate, and did not aver any unreasonableness in the fees

² It should be noted that the actual attorney fees awarded in this case, \$13,500.00, was much less than requested. (Compare Record, at 527-28, with Record, at 542). Dividing the latter amount, \$13,500.00, by the number of attorney hours spent yields an hourly rate of \$61.03, a very low rate in the local legal community.

or rate charged, despite the fact that the rate could easily be obtained by calculator, the Defendants' appeal of the trial court's denial of the motion should be affirmed.

CONCLUSION

The trial court granted summary judgment first as to the issue of liability, and then as to the issues of damages and attorney fees.

Since the Defendants are liable as guarantors regardless of whether the agreement was a lease or a security agreement, this Court should affirm the trial court's summary judgment on the issue of liability. It is immaterial whether the agreement was a lease or a security agreement because the requirement of a commercially reasonable sale of the vehicles is a requirement of both the Lease and the Utah U.C.C.

The trial court's grant of summary judgment on the issue of damages should also be affirmed because Defendants do not oppose LMV's affidavits containing facts upon which the trial court relied in making findings and conclusions supporting the reasonableness of the sales. Further, Defendants' affidavits only make conclusory statements that an "offer" was made, while failing to affirmatively assert that any kind of actual bid or offer was ever communicated to LMV. Also, Defendants' affidavits fail to show by specific evidentiary facts, Treloggan v. Treloggan, 699 P.2d 747 (Utah

1985), that there was an offer, or even if there was an offer, how such offer would have further mitigated LMV's damages. Therefore, Defendants fail to raise any genuine issues of material fact relating to the commercially reasonable sale of the vehicles or to mitigation of damages.

Defendants also fail to raise any genuine issues of material fact and are barred on procedural grounds from raising issues as to an estoppel arising from impairment of the collateral, or as to deciding the issue of damages by affidavit without hearing, because Defendants failed to properly raise these issues before the trial court.

Finally, Defendants' Motion to Strike LMV's affidavit on attorneys fees was properly denied because Defendants failed to demonstrate how their position is justified under the rules or case law.

Therefore, the trial court's grant of summary judgment should be affirmed as to liability, damages and attorney fees.

Additionally, LMV respectfully requests this Court to award to LMV additional attorney fees it has accrued in working on this appeal based on section 18.2 of the Lease, which provides, as one of the Lessor's remedies, the right to recover any expenses paid for attorneys' fees, legal expenses and court costs. (Record, at 23). See, G.G.A., Inc. v. Leventis, 773 P.2d 841, 846-47 (Utah

Ct. App. 1989); Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984).

Respectfully submitted,

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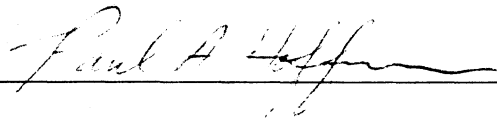
CERTIFICATE OF SERVICE

I hereby certify that I am an attorney licensed to practice under the laws of the State of Utah and that I mailed a true and correct copy of the foregoing BRIEF OF THE RESPONDENT to the following:

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by depositing a properly addressed envelope containing the same in the United States Mail, postage prepaid, this 1st day of December, 1989.



ADDENDUM

Exhibit A	Utah Code Ann. § 70A-1-201(26), (38) (1981)
Exhibit B	Utah Code Ann. § 70A-9-501 (1981)
Exhibit C	Utah Code Ann. § 70A-9-504 (1981)
Exhibit D	Utah Code Ann. § 70A-9-507 (1981)
Exhibit E	Rule 4-505(1) <u>Utah Code of Judicial Administration</u>
Exhibit F	"Preferred Vehicle Lease Agreement" (Record, at 13-31)
Exhibit G	Guaranty of Conlins (Record, at 111)
Exhibit H	Guaranty of Okudas (Record, at 113)
Exhibit I	Notice of Sale (Record, at 328)
Exhibit J	Final Judgment, May 4, 1989 (Record, at 544-51)

EXHIBIT A

70A-1-201

UNIFORM COMMERCIAL CODE

- (20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.
- (21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.
- (22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.
- (23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.
- (24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.
- (25) A person has "notice" of a fact when
 - (a) he has actual knowledge of it; or
 - (b) he has received a notice or notification of it; or
 - (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act.

- (26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when
 - (a) it comes to his attention; or
 - (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.
- (27) Notice, knowledge of a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

- (28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this act.
- (30) "Person" includes an individual or an organization (See section 70A-1-102).
- (31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
- (32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.
- (33) "Purchaser" means a person who takes by purchase.
- (34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
- (35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.
- (36) "Rights" includes remedies.
- (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 70A-2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of account or chattel paper which is subject to chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under section 70A-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with chapter 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (section 70A-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.
- (38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for

and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

- (39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.
- (40) "Surety" includes guarantor.
- (41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.
- (42) "Term" means that portion of an agreement which relates to a particular matter.
- (43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.
- (44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (sections 70A-3 303, 70A-4-208 and 70A-4-209) a person gives "value" for rights if he acquires them
 - (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or
 - (b) as security for or in total or partial satisfaction of a pre-existing claim; or
 - (c) by accepting delivery pursuant to a pre-existing contract for purchase; or
 - (d) generally, in return for any consideration sufficient to support a simple contract.
- (45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.
- (46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

History: L. 1965, ch. 154, § 1-201; 1977, ch. 272, § 2.

Compiler's Notes.

The 1977 amendment inserted the second sentence in subsec. (9); substituted "of" for "or" near the beginning of subsec. (27); and substituted "buyer of account or chattel paper" in the third sentence of subsec. (37) for "buyer of accounts, chattel paper."

Good faith.

"Good faith" within the meaning of this section requires only an honest belief by a creditor that he is insecure, not that the belief be reasonable; where bank's honest belief was that its prospects for repayment

were impaired by borrower's conduct of his mink ranching business and his loss by theft of a substantial quantity of mink pelts, it acted in good faith in invoking acceleration clause of loan agreement, and the reasonableness of its belief in its insecurity was irrelevant. *State Bank of Lehi v. Woolsey* (1977) 565 P 2d 413.

Lease as security interest.

The option price was nominal and the lease with an option to purchase was intended as security where the option price was 10% of the original cost of the property, and only 6% of the total lease payments, and at the time the option was to be exercised the property still had a useful life so as to leave the lessee with no sensible alternative but to

EXHIBIT B

SECURED TRANSACTIONS

70A-9-501

is intended as security (section 70A-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

History: C. 1953, 70A-9-408, enacted by L. 1977, ch. 272, § 34. relating to the destruction of old records by the filing officer, and enacted a new section 70A-9-408.

Compiler's Notes.

Laws 1977, ch. 272, § 34 repealed old section 70A-9-408 (L. 1965, ch. 154, § 9-408).

70A-9-409. Destruction of old records. Unless a filing officer has notice of an action pending relative thereto, he may remove from the file and destroy

- (1) a lapsed financing statement, a lapsed continuation statement, a statement of assignment or release relating to either, and any index of any of them, one year or more after lapse; and
- (2) a termination statement and the index on which it is noted, one year or more after the filing of the termination statement.

History: C. 1953, 70A-9-409, enacted by L. 1977, ch. 272, § 35.

PART 5

DEFAULT

Section

- 70A-9-501. Default — Procedure when security agreement covers both real and personal property.
- 70A-9-502. Collection rights of secured party.
- 70A-9-503. Secured party's right to take possession after default.
- 70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.
- 70A-9-505. Compulsory disposition of collateral — Acceptance of the collateral as discharge of obligation.
- 70A-9-506. Debtor's right to redeem collateral.
- 70A-9-507. Secured party's liability for failure to comply with this part.

70A-9-501. Default — Procedure when security agreement covers both real and personal property.

- (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 70A-9-207. The rights and remedies referred to in this subsection are cumulative.
- (2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in section 70A-9-207.

- (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of section 70A-9-504 and section 70A-9-505) and with respect to redemption of collateral (section 70A-9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
- (a) subsection (2) of section 70A-9-502 and subsection (2) of section 70A-9-504 in so far as they require accounting for surplus proceeds of collateral;
 - (b) subsection (3) of section 70A-9-504 and subsection (1) of section 70A-9-505 which deal with disposition of collateral;
 - (c) subsection (2) of section 70A-9-505 which deals with acceptance of collateral as discharge of obligation;
 - (d) section 70A-9-506 which deals with redemption of collateral; and
 - (e) subsection (1) of section 70A-9-507 which deals with the secured party's liability for failure to comply with this part.
- (4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.
- (5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this chapter.

History: L. 1965, ch. 154, § 9-501; 1977, ch. 272, § 36.

Compiler's Notes.

The 1977 amendment substituted "(subsection (3) of section 70A-9-504 and section 70A-9-506)" in the middle of the first paragraph of subsec. (3) for "(subsection (1) of section 70A-9-505)."

Cross-References.

Executions, exemptions from, 78-23-1.
Garnishment, procedure when garnishee is mortgagee or pledgee, Rules of Civil Procedure, Rule 64D (o).

Jurisdiction of circuit courts on foreclosure, 78-4-7.

Policy and subject matter of chapter, 70A-9-102.

Real estate mortgages, foreclosure, 78-37-1 et seq.

Rights and duties when collateral is in secured party's possession, 70A-9-207.

Secured party's right to take possession and dispose of collateral after default, 70A-9-508, 70A-9-504.

Transactions excluded from chapter, 70A-9-104.

EXHIBIT C

SECURED TRANSACTIONS

70A-9-504

of the last sentence of subsec. (2); and made minor changes in punctuation.

Cross-References.

Liability of secured party for failure to comply with part 5 of this chapter, 70A-9-507.

Policy and scope of chapter, 70A-9-102.

Secured party's rights on disposition of collateral, 70A-9-306.

Secured party's right to dispose of collateral after default, 70A-9-504.

Transactions excluded from chapter, 70A-9-104.

Use or disposition of collateral without accounting permissible, 70A-9-205.

Collateral References.

Secured Transactions ⇔ 227.

79 CJS Supp. Secured Transactions § 104.

69 AmJur 2d 469 to 473, Secured Transactions §§ 580 to 582.

70A-9-503. Secured party's right to take possession after default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 70A-9-504. If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.

History: L. 1965, ch. 154, § 9-503.

Cross-References.

Secured party's right to dispose of collateral after default, 70A-9-504.

Collateral References.

Secured Transactions ⇔ 228.

79 CJS Supp. Secured Transactions § 105.

69 AmJur 2d 473 to 497, Secured Transactions §§ 583 to 599.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503, 75 ALR 3d 1061.

