

2010

Westgate Resorts v. Shaun S. Adel : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

L. Rich Humpherys, Karra J. Porter, Scot a. Boyd; Christensen & Jensen; attorneys for appellee. Micheal D. Zimmerman; Troy L. Booher; Christopher L. Stout; Snell & Wilmer; Richard W. Epstein; Greenspoon Marder; Attorneys for Plaintiff.

Recommended Citation

Brief of Appellee, *Westgate Resorts v. Shaun S. Adel*, No. 20100425 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2356

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff/Counterdefendant –
Appellant,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants/Counterclaimants –
Appellees

Consolidated Case No. 20100425-SC

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HON. LYNN DAVIS, CIVIL NO. 020404068

BRIEF OF APPELLEES / CROSS-APPELLANTS

L. Rich Humpherys, 1582
Karra J. Porter, 5223
Scot A. Boyd, 9503
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101-1572

*Attorneys for Appellee / Cross-Appellant
Consumer Protection Group, LLC*

FILED
UTAH APPELLATE COURTS
DEC 28 2010

Michael D. Zimmerman
Troy L. Booher
Christopher L. Stout
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101-1004

Richard W. Epstein
(admitted pro hac vice)
GREENSPOON MARDER, P.A.
100 West Cypress Creek Road, Suite 700
Fort Lauderdale, FL 33309

*Attorneys for Plaintiff/Counterdefendant
– Appellant Westgate Resorts, Ltd.*

Shaun S. Adel
30 Capobella
Irvine, CA 92614
Defendant

of the conduct; 2) the ratio of punitive damages to compensatory damages; and 3) civil penalties that could be assessed for the misconduct under state law. *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996).

Westgate's principal focus is, again, the second factor, mathematical ratio between the total compensatory damages award and the total punitive damages award. That ratio, Westgate says, is 138 to 1 (or 4100 to 1 if the \$500 damages for the vacation were carved out). (The error of that contention is addressed, *supra*.) As discussed above, however, punitive damages awards in cases involving low compensatory damages are consistently upheld with far greater ratios. *See pp. 50-52, supra*.

The other two guideposts do not aid Westgate, either. "The most important indicium of the reasonableness of a punitive damages award is the reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.408, 419, 123 S.Ct. 1513 (2003). In assessing reprehensibility, the Court should consider, among other things, whether "the conduct involved repeated actions or was an isolated incident," and whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* Westgate's conduct in this case falls within both categories. It was deliberate deceit, and not an isolated incident. *See Exxon, supra* (repeatedly emphasizing that there was no evidence of profit motive or intentional misconduct in that case).

In its defense, Westgate can only claim that the consumers were not financially vulnerable, that there was no fiduciary relationship, and that, somehow, "Westgate's conduct should be construed to involve isolated incidents in light of the fact that 500 individual claims are being prosecuted." (Westgate Brief, p. 31.) Only by ignoring

virtually every piece of evidence at trial can Westgate claim that a resort-wide scheme involving 2,300 identical fraudulent certificates was an “isolated” incident.¹¹

The third *Gore* guidepost is the range of civil penalties that could have been imposed under state law for the misconduct. Westgate’s memorandum mentions a few: the Utah Consumer Sales Practice Act, which would allow for \$2,000 per claim; the Division of Consumer Protection could fine Westgate up to \$1,000; the Utah pattern of Unlawful Activities Act, which would allow for twice the damages sustained (plus attorney fees, not mentioned by Westgate).

Glaringly absent from Westgate’s recitation of statutory penalties is Utah Code Ann. § 57-19-3(a), a “death penalty” for timeshare companies who engage in fraudulent marketing tactics. Section § 57-19-3(a) specifically provided (and still provides) that the registration of a timeshare company to do business in Utah may be revoked if “the developer’s advertising or sales techniques or trade practices have been or are deceptive, false, or misleading[.]” That would have cost Westgate \$20 million per year, far more than the jury’s punishment. *See* p. 28, *supra*. Westgate cannot claim that “nothing in Utah statutes provided notice of the possibility of a \$1 million penalty” (Westgate Brief, p. 33) when it knew that engaging in “deceptive, false, or misleading” sales tactics could have multi-million-dollar consequences.¹²

¹¹ Westgate’s implications that the consumers were sophisticated and/or wealthy are also exaggerated. (Westgate Brief, pp. 13, 31.) Westgate targeted consumers with \$50,000 in total family income, hardly in the same league as Westgate. (Trial Exh. S.)

¹² Westgate suggests several times that, if the court “extrapolated” from this verdict, it could view Westgate as having been penalized \$33 million. In this context, extrapolation is synonymous with speculation: It assumes that punitive damages would be sought in

IN THE UTAH SUPREME COURT

WESTGATE RESORTS LTD.,

Plaintiff/Counterdefendant –
Appellant,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC

Defendants/Counterclaimants –
Appellees

Consolidated Case No. 20100425-SC

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HON. LYNN DAVIS, CIVIL NO. 020404068

BRIEF OF APPELLEES / CROSS-APPELLANTS

L. Rich Humpherys, 1582
Karra J. Porter, 5223
Scot A. Boyd, 9503
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101-1572

*Attorneys for Appellee / Cross-Appellant
Consumer Protection Group, LLC*

Michael D. Zimmerman
Troy L. Booher
Christopher L. Stout
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101-1004

Richard W. Epstein
(admitted pro hac vice)
GREENSPOON MARDER, P.A.
100 West Cypress Creek Road, Suite 700
Fort Lauderdale, FL 33309

*Attorneys for Plaintiff/Counterdefendant
– Appellant Westgate Resorts, Ltd.*

Shaun S. Adel
30 Capobella
Irvine, CA 92614
Defendant

LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the court below are identified in the caption on appeal. The claims tried below were assigned to appellee Consumer Protection Group by the following non-party individuals: George Baty, Jon and Holly Beck, Howard and Karen Brandt, Kristy and Stephen Brower, Daren and Irene Davis, Kristen and David Detienne, Larry and Sherrill Dorius, Diane Eastman, Diane and Robert Ellis, Kurtis and Karen Heser, Susan Hubbard, Luanne and Mark Huntington, Byard and Joan Price, Darla and George Serassio, Rodney Sorensen, and Greg and Relda White.

TABLE OF CONTENTS

JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTES AND RULES	3
STATEMENT OF THE CASE	3
Nature of the case, course of proceedings, and disposition below.....	3
Facts	8
<i>Westgate’s Relationship with Marketing Decisions, Inc. (“MDI”)</i>	13
<i>Represented Value of Premiums Offered by Westgate</i>	18
<i>Westgate’s Solicitation of the Consumers to Become Tours</i>	20
<i>Westgate’s Knowledge of the Problems with the Anaheim Certs.</i>	25
<i>Consumers’ Assignments of Their Claims to CPG</i>	28
<i>Westgate Resorts’ Financial Information</i>	28
SUMMARY OF ARGUMENT	28
ARGUMENT	31
I. WESTGATE HAS NOT DEMONSTRATED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONSOLIDATING THE CASES FOR TRIAL, NOR ESTABLISHED PREJUDICE IN ANY EVENT	31
II. THE TRIAL COURT DID NOT ERR IN DENYING WESTGATE’S MOTION FOR NEW TRIAL OR REMITTITUR OF THE PUNITIVE DAMAGES	40
A. The verdict is not contrary to Utah state law	41
1. Wealth	42
2. Nature of misconduct	43
3. Facts and circumstances surrounding the misconduct	44
4. Effect of misconduct on the consumers and others	44
5. Motive	45
6. Likelihood of recurrence.....	45
7. Amount of actual damages awarded.....	47
B. The punitive damages award does not violate the United States constitution	54

1. <i>Gore</i> factors	54
2. Harm to others	57
CROSS APPEAL	63
III. THE TRIAL COURT ERRED IN RULING THAT CLAIMS UNDER THE UTAH CONSUMER SALES PRACTICES ACT ARE NOT ASSIGNABLE	64
IV. IF THE PUNITIVE DAMAGE AWARD IS MODIFIED OR REVERSED, THE TRIAL COURT’S DENIAL OF ATTORNEY FEES TO CPG SHOULD BE REMANDED FOR RECONSIDERATION	66
CONCLUSION.....	67

TABLE OF AUTHORITIES

CASES

<i>American Family Mutual Insurance Co. v. Miell</i> , 569 F.Supp.2d 841 (N.D. Iowa 2008)	49, 57
<i>Anderson v. Provo City Corp.</i> , 2005 UT 5, 108 P.3d 701	2
<i>BMW v. Gore</i> , 517 U.S. 559, 116 S.Ct. 1589 (1996)	55
<i>Burton Lumber & Hardware Co. v. Graham</i> , 186 P.3d 1012, 2008 UT App 207	46, 54
<i>Campbell v. State Farm Mut. Auto. Ins. Co. (Campbell IV)</i> , 98 P.3d 409, 2004 UT 34	45, 51
<i>Cash v. Beltmann N. Am. Co.</i> , 900 F.2d 109 (7th Cir. 1990)	42
<i>City of Hildale v. Cooke</i> , 2001 UT 56, 28 P.3d 697	37
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	1
<i>Crookston v. Fire Insurance Exchange</i> , 817 P.2d 789 (Utah 1991)	41, 42, 54, 60
<i>Diversified Holdings v. Gilbert R. Turner</i> , 2002 UT 129, 63 P.3d 686	1, 41, 42, 45, 54
<i>Diversified Water Diversion, Inc. v. Standard Water Control Systems</i> , 2008 WL 4300258 (Minn.App. 2008)	51
<i>Ellis v. La Vecchia</i> , 567 F.Supp.2d 601 (S.D.N.Y. 2008)	52
<i>Encon Utah, LLC v. Fluor Ames Kraemer, LLC</i> , 210 P.3d 263, (Utah 2009)	48
<i>Exxon Shipping Co. v. Baker</i> , --- U.S. ---, ---, 128 S.Ct. 2605, 2621, 171 L.Ed.2d 570 (2008)	50, 55
<i>Fell v. Union Pacific Railway Co.</i> , 32 Utah 101, 88 P.1003 (1907)	48
<i>Florida Asset Financing Corp. v. Utah Labor Commission</i> , 2004 UT App 273, 98 P.3d 436	64
<i>Gross v. Burggraf Construction Co.</i> , 53 F.3d 1531 (10th Cir. 1995)	40
<i>Hadelman v. DeLuca</i> , 35 Conn. L. Rptr. 60, 2003 WL 21493968 (Conn. Super. 2003)	52
<i>In re Behm's Estate v. Gee</i> , 117 Utah 151, 213 P.2d 657 (1950)	64
<i>JCB, Inc. v. Union Planters Bank, NA</i> , 539 F.3d 862 (8th Cir. 2008)	51
<i>Johansen v. Combustion Engineering, Inc.</i> , 170 F.3d 1320 (11th Cir. 1999)	52
<i>Kauffman v. Maxim Healthcare Services, Inc.</i> , 509 F.Supp.2d 210 (E.D.N.Y. 2007)	57
<i>Lamb v. Bangart</i> , 525 P.2d 602 (Utah 1974)	49
<i>Lee v. Langley</i> , 2005 UT App 339, 121 P.3d 33	37
<i>Mathias v. Accor Economy Lodging, Inc.</i> , 347 F.2d 672 (7th Cir. 2003)	53
<i>Mayer v. Rankin</i> , 91 Utah 193, 63 P.2d 611 (1936)	64, 65
<i>Mendez v. County of San Bernadino</i> , 540 F.3d 1109 (9th Cir. 2008)	51
<i>Modern Management Co. v. Wilson</i> , 997 A.2d 37 (D.C. App. 2010)	58
<i>Myers v. Workmen's Auto Insurance Co.</i> , 140 Idaho 495, 95 P.3d 977 (2004)	51
<i>Philip Morris USA v. Williams</i> , 459 U.S. 346 (2007)	57, 59, 60, 61
<i>Porcupine Reservoir Co. v. Lloyd W. Keller Corp.</i> , 15 Utah 2d 318, 392 P.2d 620 (1964)	36
<i>Raggenbuck v. Suhrmann</i> , 7 Utah 2d 327, 325 P.2d 258 (1958)	37

<i>Rinehart v. Shelter General Insurance Co.</i> , 261 S.W.3d 583 (Mo. App. 2008)	58
<i>Russell Packard Development, Inc. v. Carson</i> , 2005 UT 14, 108 P.3d 741	65
<i>Saunders v. Branch Banking and Trust Co. of Virginia</i> , 526 F.3d 142 (4th Cir. 2008)...	50
<i>Slusher v. Ospital</i> , 777 P.2d 437 (Utah 1989)	1, 31
<i>Smith v. Fairfax Realty, Inc.</i> , 2003 UT 41	1, 11, 40, 42, 43, 49, 54, 58
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S.408, 123 S.Ct. 1513 (2003).....	55
<i>State v. Pena</i> , 869 P.2d 932, 938 (Utah 1994)	1
<i>State v. Sucec</i> , 924 P.2d 882 (Utah 1996).....	64
<i>State v. Winfield</i> , 2006 UT 4, 128 P.3d 1171	58
<i>Steele v. Board of Review of Indus. Com'n of Utah</i> , 845 P.2d 960 (Utah 1993).....	34
<i>Time Finance Corp. v. Johnson Trucking Co.</i> , 23 Utah 2d 115, 458 P.2d 873 (1969)	64
<i>Tschaggeny v. Milbank Ins. Co.</i> , 2007 UT 37, 163 P.3d 615	58
<i>Williams v. Kaufman County</i> , 352 F.3d 994 (5th Cir. 2003)	52
<i>Williams v. Philip Morris Inc.</i> , 344 Or. 45, 176 P.3d 1255	59
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982)	65
<i>Wright v. Westside Nursery</i> , 787 P.2d 508 (Utah Ct. App. 1990)	40

STATUTES

Utah Code Ann. § 13-11-19 (2001)	3, 64
Utah Code Ann. § 13-11-4	65
Utah Code Ann. § 57-19-3(a)	56
Utah Code Ann. § 78A-4-103(j)	1

OTHER AUTHORITIES

1 <i>Federal Rules of Civil Procedure, Rules and Commentary</i> , Steven S. Gensler	36
9A <i>Fed. Prac. & Proc. Civ.</i> § 2383	33

RULES

Rules of Appellate Procedure 24(a)(7)	40
Utah Rules of Civil Procedure 42	1, 3, 29, 36
Utah Rules of Civil Procedure 59	49
Utah Rules of Evidence 103(a)	39
Utah Rules of Evidence 404(b)	38

JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78A-4-103(j).

ISSUES PRESENTED FOR REVIEW

The following issues are presented to this Court for review:

ISSUE NO. 1: DID THE TRIAL COURT ABUSE ITS DISCRETION IN CONSOLIDATING THE CASES FOR TRIAL?

Standard of review: A trial court's orders regarding consolidation are reviewed for abuse of discretion. *Slusher v. Ospital*, 777 P.2d 437, 441 (Utah 1989). Subsidiary factual determinations by the trial court are reviewed under a "clearly erroneous" standard. *State v. Pena*, 869 P.2d 932, 938-939 (Utah 1994).

Preservation: Westgate's arguments regarding consolidation under U.R.Civ.P. 42 were preserved at R. 4270.

ISSUE NO. 2: DID THE TRIAL COURT ERR IN DENYING WESTGATE'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR REMITTUR WITH RESPECT TO PUNITIVE DAMAGES?

Standard of review: With respect to the trial court's denial of Westgate's motion for new trial with respect to punitive damages, the record is reviewed *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001); *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 31 and n. 13, 82 P.3d 1064. However, the facts from the record are recited in the light most favorable to the jury's verdict. *Diversified Holdings v. Gilbert R. Turner*, 2002 UT 129, ¶ 2, 63 P.3d 686. Additionally, arguments that were not preserved, or are inadequately briefed, are waived. *Fairfax Realty, supra*,

2003 UT 41, ¶ 30 n. 12, 82 P.3d 1064 (“the right to constitutional review of a punitive damage award may be waived or forfeited like many other constitutional rights”).

Preservation: Westgate did not preserve its constitutional arguments regarding punitive damages. *See* pp. 40, 57-60, *infra*.

ISSUE NO. 3: WITH RESPECT TO CPG’S CONDITIONAL CROSS-APPEAL, DID THE TRIAL COURT ERR IN RULING THAT CLAIMS UNDER THE CONSUMER SALES PRACTICES ACT ARE NOT SUBJECT TO ASSIGNMENT?

Standard of review: Interpretation of a statute is a question of law reviewed de novo. *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 11, 108 P.3d 701.

Preservation: CPG preserved this issue in its opposition to Westgate’s motions to dismiss. (R. 210, 2761.)

ISSUE NO. 4: WITH RESPECT TO CPG’S CONDITIONAL CROSS-APPEAL, SHOULD THE TRIAL COURT’S DENIAL OF ATTORNEY FEES BE REMANDED FOR RECONSIDERATION?

Standard of review: The Court is not being asked to review the trial court’s ruling regarding attorney fees. CPG requests only that, if the court modifies or remands the punitive damages award, the trial court be permitted to revisit its denial of attorney fees, which was based on the existence of the punitive damage award.

Preservation: CPG preserved its request for attorney fees at R. 5717.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 13-11-19 (2001):

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs.

U.R.Civ.P. 42(a):

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

STATEMENT OF THE CASE

Rather than argue appellee's theory of the case in its Statement of the Case, as Westgate has done, CPG presents the following procedural summary:

Nature of the case, course of proceedings, and disposition below

In 2002, Consumer Protection Group and its founder, Shaun Adel, began obtaining assignments from customers of Westgate Resorts, LLC, of certain claims against Westgate. (*E.g.*, Trial Exh. A (Exh. 8), B (Exh. 7).) The claims arose out of representations that, if consumers traveled to Park City and attended a sales presentation,

Westgate would give them a 3-day, 2-night vacation package to Anaheim, California, which representations the jury found to have been false.¹

Upon learning that Adel was soliciting the assignments, Westgate filed a Verified Complaint and Jury Demand against CPG on September 19, 2002, accusing Adel of having “stolen” documents from Westgate and seeking, among other things, injunctive relief. (R. 1-11, ¶ 13.)

On September 25, 2002, Westgate filed an application for a temporary restraining order. (R. 15.) CPG obtained counsel, and a stipulated TRO was entered on September 30, 2002. (R. 82-84.) The TRO precluded CPG from contacting any additional Westgate customers, but permitted the use of the contested documents for the purpose of preparing claims and defenses. (R. 83 ¶ 2.) A preliminary injunction was later entered on similar terms. (R. 2351.)

On October 23, 2002, CPG filed a Verified Answer and Counter-Claim. (R. 136.) The counterclaim included, among other things, more than 500 assigned claims against Westgate under the Utah Consumer Sales Practices Act (UCSPA) and common law fraud. (R. 118-122; R. 632.)

On November 29, 2002, Westgate filed a motion to dismiss the UCSPA and fraud claims for lack of standing. (R. 156-157.) The trial court declined to dismiss the fraud claims, but granted Westgate’s motion to dismiss the UCSPA claims on the ground that UCSPA claims cannot be assigned. (R. 2339-2340, 2346-2347.)

¹ Claims involving other promised premiums (*e.g.*, a camera) were not part of the trial, and are not at issue in the appeal.

With leave of court (R. 2630), CPG filed an Amended Verified Answer and Counter-Claim on March 12, 2004. (R. 2755.) Present counsel appeared for CPG (R. 2720), and a scheduling conference was held. (R. 2724.) In light of the trial court's ruling regarding its UCSPA claims, CPG moved to amend the counterclaim to add the individual assignors. (R. 2735, 2744.) Although Westgate had successfully argued that UCSPA claims cannot be assigned, Westgate opposed the motion on the grounds that, among other things, the consumers lacked standing because they had assigned their UCSPA claims to CPG. (R. 2745, 2745f.) The trial court denied CPG's motion. (R. 2753.)

Westgate then filed another motion to dismiss (R. 2760) Among the issues raised was that CPG's claims "improperly join the distinct and individual claims of over 900 Westgate consumers in single counts in one lawsuit, circumventing class action scrutiny required by Rule 23, U.R.C.P. for such collective actions." (R. 2760f.) Westgate also argued that joinder was improper under U.R.Civ.P. 20 (R. 2760r), and that "[i]t is logistically impossible for this Court to manage over 900 distinct claims in one lawsuit." (R. 2760u). Westgate said that, if all "900" claims were tried together, and assuming one-half day for the trial of each claim, "the trial will consume more than 450 trial days, approximately 2 1/4 years." *Id.* In response, CPG cited case law that the number of

claims is not a basis for dismissal, and that the number of defrauded persons is solely within the control of the defrauder. (R. 2761i.)²

In its second motion to dismiss, Westgate also sought dismissal of CPG's amended counterclaims under the UCSPA based upon law of the case, *i.e.*, the court's earlier ruling that such claims are not assignable. (R. 2760.) In response, CPG argued that the earlier dismissal should be revisited in light of intervening case law. (R. 2761b-d.) The trial court denied CPG's motion. (R. 2768f.)

In November 2005, CPG requested a scheduling and management order. In its motion, CPG suggested the court "take a small number (thirty) of plaintiffs [assignors] who have similar claims in each of four common areas, and separately handle them on fast track basis. Once discovery has been completed on the thirty claims, the legal issues can be resolved and trial can proceed on these 30 claims. The outcome of trial will enhance the likelihood of settlement and resolution of the case regarding the remaining 890 claims." (R. 2780.) CPG noted that doing so "would allow a manageable group of consumer claims to be resolved on an expedited basis," might resolve some common legal and issues, and might facilitate settlement, depending on the outcome. (R. 2778.)

CPG referred to the foregoing suggestion as a "small scale trial" or "test" trial. (R. 2777.) Westgate called it a "mini-trial." (R. 2807.) (CPG used those terms only once, back in 2005, but Westgate continues to use the "test trial" nomenclature (frequently). *E.g.*, Brief of Appellant, p. 14.)

² Although both parties loosely referred to 900-plus claims, that was actually the number of individual claimants. Because a number of the claimants were married couples, the actual number of distinct claims was just over 500. (R. 632.)

CPG stated, “The question now is how to proceed. CPG has suggested a reasonable approach: start with 30 claims. Conduct discovery on those claims, try them, and see what the jury does with them. If the parties do not resolve the remaining cases after seeing the result, proceed with another thirty. This arrangement – carving a big case into smaller pieces – is workable regardless of whether the first thirty are deemed to have any res judicata or other preclusive effect.” (R. 2821.) In response, Westgate offered no proposal for how the claims should be handled, but instead restated its opposition to joinder of the claims at all. (R. 2795-2819.)

On December 15, 2005, the court entered a Scheduling and Management Order. The court reserved ruling on how claims would be tried. (R. 2862.) Discovery proceeded on individual assignors, and on April 17, 2008, CPG requested a trial setting and scheduling conference. (R. 3012.) At a hearing on June 6, 2008, the court scheduled a jury trial on the claims of 16 assignors for whom discovery had been completed. (R. 3351.)

On August 12, 2008, Westgate filed a “Motion for Trial Order.” (R. 4270.) Westgate acknowledged the trial court’s decision to try 16 claims beginning October 27, 2008, “but how those claims are to be tried is still unresolved.” (R. 4266.) Westgate did not make any suggestions as to the manner of trial, arguing only that each assigned claim should be tried separately. (R. 4247-4270). Westgate’s motion was denied. (R. 4680.)³

³ Westgate expressed concern that CPG was seeking to “bind subsequent litigation” with the results of the first trial (or “test trial,” to use Westgate’s preferred term). (R. 4263.) CPG clarified that it was not contending that the first trial would have preclusive effect. (R. 4551.)

The 16 assigned claims were tried to a jury from October 27 – November 14, 2008. Upon the conclusion of CPG’s case in chief, the court granted Westgate’s motion for directed verdict as to one claimant, George Serassio. (R. 4933.) In separate special verdicts, the jury found by clear and convincing evidence that Westgate Resorts had committed fraud against each of the remaining claimants, and that punitive damages should be awarded. (R. 4758-4802.) Additional evidence was then presented with respect to the amount of punitive damages. (R. 4749.)

The jury awarded economic damages in varying amounts to each of the claimants. ((\$500 (Baty), \$508 (Beck), \$500 (Brandt), \$517 (Brower), \$5 (Davis), \$550 (Detienne), \$500 (Dorius), \$517 (Eastman), \$515 (Ellis), \$535 (Heser), \$505 (Hubbard), \$500 (Huntington), \$540 (Price), \$500 (Sorensen), and \$550 (White).) The jury did not award non-economic damages to any claimant. The jury awarded \$66,666.67 in punitive damages to each of the claimants, for a total of \$1,000,000.05. (R. 4807-4808.)

A judgment was entered on December 11, 2008. (R. 4817-4823.) On December 26, 2008, Westgate filed motions for judgment as a matter of law, for new trial, and for remittitur. (R. 4835.) On April 6, 2010, the trial court denied Westgate’s motions, and certified the judgment as final under U.R.Civ.P. 54(b). (R. 5829.) Westgate timely appealed. (R. 5988.)

Facts

Before summarizing the evidence at trial, CPG feels impelled to note that many of Westgate’s “facts” are unsupported by citation to the record. For example, Westgate begins its brief with the following: “Shaun Adel, a disgruntled former Westgate

contractor fired for falsifying sales records, stole Westgate files containing contact information of gift certificate recipients.” (Westgate Brief, p. 1; *also id.*, p. 4.)

No citation to the record is provided for this assertion, which, considering its irrelevance to the appeal, appears to be included for prejudicial effect, in contravention of U.R.A.P. 24(k) (brief is to be “free from burdensome, irrelevant, immaterial or scandalous matters”). Indeed, the trial court expressly found that Westgate failed to adduce any evidence at trial to support this claim. (R. 5806 (“Westgate did not provide admissible evidence, despite its many claims to the contrary, that the Consumer information was stolen from Westgate.”).)

