

2010

# Westgate Resorts v. Shaun S. Adel : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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WESTGATE RESORTS, LTD.,

Plaintiff/Counterdefendant -  
Appellant,

v.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants/Counterclaimants –  
Appellee.

Consolidated No. 20100425-SC

Appeal from Fourth Judicial District  
Court, Honorable Lynn W. Davis,  
No. 020404068

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OPENING BRIEF OF APPELLANT

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## **Jurisdiction**

This court has jurisdiction under Utah Code section 78A-3-102(3)(j).

## **Statement of the Issues and Standards of Review**

Westgate Resorts, Ltd. invited a number of people to Park City to hear a sales presentation for Westgate timeshares in exchange for a gift certificate worth \$500 for airline travel to, and hotel accommodations in, Anaheim, California. The people Westgate invited to the presentation were those with sufficient means to purchase a timeshare, including engineers, university professors, sales managers, and advertising consultants. Some of those people found the gift certificates difficult to redeem.

Shaun Adel, a disgruntled former Westgate contractor fired for falsifying sales records, stole Westgate files containing contact information of gift certificate recipients. Mr. Adel then formed Consumer Protection Group, LLC (CPG) for the sole purpose of obtaining from certificate recipients claims against Westgate related to certificate redemption and then prosecuting those claims. To obtain the claims, CPG agreed the recipients would pay nothing and do nothing (not even participate in the litigation) to prosecute their claims but would receive 50% of any recovery. In all, CPG was assigned approximately 500 claims from people who had heard a Westgate sales presentation.

But instead of trying the purchased claims separately or certifying a class of claim holders, all 500 claims were joined in this lawsuit because, and only because, they had been purchased by, and were owned by, one party—CPG, an entity that neither suffered harm nor had a claim against Westgate. CPG's purchased claims were diverse, ranging from claims of people who never tried to redeem a certificate; to people who tried but did not redeem a certificate; to people who tried, redeemed the certificate, and traveled to

Anaheim. Thus, any consolidation of claims for trial presented challenges. Instead of consolidating claims with similar fact patterns to minimize prejudice, however, the court consolidated 15 claims with different fact patterns, resulting in an array of “test cases” CPG hoped would indicate the value of all remaining claims and facilitate settlement.

The eventual result was predictable and prejudicial. The jury awarded each of the 15 claimants<sup>1</sup> between \$5 and \$550 in compensatory damages and identical punitive damages of \$66,666.67, for a total of \$1 million in punitive damages awards.

Extrapolating the punitive awards for those 15 claims to all of the 500 assigned claims would result in more than \$33 million in “punishment” imposed on Westgate as a result of the difficulty some people experienced in redeeming the \$500 certificates—certificates provided to them by an independent contractor hired by Westgate.

The way the claims were consolidated and tried and the characteristics of the jury’s punitive damages awards together demonstrate that with each separate punitive damage award the jury punished Westgate for conduct directed to the other 14 claimants and to third parties not before the court, something constitutionally forbidden. Separately, the amount of the individual punitive damages awards, which range from 121 to 13,333 times larger than all compensatory damages, and range from 1,333 and 13,333 times compensatory damages from fraud, are grossly excessive.

**Issue 1:** Whether Westgate was prejudiced by the trial court’s manner of consolidating disparate consumer claims for trial, exacerbated by the trial court’s refusal to strike statements by counsel for CPG that invited the jury to punish Westgate for conduct directed at other claimants whose claims were not then before the court.

<sup>1</sup> Although the trial began with 16 claims, Westgate obtained judgment as a matter of law on one claim, leaving 15 claims that went to the jury. (R. 4933-34.)

**Standard of Review:** A trial court's decision to consolidate is reviewed for abuse of discretion. Raggenbuck v. Suhrmann, 325 P.2d 258, 259 (Utah 1958).

**Preservation:** R. 2795-808; 4224-70; 4897-901.

**Issue 2:** Whether the trial court erred in refusing to grant JNOV or remittitur with regard to the punitive damages awards where (i) the amount of the award is constitutionally excessive and the result of passion and prejudice and (ii) the jury punished Westgate for harm allegedly suffered by third parties.

**Standard of Review:** On appeal, a party is entitled to de novo review of the constitutionality of a punitive damages award and its excessiveness under state law. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001); Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 31 & n.13, 82 P.3d 1064.

**Preservation:** R. 4861-81.

### **Determinative Provisions**

The following determinative provisions are set forth at Addendum I.

U.S. Const. amend XIV, § 2

Utah Code Ann. § 13-11-17 (2001)

Utah Code Ann. § 13-11-19 (2001)

Utah Code Ann. § 76-10-1605 (2001)

Utah R. Civ. P. 42

Utah R. Civ. P. 59

## **Statement of the Case**

### **I. Nature of the Case**

This case initially arose when Westgate invited people who could afford to purchase timeshare properties to attend a sales presentation for those timeshares in exchange for, in addition to other gifts, a certificate worth approximately \$500 for airfare to and lodging in Anaheim, California. Westgate hired a reputable, well-known independent contractor that specializes in advertising such certificate programs. Some people found that the independent contractor made it difficult to redeem the certificates.

Shaun Adel, a Westgate marketing contractor, became disgruntled when he was terminated for attempting to defraud Westgate by lying about the number of people he had solicited to attend sales presentations, solicitations for which he claimed a commission. Adel then stole confidential Westgate records with contact information for people who had attended such sales presentations. Westgate sought injunctive relief against Mr. Adel, which the trial court granted after characterizing Mr. Adel's actions as "wrongful." (R. 2349.) Mr. Adel nonetheless used the stolen contact information to enable his entity, CPG, to purchase claims from certificate recipients. Mr. Adel formed CPG for the sole purpose of obtaining and prosecuting claims against Westgate. In exchange for assigning these claims, CPG offered to give the certificate recipients, at no cost to them, 50% of any recovery. CPG eventually obtained assignments of nearly 500 such claims. This appeal is from a trial involving 15 of those 500 claims.

The proceedings involving those 15 claims raise a number of issues. First, the trial court chose not to consolidate 15 similar claims for trial, but instead consolidated 15 claims with disparate facts. Some of the 15 claimants never tried to redeem a certificate,



others tried unsuccessfully to redeem a certificate, and yet others actually redeemed a certificate, one of them traveling to Anaheim. Yet because the disparate claims were tried together, the jury treated all of them the same and awarded each of the 15 claimants the exact same punitive damages award—\$66,666.67.

Second, the punitive damages awards violate the federal due process clause and Utah law specifying limits on punitive damages awards. The purely economic damages awarded here arise exclusively from an arm's-length contractual bargain—listening to sales presentations in exchange for a \$500 certificate and other gifts—where fraud is alleged to have induced the claimants to enter into a contract. Yet the claimants here affirm that contract and seek damages stemming from Westgate's independent contractor's making it difficult to obtain a part of the benefit of their bargain. The bulk of the actual damages awarded by the jury—\$7,000—are contractual damages. The damages resulting from fraud amount to \$242. Yet whether comparing punitive damages with all actual damages or only fraud damages, the punitive damages awards are grossly disproportional under the measuring sticks structured by the United States Supreme Court and the Utah Supreme Court.

## **II. Course of Proceedings and Statement of Facts**

After nearly a decade of litigation, it is easy to overlook the initial reason that 500 diverse consumer claims were joined and 15 of those claims then consolidated for trial. It was not because the consumers knew each other, let alone were motivated to come together to file a class action lawsuit. And it is not because multiple consumers brought individual claims that caused someone to suggest consolidation. Instead, the claims at issue here were filed together, and then consolidated, only because a former Westgate

contractor, Shaun Adel, stole Westgate documents, formed CPG, and solicited claim assignments with the promise that the consumers would share in any recovery at no cost to them. (R. 7-9, 2755g-i.) CPG, which itself had no claim against Westgate, then filed all the claims in its own name. (R. 117-36.)

The 500 claims were based on theories that Westgate breached a contract with the consumer or fraudulently induced the consumer to enter into a contract. The contract involved consumers who could afford to purchase a timeshare property listening to a sales presentation in exchange for a certificate worth \$500 to travel to Anaheim (the Anaheim Certificate).<sup>2</sup> (Trial Tr. 489, 686, 857, 2381.) The alleged contract breach was that the certificate was difficult to redeem, thus depriving the consumer of the benefit of the bargain. (Trial Tr. 2381.) The alleged fraudulent conduct was that Westgate was reckless in representing the value of the certificate, which, because it was difficult to redeem, was not worth \$500. (Trial Tr. 2394-95.)

Seven years later, 15 consumer claims were tried together in a single trial. (R. 4710-12, 4723-51.) At that trial, CPG's recovery of actual damages for each claim varied from \$5 to \$550 and totaled \$7,242. (R. 4772-802.) Importantly, these compensatory damages were purely economic, as the jury refused to award any damages for emotional distress. (Id.)

The jury also awarded punitive damages. (R. 4758-72.) For a claim involving a consumer who redeemed the certificate, traveled to Anaheim, and took his family to Disneyland, the jury awarded CPG \$66,666.67 in punitive damages. (Id.) For the claims

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<sup>2</sup> In addition to the Anaheim Certificate, the consumers also all received other gifts such as gift certificates for shopping and dining and free passes for area golf courses and ski slopes. These other gifts were not at issue at trial.

involving consumers who rejected the Anaheim Certificate when offered it but accepted other valuable gifts they used, the jury awarded CPG \$66,666.67 in punitive damages. (Id.) For the claims involving consumers who accepted the Anaheim Certificate but never attempted to redeem it, the jury awarded CPG \$66,666.67 in punitive damages. (Id.) And for the claims involving consumers who tried to redeem the certificate but were unable to do so, the jury awarded CPG \$66,666.67 in punitive damages. (Id.) . These awards are, on average, 138 times larger than the average economic damages in this case. On a claim-by-claim basis, the awards range from 121 times to 13,333 times the size of the economic damages awards and from 1,333 times to 13,333 times the size of the economic damages resulting from fraud.

On their face, the uniformity of the punitive damages awards are explained by the fact that disparate claims were consolidated so the jury heard the worst facts and, essentially ignoring the evidence specific to each claimant, considered only those worst facts when arriving at a punitive damages award for each claim. But two additional factors also explain the uniform awards. First, during trial and during CPG's closing arguments, the jury was told about numerous nonparties who allegedly had been harmed by Westgate's conduct. (Trial Tr. 506, 560, 762.) Second, during closing arguments in the punitive damages phase of the trial, counsel for CPG invited the jury to fulfill "the primary purpose of punitive damage [which] is to make sure that on a one time basis we can address this as a whole." (Trial Tr. 2646-47.) In the end, the sum total of these punitive damages for 15 claims was \$1,000,000.05. Extrapolated to the other 485 claims, Westgate's total punishment would be more than \$33 million.

**A. The Consolidation of Nearly 500 Consumer Claims into a Single Lawsuit and the Test Trial of 15 Claims**

From the outset, Westgate objected to the joinder of claims, especially if they were to be consolidated for trial. (R. 2760r-t.) The trial court allowed the claims to be joined. (R. 2768f-j.) Once the claims were joined, CPG proposed a “test trial,” in which it would choose 30 claims to “be handled on a fast track discovery schedule and a separate trial.” (R. 2776-80.) Under CPG’s plan, the 30 claims would not be the claims most factually similar, but would be representative of all the different types of claims. (R. 2778.) CPG suggested that results of the “test trial” could be used as “law of the case . . . res judicata . . . or a strong persuasive precedent to apply to the remaining claims.” (*Id.*) CPG also represented that the outcome of this test trial could guide settlement negotiations. (*Id.*)

Westgate opposed CPG’s “test trial” plan. Westgate argued that each instance of alleged fraud was distinct and consolidation of multiple fraud claims would be improper. (R. 2798-803.) Westgate pointed out that “[j]uries are often unable to distinguish the defendants’ liability as to each claim,” especially where, as here, the jury would hear evidence related to nonparties that would otherwise be inadmissible in a single claim trial. (R. 2799, 2801-03.) The trial court ordered discovery on all claims and reserved its ruling on consolidation until trial. (R. 2862.)

Ultimately, the trial court adopted what was, in effect, a version of CPG’s proposed plan. Ten days before trial, the court ordered the parties to proceed to trial on 16 claims.<sup>3</sup> (R. 4680, 4714-18.) Around this same time, the court compelled the parties to submit all of the consumer claims involving other claimants under the Utah Pattern of Unlawful Activity Act to arbitration. (R. 4714-15.) The 16 claims went to trial.

<sup>3</sup> Westgate obtained judgment as a matter of law on the claim of one consumer, leaving 15 claims that went to the jury. (R. 4933-34.)

## **B. Westgate Is Prejudiced at Trial**

At trial, the prejudice Westgate had predicted would result from consolidating diverse fraud claims in fact occurred. In addition to the jury's deciding each case after hearing about the 14 other consolidated claims, at least three times CPG's witnesses told the jury that Westgate had defrauded hundreds or thousands of people. One witness stated that there were "hundreds or a thousand plus people" involved in the "whole situation." (Trial Tr. 762.) Another witness stated that if Westgate had fulfilled its promises "there wouldn't be 1,000 of us consumers . . . or 10,000 of us that had been misled." (Trial Tr. 508.) Yet another witness referred to the fact that her recovery in this case would be impacted by the fact that there were "900 people" who had similarly assigned their claims to CPG. (Trial Tr. 560.)

During closing arguments in the punitive damages phase, counsel for CPG aggravated the problem by arguing that the purpose of punitive damages required that the jury punish Westgate for wrongful conduct directed to third parties:

Now, this is a perfect example of why punitive damages have to be large. It's taken us three weeks to try 15 couples out of hundreds and hundreds and hundreds out of the 2400 to 3700 tours that had this gift certificate.

Can you see the purpose and wisdom of having punitive damages awarded? Because it is in our legal system nearly impossible to try and litigate the entire matter or we'd be here for years, and so that is the primary purpose of punitive damage is to make sure that on a one time basis we can address this as a whole.

(Trial Tr. 2646-47 (emphasis added).) When the witnesses made comments about nonparties, the court struck the comments. (R. 508, 560, 762.) But when counsel for CPG resurrected the prejudice from those stricken comments during his closing

arguments in the punitive damages phase, the court refused to strike the comments. (Trial Tr. 2647-48.) As a ground for its refusal, the trial court read the jury instruction that permitted punitive damages to be awarded in light of “the effect of the conduct on the lives of consumers and others.” (Trial Tr. 2648.) The court did not elaborate on how the jury should interpret that instruction in light of CPG’s arguments urging punishment for conduct directed at third parties. (Trial Tr. 2649.)

As 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. For instance, Darren and Irene Davis were consumers who successfully redeemed their certificate and took their family to Disneyland. (Trial Tr. 753-55.) But by the time the jury was asked to determine Westgate’s liability to these consumers—and to punish Westgate—the jury had heard about 14 other consumers who did not travel. One consumer was offered an Anaheim Certificate, but rejected it. (Trial Tr. 672-73.) Others accepted their certificates, but never attempted to redeem them. (Trial Tr. 524, 527, 865-66, 918, 1383, 1389-92.) The remaining consumers attempted to redeem their certificates but were unsuccessful. (Trial Tr. 131-36, 202, 255, 326-27, 393, 453-54, 606, 795, 823, 826-27.)

Not only did the claimants have different levels of success in using the certificates, but they also testified about having different expectations and different levels of reliance. One consumer testified that, prior to his transaction with Westgate, he had attended a similar presentation with a different timeshare company and that the trip he was promised as a reward for that transaction never materialized. (Trial Tr. 249.) He testified that he thought the Westgate offer sounded “[t]oo good to be true,” but that he was willing to

“give it a try again.” (Trial Tr. 249, 278.) When asked whether he would have attended the presentation if he “had known there were extensive restrictions” associated with the Anaheim Certificate, he responded “I’m a gambler, I probably would have.” (Trial Tr. 249.) Other consumers testified that, even after they encountered difficulty redeeming the certificate, they attended subsequent Westgate presentations in the hope of obtaining more free gifts. (Trial Tr. 495-96, 628, 690.) Some of the consumers testified that they had no intention of buying a Westgate package, but attended the presentation because they wanted a free trip. (Trial Tr. 248, 397, 804, 930.) Some testified about knowing the Anaheim Certificate would include travel restrictions. (Trial Tr. 401, 719, 801, 930.) Others did not. (Trial Tr. 201, 249, 324, 392, 452, 670, 791, 863.) Most testified that they had attended similar presentations. (Trial Tr. 145, 249, 396, 486, 618, 804, 836, 929, 1347.) Yet they all were awarded the same in punitive damages.

The court did not instruct the jury in a way adequate to counteract the merging of all the testimony to consider all claims. The only instructions designed to ensure that jurors would evaluate each claim independently were instructions that “Westgate is entitled to a fair consideration of its defense against each consumer,” that “[t]he assigned claims of each of the 15 consumers must be considered separately” and that jurors should “ignore the . . . fact that CPG has, or has not, established the claims of any of the other 14 consumers.” (Trial Tr. 13, 2380.) These instructions were insufficient to mitigate the prejudice; indeed, no instruction could have accomplished that. As mentioned, the jury awarded almost identical compensatory damages to each consumer, notwithstanding the fact that some consumers never attempted to redeem their certificate and other consumers were offered their certificates but rejected them altogether. (R. 4773-802.) And in

awarding punitive damages, the jury did not make any distinctions—CPG received an identical punitive damages award of \$66,666.67 for each claim. (R. 4758-72.)