Law Reviews.

Breach of the Peace and New Mexico's Uniform Commercial Code, 4 Natural Resources J. 85.

Note, Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 Utah L. Rev. 536.

DECISIONS UNDER FORMER LAW

Replevin.

Where chattel mortgage provided that in event default was made in payment of debt mortgagee could take possession of property and proceed to foreclose mortgage, mort-

gagee could maintain action in claim and delivery to recover such possession after default, remedy by foreclosing mortgage not being exclusive. *Morgan v. Layton* (1922) 60 U 280, 208 P 505.

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

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

- (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
 - (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
 - (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.
- (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.
- (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.
- (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The

purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

- (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
 - (b) in any other case, if the purchaser acts in good faith.
- (5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

History: L. 1965, ch. 154, § 9-504; 1977, ch. 272, § 38.

Compiler's Notes.

The 1977 amendment inserted "or lease" near the beginning of subd. (1) (a); added the second sentence of subsec. (2) relating to a sale of accounts or chattel paper; substituted "if he has not signed after default a statement renouncing or modifying his right to notification of sale" at the end of the third sentence of subsec. (3) for "and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral"; and inserted the fourth sentence of subsec. (3) relating to notification of other secured parties.

Cross-References.

Collateral not owned by debtor, 70A-9-112.
Compulsory disposition of collateral, 70A-9-505.
Contract for sale of goods, breach by buyer, resale by seller, 70A-2-706.
Policy and subject matter of chapter, 70A-9-102.
Secured party's liability for failure to comply with part 5 of this chapter, 70A-9-507.

Notice of disposition.

Secured party is barred from obtaining a deficiency judgment after a disposition of the property securing the debt where no notice of the disposition was given the debtor and the disposition was not conducted in a commercially reasonable manner. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Notice of sale.

Secured party should give notice of time and place of sale of the collateral to a guarantor of the debt. *Zions First Nat. Bank v. Hurst* (1977) 570 P 2d 1031.

Collateral References.

Secured Transactions §§ 229 to 237, 240.
79 CJS Supp. Secured Transactions §§ 106 to 113.
69 AmJur 2d 499 to 532, Secured Transactions §§ 602 to 624.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR 2d 15.

Uniform Commercial Code: burden of proof as to commercially reasonable disposition of collateral, 59 ALR 3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR 3d 401.

What constitutes a "public sale," 4 ALR 2d 575.

DECISIONS UNDER FORMER LAW

Foreclosure by advertisement or sale — Perishable property or livestock.

In proceeding under former section 9-1-6, relating to mortgagor's right to enjoin foreclosure by advertisement and sale, court had

power, where it appeared that mortgaged property was perishable, or that it was livestock and that cost of feeding and keeping it pending action would be great, to call on mortgagor to consent to sale or furnish indemnity bond to hold mortgagee harmless.

EXHIBIT D

SECURED TRANSACTIONS

70A-9-507

Cross-References.

Secured party's liability for failure to comply with part 5 of this chapter, 70A-9-507.
Secured party's right to dispose of collateral after default, 70A-9-504.

79 CJS Supp. Secured Transactions §§ 114, 115.
69 AmJur 2d 532 to 537, Secured Transactions §§ 625 to 627.

Collateral References.

Secured Transactions ⇌ 238, 239.

Construction and operation of UCC § 9-505 (2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation, 55 ALR 3d 651.

70A-9-506. Debtor's right to redeem collateral. At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 70A-9-504 or before the obligation has been discharged under section 70A-9-505 (2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses.

History: L. 1965, ch. 154, § 9-506.

Collateral References.

Cross-References.

Compulsory disposition of collateral, 70A-9-505.
Secured party's right to dispose of collateral, 70A-9-504.

Secured Transactions ⇌ 241.
79 CJS Supp. Secured Transactions § 118.
69 AmJur 2d 550 to 559, Secured Transactions §§ 639 to 648.

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

- (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.
- (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the

type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

History: L. 1965, ch. 154, § 9-507.

Cross-References.

Obligation of good faith, 70A-1-203.

Secured party's right to dispose of collateral after default, 70A-9-504.

Title to collateral immaterial, 70A-9-202.

Deficiency judgment.

Secured party is barred from obtaining a deficiency judgment after a disposition, pursuant to 70A-9-504, of the property securing the debt where no notice of the disposition was given the debtor and the disposition was not conducted in a commercially reasonable manner. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Disposition not made in commercially reasonable manner.

Secured party's disposition of the collateral was not made in a commercially reasonable manner, and secured party was liable to debtor for the value of debtor's equity in the

collateral, where secured party failed to give debtor notice of the disposition and sold the collateral for a price equal to the balance due on the promissory note when the fair market value of the collateral was more than four times that amount. *Maas v. Allred* (1978) 577 P 2d 127.

Failure to give notice of sale of collateral.

Failure by secured party to give debtor notice of time and place of sale of the collateral does not release debtor from his obligation to pay any deficiency debt still existing after the sale; but debtor can recover for any loss caused by the failure to so notify. *Zions First Nat. Bank v. Hurst* (1977) 570 P 2d 1031.

Collateral References.

Secured Transactions §§ 225, 242, 243.

79 CJS Supp. Secured Transactions § 119.

69 AmJur 2d 559 to 567, Secured Transactions §§ 647 to 653.

CHAPTER 10

EFFECTIVE DATE AND REPEALER

Section

70A-10-101. Effective date.

70A-10-102. Specific repealer — Provision for transition.

70A-10-103. General repealer.

70A-10-104. Laws not repealed.

70A-10-101. Effective date. This act shall become effective at midnight on December 31st, 1965. It applies to transactions entered into and events occurring after that date.

History: L. 1965, ch. 154, § 10-101.

70A-10-102. Specific repealer — Provision for transition.

(1) The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

Uniform Negotiable Instruments Act, Title 44, U.C.A., 1953;

the court otherwise orders. Notice of objections shall be submitted to the court and counsel within (5) days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

Rule 4-505. Attorneys' fees affidavits.

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorneys' fees.

Applicability:

This rule shall govern the award of attorneys' fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorneys' fees must set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services. The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(2) If the fee arrangement with the client is other than at an hourly rate an affidavit of the client or correspondence from the client shall be filed with the

court setting forth the terms and conditions of the arrangement, whether a flat rate or contingent fee, or the percentage of funds recovered or dealt with.

(3) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

"AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

(4) Judgments for attorney's fees should not be awarded except as they conform to the provisions of this rule.

Rule 4-506. Withdrawal of counsel in civil cases.

Intent:

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all trial courts of record and not of record.

Statement of the Rule:

(1) An attorney may withdraw as counsel of record in all cases except where withdrawal would result in a delay of trial. In that case, an attorney may not withdraw without the approval of the court.

(2) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate further proceedings against the client.

Rule 4-507. Disposition of funds on trustee's sale.

Intent:

To establish a uniform procedure for filing trustee affidavits of deposit and claimant petitions for adjudication of priority in trustee's sales.

To establish a uniform procedure in determining the disposition of funds on trustee's sales.

Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

(1) At the time of depositing with the Clerk of the Court any proceeds from a trustee's sale in accordance with Utah Code Ann. Section 57-1-29, the

PREFERRED VEHICLE LEASE AGREEMENT

THIS AGREEMENT, made the 29th day of December, 1986, by and between _____

LMV LEASING, INC., 121 Freeport Road, Pittsburgh, PA 15238
hereinafter called "Lessor"

A
N
D

Inc.
MCQ/DBA/AMERICAN INTERNATIONAL CAR RENTAL

1380 W. North Temple Street, Salt Lake City, UT 84116
hereinafter called "Lessee".

WITNESSETH

WHEREAS, Lessee contemplates the leasing of various vehicles; and
WHEREAS, Lessor is willing to lease said vehicles upon the terms and conditions hereinafter set forth;
NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. DEFINITIONS. As herein used:-

- 1.1 "Accounting Form" is a record with respect to a specific vehicle. Each Accounting Form will show the date of delivery of the vehicle, the make, manufacturer, model number, serial number, Agreed Price, Rental Payment, Base Lease Term in months, Interim Rental, Interim Lease Term, location and such other applicable details as Lessor and Lessee may desire.
- 1.2 "Acquisition Fee" is a charge made by Lessor for procuring each vehicle. The amount and manner of payment are set forth in Schedule "A".
- 1.3 "Administrative Fee" is a monthly service charge payable by Lessee to Lessor; agreed upon between Lessor and Lessee as set forth in Schedule "A".
- 1.4 "Agreed Price" of any vehicle is determined as set forth in Schedule "A".
- 1.5 "Base Lease Term", with respect to any vehicle, is the period commencing on the 15th day of the month following the month in which such vehicle is first delivered to Lessee and ending on the 14th day of the month identified in the Purchase Order as the last month of the Base Lease Term.
- 1.6 "Basic Rent", when used, combines and replaces Financing Charge" and "Monthly Depreciation", and, if used, is as set forth in Schedule "A".
- 1.7 "Book Value" of any vehicle is the Agreed Price less the aggregate Monthly Depreciation.
- 1.8 "Extended Rental" is a charge made by Lessor and payable by Lessee as set forth in Schedule "A" for continuing to lease any vehicle beyond the Base Lease Term thereof.
- 1.9 "Financing Charge" is a component of the monthly Rental Payment determined as set forth in Schedule "A".
- 1.10 "Interim Lease Term", with respect to any vehicle, is (a) in the case of delivery by the manufacturer, the period commencing on the 10th day following the shipping date (as set forth in the manufacturer's invoice, a copy of which shall be delivered to Lessee) of such vehicle by the manufacturer thereof and, in the case of delivery by anyone other than the manufacturer, commencing on the date of delivery of such vehicle to Lessee and ending, in each case, on the

commencement of the Base Lease Term for such vehicle (the "Initial Interim Lease Term") plus (b) the period, if any, commencing on the day on which Lessee returns such vehicle to Lessor in connection with Lessee's exercise of any option to terminate the lease of such vehicle prior to the regularly scheduled expiration of the Base Lease Term thereof (provided that on such day Lessee pays to Lessor the monthly Rental Payment due on such date, if any), and ending on the day on which Lessor shall have received the net proceeds of sale of such vehicle together with any termination payment due under Section 19 from Lessee with respect to such sale the ("Second Interim Lease Term").