Westgate also fails to acknowledge any evidence supporting the jury’s verdict or the lower court’s rulings. Westgate’s brief does not contain a true “statement of facts relevant to the issues presented for review,” as required by U.R.A.P. 24(a)(7). Westgate devotes only one paragraph to summarizing (purportedly) CPG’s claims and the allegations against it, which bear little resemblance to CPG’s actual theory of the case. (*See* Westgate Brief, p. 6.)

The trial court noted this same refusal to acknowledge any contrary evidence in Westgate’s post-trial motions. (R. 5806-5807 (“The court notes that Westgate conveniently failed to present evidence supporting the jury verdict. This is understandable because Westgate apparently does not want the court to focus on any evidence unfavorable to Westgate’s view of the case.”).)

Additionally, Westgate’s few citations to the record are grossly skewed toward a view of the case that the jury rejected. As an example, with respect to one assignor,

Westgate says: “For a claim involving a consumer who redeemed the certificate, traveled to Anaheim, and took his family to Disneyland, the jury awarded \$66,666.67 in punitive damages.” (Westgate Brief, p. 6, citing R. 4758-4772.) Westgate later describes these same assignors as “consumers who successfully redeemed their certificate and took their family to Disneyland.” (*Id.*, p. 10, citing R. 5668 (Tr.) 753-755.)

Westgate’s citation to the record begins on page 753 of the trial transcript, where Mr. Davis agreed that he was eventually able to travel on the certificate. But the witness’s testimony actually began on page 741, and painted a far different picture: Mr. Davis testified that it took him nearly *one hundred* telephone calls and *three years* to get his trip – and even then, he was only able to do so because the regularly assigned employee, who was a supervisor, happened to go on maternity leave. (R. 5661: T. 741-754.) At trial, Westgate’s counsel characterized Mr. Davis as “another one that won’t take yes for an answer.” (R. 5667:9-13.)⁴

Similarly, Westgate says that another consumer “was offered an Anaheim Certificate, but rejected it.” (Westgate Brief, p. 10, citing R. 5661 (Tr.) 672-673.) Westgate omits that, when this consumer was handed the certificate for the first time after the presentation, she realized immediately that its onerous terms and conditions made it worthless. (R. 5661: D. Ellis: 670-673.)

⁴ Mr. Davis would submit three requested dates as required (consumers were not allowed simply to ask what dates were available). Before each date arrived, Mr. Davis contacted National Redemption Center, and was told each time that the date was unavailable. Each time that three dates came and went, Mr. Davis was required to request another form to request another three dates; he went through this process *ten* times. (R. 5661: Davis: 741-56.)

On appeal, the facts are to be recited “in the light most favorable to the jury’s verdict.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 3, 82 P.3d 1064. Having stated its concern with Westgate’s failure to honor this principle, CPG offers the following statement of facts, supported by citations to the record:

Westgate Resorts, one of the country’s largest timeshare companies with over 1 billion in gross revenues for 2007 and 400,000 owners (R. 5668: Westgate VP Tim Gissy: 2585, R. 5664: 1695), began sales operation at its “Westgate at the Canyons” timeshare resort in Park City, Utah (“the Resort”) in October 2000.

Prior to beginning its sales operation, Westgate hired personnel with timeshare sales and marketing experience for on-site managerial positions. Their hires included Martin Reese, Project Director, and Jay Bryan, Director of Marketing. (R. 5662: Martin Reese: 1175-1177; R. 5664: Vanhartesvelt: 1813-1817; Gissy: 1705.) At all relevant times (2000-2002), the directors of marketing reported directly to Tim Gissy in Orlando, Florida who was in a senior marketing position for Westgate at its home offices. (R. 5664: Horowitz: 1968-69; Gissy: 1704.) Mark VanHartesvelt and Gemstone Resorts were hired to run the start-up, responsible for opening the resort and operating it at a luxury resort level. (R. 5664: Vanhartesvelt: 1813-1815; Gissy: 1705.)

Jody Linehan, now known as Jody Wright, was hired as Marketing Administrator in October 2000. (R. 5662: Martin Reese: 1176-77.) The Gift Room employees at the Resort reported to her. (R. 5664: David Reed – Westgate’s Corporate Marketing Director: 1782-83.) The gifting department was in charge of providing tours with Premiums and resolving issues related thereto. (R. 5664: Mark Vanhartesvelt: 1829.)

During the period in question, October 2000-2002, “tours” were Westgate’s lifeblood. (R. 5664: Mark VanHartesvelt: 1843-44.) A “tour” is a single person or a married couple induced to submit to a sales presentation at Westgate, wherein a salesperson would push the purchase of either a timeshare or a VOA (vacation occupancy agreement). *See* R. 4756: Trial Exh Q: Confirmation Letters.⁵

Westgate uses various methods to induce tours and/or guests to visit the Resort, including telemarketing by its own telemarketing arm; telemarketing by marketing companies under direct contract with Westgate; and telemarketing by outside marketing firms through a broker, Marketing Decisions Incorporated (“MDI”). (R. 5664: VanHartesfeld: 1819-20.)

“Premiums” are the key to getting tours. Premiums are incentives that a tour is promised for sitting through a sales presentation. (R. 5664: Tim Gissy – Westgate VP of Marketing: 1716; R. 5663: Brent Ferrin – CPG’s expert on the time share industry: 1457 (99 ½ percent of all timeshare presentations are induced by offering a premium.) As explained at trial by those in the time share industry, the better the perceived value of the Premium, the more effective it is in enticing potential tours to submit to a sales presentation. (R. 5660: David Wagner – President of Marketing Decisions, Inc.: 587-588, R. 5662: 1161 (\$500 value is good incentive); R. 5663: CPG’s expert Brent Ferrin: 1445-46 (resorts aim for more value for the gift in order to receive the greatest number of

⁵ In various documents the individuals who accept an invitation are described by Westgate as “tours” or “guests.” Hereinafter the terms are used interchangeably.

prospects); R. 5665: Westgate's expert William Smith: 2188 (perceived value of the trip critical for getting tours).)

The perceived value of the premium will also affect how long a consumer is willing to sit through a presentation, as well as how well the consumer will respond to the salesperson. (R. 5663: Brent Ferrin: 1474-75.)

These Premiums are not "gifts" because the recipients travel to the Resort and sit through a time share presentation in order to obtain the premium. (R. 5664: Westgate's VP of Marketing, Tim Gissy: 1716.)

According to Mr. Gissy, who oversaw the Resort on behalf of Westgate and was aware of the revenues generated by the project, the Resort was certainly a profitable project. (R. 5668: Gissy: 2583-84, 2591.) In the eight months between November 1, 2000 and July 5, 2001, it hosted 7,488 tours, and sold to 1,470 of those tours, generating sales of \$15,221,980. (R. 4756: Trial Exh. R, Tour Analysis Report (Exh. 529) authenticated by R. 5668: Gissy: 2587-90.) The project increased beyond that total to average approximately \$20 million a year in revenue, (R. 5668: Gissy: 2585) and had one of the highest VPG "volume per guest," percentage of sales and average sales price in the corporation. (R. 5664: Gissy: 1728, R. 5668: 2590.)

Westgate's Relationship with Marketing Decisions, Inc. ("MDI")

Marketing Decisions, Inc. ("MDI"), a broker between timeshare resort companies and outbound telemarketing companies, entered into a contractual relationship with the Resort on September 27, 2000 at the same time as Westgate began its sales effort at the Canyons. (R. 5660: David Wagner – president of MDI: 567, R. 5662: 1028.) MDI was

hired to provide Westgate with tours generated through a day-drive program. (R. 5662: D. Wagner: 991.) From October 2000 through August 2002, MDI provided 3700 tours to Westgate. (R. 5662: D. Wagner: 1133-34.)

MDI provided Westgate with written "Start-Up Memos" that documented the important points that Westgate required MDI's marketing firms to disclose to potential tours. (R. 5660: D. Wagner: 571; R. 5662: Martin Reese – Westgate's Project Manager: 1203; R. 4756: Trial Exhibit S: "Start-up Memos.")

The "Start-Up Memos" were Westgate's only method of communicating with the telemarketing companies that would be contacting potential tours on Westgate's behalf.

Quoting MDI's president, David Wagner:

A. When Marketing Decisions, Inc. gives a start up memo to any particular resort, they are to carefully read it, change it, edit whatever, and then sign it, initial it and send it back to us. That is the resort's way of communicating with my company that these are all important facts that should all be given to the call center who would then use them on behalf of the resort to make telephone calls.

Q. So Westgate did communicate the requirement to MDI by way of the start up memo; correct?

A. Yes. By signing this they're saying that these are the things they believe are important.

(R. 5660: D. Wagner: 583-84.)

At trial, Mr. Wagner elaborated on the resort's involvement in the telemarketing process:

Well, generally what we would do is within Marketing Decisions we would have meetings and put forth ideas of what we felt would be ideal for that particular marketplace. We would then go to the resort and get the resort's approval to use that particular combination of gifts. We would ask for that approval within the start-up memo, that these are the gifts we would like to

use, this is how we would like to run the program. And they would edit it, change, approve it, give it back to us, and we would give it to the call centers to initiate the start.

(R. 5662: D. Wagner: 1035.)

According to Mr. Wagner, if the premium to be offered by a marketing company brokered by MDI contained any restrictions, the Start-Up Memo provided the marketing company with a bullet-point list of restrictions that Westgate required be disclosed while contacting tours on Westgate's behalf. (R. 5660: D. Wagner: 577; R. 4756: Trial Exh. S: "Start-up Memos.") "It's always given to the resort to sign off and approve and edit if they feel it's incorrect." "It's to make sure there's no holes in the system." (R. 5662: D. Wagner: 994; *see also* D. Wagner: 999.)

Westgate required that all marketing companies with whom MDI contracted only offer Westgate-approved Premiums. (R. 5662: D. Wagner: 1102; Martin Reese – Westgate's Project Director: 1280.) Additionally, Westgate required that "All marketing materials used by MDI will be submitted to Westgate prior to the use, including all telemarketing scripts and confirmation materials." (R. 4756: Westgate Trial Exh. 4; R. 5662: D. Wagner: 1105.) Westgate project manager Martin Reese testified that he believed MDI fulfilled the contract and submitted all marketing materials to Westgate prior to their use. (R. 5662: M. Reese: 1281.)

It is generally understood in the industry that the company promoting a particular premium has the right to control what telemarketers say. (R. 5663: Brent Ferrin – CPG's expert: 1469-70.) Because telemarketers are paid by how many tours they get through

the door, it is an ongoing problem in the industry to control the telemarketers. (R. 5663: Brent Ferrin: 1470.)

One of the Premiums purchased by Westgate, and authorized by Westgate to be offered by the marketing firms, was a 3-day, 2-night vacation to Anaheim, California (referred to by Westgate as the “Anaheim Cert”). (R. 4756: Trial Exh. S: “Start-up Memos.”) MDI purchased the Anaheim Cert from National Redemption Center, and then Westgate purchased the Anaheim Cert from MDI. (R. 5662: D. Wagner: 1060, 1093; R. 4756: Trial Exh B: Anaheim Invoices.)

The Start-Up Memo approved by Westgate in December 2000 for three marketing companies brokered by MDI – *i.e.*, the information that Westgate wanted disclosed to its prospective tours – did not include any of the restrictions that are contained on the Anaheim Cert. (R. 4756: Trial Exh. S (2/20/00 Start-up memo)(Exh. 586).)

The remaining Start-Up Memos approved by Westgate omitted or misstated the majority of restrictions on the Anaheim Cert. Below is a comparison between restrictions Westgate told telemarketers to mention (Trial Exh. S: Start-up memos) and actual terms and conditions of the Anaheim Cert. (R. 4756: Trial Exh. U.)

Anaheim Certificate (Trial Exh. U)	Trial Exh. S: Start-up Memos (3/20/01, 05/11/01, 06/20/01, 09/04/01, 09/10/01, 10/08/01, 10/13/01, 11/06/01, 01/07/02, 04/25/02 and 06/19/02)
1. Room guarantee deposit of \$50 per person must be sent in immediately, rather than at time reservation is made.	1. Must pay a \$50 fully refundable deposit per person.
2. Additional tax deposit fee (\$35 non-refundable) must be sent in	2. Must pay airport and hotel taxes about \$40 total.

Anaheim Certificate (Trial Exh. U)	Trial Exh. S: Start-up Memos (3/20/01, 05/11/01, 06/20/01, 09/04/01, 09/10/01, 10/08/01, 10/13/01, 11/06/01, 01/07/02, 04/25/02 and 06/19/02)
immediately.	
3. The original reservation request form, no faxes or copies, must be received by the reservation company within 21 days of the date of issue, or the form will be void.	3. No such requirement.
4. "Tuesday arrivals only."	4. "This is a mid-week trip. It may be upgraded to a weekend, if available."
5. 1-year expiration from date of issuance.	5. No such restriction.
6. Consumers not allowed to choose dates until after sending in the reservation request form and waiting to receive a date selection letter from the redemption company.	6. No such restriction.
7. Consumer must "select three valid dates, at least 21 days between choices."	7. No such restriction.
8. "This promotion is subject to high season blocked out periods. It is not valid during major holiday seasons (this includes one week prior to and one week following). Major holidays include: New Years Day, Martin Luther King's Birthday, President's Day, Easter, Memorial Day, Independence Day, Labor Day, Columbus Day, thanksgiving Day, and Christmas."	8. No such restrictions.
9. Redemption company must receive the choice of valid dates "at least 60 days in advance of the earliest departure	9. "Sixty (60) day advance notice required."

Anaheim Certificate (Trial Exh. U)	Trial Exh. S: Start-up Memos (3/20/01, 05/11/01, 06/20/01, 09/04/01, 09/10/01, 10/08/01, 10/13/01, 11/06/01, 01/07/02, 04/25/02 and 06/19/02)
date” <i>[eliminating the last two-months of the 1-year expiration period]</i> .	
10. “All requests and correspondence must be in writing.”	10. No such requirement.
11. “No-show fee of \$50.”	11. No such requirement.
12. “Cancellations must be in writing.”	12. No such requirement.
13. Penalties for cancellations may apply.	13. No penalties mentioned.
14. “The package is subject to change without notice.”	14. No such provision.
15. Broad disclaimer of liability.	15. No disclaimer of liability.

According to invoices, between November 1, 2000 and July 5, 2001, the Resort purchased 2,150 Anaheim Certs from MDI. See R. 4756: Trial Exh. B: Anaheim Invoices (showing purchases of Anaheim Certs of: 50 (10/2/2000), 100 (10/9/2000), 500 (10/16/2000), 500 (10/31/2000), 500 (1/29/2001) and 500 (4/3/2001) certificates). For all except the first purchase, the Anaheim Certs were shipped directly to Westgate at the Canyons. *Id.*; (R. 5663: R. Romanelo – owner of National Redemption Center: 1409-1410 (authenticating Exhs. 574-576)).

Represented Value of Premiums Offered by Westgate

According to MDI president Wagner, Westgate purchased the Anaheim Cert for no more than \$42 (R. 5660: D. Wagner: T. 592, R. 5662: 1060), and as little as \$32 (R. 5662:

D. Wagner: 1096), but consistently represented it to Tours on letters and on receipts as having a value of at least \$498. (R. 4756: Trial Exh. Q: Confirmation letters; Guest Room Receipt (documenting the represented value of the Anaheim Cert as \$500); R. 5659: DeTienne: 109 (R. 4757: Trial Exh. F #0063); Eastman (R. 4757: Trial Exh. H), R. 5661: Hubbard: 828-831 (R. 4757: Trial Exh. K); R. 5661: Brower: 871 (R. 4757: Trial Exh. D).) Westgate's senior vice president of marketing, Mr. Gissy, understands that the Cert was advertised as a \$500 value (R. 5664: Gissy: 1720) and Mr. Smith, Westgate's expert, acknowledged that the perceived value of the trip was \$500. (R. 5665: Smith: 2188.)

Unknown to the consumers, the low cost to Westgate of a package that purportedly included air fare and accommodations was because the Anaheim Cert was a "breakage" deal, *i.e.*, admitted by Westgate's project manager to be knowingly designed to be difficult to redeem. (R. 5662: Martin Reese: 1259, 1282.) Many of the recipients did in fact "break" – after subjecting themselves to the nearly impossible process of trying to redeem the Anaheim Cert, they gave up. (R. 5659: Eastman: 210; Dorius 254-55; R. 5660: Beck: 325-27; Sorensen: 393, 405; Heser: 452-53; Huntington: 604-06; R. 5661: White: 792-95; Hubbard: 822; R. 5663: Baty: 1389-91, 1394-95.)

Although Westgate had represented to the Consumers that they would receive the premium regardless of whether they purchased Westgate product (R. 4756: Trial Exh. Q: Confirmation Letters), Westgate did not want Tours who in fact ended up purchasing to have the same "breakage" experience. Accordingly, Westgate employees stamped the word "OWNER" on the certificates of Tours who made a purchase during the sales presentation. (R. 5662: Martin Reese: 1232, 1274-75; R. 5663: National Redemption

Center owner Richard Romanelo: 1420-22 (owners were provided with “more care,” “like a VIP,” provided quicker problem resolution and might have had a greater percentage of owners traveling than non-owners).)

Westgate’s Project Director, Martin Reese, explained:

Q. What would happen if someone actually bought a time share? Would Westgate make any effort to actually get them a Disneyland vacation?

A. What would take place at the time is, to my understanding, that the certificate, if they chose the Southern California certificate, that certificate would be stamped that that person was an owner, and so when they sent it in they were supposed to get priority treatment.

Q. Meaning what?

A. Meaning no problems.

Q. Don’t reject their application for any number of reasons?

A. Yeah.

(R. 5662: M. Reese: 1274-75).

Westgate’s Solicitation of the Consumers to Become Tours

As testified to by the consumers at trial, telemarketers, identifying themselves as calling on behalf of Westgate, cold-called the consumers promoting the Anaheim Cert, in an effort to induce the consumers to commit to go to the Resort for a sales presentation.

(R. 5659: DeTienne: 90-91; Eastman: 191-92, 196; Dorius: 248, 276, 298; R. 5660: Beck: 315-16; Sorensen: 379-80, 389; Heser: 444; Price: 514-15; Huntington: 597-98; R. 5661: Ellis: 658-62; Davis: 728-29; White: 783-84; Hubbard: 814-15; Brower: 854, 857; Brandt: 902-03; R. 5663: Baty: 1353-54.)

Westgate’s expert admitted that the consumers would presume that the person calling on behalf of Westgate was a representative of Westgate’s, that Westgate was

making the offer, and that Westgate, no one else, was promising them an Anaheim trip. (R. 5665: Richard Smith: 2164, 2165, 2168.)

During this solicitation, the consumers were not informed that the free vacation being offered to them had the contested restrictions. (R. 5659: DeTienne: 94-95, 119-20; Eastman: 196; Dorius: 249; R. 5660: Beck: 319,336; Sorensen: 379-80, 389; Heser: 444; Price: 516; Huntington: 600; R. 5661: Ellis: 663; Davis: 730, 764; White: 785; Hubbard: 816; Brower: 855; Brandt: 903-04; R. 5663: Baty: 1355-56.)

Shortly before the Tour date, the marketing company mailed Westgate-approved confirmation letters to tours. (R. 5662: David Wagner: 1046.) The Confirmation Letters used the Westgate name prominently, gave directions to the Resort and included, for those enticed by an Anaheim vacation, a statement that the Anaheim Vacation had a value of \$498. R. 4756: Trial Exh Q: Confirmation Letters. The Confirmation Letters approved by Westgate omitted many of the restrictions on the Anaheim Cert. Similar to the Start Up Memos, a comparison of the terms and conditions disclosed in the Anaheim Certificate to the Confirmation Letters reveals the following contradictory or additional terms:

Anaheim Certificate (Trial Exh. U)	Original Westgate confirmation letters (Trial Exh Q)
1. Room guarantee deposit of \$50 per person must be sent in immediately, rather than at time reservation is made.	1. Room deposit sent at time reservation is made.
2. Additional tax deposit fee (\$35 non-refundable) must be sent in immediately.	2. States only that the recipient is responsible for the tax deposit payment.

Anaheim Certificate (Trial Exh. U)	Original Westgate confirmation letters (Trial Exh Q)
3. The original reservation request form, no faxes or copies, must be received by the reservation company within 21 days of the date of issue, or the form will be void.	3. No such requirement.
4. 1-year expiration from date of issuance.	4. No expiration date.
5. Consumers not allowed to choose dates until after sending in the reservation request form and waiting to receive a date selection letter from the redemption company.	5. No such restriction.
6. Consumer must "select three valid dates, at least 21 days between choices."	6. No such restriction.
7. Redemption company must receive the choice of valid dates "at least 60 days in advance of the earliest departure date" (<i>which also essentially eliminates the last two-months of the 1-year expiration period</i>).	7. No such requirement.
8. "All requests and correspondence must be in writing."	8. No such requirement.
9. "No-show fee of \$50."	9. No such requirement.
10. "Cancellations must be in writing."	10. No such requirement.
11. Penalties for cancellations may apply.	11. No penalties mentioned.
12. "The package is subject to change without notice."	12. No such provision.

Anaheim Certificate (Trial Exh. U)	Original Westgate confirmation letters (Trial Exh Q)
13. Broad disclaimer of liability.	13. No disclaimer of liability.

According to the testifying consumers, when they arrived at the Resort for their sales presentation, they presented their Confirmation Letter to the front desk and filled out a “Guest Information Sheet,” which typically listed the Premium offered. (R. 5659: DeTienne: 112-23; R. 4757: Eastman: Trial Exh. H; Dorius: Trial Exh. G; R. 5660: Beck: 321, 332-33; Sorensen: 388, 390; R. 4757: Heser: Trial Exh. J; Price: Trial Exh. M; R. 5660: Huntington: 601; R. 5661: Ellis: 668; Davis: 736; White: 788; Hubbard: 818-19; Brower: 858-59; Brandt: 905-06; R. 5663: Baty: 1365.)

During the consumers’ tours, an on-site Westgate salesperson subjected each to a high-pressure sales presentation which often lasted longer than the promised 90 minutes.⁶

At the end of the sales pitch, the consumers received their chosen premium. For the Anaheim Cert, this was the first time that consumers had the opportunity to see the many restrictions that played such a key role in making the Anaheim Cert a “breakage” deal. (R. 5659: DeTienne: 109; Eastman: 201; Dorius: 249; R. 5660: Beck: 324; Sorensen: 391; Heser: 451; Price: 521-22; Huntington: 601; R. 5661: Ellis: 670-73, 700; Davis: 739; White: 790-91; Hubbard: 820; Brower: 862-63; Brandt: 911-12; R. 5663: Baty: 1384.)

⁶ R. 5660: Beck: 322 (2 ½ - 3 hours); Price: 519, 521 (3 hours); Huntington: 601 (2 hours); R. 5661: Ellis: 670 (2 hours); Davis: 737 (2 hours), White: 789 (over 3 hours); Hubbard: 819 (2 ½ hours); R. 5663: Baty: 1370 (2 ½ hours).

According to CPG's expert, at this moment, Westgate had committed a "bait and switch." (R. 5663: Ferrin: 1481; *see also*, testimony of consumers who believed it was a "bait and switch" (R. 5660: Sorensen: 436-37; R. 5661: Ellis: 677).)

Upon seeing the previously undisclosed restrictions, two of the consumers were so frustrated by receiving a premium that was very different than what they were promised that they simply gave up without trying to redeem the Anaheim Cert. (R. 5661: Ellis: 670-73, 700; R. 5660: Price: 523-26, 546.) Others contacted the redemption company, discovered how difficult it would be to redeem, and gave up. (R. 5661: Brower: 865-67; Brandt: 915-18; R. 5663: Baty: 1389-91, 1394-95.)

The other Consumers attempted to redeem their certificates by navigating the labyrinthian process described on the certificate (Trial Exh U):

- mailing in \$135, which had to be received by the redemption company within 21 days of the consumer's receipt of the certificate;
- waiting for National Redemption Center to respond;
- filling out a form sent to them by NRC to request 3 "valid" dates that were:
 - at least 21 days between choices;
 - at least 60 days beyond the date that NRC would receive the choices in the mail;
 - Tuesday arrivals only;
 - not during (unidentified) "high season blocked out periods";
 - not during major holiday seasons that include one week prior to and one week following: New Year's Day, Martin Luther King's Birthday, President's Day, Easter, Memorial Day, Independence Day, Labor Day, Columbus Day, Thanksgiving Day, and Christmas.
- ensuring that both travelers signed the certificate, lest it be voided.

Consumers had to wait and see if their requested dates would be deemed “valid” and available, which, consistent with the “breakage” concept, turned out to be never. Despite complying with the restrictions, none of the consumers except for Mr. Davis – after one hundred calls and a fortuitous baby – were able to travel, even when some chose to submit additional “valid” dates after their previous dates were rejected for unspecified reasons. (R. 5659: DeTienne: 122-33 (trying for six years); Eastman: 210 (finally gave up after 4 attempts); Dorius: 254-55 (tried 2 or 3 times); R. 5660: Beck: 325-27 (made 3 separate attempts to redeem the Cert.); Sorensen: 393, 405; Hesar: 452-53 (tried to redeem 3 or 4 times); Huntington: 604-606 (tried to redeem 4 times); R. 5661: White: 792-95 (filled out form and tried to redeem 4 times); Hubbard: 823.)

Many of the frustrated consumers attempted to contact NRC or Westgate by phone for assistance. Those who called NRC were told either to wait for their chosen dates to lapse or to fill out an additional request for dates. (*See, e.g.*, R. 5661: Huntington: 605-06; Davis: 741-56.) NRC refused to provide a list of dates that were available. (R. 5660: Beck: 327; R. 5661: Huntington: 607; Davis: 741-56; White: 793.) Westgate told consumers who called it to contact NRC. (R. 5661: DeTienne: 127-28 (“I called Westgate at least 20 times.” They told me “[i]t’s not their problem.”); R. 5660: Hesar: 453-54 (contacted Westgate 3 or 4 times, they told her to contact NRC.)

Westgate’s Knowledge of the Problems with the Anaheim Certs.