**C. The Trial Court Denies Westgate’s Combined Motion for JNOV, Remittitur, and New Trial**

After trial, Westgate moved for JNOV, remittitur of the punitive damages award, and for a new trial. 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. (R. 4897-901.) In support of its motion for a new trial, Westgate asserted the excessiveness of the punitive damages awards. Westgate argued that, given the conduct at issue, the punitive damages awards are excessive because they range from 121 to 13,333 times larger than the total compensatory damages awards. (R. 4865-76.) Westgate also argued that the jury had impermissibly awarded punitive damages based on harms the jury believed were caused to third parties. (R. 4866.)

The trial court denied Westgate’s JNOV and new trial motions on the ground that Westgate was a successful corporation that had profited from its actions and had shown no remorse during trial. (R. 5804.) Although the court acknowledged that the highest ratio of punitive to compensatory damages generally permitted under federal due process case law is 9 to 1, and under state standards is 3 to 1, it denied the request for remittitur because the punitive awards “would hardly be a drop in the bucket” for Westgate. (R. 5802-03.) The court also noted that, in agreeing to hear a sales presentation in exchange for a certificate, the consumers had “placed a degree of trust in Westgate,” whose conduct was likely to recur because the fraud was difficult to detect. (R. 5802.)



The trial court's analysis of the excessiveness of the punitive awards is silent about the fact that many claimants conceded they were chosen specifically because they were not financially vulnerable, a relevant mitigating factor. (Trial Tr. 489, 686, 857.) The trial court's decision also is silent about the fact that many certificate recipients were well educated and employed in highly sophisticated fields. The consumers' professions included, among other things, a tax examiner and senior investigative analyst for the I.R.S., a teacher, a paramedic, a computer consultant, a hospital health unit coordinator, a sales manager, an electrical engineer, a retired mechanical engineer, an advertising consultant, and a professor at B.Y.U. (Trial Tr. 88, 172, 246, 314-15, 512-13, 595, 728, 853, 901, 947, 1344.) Many of the consumers had at least one, if not several, undergraduate or graduate degrees. (Trial Tr. 88, 172, 246, 443, 512-13, 595-96, 1344.)

The court also did not address Westgate's argument that, because the jury improperly punished Westgate for conduct directed at third parties, the punitive damages awards denied Westgate procedural due process. Instead, the court followed the theme of CPG's counsel at closing argument, and ignored the actual testimony of the consumers who anticipated the certificates might be difficult to redeem but attended sales presentations because they wanted the free gift: "because it appears that Westgate perpetrated the scheme on many unsuspecting victims," the effects of Westgate's conduct did not weigh in its favor. (R. 5802.) Finally, the court did not address Westgate's argument that, because the evidence at trial showed that the Anaheim Certificates were purchased from and administered by an independent contractor, Westgate's conduct did not justify a heightened punitive damages award. (Id.; R. 4868, 4910.)

Westgate timely appealed (R. 6097), and CPG cross-appealed. (R. 6108.)

### **Summary of the Argument**

This case began with 500 consumers attending sales presentations for Westgate timeshare packages. The consumers were selected because they had the financial means to purchase Westgate products. In exchange for their time, Westgate offered the consumers a gift certificate, valued at approximately \$500, for travel to Anaheim, California. The certificates, as many consumers later testified they had expected, were difficult for some consumers to redeem.

This case ended with a jury awarding CPG—assignee of the 500 claims—more than \$1 million in punitive damages for just 15 of the 500 claims based upon the difficulty in redeeming the certificates, an amount representing more than \$33 million in punitive damages when extrapolated over all 500 claims. Three errors explain the very large awards. Those errors range from consolidating for trial 15 claims with disparate fact patterns, to allowing counsel for CPG to ask the jury to punish Westgate for harm to third parties, to refusing to remit punitive damages awards between 121 and 13,333 times larger than the full compensatory awards and between 1,333 and 13,333 times larger than the awards resulting from fraud rather than breach of contract.

In support of its request to reverse the trial court’s verdict, Westgate focuses on two overarching errors. The first fundamental trial court error was consolidating 15 disparate claims for trial instead of holding separate trials or at least consolidating claims with similar fact patterns. Under Rule 42, trial courts have discretion to consolidate claims, but must do so in a manner that mitigates, not exacerbates, prejudice. Here, CPG proposed a “test trial” with disparate claims to evaluate the worth of all 500 claims. The trial court consolidated 15 disparate claims, ranging from consumers who redeemed

certificates and traveled, to consumers who did not try to redeem certificates, to consumers who tried unsuccessfully to redeem certificates.

The manner of consolidation resulted in prejudice, not only because in considering each claim the jury heard evidence about 14 other claims, but also because the trial court allowed counsel for CPG to urge the jury to punish Westgate for conduct directed at third parties who were not before the court. The resulting prejudice is apparent. The jury awarded identical punitive damages on all 15 claims—\$66,666.67—even though one consumer redeemed a certificate and incurred only \$5 in damages; another consumer testified that he never intended to purchase a Westgate product when he attended the sales presentation; and another consumer testified he would have attended the sale presentation even if he had known the certificate was difficult to redeem. The jury’s failure to discriminate among such fact patterns confirms that the manner of consolidation resulted in prejudice to Westgate.

The second fundamental trial court error was its refusal either to vacate or to remit the punitive damages awards on the ground that they violate federal procedural due process, federal substantive due process, and Utah law. Addressing the procedural due process point, a court must implement procedures that will prevent a jury from punishing the defendant for harms to third parties. Philip Morris USA v. Williams, 549 U.S. 346, 356-57 (2007). Here, over Westgate’s objection, counsel for CPG told the jury that “the primary purpose of punitive damage is to make sure that on a one time basis we can address this as a whole,” and the whole, according to CPG’s counsel, was “hundreds and hundreds and hundreds out of the 2400 to 3700 tours that had this gift certificate.” (Trial Tr. 2646-47(emphasis added).) With \$1 million in punitive damages awards, the jury did

just what counsel asked it to do: it punished Westgate for conduct directed at third parties, something that violated Westgate's right to procedural due process.

In the alternative, the excessiveness of the punitive damages awards violates Westgate's substantive due process rights. That the punishment is grossly excessive under principles of substantive due process is made clear by considering the total punishment to Westgate, which, assuming the jury was not punishing Westgate for more than the 15 claims before it, would be the \$66,666.67 per claim extrapolated to all 500 claims. Under that scenario, Westgate would be punished by paying more than \$33 million for its independent contractor having administered a certificate redemption program involving only the one certificate—the Anaheim Certificate at issue here—that some found difficult to redeem. Those awards are excessive as a matter of federal substantive due process and Utah law when analyzed under the operative standards. State Farm Mut. Auto. Ins. Co. v. Campbell (State Farm II), 538 U.S. 408, 423 (2003); Crookston v. Fire Ins. Exchange (Crookston I), 817 P.2d 789, 808 (Utah 1991).

The constitutional presumption under the federal due process clause is that punitive damages will not exceed a 1 to 1 ratio with compensatory damages. The presumption under Utah law in cases like this one is a 2 to 1 ratio. There is no egregious conduct to justify departing from those presumptions. The compensatory awards made consumers whole, the damages were purely economic, the consumers were not financially vulnerable, the consumers' safety and welfare were not threatened, and comparable civil penalties would result in only a 2 to 1 ratio of penalty to compensation. Assuming the punitive awards do not violate procedural due process in reflecting punishment for conduct directed at third parties, this court should remit the punitive awards under the standards of federal due process and Utah law.

## **Argument**

This court should reverse on two separate grounds. First, the trial court abused its discretion in consolidating 15 disparate claims for trial, and not more carefully guarding against the prejudice inherent in consolidating disparate claims. Second, the punitive damages awards violate principles of procedural and substantive due process, as well as Utah law defining the outer limit of punitive damages awards. For the prejudice resulting from consolidation and the procedural due process violation, this court should vacate the verdict and order a new trial. Alternatively, to bring the punitive awards in compliance with substantive due process and Utah law, the court should remit the awards.

### **I. The Trial Court Abused Its Discretion in Consolidating 15 Disparate Consumer Claims for Trial Without Mitigating the Resulting Prejudice**

The trial court's manner of consolidating 15 claims in a single trial and in conducting the trial resulted in prejudice to Westgate and requires a new trial. 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. Lignell v. Berg, 593 P.2d 800, 806 (Utah 1979). But a trial court exceeds that discretion if its manner of consolidation "'is unfair or prejudicial to a party.'" Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1244 (Utah 1998) (quoting Angelo v. Armstrong World Indus., 11 F.3d 957, 964 (10th Cir. 1993)).

Here, 15 consumer claims were consolidated for trial. 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.)

That bellwether approach to trying cases is, in important respects, the opposite of the justification for permitting a number of claims to be tried together, either as a class action or through consolidation. The purpose behind the Rule 23 requirements for certifying a class—impossibility of joinder, commonality, typicality, and representative parties that will protect the interests of all class members—is to ensure due process when a court adjudicates the rights of nonparties in collective litigation. 7A Charles Alan Wright, Arthur R. Miller & May Kay Kane, Federal Practice and Procedure § 1751 (3d ed. 2005). And while consolidation can be used to construct a “test trial,” in doing so, a court is still bound by Rule 42’s requirement that the cases share “a common question of law or fact,” an echo of the requirements for a class action under Rule 23.

Accordingly, plaintiffs who forego a class action in complex litigation may seek consolidation both for purposes of convenience and, as was the case here, to influence settlement negotiations. In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 995, 998 (9th Cir. 2008). In such a “test trial,” the plaintiffs (or in this case, the assignee) typically seek to consolidate the broadest variety of claims possible—without respect for class-action-type commonality—so that the result of the trial can assist the plaintiffs in estimating the differing price points of the variety of claims they have collected. Id.; In re Chevron U.S.A., Inc., 109 F.3d 1016, 1018-20 (5th Cir. 1997).

While courts have not held “test trial” practice to be per se impermissible, it gives rise to unique concerns under Rule 42. The threshold requirement for consolidation, “a common question of law or fact,” is insufficient to mitigate potential prejudice in a

bellwether case. Utah R. Civ. P. 42 (emphasis added). Courts must balance the “specific risks of prejudice and possible [jury] confusion” against the economic incentives that may flow from trying claims together. Malcolm v. Nat’l Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993); see also In re Consol. Parlodel Litig., 182 F.R.D. 441, 444 (D.N.J. 1998) (indicating that steps to mitigate potential prejudice are required in fourth, second, and eleventh circuits).<sup>4</sup> But a fair trial remains the overarching objective: “[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial,” particularly where, as here, the “test trial” would not be dispositive of either Westgate’s liability to the remaining claimants or those other claimants’ damages should further trials be conducted. Malcolm, 995 F.2d at 350.

In cases upholding consolidation under such circumstances, appellate courts have focused on the steps the trial court took to “make sure that the rights of the parties are not prejudiced by the order of consolidation.” Dupont v. S. Pac. Co., 366 F.2d 193, 196 (5th Cir. 1966). Where trial courts have taken “considerable care during the trial to minimize [juror] confusion,” Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1497 (11th Cir. 1985), consolidation is upheld as within the bounds of discretion. Those cases give some idea of what steps are necessary to protect against unfair prejudice. For instance, in Hendrix, the trial court attempted to “ensure that each claim would receive separate consideration” by giving each juror “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.” 776 F.2d at 1496. In stark contrast to the special care taken

<sup>4</sup> Westgate has been unable to locate any Utah cases examining Rule 42 in the context of bellwether cases. But because Federal Rule 42 is similar, this court may consider federal courts’ interpretation of Federal Rule 42. Bichler v. DEI Sys., Inc., 2009 UT 63, ¶ 24 n.2, 220 P.3d 1203.

in Hendrix, the trial court here made no provision to facilitate the mandated separate consideration of each of the claims, instead instructing jurors that they could take notes but cautioned them not to “overdo it and [not to] let your note taking distract you from following the evidence.” (Trial Tr. 12.)

Together, the relevant federal cases establish not only that consolidation is inappropriate where the risks of prejudice outweigh potential benefits, but also that consolidation must be handled with caution to minimize the chances of unfair prejudice. The decision to consolidate carries with it “a heightened need to insist on scrupulous fairness in all other aspects of the trial of the consolidated cases.” Arnold v. Eastern Air Lines, 712 F.2d 889, 907 (4th Cir. 1983) (en banc) (Murnaghan, J., concurring).

Here, while some sets of the 500 claims might have been brought together and consolidated without undue prejudice to Westgate, the disparity of the 15 claims chosen for consolidation for trial makes them not one of those sets. Rather, their diversity heightened the prejudice. Because the claims were disparate and the trial court did not insist on steps being taken to ensure “scrupulous fairness” and to minimize prejudice, the jury was permitted to hear inadmissible evidence and to punish Westgate for harms suffered by third parties and nonparties. Westgate’s conduct toward each consumer was relevant at trial only to the claims of that consumer. Yet the jury heard evidence in deciding each individual claim that, in separate trials, would have been inadmissible character propensity evidence under Rule 404(b)—it tended only to show that Westgate’s actions toward any particular consumer were in conformity with Westgate’s general character. In separate trials, Rule 403 would have prevented introduction of that evidence. Because the claims were so disparate, the resulting prejudice to Westgate was



aggravated. Jurors heard evidence concerning other claimants whose stories are far less sympathetic and were heavily influenced by the most sympathetic of the claimants. This elevated level of prejudice stems from the improper consolidation.

The manner in which the trial court allowed CPG's counsel to present the consolidated cases heightened the prejudice and indeed led to violations of Westgate's procedural due process rights. In addition to hearing about the other 14 claims, the jury heard from different witnesses who referred to the "900 people," "1000 people," or the "1000:10,000 misled" allegedly harmed by Westgate's conduct. In each of these instances, the court sustained Westgate's objection and struck the testimony. But during CPG's closing argument in the punitive damages phase—when the need for "scrupulous fairness" is at its height—those stricken comments were given renewed prejudicial vitality when CPG's counsel argued to the jury: "if [you] say, well, we're just going to punish Westgate for these 15 people, then [you] are not doing the purpose and fulfilling the purpose of punitive damages awards." (R. 2642.) Counsel for CPG continued, because it had taken "three weeks to try 15 couples out of hundreds and hundreds and hundreds out of the 2400 to 3700 . . . that had this gift certificate," and because it would be "nearly impossible to try and litigate the entire matter," it was incumbent upon the jury to "make sure that on a one time basis [it] address[ed] this as a whole," even though CPG's counsel knew that those 15 verdicts would have no issue preclusive effect upon Westgate's liability to other claimants and that punitive damages could be requested if and when any of those claims proceeded to trial. (R. 2646-47 (emphasis added).)

Westgate objected and moved to strike counsel's statements, but the trial court refused. When Westgate then asked the court to clarify whether CPG could "argue that

punitive damages can be awarded for the entire group of people that might have been affected” by Westgate’s use of the Anaheim Certificate, the court responded simply by reading a jury instruction stating that the jury could consider “the effect of the conduct on the lives of the consumers and others.” (R. 2648-49.)

The court’s refusal to strike counsel’s statements not only compounded the error in consolidating 15 disparate claims, but, coupled with the manner of consolidation—trying together disparate claims—also denied Westgate its procedural due process rights. As the United States Supreme Court held in Philip Morris USA v. Williams, courts must safeguard against “the unreasonable and unnecessary risk” that a jury will punish the defendant for having caused harm to others. 549 U.S. 346, 357 (2007). Here, that unnecessary risk arose because (i) the jury was exposed to disparate claims and inadmissible evidence concerning other consumers; and (ii) after CPG’s counsel was permitted to invite the jury to punish Westgate for harm to nonparties, the trial court’s instruction—that CPG could invite the jury to consider “the effect of the conduct on the lives of the consumers and others”—was inadequate.

In State Farm v. Campbell, the United States Supreme Court rejected the notion that through the language of that instruction—the jury could consider “the effect of the conduct on the lives of the consumers and others”—a plaintiff can invite a jury to “adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.” State Farm II, 538 U.S. at 423 (citing Campbell v. State Farm Mut. Auto. Ins. Co. (State Farm I), 2001 UT 89, ¶ 39, 65 P.3d 1134). Thus, the trial court did not act to mitigate the unreasonable risk of prejudice arising from consolidation and CPG’s closing argument. Instead, the trial court heightened that risk.

The punitive damages awards confirm that the unnecessary risk of prejudice translated into actual prejudice. The jury did not meaningfully distinguish between the consumer who redeemed the Anaheim Certificate and took his family on a vacation, the consumers who were offered the certificate but refused to take it, the consumers who accepted the certificate but were unable to arrange travel dates, and the consumers who received the certificate and did nothing at all. Rather than undertaking an individualized determination of the nature of the harm in each case, the jury imposed a collective award of \$1,000,000 and then divvied it up 15 ways—\$66,666.67 per claim. This court should vacate the verdicts and remand for new trials.