- 1.11 "Interim Rental" is the amount payable by Lessee to Lessor with respect to the lease of any vehicle during the Interim Lease Term thereof and shall be equal to the Financing Charge multiplied by the unamortized balance of the Agreed Price, computed on the basis of a 360-day year and twelve 30-day months, for the actual number of days involved.
- 1.12 "Monthly Depreciation" for any vehicle is that portion of the monthly Rental Payment which is used to reduce the Agreed Price to Book Value.
- 1.13 "Overall Lease Term" with respect to any vehicle is the period consisting of the Interim Lease Term and the Base Lease Term thereof; provided, however, that it also includes any other period, whether prior to the Interim Lease Term or the subsequent to the expiration or other termination of the Base Lease Term or the Interim Lease Term, as the case may be, during which Lessee has possession of such vehicle (including any period contemplated by Section 3.4.
- 1.14 "Purchase Order" is a form supplied or approved by Lessor and signed (or electronically entered) by Lessee that specifies the Lessee's preference as to delivery area, date of delivery, vehicle to be furnished, the make, manufacturer, model number, color, accessories, optional items and any other features to be furnished and the number of months in the Base Lease Term.
- 1.15 "Rental Payment" is the amount payable by Lessee to Lessor each month for the use of a specific vehicle during the Base Lease Term thereof and consists of, but is not necessarily limited to:
 - Monthly Depreciation (1.12 above) Basic Rent (1.6 above)
 - Financing Charge (1.9 above) Maintenance (6 below)
 - Administrative Fee (1.3 above) Taxes and Fees (7 below)
- 1.16. "Settlement Fee" is a charge made by Lessor at termination of the lease of each vehicle as set forth in Schedule "A".
- 1.17 "Termination Value", with respect to any vehicle, is the amount determined in accordance with Exhibit "I" and payable pursuant to Section 19.
- 1.18 "Vehicle" means one or more automobiles, vans, trucks or similar items.

2. LEASE AGREEMENT

- 2.1 Lessor hereby leases to Lessee, and the Lessee hereby leases from Lessor, the vehicles described in Accounting Forms delivered and/or to be delivered upon the terms and conditions set forth in this Agreement, as supplemented with respect to each vehicle by the terms and conditions set forth in the appropriate Accounting Form identifying such vehicle.
- 2.2 The vehicles to be leased hereunder shall be those identified and specified in Purchase Orders placed by Lessee with Lessor from time to time and which Lessor undertakes to have delivered to Lessee. In the event the usual supplier of any particular vehicle is unable to provide the same in time to meet the delivery date specified by Lessee, Lessor and Lessee shall agree on substituted action in the circumstance. Upon delivery of any vehicle

deliver to Lessor a delivery receipt signed by the individual to whom delivery is authorized by Lessee. Upon delivery of a vehicle to Lessee, Lessor and Lessee shall execute an Accounting Form with respect to such vehicle. Except as specifically modified with respect to any vehicle by the terms and conditions set forth in the appropriate Accounting Form identifying such vehicle, all of the terms and conditions of this Agreement shall govern the rights and obligations of Lessor and Lessee. Whatever reference is made to "this Agreement" it shall be deemed to include, as required, the one or more Accounting Forms identifying the vehicle.

- 2.3 Each vehicle shall at all times be the sole and exclusive property of Lessor, and Lessee shall have no right, title or interest therein except the right to use the same as herein provided. As long as Lessee is not in default in any obligation to Lessor, Lessee may use the vehicles in the regular course of its business for any lawful purpose.

3. TERM

- 3.1 The Base Lease Term with respect to any vehicle is set forth in the Accounting Form relating thereto.
- 3.2 This Agreement shall remain in effect until such time as no further vehicles are subject hereto and until Lessee has satisfied in full all of its obligations to Lessor with respect to any vehicle at any time leased hereunder. Provided that no Event of Default shall have occurred and be continuing, the termination of this Agreement in respect of any vehicle shall not affect any other vehicle subject hereto at the time of such termination and any such other vehicle shall remain subject to the terms of this Agreement and the appropriate Accounting Form identifying such other vehicle.
- 3.3 Lessee may retire from service any vehicle leased pursuant to this Agreement by giving to Lessor written notice and surrendering possession of such vehicle to Lessor at the point where same was originally delivered to Lessee, or at such other point as may be mutually agreed upon. The lease as to such vehicle shall terminate upon the date such vehicle is sold by Lessor pursuant to Section 19, subject, however, to the provisions hereof including, but not limited to, Sections 16 and 19.
- 3.4 At Lessee's option any vehicle may be continued in service beyond the Base Lease Term thereof, in which event (a) the monthly rental due therefor during such continuation will be the Extended Rental and (b) no Interim Rental will be payable with respect to any Second Interim Lease Term of such vehicle.

4. RENTAL PAYMENTS

- 4.1 Lessee agrees to pay Lessor, as rent for each vehicle leased hereunder, Interim Rental and monthly Rental Payments, and any other charges due, during each month of the Overall Lease Term with respect to such vehicle in such amounts as are set forth in the Accounting Form relating to such vehicle and are calculated in accordance with methods of computation set forth in Schedule "A". With respect to each vehicle, all rent and other charges shall be due and payable on or before the fifteenth (15th) day of each month during the Overall Lease Term thereof, commencing with the first such fifteenth (15th) day after the commencement of the Interim Lease Term with respect to such vehicle. A LATE CHARGE OF 2% OF THE AMOUNT DUE WITH A MINIMUM CHARGE OF \$2.00 WILL BE ADDED TO EACH SUCH PAYMENT UNPAID ON THE DUE DATE AND THE SAME CHARGE WILL BE ADDED FOR EACH SUBSEQUENT MONTH OR PART THEREOF ON WHICH SUCH PAYMENT REMAINS UNPAID.

- 4.2 With respect to any vehicle returned to Lessor pursuant to Section 3.3, monthly Rental Payments shall cease on the day after the return date.
- 4.3 Interim Rental and monthly Rental Payments shall be paid to Lessor at the address set forth above or such other address as Lessor shall provide to Lessee.

5. WARRANTIES.

LESSOR, NOT BEING THE MANUFACTURER OR A DISTRIBUTOR OF THE VEHICLES NOR THE MANUFACTURER'S OR A DISTRIBUTOR'S AGENT, MAKES NO EXPRESS OR IMPLIED WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER WITH RESPECT TO ANY VEHICLE, INCLUDING BUT NOT LIMITED TO: THE MERCHANTABILITY OF THE VEHICLE OR ITS FITNESS FOR ANY PARTICULAR PURPOSE; THE DESIGN OR CONDITION OF THE VEHICLE; THE QUALITY OR CAPACITY OF THE VEHICLE; THE WORKMANSHIP IN THE VEHICLE; COMPLIANCE OF THE VEHICLE WITH THE REQUIREMENTS OF ANY LAW, RULE, SPECIFICATION OR CONTRACT PERTAINING THERETO; PATENT INFRINGEMENT; IT BEING AGREED THAT THE VEHICLES ARE LEASED "AS IS". WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, LESSOR SHALL NOT BE LIABLE FOR ANY DEFECTS, EITHER LATENT OR PATENT IN ANY VEHICLE, OR FOR ANY DIRECT OR CONSEQUENTIAL DAMAGE THEREFROM, OR FOR ANY LOSS OF USE THEREOF OR FOR ANY INTERRUPTION IN LESSEE'S BUSINESS BY ITS INABILITY TO USE ANY VEHICLE FOR ANY REASON WHATSOEVER. Lessee will be subrogated to Lessor's claims, if any, against the manufacturer or supplier of any vehicle for breach of any warranty or representation, by such manufacturers or suppliers and, upon written request from Lessee, Lessor shall take all reasonable action requested by Lessee to enforce any such warranty, express or implied, issued on or applicable to any vehicle which is enforceable by Lessor in its own name, provided, however, that (a) no Event of Default has occurred and (b) Lessor shall not be obligated to take any action to enforce any such warranty unless Lessee shall pay all expenses in connection therewith. Upon request by Lessor, Lessee shall pay Lessor's reasonably estimated costs in advance. Notwithstanding the foregoing, Lessee's obligations to pay the Interim Rental, monthly Rental Payments and other charges under this Agreement shall be and are absolute and unconditional. All proceeds of any such warranty recovered from the manufacturer or supplier of a vehicle shall first be used to repair the affected vehicle.

6. MAINTENANCE, REPAIRS, OPERATING EXPENSES AND RETURN OF VEHICLES.

- 6.1 Unless otherwise specified in a schedule hereto separately signed by Lessor, Lessee will pay for all maintenance and repairs to keep the vehicles in good working order and condition and any other expenses associated with operating the vehicles. Lessee will service the vehicles according to the manufacturers' recommendations as outlined in the owner's manual and the maintenance schedule folder accompanying each vehicle.
- 6.2 Lessee will return each vehicle at the end of the lease thereof in good condition with no excessive wear and tear including, among other things: (1) no glass breakage or discoloration, (2) no damage or deterioration of body, fenders, metal work, trim or paint, (3) no original equipment including wheel covers or tires (including spare) that are missing or not in safe condition, (6) no damage from flood water, hail, or sand, and (7) no damage or alteration that makes the vehicle either unsafe or unlawful to operate.
- 6.3 Lessee shall comply with any and all governmental requirements affecting the maintenance, operation or use of each of the vehicles including, without limitation, any changes or safeguards therein to keep each of the vehicles in such compliance. Any replacement parts, changes in or improvements to each of the vehicles shall become and remain the property of Lessor.

7. LICENSE, REGISTRATION, TAXES AND INSPECTION.

Lessee shall be responsible for payment for titling, registration and licensing and all inspection of the vehicles required by any government authority during the overall lease term. Lessee shall pay for all excise, sale, use, personal property, gross receipts, and other taxes incurred, or assessed by federal, state or local governments, during the Overall Lease Term whether with respect to this Agreement or the ownership, lease, use or operation of the vehicle, or with respect to the receipt of rental and other payments by Lessor, except those taxes levied on the net income of the Lessor, provided that the foregoing exception shall not apply to any such net income taxes which are in substitution for, or relieve the Lessee from the payment of, taxes which it would otherwise be obligated to pay or reimburse. Lessee shall comply with all federal, state, county and municipal statutes, ordinances, rules, and regulations which may be applicable to the leasing, use, insuring, condition, maintenance or operation of the vehicles hereunder, and shall prepare and furnish to Lessor all documents, returns, or forms legally required thereunder. Lessee shall provide all drivers or other operators of the vehicles and shall be solely responsible for any and all fines, penalties and forfeitures (including, without limitation, the confiscation of any of the vehicles) arising out of or due to the use, operation, condition, maintenance or insuring of each of the vehicles in violation of any law, regulation, statute or similar requirement of any governmental authority.