Westgate received many complaints regarding the restrictions on, and the difficulty of redeeming, the Anaheim Certs. In fact, Martin Reese, the project director in 2001, admits that he was told by Jody Linehan, the person responsible for complaints

related to the premiums, that Westgate needed to get rid of the Anaheim Cert. (R. 5662: Reese: 1264 (“...I believe that Jody Linehan in our marketing department was the one that finally said, ‘You know what? We need to get rid of this,’ because they were having too many problems with people having problems redeeming it.”), 1275). CPG’s expert opined that Westgate was on notice by February 2001, which predated the tours of any of the consumers at trial. (R. 5663: Ferrin: 1615, 1620-21.)

Often, Westgate salespersons and gift room employees, knowing the real nature of the Anaheim Cert, tried to persuade the consumer to switch to another gift. (R. 5659: DeTienne: 101, 106 (sales agent said, “[l]ook, I like you, this isn’t in your best interest. We’re done with the sales thing, now for the gift thing. If you want a gift, you should choose one of the other two because you have a chance of getting something, and this one we know it’s just nobody ever gets the gift. You get a piece of paper that’s worthless. You really need to take the others.”); R. 5662: Martin Reese – Westgate’s Project Manager: 1267-68 (Q. “So if someone would come in, having come with a promise for this and get talked into something else?” A. My answer was, “Yes.” Q. “How many times do you think that occurred?” A. And I said, “It probably happened a lot.” Q. “Hundreds?” A. “Okay.”).)

Despite this knowledge of the difficulties in trying to redeem the premium, Westgate continued to use the Anaheim Cert (R. 5662: Martin Reese: 1265) until it learned that CPG had been formed and was soliciting consumers to become part of a lawsuit. (R. 4757: Trial Exh. B: Anaheim Invoices, Exh. 574-576 (showing purchases of Anaheim Certs as late as August 14, 2002 and credit for 25 Anaheim certs on September

17, 2002); R. 4756: Trial Exh. S: Start-Up Memos (June 19, 2002 start-up memo offering Anaheim trip)); R. 5664: Gissy: 1712).) Westgate filed suit against CPG on September 19, 2002.

At trial, Westgate, MDI and National Redemption Center claimed to have no idea what the redemption or travel rates (the percentage of tours given the certificate who tried to redeem them and the percentage who actually travelled) were for the Anaheim Cert. (R. 5662: Martin Reese – Westgate’s Project Director: 1211, 1297 (Westgate not given the redemption statistics); David Wagner: 1147 (MDI doesn’t know the travel rate on the Anaheim Cert.); R. 5664: Felix Revuelta: 1913 (National Redemption Center has no idea how many Cert holders actually traveled.)) Perhaps not coincidentally, a MDI employee admitted that MDI shredded all documents relating to Westgate in August 2003, after this lawsuit began. (R. 5664: Sherri Miller: 1961-1962.)

CPG’s expert found this claimed lack of knowledge especially damning because:

The redemption rate is probably the single most important thing in my estimation as to the value of the certificate and the value to the consumers themselves. If you don’t know how many people are actually able to travel, then if I were a consultant advising a developer, I would say then you’re in trouble.

That’s one of the most critical factors that you need to understand about any gift, how many people are actually using it and how many are using it successfully.

(R. 5663: Brent Ferrin: 1492.)

The expert explained to the jury that the “redemption rate” is the single most important factor when evaluating the “true value” of the certificate and whether it was being represented properly to the consumer. (R. 5663: Brent Ferrin: 1492-93.)

Consumers' Assignments of Their Claims to CPG

At trial, the consumers testified that they intended to and did assign their claims against Westgate to CPG. (R. 5659: DeTienne: 136-38; Eastman: 212-13; Dorius: 259-60; R. 5660: Beck: 343; Sorensen: 395; Heser: 462, 466; Price: 539-40; Huntington: 611; R. 5661: Ellis: 679; Davis: 763; White: 801; Hubbard: 828; Brower: 875; Brandt: 925; R. 5663: Baty: 1397.)

Westgate Resorts' Financial Information

David Crabtree is the Chief Operating Officer for the Sales and Marketing Department of Westgate. (R. 5668: Crabtree: 2601.) The net equity (net worth) of Westgate had grown from between \$100 million to \$150 million in 2000, to \$519 million as of the end of 2007. (R. 5668: Crabtree: 2605, 2621.) After opining that Westgate had lost value due to the credit crunch, he stated that Westgate believes that the bailout for the credit industry would help Westgate recover. (R. 5668: Crabtree: 2612, 2630.) The resort at Westgate at the Canyons has consistently created revenue of \$20 to \$22 million per year. (R. 5668: Crabtree: 2607.)

At trial, Westgate stipulated to the instructions given to the jury regarding punitive damages. (R. 5668: Tr. 2561-2574, 2577-2578 (no objection to Instruction 75 and 76, "which are fine"), 2636-2639.) Westgate did not proffer any instructions of its own that were rejected by the trial court. *Id.*

SUMMARY OF ARGUMENT

Westgate has not established that the trial court abused its discretion in consolidating the cases for trial. Westgate's principal challenge to the consolidation is

that the claims were factually “disparate,” but the trial court’s finding to the contrary can be reversed only if shown to be clearly erroneous. Where CPG’s theory of the case was the same for each claim, the alleged conduct of Westgate was the same for each claim, and even Westgate itself characterized consumers’ testimony as redundant, the trial court’s finding that the consolidated claims were “strikingly similar” is fully supported.

Once a common question of fact or law was found to exist, the trial court had considerable discretion in managing the trial. Under U.R.Civ.P. 42, the court was permitted to consider a wide range of factors, such as convenience and judicial economy. Westgate never offered any suggestions to the court for trying hundreds of claims, and has not established a basis for criticizing the court’s efforts.

Westgate has also failed to establish prejudice. Its argument that prejudice should simply be presumed fails to meet its burden on appeal. Although Westgate claims that consolidation allowed the introduction of inadmissible evidence, it neither acknowledges the trial court’s ruling regarding the evidence nor shows the court’s evidentiary rulings to have been an abuse of discretion. Westgate’s further claim of prejudice arising from a failure to instruct the jury adequately is waived because Westgate never objected to the jury instructions, nor promulgated a proposed instruction of its own.

With respect to punitive damages, Westgate has established neither a violation of the federal constitutional nor of state law. Initially, CPG notes that Westgate has failed to provide an appropriate statement of facts or record citations, and has refused to admit that any evidence exists in support of the jury verdict. Accordingly, Westgate’s challenge to the punitive damages award should be disregarded as inadequately briefed.

On the merits, applying the seven *Crookston* factors demonstrates the reasonableness of the jury's verdict. Westgate's principal focus, the ratio of punitive damages to compensatory damages, is largely immaterial in small-damage cases, as recognized by the United States Supreme Court and numerous other courts. As the trial court also observed, a jury could have found a high likelihood of recurrence, particularly in view of Westgate's belligerence and even utter disrespect of the consumers, the trial court, and counsel.

Analysis of the *Crookston* factors is also informative on Westgate's federal challenge: Reprehensibility is high; the ratio is largely irrelevant, and Westgate's fraudulent sales tactics could have resulted in a statutory "death penalty" costing it far more than the jury's award. Westgate's protestations of innocence are too little, too late – the jury reasonably concluded that, given Westgate's wealth, conduct, and attitude, it would require an award of \$1 million to get its attention.

With respect to CPG's conditional cross appeal, the trial court erred in ruling that claims under the Utah Consumer Sales Practices Act are not assignable. This Court has held that choses in action are assignable, and the trend has long been to expand the field of assignable claims. The Act does not prohibit assignments, and the trial court erred in ruling otherwise.

Also as to CPG's conditional cross appeal, (only) if the punitive damage award is modified or reversed, the trial court should be permitted to revisit its denial of CPG's request for attorney fees. With respect to the private attorney general doctrine, the court

premised its denial on a determination that the considerations raised by CPG were adequately addressed in the punitive damage award.

ARGUMENT

I. WESTGATE HAS NOT DEMONSTRATED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONSOLIDATING THE CASES FOR TRIAL, NOR ESTABLISHED PREJUDICE IN ANY EVENT.

Westgate's brief acknowledges that trial courts are afforded discretion in making decisions regarding consolidation. (Westgate Brief, p. 17 ("When cases present 'a common question of law or fact,' Rule 42 of the Utah Rules of Civil Procedure provides trial courts discretion in deciding whether to consolidate issues for trial.")) Indeed, it is "considerable" discretion. *Slusher v. Ospital*, 777 P.2d 437, 441 (Utah 1989).

Westgate further concedes that claims "can be" consolidated under Rule 42 if there is a common question of law or fact (Westgate Brief at 18), and that such consolidation is not "per se impermissible[.]" *Id.* Westgate argues, however, that there was no common question of law or fact in this case, because the consolidated claims were too "disparate."⁷

⁷ Westgate does not suggest that claims must be identical in order to be consolidated, nor is there any authority for that proposition. Accordingly, Westgate must show not only that the facts were disparate, but that they were *really* disparate. See, e.g., 9A *Fed. Prac. & Proc. Civ.* § 2384 (3d ed.) ("A substantial common question of law or fact is enough. If an appropriate common question exists, federal courts often have consolidated actions despite differences in the parties.")

Westgate has not challenged on appeal the trial court's ruling that joinder of claims in the first instance was appropriate under U.R.Civ.P. 20. In that ruling, the court wrote:

As CPG is quick to point out, Westgate is unclear about what it wants the court to do with CPG's 950 claims. As a practical matter, since CPG is presumably the owner of 950 validly assigned claims, the court is faced with two options: (1) reject Westgate's argument and allow CPG to bring the claims in one lawsuit; or (2) accept Westgate's argument and force CPG to bring the claims in 950 separate lawsuits. No doubt if CPG brings 950 suits someone would seek to consolidate the cases either for discovery purposes or for trial.

(R. 2768f.)

The court then concluded that joinder was proper. The court observed that "CPG alleges Westgate was involved in a systematic, ongoing pattern of fraudulent activity that affected many, many individuals," and that such allegations expressly involved a "series of transactions" as contemplated by Rule 20(a). (R. 2768f-h.) Westgate's characterization of the assignors' affidavits as "fill-in-the-blank and check-box" forms "only bolsters CPG's position," the court observed. (R. 2768h.)

With respect to the number of claims, the trial court said, "Here, without doubt a single, massive trial including 950 consumer claims will be costly, time-consuming, and a logistical nightmare. But, it seems to me, separating the matter into 950 individual trials only will exacerbate the delay and expense to the parties and increase the administrative burden to the court." The court wrote:

Westgate claims that a lawsuit involving the claims of 950 consumers, each of whom may be required to testify, will be extremely time-consuming, although Westgate's figure of a half-day per witness seems significantly exaggerated. I cannot conceive, however, that such a trial likely will be more time-consuming and an administrative headache than 950 separate

trials, including selecting and instructing 950 separate juries, 950 separate opening statements and closing arguments, 950 separate plans for discovery, and 950 separate pre-trial hearings, motion hearings, rulings and orders, all asserted by CPG as assignee against Westgate, all involving highly similar facts and claiming essentially the same injury. Indeed, could there be a better argument for consolidation?

(R. 2768i n. 4.)⁸

Westgate has not met its obligation of marshaling all evidence in support of the trial court's factual determination that the claims were factually similar. U.R.A.P. 24(a)(9) provides: "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." The trial court's assessment of whether common factual issues exist, particularly after the trial, is such a finding. *See, e.g.*, 9A *Fed. Prac. & Proc. Civ.* § 2383 ("The district court is given broad discretion to decide whether consolidation under Rule 42(a) would be desirable and the district judge's decision inevitably is highly contextual, as the case law amply demonstrates.").

Westgate itself repeatedly characterizes the trial court's ruling as based upon a misapprehension of the facts. *E.g.*, Westgate Brief, p. 4 ("the trial court chose not to consolidate 15 similar claims for trial, but instead consolidated 15 claims with disparate facts"; p. 14 ("The first fundamental error was consolidating 15 disparate claims for trial

⁸ In finding joinder appropriate, the court concluded that the claims "aris[e] out of the same . . . series of transactions." U.R.Civ.P. 20. Based thereon, it is clear CPG is asserting a series of injuries to a long list of assignors all of which arose out of a single series of transactions." (R. 2768h.) Rule 42 permits actions to be consolidated for trial if they "involv[e] a common question of law or fact[.]" The court's unchallenged Rule 20 finding that a "question of law or fact common to all of th[e claims]" precludes a contention by Westgate that no "common question of law or fact" is involved.

instead of holding separate trials or at least consolidating claims with similar fact patterns.”).

Rule 24(a)(9) applies to *any* factual determinations, including those of a trial judge exercising its discretion. Westgate has not mentioned, let alone marshaled, any evidence supporting the trial court’s determinations that common questions of fact or law existed. *Steele v. Board of Review of Indus. Com’n of Utah*, 845 P.2d 960, 962 (Utah 1993). (“If a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment.”)

No argument can be made that the trial court’s factual determinations were clearly erroneous, or that any abuse of discretion occurred. By the time of trial, the claims had been narrowed to those involving a single premium, the bogus travel certificate. CPG had the same theory of the case as to each consumer, that Westgate’s fraud was complete at the moment the sales presentation ended, because that was when the “bait and switch” occurred: Westgate held out a certificate it had misrepresented as worth \$500 but knew was actually worthless.

At that point, the only dissimilarity is one that would exist in virtually all consolidated cases (and in any case with more than one claimant): the specific amount of damages to which each claimant is entitled. Even that question involved relatively little variation in this case. Westgate set the floor for damages by acknowledging in writing that the value of the Anaheim trip, had it been legitimate, was \$500. (*See* pp. 18-19, *supra*.) Added to that were out-of-pocket expenses and other minor, individualized damages. (R. 4774-4802.)

Having sat through ten days of trial, the trial court reaffirmed its original determination that the claims shared common issues – and, indeed, were “strikingly similar”:

The court already meticulously weighed and balanced the factors in deciding whether to consolidate the claims of CPG. Westgate has presented no new arguments or case law justifying reconsideration of this careful decision. Certainly, the striking similarity of the Consumer claims supported the court’s decision to consolidate. This determination comports with judicial economy and efficiency and avoids unnecessary costs and delays. Further, CPG had a right to show evidence of knowledge, intent and plan, pursuant to Rule of Evidence 404(b). Westgate complained of the ‘mind-numbing redundancy’ of CPG’s witness testimony. Separate trials for each individual claim would have been no less redundant; perhaps it would have more redundant because witnesses may have been called to re-testify in each and every case. The court was not and is not unmindful of the potential prejudice toward Westgate of requiring a jury to consider many similar fraudulent acts committed against the Consumers in a single trial. Westgate argues that its right to defend itself was sacrificed to judicial economy. This is not true. Westgate still had the right, and exercised that right, to defend itself against the claims of CPG. Just because Westgate lost at trial did not mean that it was not afforded an essential trial right. The court finds that, on balance, the right decision (to consolidate) was made, and the court will not disturb that decision.

(R. 5805-5806.) Westgate itself complained that the consumers’ trial testimony consisted of “mind numbing redundancy,” conceding the similarity of claims. (R. 4918.)

Westgate mentions none of the foregoing, nor even the trial court’s rationale for consolidation. To the contrary, it misrepresents the basis for the court’s consolidation order. Westgate says:

The stated purpose of consolidation was to ‘enhance the likelihood of settlement and resolution of’ the remaining 485 claims. (R. 2780.) To facilitate this, over Westgate’s objections, CPG was allowed to try claims with disparate underlying facts so that ‘each area [could] be appropriately adjudicated on a small scale’ and to give rise either to ‘law of the case, res

judicata . . . or a strong persuasive precedent to apply to the remaining claims.’ (R. 2778.)

(Westgate Brief, pp. 17-18.)

The partial quotations are not from any ruling of the judge, as Westgate implies. Instead, they are lifted from a memorandum filed by CPG in 2005, three years before the consolidation. (In fact, Westgate does not even fairly convey what *CPG* said. See pp. 6-7, *supra*.) Before trial, CPG reiterated that it was not seeking to bind Westgate in future trials to the results of the first trial. (R. 4551). Westgate thus is flatly misleading the Court when it claims that “CPG was allowed to try claims with disparate underlying facts so that ‘each area [could] be appropriately adjudicated on a small scale’ and to give rise either to ‘law of the case, res judicata...or a strong persuasive precedent to apply to the remaining claims.’”

A party who fails to fairly characterize a trial court’s rulings obviously has not shown that the court abused its discretion. Consolidation is quite context-specific:

Consolidation has been described as a valuable and important tool of judicial administration. When properly used, it can streamline the pretrial proceedings, expedite the trial, avoid duplication of effort, and promote consistency. . . . In order to consolidate actions for any purpose, the court must first find that there are common questions of law or fact. Beyond that threshold showing, courts consider and weigh a variety of factors to determine whether consolidation is appropriate, including convenience, judicial economy, efficiency, and any prejudice.

1 *Federal Rules of Civil Procedure, Rules and Commentary*, Steven S. Gensler, Rule 42 (citations omitted); *see also Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964) (court could consolidate three separate condemnation proceedings involving three separate owners if it so chose); *Raggenbuck v. Suhrmann*, 7

Utah 2d 327, 325 P.2d 258 (1958) (consolidation of 11 actions involving 19 plaintiffs for trial was within court's discretion.)

Westgate also has failed to establish that it was prejudiced by any alleged abuse of discretion in any event. Each claimant was required to prove each element of his or her claim. The jury was so instructed (R. 5667: Instruction 35: 2379-80), and the special verdict required individual findings for each set of consumers. The court likewise evaluated the sufficiency of evidence on an individualized basis, granting a directed verdict as to one couple, George and Darla Serassio, for example, due to insufficient evidence. (R. 5664: T. 1688.)

Although Westgate argues that certain steps were not taken that were “necessary to protect against unfair prejudice,” its only example is a case in which jurors were given “a notebook, tabbed for each plaintiff and each defendant, and during the presentation of evidence the jurors would be given time, as necessary, to make notes.” (Westgate Brief, p. 19.) Westgate says that, “in stark contrast to the special care taken” in that case, the trial court here only “instruct[ed] jurors that they could take notes but cautioned them not to ‘overdo it and let your note taking distract you from following the evidence.’” *Id.*, 20.

That argument is borderline frivolous. Letting jurors take notes with an instruction to follow the evidence rather than give them tabbed notebooks (which Westgate never suggested), if even to be criticized, is “sufficiently inconsequential that . . . there is no reasonable likelihood that the error affected the outcome of the proceedings.” *Lee v. Langley*, 2005 UT App 339, ¶ 16, 121 P.3d 33; *see also City of Hildale v. Cooke*, 2001 UT 56, ¶ 30, 28 P.3d 697.

Westgate argues that it was prejudiced because, “[a]s predicted by Westgate before trial, because the consumers each testified as to their own interactions with Westgate, the jury heard evidence about other alleged conduct it would not have heard had the cases been tried alone.” (Westgate Brief at 10.) Westgate’s entire analysis of this ruling or of U.R.E. 404(b) is a one sentence assertion that the evidence “tended only to show that Westgate’s actions toward any particular consumer were in conformity with Westgate’s general character.” (*Id.*, p. 20.) No, it showed that Westgate’s actions were conformity with Westgate’s general *scheme*, and its general *intent*.

As CPG’s counsel argued, even if the claims had been tried one at a time, evidence of other incidents would have been admissible, if not *required*, to establish elements of fraud such as intent, lack of mistake, etc.:

MR. HUMPHERYS: . . . More importantly, let’s assume we were to take one case at a time. What Counsel has overlooked and has not correctly stated, and that is in order to establish fraud we have to be able to show knowledge and intent, and that is typically not shown by one incident, unless it is absolutely clear.

On the contrary, fraud and intent and corporate knowledge, which is a key factor in this, is shown by repetitive actions and the actions of the company toward those problems, because they then begin to show the knowledge of the company, the intent and the plan of the company to continue on.

So even if this were bifurcated to be tried separately, we would still need to have the additional witnesses coming in that represent other claims to be able to show and present the intent and plan of Westgate to continue this fraud.

(R. 5658: Transcript, September 30, 2008, Hearing, p. 77; *See* U.R.E. 404 (b) (evidence of other acts is admissible to prove “motive, . . . intent, preparation, plan, knowledge . . . or absence of mistake or accident”) The trial court ruled that “CPG had a right to

show evidence of knowledge, intent and plan, pursuant to Rule of Evidence 404(b)” (R. 5805-5806). Again, Westgate has not acknowledged or addressed this ruling on appeal.

Westgate argues, in a single sentence: “In separate trials, Rule 403 would have prevented introduction of that evidence.” (Westgate Brief, p. 20.) Why? No analysis is provided, and there is nothing to which CPG can respond. Under U.R.E. 103(a), “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected” Instead of attempting to establish prejudice, Westgate asks the Court to presume it from the fact that it lost. (Westgate Brief, p. 12 (“In support of its motion for JNOV, Westgate again raised arguments concerning consolidation and pointed out that the result of trial demonstrates the prejudice of consolidation.”); p. 23 (“The punitive damages awards confirm that the unnecessary risk of prejudice translated into actual prejudice.”).

In criticizing the conduct of trial, Westgate says the court failed to “instruct the jury in a way adequate to counteract the merging of all the testimony to consider all the claims.” (Westgate Brief, p. 11; also *id.* (“These instructions were insufficient to mitigate the prejudice”)). But Westgate never objected to the jury instructions, nor offered any instructions of its own that were rejected. In Utah, a party who stipulates to, fails to object to, and/or fails to offer its own jury instruction has waived any right to claim error in the instructions. *See* p. 60, *infra*.

In short, while Westgate might have preferred dragging consumers back into court, over and over, to tell the same story to jury after jury, Rule 42 allowed the court to avoid that waste of time and resources. No error has been shown.

II. THE TRIAL COURT DID NOT ERR IN DENYING WESTGATE'S MOTION FOR NEW TRIAL OR REMITTITUR OF THE PUNITIVE DAMAGES.

Westgate's second argument on appeal is that the punitive damages award infringes upon the federal constitution, and resulted from passion and prejudice. (Westgate Brief, pp. 23-46.) While the record is review *de novo* when punitive damages are at issue, parties are not thereby relieved of their briefing obligations under the Rules of Appellate Procedure. A *de novo* standard of review does not mean that parties may simply send the record up and expect the Court to start sifting.

Under Rule 24(a)(7), Westgate was required to submit "a statement of the facts relevant to" the punitive damages issue, supported by citations to the record. Further, it was required to recite such facts in the light most favorable to the jury's verdict. *Fairfax Realty*, 2003 UT 41, ¶ 3. Westgate has done neither. *See Wright v. Westside Nursery*, 787 P.2d 508, 512 (Utah Ct. App. 1990) (declining "to make a thorough review of the whole record, which fills a box the size of an orange crate The very purpose of such devices as the 'marshaling' doctrine and R.Utah.Ct.App. 24(a)(7), requiring that all references in brief to factual matters 'be supported by citations to the record,' is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties"); *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Apart from refusing to acknowledge any evidence supporting the verdict, or to recite any facts in a light favorable to the verdict, Westgate's challenge to the punitive damages claim fails on several other grounds.

A. The verdict is not contrary to Utah state law.

Westgate argues that punitive damages should be reduced to a 2-1 ratio under Utah state law, citing *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 809 (Utah 1991) and *Diversified Holdings, supra*. No argument is made under the state constitution.

It is logical to begin the analysis of punitive damages by reviewing what the jury was told to consider in awarding such damages. Westgate stipulated to these instructions:

[75.] If you find that punitive damages are proper in this case, you may award such sum as, in your judgment, would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and not the measure of actual damages. (R. 5668: 2636-37)

[76.] If you award punitive damages against Westgate Resorts, in determining the amount of the award, you should take into account these factors: (i), the relative wealth of Westgate Resorts; (ii), the nature of the alleged misconduct; (iii), the facts and circumstances surrounding such conduct; (iv), the effect of the conduct on the lives of consumers and others; (v), the probability of future recurrence of the misconduct; (vi), the relationship of the parties; and, (vii), the amount of actual damages awarded. (R. 5668: Tr. 2637-38 [the "*Crookston*" factors].)

Punitive damages reflect the amount of money that a factfinder concludes is needed to punish a defendant's misconduct, and to deter others from engaging in similar activities. In this case, the jury concluded that it would take \$1,000,000 to send that

message to Westgate. Application of the seven *Crookston* factors (which “share some similarities” with the federal *Gore* factors, *Fairfax Realty*, ¶ 31) supports the jury’s conclusion.

1. Wealth

With respect to wealth, the jury heard evidence that Westgate Resorts’ net wealth was about \$500,000,000.00 in 2007. Westgate’s CEO testified that the company’s net equity had deteriorated substantially in 2008, but that the company intended to seek bailout money from the federal government. During the year before trial, Westgate Resorts generated approximately \$1 billion in gross revenues. Westgate Resorts at the Canyons was a very profitable part of Westgate’s operations. Within the first eight months, Westgate Resorts had generated \$15 million in revenue from the resort, after which it remained steady or increased, annualized between \$20 and \$22 million in revenue. (*See* p. 13, *supra*.)

“An extremely wealthy defendant may require a larger award of punitive damages to be deterred from further misconduct[.]” *Diversified Holdings*, ¶ 15. Westgate’s brief acknowledges this Court’s previous citation to the Seventh Circuit’s observation that “a typical punitive damages award may be around one percent of the defendant’s net worth.” *Fairfax Realty*, 2003 UT 41, ¶33 (citing *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990)). Although one might argue that the punitive damages in this case were too low under that standard, it is certainly understandable, based on the Westgate’s relative wealth, that the jury believed a large number would be required to meaningfully punish Westgate.

2. Nature of misconduct

The nature of Westgate’s misconduct, the second prong of the *Crookston* test, was a longstanding, highly profitable, deliberately fraudulent scheme. “Deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive” support more substantial awards, as do acts involving ‘trickery and deceit.’” *Fairfax Realty*, ¶ 35 (citations omitted).