## **II. The Punitive Damages Awards Violate Both the United States Constitution and Utah Law**

The punitive damages awards violate federal procedural and substantive due process and Utah law. Punitive damages are unique. They impose a quasi-criminal penalty in a civil proceeding. State Farm II, 538 U.S. at 417-18. They “‘pose an acute danger of arbitrary deprivation of property.’” Id. (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)). And they invite a jury to act on its passion and exercise its caprice. Id. at 418; see also Crookston I, 817 P.2d at 801.

A number of substantive safeguards ensure that defendants are not punished arbitrarily. For example, federal substantive due process protections require courts to review a jury’s punitive damages award de novo to ensure it is not disproportional to the gravity of the offense. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-36 (2001). Similarly, under Utah law awards are reviewed to ensure they are not the result of passion or prejudice. Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶¶ 29-

31, 82 P.3d 1064. Further, procedural due process requires courts to take steps to ensure that juries do not punish a defendant for conduct directed at third parties. Philip Morris USA v. Williams, 549 U.S. 346, 355-57 (2007). The punitive damages awards here run afoul of both substantive and procedural protections. Although there is substantial overlap between federal and state law, Westgate will address each separately.

**A. The Punishment Imposed on Westgate Is Excessive Under the United States Constitution**

The punishments in this case exceed all actual damages by an average of 138 times and exceed damages resulting from fraud by an average of more than 4100 times. Extrapolated to all 500 claims, the total punitive damages awards would be more than \$33 million. Those awards violate federal substantive due process standards.

**1. The Nature of the Punitive Damages Awards**

Before setting forth the relevant legal standards, it is important to be clear about the precise nature of the damages awards in this case. The jury awarded CPG \$1,000,000 in total punitive damages, which is 138 times greater than the \$7,242 in total economic compensatory damages and more than 4100 times greater than the \$242 in damages the jury attributed to fraud. For 14 of the 15 claims, \$500 of the jury's award to CPG (a total of \$7,000 of the overall \$7,242 in compensatory damages) was for contract damages.<sup>5</sup> Therefore, the relevant denominator for fixing the ratio of punitive damages to compensatory damages ranges from \$0 to \$5 to \$50 and totals \$242 for all 15 claims.

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<sup>5</sup> The court distinguished contract and fraud damages in the special verdict form when it awarded pre-judgment interest under Utah Code section 15-1-1(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.

Thus, Westgate's punitive damages liability of \$1 million is 4132 times the damages related to fraud—the only cause of action that can be a basis for punitive damages.

For additional context, recall that CPG's purpose of consolidating the 15 claims was to help determine the value of the remaining 485 claims. Thus, the punitive damages awards here represent only 3% (15 out of 500) of the total value of the assigned claims.<sup>6</sup> Extrapolating these results to all the claims yields the following: \$241,400 in economic damages, \$8,066.67 in economic damages resulting from fraud, and \$33,333,333 in punitive damages, for a total of \$33,574,733, all for 500 certificates provided by an independent contractor that were difficult to redeem.

With that context in mind, the ratios of the punitive damages awards to compensatory awards, the nature of Westgate's conduct, and the relevant legislative determinations of appropriate penalties all demonstrate that the punitive damages awards here are constitutionally excessive.

## **2. The Punishment Imposed on Westgate Is Grossly Disproportional to the Gravity of the Harm**

The punitive damages awarded to CPG exceed the proportions permitted under federal due process standards. A punitive damages award is unconstitutional if it is “grossly disproportional to the gravity of [the offense].” Cooper, 532 U.S. at 434.

Proportionality is evaluated under three factors: (i) the reprehensibility of the punishable

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<sup>6</sup> Westgate concedes the effectiveness of this extrapolation for purposes of argument only. In this case, the consumer claims were not tried in such a way that Westgate can be bound by these awards as to claims not tried in these proceedings. Indeed, this is precisely what makes this award so misjudged—the jurors were asked to punish Westgate on behalf of all of the consumers who might have participated in this program but whose claims have not yet gone to trial. Yet Westgate cannot now preclude subsequent punitive damages awards on the theory that it has already been punished.

conduct, (ii) the disparity between the harm caused by this conduct and the size of the punitive damages award, and (iii) the relationship between a judicially sanctioned punitive award and any legislatively established punishments authorized for similar conduct. BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996).

Although the relationship between those three factors has been left somewhat vague, the purpose of requiring de novo appellate review of punitive damages awards is to “ensure[] that an award of punitive damages is based upon an application of law rather than a decisionmaker’s caprice.” State Farm II, 538 U.S. at 418 (internal quotation marks omitted). Accordingly, courts must guard against the “acute danger of arbitrary deprivation of property” and the “potential that juries will use their verdicts to express biases against big businesses.” Id. at 417 (quoting Honda Motor Co., 512 U.S. at 432). In awarding punitive damages that bear almost no relationship to the consequences of Westgate’s tortious conduct, the jury here exceeded the boundaries of constitutionally permissible punishment.

We now address the Gore guideposts.

**a. The Ratio of Punitive Damages to Compensatory Damages**

Despite being the second guidepost, the ratio of punitive damages to compensatory damages provides the initial touchstone for assessing punitive damages. Gore, 517 U.S. at 581-82. The presumptive ratio is 1 to 1, but a departure from that ratio may be appropriate where “a particularly egregious act has resulted in only a small amount of economic damages” or, possibly, where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.” Id. at 582 (internal

quotations omitted). Even with egregious conduct, however, “few awards exceeding a single-digit ratio . . . will satisfy due process.” State Farm II, 538 U.S. at 425.

The trial court here incorrectly concluded that this case presented the combustible combination of egregious acts and minimal harm that would justify imposing punitive damages awards with ratios to actual damages far exceeding single digit ratios. More important, the trial court ignored the class-type relief being pursued by CPG, which, in the aggregate, would amount to more than \$33 million in punitive damages alone.

In Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 & n.28 (2008), a maritime case, the Supreme Court explained why courts may impose larger punitive damages awards when compensatory damages are small: “The criterion of ‘substantial’ takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, [but that] concern [is] addressed by the opportunity for a class action . . . .” Further, in fixing the relevant ratio in a class-action, “individual awards are not the touchstone, for it is the class option that facilitates suit.” Id. (emphasis added). When class recovery is substantial, it is immaterial that individual awards may have been small, and “the constitutional outer limit may well be 1:1.” Id. Although CPG did not to file this suit as a class action, the assignment of claims to CPG for purpose of prosecution—not the potential for punitive damages—is the “option that facilitates suit.” Id. That operates exactly the same in that respect as a certified class action.

Accordingly, while departure from the single-digit-ratio analysis might be justified in cases where punitive damages provide the incentive to challenge wrongful conduct, it does not where that purpose has already been served. CPG, as assignee of the 15 claimants, has recovered \$7,242. And CPG, as assignee of 485 more claims, does not

lack incentive to seek another \$241,400. That is precisely the sort of “substantial” recovery that justifies the presumptive 1 to 1 ratio. Moreover, the trial court ignored the other 485 claims when concluding that a 1 to 1 ratio was inappropriate because a \$7,242 punishment would not send the necessary message to Westgate, even though the trial court also recognized that this trial would not be dispositive of the remaining claims.

What perhaps explains the trial court’s mistake is its apparent reliance upon several cases cited by CPG in opposition to Westgate’s motion for remittitur that are inapposite because they involve awards of solely nominal or presumed damages.<sup>7</sup> In those cases, the remedy represents precisely the combination of factors that requires departure from a small ratio punitive damages award: plaintiffs suffer harm in a manner that justifies punishment, but plaintiffs have no measurable economic harm. For example, in Williams v. Kaufman County, the Fifth Circuit aptly pointed out, “[b]ecause actions seeking vindication of constitutional rights are more likely to result only in nominal damages, strict proportionality would defeat the ability to award punitive damages at all.” 352 F.3d 994, 1016 (5th Cir. 2003). Put differently, punitive damages may be disproportionately large in cases involving only nominal damage because the true amount of harm cannot be adequately assessed. Restatement (Second) Torts § 907 cmt. c (2010). But here the jury was not considering civil rights claims invoking constitutional guarantees but rather contract claims arising from an advertising campaign for which the

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<sup>7</sup> Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003); Bjornson v. Dave Smith Motors, 578 F. Supp. 2d 1269, 1283 (D. Idaho 2008); Hadelman v. DeLuca, No. CV970060279S, 2003 WL 21493968, at \*5 (Conn. Super. Ct. June 12, 2003); Ellis v. La Vecchia, 567 F. Supp. 2d 601, 610-11 (S.D.N.Y. 2008); Diversified Water Diversion, Inc. v. Standard Water Control Sys., No. A07-1828, 2008 WL 4300258, at \* 7 (Minn. Ct. App. Dec. 16, 2008); Myers v. Workmen’s Auto Ins. Co., 95 P.3d 977, 992 (Idaho 2004).



precise value of economic damages for each consumer was easily determinable by the jury. Unlike awards of nominal damages, these awards represent the full measure of the harm caused by Westgate to each consumer. With the benefit of that information, a proportional punishment could have been, and should have been, crafted.

Tellingly, in the trial court's written decision denying Westgate's motion for remittitur, it relied on Bennett v. Reynolds, 242 S.W.3d 866, 904-05 (Tex. Ct. App. 2007). (R. 5803.) In that case, the Texas Court of Appeals approved of a punitive damages award of \$1.25 million where compensatory damages totaled approximately \$5,000. Id. at 876. Importantly, however, the Texas Supreme Court has reversed that decision. Bennett v. Reynolds, 315 S.W.3d 867, 879-80 (Tex. 2010). The Texas Supreme Court held that a 4 to 1 ratio represented the constitutional limit. Id. at 878-79. The court noted that "[p]ushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public." Id. at 879 (internal quotation marks omitted). The court also noted the importance of allowing departures from established punitive damages ratios only in particularly egregious circumstances: "If courts fail to diligently police the 'particularly egregious' exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost." Id.

Here, a disproportionately large award is not necessary to compensate for nominal damages. And given the fact that CPG's "assignee-for-prosecution" status has made it

possible for the consumers to obtain class-type relief, this also is not a case where punitive damages must be inflated to incentivize future lawsuits of lone consumers. Thus, the facts of this case do not justify a departure from the presumptive ratio. Such departures should be reserved for cases “involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public.”

**b. Westgate’s Conduct Was Not Reprehensible**

The reprehensibility factor also does not justify large punitive damages awards. Considerations for evaluating reprehensibility include whether (i) the harm was physical or merely economic; (ii) the conduct evidenced a reckless disregard of health or safety; (iii) the plaintiff was financially vulnerable; (iv) the conduct was repeated or isolated; and (v) the harm resulted from intentional malice, trickery, or deceit. State Farm II, 538 U.S. at 419. Importantly, the fact that one factor weighs in favor of the plaintiff “may not be sufficient to sustain a punitive damages award” at all, let alone an award above a 1 to 1 ratio. Id. Where a plaintiff has been made whole by compensatory damages, punitive damages are appropriate only if the defendant’s conduct “is so reprehensible as to warrant the imposition of further sanctions,” something that is not present here. Id.

First, there is no dispute that the consumers were not physically harmed. Nor did Westgate’s conduct constitute any manner of indifference to the consumers’ health or safety. In fact, concluding that the facts of this case warrant a 138 to 1 ratio devalues cases in which such a ratio may seem justified, i.e., cases involving serious injury or death. Westgate’s conduct also did not give rise to a potential for any greater harm. The full extent of economic damages—the benefit of the bargain—was established at the time the consumers attended the sales presentations.

Second, the consumers here were not financially vulnerable. The consumers were solicited by Westgate because they had the financial means to purchase a Westgate timeshare package. Even more important, financial vulnerability has nothing to do with the basis of the consumers' claims. Westgate did not defraud the consumers out of any property. Here, the jury was not asked to award damages based upon the inconvenience of attending the sales presentation, but the inconvenience in redeeming the certificates. And those frustrated expectations were fully remedied by the compensatory awards.

Third, as to each consumer, Westgate's conduct should be construed to involve isolated incidents in light of the fact that 500 individual claims are being prosecuted. And even though Westgate's sales presentations to consumers involved various other certificates, including other gifts which these claimants received and used, only the Anaheim Certificate forms the basis of any claims.

Finally, Westgate acknowledges that while the jury's finding of fraud inherently includes a finding that Westgate deceived the consumers, that element is present in all fraud cases. It does not make this case extraordinary. The extent of Westgate's misrepresentations must be viewed in the context of an entire transaction. In explaining its decision to go above single-digit ratios, the trial court indicated that the consumers "placed a degree of trust in Westgate which was clearly breached." (R. 5802.) That conclusion has no basis, except to the extent all fraud involves a degree of trust. Westgate had nothing resembling a fiduciary relationship with consumers. Indeed, given the intentions of a number of the claimants, it might be too generous to characterize Westgate's exchanges with them as "arm's-length" transactions. Several consumers testified that they had no intent to purchase a Westgate timeshare, as they were willing to

attend a sales presentation just to get a free trip. To illustrate the real “trust relationship” present here, it is worth noting that breaches of fiduciary duty are justifiably deemed reprehensible while breaches of contract cannot form the basis of a punitive damages award. Because the transactions here did not originate from a place of trust, any deceit finding does not involve the kind of deceit that is “so reprehensible as to warrant the imposition of . . . sanctions” larger than those necessary to remedy the actual harm.

Given these considerations, the reprehensibility factors do not support punitive damages awards beyond a 1 to 1 ratio.

**c. Civil Penalties Imposed for Similar Conduct**

The final guidepost for assessing the constitutional excessiveness of a punitive damages award is the size of the award in comparison to relevant civil penalties that could be imposed for the same conduct. In evaluating alternative sanctions, courts “accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.” Gore, 517 U.S. at 559 (internal quotation marks omitted). This deference is important because it represents the only place in the analysis to consider a legislatively determined state interest in punishing certain conduct. Where the appropriate ratio is in doubt, comparable civil penalties should govern.

In this case, the comparable civil penalties stand in stark contrast to the punishment imposed on Westgate. The Utah Consumer Sales Practice Act provides for both the State and affected consumers to pursue remedial action in cases similar to this one. Utah Code Ann. §§ 13-11-17, 13-11-19 (2001). Assuming Westgate’s conduct constituted a deceptive act under the UCSPA, each consumer would have been permitted to recover as damages his or her “actual damages or \$2,000, whichever is greater.” Id.

§ 13-11-19(2). Further, the Division of Consumer Protection could “impose an administrative fine of up to \$1,000” for each transaction. Id. § 13-11-17(4). These remedies reflect the legislative determination that the State’s interest in punishing such practices can be satisfied by a civil penalty of \$1,000 per transaction in addition to actual damages. The punishment imposed on Westgate in this case, \$66,666.67 per transaction, is more than 66 times larger than the legislatively authorized penalty.

The Utah Pattern of Unlawful Activities Act confirms that legislatively-authorized penalty. Id. § 76-10-1605(1) (2001). Assuming Westgate’s conduct constituted a pattern of unlawful activity, each consumer could recover “twice the damages he sustain[ed].” Id. For the consumer claims prosecuted by CPG in this action, then, the legislatively-authorized recovery under the UPUAA would have ranged from \$10 to \$1100.

Just as similar provisions in Gore failed to “provide [a defendant] with fair notice that [a] violation of . . . its provisions might subject an offender to a multimillion dollar penalty,” nothing in Utah statutes provided notice of the possibility of a \$1 million penalty for 15 transactions. Gore, 517 U.S. at 584. The legislature has determined that, in addition to actual damages, civil penalties of approximately \$1,000 per transaction will sufficiently advance the state’s interest. In light of those determinations, the awards here are grossly disproportional and therefore violate substantive due process standards.

Because CPG obtained relief in this case by pursuing a class-type recovery, whether the punishment was substantial must be evaluated in the aggregate. Cast in the proper light, it is apparent that CPG’s recovery is neither nominal nor so minimal that the trial court was justified in disregarding presumptive constitutional ratios, the lack of

reprehensibility, and comparable civil penalties. The trial court erred when it denied Westgate's motion for remittitur and to reduce the punitive awards to a 1 to 1 ratio.

**B. The Procedures at Trial Created an Unreasonable Risk That Westgate Would Be Punished for Harm to Nonparties**

The punitive damages awards also violate Westgate's procedural due process rights because they resulted from a trial admitting an unreasonable risk that the jury would (and did) punish Westgate for harm to nonparties. Procedural due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon . . . those who are essentially strangers to the litigation." Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007). That prohibition arises from the need to afford a defendant the opportunity "to present every available defense," an opportunity denied where one plaintiff's claim becomes a platform to punish for claims unrelated to that plaintiff. Id. (internal quotation marks omitted).

More important, the prohibition ensures that a defendant is not punished for harm allegedly caused to nonparties, something that "would add a near standardless dimension to the punitive damages equation: How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate." Id. And this manner of jury speculation undermines other procedural protections. As the Supreme Court noted, "the fundamental due process concerns to which [the] punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified." Id.

The Supreme Court has acknowledged that its precedent gives rise to possible juror confusion. Jurors may consider, for purposes of determining whether the defendant's conduct was reprehensible, whether "the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public." Id. at 355. But the jury may not then use this information to punish the defendant for harm that it may allegedly have caused to strangers. Id. That gives rise to the "practical problem" of how to assess "whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others." Id. at 357. The solution also is practical: "[a]lthough the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases." Id.