8. DELIVERY

- 8.1 Lessor will not be responsible for any loss resulting from delay in delivery of any vehicle.
- 8.2 Lessee hereby warrants to Lessor that any person accepting delivery of any vehicle has authority to do so on behalf of Lessee and that the signature of such person on any document executed in connection herewith shall be binding on Lessee.

9. USE

- 9.1 Lessee will allow only licensed drivers to operate the vehicles and Lessee agrees that Lessee (if a natural person) and all such licensed drivers are drivers in good standing under the laws of the state in which they are licensed and have not within the past five (5) years had any driver's license suspended or revoked or had any insurance premium adjusted because of a poor driving record.
- 9.2 Lessee will keep the vehicles free of all fines, liens and encumbrances. If Lessor receives notice of any motor vehicle violation relating to any vehicle, Lessor may charge Lessee a reasonable service charge, as determined by Lessor from time to time, for processing such notice. Nothing in this Section 9.2 shall require Lessor, however, to take any action with respect to such notice.
- 9.3 Lessee will not use the vehicles illegally, improperly or for hire, or permit such use.
- 9.4 Lessee will not use the vehicles to pull trailers unless designed for that purpose.
- 9.5 Lessee will not remove the vehicles from the continental United States.
- 9.6 Lessee will not alter, mark or install equipment in the vehicles without Lessor's written consent.
- 9.7 Lessee will not change the locations at which the vehicles are permanently garaged without prior notification to Lessor of such relocation.

10. OWNERSHIP.

- 10.1 This Agreement is a lease only and Lessor remains the owner of the vehicles. This Agreement is a net lease and Lessee shall not be entitled to any abatement of Interim Rentals, Rental Payments or other amounts payable hereunder or reduction thereof, including, but not limited to, abatements or reductions due to any present or future claims of Lessee against Lessor under this Agreement or

otherwise, or against the manufacturer or vendor of the vehicles nor, except as otherwise expressly provided herein, shall this Agreement terminate, or the respective obligations of Lessor or Lessee be otherwise affected, by reason of any defect in or damage to or loss or destruction of all or any of the vehicles from whatsoever cause, the taking or requisitioning of all or any vehicles by condemnation or otherwise, the prohibition by law of Lessee's use of all or any vehicles, the interference with such use by any private person or corporation, the invalidity or unenforceability or lack of due authorization or other infirmity of this Agreement, or lack of right, power or authority of Lessor to enter into this Agreement, or for any other cause whether similar or dissimilar to the foregoing, any present or future law to the contrary notwithstanding, it being the intention of the parties hereto that the rents and other amounts payable by Lessee hereunder shall continue to be payable in all events unless the obligation to pay the same shall be terminated pursuant to the terms hereof.

- 10.2 Lessee will not transfer, sublease, or rent any of the vehicles or do anything to interfere with Lessor's ownership of the vehicles. Lessee agrees that this Lease will be treated as a true lease for federal income tax purposes and that unless there is a written agreement with Lessor to the contrary, Lessor will receive all of the tax and other benefits of ownership of the vehicles and Lessee will not claim any depreciation or ACRS deductions or investment tax credits with respect to the vehicles. Lessee will, from time to time, execute such statements as may be requested by Lessor in order to confirm Lessor's ownership of the vehicles and Lessor's right to claim such tax benefits with respect thereto.

11. RISK OF LOSS AND INSURANCE.

All risks of loss from public liability, damage to property or third persons, or damage to each vehicle, whether caused by an unavoidable casualty, accident, abuse or misuse thereof by Lessee, its employees, agents or others, shall be borne by Lessee. Lessee shall provide public liability and ~~property damage coverage, coverage against fire and theft and comprehensive and collision coverage~~ with a responsible qualified insurance company acceptable to Lessor, protecting the interests of Lessor and Lessee against liability for damages for personal injury or death, property damage to others, or damage to the vehicles wherever such vehicles may be used or be located, all as set forth in Schedule "A". Said insurance shall not be excess over other coverage, but shall be primary insurance up to and including the limits set forth in Schedule "A". Said insurance policies shall be satisfactory to Lessor as to form and substance, shall be payable to Lessor or its assigns as their interests may appear and shall name Lessor as an additional named insured without liability for premiums. Said policies shall provide for at least ten (10) days written notice of cancellation to Lessor or its assigns and Lessee shall furnish certificates, policies or endorsements to Lessor or any such assigns as proof of such insurance. Lessor or its assigns may act as attorney for Lessee in making, adjusting or settling any claims under any insurance policies insuring the vehicles. Lessee assigns to Lessor all of its right, title, and interest to any insurance policies insuring the vehicles, including all rights to receive the proceeds of insurance not in excess of the unpaid obligations under this Lease, and direct any insurer to pay all such proceeds directly to Lessor or its assigns and authorizes Lessor or its assigns to endorse Lessee's name on any draft for such proceeds. No such loss, damage, theft or destruction of any vehicle, in whole or part, shall impair the obligations of Lessee under this Agreement, all of which shall continue in full force and effect subject to Lessee's right to terminate the lease of any vehicle pursuant to Section 3.3. After compliance with the foregoing to Lessor's satisfaction, and provided no Event of Default has occurred and continuing, Lessee shall be subrogated to Lessor's rights with respect to any insurance policies or claims for reimbursement by others with respect to such loss.

12. GENERAL INDEMNITY.

Lessee assumes liability for and hereby agrees to indemnify, protect, and save and keep harmless Lessor, its agents, servants, successors and assigns from and against all claims, whether or not due in whole or in part to any act or omission or other negligence of Lessor, its agents, servants, successors, assigns or any of their employees, for losses, damages, injuries, costs, expenses, attorneys' fees and court costs arising out of the use, condition (including, but not limited to, latent and other defects, whether or not discoverable by it), or operation of any vehicle, regardless of where, how and by whom operated or arising out of or resulting from the condition of the vehicles sold or disposed of after use by Lessee or, if Lessee shall not take delivery of any vehicle hereunder, after Lessee shall have signed (or electronically entered) a Purchase Order with respect to such vehicle arising out of or resulting from any claims that the manufacturer or supplier of such vehicle may assert against Lessor with respect to such Purchase Order. Lessee shall assume the settlement of, and the defense of any suit or suits, or other legal proceedings brought to enforce all such losses, damages, injuries, claims, demands and expenses, and shall pay all judgments entered in any such suit or suits or other legal proceedings. The indemnities and assumptions of liabilities and obligations herein provided for shall continue in full force and effect from and after the date of Lessee's execution of this Agreement, notwithstanding the subsequent termination hereof by expiration of time, by operation of law, or otherwise. Lessee shall indemnify, protect and save and keep harmless Lessor, its agents, servants, successors and assigns from and against all liability arising under Title IV of the Motor Vehicle Information and Cost Saving Act, P.L. 92-513, and similar laws of any other jurisdiction relating to false or inaccurate odometer readings. Lessee hereby represents and warrants that this Agreement constitutes a "qualified motor vehicle operating agreement", as defined in Section 168 (f) (13) of the Internal Revenue Code, and shall indemnify Lessor in the event of the incorrectness of such representation and warranty pursuant to this Section 12. Lessee is an independent contractor and nothing contained in the Agreement shall authorize Lessee or any other person to operate any vehicle so as to incur or impose any liability or obligation for or on behalf of Lessor.

13. ASSIGNMENT AND SUBLEASE BY LESSEE; CHANGE IN CONTROL.

13.1 Without Lessor's prior written consent, Lessee may not, by operation or law or otherwise; (a) assign, transfer, pledge, hypothecate or otherwise dispose of this Agreement or any interest therein or (b) sublet or lend the vehicles or permit the same to be used by anyone other than Lessee or Lessee's employees, except that, following written notice to Lessor, it may sublet the same to any of its present or future subsidiaries or affiliated companies, but every such sublease shall be subject and subordinate to the terms of this Agreement and shall in no event relieve Lessee of its obligations hereunder, and each such sublessee shall, in addition, agree in writing with Lessor at the time of the sublease to be bound by the terms and conditions hereof.

13.2 If there is a change in control of Lessee, such change in control shall be deemed to be a transfer of this Agreement for purposes of Section 13.1. In addition to any actual change of control, a change in control shall be deemed to have occurred if, at any time, the ownership of more than 50 percent of either the voting power of or the equity interests in Lessee is different than on the date hereof.

14. ASSIGNMENT BY LESSOR.

For the purpose of providing funds for financing the purchase of vehicles to be leased hereunder, or for any other purpose, Lessor may assign to any third party all or any part of its right, title and interest in and to this Agreement and in and to the vehicles and monies due and to become due to the Lessor hereunder. In such event all the provisions of this

Agreement for the benefit of Lessor shall, to the extent of the rights assigned, inure to the benefit of and may, to such extent, be exercised by or on behalf of such third party, and all rental payments and other amounts due and to become due under this Agreement and assigned to such third party, upon notice by Lessor or assignee to Lessee, shall be paid directly to such third party, and THE RIGHTS OF SUCH ASSIGNEE SHALL NOT BE SUBJECT TO ANY DEFENSE, COUNTERCLAIM OR SET-OFF WHICH LESSEE MAY HAVE AGAINST LESSOR, for any claim of the Lessee whatsoever; whether arising from breach of warranty or representation relating to any vehicle, or arising from the termination of this Agreement or of any lease of any vehicle hereunder, or arising from the breach or failure of Lessor to observe or perform any of the terms or provisions of this Agreement or of any other agreement or transaction whatsoever between Lessor and the Lessee. Lessee agrees to make prompt payment to such third party of the rentals and other amounts so assigned even though bankruptcy, reorganization, arrangement, insolvency, liquidation or dissolution proceedings are instituted by or against the Lessor and regardless of whether a trustee or receiver in any such proceedings shall assume or reject this Agreement. In the event of such assignment, the liability of Lessee to pay such third party the full amount of the rental and other sums assigned with respect to each vehicle hereunder shall not be terminated, notwithstanding anything herein contained to the contrary, unless (1) Lessee shall have paid such third party all assigned sums due hereunder with respect to such vehicle or (2) such third party or Lessor shall have furnished to Lessee a release executed by such third party in substantially the following form:

"The vehicle herein described has been released from the assignment made by LMV LEASING, INC., to the undersigned". (Signature of third party or authorized officer to be added.)

Such third party shall have no obligation or liabilities under this Agreement by reason of or arising out of such assignment, nor shall such third party be required or obligated in any manner to perform or fulfill any duties or obligations of the Lessor under this Agreement.