Ignoring the jury’s finding of fraud, its own project manager’s acknowledgement that the Anaheim Cert was intentionally designed for “breakage,” and all testimony by the consumers about their experiences, Westgate describes CPG’s claims against it as involving nothing more than “the difficulty some people experienced in redeeming the \$500 certificates—certificates provided to them by an independent contractor hired by Westgate.” (Westgate Brief, p. 2.; *also id.*, p. 4 (“Some people found that the independent contractor made it difficult to redeem the certificates.”).)

Adding insult to injury, Westgate argued at trial that, even though its letter specifically promised “an Anaheim California vacation,” a “trip,” a “vacation package” including air fare and accommodations, Westgate’s only obligation to the consumers was to provide a “certificate” for a vacation, not an actual vacation. (*See* R. 5664: Tr. 1672; R. 5667: Tr. 2505.)

Westgate’s continued deflection to the “independent contractor” disregards evidence from which the jury could have found Westgate itself blameworthy, rather than simply a hapless victim of some unrelated entity. *E.g.*, pp. 14-20, 21-23, 25-27, *supra*; R.

5668: Tr. 2578-2581 (Westgate counsel acknowledging that the jury might have based punitive damages on the misconduct of Westgate's own employees, not of agents).

Westgate's counsel told the jury that it could find against Westgate either for the actions of its employees, or, if certain elements were met, for the actions of an agent. (R. 5668: T. 2655-2656.) Either way, the jury found it appropriate and necessary to assess punitive damages against Westgate.

3. Facts and circumstances surrounding the misconduct

The next prong, the facts and circumstances surrounding the misconduct, is summarized in the statement of facts above. In essence, Westgate promised people something it had no intention of providing. When it got caught, it attempted to shift blame to others, including the consumers themselves and the attorneys who have worked for seven years to expose the misconduct. (R. 5668: Tr. 2662 (Phase II) (Epstein: "The probability of future recurrence, zero. There's nothing that can be achieved, other than the lawyers and others making profits that are off of the back of these consumers to awarding a large amount of punitive damages when there's nothing to punish, when there's no future conduct to deter and when the message is not going to be heard by anybody.").)

4. Effect of misconduct on the consumers and others

The effect of Westgate's conduct on the consumers and others is what one would expect from being victimized by a fraudulent scheme. Although the jury chose not to award general damages, the consumers' testimony regarding their frustrations, disillusionment, and anger is properly considered on this element. Every time intentional

fraud is committed by a well-known entity that portrays itself as a solid citizen, consumers lose more confidence in the integrity of the corporate world and in their fellow residents.

5. Motive

The sole motive behind the scheme was profit. It may not have escaped the jury's attention that Westgate at the Canyons was the only resort to use the "Anaheim vacation" ploy, and was also one of the more successful locations. It is also reasonable to infer that, because of the relatively low dollar amount at issue, Westgate assumed that no consumers could afford, or would have the fortitude, to do anything in response to being defrauded.

6. Likelihood of recurrence

As the trial court observed, the jury likely concluded that the probability of recurrence is high. (R. 5804 "[I]t was proper for the jury to infer from the evidence that Westgate had a calloused attitude toward the Consumers, and that such attitude means that Westgate would be willing to defraud others.") Several considerations support that conclusion.

Remorse – or lack thereof – is a predictor of recidivism. *See Campbell v. State Farm Mut. Auto. Ins. Co. (Campbell IV)*, 98 P.3d 409, 2004 UT 34, ¶¶ 29, 35 (after noting that State Farm had "not voiced so much as a whisper of apology or remorse," observing, "We . . . find ample grounds to defend an award of punitive damages in the upper range permitted by due process based on our concern that State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells") (*citing Diversified Holdings*) (identifying

chief aggravating factor in an award of punitive damages as “a lack of remorse increasing the likelihood of recidivism”)); *Burton Lumber & Hardware Co. v. Graham*, 186 P.3d 1012, 2008 UT App 207, ¶ 27-28 (one factor supporting punitive damages award was that defendant “has never shown remorse for his actions[.]”)

In this case, both the jury and the court could properly consider the utter refusal of Westgate or any of its witnesses to acknowledge any impropriety, at trial or afterward, and its continued insistence of blaming the consumers themselves. “Where is the deplorable behavior?” Westgate lamented in its post-trial motions. (R. 4918.) It has been punished for “acts of unquestioned prudence and good business practice,” it said. *Id.* This utter lack of contrition – indeed, outright combativeness – was replete throughout Westgate’s post-trial briefing. Even after hearing consumer after consumer lay out their tribulations, Westgate refused to acknowledge even that *MDI or NRC* committed misconduct. *See* R. 4917 (arguing that Westgate “has been held accountable to the tune of \$1,000,000 for the *perceived* wrong doing of others”) (emphasis added).

Even now, Westgate seeks to smear the victims by claiming that “several were savvy enough to try to ‘game the system’ by claiming their gifts without even considering the purchase of a Westgate timeshare, a breach of the covenant of good faith and fair dealing.” (Westgate Brief, p. 40). But Westgate’s invitation (Confirmation Letter) expressly told consumers they had no obligation to purchase:

An informative and relaxing timeshare sales presentation that lasts approximately 90 minutes. There is absolutely no purchase required to obtain your gift. This is our way of saying thank you for joining us and sharing your valued time and opinions about our resort. At the end of your presentation you will receive your choice of [gift]...

It is incredible – but typical – for Westgate to attack consumers for believing exactly what Westgate told them.

Westgate argued to the trial court that “[r]ecidivism is clearly unlikely here because Westgate completely ceased offering the Anaheim Cert in 2002 and has no plans to use such a certificate in the future.” (R. 4872.) Significantly, however, it only stopped using the highly profitable certificate when it got caught, *i.e.*, when it learned that this lawsuit was imminent. (*See* pp. 25-26, *supra*.)⁹

7. Amount of actual damages awarded

Westgate devotes most of its attention to the seventh element that the jury was instructed to consider, *i.e.*, the amount of actual damages awarded. *Crookston* does indicate that, as a starting point, a punitive damage award exceeding a ratio of 3 to 1 should be more closely scrutinized than one below that ratio. However, the *Crookston* ratios have little or no application to cases in which compensatory damages are small.

Before addressing that key point, an initial observation is appropriate regarding the ratio. Although it is not dispositive, Westgate has made an odd argument that the ratio denominator is only \$242, not \$7,242. (Westgate Brief, p. 5, 24 n. 5.) To get there, it asks the Court to subtract the value of the promised trip itself (\$500). Westgate argues:

⁹ Westgate’s citations (R. 5668: T. 2613) did not preclude future use of such certificates; the witness actually said that Westgate does not “now” use air-inclusive certificates, and that it does not have plans “at this point in time” to use certificates on which it does not control the fulfillment process. (R. 5668: T. 2614-2615.) In any event, the jury was not required to believe the convenient testimony of Westgate’s representative on this point.

The court distinguished contract and fraud damages in the special verdict form when it awarded pre-judgment interest under Utah Code section 15-1-(2) only as to “each \$500 award.” (R. 4818.) Under section 15-1-1, pre-judgment interest is appropriate only for damages resulting from breach of contract, not from tort. Utah Code Ann. § 15-1-1(2) (setting pre-judgment interest at 10% for claims where the contract does not specify a different rate). Thus, \$500 of each of the 15 claims represents only contract damages.

(*Id.*, p. 24 n. 5.)

Westgate misreads (and misquotes) Section 15-1-1. The statute provides that, “unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.” There is no contract between the parties specifying a different rate; hence, prejudgment interest is 10 percent.

Westgate claims that pre-judgment interest is only available for contract claims, not torts, but a century of Utah case law says otherwise: “Prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures. Prejudgment interest is appropriate when ‘the loss has been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages.’” *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 210 P.3d 263, ¶51 (Utah 2009); *Fell v. Union Pacific Railway Co.*, 32 Utah 101, 88 P.1003 (1907).

Westgate’s counsel admitted at trial, “[W]e have testimony as to the value of the trip that was supposedly represented, we have testimony and evidence of the receipt showing that the value or some value, the \$500, was attributed to it. We also have a

witness, an expert, who testified that, in fact, the value was far less. . . . The expert has said that the value of what they actually received was far less, say zero.” (R. 5663: T. 1637.) A proper measure of economic loss in fraud cases is the benefit of the bargain, the difference between the value of the item received (\$0) and the value the item would have had if the defendant’s representations had been true (\$500). *Lamb v. Bangart*, 525 P.2d 602, 609 (Utah 1974).

In any event, as discussed further *infra*, the relevance of the “ratio” consideration dissipates when in cases with small compensatory damages. As this Court has recognized, there are some similarities between the “*Crookston* factors” for purposes of claimed excessiveness under U.R.Civ.P. 59 and the “*Gore* guideposts” for purposes of claimed excessiveness under the Constitution. *Fairfax Realty, supra*, ¶ 31. It is therefore instructive to note that, in the context of constitutional analysis, virtually all courts, including the United States Supreme Court, have agreed that the “ratio” factor has limited or no application in cases where the compensatory damages are small.

Not surprisingly, ratios of punitive-to-compensatory damages awards are often hundreds or thousands to one when the compensatory award is small. Defendants who seek to apply a single-digit ratio to low compensatory damages have consistently been rebuffed, largely because of the absurd and counterproductive results that would obtain. In *American Family Mutual Insurance Co. v. Miell*, 569 F.Supp.2d 841 (N.D. Iowa 2008), for example, the defendant argued that only a single-digit ratio was permitted even though the plaintiff had only been awarded \$1 dollar in compensatory damages. That

outcome would be both illogical and contrary to the Supreme Court's recent pronouncements, the court observed:

If a single digit multiplier was applied in this case, Plaintiff would receive \$1.00 in nominal damages and, at most, \$9.00 in punitive damages. This somewhat ridiculous outcome demonstrates why multipliers in these types of cases are not appropriate. As the Supreme Court recently stated in *Exxon Shipping Co. v. Baker*, "the consensus today is that punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct." --- U.S. ----, ----, 128 S.Ct. 2605, 2621, 171 L.Ed.2d 570 (2008). "Heavier punitive damages awards have been thought to be justifiable when wrongdoing is hard to detect . . . , or when the value of injury and corresponding compensatory award are small" *Id.* at 2622.

Id., 578 F.Supp.2d at 1284 (ellipses in original).

While Westgate cites *Exxon* in its memorandum, it does not mention the clear distinction drawn by the United States Supreme Court in that case between cases with large compensatory damages (\$507 million in *Exxon*), wherein a smaller ratio is appropriate, and cases with small and/or difficult to detect damages, in which larger ratios are appropriate.

Other courts have consistently recognized this distinction, and the corresponding limited relevance of "ratios" in low-damage cases. With apologies for the lengthy string cite, see, e.g., *Saunders v. Branch Banking and Trust Co. of Virginia*, 526 F.3d 142, 154 (4th Cir. 2008) (involving a single violation of the Fair Credit Reporting Act where the plaintiff received \$1,000 in statutory damages and \$80,000 in punitive damages. In upholding an 1:80 ration, the court stated the "Supreme Court has long recognized that greater ratios may comport with due process, however, when reprehensible conduct results in only a small amount of economic damages."); *JCB, Inc. v. Union Planters*

Bank, NA, 539 F.3d 862, 876-77 (8th Cir. 2008) (involving a single trespass where the plaintiff received nominal damages and \$108,750 in punitive damages. The court reasoned that “[p]unitive damages may withstand constitutional scrutiny when only nominal or small amount of compensatory damages have been assigned, even though the ratio between the two will necessarily be large.”); *Mendez v. County of San Bernadino*, 540 F.3d 1109, 1121 (9th Cir. 2008) (justifying a ratio of 2,500 to 1, for a single civil rights violation. In justifying the ratio, the court cited to the United States Supreme Court decision of *Campbell* where it states “ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a *small amount of economic damages*.” 538 U.S. 408, 425 (2003) (emphasis added)); *Myers v. Workmen’s Auto Insurance Co.*, 140 Idaho 495, 95 P.3d 977, 992 (2004) (upholding \$300,000 punitive damage award on compensatory damages of \$735 (ratio: 408 to 1); “It should be observed that ratios of compensatory damages and punitive damages are of no real assistance in this case were only nominal damages are sought. A punitive damage award tied to some ratio would almost certainly have none of the salutary effects sought to be achieved by a punitive damage award”); *Diversified Water Diversion, Inc. v. Standard Water Control Systems*, 2008 WL 4300258 (Minn.App. 2008) (“The nature of the relationship between a punitive- and compensatory-damage award when only nominal compensatory damages are found differs from the circumstances presented in *Gore* and *Campbell*. Taking their cue from this fact and the flexibility allowed by the Supreme Court in *Gore* and *Campbell*, numerous courts from other jurisdictions have upheld comparatively significant punitive-damage awards even when

only nominal compensatory damages were awarded. These courts have generally justified this result by significantly deemphasizing, if not disregarding, the importance of the proportionality guidepost when nominal compensatory damages are found”; upholding \$30,000 punitive damage award with only \$1 in compensatory damages) (ratio: 30,000 to 1), and cases cited; *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1338-1339 (11th Cir. 1999) (upholding \$4.35 million punitive damage award on \$47,000 compensatory damages (ratio: 92 to 1); “substantial punitive damages are warranted for deterrence and, since the actual damages are quite small, must be somewhat disproportionate to the actual damage award”). *See also Ellis v. La Vecchia*, 567 F.Supp.2d 601, 610-611 (S.D.N.Y. 2008) (higher ratio is appropriate with small damages; upholding \$2,600 punitive damage award on \$1 compensatory damages) (ratio: 2600 to 1); *Williams v. Kaufman County*, 352 F.3d 994, 1014, 1016 (5th Cir. 2003) (noting that a “‘ratio analysis’ cannot be applied effectively” in cases with low damages; upholding \$15,000 in punitive damages on \$100 compensatory damages) (ratio: 150 to 1); *Hadelman v. DeLuca*, 35 Conn. L. Rptr. 60, 2003 WL 21493968 (Conn. Super. 2003) (upholding punitive damage award of \$150,000 on award of zero compensatory damages (ratio: infinite); where little or no compensatory damages are awarded, “the ratio will always be infinite or a huge multiple”), and cases cited.

The damages in this case were roughly \$500 for each set of Consumers, for a total compensatory award of \$7,242.00. Westgate previously claimed that a \$1 million punitive damage is “breathtaking” (R. 4904), but it would have been more breathtaking if the jury had found an intentionally fraudulent scheme with multiple incidents over time

by a billion-dollar company, yet only awarded \$14,484 in punitive damages, not even a blip on Westgate's radar. Such an award would have been .00003 (.003 percent) of Westgate's net worth in 2007, and .0007 of Westgate's yearly sales at the Resort.¹⁰

If its punitive damages exposure were limited as Westgate urges, it would have been virtually impossible for Westgate's misconduct to be brought to light, or to an end. As Judge Posner observed regarding a low-damage claims in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.2d 672, 676-677 (7th Cir. 2003), had the defendant's similar argument been accepted,

the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant's aggregate net worth of \$1.6 billion becomes relevant. . . . Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.

As it is, the punitive damage award in this case is less than two-tenths of one percent of Westgate's net wealth as of 2007, and between one-half and three-quarters of one percent of Westgate's claimed wealth as of the date of trial. It is one-tenth of one percent of Westgate's annual gross revenues, and only 5 percent of the annual gross revenues just at the Canyons resort.

When viewed from that perspective, the award actually seems low – less than one percent of a company's net equity (assuming no bailout funds) does not seem likely to deter highly profitable fraudulent conduct. Stiffer punches have been upheld by this

¹⁰ At 3-1, \$21,726 in punitives would have been .000043 of Westgate's net worth in 2007, and .001 of Westgate's yearly sales at the Resort.

Court. See, e.g., *Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, ¶¶ 27-28, 186 P.3d 1012 (upholding punitive damage award of \$34,000 against defendant whose annual income was \$40,000 and net worth \$12,000); *Fairfax Realty, supra* (upholding punitive damages award equaling 15 percent of the defendant’s wealth); *Diversified Holdings* at ¶33 (reducing a punitive damage award to 2.86% of the defendant’s net worth).

Westgate argues that this case is similar to *Diversified Holdings*, in which the Court reduced a punitive damage award. Punitive damages are inherently case specific, however, and the concerns in that case are not present here. For example, in *Diversified Holdings*, only a single transaction was involved. *Id.*, ¶ 2. The award was 10 percent of the defendant’s net worth. ¶ 15. The victim was “a corporation, represented in [the] transaction by two men with substantial experience in both business and real estate transactions.” ¶ 16. The defendant’s fraud was directed at only a small number of people. ¶ 20. This case is not *Diversified Holdings*, and the jury’s punitive damages verdict is not excessive under Utah law.

B. The punitive damages award does not violate the United States constitution.

1. Gore factors

Because significant overlap exists between the state (*Crookston*) and federal (*Gore*) factors, much of the foregoing discussion bears on the federal analysis as well.

The U.S Supreme Court has set forth three “guideposts” for aiding the Court in reviewing constitutional challenges to punitive damages awards: 1) the reprehensibility

of the conduct; 2) the ratio of punitive damages to compensatory damages; and 3) civil penalties that could be assessed for the misconduct under state law. *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996).

Westgate's principal focus is, again, the second factor, mathematical ratio between the total compensatory damages award and the total punitive damages award. That ratio, Westgate says, is 138 to 1 (or 4100 to 1 if the \$500 damages for the vacation were carved out). (The error of that contention is addressed, *supra*.) As discussed above, however, punitive damages awards in cases involving low compensatory damages are consistently upheld with far greater ratios. *See* pp. 50-52, *supra*.

The other two guideposts do not aid Westgate, either. "The most important indicium of the reasonableness of a punitive damages award is the reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.408, 419, 123 S.Ct. 1513 (2003). In assessing reprehensibility, the Court should consider, among other things, whether "the conduct involved repeated actions or was an isolated incident," and whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* Westgate's conduct in this case falls within both categories. It was deliberate deceit, and not an isolated incident. *See Exxon, supra* (repeatedly emphasizing that there was no evidence of profit motive or intentional misconduct in that case).

In its defense, Westgate can only claim that the consumers were not financially vulnerable, that there was no fiduciary relationship, and that, somehow, "Westgate's conduct should be construed to involve isolated incidents in light of the fact that 500 individual claims are being prosecuted." (Westgate Brief, p. 31.) Only by ignoring

virtually every piece of evidence at trial can Westgate claim that a resort-wide scheme involving 2,300 identical fraudulent certificates was an “isolated” incident.¹¹

The third *Gore* guidepost is the range of civil penalties that could have been imposed under state law for the misconduct. Westgate’s memorandum mentions a few: the Utah Consumer Sales Practice Act, which would allow for \$2,000 per claim; the Division of Consumer Protection could fine Westgate up to \$1,000; the Utah pattern of Unlawful Activities Act, which would allow for twice the damages sustained (plus attorney fees, not mentioned by Westgate).

Glaringly absent from Westgate’s recitation of statutory penalties is Utah Code Ann. § 57-19-3(a), a “death penalty” for timeshare companies who engage in fraudulent marketing tactics. Section § 57-19-3(a) specifically provided (and still provides) that the registration of a timeshare company to do business in Utah may be revoked if “the developer’s advertising or sales techniques or trade practices have been or are deceptive, false, or misleading[.]” That would have cost Westgate \$20 million per year, far more than the jury’s punishment. *See* p. _____, *supra*. Westgate cannot claim that “nothing in Utah statutes provided notice of the possibility of a \$1 million penalty” (Westgate Brief, p. 33) when it knew that engaging in “deceptive, false, or misleading” sales tactics could have multi-million-dollar consequences.¹²

¹¹ Westgate’s implications that the consumers were sophisticated and/or wealthy are also exaggerated. (Westgate Brief, pp. 13, 31.) Westgate targeted consumers with \$50,000 in total family income, hardly in the same league as Westgate. (Trial Exh. S.)

¹² Westgate suggests several times that, if the court “extrapolated” from this verdict, it could view Westgate as having been penalized \$33 million. In this context, extrapolation is synonymous with speculation: It assumes that punitive damages would be sought in

2. Harm to others

Westgate argues that the jury's verdict runs afoul of *Philip Morris USA v. Williams*, 459 U.S. 346, 349, 353-355 (2007). *Philip Morris* said that, while a jury can be informed of and consider harm to others in evaluating reprehensibility, it cannot punish a defendant for harm inflicted upon strangers to the litigation. *Id.* at 353. Westgate argues: "Where the likelihood of punishing third parties is present, it is constitutionally inadequate for a trial court to rely on that language alone to ensure that the jury was 'not asking the wrong question, *i.e.*, seeking not simply to determine reprehensibility, but also to punish for harm caused to strangers.'" (Westgate Brief, p. 36.)

The problem with Westgate's argument is threefold. First, as noted above, the jury instruction that Westgate says created this "likelihood of punishing third parties" is one to which Westgate *stipulated*. A party cannot complain about an instruction to which it stipulated, or failed to object.

Relatedly, Westgate is precluded from challenging the verdict on this ground because it did not request a "*Philip Morris*" instruction. *Miell, supra*, 569 F.Supp.2d at 850-851 (defendant cannot challenge verdict on *Philip Morris* grounds unless it requested a jury instruction on that issue); *Kauffman v. Maxim Healthcare Services, Inc.*, 509 F.Supp.2d 210, 214-215 (E.D.N.Y. 2007) (same; noting that *Philip Morris* says a trial

subsequent trials, that the trial court would submit such damages to the jury, that Westgate would not be permitted to tell the jury about the prior award, etc. While it is understandable that Westgate would prefer to challenge a much bigger but non-existent award, the only judgment before the court is for \$1 million.

court must, “upon request,” provide such an instruction); *Rinehart v. Shelter General Insurance Co.*, 261 S.W.3d 583, 597-598 (Mo. App. 2008), application for transfer to Supreme Court denied; *Modern Management Co. v. Wilson*, 997 A.2d 37, 53 (D.C. App. 2010); *Fairfax Realty, supra*, ¶ 30 n. 12 (right to constitutional review of a punitive damage award “may be waived or forfeited like many other constitutional rights.”).

Enforcing these established rules of waiver is important in several respects. Both CPG’s counsel and the court relied on Westgate’s stipulation in their argument and rulings. (*See, e.g.*, R. 5668: T. 2646-2649.) If the instruction were erroneous as Westgate apparently contends, it was invited error, and allowing Westgate to raise the issue now would severely prejudice CPG. *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 12, 163 P.3d 615 (“The invited error doctrine prevents a party from taking ‘advantage of an error committed at trial when that party led the trial court into committing the error.’”).

“[U]nder the doctrine of invited error, we have declined to engage in even plain error review when ‘counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].’” *State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171, 1175 (alterations in original) (citation omitted). “Our invited error doctrine arises from the principle that ‘a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.’” *Id.* at ¶ 15 (citation omitted).

More fundamentally, the United States Supreme Court has recognized that state courts have an important interest in enforcing their established rules. An example is the

Philip Morris case itself. In 2007, the Supreme Court vacated a large punitive damage award against Philip Morris, holding that the Fourteenth Amendment prohibits the state from using punitive damages to punish for harms to nonparties. 549 U.S. 346.

On remand, the Oregon Supreme Court noted that “there is a preliminary, independent state law standard that we must consider, before we address the constitutional standard that the United States Supreme Court has articulated.” *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255, 1260. The court concluded that under state law, Philip Morris waived its right to challenge the trial court’s instruction of the jury, because it failed to proffer an instruction consistent with the requirements of Oregon law. *Id.* at 1260-1263. Accordingly, it affirmed the original punitive damage award. *Id.* at 1264.

Philip Morris filed a petition for certiorari, which the United States Supreme Court initially granted. The parties’ briefing centered on whether the Oregon Supreme Court was permitted to apply its own waiver rules to a federal constitutional challenge. http://www.scotuswiki.com/index.php?title=Philip_Morris_USA%2C_Inc._v._Williams (accessed December 17, 2010). (Philip Morris also argued that the waiver rule was not “firmly established” or “regularly followed.” *Id.*)

Oral argument centered around the same inquiry, a state’s legitimate interest in applying its own, well-established principles of waiver, even if doing so allegedly sustains a federal constitutional violation. *See* Addendum Exh. 3. After argument, the court dismissed certiorari as improvidently granted. *Id.*

Unlike *Philip Morris*, where the cited rule had rarely been invoked, there is no debate here as to the vitality of Utah's waiver rules. Utah appellate courts have held dozens of times in recent years alone that a party who stipulates to a jury instruction, who fails to object to an instruction, or who fails to proffer its own instruction cannot thereafter claim error on appeal. See list of cases attached hereto as Addendum Exh. 4. In light of the prejudice resulting from invited error, CPG respectfully submits that applying these settled principles to Westgate's argument is critical.

CPG also notes that, even without a proffered instruction from Westgate, the trial court essentially gave the jury guidance on its own. The entire exchange that occurred during Mr. Humpherys' closing argument (contrasted with Westgate's excerpt) makes clear the limited purpose for which the Court permitted reference to other consumers:

At the point of closing argument at which Westgate objected, counsel was addressing the fourth of the seven *Crookston* considerations delineated in the jury instruction to which Westgate had stipulated. See R. 5668: T. 2646-2647 (Mr. Humpherys: "In the Jury Instruction, Your Honor, one of the things that the jury must consider is item Number 4, the effect of the conduct on the lives of the consumers and others. I'm addressing that very thing.")).

In front of the jury, Westgate asked the Court whether counsel would be allowed to "argue that punitive damages can be awarded for the entire group of people that might have been affected by this particular premium incentive program; is that right?" (R. 5668: T. 2648 (Epstein).) The Court then stated that counsel's argument would be limited to the items in the stipulated jury instruction: "He may argue the facts and

circumstances surrounding the conduct, the nature of the alleged conduct, the relative wealth of Westgate Resorts, the effect of the conduct on the lives of the consumers and others, the probability of future recurrence and misconduct, the relationship of the parties and the amount of actual damages awarded. As long as he's confined to that, that's the Instruction 76 relative to punitive damages.” (R. 5668: T. 2648-2649.)