Given the manner of consolidation in this case, procedural protections were necessary, especially after counsel for CPG invited the jury to punish Westgate for the entire universe of potential plaintiffs so that "on a one time basis" Westgate would be punished for all the harm it had allegedly caused by offering the Anaheim Certificate. Otherwise, CPG argued, the purpose of punitive damages would not be fulfilled because it would be "nearly impossible to try and litigate the entire matter." (Trial Tr. 2646.)

The trial court then instructed the jury that it could consider "the effect of [Westgate's] conduct on the lives of the consumers and others," language from this court's decision in Crookston I, 817 P.2d at 808. In State Farm, the United States Supreme Court said that very language provides inadequate guidance because it would permit adjudication of "the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis" and would permit a defendant

to be punished “for being an unsavory individual or business” instead of for the conduct that harmed the plaintiff. State Farm II, 538 U.S. at 422-23 (analyzing this court’s application of this standard in State Farm I, 2001 UT 89, ¶ 39). 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.” Phillip Morris, 549 U.S. at 355.

Likelihoods aside, the jury here, in fact, did punish Westgate for harm to nonparties, as demonstrated by both the sheer size of the jury’s award and the identical awards for disparate claims. At the very least, the claim involving the consumer who redeemed his certificate and took his family on vacation should not have received the same punitive award as those who did not redeem their certificates. If the jury intended for its punishment to apply only to the 15 claims, then the extrapolated punitive damages award for all of the consumers’ claims would be \$33,333,333, a grossly excessive amount. If the jury instead followed the instruction of CPG’s counsel and punished Westgate for more than the 15 claims, then the awards violate procedural due process. Either way, the punitive damages awards should be vacated or remitted.

**C. The Punitive Damages Awards Violate Utah Law Because They Were a Result of Passion or Prejudice**

Westgate is entitled to remittitur of the punitive damages award under Utah law as well. Under Utah Rule of Civil Procedure 59(a)(5) when a judgment is excessive, the trial court is vested with authority to grant a new trial or to direct the entry of a new judgment. The Utah Supreme Court has enumerated 7 factors in determining whether a



judgment “appear[s] to have been given under the influence of passion or prejudice.”

Utah R. Civ. P. 59(a)(5) These factors are (i) the relationship between compensatory damages and the amount of punitive damages awarded; (ii) the relative wealth of the defendant; (iii) the nature of the alleged misconduct; (iv) the circumstances surrounding the misconduct; (v) the effect of the conduct on the lives of the plaintiff and others; (vi) the probability of future recurrence; and (vii) the relationship of the parties.

Crookston I, 817 P.2d at 808. Much of the analysis under Utah law is similar to the due process analysis under the federal constitution. Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 31, 82 P.3d 1064. Accordingly, in analyzing each of the Crookston factors, Westgate will identify only the additional considerations under Utah law that confirm the excessiveness of the punitive damages awards.

### **1. The Ratio of Punitive to Compensatory Damages**

The trial court incorrectly concluded that punitive damages awards well above single-digit ratios are warranted in this case. The excessiveness inquiry under Utah law looks to the ratio between punitive damages and compensatory damages as a touchstone for determining excessiveness. That ratio provides a “presumptive ceiling” above which a punitive damages award may not go without justification. Diversified Holdings v. Turner, 2002 UT 129, ¶ 32, 63 P.3d 686.

While in extreme cases federal due process permits punitive damages awards as large as nine times the size of compensatory damages, State Farm II, 538 U.S. at 425, Utah law is especially skeptical of awards exceeding a ratio of 3 to 1. Fairfax Realty, 2003 UT 41, ¶ 45. The presumptive ratio provides the starting point for analysis. Here, the punishment exceeds economic damages by 138 times, on average. And if the

consequences of the fraud are separated from the contractual damages, the punishment is more than 4000 times greater than the fraud-based damages. Further, for reasons discussed above, the trial court incorrectly concluded that the presumptive ratio has no application, drawing analogies from nominal damages cases. Because CPG pursued class-type recovery, it is inappropriate to treat these claims like suits for nominal damages, especially where the extrapolated punitive damages would be \$33,333,333.

To illustrate the trial court's error, consider Diversified Holdings, in which the defendant fraudulently induced the plaintiffs to enter into a real estate contract. Diversified Holdings v. Turner, 2002 UT 129, ¶¶ 2-3. The plaintiffs were defrauded out of \$70,000. Id. ¶ 9. The parties negotiated at arm's length and the consequences to the plaintiffs—after they were made whole by the compensatory judgment—were limited. Id. ¶¶ 16, 20. The court concluded that the greatest permissible punitive damages award, given the state's interests in deterring what this court called “garden-variety” fraud, would be two times the compensatory damages award. Id. ¶¶ 18, 33. Tellingly, here the relevant civil penalties, which would total \$1,000, are consistent with a 2 to 1 ratio with all compensatory damages, contract and fraud. Excepting the fact that Westgate's conduct did not harm any consumer in an amount nearing \$70,000, the similarities between this case and Diversified Holdings require a similar remittitur here.

## **2. Westgate's Wealth Relative to the Size of the Award**

Westgate's financial status does not justify the disproportional punitive damages award. In determining the amount of punitive damages, a jury may consider the defendant's wealth. Id. ¶ 15. But the Utah Supreme Court has made it clear that “the presence of substantial corporate assets is not alone sufficient to require an award that

exceeds” ratios between 1 to 1 and 3 to 1. Id. Further, even when wealth is properly considered, it must be considered with care because it “provides an open-ended basis for inflating awards.” State Farm II, 538 U.S. at 427-28. This court has cited with approval the Seventh Circuit’s conclusion 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)).

In practice, the Utah Supreme Court has never used a defendant’s wealth as justification for departing from a permissible punitive damages ratio.<sup>8</sup> Further, even where corporate defendants have substantial assets, the court has rarely approached the 1% mark. In Crookston and State Farm, both of which involved corporate defendants and both of which the court characterized as egregious cases, the awards affirmed by this court were 0.5% and 0.26%. State Farm I, 2001 UT 89, ¶ 26; Crookston II, 860 P.2d at 940-41. Further, after remand from the United States Supreme Court, the reduced amount of the punitive damages award in State Farm represented 0.016% of State Farm’s corporate assets. State Farm III, 2004 UT 34, ¶ 1. Westgate has located only one case where the court affirmed a punitive damages award proportionally larger than the extrapolated award in this case.<sup>9</sup> In Fairfax Realty, the court upheld a punitive damages award that constituted 15% of the defendant’s net worth. 2003 UT 41, ¶¶ 33-34. But the

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<sup>8</sup> Indeed, except for Campbell v. State Farm, Westgate has been unable to find a single case where this court has upheld a punitive damages award based on a multiplier large than a single digit. See State Farm III, 2004 UT 34, ¶ 1 (9 to 1); Fairfax Realty, 2003 UT 41, ¶¶ 33, 48 (5.5 to 1); Diversified Holdings, 2002 UT 129, ¶ 33 (2 to 1); Hall v. Wal-Mart Stores, Inc., 959 P.2d 109, 110 (Utah 1998) (1.26 to 1); Crookston v. Fire Ins. Exch. (Crookston II), 860 P.2d 937, 940-41 (Utah 1993) (4.9 to 1).

<sup>9</sup> The trial court found that Westgate’s net worth was \$500 million. The extrapolated award of \$33 million represents approximately 6% of that net worth.

court did so only after finding that the defendant's conduct was personal, involved breaches of fiduciary duty, and that the ratio of punitive to compensatory damages was an otherwise permissible 5.5 to 1. Id. ¶¶ 43, 48. Were the award here within the permissible range of punitive damages, Westgate's wealth might permit an award near the high end of that range. But the trial court's reliance on Westgate's wealth led it to disregard that range entirely. Properly analyzed, Westgate's net worth does not justify a departure from the presumptive ratio.

### **3. The Nature of Westgate's Conduct**

Westgate's conduct is not of the kind that justifies an extreme departure from presumptive ratios. While the jury found punitive damages were appropriate, that is true in all cases triggering this analysis. Under Utah law, the nature of a defendant's conduct, along with the facts and circumstances surrounding that conduct and the probability that the conduct will occur again in the future, "are subsumed in the 'reprehensibility' guidepost established in Gore as part of the federal punitive damages excessiveness analysis." Id. As has been established, the consumers in this case suffered minor economic harm. The jury concluded that no consumer suffered pain and suffering, personal injury, or other non-economic harm. Because the harm was solely economic, each consumer obtained a full remedy by virtue of the compensatory damages awards. Further, the consumers who attended Westgate presentations were not vulnerable individuals—many testified that they were selected because they met certain income criteria—and 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.

In addition, two important considerations arise under this prong that require independent analysis under Utah law. First, in examining the nature of misconduct, the court distinguishes between fraud that involves a breach of fiduciary duty and “garden-variety” fraud. Diversified Holdings, 2002 UT 129, ¶ 18. That distinction is premised on the United States Supreme Court’s recognition that “[while] infliction of economic injury . . . can warrant a substantial penalty. . . this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.” Id. (quoting B.M.W. of North America v. Gore, 517 U.S. 559, 576 (1996)). Put more simply, the court concluded that “[p]unitive damages awards should reflect a different degree of culpability for ‘garden-variety’ fraud as opposed to its more egregious forms.” Id.

The distinction is borne out in the different punitive damages awards considered by the Utah Supreme Court. Where a breach of fiduciary duty is involved, ratios like 9 to 1, 5.5 to 1, and 4.9 to 1 are appropriate. State Farm III, 2004 UT 34, ¶ 1; Fairfax Realty, 2003 UT 41, ¶¶ 33, 48; Crookston II, 860 P.2d at 940-41. But where a breach of fiduciary duty is not involved, ratios in the neighborhood of 2 to 1 and 1.26 to 1 are appropriate. Diversified Holdings, 2002 UT 129, ¶33; Hall, 959 P.2d at 110. Given the nature of Westgate’s conduct, the trial court should have followed the presumptive ratio.

Moreover, the fact that punitive damages may be awarded in this case arises from the confluence of contract remedies and fraud remedies. That is, the plaintiff who is fraudulently induced to enter into a contract is entitled to the same remedy as for breach of that contract—the benefit of the bargain—but not punitive damages. Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980). Thus, in this case only the consequential damages

arise from fraud, as the \$500 portion of the awards are benefit-of-the-bargain contract damages, as evidenced by the fact that the jury awarded prejudgment interest for contract damages only to the \$500 portion of awards. For that reason, the ratios approved by the trial court are even larger—not only are the punitive damages 138 times greater than the total compensatory awards, they are 4,132 times greater than the fraud-based compensatory awards. The trial court should have reduced the punitive damages awards to presumptive ratios and used only fraud damages in those ratios.

#### **4. The Facts and Circumstances Surrounding Westgate’s Conduct**

The facts and circumstances surrounding Westgate’s conduct also indicate that the punitive damages awards are grossly excessive. This factor permits “a more subjective inquiry into what the defendant knew and what was motivating his or her actions.”

Diversified Holdings, 2002 UT 129, ¶ 19. In applying this factor, the court has made clear that “[w]hile [the] motive of making money regardless of legal . . . duties is hardly admirable,” that motive, standing alone, provides “no evidence of intentions or actions so profoundly reprehensible as to merit punitive damages beyond ordinary measures.” Id. Notably, in Diversified Holdings this court affirmed a 2 to 1 ratio where the defendant defrauded plaintiffs out of \$70,000. Id. ¶ 33. Here, the consumers were not defrauded out of any money. At most, they spent time listening to a sale presentation in exchange for a certificate. In Diversified, the court concluded that in circumstances much more egregious, the defendant’s actions did “not merit punitive damages significantly outside” presumptively permissible levels. Id. ¶ 19. The same is true here.

## **5. Effect of Westgate's Conduct on the Consumers and Others**

Westgate's conduct also did not result in consequences that justify an award above the presumptive ratio. This factor requires inquiry into whether a defendant's conduct had a "widespread effect on groups of vulnerable victims or a devastating impact on the plaintiff." Id. ¶ 20. Neither indicator is present here. The consumers here were simply asked by Westgate to attend a sales presentation to give Westgate the opportunity to persuade them to purchase a timeshare. As potential timeshare purchasers, they were not financially vulnerable. And the impact of the conduct was far from "devastating." Many consumers testified that they attended Westgate's sales presentations with no intent to purchase, a breach of the implied covenant. Several consumers returned to Westgate, even after experiencing frustration with the Anaheim Certificate, because they wanted another free gift. These customers could not have relied upon the representation of the value of the certificate as their basis for attending the sales presentation. The effects of Westgate's conduct were not so severe that Westgate must be punished in an amount "outside the range usually deemed adequate." Id.

## **6. The Possibility of Future Recurrence**

The possibility that Westgate will, in the future, engage in conduct similar to the conduct in this case does not justify a departure from the presumptive ratio. Id. ¶ 21. Relevant to this inquiry is whether a defendant's conduct is likely a "one-time occurrence . . . so that future misconduct under the same circumstances is not foreseeable." Fairfax Realty, 2003 UT 41, ¶ 42. Also relevant is whether legal proceedings alone are sufficient to deter future misconduct or whether a party "holds in contempt any legal procedure that would censure his conduct." Diversified Holdings, 2002 UT 129, ¶¶ 21-22.

Importantly, even where this factor provides the “most compelling” basis for a substantial punitive damages award, that does not “support[] a result different from that which an analysis of the other six . . . factors suggests.” Id. So, for instance, where a defendant had “demonstrated an incredibly arrogant and uncaring attitude on the stand when asked about [his conduct],” the defendant’s conduct is an insufficient indicator of recidivism to justify a ratio greater than 2 to 1. Id. It is enough that the punitive damages awards would give the defendant “some pause before he chooses to pursue fraudulent courses of action in the future.” Id. Westgate has long ceased using the Anaheim Certificate, which was created and administered by a third-party independent contractor. Westgate’s other sales incentives—several of which the claimants here used—were not at issue at trial. And Westgate has no previous or subsequent history of similarly troublesome incentive packages. Westgate is not going to engage in the same conduct in the future and endure 7 more years of litigation.<sup>10</sup>

## **7. The Relationship of the Parties**

The relationship between the consumers and Westgate also does not justify departing from the presumptive ratio. Westgate’s program was simply a form of advertising to encourage prospective timeshare purchasers to visit Westgate’s resort. The Anaheim Certificate and Westgate’s other shopping, dining, golf and ski certificates were offered, as with many forms of advertising, to incentivize the recipient to respond. But

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<sup>10</sup> Westgate acknowledges that this court has considered a defendant’s refusal to repent as a predictor of recidivism. Like with a prisoner maintaining his actual innocence before a parole board, however, this creates a Hobson’s choice for the defendant. By drawing this court’s attention to the limited harm and the fact that consumers did not have fiduciary relationships with Westgate, Westgate seeks only to characterize its conduct, not deny its liability for the benefit of the bargain. Westgate urges this court not to construe its attempt to defend itself as the obstreperous protests of an irredeemable recidivist.



offering a gift to a responder does not make Westgate a fiduciary. The Utah Supreme Court has consistently distinguished between fraud involving fiduciaries and fraud involving parties in arm's-length contracts. To this end, "[t]he greater the trust reposed in a defendant, the greater will be the justification for a more significant award of punitive damages." Id. ¶ 23. The trial court correctly noted that there was no fiduciary relationship in this case. But the court then concluded that the consumers did place "a degree of trust" in Westgate. The court departed from traditional punitive damages ratios in part because Westgate breached that trust.

But as discussed, the trust consumers placed in Westgate is of the type all defrauded plaintiffs place in others and in no way resembles the trust between an insurer and an insured, State Farm III, 2004 UT 34, ¶ 27, partners in a business, Fairfax Realty, 2003 UT 41, ¶¶ 43-44, or a real estate agent and his clients, Diversified Holdings, 2002 UT 129, ¶ 23. Here, the jury found a contractual relationship existed. But that contract was the culmination of an arm's-length transaction. Indeed, the nature of these transactions indicates a remarkably low amount of trust placed in Westgate.

Notably, even in cases involving a fiduciary duty, awards must still be within single-digit ratios. State Farm III, 2004 UT 34, ¶ 1; Fairfax Realty, 2003 UT 41, ¶¶ 33, 48; Crookston II, 860 P.2d at 940-41. Where the court has considered parties engaging in an arm's-length transaction, it has held that a punitive damages award "of . . . approximately two times the amount of fraud damages suffered by the plaintiff, will serve as an adequate punishment and deterrence." Diversified Holdings, 2002 UT 129, ¶ 33.

In conclusion, this case warrants the presumptive 2 to 1 ratio approved in Diversified Holdings. Both cases involved garden-variety fraud. Both cases arose from

arm's-length transactions. Both cases involved only economic damages fully remedied by the compensatory award. In both cases, the litigation will serve, and indeed already has served, as a deterrent against future misconduct. And, while the defendant in Diversified defrauded plaintiffs out of more than \$70,000, the consumers in this case lost only their time. Accordingly, this court should remit the punitive damages awards to an amount no greater than twice the amount of economic damages.