15. LESSOR'S PERFORMANCE OF LESSEE OBLIGATIONS.

If Lessee shall fail to duly and promptly perform any of its obligations under this Agreement with respect to any vehicle, Lessor may (at its option) perform any act or make any payment which Lessor deems necessary for the maintenance and preservation of such vehicle and Lessor's title thereto, including payments for satisfaction of liens, repairs, taxes, levies and insurance and all sums so paid or incurred by Lessor, together with interest at the maximum rate permitted by law from the date of payment, and any reasonable legal fees incurred by Lessor in connection therewith shall be additional amounts due under this Agreement and payable by Lessee to Lessor on demand. The performance of any act or payment by Lessor as aforesaid shall not be deemed a waiver or release of any obligation or default on the part of Lessee.

16. TAX INDEMNITY.

This Section 16 applies unless otherwise specified in Exhibit "I".

16.1 If (a) for any reason other than a Law Change (as hereinafter defined) Lessor not entitled to claim or shall have reduced or disallowed all or any portion of its investment tax credit or the depreciation or ACRS deductions described in Exhibit "I" ("Tax Benefits") or any such Tax Benefits are recaptured or deferred in whole or in part pursuant to the Internal Revenue Code of 1954, as amended ("Tax Benefits Loss") or (b) there occurs a Law Change that would result in reduction of Lessor's after-tax yield from the leasing of any vehicle hereunder ("Law Change Loss"), then Lessee shall pay to Lessor as additional rent such amount as, after deduction of all taxes required to be paid by Lessor in respect

of the receipt thereof under the laws of any governmental or taxing authority in the United States, shall be required to cause Lessor's net return and cash flow to equal the net return and cash flow that would have been available to Lessor if it (i) Lessor had been entitled to the utilization of the Tax Benefits or (ii) such Law Change had not occurred (in either case, the "Tax Indemnity Amount"). For purposes hereof, "Law Change" means any amendment of the Internal Revenue Code of 1954 that is enacted after the date on which the Overall Lease Term commences as to a particular vehicle.

- 16.2 Lessor shall be responsible for, and shall not be entitled to a payment by Lessee on account of, any Tax Benefits Loss arising solely as a direct result of the occurrence of any one or more of the following events: (i) the failure of Lessor to timely and properly claim Tax Benefits (unless tax counsel to Lessor shall have advised it that such Tax Benefits cannot properly be claimed for any vehicle on the tax return of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part); or (ii) the failure of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) to have sufficient taxable income before depreciation or ACRS deductions with respect to the vehicles to offset the full amount of any such depreciation or ACRS deduction or to have sufficient tax liability to utilize the investment tax credit with respect to the vehicles.
- 16.3 Lessor promptly shall notify Lessee in writing of any Tax Benefits Loss or Law Change Loss and of the Tax Indemnity Amount relating thereto and Lessee shall pay to Lessor such Tax Indemnity Amount within thirty (30) days of such notice. For purposes of this Section 16, a Tax Benefits Loss shall occur upon the earliest of (i) the happening of any event (such as a change in use of any vehicle or a disposition of a vehicle by Lessor after Lessee has terminated the lease of such vehicle before the end of the Base Lease Term thereof) which may cause such Tax Benefits Loss; (ii) the payment by Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) to the Internal Revenue Service or a state or local taxing authority of the tax increase resulting from such Tax Benefits Loss; or (iii) the adjustment of the tax return of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) by an examining agent to reflect such Tax Benefits Loss; for purposes hereof, a Law Change Loss shall occur upon the effective date of such Law Change.
- 16.4 Notwithstanding the foregoing, following the sale or other disposition of a vehicle by Lessor, if no Tax Benefits Loss has previously occurred with respect to such vehicle, a Tax Benefits Loss shall (unless Lessee shall have paid in full the Termination Value of such vehicle pursuant to Section 19) be deemed to have resulted and the Tax Indemnity Amount with respect thereto shall be that amount determined by multiplying the factor set forth on Exhibit "I" by the ~~Agreed Price~~.
- 16.5 Lessee's obligations under this Section shall survive the termination of this Agreement.

17. EVENTS OF DEFAULT.

Lessee shall be in default under this Agreement with respect to all vehicles acquired hereunder upon the happening of any of the following events or conditions ("Events of Default"):

- 17.1 Default by Lessee in payment of any Interim Rental or Rental Payment or any other indebtedness or obligation now or hereafter owed by Lessee to Lessor under this Agreement or otherwise;

- 17.2 Default in the performance of any obligation, covenant or liability contained in this Agreement or any other agreement or document with Lessor, and the continuance of such default for ten (10) consecutive days after written notice thereof by Lessor to Lessee;
- 17.3 Any warranty, representation or statement made or furnished to Lessor by or on behalf of Lessee or any permitted sublessee proves to have been false in any material respect when made or furnished;
- 17.4 Loss, theft, damage, or destruction of any vehicle not covered by insurance or the attempted sale or encumbrance by Lessee of any vehicle, or the making of any levy, seizure or attachment thereof or thereon;
- 17.5 Dissolution, termination of existence, discontinuance of its business, insolvency, business failure, or appointment of a receiver of any part of the property of, or assignment for the benefit of creditors by, Lessee or any permitted sublessee or the commencement of any proceedings under any insolvency, bankruptcy, reorganization or arrangement laws by or against Lessee or any permitted sublessee; or
- 17.6 Lessee or any permitted sublessee shall fail generally to pay its debts as they become due, or shall take any corporate action in furtherance of any Event of Default.

Anything to the contrary contained in the preceding provisions of this Section 17 notwithstanding, in the event that the Lessor shall have assigned to one or more third parties all or any part of its right, title and interest hereunder, each such third party shall, to the extent of the rights assigned to it, have the right to determine whether the happening of any of the foregoing events or conditions (a) with respect to any Interim Rentals of Rental Payments or other payment not assigned to such third party, or (b) with respect to any of the Lessee's obligations, covenants, liabilities, representations and warranties regarding any vehicle, rights to which have not been assigned to such third party, shall constitute Events of Default for purposes of such third party's rights in and to this Agreement.

In the event of an affirmative election in writing by any such third party to treat an event or condition described in the preceding clause (a) or clause (b) as an Event of Default, for purposes of such third party's rights hereunder, such third party shall, to the extent of the rights assigned to it, be entitled to exercise the remedies provided for in Section 18. Absent such an affirmative election by such third party, (i) the rights assigned to such third party shall be deemed, for purposes of this Section 17, to arise under a separate lease agreement and (ii) there shall not be any cross-default between such deemed separate lease agreement and this Agreement.

18. REMEDIES OF LESSOR.

Upon the occurrence of any Event of Default and at any time thereafter:

LESSOR may without any further notice exercise one or more of the following remedies, as Lessor in its sole discretion shall elect: (a) declare all unpaid rental under this Agreement (discounted, however, to their then present value at discount rate of 6% per annum) to be immediately due and payable; (b) terminate this Agreement as to any or all vehicles; (c) take possession of the vehicle wherever found, and for this purpose enter upon any premises of Lessee or any other person and remove the vehicles, without liability for suit, action or other proceeding by the Lessee or any person acting by, for or under Lessee, to remove the same; (d) cause Lessee at its expense promptly to return the vehicle to Lessor in the condition set forth in Section 6.2; (e) use, hold, sell, repair, lease

or otherwise dispose of the vehicles on the premises of Lessee or any other location without affecting the obligations of Lessee as provided in this Agreement; (f) sell or lease the vehicles at public auction or by private sale or lease at such time or times and upon such terms as Lessor may determine, free and clear of any rights of Lessee and, if notice thereof is required by law, any notice in writing of any such sale or lease by Lessor to Lessee not less than ten (10) days prior to the date thereof shall constitute reasonable notice thereof to Lessee; (g) proceed by appropriate action either at law or in equity to enforce performance by Lessee of the applicable covenants of this Agreement or to recover damages for the breach thereof; and (h) exercise any and all rights accruing to a lessor under any applicable law upon a default by a lessee.

18.2 In addition, Lessor shall be entitled to recover immediately as liquidated damages, and not as a penalty, a sum equal to the aggregate of the following: (a) all unpaid rentals or other sums which are due and payable hereunder up to the date of redelivery to, or repossession by, Lessor; (b) any expenses paid or incurred by Lessor in connection with exercising any of its remedies under Section 18.1, including attorneys' fees, legal expenses and court costs; (c) all unpaid rentals due and to become due under this Agreement for any vehicle which Lessee fails to return to Lessor as provided above or converts or destroys, or which Lessor is unable to repossess; (d) the Tax Indemnity Amount (if Section 16 applies); and (e) an amount equal to the difference between (i) all unpaid rentals for any vehicle returned to or repossessed by Lessor from the date thereof to the end of the term therefor plus the expected Termination Value (if any) of such vehicle at the end of the term therefor, and (ii) the wholesale value of each such vehicle on such date, provided, however, that the value of each vehicle shall not exceed the proceeds of any sale thereof by Lessor. Should Lessor, however, estimate its actual damages to exceed the foregoing, Lessor may, at its option, recover its actual damages in lieu thereof or in addition thereto. Lessor shall not be obligated to sell, lease or otherwise dispose of any vehicle hereunder if it would impair the sale, lease or other disposition of other vehicles in the ordinary course of Lessor's business or vehicles which were previously repossessed by Lessor from any party.

18.3 None of the remedies under this Agreement are intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to herein or otherwise available to Lessor at law or in equity and the third party election set forth in the penultimate paragraph of Section 17 shall be exercisable so long as the Events and Default described in clause (a) or (b) of said paragraph are continuing. Any repossession or subsequent sale or lease by Lessor of any vehicle shall not bar an action for a deficiency as herein provided, and the bringing of an action or the entry of judgment against the Lessee shall not bar the Lessor's right to repossess any or all vehicles. LESSEE WAIVES ANY AND ALL RIGHTS TO NOTICE AND TO A JUDICIAL HEARING WITH RESPECT TO THE REPOSSESSION OF THE VEHICLES BY LESSOR IN THE EVENT OF A DEFAULT HEREUNDER BY LESSEE.

19. TERMINATION.

At the end of the Base Lease Term of any vehicle or upon the termination of the lease pursuant to Section 18 hereof by Lessor, or upon the exercise by Lessee of its right to retire any vehicle from service pursuant to Section 3.3, Lessee will return such vehicle to Lessor at the location specified in Section 3.3. Lessor will sell it at wholesale in a commercially reasonable manner. If the net selling price is more than the amount (the "Termination Value" with respect to such vehicle) determined by applying the formula set forth in Exhibit

"T" (if a formula for such determination appears therein or by multiplying the factor set forth in Exhibit "T" by the Agreed Price, (if a table of factors for such determination appears therein), [REDACTED] will pay Lessee the surplus less any amounts owed under this Agreement. If it is less, [REDACTED] will pay the deficiency plus any amounts owed under this Agreement. The net selling price is the sale price less the sum of (a) Lessor's direct expenses of selling, preparing and storing such vehicle and (b) the Settlement Fee shown on Schedule "A".