On its own, therefore, the trial court limited consideration of counsel's reference to other consumers to the purposes delineated in Instruction 76, to which Westgate stipulated. Moreover, Westgate had an opportunity to tell the jury its own view as to the limited scope of Instruction 76, and it did so. (R. 5668: T. 2663.)

Westgate has not shown that the jury's verdict was based upon improper considerations. Under *Philip Morris*, a jury can consider harm to others for the purpose of determining reprehensibility. *See id.*, 127 S.Ct. at 1063 (reaffirming that plaintiff may show harm to non-parties to demonstrate “a different part of the punitive damages constitutional equation, namely, reprehensibility”) and *id.* (“harm to others shows more reprehensible conduct”).

Westgate claims that the sheer size of the jury's award, the identical awards, and the award of punitive damages to Mr. Davis, who (eventually) travelled, must have meant that the jury punished Westgate for harm to nonparties. (Westgate Brief, p. 36.) But with this set of facts, it is more likely that the jury followed stipulated Instruction 75, Punitive Damages as Punishment:

If you find that punitive damages are proper in this case, you may award such sum as, in your judgment, would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning

to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and not the measure of actual damages. (R. 5668: 2636-37)

The jury, knowing the facts of the case and familiar with Westgate's wealth, conduct, and attitude, chose a figure of \$1,000,000 as necessary and sufficient to punish Westgate and serve as a warning to others. Following Instruction 75, the jury did not tailor each award to the minor variations in consumers' actual damages, it simply divided the punitive number by fifteen.

\$1 million was a reasonable assessment of what it would take to fulfill the purposes of punitive damages in light of Westgate's conduct toward the fifteen consumers whose claims were tried. Any suggestion that the jury's verdict includes punishment of Westgate for harm caused to non-parties is purely speculative, but Westgate would have only itself to blame if it did.¹³

Westgate complains that references were made by three consumers to "900 people," "hundreds or 1000 people," or "1000; 10,000 misled Consumers," and which CPG's counsel allegedly referenced improperly during closing argument. (Westgate Brief, p. 9.) With respect to the consumer references, Westgate disregards the court's response. On R. 5660: T. 508, for example, a witness did mention, unsolicited, that if he had received his trip, "there wouldn't be 1,000 of us consumers out there, or 10,000 of us that had been misled—", at which point CPG's counsel immediately cut him off. The

¹³ Westgate's assumption that the jury was otherwise inflamed is contradicted by the fact that the jurors, despite counsel's urging, calmly rejected every consumer's claim of emotional distress and general damages. (R. 4802: Verdict.)

court struck the reference, to which the jury was unlikely to give credence anyway, as it knew that the entire number of certificates that MDI had provided Westgate was nowhere near 10,000. The court also struck the other two cited references, R. 5660: T. 560, T. 762.

In any event, any alleged prejudice from a few isolated comments in a 10-day trial was mooted when the court found that Westgate had opened the door to information regarding other consumers by affirmatively eliciting testimony from witness David Wagner about an alleged lack of a high level of complaints about the Anaheim certificate. (See R. 5662: Wagner: 1114-1115; *e.g., id.*: 1022-1024, 1049 (“I don’t remember ever having any reason to discontinue it [the travel certificate]. That would have been if there was problems, and I don’t believe that that occurred.”), R. 5662: T. 1056-1059 (testimony regarding “small number” of problems with certificate, including that “I have never had at any of my locations nationwide any high level of bad customer experience or complaints using the NRC products”), R. 5662: T. 1080-1082 (eliciting testimony about “any discussions that you had with any of the management or executive level employees of Westgate that involved the performance of the Anaheim certificate, complaints about redemption or anything like that” and “small amounts” of complaints reported by NRC). CPG was entitled to question the basis and legitimacy of that key aspect of Westgate’s defense.

CROSS APPEAL

Pursuant to its conditional cross-appeal, Consumer Protection Group requests the Court to rule on the following issues only if the court reverses the trial court’s judgment.

III. THE TRIAL COURT ERRED IN RULING THAT CLAIMS UNDER THE UTAH CONSUMER SALES PRACTICES ACT ARE NOT ASSIGNABLE.

Early in the case, the trial court dismissed the claims asserted by CPG under the Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11, *et seq.* CPG lacked standing to assert the claims, the court ruled, because the statute permits only “consumers” to bring claims, and thus such claims cannot be brought by an assignee. (R. 2340.) With respect, the trial court erred.

It is well established in Utah that choses in action are assignable. *Time Finance Corp. v. Johnson Trucking Co.*, 23 Utah 2d 115, 458 P.2d 873 (1969) (“the right to the proceeds was a chose in action, which could be assigned as any other chose in action”). Assignability extends to choses in action derived from statute. *Mayer v. Rankin*, 91 Utah 193, 63 P.2d 611 (1936); *see also* 6A C.J.S. Assignments § 49 (“Whether a claim is statutory is not determinative of its assignability or survivability”).

In *Mayer*, this Court noted that “[t]he trend of judicial opinion has been to enlarge rather than to restrict the causes that may be assigned.” *Id.*, 63 P.2d at 616. Consistent with that principle, Utah courts have recognized the assignability of claims or benefits unless a statute expressly prohibits it (which the UCSPA does not do). *See, e.g., Florida Asset Financing Corp. v. Utah Labor Commission*, 2004 UT App 273, ¶¶ 12-13, 18, 22, 98 P.3d 436 (absent express prohibition, workers’ statutory compensation benefits are assignable by worker upon receipt); *see also State v. Sucec*, 924 P.2d 882, 885-886 (Utah 1996) (judgment for past-due court-ordered child support is assignable); *In re Behm’s Estate v. Gee*, 117 Utah 151, 213 P.2d 657 (1950) (even if cause of action for wrongful

death was not itself assignable, individual heir's portion of the death claim was assignable).

Claims for fraud are assignable in Utah, and an assignee of such claims possesses legal standing to pursue them in court. *Russell/Packard Development, Inc. v. Carson*, 2003 UT App 316, ¶¶ 29-30, 78 P.3d 616, *affirmed on other grounds*, *Russell Packard Development, Inc. v. Carson*, 2005 UT 14, 108 P.3d 741 (addressing discovery rule under statute of limitations), *citing Mayer, supra*.

The fact that a cause of action is extended under the UCSPA to “consumers” is no more a bar to assignment than the fact that a cause of action for fraud is extended under the common law to a person who has reasonably relied upon a misrepresentation to his detriment. In both instances, the original claimant is simply required to meet certain criteria in order to have a chose in action to assign.

The UCSPA claims assigned to CPG allege that Westgate engaged in “deceptive acts or practices” (Utah Code Ann. § 13-11-4), essentially a form of statutory fraud. There is no indication in Utah law that the court would apply a different standard for assignability depending on whether the fraud is actionable under the common law or pursuant to statute. Indeed, *Russell/Packard* suggests otherwise. In that case, the Court of Appeals found the plaintiff's common law fraud claim “indistinguishable” from *Mayer*, which involved a statutory action to recover on a bond for fraud committed by a securities dealer. *See also Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982) (pleading requirements of Rule 9 are not “limited to allegation of common-law

fraud,” but include all circumstances involving “the kind of misrepresentations, omissions, or other deceptions covered by the term ‘fraud’ in its broadest dimension”).

Nowhere in the Act does the legislature prohibit the assignment of UCSPA claims. A valid assignment confers upon the assignee standing to sue in the place of the assignor. Moreover, Westgate successfully opposed CPG’s motion to add the individual assignors, in part based upon the argument that the consumers had assigned their claims to CPG under the UCSPA. (R. 2745.) Having obtained that relief, Westgate should be held to its position.

IV. IF THE PUNITIVE DAMAGE AWARD IS MODIFIED OR REVERSED, THE TRIAL COURT’S DENIAL OF ATTORNEY FEES TO CPG SHOULD BE REMANDED FOR RECONSIDERATION.

In the court below, CPG sought attorney fees on various grounds. The trial court denied CPG’s motion. With respect to CPG’s argument under the private attorney general doctrine, however, the trial court’s denial was based upon the fact that the punitive damage award addressed the considerations raised by CPG: “Many of the arguments CPG made in favor of the private attorney general doctrine also relate to its plea for this court to uphold the punitive damages award. Thus, the issue does not need to be revisited. The goals of deterrence and punishment are met by the punitive damages award.” (R. 5801.)

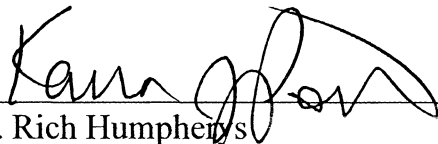
If the punitive damage is modified or amended, the trial court should be given an opportunity to revisit the attorney fee issue.

CONCLUSION

For the reasons set forth above, appellee Consumer Protection Group respectfully requests the Court affirm the trial court's judgment. In the alternative only, CPG requests the Court reverse the trial court's dismissal of CPG's claims under the Utah Consumer Sales Practices Act.

DATED this 17th day of December, 2010.

CHRISTENSEN & JENSEN, P.C.



L. Rich Humphreys
Karra J. Porter
Scot A. Boyd
*Defendants/Counterclaimants –
Appellees*

CERTIFICATE OF SERVICE

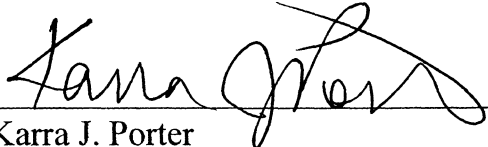
I hereby certify that a copy of **BRIEF OF APPELLEES / CROSS-APPELLANTS** was mailed to the following this 17th day of December, 2010:

Michael D. Zimmerman
Troy L. Booher
Christopher L. Stout
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101-1004

Richard W. Epstein
(admitted pro hac vice)
GREENSPOON MARDER, P.A.
100 West Cypress Creek Road, Suite 700
Fort Lauderdale, FL 33309

*Attorneys for Plaintiff/Counterdefendant
– Appellant Westgate Resorts, Ltd.*

Shaun S. Adel
30 Capobella
Irvine, CA 92614
Defendant


Karra J. Porter

ADDENDUM

Ruling, January 23, 2003

Ruling, August 31, 2005

**Transcript and dismissal of writ of certiorari, *Philip Morris USA Inc. v. Williams*,
United States Supreme Court, 07-1216**

List of Utah authorities regarding waiver

IN THE FOURTH JUDICIAL DISTRICT COURT 1/24/03 Deput
UTAH COUNTY, STATE OF UTAH

WESTGATE RESORTS, LTD, a Florida
limited partnership,

Plaintiff and Counterclaim
Defendant,

v.

SHAUN S. ADEL, an individual, and
CONSUMER PROTECTION GROUP,
LLC, a Utah limited company,

Defendants and
Counterclaimants.

RULING

Case No. 020404068

Judge Gary D. Stott

This matter comes before the court on Plaintiff's motion to dismiss counts five and six of the defendant's counterclaim. The Court has reviewed the file, the memoranda filed by the parties, and the relevant case law and statutory provisions, and being fully advised, issues the following:

RULING

Sometime in August 2002, Defendant Shaun S. Adel formed Consumer Protection Group, LLC ("CPG") to solicit claims under the Utah Consumer Sales Practices Act ("UCSPA") against Plaintiff Westgate Resorts, Ltd. ("Westgate") from Westgate costumers. (Counterclaim ¶ 17.) CPG sent some 1,989 identical letters to Westgate customers advising them that they may have been defrauded by Westgate, that certain practices by Westgate were unlawful under the UCSPA, and that they may be entitled to \$2,000.00 or more under the UCSPA. (Counterclaim ¶ 17; CPG Letter ¶¶ 1,3.) The letter then informed the costumers that CPG had already invested time and resources to bring such claims to court and solicited their individual claims. (CPG Letter ¶ 4.)

The letter also informed those who had purchased timeshares from Westgate that CPG would send an additional letter describing their potential case against Westgate for fraud in inducing the sale of timeshares. (CPG Letter ¶ 6.) Enclosed with the letters were pre-prepared affidavits and assignment forms for Westgate costumers to sign and return. (CPG Letter ¶ 4.)

On or about September 25, 2002, Westgate filed for a temporary restraining order and preliminary injunction to prevent CPG from sending more letters to Westgate costumers until the conclusion of a trial on the merits. The parties stipulated to a temporary restraining order on or about September 30, 2002, and CPG filed a counterclaim against Westgate, alleging, among other things, that: (1) certain Westgate behavior was in violation of the UCSPA, and CPG as assignee of some 900 Westgate costumers, is entitled to relief in the amount of \$2000 for each of those claims or such greater amounts as may be proven at trial, plus reasonable attorneys' fees as allowed under the UCSPA; and (2) that CPG as assignee is entitled to relief under the common law tort of fraud in the amount of damages suffered by the assignors as a result of Westgate's allegedly fraudulent practices. These claims represent the fifth and sixth causes of action respectively as set forth in the defendant's counterclaim.

On or about November 27, 2002, Westgate filed a motion to dismiss counts five and six of the counterclaim on the following grounds: (1) defendant does not have standing to pursue those claims; (2) defendant is engaged in the unauthorized practice of law; and (3) defendant has failed to plead allegations of fraud with particularity. On December 12, 2002, CPG filed a motion in objection to Westgate's motion to dismiss and on January 6, 2003, Westgate filed a reply memorandum. On January 15, 2003, the Court heard oral arguments and took the matter under advisement before issuing this ruling.

I. Standing

Westgate claims that the defendants CPG and Adel lack standing to sue under the UCSPA because they are not a consumer of Westgate and the UCSPA specifically limits recovery to “consumers”. The UCSPA provides in pertinent part: “A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs.” Utah Code Ann. § 13-11-19(2).

Neither Adel nor CPG claim to be “consumers” for purposes of the UCSPA; however, they argue that the UCSPA does not prohibit assignment of USCPA claims and a valid assignment confers standing to sue in the place of the assignor. ((CPG Motion in Objection to Dismissal at 7, citing Brandenburger & Davis, Inc. v. Estate of Lewis, 771 A.2d 984, 998 (D.C. 2001)). CPG further argues that the rule of assignments applies to statutes that explicitly limit the parties who may sue. ((CPG Motion in Objection to Dismissal at 7, citing Miami Children’s Hosp., Inc. v. Malakoff, 795 F. Supp. 718 (S.D. Fla. 1991)(granting a hospital standing to sue for a patient who had assigned to the hospital claims against a healthcare provider)). CPG also sites Misic v. Building Services Employees Health and Welfare Trust, 789 F.2d 1374, 1378 (9th Cir. 1986), where “the court went on to demonstrate that an assignee has standing even when the claim arises from a statute that ‘explicitly limits the parties who may sue.’” (CPG Motion in Objection to Dismissal at 8).

While this Court notes that the above cited cases are not controlling, it also finds that their holdings are limited to special circumstances not present in this case. In Misic, the assignee had a special relationship with the assignors. The assignee was a dentist who provided medical care to the assignors. The dentist billed the assignors’ health provider who failed to pay the full amount of the claims as required by contract. Misic, 789 F2d at 1376. The court held that the dentist should have standing to sue as the assignee of his patient because doing so would protect the patient and

avoid the necessity of the patient to pay potentially large medical bills and await compensation from the plan. *Id.* at 1377. Without such a relationship, courts have been reluctant to confer standing on third party assignees with respect to statutory claims.

Recently, in Simon v. Cyprus Amax Minerals Health Care Plan, No. 00-1331, 2002 U.S. App LEXIS at **5 (10th Cir. June 11, 2001), the court denied standing to an assignee of a statutory claim explaining that “[b]ecause plaintiff does not qualify as a party entitled to ERISA civil enforcement provisions, he does not have standing to bring this action.” Referencing Misic, the court in Simon v. Value Behavioral Health, Inc., 955 F.Supp. 93, 95 (C.D. 1997), refused to grant an assignee standing, explaining that the “[p]laintiff fails to present persuasive authority supporting standing of a third party ERISA claim assignee other than the beneficiary’s health care provider.” *Id.* at 95. Likewise, in the instant case, CPG has failed to present persuasive authority that would support standing of a third party UCSPA assignee who is not a consumer. The case law provided by CPG concern statutes that either expressly authorize assignment of claims or involve a special relationship, namely, the physician-patient relationship; both absent in this case.

Considering the language of the UCSPA, and its apparent purpose and intent, this Court finds that the defendants lack standing to sue under the Act. The defendants, seeking to take advantage of the statutory remedies available under the UCSPA, must strictly comply with all the requirements of the Act. Without the specific statutory claim provided in 13-11-1 in sequence, the defendants would not have the opportunity of alleging the claim set forth in the fifth cause of action. The right of relief is created by statute and is intended to be restricted to a particular class of people who qualify under the statute. The relief sought here is not a common law relief but a specific statutory remedy and the defendants do not qualify under the specific class requirement of the Act.

Because the defendant is not a consumer, Westgate is entitled to relief on the standing

issue with respect to the UCSPA claim. The fact that the defendants have received assignments from those who may have been consumers does not qualify them as a consumer under the Act. Therefore, the plaintiff's motion as to standing is granted.

II. Unauthorized Practice of Law

Westgate also argues that the fifth and sixth causes of action set forth in the defendant's counterclaim should be dismissed because the defendants engaged in the unauthorized practice of law. ((Westgate Motion to Dismiss at 11, citing Nelson v. Smith, 154 P.2d 634 (Utah 1944)). Nelson involved a collection agency who solicited from the general public various claims for the payment of money for collection. The agency would bring suit if necessary, pay all court costs, and furnish all legal services in return for a fixed percentage of any sum recovered. 154 P.2d 635. The defendants filed lawsuits "in their own names as assignees of the real owner of the claims." Id. The Utah Supreme Court held that such activities constitute the unauthorized practice of law, stating, "[t]he authorities almost uniformly hold that laymen cannot evade and circumvent a statute such as [the unauthorized practice of law statute] by the device of taking an assignment of the claim and proceeding in their own names." Id. at 639.

The instant case is similar in all respects to the Nelson case. CPG was formed to solicit legal claims from Westgate costumers, and has agreed to file suit in its own name and to finance and direct the litigation in return for a portion of the recovery. Indeed, the language in Nelson could hardly be more applicable to this case. "The question as to whether the defendants are illegally engaging in the practice of law by soliciting the placements of claims in their hands for collection, having an assignment of the claim made to them, and then proceeding in their own names as assignees to prepare legal papers, institute law suits, manage and conduct supplemental proceedings, employ counsel, etc., really presents two problems: First, can they proceed in their own names as assignees to do the work themselves; and second, can they institute, manage and

control proceedings and preparation of legal papers by employing a licensed attorney to do the work for them? We believe that both of these questions must be answered in the negative.” Id.

In addition to CPG’s business objective and solicitation of legal claims stated above, the letter sent out by CPG raises additional concerns. In Utah State Bar v. Peterson, 937 P.2d 1263, 1268 (Utah 1997) our supreme court offered the following guidance with respect to the practice of law: “The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.” Peterson, 937 P.2d at 1228.

Statements in CPG’s letter such as “[p]ractices such as those described above are unlawful under the Utah Consumer Sales Practices Act”, and “you may be able to recover your damages or \$2,000.00 whichever is greater”, involve counseling, advising, and assisting others in connection with their legal rights. Although CPG does not explicitly claim competence to render legal advice or to take legal action, such competence may be implied by the letter’s legal conclusions as well as the scale of justice logo and enclosure of a pre-prepared affidavit and assignment form.

After carefully reviewing the CPG letter and comparing the facts of this case with Nelson, it appears clear that the defendant CPG has engaged in the unauthorized practice of law as the Plaintiff contends. However, the statute prohibiting the unauthorized practice of law in Utah does not provide for a private right of action. The statute states: “the prohibition against the practice of law in Subsection (1) shall be enforced by any civil action or proceedings instituted by the Board of Commissioners of the Utah State Bar.” U.C.A. § 78-9-101(2). The plaintiff has failed to

present persuasive authority supporting standing of a party other than the state bar to assert a claim under the statute. Hence, while this Court is troubled by the unauthorized practice of law apparent in this case, it leaves the matter for the Utah State Bar to bring the appropriate action under 78-9-101.

III. Failure to Plead Fraud with Particularity

Finally, Westgate asserts that the claims of fraud as set forth in the counterclaim should be dismissed for failing to comply with Rule 9(b) of the Utah Rules of Civil Procedure. Rule 9(b) states that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” After reviewing the counterclaim in its entirety, this Court finds that it satisfies the requirements of Rule 9. The detailed descriptions of the alleged fraudulent practices performed by Westgate contained in counts 68 through 72 of defendant’s counterclaim give the plaintiff ample information to mount its defense and are sufficiently particular to satisfy Rule 9.

CONCLUSION

For the above reasons, the Court grants the plaintiff’s motion to dismiss with respect to the fifth cause of action and denies the plaintiff’s motion to dismiss with respect to the sixth cause of action. Counsel for the plaintiff is to prepare an order consistent with this ruling and submit it for signature.

DATED this 24 day of January, 2003


GARY D. STOTT, JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020404068 by the method and on the date specified.

METHOD NAME

Mail TODD M SHAUGHNESSY
ATTORNEY PLA
15 WEST SOUTH TEMPLE, STE
1200
GATEWAY TOWER WEST
SALT LAKE CITY, UT 84101
Mail MONTE N STEWART
ATTD
1014 E 590 S
Orem UT 84097

Dated this 27 day of January, 2003.

Sumner
Deputy Court Clerk



FILED
Fourth Judicial District Court
of Utah County, State of Utah
8/31/05 JC Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

WESTGATE RESORTS, LTD., Plaintiff, vs. SHAUN S. ADEL, et al., Defendants.	CASE NUMBER: 020404068 DATED: AUGUST 31, 2005 RULING ANTHONY W. SCHOFIELD, JUDGE
---	--

This case is before the court on Westgate Resorts, Inc.'s ("Westgate") motion to dismiss Counts V, VI, VII, and VIII of defendants' amended counterclaim, brought by Consumer Protection Group, LLC (CPG) as assignee of approximately 950 consumers who had prior business contacts with Westgate. Having carefully considered the motion, memoranda supporting and opposing the motion and the prior rulings of the court, I now issue this ruling denying Westgate's motion except as to Count V.

I. Procedural History.

Defendants' current amended counterclaim replaces a series of former counterclaims, the first of which was filed on October 23, 2002 ("Original Counterclaim"). Former Count V of the Original Counterclaim sought relief under the Utah Consumer Sales Protection Act ("UCSPA") and former Count VI alleged common

law fraud. Westgate moved to dismiss former Counts V and VI of the Original Counterclaim. On February 20, 2003, Westgate's motion was granted as to Count V (UCSPA) claim and denied as to Count VI (fraud).

Thereafter, defendants sought leave to amend the Original Counterclaim to replace the UCSPA claim with a claim under the Utah Pattern of Unlawful Activity Act ("UPUAA"). Then defendants sought leave to amend their counterclaim a second time, seeking to join 950 aggrieved consumers as parties and to add a claim for relief based on breach of the implied covenant of good faith and fair dealing. On October 4, 2004, the parties stipulated to allow defendants to add the breach of covenant claim, but the court denied leave to amend to join the 950 consumers.

The amended counterclaim at issue in this motion (the "Amended Counterclaim") was filed on March 3, 2005. It contains the UPUAA, Fraud, and Breach of Covenant claims as counts VI, VII, and VIII respectively. It also recites the UCSPA claim as Count V, with the caveat that "[t]his cause of action has been dismissed ... but is included herein to preserve counterclaimants' right to appeal." (Amended Counterclaim ¶ 68.)

On March 31, 2005, Westgate filed this motion to dismiss counts V, VI, VII and VIII of the Amended Counterclaim.

II. Preliminary Consideration: Application of the "law of the case".

Westgate and CPG each allege that the other is attempting to relitigate claims or arguments resolved by the court's order of February 20, 2003, which dismissed one count of the Original Counterclaim while retaining the other counts of the Original Counterclaim. Westgate correctly points out that the February 20, 2003, order is the "law

of the case". CPG correctly points out that "[a]pplication of law of the case should not depend on whether a particular ruling was favorable to [one party or the other]."

The law of the case doctrine is grounded in the principle that a matter once decided by a trial court in a case is binding on the parties through all of the subsequent stages of the same case. It is a doctrine both of judicial economy - matters once having been considered by the court will not be reconsidered absent unusual circumstances - and economy for the parties - they will not need to expend their resources to ask the court, repeatedly, to consider a matter as to which the court previously has spoken.

Under *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Ut. App. 1994), there are limited circumstances under which a trial court properly should reconsider a prior decision, and this bypass the law of the case doctrine.¹ With that checklist as a guide, in this case I only will reconsider claims or arguments that have already been adjudicated if the parties clearly fit within one of the grounds for reconsideration set forth in *Trembly* or otherwise can demonstrate to the court a sound basis for reconsidering the prior decision.

III. Count V must be dismissed because applicable law has not changed.

With only minor grammatical changes, Count V of the Amended Counterclaim is virtually identical to the UCSPA claim dismissed on February 20, 2003. Notwithstanding

¹ "A Court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a 'different light' or under 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court."

CPG's argument that applicable law has changed or been clarified, the case it cites as a change in the law, *Russell/Packard Development, Inc. v. Carson*, 78 P.3d 616 (Ut. App. 2003), does not even speak to the UCSPA. As such, that case does not constitute a "change in the law" that *Trembly* advances as a reason to reconsider a prior ruling.

Judge Stott had the benefit of full briefing on the motion to dismiss the UCSPA claim and thoroughly considered the requirements of UCSPA that a consumer suffer damages in a sales transaction, conditions of the statute that CPG cannot meet.² He also considered the procedure under the UCSPA for class actions and its requirement that the class representative be injured by the improper sales practice, something that CPG also cannot meet. His decision to dismiss that claim was well-taken. I will not revisit the issue since the only case cited by CPG as being a change in the law does not even concern the UCSPA. Count V must be dismissed.