### **Conclusion**

Westgate is entitled to a new trial of the consumer claims that is conducted in a non-prejudicial manner under Utah Rule of Civil Procedure 42. The court also should grant a new trial on punitive damages that is conducted to afford Westgate procedural due process. In the alternative, the court should order a remittitur of the punitive damages award under both federal substantive due process and Utah law.

DATED this 15<sup>th</sup> day of October, 2010.

SNELL & WILMER L.L.P.

A handwritten signature in black ink, appearing to read "Michael D. Zimmerman", is written over a horizontal line.

Michael D. Zimmerman

Troy L. Booher

Christopher L. Stout


*Attorneys for Appellant Westgate Resorts, Ltd.*

CERTIFICATE OF SERVICE

This is to certify that on the 15<sup>th</sup> day of October, 2010, two true and correct copies of the foregoing Opening Brief of Appellant were sent via U.S. Mail, postage prepaid, to the following:

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

Tab A

**FILED**

OCT 27 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Counterclaimants,

vs.

WESTGATE RESORTS, LTD.,

Counterdefendant.

**ORDER REGARDING WESTGATE  
RESORTS, LTD.'S MOTION TO  
COMPEL ARBITRATION**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Westgate Resorts, Ltd., ("Westgate") filed a motion to compel arbitration and stay this Court's proceedings, which came regularly before the Court on September 16, 2008 at the hour

of 1:00 p.m. Richard W. Epstein and Rebecca F. Bratter appeared in behalf of Westgate; L. Rich Humpherys, Karra J. Porter, and Scot A. Boyd appeared in behalf of Consumer Protection Group, LLC (“CPG”).

The Court considered the memoranda submitted by the parties and the oral argument, together with all other information contained in the file. The Court issues the following findings and conclusions:

1. The Court is unable to determine whether the statutory language of Utah Code Ann. §76-10-1605 (3), as amended, mandates that any claims made under the Utah Pattern of Unlawful Activity Act (“UPUA”), , which claims are grounded in fraud, must be decided exclusively by arbitration pursuant to the Utah Uniform Arbitration Act (“UUA”), § 78B-31a-101, et seq. The applicable language of section 76-10-1605 (3), which uses the words, “subject to” is unclear. The Court therefore cannot find or conclude that such language would give exclusive subject matter jurisdiction to the arbitrators in an arbitration pursuant to UUA. Accordingly, the court cannot address the issue of waiver.

2. Regardless of whether the words “subject to” conveys exclusive subject matter jurisdiction to the arbitrators, the Court finds and concludes that such language does allow the UPUA claims founded in fraud to be arbitrated pursuant to UUA.

3. The Court finds and concludes that though the motion has been filed late in the proceedings, it is appropriate and reasonable to compel arbitration, and there is wisdom in having the UPUA claims of CPG arbitrated given the circumstances in this case, including: (a) the over 900 claims based on communications fraud; (b) the repetitive nature of much of the evidence that would

relate to each of the claims; (c) the discretion of arbitrators to consider evidence without confusion of facts regarding the liability and damages and the applicable law; (d) the complexity regarding statutory violations and the recoverable damages under the statute; (e) the advantage of allowing testimony and evidence to be submitted in different ways in arbitration (rather than repeated appearances of witnesses), which would decrease the potential cost and prejudice to everyone involved.; and (f) denying the motion to arbitrate would result in further significant delays since Westgate would have, and would exercise, an immediate right to appeal.

4. The parties have stipulated that all of the discovery that has taken place in the present action may be used and applied in the arbitration proceedings. The Court finds that the stipulation is reasonable and appropriate as to twenty-eight claimants (pursuant to the previous scheduling orders of this court, discovery has been completed as it relates to the following claimants: George Baty, Holly and Jon Beck, Karen and Howard Brandt, Kristy and Stephen Brower, Darren and Irene Davis, David and Kristen Detienne, Larry and Sherrill Dorius, Diane Eastman, Diane and Robert Ellis, Karen and Kurtis Heser, Susan Hubbard, Luanne and Mark Huntington, Byard and Joan Price, Darla and George Serassio, Rodney Sorensen, Greg and Relda White).

5. The Court finds and concludes that the arbitrators will be able to promptly address the UPUA claims efficiently and in a cost effective manner.

6. The Court finds and concludes that there is no reasonable basis to stay the claims based upon common law fraud and contract (the seventh and eighth causes of action), since the resolution of the arbitration proceedings may not finally resolve the claims based upon common

law fraud and will not resolved the claims based on contract. Staying these claims would result in further delays and potential serious prejudice to the parties and, since it may take years to fully resolve the arbitration proceedings, and if stayed, the Court would then have to deal with the claims of common law fraud and contract in any event. Delaying the resolution of the common law fraud and contract claims may result in faded memories, the unavailability of certain witnesses and otherwise stale evidence. In addition, these claims are severable from the UPUA claims.

7. Under the circumstances of this case, witnesses may be required to testify multiple times. The Court finds that staying the proceedings would not be reasonable, but more imposing and prejudicial to the parties and to the witnesses. If the matters were stayed, it may require all of the witnesses to return multiple times many years from now.

8. The Court therefore concludes that arbitration would be in the best interest of the parties as it relates to the UPUA claims and proceeding to trial with the common law fraud and contract claims would be the most appropriate way to resolve the non UPUA claims with the least prejudice, imposition and cost.

Based upon the above findings and conclusions, the Court issues the order set forth below.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Westgate's motion to compel arbitration regarding the Utah Pattern of Unlawful Activity ("UPUA") claims is granted. The trial of the UPUA claims shall therefore be cancelled and these claims instead shall be arbitrated pursuant to the Utah Uniform Arbitration Act, § 78B-

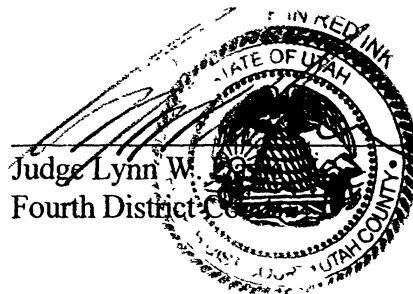


11-101, et seq. Each party shall have twenty (20) days from the date of this order in which to designate an arbitrator. These two arbitrators will select the third arbitrator. All of the discovery by the parties in the present action shall be applicable to the arbitration proceedings and the parties may use the discovery accordingly. This matter is now many years old and the Court orders that the arbitration proceedings be handled as expeditiously as reasonably possible.

2. Westgate's motion to stay the non-UPUA causes of action is denied.

DATED this 27<sup>th</sup> <sup>October</sup> day of ~~September~~, 2008.

BY THE COURT:



Approved as to form:

GREENSPOON MARDER

---

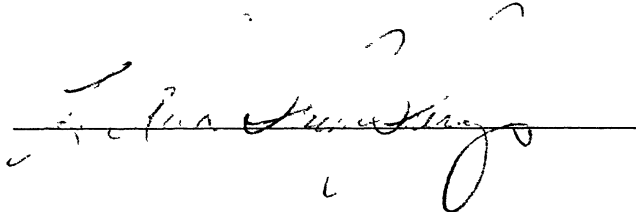
Richard W. Epstein  
*Attorneys for Westgate Resorts, Ltd.*

**CERTIFICATE OF SERVICE**

This is to certify that on the 30<sup>th</sup> day of September, 2008, a true and correct copy of the foregoing **ORDER REGARDING WESTGATE RESORTS, LTD.'S MOTION TO COMPEL ARBITRATION** was served:

Richard W. Epstein  
Robby H. Birnbaum  
Rebecca F. Bratter  
GREENSPOON MARDER  
Trade Center South, Suite 700  
100 West Cypress Creek Road  
Fort Lauderdale, FL 33309-2140

by Hand delivery

A handwritten signature in black ink, appearing to read "Richard W. Epstein", is written over a horizontal line.

Tab B

ORIGINAL TRANSCRIPT

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

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

2008 DEC 23 A 10:23

WESTGATE RESORTS, LTD., a  
Florida limited  
partnership,

Plaintiff and  
Counterclaim Defendant,

vs.

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

Defendants and  
Counterclaimants.

)  
)  
) TRANSCRIPT OF  
) PROCEEDINGS

) Volume 9  
)

) Civil No.  
) 020404068

) Judge Anthony W.  
) Schofield

) DAVIS - Div. 8  
)  
)

November 13, 2008 \* 8:12 a.m.

Location: Fourth Judicial District Courthouse  
125 North 100 West  
Provo, Utah

Reporter: Denise M. Thomas, CRR/RPR  
Notary Public in and for the State of Utah

FILED  
UTAH APPELLATE COURTS

APR 02 2009

20090065-CA 005667



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170 South Main Street, Suite 300  
Salt Lake City, Utah 84101

PH 801 532 3441 FAX 801 532 3442

1 will be harmful to themselves  
2 simply to benefit the other party.

3 "Finally, you cannot use this  
4 unwritten promise to achieve an  
5 outcome that you believe is fair  
6 but is inconsistent with the  
7 actual terms of the contract.

8 "If you find that Westgate  
9 Resorts violated this unwritten  
10 promise to deal fairly and in good  
11 faith with the consumer, then  
12 Westgate violated the contract."

13 Number 51, Damages for Nonperformance.

14 "Consumer Protection Group is  
15 entitled to recover the  
16 consumers's damages from Westgate  
17 Resorts if the consumer did  
18 everything that he or she had  
19 promised to do under the contract  
20 and Westgate Resorts failed to do  
21 what it had promised to do under  
22 the contract."

23 Number 52, Expectation Damages General.

24 "If a consumer was damaged by a  
25 breach of the contract with

1 Westgate Resorts, then Westgate  
2 Resorts is liable for the damages  
3 that follow naturally from the  
4 breach as follows: (1) the loss  
5 of the benefits from the contract  
6 caused by Westgate's breach; minus  
7 (2) any costs or other loss that  
8 the consumer has avoided by not  
9 having to perform."

10 52A, Consequential Damages for Breach of  
11 Contract (Implied Covenant of Good Faith and Fair  
12 Dealing).

13 "If the contract with the consumer  
14 was breached by Westgate Resorts,  
15 then Westgate Resorts is also  
16 liable for 'consequential damages'  
17 caused by the breach of the  
18 contract.

19 "Consequential damages are  
20 those losses reasonably within the  
21 contemplation of the parties, that  
22 is, they could have considered the  
23 damages or reasonably foreseen  
24 them, at the time the contract was  
25 made.

1 "In order to decide whether a  
2 loss was foreseeable at the time  
3 the contract was made, you should  
4 examine the nature and language of  
5 the contract and the reasonable  
6 expectations of the parties. A  
7 loss may be foreseeable because it  
8 would naturally flow from the  
9 contract breach (1) in the  
10 ordinary course of events, or (2)  
11 as a result of special  
12 circumstances, beyond the ordinary  
13 course of events, that Westgate  
14 Resorts had reason to know or to  
15 expect would occur.

16 "However, you may not award  
17 damages under this claim for  
18 breach of contract: (1) emotional  
19 distress, (2) the time expended by  
20 the consumers in connection with  
21 the contract, or (3) for mileage  
22 or other automobile or travel  
23 expense."

24 Next we turn to fraud. We've been dealing  
25 with issues of contract to this point in time.

1 surrounding circumstances. You  
2 may consider any statement made or  
3 acts done by Westgate Resorts and  
4 all other facts and circumstances  
5 which indicate intent. You may  
6 draw the inference and find the  
7 person intends the natural and  
8 probable consequences of acts  
9 knowingly done."  
10 Number 60, Reasonable Reliance.  
11 "You must decide whether each  
12 consumer's reliance on the false  
13 statement was reasonable under the  
14 circumstances. To do so, you may  
15 consider his or her age,  
16 intelligence, experience, mental  
17 condition, and knowledge, along  
18 with his or her relationship to  
19 Westgate Resorts and access to  
20 information."  
21 Number 61, Compensatory Damages for Fraud.  
22 "If you decide that CPG has proven  
23 by clear and convincing evidence  
24 that Westgate Resorts defrauded a  
25 consumer, then you must also



1           decide how much money is needed to  
2           fairly compensate for any damages  
3           to that particular consumer caused  
4           by the fraud. As I've instructed  
5           you, you must consider each  
6           consumer claim separately, and any  
7           damages, if any, you decide to  
8           award each consumer must be based  
9           solely on the evidence presented  
10          by that consumer. You may not  
11          consider any evidence of damages  
12          presented by any other consumer  
13          when you evaluate each particular  
14          consumer's claim.

15                 "There are two kinds of  
16          damages that you may award: (1)  
17          economic, and (2) noneconomic. In  
18          deciding how much money the  
19          consumer has been damaged, a kind  
20          of economic damages, you should  
21          determine the difference between  
22          (1) the value of what Westgate  
23          Resorts promised to give the  
24          consumer if Westgate Resorts'  
25          false statements had been true,

1 and, (2) the value of what the  
2 consumer actually received.

3 "You should determine the  
4 total amount that the consumer was  
5 damaged as a consequence of his or  
6 her reliance on Westgate's false  
7 statement. You must consider the  
8 following:

9 "(1) You may award damages  
10 for expenses the consumer  
11 reasonably incurred caused by  
12 Westgate Resorts' fraud. These  
13 are also a kind of economic  
14 damages. However, the expenses  
15 must have been reasonably  
16 foreseeable from Westgate Resorts'  
17 fraud. Consumer Protection Group  
18 must prove these damages with  
19 reasonable certainty. You may  
20 not, however, award damages for  
21 the time expended by the consumer  
22 or for mileage or other automobile  
23 or travel expense.

24 "(2) You may also award  
25 damages for the emotional distress

1           caused by Westgate Resorts' false  
2           statement if the emotional  
3           distress was a natural and  
4           proximate result of Westgate  
5           Resorts' fraud. These are a kind  
6           of noneconomic damages."

7           Number 62, Noneconomic Damages Defined.

8           "Noneconomic damages are not  
9           capable of being exactly measured,  
10          and there is no fixed rule,  
11          standard or formula for them.

12          Noneconomic damages must still be  
13          awarded even though they may be  
14          difficult to compute. It is your  
15          duty to make this determination  
16          with calm and reasonable judgment.  
17          The law does not require the  
18          testimony of any witness to  
19          establish the amount of  
20          noneconomic damages.

21                 "While you may not award  
22          damages based upon speculation,  
23          the law requires only that the  
24          evidence provide a reasonable  
25          basis for assessing the damages

1 but does not require a  
2 mathematical certainty."

3 Number 63, Proof of Damages.

4 "To be entitled to damages, Consumer  
5 Protection Group must prove two  
6 points: First, that damages  
7 occurred to the consumers, and  
8 there must be a reasonable  
9 probability, not just speculation,  
10 that the consumer suffered damages  
11 from Westgate Resorts' fault.

12 "Second, the amount of  
13 damages of each consumer. The  
14 level of evidence required to  
15 prove the amount of damages is not  
16 as high as what is required to  
17 prove the occurrence of damages.  
18 There must still be evidence, not  
19 just speculation, that gives a  
20 reasonable estimate of the amount  
21 of damages, but the law does not  
22 require a mathematical certainty.

23 "In other words, if Consumer  
24 Protection Group has proved that  
25 the consumer has been damaged and

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations.

## Tab C

2. The second part of the document outlines the specific procedures and protocols that must be followed to ensure that all records are properly maintained and updated. It details the roles and responsibilities of the personnel involved in this process.

ORIGINAL TRANSCRIPT

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY STATE OF UTAH

2008 DEC 23 A 10:2

WESTGATE RESORTS LTD  
Florida limited  
partnership

Plaintiff and  
Counterclaim Defendant,

vs

SHAUN S ADLI, an  
individual, and CONSUMER  
PROTECTION GROUP, LLC a  
Utah limited liability  
company

Defendants and  
Counterclaimants.

TRANSCRIPT OF  
PROCEEDINGS

Volume 10

Civil No.  
00404068

Judge Anthony W.  
Schofield

DAVIS - DIV 3

November 14 2008 \* 11:25 a m

Location Fourth Judicial District Courthouse  
125 North 100 West  
Provo, Utah

Reporter Denise M. Thomas, CRR/RPR  
Notary Public in and for the State of Utah

FILED  
UTAH APPELLATE COURTS

APR 02 2009

005663

20090065-CA



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1 to you, there is a reason why it says proper  
2 punishment and as a wholesome warning to others.

3 Now, others doesn't necessarily mean  
4 Westgate. Punitive damage is also sometimes called  
5 exemplary damages. It's an example. It's to set an  
6 example for the industry to others, a wholesome  
7 warning to others not to offend in like manner, so  
8 punitive damages now takes a very broad, broad  
9 purpose in policy decision.

10 Now, when we're addressing the punitive  
11 damages, we need to appreciate that Exhibit -- I  
12 don't remember which number. There were invoices for  
13 2400 Anaheim certificates. We know that at least  
14 2400 people received this deceptive certificate.  
15 Now, we believe there was a lot more involved.  
16 Mr. Wagner from MDI said that he sent approximately  
17 3700 tours to Westgate, and it was the primary  
18 sponsor of this certificate.