20. FURTHER ASSURANCES.

Lessee shall execute and deliver to Lessor, upon Lessor's request, such instruments, opinions of counsel, authorizing resolutions, financing statements and assurances as Lessor deems necessary for the confirmation or perfection of this Agreement and Lessor's rights hereunder. In furtherance thereof, Lessor may file or record this Agreement or financing statements with respect thereto so as to give notice to any interested parties. Any such filing or recording shall not be deemed evidence that this Agreement is intended as security or of any intent to create a security interest under the Uniform Commercial Code. Lessee authorizes Lessor and Lessor's assignee and each subsequent assignee to file a financing statement signed only by Lessor or such assignee in all places where such authorization is permitted by law.

21. SEVERABILITY.

Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition and unenforceability without invalidating the remaining provision hereof. To the extent permitted by applicable law, Lessee hereby waives any provision of law which prohibits or renders unenforceable any provisions hereof in any respect.

22. NOTICES.

All notices, reports and other documents provided for herein shall be deemed to have been given or made when mailed, postage prepaid, or delivered to a telegraph or cable company, addressed to Lessor or Lessee at their respective addresses set forth above or such other addresses as either of the parties hereto may designate in writing to the other from time to time for such purpose.

23. AMENDMENTS AND WAIVERS.

This Agreement, the Accounting Forms, Purchase Orders and Schedules executed by Lessor and Lessee constitute the entire agreement between Lessor and Lessee with respect to the vehicles and the subject matter of this Agreement. No term or provision of this Agreement, the Accounting Forms, Purchase Orders and Schedules may be changed, waived, amended or terminated except by a written agreement signed by both Lessor and Lessee, except that Lessor may insert the serial number of any vehicle or other identifying information on the appropriate documents after delivery of such vehicle. No express or implied waiver by Lessor of any Event of Default hereunder shall in any way be, or be construed to be, a waiver of any future or subsequent Event of Default, whether similar in kind or otherwise.

24. CHOICE OF LAW; CONSTRUCTION.

THIS AGREEMENT SHALL BE BINDING, WHEN ACCEPTED BY LESSOR IN THE COMMONWEALTH OF PENNSYLVANIA, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA. LESSEE CONSENTS TO THE EXERCISE OF PERSONAL JURISDICTION OVER LESSEE BY ANY COURT OF RECORD SITTING IN PENNSYLVANIA IN CONNECTION WITH ANY ACTION ARISING OUT OF THIS AGREEMENT, AND WAIVES ALL OBJECTIONS TO VENUE IN ANY SUCH COURT AND TO SERVICE OF PROCESS ON LESSEE AT ITS DESIGNATED ADDRESS FOR PURPOSES OF NOTICE HEREUNDER IN ACCORDANCE WITH THE PENNSYLVANIA UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT OR ANY SUCCESSOR STATUTE IN CONNECTION WITH SUCH ACTION. Lessee waives, insofar as permitted by law, trial by jury and right of counterclaim in any action between the parties. The titles of the sections of this Agreement are for convenience only and shall not define or limit any of the terms or provisions hereof. Time is of the essence of this Agreement in each and all of its provisions.

25. PARTIES.

The provisions of this Agreement shall be binding upon, and inure to the benefit of, the permitted assigns, representatives and successors of the Lessor and Lessee. If there is more than one Lessee named in this Agreement, the liability of each shall be joint and several.

26. FINANCIAL STATEMENTS.

Lessee will furnish Lessor (a) within 45 days of the close of each fiscal quarter of Lessee a balance sheet and profit and loss statement of Lessee as of the end of such quarter, (b) within 90 days after the close of each fiscal year of Lessee, a balance sheet and profit and loss statement of lessee as of the end of such year, the yearly statement to be certified by public accountants of recognized standing acceptable to Lessor, (c) such other financial statements and information to be furnished promptly after the same is made available to said stockholders, and (d) such other information respecting the financial condition and operations of Lessee as Lessor may from time to time reasonably respect.

27. CONFESSION OF JUDGMENT.

UPON DEFAULT LESSEE HEREBY EMPOWERS THE PROTHONOTARY OR ANY ATTORNEY OF ANY COURT OF RECORD WITHIN THE UNITED STATES OR ELSEWHERE TO APPEAR FOR IT AND, WITH OR WITHOUT ONE OR MORE DECLARATIONS FILED, CONFESS A JUDGMENT OR JUDGMENTS AGAINST IT IN THE FAVOR OF LESSOR OR ANY ASSIGNEE AS OF ANY TERM FOR THE UNPAID BALANCE HEREOF WITH COSTS OF SUIT AND AN ATTORNEY'S COMMISSION OF 10% FOR COLLECTION, WITH RELEASE OF ALL ERRORS AND WITHOUT STAY OF EXECUTION, AND INQUISITION AND EXTENSION UPON ANY LEVY ON REAL ESTATE IS HEREBY WAIVED AND CONDEMNATION AGREED TO, AND THE EXEMPTION OF ALL PROPERTY FROM LEVY AND SALE ON ANY EXECUTION THEREON, AND EXEMPTION OF WAGES FROM ATTACHMENT, ARE ALSO HEREBY EXPRESSLY WAIVED, AND NO BENEFIT EXEMPTION SHALL BE CLAIMED UNDER OR BY VIRTUE OF ANY EXEMPTION LAW NOW IN FORCE OR WHICH MAY HEREAFTER BE ENACTED.

IT IS HEREBY ACKNOWLEDGED THAT THE CONFESSION OF JUDGMENT PROVISIONS HEREIN CONTAINED AFFECT AND WAIVE CERTAIN LEGAL RIGHTS OF LESSEE AND HAVE BEEN READ, UNDERSTOOD AND VOLUNTARILY AGREED TO BY LESSEE.

LESSEE HEREBY ACKNOWLEDGES RECEIPT OF AN EXECUTED AND TRUE COPY OF THIS LEASE.

IN WITNESS WHEREOF, the Lessor and Lessee, intending to be legally bound, have caused these presents to be duly executed the day and year first above written.

WITNESS: _____

INC. MCQADBA/AMERICAN
LESSEE: INTERNATIONAL CAR RENTAL
By: [Signature]
Titles: [Signature]

Accepted by Lessor this December 29, 1986 at 121 Freeport Road, Pittsburgh, PA 15238.

3/20/87 [Signature]

By: [Signature]
Titles: [Signature]

TERMINAL RENTAL ADJUSTMENT CLAUSE L.R.C. 168(1)(3) Statement

The undersigned hereby certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the vehicles subject to the above Agreement will be in the undersigned's trade or business.

The undersigned has further been advised that it will not be treated as the owner of the vehicles subject to the Agreement for federal income tax purposes and the undersigned is not aware of any information which may lead Lessor to believe that this certification is false.

Date: 1-5-87

INC. MCQADBA/AMERICAN
LESSEE: INTERNATIONAL CAR RENTAL
By: [Signature]
Titles: [Signature]

SCHEDULE "A"
TO PREFERRED VEHICLE LEASE AGREEMENT
NON-TAX ORIENTED

1. ACQUISITION FEE

\$75.00

2. SETTLEMENT FEE

\$75.00 per vehicle on vehicles sold by LMV on behalf of MCO, Inc.
DBA/American International Car Rental.

3. APPORTIONMENT OF EXCESS OF SALES OR SETTLEMENT PRICE IN EXCESS OF BOOK VALUE AFTER DEDUCTION OF SETTLEMENT FEE.

Lessor shall pay to Lessee as a rental adjustment 100% of any such excess. If the amount remaining results in a deficiency, Lessee shall pay to Lessor as rental adjustment the amount of such deficiency, provided that Lessor shall guarantee to Lessee minimum net resale proceeds equal to 20% of the Agreed Price at the beginning of the initial lease term. If Lessee is otherwise permitted to and does elect to extend the lease of any vehicle beyond the Base Lease Term, Lessor shall guarantee 25% of the fair value of the vehicle at the inception of the extension period.

"Fair value" shall be defined as 85% of resale value for automobiles, and 70% of resale value on light trucks as reported by "Automotive Market Report" published by Automotive Auction Publishing, Inc., as of the publication date immediately preceding the last day of the month which immediately precedes the month in which termination as to the particular vehicle occurs.

Settlements of excess or deficiency from resale, as described above, shall be based on calendar-year-to-date sales. Tentative settlements will be made monthly, but adjusted quarterly, to year-to-date results. For this purpose, a quarter is defined as a three-month period ending March 31, June 30, September 30 and December 31.

4. FINANCING CHARGE

Financing charges shall be charged at an interest rate of two ~~percent~~ (2%) in excess of the prime rate. The prime rate shall be that rate charged by Citibank, New York. This rate will be changed every month by reference to the prime rate as reported by Citibank, New York on the 15th calendar day of the applicable lease period.

5. ADMINISTRATIVE FEE

.0011 of the Agreed Price per month per vehicle. After forty-eight months, the administrative fee shall be 20% of the Monthly Rental Payment per month per vehicle.

6. AGREED PRICE

\$100.00 over Dealer Invoice. This pricing applies only to ordered vehicles customarily used by corporate fleets which are manufactured by Buick, Chevrolet, Chrysler, Dodge, Ford, Mercury, Oldsmobile, Plymouth, Pontiac and Chevrolet, Dodge and Ford Trucks having a GVW of 11,000 pounds or under. This pricing is premised on continuation of the vehicle manufacturers' existing pricing structure and dealer incentive programs for the sale of motor vehicles to its dealers for 1987 models. In the event the pricing structure or dealer incentive is changed by any of the manufacturers for 1987 or subsequent models, then the pricing agreed to herein shall be null and void with respect to that manufacturer's vehicle and the parties hereto agree to negotiate revised pricing.

If a motor vehicle is taken from the existing inventory of a dealer or is ordered by LMV from a dealer specified by Lessee, LMV shall be entitled to a fee of 2% over procurement cost.

7. METHOD OF COMPUTATION FOR RENTAL PAYMENTS

Each Monthly Rental Payment shall be equal to:

- I. The Agreed Price less the balloon Payment of each vehicle divided by the Base Lease Term as set forth in the Accounting Form.