IV. Count VI may stand because UPUAA claims may be assigned.

Westgate advances two reasons for the dismissal of Count VI. First, it asserts that CPG lacks standing to bring the UPUAA claims in behalf of the 950 consumers, and second, the joinder of the claims of the 950 consumers is improper. Both reasons are similar to arguments rejected in the February 20, 2003 order, but each is sufficiently different in substance to be considered.

² Under the UCSPA enforcement actions only may be brought by consumers, by consumers on behalf of a class of similarly situated consumers or by the Division of Consumer Protection. CPG is none of these.

A. CPG has standing to bring validly assigned UPUAA claims.

Westgate's standing argument presents itself in two alternative forms. First, Westgate argues that UPUAA claims are not assignable. Alternatively, Westgate argues that CPG, as an assignee of an assigned UPUAA claim, does not have standing to assert the claim of its assignors unless CPG has some injury to its business or property; it cannot rely upon the injuries to the assignors. I will treat these arguments in inverse order.

1. Assignees generally have standing to assert assigned claims.

In general, "an assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (this language is technically dicta, since *Vermont Agency* does not involve assignees, but articulates a well-settled principle). "This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor." *Titus v. Wallick*, 306 U.S. 282, 289 (1939).

Westgate argues from a number of federal RICO cases that the party making a RICO claim must have been injured in its business or property. Under the analysis of *Vermont Agency* and similar cases, however, the injury which CPG is asserting here is the injury to the business or property of its multitude of assignors. Thus, under *Vermont Agency*, the requirement of injury to business or property can be met if the assignors had an injury to business or property.

2. No provision of law prohibits assignment of UPUAA claims.

Westgate does not point to any provision of law that would prohibit assignees from asserting UPUAA claims, nor is the court independently aware of any such

provision. Westgate and CPG agree to look by analogy to federal RICO case law, since the UPUAA, formerly known as the Racketeering Influences and Corrupt Enterprises Act, was "patterned after the federal Racketeering Influenced and Corrupt Organizations Act" (RICO). *State v. Thompson*, 751 P.2d 805 (Utah Ct. App. 1988), *rev'd on other grounds*.

Contrary to Westgate's theory that RICO claims are assignable only under very restrictive conditions, "[l]ower federal courts which have addressed the issue of the assignability of RICO claims have universally held that RICO claims are assignable." *Resolution Trust Corp. v. S & K Chevrolet*, 868 F. Supp. 1047, 1054 (C.D. Ill. 1994). None of the four cases on which Westgate relies supports Westgate's position, but rather in each the assignee had standing to proceed with the RICO case without any requirement of separate injury or other special circumstances creating standing. *See Paolini v. Goldstein*, 200 F.R.D. 644, 645 (D. Colo. 2001) ("Plaintiff-Brokers are assignees . . . [a]s such the Plaintiff-Brokers have standing to prosecute these claims against Defendants"), *Federal Insurance Company v. Parello*, 767 F. Supp. 157, 163 (N.D. Ill. 1991) ("The assignability of RICO claims is not a question of first impression. . . . RICO claims are assignable"), *Federal Insurance Company v. Ayers*, 760 F. Supp. 1118, 1120 (E.D. Pa. 1990) ("RICO claims (including claims for treble damages) are assignable"), *In re National Mortgage Equity Corp.*, 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986) (comparing to anti-trust claims, "RICO treble damage claims likewise should be assignable").

Giving weight to the clear statements from a multiplicity of federal courts concerning the assignability of federal RICO claims and the ability of assignees to sue on

such claims as a basis for evaluating the UPUAA case at issue here, I conclude that CPG has the right, as assignee of the 950 consumers, to sue on the claimed violations of UPUAA.

B. CPG's joinder is a permissible under the law cited by the parties.

Westgate's only remaining theories on which it asks the court to dismiss CPG's UPUAA claims is that the joinder of 950 consumer claims is improper. First, Westgate claims that this court should dismiss CPG's claims unless CPG characterizes them as a class action. This argument was raised, considered, and rejected in the February 20, 2003 ruling and I will not revisit that claim. Westgate's second argument, that joinder is improper under URCP 20, was not raised before. I will consider it now.

1. The court is faced with a choice between one suit and 950 suits.

As CPG is quick to point out, Westgate is unclear about what it wants the court to do with CPG's 950 claims. As a practical matter, since CPG is presumably the owner of 950 validly assigned claims, the court is faced with two options: (1) reject Westgate's argument and allow CPG to bring the claims in one lawsuit; or (2) accept Westgate's argument and force CPG to bring the claims in 950 separate lawsuits. No doubt if CPG brings 950 suits someone would seek to consolidate the cases either for discovery purposes or for trial.

2. CPG's joinder of assigned claims is permissible.

The rules of civil procedure draw a distinction between joinder of claims and joinder of parties. The rules for joinder of claims are fairly relaxed, allowing a defendant in a counterclaim to "join as many claims . . . as he may have against an opposing party."

URCP 18(a). If this is a circumstance where CPG, as the counterclaimant, seeks to join the claims of its 950 assignors, arguably it is an assignment of claims which should be permitted under Rule 18(a).

Parties, on the other hand, may be joined only in more restrictive circumstances. URCP 20(a) requires that joined parties be either (1) subject to joint and several liability, or (2) linked by "the same transaction, occurrence, or series of transactions or occurrences."

In this case it is not altogether clear whether this is a case of joinder of claims or of joinder of parties.³ But it may not matter.

Here CPG alleges Westgate was involved in a systematic, ongoing pattern of fraudulent activity that affected many, many individuals. In sharp contrast to the unrelated creditor claims gathered up by the plaintiff in *Stank*, what occurred here is a "series of transactions" as contemplated by URCP 20(a).

³ The Utah Supreme Court considered whether a joinder was of claims or of parties in *Stank v. Jones*, 404 P.2d 964, 965 (Utah 1965). There a collections agency acquired "twelve different, distinct, and unrelated claims" from seven assignors and asserted them against a debtor defendant in a single lawsuit. The court concluded that "[o]bviously, the seven assignors could not have joined as plaintiffs and asserted their diverse and unrelated claims in one action against the defendant. Why, then, should they be allowed to do indirectly what they could not do directly? The answer is they should not."

In his typical, inimitable fashion, Justice Henriod, concurring in *Stank*, further clarified the practical necessity of the Court's ruling in a hypothetical, where a single assignee gathers the claims of various plaintiffs: "for assault and battery, liability on a promissory note, reformation of a deed, cancellation of an instrument for fraud, alienation of affections, invasion of the right of privacy, violation of an agency agreement, claim for wrongful death, damages for negligent collision, violation of a patent right, a claim for water damage, invasions of the rights of a beleaguered husband's wife, selling adulterated food, kicking the neighbor's trespassing kid off his property, and even quo warranto ouster proceedings—all before one bewildered jury,—and all for a \$17 filing fee." He concluded that "Rule 18(a) never was intended to produce such ridiculousity" 404 P.2d at 966.

Westgate argues that CPG's assigned claims do not "arise out of the same . . . series of transactions" by pointing out that CPG's affidavit form contains fill-in-the-blank and check-box provisions that individualize the consumer claims. These provisions allow the consumers to describe (1) the manner of Westgate's solicitation of the individual consumer's business, (2) the precise statements, omissions and promises of Westgate representatives, and (3) the manner in which Westgate representatives allegedly exerted pressure. Contrary to Westgate's claim, however, where, as here, CPG is pursuing joinder governed by URCP 20, joinder is proper if the injuries "arise out of the same . . . series of transactions." Under this standard, the fact that CPG is able to classify its claims using fill-in-the-blank and check-box provisions only bolsters CPG's position.

CPG's allegations in the Amended Counterclaim are sufficiently detailed to allow the court to conclude that the events as alleged appear to "arise out of the same . . . series of transactions." For the purposes of the motion to dismiss I must accept these facts as alleged. Based thereon it is clear CPG is asserting a series of injuries to a long list of assignors all of which arose out of a single series of transactions.

Thus, whether the joinder is deemed a joinder of claims under Rule 18(a) or a joinder of parties under Rule 20(a), joinder of these claims is appropriate.

3. The number of claims is not an obstacle to joinder.

The authority cited by the parties does not clearly address the issue of whether the number of claims can be an obstacle to joinder, but the cases the parties cite make it sufficiently clear that assertions of large numbers of claims by assignees is not unprecedented. In *in re National Mortgage Equity Corporation*, plaintiff brought RICO

claims assigned from "nineteen investor institutions" alleging fraud. 636 F. Supp. 1118, 1143 (C.D. Cal. 1986). In *Paolini v. Goldstein*, plaintiffs were allowed to assert RICO claims in behalf of "more than half of the 508 customers." 200 F.R.D. 644, 646 n. 4 (D. Colo. 2001). In *APCC Servs. v. Sprint Communs. Co.*, plaintiffs were allowed to aggregate "more than 1400" claims for failure to pay dial-around compensation under the federal Telephone Operator Consumer Services Improvement Act, 2005 U.S. App. LEXIS 12759 (D.C. Cir. 2005). I see no legal impediment to joinder in this case of the claims which CPG raises against Westgate, even though a very large number of claims is involved.

4. Judicial economy and substantial justice favor one suit over 950.

Finally, the court has discretion under URCP 20(b) to "order separate trials or make other orders to prevent delay or prejudice" to the parties. Here, without doubt a single, massive trial including 950 consumer claims will be costly, time-consuming, and a logistical nightmare. But, it seems to me, separating the matter into 950 individual trials only will exacerbate the delay and expense to the parties and increase the administrative burden to the court.⁴

⁴ Westgate claims that a lawsuit involving the claims of 950 consumers, each of whom may be required to testify, will be extremely time-consuming, although Westgate's figure of a half-day per witness seems significantly exaggerated. I cannot conceive, however, that such a trial likely will be more time-consuming and an administrative headache than 950 separate trials, including selecting and instructing 950 separate juries, 950 separate opening statements and closing arguments, 950 separate plans for discovery, and 950 separate pre-trial hearings, motion hearings, rulings and orders, all asserted by CPG as assignee against Westgate, all involving highly similar facts and claiming essentially the same injury. Indeed, could there be a better argument for consolidation?

In summary, in the interest of judicial economy and substantial justice, and finding that joinder of so many claims is not inappropriate, I deny Westgate's motion to dismiss Count VI of the Amended Counterclaim.

V. Count VII may stand as the adequacy of the fraud allegations previously has been decided by the court.

Count VII of the Amended Counterclaim is virtually identical to former Count VI of the Original Counterclaim. Westgate's original motion to dismiss that earlier claim was denied. Other than the improper joinder claim discussed above, which Westgate asserts should invalidate all of the claims of the Amended Counterclaim, Westgate's only substantive argument against this claim is that defendants did not plead the fraud allegations with particularity. Yet the allegations of this claim are substantially the same as the allegations of the prior claim which the court previously found adequate under Rule 9. I see no flaw in that prior conclusion and deny the motion to dismiss this claim.

VI. Count VIII may stand as the claim is pled with sufficient particularity.

Westgate advances two theories in support of its motion to dismiss Count VIII: improper joinder and failure to plead allegations of fraud with particularity. Having considered and rejected the improper joinder claim, I only will review the claim under Rule 9 of a failure to plead the allegations of Count VIII with particularity.

In this matter Westgate only touches briefly on its claim of failure to plead with particularity with respect to Count VIII. That passing discussion is inadequate to assist the court in determining the adequacy of the pleadings of Count VIII. As well, while the pleading is more spare than it could be, the allegations of misrepresentation resulting in a

breach of the covenant of good faith and fair dealing are sufficient. I deny the motion to dismiss Count VIII.

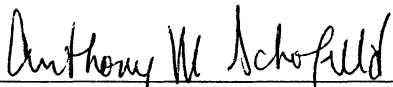
VII. Conclusion

Based on the foregoing and on the February 20, 2003 order, Westgate's motion to dismiss is granted as to Count V and denied as to Counts VI, VII, and VIII.

Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, defendants' counsel is directed to prepare an appropriate order.

Dated this 31 day of August, 2005.

BY THE COURT:



ANTHONY W. SCHOFIELD, JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 2 day of ~~August~~, 2005:
September

L. Rich Humpherys
Karra J. Porter
Christensen & Jensen
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144

Richard w. Epstein
Greenspoon, Marder, Hirschfeld, Rafkin, Ross &
Berger, P.A.
100 West Cypress Creek Road, Suite 700
Fort Lauderdale, Florida 33309

Todd Shaughnessy
David P. Williams
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

LORI WOFFINDEN
CLERK OF THE COURT

By *J. Christensen*
Deputy Clerk

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 PHILLIP MORRIS USA INC., :

4 Petitioner :

5 v. : No. 07-1216

6 MAYOLA WILLIAMS, :

7 PERSONAL REPRESENTATIVE :

8 OF THE ESTATE OF JESSE D. :

9 WILLIAMS, DECEASED. :

10 - - - - - x

11 Washington, D.C.

12 Wednesday, December 3, 2008

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:02 a.m.

17 APPEARANCES:

18 STEPHEN M. SHAPIRO, ESQ., Chicago, Ill.; on behalf of

19 the Petitioner.

20 ROBERT S. PECK, ESQ., Washington, D.C.; on behalf of the

21 Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STEPHEN M. SHAPIRO, ESQ.	
4	On behalf of the Petitioner	3
5	ROBERT S. PECK, ESQ.	
6	On behalf of the Respondent	27
7	REBUTTAL ARGUMENT OF	
8	STEPHEN M. SHAPIRO, ESQ.	
9	On behalf of the Petitioner	54
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 07-1216, Philip Morris v.
5 Williams.

6 Mr. Shapiro.

7 ORAL ARGUMENT OF STEPHEN M. SHAPIRO

8 ON BEHALF OF THE PETITIONER

9 MR. SHAPIRO: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 We are here today because the Oregon court
12 failed to follow this Court's directions on remand and
13 because the ground it gave is not adequate to show a
14 forfeiture of due process rights.

15 This -- this Court vacated after finding
16 that the Oregon Supreme Court applied the wrong
17 constitutional standard, and it remanded with directions
18 to apply the standard that the Court laid out. But the
19 Oregon court didn't do that. It never even addressed
20 the constitutional issue. The Oregon court, of course,
21 refused to follow this Court's direction because it
22 believed there were mistakes in another paragraph in our
23 instruction request dealing with what the court referred
24 to as "unrelated issues."

25 But that isn't what this Court mandated.

1 And the specific forfeiture theory adopted here for the
2 first time after nine years of appellate litigation is
3 completely inadequate to avoid this mandate.

4 JUSTICE GINSBURG: Mr. Shapiro, we are
5 dealing with a State supreme court, and our bottom line
6 always reads "for further proceedings not inconsistent
7 with this opinion." And it was my understanding that a
8 State court can resolve a case on an alternate State law
9 ground, if there is such a ground in the case.

10 MR. SHAPIRO: Yes, Your Honor. We believe
11 that this disposition is quite inconsistent with what
12 the Court mandated. The Court heard arguments in this
13 case about the "correct in all respects" rule, but it
14 still mandated an application of the constitutional
15 standard, including the prohibition on punishment for
16 harm to non-parties, and that standard simply was never
17 applied. We say that is inconsistent with this Court's
18 opinion.

19 JUSTICE SOUTER: But it seems to me the
20 problem with the argument is that to say it is
21 inconsistent with the opinion we implicitly have to say
22 that the Oregon Supreme Court has to confront State law
23 issues in a certain sequence, and that if it does not do
24 so those issues are waived, as it were, not only by the
25 court but by the party who raised it. And the

1 difficulty, I think, with your position here is that on
2 the assumption, which I do make, that the -- that the
3 issue, "correct in all respect" issue, was properly
4 raised by the other side, if we accept your position, we
5 in effect are saying the other side is not going to have
6 an opportunity to argue that before the Oregon Supreme
7 Court. And that's, it seems to me, kind of a steep hill
8 for you to climb.

9 MR. SHAPIRO: Well, we don't say that the
10 court can never adopt a State law standard after remand
11 from this Court, but we say that this disposition is
12 inconsistent --

13 JUSTICE SOUTER: I know you are saying that
14 but why -- why does the disposition that you are asking
15 for not entail what I just said, and that is, in effect
16 you cut off the claim by a party raised before the
17 Oregon Supreme Court, not considered by the Oregon
18 Supreme Court, and you cut off that claim simply because
19 the Oregon Supreme Court chose to approach the issues in
20 the case in a certain sequence? What business do we
21 have to do that?

22 MR. SHAPIRO: Well, because the preservation
23 issue was debated before this Court and it adopted a
24 specific order here saying on remand now consider the
25 constitutional standard, which is the prohibition on --

1 JUSTICE SOUTER: I know the language that
2 you are referring to.

3 MR. SHAPIRO: Yes.

4 JUSTICE SOUTER: But the referring to that
5 language simply skips over the issue that I am trying to
6 raise. Isn't there a problem that we should be
7 concerned with if we accept your position in cutting off
8 the claim made by one party to the case which was never
9 heard by the Oregon Supreme Court?

10 MR. SHAPIRO: Well, Your Honor, this is very
11 similar to what occurred in the Sullivan case in this
12 Court, where the issue of preservation was debated
13 before this Court at the cert stage in the cert papers,
14 and the Court said: We sub silentio passed on the
15 adequacy of the State ground when we CDRed the case.

16 JUSTICE GINSBURG: Didn't -- did the
17 Court -- suppose the -- what is it called -- "correct in
18 all respects" had been raised and decided by the Oregon
19 Supreme Court in the first instance. Suppose it had
20 said, well, we don't have to deal with whether
21 Instruction 34 was right or wrong in this particular,
22 because it was wrong in other respects. Suppose that
23 had been the first time around what the Oregon Supreme
24 Court said. Would that have offended any Federal due
25 process? Would that have been an appropriate

1 disposition for the Oregon Supreme Court to make?

2 MR. SHAPIRO: Well, that takes us to our
3 second and principal argument, which is that that ground
4 would not be adequate under this Court's criteria for
5 adequacy. And we say that there are really three
6 reasons why that would not be an adequate ground for
7 forfeiting this constitutional right. It's an ambush.
8 It was a surprise ruling that we couldn't anticipate.
9 It is an exercise in futility because, even if we
10 submitted a perfect instruction that complied with that
11 rule, we would have been rejected anyway by the trial
12 court that simply believed that this instruction wasn't
13 required by the --

14 JUSTICE SOUTER: Isn't the place to make
15 that argument in the Oregon Supreme Court?

16 MR. SHAPIRO: Well, no. The Oregon Supreme
17 --

18 JUSTICE SOUTER: Wouldn't it have been
19 appropriate to -- to hear the -- the issue that they are
20 raising and for you to make the reply that you have just
21 made?

22 MR. SHAPIRO: Your Honor, this Court has
23 said repeatedly that adequacy is a Federal law question
24 for this Court to decide.

25 JUSTICE SOUTER: I realize it's a Federal

1 law question and in approaching that question, I keep
2 asking the question which I think I have now put to you
3 three times and have yet to hear an answer on the merits
4 on: Why is it appropriate for us to have a rule here
5 that cuts off the right of a party that properly raised
6 an issue in the Oregon Supreme Court and has yet to be
7 heard on the merits in the Oregon Supreme Court?

8 MR. SHAPIRO: Well, there are two reasons.
9 First under the adequacy decisions of this Court,
10 including Lee v. Kemna, if it takes years and years
11 after the trial to articulate a forfeiture rule like
12 this that counts heavily against the adequacy of the
13 State ground. This Court held that in Lee v. Kemna very
14 recently.

15 And then secondly, this is a point that was
16 argued to this Court four separate times now and when
17 the Court remanded with explicit directions to apply the
18 constitutional standard that's something that had to be
19 done on remand. The Court did not invite the lower
20 court to get into the question of whether this request
21 was made. The Court found that the request was made.

22 JUSTICE SOUTER: Maybe -- maybe this Court
23 insufficiently appreciated the significance of the issue
24 which is now before us. And I still want to know, is
25 there a good reason on the merits why it is fair for us

1 to cut off the right of the other side to raise an issue
2 that they raise or to argue an issue that they raised in
3 a timely fashion?

4 MR. SHAPIRO: Yes, there is a good reason,
5 because this is -- adequacy is ultimately a Federal
6 question for this Court to decide. The issue was
7 debated here four separate times at great length. The
8 Court remanded for a specific decision by the lower
9 court. That wasn't done. And if we turn to the
10 adequacy doctrine --

11 JUSTICE SCALIA: Excuse me. What -- what
12 issue was debated here four times?

13 MR. SHAPIRO: Whether or not there was an
14 adequate State ground because of the "correct in all
15 respects" rule. That was debated in the merits brief,
16 in the cert oppositions twice. It was debated again in
17 the cert opposition this time around. But the Court has
18 never accepted it.

19 JUSTICE STEVENS: But the State court hadn't
20 ruled on it at that time.

21 MR. SHAPIRO: That's correct.

22 JUSTICE STEVENS: So how do we rule on it as
23 a matter of first impression?

24 MR. SHAPIRO: Well, because, Your Honor, the
25 Court considered, just as it did in Sullivan, it

1 considered these issues in the cert papers and then
2 remanded the case for a different issue to be decided by
3 the lower court.

4 But we don't hesitate from debating the
5 adequacy issue.

6 JUSTICE SCALIA: Did our opinion decide that
7 -- that question? Did our opinion say that that
8 question was decided against your opponent?

9 MR. SHAPIRO: No. What the Court said in
10 Sullivan was that it was a sub silentio determination.

11 JUSTICE GINSBURG: How could we have
12 determined it when the Oregon Supreme Court itself
13 hadn't made any determination?

14 MR. SHAPIRO: Because the parties debated
15 this extensively in their briefs.

16 JUSTICE GINSBURG: But we don't decide
17 questions, particularly questions of State law, that may
18 have a Federal check. But we don't decide them in the
19 first instance.

20 And there's one point, Mr. Shapiro, that I
21 think affects this concern of fairness to the parties
22 who raised this "correct in all respects" from the
23 beginning. This Court had not clarified, had it, until
24 the Williams case itself, the rule about harm to others.
25 In State Farm we were talking about harm to

1 nonresidents. So if I recall correctly, Williams was
2 the first time we ever clarified that harm to others
3 included people within the same State; is that correct?

4 MR. SHAPIRO: Yes. That's true.

5 This -- this, as the Court expressed it, was
6 a slight extension of the previous decisions. But Your
7 Honor, if the Court feel that this adequacy issue hasn't
8 been dealt with previously by this Court, it's presented
9 squarely here. It is a Federal question, which this
10 Court says has to be decided by this Court. And we
11 don't hesitate from --

12 CHIEF JUSTICE ROBERTS: I suppose one reason
13 -- one reason to think it may not have been decided is
14 that, unlike the other situations you have discussed, it
15 would not have been a bar to our consideration of this
16 case the last time because, just as you raise the
17 question in your second question presented that whether
18 the award complies with due process, we may have thought
19 there might have been an adequate and independent State
20 ground on a procedural question, but we were going to go
21 ahead. We granted cert on the substantive question on
22 whether the damages award was unconstitutional.

23 MR. SHAPIRO: Well, Your Honor, if -- if
24 we're not right about the decision resolving the
25 adequacy issue already, we're happy to turn to it now

1 and address it as we do in our briefs. This is not an
2 adequate State ground under this Court's decisions. The
3 first reason for that is that this is a futile gesture
4 that the State court requires of us.

5 JUSTICE STEVENS: I want to ask you about
6 that. That's the thrust of your argument: It would
7 have been futile to comply with the specific, drafting a
8 perfect -- perfect instruction "correct in all
9 respects." But I have to think the trial -- the record
10 is subject to the reading that the trial judge thought
11 the issue had already been adequately taken care of,
12 rather than it would be an incorrect instruction.

13 MR. SHAPIRO: Well, the trial judge asked,
14 is there any authority that requires me to give this
15 instruction on harm to non-parties? And we said, in our
16 view it's the BMW case. And she said, well, if there is
17 not an authority right on point I'm not going to give
18 this instruction. She said that very clearly. So if we
19 submitted a separate piece of paper, it would have made
20 no difference; and if we had taken out the two mistakes
21 --

22 JUSTICE STEVENS: Where in the record is the
23 portion of the colloquy about the instructions most
24 clearly stated in your view, on your side of that issue?

25 MR. SHAPIRO: Let's see. It's the

1 instruction conference. This begins on page 17a, where
2 Mr. Beaty starts discussing the second prong of this
3 paragraph. He says -- he quotes the language, and the
4 judge -- the judge says: "Well, I think that that's
5 covered by giving an instruction that punitive damages
6 are not compensatory." And he says: No, no, that is
7 not -- "That is not the point of this instruction."
8 This is pages 17 and 18a.

9 JUSTICE STEVENS: But that's exactly the
10 point I make. I think the trial judge was saying, I
11 think it's already covered, which is different from
12 saying, no matter how you phrase it, I won't give it.

13 MR. SHAPIRO: Well, she said she just
14 disagreed with the idea that there should be protection
15 against punishment for harm to non-parties. And she
16 said unless there's a case requiring that, I'm not going
17 to give that instruction. And she said --

18 JUSTICE SOUTER: Didn't she also say that
19 she was going to give, and ultimately did give an
20 instruction, to the effect that punitive damages are
21 punitive, they are not for the compensation of this
22 person or any other person, and to -- she then turned to
23 Philip Morris's counsel and said: What about that? And
24 Philip Morris's counsel said okay.

25 MR. SHAPIRO: What he was saying when he

1 said okay was: I understand your ruling and I'm not
2 going to continue to argue a point that I've already
3 lost. But he pressed that point --

4 JUSTICE SOUTER: It doesn't sound like much
5 of an objection.

6 MR. SHAPIRO: Well, the -- the State courts
7 both held -- both of the appellate courts held our
8 instruction was rejected. And this Court said it was
9 rejected, too, in its opinion. And that's exactly
10 right. You can't antagonize the trial judge by arguing
11 and arguing after your position has been rejected.