19 Now, is it exactly 3700 or 2400 or some  
20 number in between, we don't know, but we also know  
21 that there were hundreds of people that were  
22 persuaded not to take it after they have already been  
23 duped by coming into Westgate at The Canyons and had  
24 gone through the sales presentation and they were  
25 talked out of taking that and took a different

1 premium, so there are literally many more than the  
2 2400 to 3700 people who were actually involved in  
3 this fraudulent scheme.  
4 All right. But we only have 15 here, 15  
5 couples, or units, so if we're going to address the  
6 issue and purpose of punitive damage, we have to look  
7 beyond these 15 people. Now, you have 15 verdicts.  
8 We have to appreciate that there is a reason why we  
9 have divided them up into 15. That is just the  
10 logistical way this has been handled. The Court had  
11 separate verdicts for each 15.  
12 Now, it is important in awarding any  
13 damage, including punitive damage, that we don't  
14 duplicate them, so one could say, well, if we try and  
15 punish everybody and we have a wholesome example and  
16 we do it 15 times, that's really a duplication of  
17 punishment and damage, and that should not be done.  
18 But, on the other hand, if we're saying, well, we're  
19 just going to punish Westgate for these 15 people,  
20 then we are not doing the purpose and fulfilling the  
21 purpose of punitive damages.  
22 So we're kind of caught in that sticky  
23 thing that we have 15 verdicts, so what do we do and  
24 how do we address punishing Westgate for the entire  
25 scheme, trying to have an amount that would deter or



1 dissuade them from ever engaging in this kind of  
2 conduct again, and then we do it among 15. But we  
3 need to do that, so I'm going to suggest a way that I  
4 think would be fair so that we don't have duplication  
5 and yet we fulfill the purpose of punitive damages.

6 It would be wrong for you to assume that  
7 what is awarded in punitive damages in these 15  
8 verdicts are only going to go to these 15 consumers.  
9 You need not concern yourselves with where the  
10 money's going to go on the punitive damages. The  
11 Court will administer and decide how that money is  
12 disbursed and addressed, but it would be wrong to  
13 assume that this money would go to these 15 people,  
14 or just to these 15 I should say.

15 All right. So if we look at taking the  
16 profit out of the fraud, one of the things that I  
17 would suggest we look at -- we can look at it in two  
18 or three different ways. One can be the fact that we  
19 have tours.

20 As we just heard from both Mr. Crabtree  
21 and also Mr. Gissy, that they computed the value of  
22 these tours or the volume per tour, which converted  
23 to a monetary value, of about \$1200 per tour, and  
24 that the tours that were involved in the Anaheim  
25 certificate were somewhere between \$2400 and \$3700.

1 say around \$3,000, we then have a figure of about  
2 \$3.6 million.

3 JUDGE DAVIS: I think you misspoke,  
4 Counsel when you said \$3,000. You mean 3,000 tours?

5 MR. HUMPHERYS: Tours. Pardon me. Thank  
6 you, Judge.

7 That would equate to just the value per  
8 tour times the number of certificates would be  
9 approximately \$3.6 million.

10 Now, let's look at it in a different way.  
11 The promised gift was \$500. We have, again,  
12 somewhere between 2400 and 3700 tours that used this  
13 certificate. If you take just the cost or what was  
14 promised as the value times 3,000, which is about in  
15 the middle of that range, that equals about  
16 \$1.5 million.

17 Now, as I talk about that, we need to  
18 appreciate all that does is get us to restitution.  
19 Five hundred dollars that should have been paid from  
20 the beginning is an amount of 1.5. That doesn't even  
21 talk about punishment, it doesn't talk about  
22 deterrence.

23 So what amount in a large corporation such  
24 as this is it going to take to make sure that this  
25 company doesn't engage in this kind of fraudulent

1 behavior ever again?

2 Now, we've heard quite a bit about how the  
3 market has been affected in the last few months, and  
4 you've heard Mr. Crabtree's estimate. Whether or not  
5 it's believable, I don't know. I leave it up to you.  
6 He has every incentive to downplay their value by way  
7 of estimate. He can't do much with an audited amount  
8 because that's fixed by accountants, but we do know  
9 from what he said that the value in 2000, the time  
10 when this scheme was being perpetrated, was around  
11 \$100 million to \$150 million, so in seven years the  
12 profitability and net equity of this company went up  
13 to \$517 million -- or \$519 million? \$519 million.

14 Now, Westgate pleads not poverty, that  
15 would not be the right way to put it, but certainly  
16 pleads that the financial crisis has had its effect.  
17 I don't doubt it, don't doubt it a bit, but it has  
18 enjoyed a profit generated from this scheme, and it  
19 doesn't complain a bit.

20 So what I would suggest to you is this: A  
21 company such as Westgate needs to feel some type of  
22 financial pain, since a corporation feels no pain  
23 otherwise, in order to make sure it knows that in  
24 Utah we will not accept this kind of fraudulent  
25 scheme and don't come into Utah ever again with this

1 kind of approach, and if all we're doing is making  
2 them pay the \$500 that they promised to pay, that's  
3 not paying. That's what they agreed to pay already.  
4 It has to be something higher than that.

5 If we punish them, or try to punish them  
6 for an amount less than that, I suggest that Westgate  
7 then ends up gaining on the deal, making something on  
8 the deal, because if the profit isn't regurgitated,  
9 if the money that is promised, the \$500, is not taken  
10 away from them, then they end up with a net gain and  
11 none for the wear -- no worse for the wear. When  
12 they get caught once in awhile and have to pay some  
13 smaller amount, it never gets to the point where it  
14 becomes unprofitable for them to do it.

15 Now, this is a perfect example of why  
16 punitive damages have to be large. It's taken us  
17 three weeks to try 15 couples out of hundreds and  
18 hundreds and hundreds out of the 2400 to 3700 tours  
19 that had this gift certificate.

20 Can you see the purpose and wisdom of  
21 having punitive damages awarded? Because it is in  
22 our legal system nearly impossible to try and  
23 litigate the entire matter or we'd be here for years,  
24 and so that is the primary purpose of punitive damage  
25 is to make sure that on a one time basis we can

1 address this as a whole.

2 All right. Now --

3 MR. EPSTEIN: Objection. I move to strike  
4 that entire last dialogue. I think it's entirely  
5 improper argument.

6 JUDGE DAVIS: You may respond, Counsel.

7 MR. HUMPHERYS: Sure. In the Jury  
8 Instruction, Your Honor, one of the things that the  
9 jury must consider is item Number 4, the effect of  
10 the conduct on the lives of the consumers and others.  
11 I'm addressing that very thing.

12 MR. EPSTEIN: The consumers involved in  
13 this case, it has nothing to do with that. This is  
14 something else that's not before the jury at all.

15 JUDGE DAVIS: I do think it's restricted  
16 to the consumers that, or the witnesses before this  
17 case, is it not, Counsel, the reference?

18 MR. HUMPHERYS: Are you talking to me?

19 JUDGE DAVIS: Yes.

20 MR. HUMPHERYS: Oh, I'm sorry. There's  
21 glare in your glasses. I thought you were looking  
22 the other way.

23 For punitive damages, no, Your Honor; for  
24 compensatory, yes.

25 JUDGE DAVIS: Well, compensatory, clearly,

1 but as it relates to punitive damages, read the  
2 generic -- whether it's generic or whether it's  
3 individualized. We have -- some of it's generic.

4 The probability of future reoccurrence of  
5 the misconduct, you have the facts and circumstances  
6 surrounding such conduct, you have the effect of the  
7 conduct on the lives of the consumers and others.

8 MR. HUMPHERYS: That's right, and others.

9 JUDGE DAVIS: Okay.

10 MR. HUMPHERYS: And that's the point. All  
11 punitive damage claims relate to the entirety, and it  
12 also goes to the reprehensibility of the conduct.

13 JUDGE DAVIS: I'll allow it.

14 MR. HUMPHERYS: All right.

15 MR. EPSTEIN: Just so it's clear so I  
16 understand it, I want to make sure I understand for  
17 purposes of this record that he's able to argue that  
18 punitive damages can be awarded for the entire group  
19 of people that might have been affected by this  
20 particular premium incentive program; is that right?

21 JUDGE DAVIS: He may argue the facts and  
22 circumstances surrounding the conduct, the nature of  
23 the alleged conduct, the relative wealth of Westgate  
24 Resorts, the effect of the conduct on the lives of  
25 the consumers and others, the probability of future

1 recurrence and misconduct, the relationship of the  
2 parties and the amount of actual damages awarded. As  
3 long as he's confined to that, that's the  
4 Instruction 76 relative to punitive damages.

5 MR. HUMPHERYS: Here's what I would  
6 suggest is appropriate: If we were to take the \$500  
7 per tour that was promised and not given, and if you  
8 were to take that figure and times three, times all  
9 of the people who have been subjected to this  
10 fraudulent scheme, I believe that the figure of  
11 \$4.5 million is an appropriate award for punitive  
12 damages, and if you were to divide that into 15,  
13 which are the number of verdicts that you have, I  
14 believe the math is \$300,000 each.

15 I again emphasize it would be wrong to  
16 assume that if we divide it up into 15, which is  
17 nothing more than a logistical way to address before  
18 you, it is not the basis upon which the award is  
19 given to any one person, then it would be wrong to  
20 assume otherwise, and I believe that that is what is  
21 necessary to catch the attention of the timeshare  
22 company that is using these kinds of tactics and kept  
23 using them even after they knew and how fraudulent it  
24 was and how little they've done and how little  
25 remorse they have shown at all in this particular

Tab D



**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Gregory and Relda White**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Gregory and Relda White? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Gregory and Relda White? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Gregory and Relda White? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Gregory and Relda White? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Gregory and Relda White? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Gregory and Relda White?

Economic damage \$ 550

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Gregory and Relda White?

Yes X No           

DATED this 14<sup>th</sup> day of November, 2008.

Dari P. Lyder  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Rod Sorensen**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Rod Sorensen? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Rod Sorensen? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Rod Sorensen? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Rod Sorensen? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Rod Sorensen?

Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Rod Sorensen?

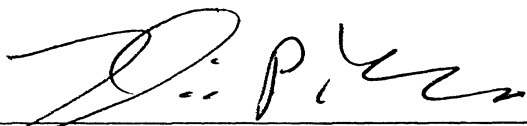
Economic damage \$ 500

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Rod Sorensen?

Yes X No           

DATED this 14<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

WESTGATE RESORTS, LTD.,

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Byard and Joan Price**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Byard and Joan Price? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Byard and Joan Price? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Byard and Joan Price? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Byard and Joan Price? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Byard and Joan Price? Yes X No \_\_\_\_\_

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Byard and Joan Price?

Economic damage \$ 540

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Byard and Joan Price?

Yes X No \_\_\_\_\_

DATED this 14<sup>th</sup> day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Mark and Luanne Huntington**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Mark and Luanne Huntington? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Mark and Luanne Huntington? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Mark and Luanne Huntington? Yes X No \_\_\_\_\_

If you answered "no" to question number 3 above, do not answer questions 4 or 5.

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Mark and Luanne Huntington? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Mark and Luanne Huntington? Yes X No \_\_\_\_\_

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Mark and Luanne Huntington?

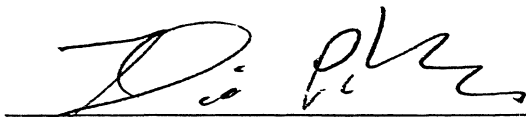
Economic damage \$ 500

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Mark and Luanne Huntington?

Yes X No \_\_\_\_\_

DATED this 14<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON



**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

Civil No. 020404068

WESTGATE RESORTS, LTD.,

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: Susan Hubbard

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Susan Hubbard? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Susan Hubbard? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Susan Hubbard? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Susan Hubbard? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Susan Hubbard?

Yes X No \_\_\_\_\_

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Susan Hubbard?

Economic damage \$ 505

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Susan Hubbard?

Yes X No \_\_\_\_\_

DATED this 14<sup>th</sup> day of November, 2008.

J. P. L.  
JURY FORE PERSON

**FILED**  
NOV 14 2008 *VSD*  
4TH DISTRICT  
STATE OF UTAH  
UTAH CO'INTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Kurtis and Karen Hesper**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Kurtis and Karen Hesper? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Kurtis and Karen Hesper? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Kurtis and Karen Hesper? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Kurtis and Karen Hesper? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Kurtis and Karen Hesar? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Kurtis and Karen Hesar?

Economic damage \$ 535

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Kurtis and Karen Hesar?

Yes X No           

DATED this 14<sup>th</sup> day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Robert and Diane Ellis**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Robert and Diane Ellis? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Robert and Diane Ellis?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Robert and Diane Ellis? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Robert and Diane Ellis? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Robert and Diane Ellis? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Robert and Diane Ellis?

Economic damage \$ 515

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Robert and Diane Ellis?

Yes X No           

DATED this 14<sup>th</sup> day of November, 2008.

*D. P. Yon.*  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH CO' INTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

Civil No. 020404068

WESTGATE RESORTS, LTD.,

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Diane Eastman**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Diane Eastman? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Diane Eastman? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Diane Eastman? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Diane Eastman? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Diane Eastman?

Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Diane Eastman?

Economic damage \$ 517

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Diane Eastman?

Yes X No           

DATED this 14<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON



**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

Civil No. 020404068

WESTGATE RESORTS, LTD.,

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: Larry and Sherrill Dorius

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Larry and Sherrill Dorius? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Larry and Sherrill Dorius?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Larry and Sherrill Dorius? Yes X No \_\_\_\_\_

If you answered "no" to question number 3 above, do not answer questions 4 or 5.

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Larry and Sherrill Dorius? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Larry and Sherrill Dorius? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Larry and Sherrill Dorius?

Economic damage \$ 500

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Larry and Sherrill Dorius?

Yes X No           

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH CO' INTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **David and Kristen Detienne**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on David and Kristen Detienne? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to David and Kristen Detienne?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and David and Kristen Detienne? Yes X . No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with David and Kristen Detienne? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to David and Kristen Detienne? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to David and Kristen Detienne?

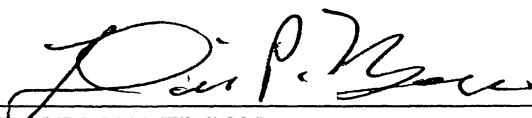
Economic damage \$ 550

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of David and Kristen Detienne?

Yes X No           

DATED this 14 day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON

**FILED**

NOV 14 2008 *kb*

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

WESTGATE RESORTS, LTD.,

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: **Darren and Irene Davis**

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Darren and Irene Davis? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Darren and Irene Davis?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Darren and Irene Davis? Yes X No \_\_\_\_\_

If you answered "no" to question number 3 above, do not answer questions 4 or 5.

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Darren and Irene Davis? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Darren and Irene Davis? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Darren and Irene Davis?


Economic damage \$ 5

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Darren and Irene Davis?

Yes X No           

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

WESTGATE RESORTS, LTD.,

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: Stephen and Kristy Brower

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Stephen and Kristy Brower? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Stephen and Kristy Brower?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Stephen and Kristy Brower? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Stephen and Kristy Brower? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Stephen and Kristy Brower? Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Stephen and Kristy Brower?

Economic damage \$ 517

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Stephen and Kristy Brower?

Yes X No           

DATED this 14 day of November, 2008.

  
JURY FORE PERSON



**FILED**

NOV 14 2008 *W*

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,	<b>SPECIAL VERDICT</b>
vs.	
WESTGATE RESORTS, LTD.,	Civil No. 020404068
	Division No. 8
	Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: Howard and Karen Brandt

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Howard and Karen Brandt? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Howard and Karen Brandt?

Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Howard and Karen Brandt? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Howard and Karen Brandt? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Howard and Karen Brandt? Yes X No           


6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Howard and Karen Brandt?

Economic damage \$ 500  
Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Howard and Karen Brandt?

Yes X No           

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

V&Z

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,

**SPECIAL VERDICT**

vs.

WESTGATE RESORTS, LTD.,

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: Holly and Jon Beck

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on Holly and Jon Beck? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to Holly and Jon Beck? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and Holly and Jon Beck? Yes X No \_\_\_\_\_

If you answered "no" to question number 3 above, do not answer questions 4 or 5.

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with Holly and Jon Beck? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to Holly and Jon Beck?

Yes X No           

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to Holly and Jon Beck?

Economic damage \$ 508

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Holly and Jon Beck?

Yes X No           

DATED this 14 day of November, 2008.

*J. P. Mc.*  
JURY FORE PERSON

**FILED**

NOV 14 2008

140

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

CONSUMER PROTECTION GROUP, LLC,	<b>SPECIAL VERDICT</b>
vs.	
WESTGATE RESORTS, LTD.,	Civil No. 020404068
	Division No. 8
	Judge Lynn W. Davis

Please answer the following questions based on the instructions the court has given you.

Re: George Baty

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on George Baty? Yes X No \_\_\_\_\_

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to George Baty? Yes X No \_\_\_\_\_

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and George Baty? Yes X No \_\_\_\_\_

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**

4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with George Baty? Yes X No \_\_\_\_\_

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to George Baty?

Yes X No \_\_\_\_\_

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to George Baty?

Economic damage \$ 500

Non Economic damage \$ 0

7. If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of George Baty?

Yes X No \_\_\_\_\_

DATED this 14 day of November, 2008.