PLUS

- II. The financing amount determined by multiplying the financing charge by the preceding month's book value.

8. INSURANCE

In accordance with the provisions of paragraph 11 of this Agreement, Lessee is to provide insurance as follows:

Comprehensive, fire, theft and collision insurance for the actual cash value of the equipment. Lessee shall be responsible for any deductible provision applicable to this insurance. Lessee shall also provide public liability insurance with minimum limits of \$250,000 per person and \$500,000 per accident for bodily injury and \$250,000 for property or a combined single limit in the amount of \$500,000. LMV Leasing, Inc. shall be named as additional insured and Lost Payee.

9. LEASE TERMS IN MONTHS

Forty-eight (48) months. The minimum lease term of any piece of equipment lease hereunder is twelve (12) months. Unless Lessor otherwise consents, the lease with respect to any piece of equipment may not be terminated by Lessee prior to the end of the twelfth (12th) month of the Base Lease Term thereof. In the event that Lessor so consents and the lease is so terminated by Lessee, Lessee agrees that Lessor shall be entitled, in addition to the amount specified in Exhibit "I" hereto, to reasonable administrative charges associated with such termination including any residual value of the vehicle and any penalties and charges imposed by financial institution.

10. EXTENDED RENTAL

Not Available

11. ADDITIONAL PROVISIONS

Should any equipment leased hereunder be terminated or replaced prior to the end of the Base Lease Term for the purposes (directly or indirectly) of refinancing, Lessee agrees to pay to Lessor all costs and penalties associated with such premature termination or replacement, including, without limitation, any and all penalties of financial institutions, reasonable administrative charges of Lessor to effect such premature termination or replacement and any loss of anticipated tax benefits to Lessor as specified in this Agreement.

Upon occurrence of a default by Lessee, or guarantor(s), if any, as provided for under this Agreement or under the terms of any other agreement of lease entered into between Lessee and Lessor that has been guaranteed by guarantor(s), if any, Lessor at its option shall have and may exercise, with respect to this Agreement or any other agreement or lease, any and all rights and remedies available to Lessor under the terms of this Agreement or any other agreement or under the terms of this Agreement or any other agreement or lease, at law or in equity. Except as otherwise provided in paragraph 17 of this Agreement, a default under the terms of any lease or agreement is, at Lessor's option, a default under all leases or agreements between Lessor and Lessee and/or guarantor, if any.

12. BROKER

Lessee represents and warrants that it has not retained a finder or a broker in connection with this Lease or the transactions contemplated by this Lease. Lessor represents and warrants that it has not retained a finder or a broker in connection with this Lease or the transactions contemplated hereby other than Rental Car Leasing and Services Inc., whose fee will be paid by Lessor alone. Lessee acknowledges that neither Rental Car Leasing and Services Inc., nor its employees or representatives are the employee, agent or representative of Lessor for any purposes whatsoever and has not and cannot make any representation, statements, promises, claims or contract modifications of any kind or the like on behalf of Lessor.

CONTINUATION OF ADDITIONAL PROVISIONS

13. Add a new section "2.4: Lessee represents and warrants (a) that this Lease constitutes, and each Schedule and attachment when executed will constitute, a duly authorized and valid obligation of Lessee, enforceable against Lessee in accordance with the terms thereof, (b) that neither the execution by Lessee of this Lease and each Schedule nor its performance thereof will result in any breach of, or constitute a default under or a violation of Lessee's certificate of incorporation, Lessee's by-laws or any other governing instrument of Lessee, any law, rule, or regulation or any agreement, order or judgement, (c) that Lessee is in good standing in its state of incorporation or other form of organization and is entitled to own properties and to carry on business in each state where any vehicle is to be located, (d) that no consent, filing or other action by or with any governmental agency or other regulatory body is necessary for the acquisition and operation of the vehicles as contemplated by this Lease, (e) that there is no litigation pending or threatened against its obligations hereunder and (f) that all financial statements furnished by Lessee to Lessor fairly present the financial condition and results of operations of Lessee as of the respective dates and for the respective periods covered and do not contain any untrue statement, or any omission, of a material fact, and that since the date of the most recent of such financial statements, there has occurred no material adverse change in the business or condition of Lessee. Lessee's execution of each Schedule shall constitute a reaffirmation of these representations and warranties. Lessee shall provide Lessor an opinion of counsel, acceptable to Lessor and its counsel, that items 2.4(a) through (e) are correct as represented.
14. On page 7, paragraph 12. **GENERAL INDEMNITY** insert on line 3 after "in part" the following: "arising out of activities permitted hereunder and/or (b) related".
15. Modifications for paragraph 10.2 and 13.1. "The above paragraphs notwithstanding, Lessee may rent vehicles provided under this Lease for periods of time, not to exceed the term of the vehicle under this Lease, to licensed drivers over 21 years of age and otherwise qualifying hereunder. This right to rent is expressly limited to rentals in the normal course of Lessee's business under restrictions contained in the Exhibit "A" - MCO, Inc. Standard Form Agreement.
16. Add to paragraph 17.6 at the end, after "defaults" the following as part of the last sentence, "Lessee shall fail to rent any vehicle in accordance with the terms of Exhibit "A" or any restrictions of this Lease."
17. **DEPOSIT.** Lessor has the right to demand Lessee make and maintain a deposit with Lessor equal to the last preceding monthly rental at any given point in time. Failure by Lessee to maintain such a deposit amount with Lessor, upon Lessor's demand, shall be a breach of this Agreement by Lessee and shall constitute a full Event of Default with all the consequences thereof.

THIS SCHEDULE "A" IS AN ADDENDUM TO THE ABOVE REFERENCED PREFERRED VEHICLE LEASE AGREEMENT WITH CAPITALIZED TERMS USED IN THIS ADDENDUM AND NOT OTHERWISE DEFINED HEREIN HAVING THE RESPECTIVE MEANINGS AS SPECIFIED IN THE AGREEMENT. THIS SCHEDULE IS INCORPORATED INTO AND CONSTITUTES AN INTEGRAL PART OF THE ABOVE REFERENCED AGREEMENT.

This Schedule "A" is part of the Preferred Vehicle Lease Agreement dated December 29, 1986 between the parties and is hereby made a part thereof.

LMV LEASING, INC., LESSOR

By: Mary E. Zoltak
Title: Unit Manager

EMC.
MCOADBA/
AMERICAN INTERNATIONAL CAR RENTAL, LESSEE

By: X [Signature]
Title: President

**UNCONDITIONAL AND IRREVOCABLE
GUARANTY OF PAYMENT**

EXHIBIT G

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, and for the purpose of seeking to induce LMV Leasing, Inc. ("Lessor") to enter into a leasing arrangement with

MCO, INC. DBA/AMERICAN INTERNATIONAL CAR RENTAL

("Lessee"), the Undersigned, jointly and severally if more than one, does hereby irrevocably and unconditionally guarantee to Lessor, and to its transferees, successors, and assigns the prompt payment and performance of all sums and other obligations which are due or hereafter may become due and the performance and observance by Lessee of all of the terms, conditions (including those pertaining to insurance liability), stipulations and agreements pursuant to that certain lease agreement between Lessor and Lessee dated December 29, 1987 ("Lease"), including any and all renewals, modifications, amendments or extensions, in whole or in part, made with respect thereto.

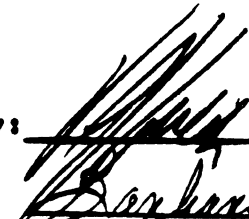
No act, course of dealing, delay, or omission on the part of Lessor in exercising or enforcing any of its rights or remedies under the Lease or under this instrument executed in connection with the Lease (including the release of any guarantor of the Lease) shall impair or be prejudicial to the rights and remedies of Lessor hereunder and the enforcement hereof. Lessor may extend, modify, or postpone the time and manner of payment and performance of the terms, conditions, stipulations and agreements of the Lease and any other document or instrument in connection therewith, all without notice to or consent by the Undersigned. Lessor may enforce the provisions hereof from time to time as often as the occasion therefore may arise and Lessor shall not be required to first initiate, pursue or exercise any of its rights or remedies against any other person or party primarily or secondarily liable under the Lease.

The Undersigned agrees that this instrument shall be governed by the laws of the State of Pennsylvania and the Undersigned hereby consents to the jurisdiction of the courts of the State of Pennsylvania and to being sued therein.

IN WITNESS WHEREOF, the Undersigned has executed and delivered this instrument under seal this 26 day of January, 1987.

Signed, sealed and delivered
in the presence of:

By:



Spouse

**UNCONDITIONAL AND IRREVOCABLE
GUARANTY OF PAYMENT**

EXHIBIT H

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, and for the purpose of seeking to induce LNV Leasing, Inc. ("Lessor") to enter into a leasing arrangement with

MCO, INC. DBA /AMERICAN INTERNATIONAL CAR RENTAL

("Lessee"), the Undersigned, jointly and severally if more than one, does hereby irrevocably and unconditionally guarantee to Lessor, and to its transferees, successors, and assigns the prompt payment and performance of all sums and other obligations which are due or hereafter may become due and the performance and observance by Lessee of all of the terms, conditions (including those pertaining to insurance liability), stipulations and agreements pursuant to that certain lease agreement between Lessor and Lessee dated December 29, 1986 ("Lease"), including any and all renewals, modifications, amendments or extensions, in whole or in part, made with respect thereto.

No act, course of dealing, delay, or omission on the part of Lessor in exercising or enforcing any of its rights or remedies under the Lease or under this instrument executed in connection with the Lease (including the release of any guarantor of the Lease) shall impair or be prejudicial to the rights and remedies of Lessor hereunder and the enforcement hereof. Lessor may extend, modify, or postpone the time and manner of payment and performance of the terms, conditions, stipulations and agreements of the Lease and any other document or instrument in connection therewith, all without notice to or consent by the Undersigned. Lessor may enforce the provisions hereof from time to time as often as the occasion therefore may arise and Lessor shall not be required to first initiate, pursue or exercise any of its rights or remedies against any other person or party primarily or secondarily liable under the Lease.

The Undersigned agrees that this instrument shall be governed by the laws of the State of Pennsylvania and the Undersigned hereby consents to the jurisdiction of the courts of the State of Pennsylvania and to being sued therein.

IN WITNESS WHEREOF, the Undersigned has executed and delivered this instrument under seal this 11th day of February, 1987.