12 JUSTICE BREYER: But -- but the -- the
13 problem that I am having at the moment is that they did
14 -- from your point of view, is that they -- the other
15 side listed 28 cases in which they said the Oregon
16 courts have followed this rule that the instruction has
17 to be good as a whole.

18 Now, I have looked up those 28 cases, and
19 they do -- they do say that. They do say it, or they
20 imply it, or they apply it. They are not completely on
21 point, but they are not completely out of point, either.
22 And -- and so I suppose what happened is that the judge
23 there just looked at this instruction on 32(a). It
24 looks like sort of it's all together. It really does
25 look like it's all together, the (1) and the (2). And

1 he ran his eye down the page and he said, well, here are
2 two other ways in which it's no good, and so that's the
3 end of it. You can't raise your objection. Maybe you
4 should have had four instructions instead of one, but
5 you did just have one.

6 And under Oregon law, unless every part of
7 it is right, the judge is correct in not giving it, even
8 if he never mentions the other part. And that 28 -- it
9 does seem as if that's what those 28 cases do say. So
10 what do we say about that?

11 MR. SHAPIRO: The -- the reason we say that
12 those 28 cases did not give us reasonable notice that we
13 had to submit a separate piece of paper or change
14 another paragraph in the instruction request is that
15 none of them dealt with a situation where you have
16 separately numbered requests --

17 JUSTICE BREYER: Well, I mean -- please, I
18 -- I don't want to appear skeptical, but I am. And --
19 and that's because I have looked up in some of those
20 cases, and then I sort of looked at the -- which doesn't
21 -- most of them don't give you the instructions, so it's
22 a little hard to say. But then I looked on page 32(a)
23 of this appendix and looked at what your instructions
24 looked like.

25 And -- and if I were sitting there as a

1 judge, I would think, well, gee, that looks like a
2 single thing there. They have it indented, and they
3 have a (1) and a (2), and it just looks like it's one
4 ball of wax. So can I really fault this Oregon court
5 for just doing what I said?

6 MR. SHAPIRO: Well, I -- I think so, because
7 the pattern instruction here told both parties to
8 include all their paragraphs pertaining to punitive
9 damages in one numbered instruction, 34.

10 JUSTICE BREYER: Well, they had some other
11 handbook that says beware of that.

12 MR. SHAPIRO: Yes.

13 JUSTICE BREYER: Because you are going to
14 run into this rule that says if there is any part of a
15 single instruction that is wrong, goodbye, even if the
16 trial judge never mentioned it.

17 MR. SHAPIRO: But that handbook came out in
18 2006. And after all, that was a practice tip. It was
19 not a State court ruling saying you had to organize your
20 instruction this way.

21 We had separate paragraphs, separately
22 numbered. They dealt with different issues. One was
23 the Constitution and the other was the State statute.
24 And there's no Oregon case that said that in that
25 situation you have to break it out into a separate piece

1 of paper.

2 JUSTICE GINSBURG: I thought the notion was
3 one issue, one charge. And it wasn't in just one
4 practice manual. There were a few cited in the brief
5 that the charge should be limited to one issue, one
6 point of law.

7 MR. SHAPIRO: Well, the pattern instructions
8 told us to put every point pertaining to punitive
9 damages in Instruction No. 34. Both sides did that.
10 And the Court was working with plaintiff's instruction,
11 taking their --

12 JUSTICE BREYER: I mean, it would be pretty
13 odd. Did the person who wrote that read these 28 cases
14 or some share thereof? And if you were going to do that
15 -- it wasn't you, I know -- why -- why wouldn't you
16 just, if you have one instruction, copy the -- the model
17 instruction? Then you won't make errors in the other
18 parts.

19 MR. SHAPIRO: Well, you see, the -- the
20 pattern -- the pattern instruction didn't include the
21 due process point.

22 JUSTICE BREYER: True, but you could add
23 that to the pattern.

24 MR. SHAPIRO: That's what we tried to do,
25 and the -- the judge invited us while dealing with the

1 other side's instruction to go through this one by one.
2 She -- she was asking us: Now, what's your next
3 addition?

4 And we -- we got to the due process point,
5 and she said: What is your authority? And we told her,
6 and she said: I don't think that instruction is
7 necessary.

8 It was separately argued. It was separately
9 decided by the State courts in the prior decisions,
10 decided by this Court as -- as a separate matter, and
11 that is exactly how the trial court approached this.
12 Her request was to go through this item by item.

13 She wasn't taking an all-or-nothing approach
14 to this instruction. She started with plaintiff's
15 document and asked what from our menu of additions
16 was necessary.

17 JUSTICE BREYER: I'm not speaking of this
18 from the point of view -- I mean I -- when I read that
19 petition for cert, I thought this is a run-around, and
20 I'm not sure that I think that now. That is, the reason
21 is because I put myself in the position of not the trial
22 judge. The person to put yourself in the position of is
23 the Oregon Supreme Court justice. And what he is doing
24 is he's reading that instruction. And -- and what can
25 you say in response to what -- what he might have

1 thought?

2 He knows this rule. The rule is if the
3 instruction is -- is unfavorable in any part, if it's
4 wrong, you are out.

5 MR. SHAPIRO: Well --

6 JUSTICE BREYER: He knows that rule, because
7 there have been a lot of cases on it. And then he reads
8 your instruction, and as I looked carefully -- I didn't
9 know this the first time when it was here, but he said
10 because it's right in paragraph 1 -- I mean it's wrong
11 in paragraph 1, where he was wrong -- I don't have to go
12 to the rest of it.

13 MR. SHAPIRO: Yes.

14 JUSTICE BREYER: Now we send it back, so he
15 says: Okay, now I've got to go to the rest of it.

16 MR. SHAPIRO: You know, Justice Breyer, this
17 is very similar to what was at issue in the Flowers case
18 which reached this Court. The Alabama Supreme Court had
19 said if you intermix different appeal points in your
20 brief, we are not going to consider any of them if there
21 are any errors to be found in any of the paragraphs in
22 their brief.

23 JUSTICE GINSBURG: But I thought the whole
24 thing about -- this is the NAACP case you that you were
25 discussing?

1 MR. SHAPIRO: Yes.

2 JUSTICE GINSBURG: -- that this was
3 something that the Alabama Supreme Court really sprung
4 at the last minute, that it was not like this rule.
5 There were not 28 cases in the Alabama Supreme Court
6 applying the rule. It seemed to be quite a novel rule.

7 MR. SHAPIRO: Well, what -- what the State
8 argued there was that for 60 years the "correct in all
9 respects" rule was in effect in Alabama, and they cited
10 dozens of cases applying it. But this Court unanimously
11 held that that approach was pointless severity. Even
12 though the State supreme court there said, we can't
13 disentangle these arguments, it's too complicated, it's
14 too much of a burden on the State supreme court, this
15 Court unanimously found that was pointless severity.
16 And at that point --

17 JUSTICE STEVENS: There was a basis for
18 questioning the good faith of the court in that case, I
19 think.

20 MR. SHAPIRO: Well --

21 JUSTICE STEVENS: And I don't think that's
22 true here.

23 MR. SHAPIRO: I -- I -- we don't question
24 the good faith of the court, but we say that this is
25 pointless severity, a rule that this Court has applied

1 more recently in Lee v. Kemna where there was no issue
2 of bad faith. The Court thought that it was pointlessly
3 severe and unnecessarily severe to insist on a perfect
4 proposal in that case.

5 JUSTICE BREYER: The best you have come up
6 with -- and I think you have researched this pretty
7 thoroughly -- and the best you have come up with to find
8 a case where they didn't apply the rule is that George
9 case, right? "George," I think, is the name of it.

10 And there, there is an alternative ground
11 which is that the judge had to -- had to give the
12 instruction himself, and it's a criminal case. And we
13 Shepardized it and it has only been cited twice. And --
14 and so I'm slightly at sea, to tell you the truth. And
15 -- and what is the standard I'm supposed to use to
16 decide whether that State ground is adequate as a matter
17 of Federal law or not?

18 MR. SHAPIRO: Well, there is an earlier case
19 that is interesting, State v. Brown, which comes several
20 years before, and it's cited in our brief. In that case
21 an imperfect instructional request was made, and the
22 Court still found that there was a duty to give the
23 instruction based on due process. And the reason was
24 that the parties during the charge conference had
25 debated the issue. It was a fair-enough exposition for

1 the trial court to understand the need for the charge.

2 And here this really is much like the
3 Osborne case. You know, in the Osborne case the
4 defendant didn't make any instructional proposal, and
5 this Court still reversed and required a new trial with
6 the correct instruction. It said due process required
7 that. And the Court said that we -- that the party had
8 sufficiently brought this to the attention of the trial
9 judge for Federal adequacy purposes even though no
10 instruction was -- was proposed.

11 The lawyer there merely moved to dismiss the
12 proceeding, never proposed an instruction, but this
13 Court required a retrial with a correct set of
14 instructions to the jury. That's an a fortiori case, I
15 think; and also the Flowers case, I believe, is a
16 fortiori. There really was a strong and compelling
17 State interest there in having the lawyers break their
18 arguments up into separate headings and subheadings so
19 the appellate court could follow the argument.

20 But here there wasn't any burden placed on
21 the trial judge at all by our request. She was going
22 through these one by one, and she asked us: What's your
23 next point that you want added? We proposed it. It was
24 on a silver platter. She didn't have to retype it. She
25 could have simply read it to the jury in that form. It

1 didn't have to be edited or amended. There literally
2 was no burden on the trial judge at all. And so we --

3 JUSTICE GINSBURG: She didn't get to the --
4 the other grounds, because I think it was all about that
5 paragraph and whether that paragraph was adequate under
6 our then precedent. And I don't think that -- that the
7 -- the incorrect portions of the charge that have now --
8 are now before us were -- were even reached then.

9 MR. SHAPIRO: She did look at the illicit
10 profits point. And she said: I'm not going to give
11 that; that's unnecessary. She did -- she didn't address
12 the "may versus shall" issue because she was working
13 with plaintiffs' proposal. So all -- really she just
14 had before her our request for this due process
15 instruction. She analyzed it separately, it was debated
16 before her.

17 And this is much more specific than what the
18 lawyers did in the Osborne case. They didn't even
19 propose an instruction. We served it up on a silver
20 platter. She could have used it, and indeed there was
21 no work for the trial judge at all because she was
22 simply telling the lawyers, make this change, make that
23 change that we've discussed, so there is zero burden on
24 the court.

25 And you have to ask in this situation, what

1 is the legitimate State interest that would support this
2 massive forfeiture of a very important due process
3 right? The plaintiff says the State interest here is
4 that it promotes affirmance of jury verdicts whether or
5 not there has been a due process violation. But think
6 about that. That's hardly a State interest.

7 JUSTICE BREYER: The State interest in the
8 rule in general, I take it, is to require the lawyers,
9 if they are going to object to the instructions that the
10 judge is going to give, to produce an instruction that
11 is a correct instruction of the law. That's -- that's
12 why, I guess, they have this rule.

13 MR. SHAPIRO: Oh, yes.

14 JUSTICE BREYER: And -- and you'd better get
15 it right, because if you don't get it right, you're
16 going to lose your ability to claim that the judge was
17 wrong in refusing to give any part of it.

18 Now, if that's the reason they have that
19 rule, that would seem to apply as much in this case as
20 in any other case. Why wouldn't it?

21 MR. SHAPIRO: Well, please recall that in
22 both Osborne and in the Lee case, there was a general
23 State purpose of that kind that supported the rule, but
24 the Court said it was an exorbitant or unnecessarily
25 severe application of the rule. And that's what we

1 contend here, that this is exorbitant, it serves no
2 legitimate purpose. It is truly a game of gotcha that
3 just nullifies the defendant's due process rights.

4 And that precedent I think would be of great
5 concern in various fields of law. This is a rule of law
6 that will apply in civil rights cases in the future,
7 criminal cases, all sorts of cases.

8 So I -- I think if this Court does apply its
9 own criteria here, it will see that this is an exercise
10 in futility, it was an ambush as a practical matter. We
11 didn't have any reason to think we had to submit this
12 again on a separate piece of paper.

13 JUSTICE STEVENS: Could you just tell me,
14 well, why was it an exercise in futility? That's what I
15 don't quite understand.

16 MR. SHAPIRO: Oh, because the judge had
17 ruled as a matter of substantive law that she wasn't
18 going to give this instruction. It wouldn't matter if
19 we separated it.

20 JUSTICE STEVENS: But she said she thought
21 it was already covered. That's what I -- on that very
22 page you pointed me to.

23 MR. SHAPIRO: Well, she -- she said that was
24 all she was going to say about the point. And we said,
25 well, that doesn't cover our point, because we want

1 protection against punishment for harm to non-parties.
2 And she said: I'm not going to give that instruction; I
3 deny the rest of your request, No. 34.

4 JUSTICE GINSBURG: And where is this
5 colloquy? I mean, we went through the parts, she said I
6 think it's covered and it was okay. You seem to be
7 saying more than was included in that colloquy.

8 MR. SHAPIRO: Well, I -- I think if -- if
9 you look at the whole colloquy, that's the gist of it.
10 I -- I have paraphrased it, but --

11 JUSTICE GINSBURG: You've made it much
12 clearer than it was.

13 MR. SHAPIRO: Perhaps --

14 (Laughter.)

15 MR. SHAPIRO: -- perhaps I did. But I -- I
16 would just point out that in Osborne the lawyer didn't
17 make it clear at all. The lawyer didn't even propose an
18 instruction.

19 We proposed a good instruction that this
20 Court has quoted from emphasizing our language,
21 saying -- saying it correctly captures the due process
22 principle. So that is enough to satisfy Federal
23 criteria of -- of adequacy, and that is sufficient to
24 preserve the point. There is no dispute that this is
25 preserved for appellate purposes in Oregon.

1 Unless the Court has further questions, I --
2 I would reserve the balance of our time.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Shapiro.

5 Mr. Peck.

6 ORAL ARGUMENT OF ROBERT S. PECK
7 ON BEHALF OF THE RESPONDENT

8 MR. PECK: Mr. Chief Justice, and may it
9 please the Court:

10 This Court's constitutional mandate in this
11 case is conditioned in several significant respects, and
12 it invites the discretion and judgment of a State court
13 that's applying it. First of all, it says that States
14 have flexibility in coming up with a procedure to
15 address this procedural due process issue.

16 It also says that it has to be an
17 appropriate case; there has to be a significant risk of
18 juror confusion, and a request. There's no indication
19 in the opinion that this Court intended to federalize
20 the State procedure over how that request occurs.

21 CHIEF JUSTICE ROBERTS: You don't dispute
22 that it's a Federal question whether that procedure is
23 adequate and independent?

24 MR. PECK: I do not, but I also submit that
25 it is more than adequate. Exist -- what the Oregon

1 Supreme Court decided was that the existing procedure
2 permitting a limiting instruction to be requested -- in
3 Oregon it's Rule 105, same language as in the Federal
4 rule -- and such a request has to be timely, it has to
5 be specific, it has to be on the record. And Oregon
6 precedent says that when we mean specific, the proponent
7 has to give us the exact language -- this is part of the
8 party presentation principle -- the exact language that
9 they are asking us to use.

10 And that means that we also apply our
11 traditional 92-year-old rule that requests for
12 instruction must be clear and correct in all respects.

13 JUSTICE STEVENS: The problem --

14 JUSTICE BREYER: I would say the 28 cases
15 are not quite as clear as I suggested. That is, I
16 couldn't find in those 28 cases really a comparable
17 situation.

18 MR. PECK: Well --

19 JUSTICE BREYER: In each instance it seemed
20 as if one of two things was the case: Either, A, where
21 the instruction was in error, it really was the matter
22 brought up in the first place, or the court said, but he
23 gave the essence of the instruction he wanted anyway.

24 Now, which of those cases do you think -- I
25 am leading up to, what of -- what of those cases do you

1 think is your best support, because I couldn't -- they
2 are not perfect.

3 MR. PECK: I would look first at
4 Reyes-Camarena, which is a 2000 -- a 2000 decision
5 involving the death penalty. And there, there were two
6 parts of this request, in a single request. The request
7 asked for a mitigating factors instruction, which the
8 court found was correct on the law and -- and would have
9 been given had it been asked for separately.

10 But it also asked the jury to consider
11 sympathy for the defendant, which they found to be
12 contrary to Oregon law, and therefore, it was not error
13 for the trial court to have refused this.

14 JUSTICE BREYER: What -- what you can't tell
15 from that is what was the part of the sympathy
16 instruction that they thought was wrong, and was the
17 part that they thought was wrong really part and parcel
18 of the part that the -- that the appellant was
19 complaining about.

20 MR. PECK: Well, the court, though, did cite
21 a prior decision that talked about a sympathy
22 instruction and claimed that this one was no different
23 than that. It was contained in a single instruction.
24 It makes clear, the opinion does, on that.

25 Owings v. Rose is that another case which

1 both parties have cited. And in Owings, it's very
2 clear. There you have two different parts of an
3 instruction that are offered at the same time, and --
4 and one part is right. And this -- this one deals with
5 third party liability.

6 JUSTICE BREYER: But I remember that,
7 because they said on that one -- some floor covering
8 thing, wasn't it, that they had some liability for bad
9 floors or designing the floors wrong --

10 MR. PECK: If --

11 JUSTICE BREYER: If that's the case, what
12 they said was: Don't worry about it because basically
13 he did give you the instruction that you wanted, though
14 in a different way --

15 MR. PECK: But --

16 JUSTICE BREYER: -- and besides that, they
17 added --

18 MR. PECK: And besides that --

19 JUSTICE BREYER: You're right.

20 MR. PECK: -- this was an alternate ground.

21 Then in Hotelling v. Walther, a 1944 case,
22 the proposed instruction consist -- consisted of three
23 separate sentences, and the Court does reprint that
24 instruction. And each of those sentences has a
25 different legal proposition in it. And it was only the

1 last sentence, the third proposition, that the Court
2 found to be in error, and therefore, found that there
3 was no error in failing to give this instruction because
4 it was not clear and correct in all respects.

5 I -- I think that that --

6 JUSTICE BREYER: In the last one, what I
7 have here is that the court said the so-called requested
8 instruction was never requested at all --

9 MR. PECK: But --

10 JUSTICE BREYER: -- at all.

11 MR. PECK: But I do not believe that that
12 was the --

13 JUSTICE BREYER: What is the -- what is the
14 -- I will go look at that again. But what is the
15 standard? I mean, remember, I think what your brother
16 said at the end is correct. Imagine that yours is a
17 death case and we have said as a matter of Federal law
18 that this execution is unconstitutional, and then we
19 send it back. And the court then says: Oh, we forgot;
20 there are a couple of matters of State law here that bar
21 the Federal consideration of the death question. And
22 here they are. And then they come up with just this.

23 Is this -- is this a situation where you
24 would be equally -- that's my problem. And so, put
25 yourself in my shoes and -- and tell me what you would

1 do if this is the death case and not the case that you
2 have?

3 MR. PECK: Well, you know, it's -- it's hard
4 to get my arms around your hypothetical, because I don't
5 know the grounds on which --

6 JUSTICE BREYER: I'm just imagining that
7 what has happened is that the instruction that they have
8 given for the defendant in the death case violates
9 Federal law, and then we send it back, and what happens
10 is that the State court says, oh, it may violate Federal
11 law all right, but it's -- the Federal court is blocked
12 from considering it because there are these two other
13 State grounds that mean that the lawyer --

14 MR. PECK: I understand.

15 JUSTICE BREYER: Okay.

16 MR. PECK: But -- but the question would be
17 then, why would that be a situation like this, where the
18 trial judge -- contrary to your assumption,
19 Justice Ginsburg -- the trial judge did find that there
20 were other parts of the instructions offered by Philip
21 Morris that were incorrect on the law, and the illicit
22 profits was one of them.

23 JUSTICE SCALIA: Why didn't the trial judge
24 just stop there? I mean, if this is the ruling in the
25 State --

1 MR. PECK: Justice --

2 JUSTICE SCALIA: -- once the trial judge
3 found that one of the other instructions was bad, he
4 could have just said, I throw the whole thing out. Why
5 did he go to all the trouble of going into this, the
6 governing one?

7 MR. PECK: This is -- this is a process.
8 Counsel in the case in a trial in Oregon can offer
9 instructions every -- a proffered instruction up to the
10 point when the jury is instructed under their law. So
11 Philip Morris had the opportunity to correct it. The
12 practical nature of a charge conference is that the
13 parties come in with their proposed instructions. The
14 plaintiffs followed the pattern instruction, which by
15 the way does not require enumeration.

16 JUSTICE SCALIA: You -- you are
17 acknowledging that the trial court did not apply the
18 rule --

19 MR. PECK: The -- it's not a rule of trial
20 procedure. It's a rule of appellate review.

21 CHIEF JUSTICE ROBERTS: Well, I -- yes,
22 that's exactly right. And I think the purpose for the
23 rule is to avoid confusion about the ground of decision
24 for the trial court. If you have got two errors, and
25 she says the instruction's no good, on appellate review

1 you don't know which basis was at issue. There is no
2 doubt here the basis on which the trial court was
3 ruling, is there?

4 MR. PECK: I believe there is -- there --
5 first of all the trial judge rejected this instruction
6 on multiple grounds, and made it clear that the illicit
7 profits request was contrary to the Oregon statute that
8 sets up the criteria. She found other parts confusing
9 and contradictory. But -- and -- but there are two
10 things that I think are significant here.

11 You have to look at what was discussed
12 here. The trial judge, if you turn to 21a of the joint
13 appendix: "We are not here to punish for other
14 plaintiffs' harms. We are here to punish, if we are
15 here to punish at all, for the conduct that caused harm
16 to Jesse Williams on or after September 1, 1988." This
17 sounds very much like an acceptance of the rule that
18 Philip Morris was advocating.

19 On 19a she says: "These punitive damages
20 are not designed to compensate for other plaintiffs who
21 are not here. " On 20a there is a colloquy; she
22 expresses her belief that the risk is adequately guarded
23 against, suggests language to express that, and asks:
24 "Does that get you where you need to be?"

25 That's when Philip Morris's counsel says

1 "Okay." She had every reason to believe that she had
2 satisfied it. She then follows up.

3 JUSTICE STEVENS: Do we give any weight in
4 the case to the fact that the instruction that the
5 Petitioners now request and the rule had not really been
6 announced clearly as of the time of this trial? It's
7 not exactly a new rule, but let's -- for our sake we
8 will call it a new rule. Does that have any weight?

9 MR. PECK: I don't think it does.

10 JUSTICE STEVENS: But it does in our cause
11 and prejudice jurisprudence. In habeas, which is also a
12 civil action --

13 MR. PECK: I understand.

14 JUSTICE STEVENS: -- we say there is an
15 overarching Federal principle that allows; because of
16 cause and prejudice, we can consider the Federal issue.
17 We do that all the time. Those cases weren't raised by
18 the Petitioner, but it seems to me they're quite
19 relevant here, especially when you consider the
20 importance of the constitutional issue, which was not
21 really -- let's face it -- clear to counsel on either
22 side of the aisle or to the trial judge.

23 MR. PECK: Well, here's the reason why I
24 think in the context of this record, and -- and this
25 litigant, it is not significant. And that is, if you

1 look at 21a, the appendix in our -- our merit brief,
2 there we have Philip Morris in another smoker trial in
3 Oregon offering up a requested instruction on this
4 issue. This is in 2002, so it's well before this
5 Court's decision in this case.

6 It's even before State Farm v. Campbell, and
7 the requested instruction says, one sentence: "You are
8 not to impose punishment for harms suffered by persons
9 other than the plaintiff before you."

10 JUSTICE STEVENS: But the trial judge didn't
11 have the benefit of -- of the ruling that this Court has
12 subsequently made on that point. The trial judge in
13 fact here said: Now, if you can give me a case, then I
14 will give you an instruction; you can't give me a case.
15 And she was right.

16 MR. PECK: But she -- but that's actually
17 not the same issue that she asked that on. Counsel
18 cited page 17a of the joint appendix for that question.
19 And if you look at the bottom of 16a, her question:
20 "Let me stop first and go back to the proportionality
21 point you are making. " This is the ratio point, the
22 second guidepost of BMW v. Gore. She says: "Is there
23 case law that says the trial court shall, in order to
24 have a constitutional instruction, tell the jury about
25 proportionality?" And this is where he says: It's

1 addressed post-verdict. She asks: Is there any case
2 law; and she says: No, I'm not going to go there. I'm
3 not going to go where no judge has gone before, because
4 she did not want to be reversed.

5 So she is trying to be careful, and I think
6 you have to credit the Oregon --

7 JUSTICE KENNEDY: Well, but I -- it sounds
8 to me like that you are confirming my concerns.

9 MR. PECK: No. I -- I think that what she
10 said is as to the proportionality issue. On the other
11 issue, she even returns to it later when Philip Morris
12 bring up a different issue with respect to punitive
13 damages.

14 JUSTICE KENNEDY: Oh. Oh, you're -- you are
15 saying that if our law had been clear at the time, that
16 she still wouldn't have given the instruction?

17 MR. PECK: No. I'm saying that she thought
18 she was complying with that. She stated on the record
19 that: We are not here to punish for other plaintiffs'
20 harms. Later on that other issue, if you look at 28a --

21 JUSTICE KENNEDY: So your -- your contention
22 is, is that this trial court and the counsel in the case
23 had all the guidance necessary to give the correct
24 instruction --

25 MR. PECK: She --

1 JUSTICE KENNEDY: -- before -- before we
2 even announced the rule?

3 MR. PECK: She seemed to accept -- she
4 accepted the point before you announced the rule, and
5 the Oregon Court of Appeals ruling in the Estate of
6 Schwarz case where they offered that one-sentence
7 instruction, reversed the verdict, in part because that
8 instruction they said should have been given. So they
9 anticipated this Court's rule. I think --

10 CHIEF JUSTICE ROBERTS: To move -- to move
11 from the trial court to the appellate court, if you are
12 correct that there is this routine, clear rule of State
13 procedure, why would the appellate court say, in its
14 head, well, I could rely on that, but I want to decide
15 this complicated, difficult rule of Federal
16 constitutional law instead?