P. J. P. 12  
JURY FORE PERSON

FILED

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Robert and Diane Ellis

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

*L. P. Young*  
JURY FORE PERSON

FILED

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Rod Sorensen

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

*D. P. Meyer*  
JURY FORE PERSON



FILED

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Byard and Joan Price

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

*D. P. Myers*  
JURY FORE PERSON

FILED  
NOV 14 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Diane Eastman

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

*Lair P. Nylander*  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Mark and Luanne Huntington

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Susan Hubbard

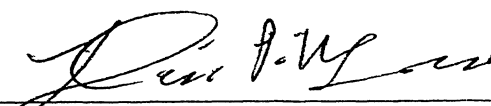
1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Kurtis and Karen Heser

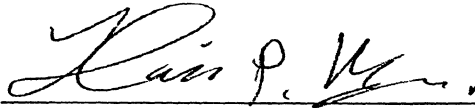
1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.



JURY FORE PERSON

**FILED**  
NOV 14 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Larry and Sherrill Dorius

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

*D. P. [Signature]*  
JURY FORE PERSON

**FILED**  
NOV 14 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,	<b>SPECIAL VERDICT REGARDING PUNITIVE DAMAGES</b>
vs.	Civil No. 020404068
WESTGATE RESORTS, LTD.,	Division No. 8
	Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: **David and Kristen Detienne**

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14<sup>th</sup> day of November, 2008.

  
JURY FORE PERSON

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH CO'NTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Gregory and Relda White

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
JURY FORE PERSON



**FILED**  
NOV 14 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: **Holly and Jon Beck**

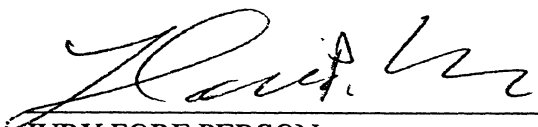
1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

**FILED**  
✓  
NOV 14 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: **Darren and Irene Davis**

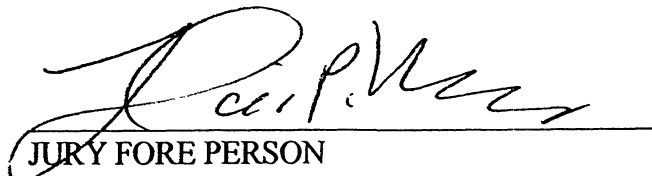
1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

004761

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Stephen and Kristy Brower

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

FILED

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: Howard and Karen Brandt

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
JURY FORE PERSON

004759

**FILED**

NOV 14 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

CONSUMER PROTECTION GROUP, LLC,

vs.

WESTGATE RESORTS, LTD.,

**SPECIAL VERDICT REGARDING  
PUNITIVE DAMAGES**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Please answer the following questions based on the evidence and instructions the court has given you.

Re: George Baty

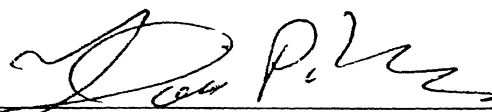
1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

\$ 66,666.67

DATED this 14 day of November, 2008.

  
\_\_\_\_\_  
JURY FORE PERSON

Tab E

FILED

DEC 11 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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, Utah 84101  
Telephone: (801) 323-5000  
Facsimile: (801) 355-3472  
*Attorneys for Defendant/Counterclaimant Consumer Protection Group, LLC.*

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Counterclaimants,

vs.

WESTGATE RESORTS, LTD.,

Counterdefendant.

**CONSUMER PROTECTION GROUP'S  
JUDGMENT AGAINST WESTGATE  
RESORTS, LTD ON SPECIAL  
VERDICTS**

Civil No. 020404068

Division No. 8

Judge Lynn W. Davis

Trial in the above matter came regularly before the court commencing October 27, 2008  
and concluding on November 14, 2008. Consumer Protection Group appeared and was

represented by its attorneys L. Rich Humpherys, Karra J. Porter and Scot A. Boyd; Westgate Resorts appeared through its attorneys Richard W. Epstein and Rebecca F. Bratter. A jury was regularly impaneled and sworn to try said action. Witnesses on the part of both sides were sworn and examined, exhibits were submitted, and all evidence was adduced by the parties. Having considered the evidence, arguments of counsel and the instructions of the court, the jury first retired to consider the fifteen special verdicts as it related to the claims of each of the following consumers: George Baty, Holly and Jon Beck, Karen and Howard Brandt, Kristy and Stephen Brower, Darren and Irene Davis, David and Kristen Detienne, Larry and Sherrill Dorius, Diane Eastman, Diane and Robert Ellis, Karen and Kurtis Heser, Susan Hubbard, Luanne and Mark Huntington, Byard and Joan Price, Rodney Sorensen, Greg and Relda White. After deliberating, it returned its special verdicts and answered the interrogatories as it related to each consumer as follows:

1. Do you find by clear and convincing evidence that Westgate Resorts committed fraud on [each consumer's name]? Yes X No    

2. If you answered "yes" to question number 1 above, do you find by clear and convincing evidence that such conduct was a cause of damage to [each consumer's name]?

Yes X No    

3. Do you find by a preponderance of the evidence that there was a contract between Westgate Resorts and [each consumer's name]? Yes X No    

**If you answered "no" to question number 3 above, do not answer questions 4 or 5.**



4. Do you find by a preponderance of the evidence that Westgate Resorts violated the implied terms of good faith and fair dealing in a contractual relationship with [each consumer's name]? Yes X No     

5. If you answered "yes" to question number 4 above, do you find by a preponderance of the evidence that such violation was a cause of damage to [each consumer's name]? Yes X No     

6. If you answered "yes" to either question number 2 or 5 above, what if any damage do you award to [each consumer's name]?

[George Baty]	Economic damage	\$ 500.00
	Non Economic damage	\$ 0
[Holly and Jon Beck]	Economic damage	\$ 508.00
	Non Economic damage	\$ 0
[Howard and Karen Brandt]	Economic damage	\$ 500.00
	Non Economic damage	\$ 0
[Stephen and Kristy Brower]	Economic damage	\$ 517.00
	Non Economic damage	\$ 0
[Darren and Irene Davis]	Economic damage	\$ 5.00
	Non Economic damage	\$ 0
[David and Kristen Detienne]	Economic damage	\$ 550.00
	Non Economic damage	\$ 0
[Larry and Sherrill Dorius]	Economic damage	\$ 500.00
	Non Economic damage	\$ 0

[Diane Eastman]	Economic damage	\$ 517.00
	Non Economic damage	\$ 0
[Robert and Diane Ellis]	Economic damage	\$ 515.00
	Non Economic damage	\$ 0
[Kurtis and Karen Heser]	Economic damage	\$ 535.00
	Non Economic damage	\$ 0
[Susan Hubbard]	Economic damage	\$ 505.00
	Non Economic damage	\$ 0
[Mark and Luanne Huntington]	Economic damage	\$ 500.00
	Non Economic damage	\$ 0
[Byard and Joan Price]	Economic damage	\$ 540.00
	Non Economic damage	\$ 0
[Rodney Sorensen]	Economic damage	\$ 500.00
	Non Economic damage	\$ 0
[Gregory and Relda White]	Economic damage	\$ 550.00
	Non Economic damage	\$ 0

7. If you answered “yes” to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of Westgate Resorts were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of [each consumer’s name]?

Yes X No

After the jury reached the above verdicts, the trial moved into the punitive damage phase, where each party called an additional witness and submitted evidence. After each party rested, the court then gave additional jury instructions. After deliberating a second time, it returned its special verdicts regarding punitive damages and answered the interrogatories as it related to each consumer as follows:

1. Do you find that punitive damages should be awarded?

Yes X No \_\_\_\_\_

2. If your answer to No. 1 is yes, how much?

[George Baty]	\$66,666.67
[Holly and Jon Beck]	\$66,666.67
[Howard and Karen Brandt]	\$66,666.67
[Stephen and Kristy Brower]	\$66,666.67
[Darren and Irene Davis]	\$66,666.67
[David and Kristen Detienne]	\$66,666.67
[Larry and Sherrill Dorius]	\$66,666.67
[Diane Eastman]	\$66,666.67
[Robert and Diane Ellis]	\$66,666.67
[Kurtis and Karen Heser]	\$66,666.67
[Susan Hubbard]	\$66,666.67
[Mark and Luanne Huntington]	\$66,666.67
[Byard and Joan Price]	\$66,666.67

[Rodney Sorensen]	\$66,666.67
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[Gregory and Relda White]	\$66,666.67
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Following the reading of each verdict, the jury was polled and confirmed that this was their verdict.

Pursuant to Section 15-1-1(2), Utah Code Annotated, as amended, Consumer Protection Group is entitled to pre-judgment interest at the rate of 10% per annum on each \$500 award, the represented value of the trip to Anaheim, California, commencing from the date of the filing of the counterclaim herein (October 23, 2002) until the date hereof, calculated as follows:

Total amount for 14 trips to Anaheim, California (excluding Darren and Irene Davis who eventually received their trip)	\$7,000.00
Interest at the rate of 10% per annum from October 23, 2002 until December 1, 2008 (6 years and 39 days)	\$4,274.79

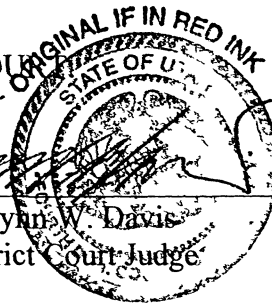
Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that counter claimant Consumer Protection Group, LLC shall have judgment against Westgate Resorts, LTD for the amount of \$11,516.79 for compensatory damages, including prejudgment interest, and \$1,000,000.05 in punitive damages. Court costs shall be awarded pursuant to Rule 54(d), Utah Rules of Civil Procedure. This judgment shall bear post-judgment interest at the legal rate from the date hereof until paid.

By stipulation of the parties, the issue of attorneys fees shall be determined hereafter.

Dated this 11<sup>TH</sup> day of December, 2008.

BY THE COURT

Honorable Lynn W. Davis  
Second District Court Judge



### CERTIFICATE OF SERVICE

This is to certify that on the 17th day of November, 2008, a true and correct copy of the foregoing **CONSUMER PROTECTION GROUP'S JUDGMENT AGAINST WESTGATE RESORTS, LTD ON SPECIAL VERDICTS** was served:

Todd Shaughnessy  
David P. Williams  
SNELL & WILMER  
15 West South Temple, Suite 1200  
Salt Lake City, UT 84101

by facsimile, email and Hand delivery

Richard W. Epstein  
Robby H. Birnbaum  
Rebecca F. Bratter  
GREENSPOON MARDER  
Trade Center South, Suite 700  
100 West Cypress Creek Road  
Fort Lauderdale, FL 33309-2140

by facsimile, email and US Mail

A handwritten signature in black ink, which appears to read 'Todd Shaughnessy', is written over a horizontal line.

Tab F

**FILED**  
APR - 6 2010  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Counterclaimants,

vs.

WESTGATE RESORTS, LTD.,

Counterdefendant.

**MEMORANDUM DECISION AND  
RULE 54(b) ORDER**

Date: April 6, 2010

Case No.: 020404068

Judge: Lynn W. Davis

This matter comes before the court on several outstanding motions: Westgate's Combined Motions for: I) Judgment as a Matter of Law, ii) for New Trial iii) and for a Remittitur ("Combined Motions"); CPG's Motion to Award and Determine the Amount of Attorney's Fees and Litigation Expenses ("Attorney Fees Motion"); and CPG's Memorandum of Costs and Disbursements ("Costs Memo"). Oral argument was held on February 16, 2010. Shaun S. Adel and Consumer Protection

Group, LLC, (“CPG”) were represented by L. Rich Humpherys, Karra J. Porter, and Scot A. Boyd. Westgate Resorts, LTD., (“Westgate”) was represented by Richard W. Epstein. The court, having carefully reviewed the parties’ memoranda, hereby rules as follows:

**I.**

**Procedural History**

1. Westgate filed its Combined Motions and supporting memorandum on January 16, 2009.
2. CPG filed its memorandum of opposition on February 26, 2009.
3. On March 4, 2009, Westgate filed its Costs Memo.
4. On March 25, 2009, Westgate replied to CPG’s opposition memorandum.
5. CPG filed its Attorney Fees Motion and supporting memorandum on June 11, 2009.
6. On July 15, 2009, Westgate filed its opposition to the Attorney Fees Motion.
7. On August 12, 2009, CPG filed its reply in support of the Attorney Fees Motion.
8. The court heard oral arguments in the case on February 16, 2010, stating that it would rule in writing.

**II.**

**Factual Background**

At a 10-day jury trial held in October and November of 2008, the jury found Westgate liable for fraud against 15 Plaintiff Consumers. The compensatory damages for the Consumers ranged from \$5 to \$550 each. The jury awarded punitive damages totaling \$1 million, or \$66,666.67 for each Consumer.



Other facts, many of which are disputed, will be discussed in later sections in this ruling.

### **III.**

#### **Standards of Review**

When reviewing a motion for judgment as a matter of law on the basis of insufficiency of evidence, the Utah Supreme Court stated: “we follow one standard of review: We reverse only if, viewing the evidence in light most favorable to the prevailing party, we conclude that the evidence is insufficient to support the verdict.” *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557; see also Utah R. Civ. P. 50(b).

To prevail on a motion for a new trial, a party must prove one of the grounds in Utah Rule of Civil Procedure 59(a). A judge may set aside a verdict and order a new trial “when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice.” *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 803 n.15 (Utah 1991).

A remittitur is appropriate if the court determines that the jury awarded “excessive . . . damages, appearing to have been given under the influence of passion or prejudice.” Utah R. Civ. P. 59(a)(5). However, there is a “strong presumption in favor of jury verdicts.” *Judd ex rel Montgomery v. Drezga*, 2004 UT 91, ¶ 58, 103 P.3d 135. The party opposing a properly supported remittitur “has the choice of accepting the reduction or seeking a new trial.” *Id.*

#### IV.

##### The Parties' Arguments

1. WESTGATE'S COMBINED MOTIONS (I) FOR JUDGMENT AS A MATTER OF LAW, (II) FOR A NEW TRIAL, AND (III) FOR A REMITTITUR.

- a. Westgate's Arguments in Support of its Combined Motions

Westgate argues for judgment as a matter of law, or for a new trial or remittitur for six reasons: (1) CPG solicited assignments in bad faith; (2) CPG's "test trial" adversely affected Westgate's rights and relaxed CPG's burden of proof and overwhelmed the jury with evidence that would have been inadmissible in any individual case; (3) CPG's common law fraud claim failed because of the economic loss rule; CPG did not show Westgate was responsible for other parties' behavior, and fraud was not proved by clear and convincing evidence; (4) Westgate had no proper claim for breach of implied covenant of good faith and fair dealing; (5) insufficient evidence of malice, by clear and convincing evidence, to support the punitive damages award, and (6) the punitive damages amounts are excessive under Utah law and the U.S. Constitution. The arguments are reviewed in order:

(1) *Sprint Communications Co., L.P. v. APCC Services, Inc.*, shows that a court may invalidate assignments obtained in bad faith and not for ordinary business purposes. 128 S.Ct. 2531 (U.S. 2008). Westgate argues that invalidation is appropriate here because CPG based its counterclaim on information stolen from Westgate and on an offer to the Consumers for a "risk free," "no obligation" opportunity to share in the proceeds of Westgate's misconduct.

(2) Westgate argues that the trial was fundamentally unfair because as a mass consolidation of unrelated claims, expediency was valued above basic fairness. Westgate's right to defend itself against each individual claim was sacrificed to supposed judicial efficiency.

Evidence of other Consumer claimants should have been inadmissible under Rule of Evidence 404(b). Westgate was entitled to an order precluding CPG from relying on the testimony of other litigants in their suits against Westgate. Courts are typically reluctant to lump together multiple claims against a defendant because of its high likelihood to substantially prejudice a jury. *See Anderson v. First Commodity Corp. of Boston*, 618 F.Supp. 262 (W.D. Wisc. 1985). Westgate argues that it should have had the right to adequately and vigorously present material defenses unique to each claimant. *See In re Ethyl Corp.*, 975 S.W. 2d 606, 611-12 (Tex. 1998).

Here, the jury was likely confused by various testimonies of Consumers who had differing experiences with Westgate: Some attended multiple presentations and others attended only one, some received a digital camera and some received a certificate to Anaheim, some never attempted to redeem a certificate and others attempted numerous times to redeem.

Westgate contends that some or all of this evidence violates Utah Rule of Evidence 403 (prejudice substantially outweighed probative value), Rule 402 (each Consumer's evidence was not relevant to other Consumers), and Rule 404(b) (evidence for one Consumer not admissible to how Westgate acted toward other Consumers).

(3) Westgate contends that the economic loss rule should have prevented any recovery

because any alleged injuries were based on contract breaches. The common law fraud claims should have failed because each Consumer knew the terms and conditions of the offers before attending the sales presentations. Thus, all Consumers ratified their agreements and waived any right to assert fraud as a ground to avoid the agreement. Further, one Consumer admitted to not following up with travel arrangements, another admitted to not using the digital camera, and one Consumer even admitted to attending the presentation, receiving the Anaheim cert, and traveling.

Thus, Westgate argues that tort claims should not have been allowed to give the Consumers license to avoid the contractual bargains they made.

Further, there was insufficient evidence that Westgate was vicariously liable for MDI or NRC's conduct in soliciting the Consumers, or offering them the Anaheim Cert, which was not a regular aspect of Westgate's business. Westgate had no control or authority, nor was it in any way responsible, for the acts of MDI or NRC, and Westgate should not have been found liable for their conduct.