Signed, sealed and delivered
in the presence of:

[Signature]

By: [Signature]

Mary E. Okuda

Notice of Sale

To: MCO, Inc., d/b/a/ American
International Rent-A-Car
1380 North West Temple
Salt Lake City, Utah 84116

(This Notice is for informational
purposes only as to MCO, Inc.,
which is currently in a Chapter 11
Bankruptcy Proceeding)

Mr. Roy W. Mallory
2980 Apache Way
Provo, Utah 84604

Mr. and Mrs. Val Conlin
2214 Temple View Circle
Provo, Utah 84604

Mr. and Mrs. Tubber T. Okuda
1994 South 1175 East
Bountiful, Utah 84010


Pursuant to Section 18 of the Preferred Vehicle Lease Agreement ("Lease") entered into between LMV LEASING, INC. ("Lessor") and MCO, Inc., d/b/a American International Car Rental on December 29, 1986, NOTICE IS HEREBY GIVEN that based the Lessee's default under the Lease, the Lessor will sell, as provided herein, the vehicles listed on Schedule "A", attached hereto, with the proceeds from such sale to be applied first to the costs of preparing the vehicles for sale, costs of sale, and storage fees with any remaining proceeds to be credited toward the amount owing Lessor by Lessee based on Lessee's default under the Lease.

Said vehicles will be sold after April 13, 1988, for the highest and best price in an "AS IS" condition. Said vehicles are currently and will continue to be located, at the time of said sale, at Nate Wade Subaru, 1207 South Main Street, Salt Lake City, Utah, and will be sold in the same manner and fashion as other used vehicles located at Nate Wade Subaru.

DATED this 4th day of April, 1988.

LMV LEASING, INC.

By


Edward T. McCracken

Title

Contoller

FILED
DISTRICT COURT

EXHIBIT J

E. BARNEY GESAS #1179
BRETT F. WOOD #4943
WATKISS & CAMPBELL
310 South Main Street, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300

MAY 11 1989
CLERK
E. M. Walker
CLERK

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

2147783

LMV LEASING, INC.,)

Plaintiff,)

vs.)

ROY W. MALLORY, VAL CONLIN,
BARBARA CONLIN, TUBBER T.
OKUDA, and MARY Y. OKUDA,)

Defendants.)

5-4-89-900
FINAL JUDGMENT

Civil No. C88-2136

Judge Pat B. Brian

The Court, having previously ruled on LMV Leasing, Inc.'s ("LMV") Motion for Summary Judgment on the Issue of Liability, and having found Defendants Val Conlin, Barbara Conlin ("Defendants Conlin"), Tubber T. Okuda and Mary Y. Okuda ("Defendants Okuda") to be personally liable to LMV based on their personal guarantys, and having determined that the only remaining issue in this case is the amount of damages incurred by LMV, and having requested and received Affidavits from LMV, Defendants Conlin and Defendants Okuda as to the damages incurred by LMV, and in conjunction with the previous ruling that LMV is entitled to judgment against Defendants Conlin and Defendants Okuda, the Court

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

00051A

hereby makes the following findings of facts, pursuant to Rule 52, Utah Rules of Civil Procedure, as grounds for its decision:

1. On December 29, 1986, MCO entered into a Preferred Vehicle Lease Agreement ("Lease") with LMV, pursuant to which LMV leased to MCO fourteen (14) motor vehicles ("Motor Vehicles") for forty-eight (48) month terms commencing on various dates.

2. On January 26, 1987, Defendants Conlin, in their personal capacities, executed an Unconditional Irrevocable and Personal Guaranty ("Conlin Guaranty"), wherein they agreed to be jointly, severally, and personally liable for all amounts owed to LMV by MCO under the Lease, including any damages LMV may suffer due to any breach of the Lease by MCO.

3. On February 11, 1987, Defendants Okuda, in their individual capacities, executed an Unconditional Irrevocable and Personal Guaranty ("Okuda Guaranty"), wherein they agreed to be jointly, severally, and personally liable for all amounts owed to LMV by MCO under the Lease, including any damages LMV may suffer due to any breach of the Lease by MCO.

4. Pursuant to section 4 of the Lease, MCO agreed to make monthly lease payments to LMV as rent for each Motor Vehicle. All lease payments were due on the 15th day of each month and would be assessed a late charge equal to the amount of two percent (2%) per month of the rental payment amount past due.

5. The amount of the monthly lease payments due from MCO to LMV under the Lease is calculated on the basis of an "Agreed Price" as defined in Schedule A of the Lease, plus a financing charge, a minimal administrative fee, and a late charge, if applicable.

6. In compliance with the Lease, LMV delivered to MCO fourteen (14) Motor Vehicles selected by LMV.

7. Although invoices were submitted to MCO by LMV on a monthly basis, MCO failed to make lease payments under the Lease due in April, May, June, and August, 1987, in a timely manner and late charges were assessed to MCO for those months' late payments.

8. MCO has failed to make the monthly lease payments under the Lease since July 15, 1987, and is therefore in default under the Lease.

9. MCO made only a partial payment of \$2,587.36 toward the total monthly lease payment due on April 15, 1987, of \$3,384.80, leaving a balance of \$797.44 owing by MCO on April's lease payment. MCO was also assessed an additional late fee in July, 1987, for failure to pay LMV the remaining amount due on the April 15, 1987, lease payment.

10. On August 13, 1987, MCO filed a petition for relief with the United States Bankruptcy Court for the District of Utah under Chapter 11 of the United States Bankruptcy Code.

11. Section 7 of the Lease requires that MCO pay for the titling, registration, licenses and inspection of the Motor Vehicles.

12. In the event of default, the Lease provides that LMV may declare all unpaid future lease payments immediately due and payable. This accelerated amount is calculated by determining the future lease payments due on all vehicles leased to MCO and then discounting that amount to its present value at a discount rate of six percent (6%).

13. The Lease further provides that LMV may recover as "liquidated damages" an amount equal to the sum of all unpaid lease payments to date, the total late charges to date, all administrative expenses, all attorney's fees and court costs, plus the accelerated amount of all future unpaid lease payments discounted to their present value, less the proceeds from the sale of the Motor Vehicles.

14. Section 18 of the Lease also provides that LMV may recover all expenses it has incurred or will incur, including all attorney's fees, legal expenses and court costs, in exercising its remedies and protecting its rights under the terms of the Lease.

15. Section 18.1(f) of the Lease provides that upon default by MCO, LMV may "sell or lease the vehicles at a public auction

or private sale."

16. Defendants Conlin and Defendants Okuda were given and received notice that MCO was in default under the terms of the Lease with LMV and that as personal guarantors they were personally liable for MCO's performance under the Lease.

17. Defendants Conlin and Defendants Okuda did not respond to this Notice of Default.

18. After MCO defaulted under the Lease and LMV obtained the Motor Vehicles from MCO, a Notice of Sale ("Notice") was sent to each of the defendants and MCO. This Notice stated that LMV would sell the Motor Vehicles, pursuant to the terms of the Lease, after April 13, 1988, what the terms of the sale would be, and that the Motor Vehicles were located at a certain used car lot. This Notice also stated that the Motor Vehicles would be sold in the same manner and fashion as other used vehicles located on that used car lot.

19. The Motor Vehicles were sold within a one (1) month time period beginning on or about May 10, 1988, and ending on or about June 10, 1988. The net proceeds from the sale totalled \$80,100.00 which is approximately 99% of the Motor Vehicles' wholesale values.

20. Defendants Conlin and Defendants Okuda have made no payments to LMV at any time.

21. The total amount due to LMV from MCO for all late charges, unpaid lease payments, administrative fees, and accelerated amounts, less the proceeds from the sale of the vehicles, is \$44,145.79. However, the Court determined that damages should not be based on the formula provided in the Lease but rather on the unamortized balance of the lease payments owed, plus all unpaid and accrued monthly lease payments, late charges, and administrative fees, less the net sale proceeds from the Motor Vehicles.

22. On March 20, 1989, the Court granted LMV's Motion for Summary Judgment establishing Defendants Conlin and Defendants Okudas' unconditional and irrevocable, joint, several, and personal liability under their respective guarantys.

23. Pursuant to the Lease, MCO could have terminated the Lease with LMV at any time by providing written notice to LMV of such termination and surrendering the Motor Vehicles.

24. Under the Lease, MCO had to return any and all of the Motor Vehicles then remaining in its possession at the end of the Lease and MCO did not have the option to extend the life of the Lease.

25. Pursuant to the Lease, no refundable deposit was required by LMV from MCO at the inception of the Lease.

26. The term of the Lease is less than the economic life of the Motor Vehicles.

Based upon the above findings, the Court concludes as a matter of law as follows:

The Court has personal jurisdiction over Defendants Conlin and Defendants Okuda and has subject matter jurisdiction over this case. This case involves a lease and not a sale subject to a security interest. The Conlin Guaranty and the Okuda Guaranty are unconditional guarantys of payment which, upon the default of MCO, fixed the liability of Defendants Conlin and Defendants Okuda at the amount owed by MCO. LMV was free to proceed against the guarantors at that point without exhausting collection efforts against MCO.

LMV acted in a commercially reasonable manner when it repossessed the Motor Vehicles and sold them on a used car lot through a private sale. This method of sale produced a greater amount of sale proceeds upon the sale of the Motor Vehicles than would have been produced by selling them at an auction to a used car dealer at substantially lower prices.

When MCO was in default under the Lease, LMV had the right under the Lease to accelerate the remaining lease payments and seek to collect all those, as well as all past amounts due under the Lease, from the guarantors.

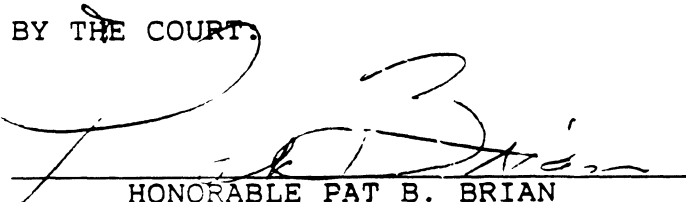
The Motion to Strike Affidavit for Attorneys' Fees filed by Defendants Conlin and Defendants Okuda is denied. Said affidavit

substantially complies with the rules set forth in the Utah Code of Judicial Administration.

Accordingly, judgment will be entered against Defendants Conlin and Defendants Okuda, jointly and severally, for \$50,500.00, which includes damages in the amount of \$37,000.00, plus interest thereon at the rate of ten percent (10%) per annum compounded annually until paid, together with attorney's fees of \$13,500.00. The Judgment granted herein is final pursuant to Rule 54(b), Utah Rules of Civil Procedure, and the Clerk is expressly directed to enter the Judgment as final.

DATED this 4 day of May, 1989.

BY THE COURT.


HONORABLE PAT B. BRIAN
THIRD DISTRICT COURT JUDGE