17 MR. PECK: Well, in fact, the -- the court
18 thought it was relying on it. In each of the previous
19 iterations in the Oregon Court of Appeals and in the
20 Oregon Supreme Court, they cited this rule, "clear and
21 correct in all respects," in order to reject the "harm
22 to others" instruction because they said it was
23 inconsistent with State law.

24 CHIEF JUSTICE ROBERTS: So you think we just
25 made a mistake in going ahead and reaching the Federal

1 procedural rule that we reached because it was barred by
2 this adequate and independent State ground that the
3 Oregon courts had relied upon?

4 MR. PECK: No. What I'm saying is that they
5 went further then, and this is what gave this Court the
6 authority to rule on that substantive issue. They said
7 that that request was inconsistent with the Oregon
8 statute. And they did so -- on page 48a of the
9 petition, where they say: "In Williams 1, the Court of
10 Appeals concluded that the instruction was incorrect
11 under State law. We agree."

12 And then again on page 52a, they note that:
13 "That is not correct as an independent matter of Oregon
14 law respecting the conduct of jury trials and
15 instructions" --

16 CHIEF JUSTICE ROBERTS: But then I think
17 your --

18 MR. PECK: But --

19 CHIEF JUSTICE ROBERTS: But I think your
20 answer -- go ahead with your but.

21 (Laughter.)

22 MR. PECK: But then they went on to say:
23 "And nothing in due process requires us to look at this
24 differently." That's where they made their error. That
25 was the constitutional mistake that the Oregon court

1 made. They thought they were wrong on a State ground.
2 They thought there was no Federal issue addressing that,
3 and so they decided that they didn't have to reach any
4 other State law issues. And they ignored the well
5 preserved objections that Mrs. Williams made to the
6 other parts of this unified instruction on punitive
7 damages.

8 CHIEF JUSTICE ROBERTS: Well, I'm sorry. I
9 still don't see that answer. You are saying they said
10 yes, there was this rule of Oregon law, but you can
11 still reach -- there might still be a Federal due
12 process issue, so we just can't rely on that. And if
13 that's true, then that seems to me to be a concession
14 that this is not an adequate and independent State
15 ground that would bar consideration of a Federal
16 constitutional issue.

17 MR. PECK: What was not an adequate on
18 independent State grounds was their decision that the
19 Oregon statute which permits you to punish a misconduct
20 in order to deter others from doing that allowed
21 punishment for harm to non-parties.

22 That part was their interpretation of the
23 statute, and if there were no due process equation here,
24 that would have been an independent State ground. It
25 was wrong as a matter of due process.

1 But there are other grounds, other mistakes,
2 substantive mistakes, avoiding law in this instruction.
3 And any trial court that gave instruction number 34,
4 which was objected to as a whole, would have committed
5 reversible error because they failed to follow the
6 Oregon statute.

7 CHIEF JUSTICE ROBERTS: I guess I think it's
8 the more routine practice for a court, if you have a --
9 again, as you argue -- a clear procedural rule that bars
10 addressing the substantive issue, to go ahead and rely
11 on that. Now, if the procedural rule is difficult and
12 of uncertain application, maybe you go ahead and say,
13 well, we we're going to decide on the merits anyway.

14 But it seems to me, under your presentation,
15 it's the other way around. It's a clear and easy
16 procedural rule, difficult Federal and State intertwined
17 constitutional rule, and yet the court says, well, I'm
18 going to do the hard work rather than the easy work.

19 MR. PECK: I think it was natural for the
20 court to do that. That was the issue presented to them
21 by Philip Morris. And courts do not reach out to do
22 other issues. They reach -- they were being solicitous
23 of Philip Morris, and they were addressing the arguments
24 that Philip Morris made. And when they decided that
25 that inured to Mrs. Williams benefit, not to Philip

1 Morris's benefit, then they said we don't need to
2 address your other questions. And I think have you to
3 look at the Oregon Supreme Court noting in their own
4 decision that there was no futility here. In fact, the
5 last time we were here Philip Morris said the reason
6 they needed this instruction was because of what was
7 said at closing argument.

8 JUSTICE BREYER: What are the elements?
9 Imagine -- I'm trying to get help, if I were to try to
10 put pen to paper on this. Suppose they win in this.
11 Then we will be back at the State law issue that I
12 thought was going to be there, which was the issue of --
13 you are talking about the colloquy. Did they give the
14 essence of the Federal mandated instruction, or didn't
15 they? And then look how cooperative the judge was, et
16 cetera. But that isn't before us now.

17 What is before us now is something that
18 blocks our consideration of that or anybody's
19 consideration of that. And imagine this is not your
20 case; imagine it is the most, you know, striking case,
21 that's why I used a death example, and we go through
22 exactly the same thing. And then the court does exactly
23 the same thing, the State court, that happened here.
24 And now what are the words that distinguish whether the
25 court is in essence, to be colloquial, giving everybody

1 the runaround or whether the court is applying a -- an
2 absolute, clear, you know, fair, standard of State law?
3 Which really they should have gone into first and saved
4 everybody a lot of trouble.

5 MR. PECK: I think the easiest way to look
6 at this --

7 JUSTICE BREYER: Yes.

8 MR. PECK: -- is imagine that the statute of
9 limitations, which now bars any such suit in Oregon,
10 were brought today, after this Court's decision in
11 Williams, and imagine that Philip Morris is the
12 defendant, and at the end of the trial they offer their
13 number 34 as it was before saying, "This Court said that
14 they had made the right choice in asking for this
15 instruction."

16 A trial court clearly would engage in
17 reversible error if they gave that instruction because
18 it materially departs from Oregon law. At the same
19 time, they could deny that instruction. They could deny
20 that instruction, and the Oregon Supreme Court would not
21 violate the mandate of this Court's decision by saying
22 that that is a correct decision on the part of the trial
23 law court because it was not clear and correct in all
24 respects.

25 And that is part of what distinguishes this.

1 This is still a rule that has to apply to its
2 instruction --

3 JUSTICE BREYER: Well, what they say is --
4 look at the two errors they found. One is in saying
5 "may" instead of "shall," and the other is in saying
6 "illicit profit" instead of "profit." And they are
7 pretty picky. So, this is very picky, they say. And
8 not only are they being picky, but they are being picky
9 after the event. And they could have raised it first,
10 and they have 28 cases supporting them, but none of
11 these cases is right on point because the subject matter
12 is, you know, closer bound up. And so they put all this
13 together and say it's an unreasonable application of a
14 rule that was there. And you say --

15 MR. PECK: I would urge you, Justice Breyer,
16 to look at the original case in 1916, the Sorenson case.
17 There the court was face with a question: If there is
18 the kernel of a correct instruction in there, is that
19 adequate to ask the court to give that instruction or
20 should we insist on what they thought at the time was
21 the majority rule in the United States, that we should
22 insist on an instruction that is clear and correct in
23 all respects, and that the -- that the counsel has the
24 responsibility to provide that? And they decided to go
25 with the clear and correct rule. That was the debate

1 that they had, and that debate informs this one.

2 JUSTICE BREYER: Sorenson was the agent and
3 the principal, the broker who was selling some land.

4 MR. PECK: Right.

5 JUSTICE BREYER: And I think in that case
6 they also said, "By the way, you've got basically the
7 instruction that you wanted, and you overlooked" -- no,
8 that was the case where they said, "You overlooked in
9 your instruction an important allegation of fact," which
10 allegation was that the guy had been rehired as a
11 broker.

12 MR. PECK: And there's a similar distinction
13 that makes Osborne irrelevant, which counsel suggested
14 was a -- an exemplary here.

15 In Osborne, an element of the crime had not
16 been instructed upon. That's why there didn't have to
17 be the offer of an instruction. But the party
18 presentation principle puts the onus on counsel to do
19 so, and Philip Morris showed, in 2002, well before this
20 Court's decisions that they know how to do it when they
21 want to.

22 JUSTICE SCALIA: Mr. Peck, are you -- are
23 you asserting that our remand order was in error? After
24 all, it did say, "We remand this case so that the Oregon
25 Supreme Court can apply this standard we have set

1 forth."

2 MR. PECK: And I -- I'd contend, Your Honor,
3 that the --

4 JUSTICE BREYER: We didn't say it was in
5 error. I mean, there is nothing wrong with that.

6 (Laughter.)

7 MR. PECK: Well, I think --

8 JUSTICE SCALIA: If you say it's in error,
9 my next question is going to be --

10 MR. PECK: I think the Oregon Supreme Court
11 read that decision --

12 JUSTICE SCALIA: -- can -- is it up to a
13 State court to sit in judgment about whether our remand
14 orders are in error or not?

15 MR. PECK: Well, I'm prepared to say that
16 the Oregon Supreme Court took that remand order to mean
17 that they had to have in place -- this was a procedural
18 due process decision -- that they had to have a
19 procedure that was fair, outcome neutral, applied --

20 JUSTICE SCALIA: If that's what they took it
21 to mean, they were just wrong. I mean, that's not what
22 it says.

23 MR. PECK: Well, if you look --

24 JUSTICE SCALIA: The opinion concludes, "As
25 the preceding discussion makes clear, we believe the

1 Oregon Supreme Court applied the wrong constitutional
2 standard when considering Philip Morris's appeal." And
3 it goes to the constitutional issue we are talking
4 about.

5 MR. PECK: When considering --

6 JUSTICE SCALIA: "We remand so that the
7 Oregon Supreme Court can apply the standard we have set
8 forth," which has nothing to do with the issue we have
9 been discussing this morning.

10 MR. PECK: Your Honor --

11 JUSTICE SCALIA: So it was wrong?

12 MR. PECK: No, it was not wrong. I don't
13 think it was wrong, and here's the reason I don't think
14 it was wrong: You corrected the Oregon Supreme Court
15 when that thought that due process does not inform the
16 analysis on harm to non-parties. You corrected that
17 substantive error, and that part is what they got wrong.

18 Much of this opinion said that they got lots
19 of other things right. And so Oregon looked at it and
20 said, "Okay, we got that issue wrong, but there are
21 other problems with this instruction that are adequate
22 and independent grounds for --

23 JUSTICE SCALIA: That's very nice, but
24 that's not what we remanded for.

25 MR. PECK: You did not remand for that, but

1 when this Court decides a constitutional issue of one
2 part, it doesn't necessarily tell the court anything
3 different. What -- the essence of this Court's opinion
4 is that where there's a significant risk of jury
5 confusion, the State has to provide a procedure and has
6 flexibility in providing that procedure. There is no
7 indication that the procedure for limiting instructions
8 does not satisfy that.

9 JUSTICE SOUTER: The problem that I think we
10 all have is how do we guard, in effect, guard against
11 making constitutional decisions which are simply going
12 to be nullified by some clever device raising a
13 procedural issue or an issue of State law when the case
14 goes back? Is there any way for us to ensure against,
15 in effect, a bad faith response to our decision except
16 by purporting to require the State courts to follow a
17 certain order of battle in the decision of issues before
18 them so that when the case gets to us, we can be assured
19 that there is no lurking issue that has not yet been
20 decided as a matter of State law that in effect could
21 then be resurrected to nullify our decision? Is there
22 any way to guard against that except by telling the
23 State courts what the sequence is in which they have to
24 make decisions?

25 MR. PECK: I believe there is. And I

1 believe that it would be error to suggest to the State
2 supreme court that they must, even though prudent,
3 follow a specific sequence, simply because that would
4 mean that they would have to necessarily decide every
5 State law issue in the case --

6 JUSTICE SOUTER: I -- I see the problem. I
7 mean, that's why I raised the question, how can we
8 ensure --

9 JUSTICE KENNEDY: But we do that all the
10 time in cause and prejudice cases. We do it all the
11 time --

12 MR. PECK: Yes.

13 JUSTICE KENNEDY: -- because of the
14 importance of the constitutional right.

15 MR. PECK: I understand that, but I think
16 the adequate and independent State law ground provides
17 all the protection. You assume, and I think properly
18 so, that State supreme courts will operate in good
19 faith. Even in *Flowers*, after the fourth trip to the
20 U.S. Supreme Court, were -- Alabama Supreme Court was
21 still trusted to apply the decision.

22 JUSTICE SOUTER: Okay. Your -- your answer
23 is there is -- there is no way to guard against it
24 except --

25 MR. PECK: Except --

1 JUSTICE SOUTER: -- by reviewing the good
2 faith of what the court does on remand.

3 MR. PECK: Well, by -- by accepting that if
4 the rule that has been imposed was invoked properly by
5 the party that invoked it at the right time --

6 JUSTICE SOUTER: Yes.

7 MR. PECK: -- that it IS firmly established
8 and regularly followed, then it should satisfy the
9 Court --

10 JUSTICE KENNEDY: But it serves very little
11 interest. Nothing the trial judge would have done,
12 nothing the plaintiff's counsel has done below, nothing
13 that the intermediate clause would have done, would have
14 -- would have been different if they had submitted what
15 they call the "correct in all respects" rule.

16 If they had filed the "correct in all
17 respects" rule and submitted that rule -- if she had
18 said, judge, I want to type a little piece of paper,
19 everything would have been the same.

20 MR. PECK: I suggest that it would be
21 different. I think the Oregon Supreme Court decided,
22 when they decided that there was no futility in offering
23 another one, that it would be different. And the fact
24 of the matter is that --

25 JUSTICE KENNEDY: I excluded the Oregon

1 Supreme Court from my list of -- of participants who
2 would have done something differently.

3 MR. PECK: But -- but -- but the fact of the
4 matter is, if after closing arguments which was the
5 trigger that Philip Morris urged upon this Court for
6 needing this substantive rule, if after -- if after that
7 Philip Morris's counsel had returned to the judge -- you
8 know, they said a few things that we think would tell
9 the jury to punish for harm to others. We don't think
10 the instruction is adequate. We will give you the same
11 instruction, that one-sentence instruction like we gave
12 in Fink v. Schwarz. I believe the court would have
13 given that instruction.

14 CHIEF JUSTICE ROBERTS: There is, of course,
15 another way to protect our constitutional authority in
16 this case. We are talking about procedures for
17 addressing the substantive due-process challenge to
18 a punitive damages award. That is the second question
19 presented here.

20 If we went and granted that question and
21 considered that issue, we would have protected our
22 authority to reach that question despite the procedural
23 objections alone. Why don't we just do that?

24 MR. PECK: Well, Your Honor, of course, the
25 last time we were here you had a full briefing and even

1 some argument on that. And I -- I believe that we are
2 prepared to stand on that briefing and argument.

3 We do not believe the Due Process Clause is
4 an exercise in elementary school mathematics. It does
5 not tell you something about this. Here you have to
6 look at the enormity of the misconduct. And that did --

7 CHIEF JUSTICE ROBERTS: I'm not asking you
8 to argue here today the second question presented.

9 MR. PECK: I understand.

10 CHIEF JUSTICE ROBERTS: But if we have some
11 concern, if there is something malodorous about the fact
12 that the Oregon Supreme Court waited until the last
13 minute to come up with this rule that was before it all
14 the time, which was a State court rule that you would
15 expect the State court to be addressing as a matter of
16 course, then -- then we -- we can avoid having to
17 address what we do in a situation, having to
18 characterize the nature of that -- that consideration,
19 simply by saying: Look, we are going to go ahead with
20 the questions presented. We can decide it in this case;
21 and to avoid having to reach that, we will go ahead and
22 do it.

23 MR. PECK: Well, it's -- it's certainly
24 within this Court's power to do that. Philip Morris had
25 made a very harsh accusation in this case of bad faith

1 on the part of the Oregon Supreme Court. There was no
2 sandbagging here. The Oregon court did not act in that
3 way.

4 Mrs. Williams raised the State-law issues at
5 every opportunity, which is something that Philip Morris
6 denied in their petition but then conceded in their
7 merit brief. And the fact is it was before the Oregon
8 Court of Appeals. It was before the Oregon Supreme
9 Court, and we even raised it before this court.

10 JUSTICE GINSBURG: You -- in answer to the
11 Chief Justice, you are not suggesting that we should go
12 ahead and decide the second question when there has been
13 no briefing on it?

14 MR. PECK: I am not suggesting that you
15 decide the question, but I recognize the Court has the
16 power to do so. Mapp v. Ohio came to this Court as a
17 First Amendment case and came out as a Fourth Amendment
18 case.

19 CHIEF JUSTICE ROBERTS: I -- I thought --
20 Mr. Peck, I thought you just told me that there has been
21 full and adequate briefing on that question.

22 MR. PECK: I believe we had full and
23 adequate briefing. We may not have had an opportunity
24 to fully argue the case, and it's up for you to decide
25 whether or not you -- you have enough on that.

1 I thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Shapiro, you have three minutes remaining.

4 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

5 ON BEHALF OF THE PETITIONER

6 MR. SHAPIRO: Thank you, Mr. Chief Justice.

7 Justice Breyer asked about these various cases from
8 Oregon, whether they provided guidance and a warning
9 here. And counsel referred to three cases, Reeve,
10 Owings and then Sorenson. If you look at those cases,
11 you will see there were simple instructions proposed on
12 a single topic that were infected with an error
13 throughout.

14 And the court said if there is any valid
15 proportion of this instruction, it was covered by
16 something that was said to the jury already. So there
17 was no harm in not giving that instruction.

18 That is certainly not our case. We have a
19 separately numbered paragraph dealing with the
20 Constitution, which is quite apart from the statutory
21 factors.

22 Now, counsel referred to the charge actually
23 given by the court as if it provided some protection
24 against punishment for harm to nonparties. If you read
25 that instruction, far from providing the protection that

1 the -- this Court said was obligatory, it invited global
2 punishment. It told the jury they could return any
3 punitive-damage award up to one hundred million dollars.
4 Lo and behold, they come up with eighty million dollars,
5 right within the suggested range of this charge. And
6 there was no --

7 JUSTICE GINSBURG: Which portion of the
8 charge specifically are you referring to?

9 MR. SHAPIRO: This is page 37a of our joint
10 appendix. The -- the court concludes the amount of
11 punitive damages you assess may not exceed the sum of
12 one hundred million dollars. And that, of course, was
13 the zone of reasonableness that the jury inferred from
14 this, suggesting a global punishment to the jury with no
15 protection.

16 Now this Court said that that protection has
17 to be provided. The Court said the State must insist,
18 that the State must give assurance, and it's an
19 important constitutional right, as Justice Kennedy said.
20 I don't think the State court --

21 JUSTICE BREYER: What is your response to
22 the Chief Justice's suggestion that maybe we should
23 reach the issue of due process on the amount?

24 MR. SHAPIRO: We wouldn't oppose that
25 because this is clearly excessive under what the Court

1 said in State Farm: Where there is substantial
2 compensatory damages, one to one is something of a norm.

3 CHIEF JUSTICE ROBERTS: I wasn't asking to
4 you argue it, either but I mean I suppose the procedure
5 the parties would prefer, if we were interested in that,
6 would be for us to grant the second question and then
7 have the normal briefing in consideration.

8 MR. SHAPIRO: Oh, that -- that -- yes,
9 certainly, that -- that -- that is true. I -- I would
10 comment, too, on Justice Breyer's question about what is
11 the ultimate test here.

12 The Court has stated various criteria and
13 opinions over the last century, but the -- the key ideas
14 are? Was it an ambush, something that couldn't be
15 anticipated?

16 JUSTICE BREYER: I mean I will tell you my
17 subjective reaction going through these 38 cases is they
18 are not quite in point, but they really take away the
19 idea of the bad faith, particularly because the first
20 time what the judge said, which I didn't understand its
21 significance then, but the judge said: Well, since the
22 first part of that paragraph was in -- was in error
23 anyway, I don't have to reach the question of whether
24 there were other mistakes under State law in the rest of
25 the instruction. They did say that the first time, I

1 think.

2 MR. SHAPIRO: Oh, yes, but this is the first
3 time the Court has ever taken this "correct in all
4 respects" rule and extended it to a completely different
5 topic, U.S. constitutional law in a separately numbered
6 paragraph. And we had no notice that this had to be
7 broken out on a separate piece of paper. If we did, we
8 would have broken it out on a separate piece of paper.
9 It's just like Lee against Kemna where the Court said --

10 JUSTICE GINSBURG: What about this point
11 that was made that in 2002 that is exactly what Philip
12 Morris did, give one simple, precise instruction?

13 MR. SHAPIRO: Well, no, that instruction was
14 not harm to nonparties. That was harm for out-of-State
15 injuries. It was a different issue. And it's true the
16 lawyers there did break up their instructions
17 differently, but the pattern instruction --

18 JUSTICE GINSBURG: Is it -- is it true that
19 they gave one simple sentence stating their position on
20 -- on what harm to others, how that --

21 MR. SHAPIRO: No. That's not true. That
22 case did not accept our instruction. It did not. It
23 accepted the State Farm instruction, which said that
24 there can't be punishment for out-of-State harm.

25 JUSTICE GINSBURG: But -- but was the

1 instruction stated in a -- in a single paragraph, but
2 all the other requests to charge were broken out?

3 MR. SHAPIRO: Yes. This -- this State Farm
4 instruction was broken out. That's an option for
5 lawyers. But under the pattern instruction, it's quite
6 proper to put them all in one instructional basket.
7 That's what the form instructions said, and that's what
8 both parties here did.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 MR. SHAPIRO: We thank the Court.

12 (Whereupon, at 11:04 a.m., the case in the
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

129 S.Ct. 1436

Supreme Court of the United States

PHILIP MORRIS USA INC., Petitioner,

v.

Mayola WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased.

No. 07-1216. March 31, 2009.

Attorneys and Law Firms

Stephen M. Shapiro, for Petitioner.

Robert S. Peck, for respondent.

Case below, 344 Or. 45, 176 P 3d 1255.

Opinion

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Parallel Citations

173 L.Ed.2d 346, 77 USLW 3557, 21 Fla. L. Weekly Fed. S 731

End of Document

© 2010 Thomson Reuters. No claim to original U.S. Government Works.

ADDENDUM EXHIBIT 4

Over the last 25 years, Utah courts have consistently held that if a party fails to object to, stipulates to, or submits incorrect jury instructions at the trial court level, then the party has waived their right to appeal the instruction.¹

- *State v. Pinder*, 2005 UT 15, ¶¶ 60-63, 114 P.3d 551 (failure to object and stipulated to the instruction);
- *State v. Geukgeuzian*, 2004 UT 16, ¶ 14, 86 P.3d 742 (party submitted incorrect jury instruction to trial court);
- *State v. Hamilton*, 2003 UT 22, ¶¶ 27-29, 70 P.3d 111 (stipulated to instruction);
- *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶¶ 10-11, 40 P.3d 1119 (failure to object);
- *Jones v. Cyprus Plateau Mineral Corporation*, 944 P.2d 357, 360 (Utah 1997) (failure to object with specificity);
- *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988) (failure to object);
- *King v. Fereday*, 739 P.2d 618, 621-22 (Utah 1987) (court held that party waived objection to jury instruction since they failed to timely object);
- *Penrod v. Carter*, 737 P.2d 199, 200 (Utah 1987) (failure to object);
- *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573, 579 (Utah 1985) (failure to object with sufficient specificity);

¹ This string citation includes both criminal and civil cases. The rules governing both are nearly identical. See Utah R. Crim. P. 19; Utah R. Civ. P. 51.

- *State v. Maese*, 2010 UT App 106, ¶ 12, 236 P.3d 155 (failure to object);
- *State v. Chavez-Espinoza*, 2008 UT App 191, ¶¶ 11-12, 186 P.3d 1023 (failure to object);
- *State v. Bennett*, 2008 UT App 126, *1 (unpublished decision, attached) (failure to object);
- *State v. Wareham*, 2006 UT App 327, ¶¶ 14-16, 143 P.3d 302 (stipulated to incorrect jury instruction);
- *Moore v. Smith*, 2007 UT App 101, ¶¶ 30-31, 158 P.3d 562 (failure to object);
- *State v. Cox*, 2007 UT App 317, ¶ 19, 169 P.3d 806 (failure to object);
- *State v. Leber*, 2007 UT App 273, ¶ 14, 167 P.3d 1091 (party submitted incorrect jury instruction);
- *State v. Harper*, 2006 UT App 178, ¶¶ 12-13, 136 P.3d 1261 (failure to object);
- *State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804 (failure to object);
- *State v. Malaga*, 2006 UT App 103, ¶ 8, 132 P.3d 703 (failure to object);
- *State v. Bloomfield*, 2003 UT App 3, ¶ 12, 63 P.3d 110 (stipulated to jury instruction);
- *Chapman v. Uintah County*, 2003 UT App 383, ¶¶ 25-26, 81 P.3d 761 (stipulated to jury instruction);

- *State v. Bradley*, 2002 UT App 348, ¶ 39, 57 P.3d 1139 (failed to submit instruction);
- *State v. Tueller*, 2001 UT App 317, ¶ 21, 37 P.3d 1180 (stipulated to jury instruction);
- *State v. Chaney*, 1999 UT App 309, ¶¶ 54-55, 989 P.2d 1091 (stipulated to jury instruction);
- *State v. Kiriluk*, 1999 UT App 30, ¶ 23, 975 P.2d 469 (failure to object);
- *State v. Blubaugh*, 904 P.2d 688, 700 (Utah Ct. App. 1995) (failure to object);
- *Tolman v. Winchester Hills Water Co., Inc.*, 912 P.2d 457, 460-61 (Utah Ct. App. 1996) (failure to object with sufficient specificity);
- *Anton v. Thomas*, 806 P.2d 744, 747 (Utah Ct. App. 1991) (failure to object);
- *State v. Perdue*, 813 P.2d 1201, 1205 (Utah Ct. App. 1991) (party submitted the jury instruction);
- *Mann v. Wadsworth*, 776 P.2d 926, 929 (Utah Ct. App. 1989) (failure to object);
- *VanDyke v. Mountain Coin Machine Distributions, Inc.*, 758 P.2d 962, 964-65 (Utah Ct. App. 1988) (failure to object).