Moreover, CPG did not prove the nine elements of common law fraud by clear and convincing evidence. Each Consumer received a confirmation that contained the terms and conditions of the tour and the premium before traveling. They attended the presentation on the date agreed to and confirmed in the letter before they traveled to the resort and expended any time or resources. Thus, there is a lack of detrimental reliance. Again, the Consumers ratified their agreements by their acts. There was also no evidence of statements known to be false at the time they were made by Westgate. The Consumers failed to show specific injuries that were a

result of reliance on allegedly false statements. Finally, the Consumers failed to mitigate any alleged damages.

(4) Westgate asserts that the breach of implied covenant of good faith and fair dealing claim fails for three reasons. First, there was no showing of new, independent rights or duties agreed upon by the parties. Second, CPG failed to show that Westgate was responsible for the conduct of MDI or NRC. Third, CPG failed to establish special, general, or consequential damages.

(5) Westgate argues there was no legal basis on which to award punitive damages. Punitives are awarded only in exceptional cases where the defendant acts maliciously, with fraudulent intent or with a reckless indifference or disregard for the rights of others. When a defendant acts with an honest but mistaken belief, then punitive damages are inappropriate.

It is clear that the jury here ignored its oath to compensate Consumers only for their individual discrete transactions with Westgate, not to punish Westgate based solely on the sheer number of suing Consumers. Each of these claims would have been unmemorable standing alone, and would clearly not merit any kind of punitive damages. However, apparently the jury improperly believed the claims that dozens or hundreds of people were defrauded and that therefore Westgate ought to be punished severely.

Also, because there was a lack of proof that Westgate authorized the acts of NRC or MDI, Westgate should not have been punished for any malicious acts of either of those two entities.

(6) Finally, the punitive damages awards exceeded constitutional boundaries. In recent years, the U.S. Supreme Court has taken steps to curb the outrageous punitive damage verdicts recklessly awarded by juries in civil cases. Under Utah law, seven factors “must be considered” before assessing the propriety of a punitive damages award. *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 808 (Utah 1991). A key factor is the ratio of compensatory to punitive damages, a 1-to-1 ratio being presumptively acceptable. It is rarely appropriate for the ratio to exceed 3 to 1. *Id.* at 810. In *Campbell v. State Farm Mut. Auto. Ins.*, a 9-to-1 ratio was allowed because the defendant caused emotional distress and humiliation that was highly egregious. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25. The key factors were whether the harm was physical or economic, whether the harm showed reckless disregard for the safety or health of others, whether the plaintiff had financial vulnerability, and whether intentional malice existed. Westgate argues that those factors show that the current punitive damage award is not only too high, but should be reduced to at most a 1-to-1 ratio. This is proper where there was no physical harm or emotional harm to the Consumers.

Based on the foregoing, Westgate requests judgment in its favor. Alternatively, the court must either enter a remittitur or hold a new trial to prevent a miscarriage of justice.

b. CPG’s Memorandum in Opposition to Westgate’s Combined Motions

CPG argues that Westgate violated the rule of viewing all evidence in the light most favorable to the prevailing party’s outcome. *See Child v. Child*, 2008 UT App 338, ¶ 2, 194 P.3d 205. Westgate seems to act as if it is obvious that the jury erred, but this is only because

Westgate bases its motion on its skewed version of the facts and on legal arguments that it has repeatedly already lost.

Westgate presents six reasons why it should be granted judgment as a matter of law.

CPG responds in order:

(1) CPG contends that Westgate presented no evidence at trial that the information was stolen. This assertion is made frequently throughout Westgate's memorandum to try to appeal to the court's sense of equitable justice. However, although counsel for Westgate promised the jury in opening statements that it would give evidence of the supposed theft, it never did so, failing to call as a witness Carolyn Workman. Further, CPG's alleged bad faith or improper motives is oft-asserted by Westgate, but without any supporting evidence. The court has heard and rejected Westgate's arguments, and it is wasteful for Westgate to continually rehash these issues.

(2) CPG argues that Westgate admitted that the fraud claims can be collectively litigated, or consolidated. Now it argues that its constitutional rights were violated. Rule 42, as well as Rule of Evidence 404(b), allows for consolidation. The claims were related, and the evidence of other acts showing intent, plan, preparation, motive, or knowledge were clearly admissible. Using Westgate's language from its own memorandum, the "check-the-box" claims, presented in testimony of "mind numbing redundancy" reveal the striking similarity of Consumers' claims.

Further, each claimant was required to prove each element of his or her claim, and each claimant did so at trial. The jury was clearly instructed on this point, and Westgate cannot now claim just because it lost that this did not occur. Any other arguments Westgate has made against

consolidation have been heard and rejected.

(3) The court has already ruled that the economic loss rule does not apply to claims of fraud, including fraud in the inducement. CPG contends that there was overwhelming evidence supporting the jury's finding of agency and the direct liability of Westgate. Westgate's own employees acted inappropriately, yet Westgate clearly ignores that fact. It can only point to Mr. Wagner's self-motivated testimony, which the jury was not required to believe, especially because it was so weakened during cross-examination.

CPG further argues that there was clear and convincing evidence of fraud. Again, Westgate has a problem with presenting only its side of the story, and ignoring CPG's version of the facts which the jury rightfully chose to believe. Further, Westgate failed to present any evidence that the Consumers failed to mitigate their damages.

(4) CPG argues that Westgate's claim that the breach of implied covenant of good faith and fair dealing cause of action fails is not supported by any legal precedent or factual evidence. Further, the special damages award is clearly appropriate because at least \$500 was within the contemplation of the parties since that was the amount used to lure Consumers to Park City.

(5) CPG contends that for the record to show no finding of legal malice by clear and convincing evidence, the court must construe all the evidence in Westgate's favor. Of course, this is not the standard in a motion for judgment as a matter of law or a new trial, and it is clear that Westgate ignores the same evidence that the jury found persuasive. There are many cases where a defendant committed fraud and is required to pay punitive damages, but Westgate



ignores such cases. The jury clearly found bad faith and fraud, and did not “ignore its oath” or become “inflamed” as claimed by Westgate. Moreover, the three references to thousands or 10,000 claims of fraud were struck by the court, so it is unlikely the jury considered those in the midst of a 10-day trial. Further, Westgate opened the door to any such isolated comments when Mr. Wagner claimed there were very few complaints regarding the Anaheim Certificate.

(6) CPG argues that Westgate’s constitutional and common-law arguments against the punitive damages award is groundless. The verdict is not contrary to state law, in that the jury did indeed consider the seven *Crookston* factors as detailed in Jury Instruction No. 76. The factors were clearly met. For example, Westgate’s net wealth in 2007 was about \$500,000,000.00, and during the year before trial the company generated \$1 billion in gross revenue. Further, the scheme was longstanding, highly profitable and deliberately fraudulent. This was not a few isolated events. Further, lack of remorse is a factor to be considered, because it is a high predictor of recidivism. *See Campbell v. State Farm Mut. Auto. Ins.*, 2004 UT 34, ¶¶ 29, 35, 98 P.3d 409. Westgate’s Combined Motions, and its constant attempts to shift blame onto other entities, including the Consumers themselves, show no remorse. Westgate, despite the findings of a jury and overwhelming evidence of fraud and bad faith, continues to believe it has done nothing wrong. This causes the public to lose trust in large corporate entities, and such gross, egregious behavior ought to be punished in the name of the public good.

As to the argument against the ratio of compensatory to punitive damages, courts have acknowledged that the ratio factor has limited or no application in cases where the compensatory

damages are small. In a case where a defendant received a \$1 compensatory judgment, the court stated that a \$9 punitive damages award would have been too low, and that this “somewhat ridiculous outcome demonstrates why multipliers in these types of cases are not appropriate.”

*Bjornson v. Dave Smith Motors/Frontier Leasing & Sales*, 578 F.Supp. 2d 1269, 1284 (D. Idaho 2008). Another court, in upholding a 187-to-1 ratio punitive damages award, stated that “[t]he smaller the compensatory damages, the higher the ratio of punitives to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages.” *Bennett v. Reynolds*, 242 S.W.3d 866, 904-05 (Tex. Ct. App. 2007).

CPG claims that if the punitive damages were as low as a 1-to-1 ratio, it would have been virtually impossible for Westgate’s misconduct to be brought to light or to an end. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.2d 672, 676-77 (7th Cir. 2003). The punitive damages award is still relatively small compared with Westgate’s net wealth, less than one percent of Westgate’s claimed wealth as of the date of trial. This is assuming that Westgate received no bailout money. Recently, the Utah Court of Appeals upheld a punitive damage award of \$34,000 against a defendant whose annual income was \$40,000 and net worth was \$12,000. *See Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, ¶¶ 27-28, 186 P.3d 1012.

Finally, CPG argues that the punitive damages award does not violate the U.S. Constitution. The ratio is all but meaningless in cases with small compensatory damages awards. Reprehensibility, too, does not weigh in Westgate’s favor. The conduct was repeated, was the result of malice and deceit, and was motivated by profits with no concern for the Consumers.

Another guidepost, though Westgate is silent on this point, is that Westgate faced a tough civil penalty for engaging in fraudulent marketing tactics. *See* Utah Code Ann. § 57-19-3(a).

Finally, Westgate argues that the jury in this case impermissibly considered harm to others. However, *Philip Morris USA v. Williams* states that a jury can consider harm to others in determining reprehensibility. 549 U.S. 346, 349, 353-55 (2007). Further, counsel for Westgate stipulated to a jury instruction consistent with this statement, and it cannot now complain that the jury followed that jury instruction.

Based on the foregoing, CPG asks this court to deny Westgate's motions for judgment as a matter of law, for a new trial, and/or for a remittitur.

c. Westgate's Reply Arguments to CPG's Opposition Memorandum

Westgate emphasized that the court had already ruled that CPG's method of obtaining the information was wrongful, and this was the law of the case. Westgate has preserved its objection to the court's pretrial ruling that the Consumers' assignments to CPG would not be invalidated on the basis of Mrs. Workman's theft of the information. Westgate takes issue with CPG's objection of its ability to argue issues on which the court has already ruled. If CPG is correct, then virtually all post-trial motions would be disallowed because they are based on arguments made during and before trial.

As to Westgate's second argument, it is clear that the consolidation of the 15 claims deprived Westgate of a fair trial. Westgate includes much case law to support its argument, very little of which was distinguished by CPG.

As to the economic loss argument, Westgate argues that CPG never properly responded to the ratification conclusion. Also, CPG has failed to show proof of the elements of common law fraud. The fraud claims were not assignable and the court never ruled that they were.

Westgate reiterated its implied covenant of good faith and fair dealing arguments, adding that CPG avoided even trying to respond to Westgate's cited case law.

Westgate argues that the conduct in the cases that exceeded 3-to-1 punitive to compensatory damages ratios was found to be clearly reprehensible, unlike the instant case. In two cases cited approvingly by CPG, the ratio was 1.2 to 1 and .25 to 1. In fact, all the cases cited by CPG averaged a ratio of 4 to 1. This is well within the single-digit ratio nearly mandated by the United States Supreme Court. As to the seven *Crookston* factors, Westgate provides arguments as to why those factors merit a finding of low punitive damages.

CPG mis-cited case law when claiming that a court would refuse to limit punitive damages to \$9 when compensatory damages were \$1. Further, the other cases with small compensatory damages and triple-to-quadruple-digit multiplied punitive damages do not reflect Utah law and all predate the U.S. Supreme Court's controlling *Exxon Shipping Co. v. Baker* decision. 128 S.Ct. 2605 (2008).

Further, the nominal damages cases involve situations where there are no provable amount of actual damages, such as defamation per se, false arrest, excessive force, or unlawful strip searches. However, in this case, actual damages were awarded, and none of the awards are nominal. Therefore, the punitive damages still must fall within a reasonable ratio compared with

the compensatory damages. Many of the rulings cited by CPG would likely have been overturned or reversed after *Exxon*, where the U.S. Supreme Court limited the ratio to 1 to 1 in a lawsuit arising from one of the worst environmental disasters in history.

Westgate contends that it is likely that the jury improperly punished Westgate for alleged harm to others, rather than merely considering harm to others as one factor in its decision. Westgate notes that based on CPG's arguments at trial, it will be precluded from seeking separate punitive damages to these others because CPG argued at trial the necessity of ensuring sufficient punitives on a one-time basis. CPG argues that there is no evidence or proof that the jury punished Westgate for harms to non-parties: However, "[h]ow can we know whether a jury, in taking into account harm caused to others under the rubric of reprehensibility, also seeks to punish the defendant from having caused injuries to others?" *Phillip Morris*, 549 U.S. at 357.

Further, a single-digit ratio is appropriate in nearly all cases, with only exceptional cases exceeding that ratio. This case is not exceptional.

Westgate reiterates its request for judgment in its favor or for a new trial, or at least to a reduction of the punitive damages to a 1-to-1 ratio with the compensatory damages.

## 2. CPG'S MOTION TO AWARD AND DETERMINE THE AMOUNT OF ATTORNEY'S FEES AND LITIGATION EXPENSES

### d. CPG's Arguments Supporting its Attorney Fees Motion

CPG seeks reasonable attorney fees and litigation expenses based on (1) the jury's finding of fraud, (2) the jury's finding of breach of implied duties of good faith and fair dealing, (3) the

court's inherent equitable powers, and (4) the private attorney general doctrine.

As to (1), the Utah Supreme Court recognizes that attorney fees generally are not recoverable without a contract or statutory provision. However, in cases of bad faith or fraud or stubborn litigiousness, attorney fees are appropriate. In *Crookston*, the Utah Supreme Court held that all attorney fees were proper upon the jury's finding of fraud. *Id.* at 798. In the instant case, there were many consumers who were potential targets of Westgate's fraud. The claims are relatively small making it economically infeasible to pursue each claim without attorney fees and expenses being awarded. Further, Westgate continues to fight the claims and rejects any responsibility for its actions, necessitating extensive litigation for the Consumers to achieve justice.

As to (2), the Utah Supreme Court has allowed recovery of attorney fees and expenses where there is a finding of breach of good faith and fair dealing. The court stated and reaffirmed that awarding attorney fees against insurers who violate the implied covenant helps "to remove any incentive for insurers to breach the duty of good faith." *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 466 (Utah 1996). Further, employers who breach the implied covenant of good faith and fair dealing are liable for attorney fees and litigation expenses. *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992). CPG argues that this case is no different than the insurance and employment cases. Westgate, without having to pay for attorney fees and litigation expenses, would be incentivized to defraud individual consumers, knowing that each would only receive a compensatory award of a few hundred dollars. Without the attorneys fees and litigation expense

award, consumers would not be in the financial position to address the breach of implied contractual duties and would not have the funds to hold Westgate and its ilk accountable for fraud.

As to (3), attorney fees are awardable where a court deems it in the interests of justice and equity. Trial courts have wide latitude to award attorney fees, without statutory or contractual authorization, as they see fit. *See Hughes v. Cafferty*, 2004 UT 22, ¶ 21, 89 P.3d 148. A clear public policy that serves the interests of justice and equity is to discourage fraud, especially when a large corporation defrauds dozens or hundreds of unsuspecting consumers. This case is the poster child for awarding attorney fees and litigation expenses equitably, as each Consumer was awarded between \$5 and \$550, and the fees and expenses far exceeded those amounts. After years of litigation and weeks of trial, the fees and expenses works out to be about \$35,000 per consumer.

As to (4), the private attorney general doctrine is applicable here. This is one method for granting equitable awards of attorney fees. *See Utahns for Better Dental Health-Davis, Inc. v. Rawlings*, 2007 UT 97, ¶ 5, 175 P.3d 1036. In *Culbertson v. Bd. of County Comm'rs of Salt Lake County*, the court clarified several standards in assessing attorney fees under the private attorney general doctrine. 2008 UT App 22. First, curbing the wilful disregard of the law is an important public policy. *Id.* at ¶ 14. Also important is whether the conduct of the defendant would have remained unchallenged but for the action of the plaintiff. *Id.* at ¶ 18.

Here, the court can help prevent and punish a large number of small frauds against

Utahns, which comports with important public policy. The breach of implied covenant of good faith and fair dealing is not to be tolerated, and this case will serve as a warning to other corporations who intend to defraud others. The case also reinforces the notion among the general public that corporations who breach the trust and respect of consumers will be answerable for their actions. Further, CPG's costs incurred in the case were so high that subsidization is needed. Finally, the case is extraordinary, and but for CPG and the claimants joining forces to fight injustice, Westgate might still be defrauding consumers today.

CPG also argues that the amount claimed for attorney fees and expenses is reasonable. The case was hard-fought, difficult, and complex, as shown by the highly technical legal issues in the parties' memoranda. It required much knowledge of time shares, vacation products, marketing procedures, and many experts and out-of-state witnesses to testify. The trial lasted three weeks. There were two dozen witnesses and 28 exhibits. The preparation for trial was extensive and required multiple attorneys and law clerks from two law firms logging many hours. Primary counsel for CPG, Rich Humpherys, specialized in trial litigation for 32 years and has extensive experience in the areas of fraud and implied duties of good faith and fair dealing. The hourly rates were reasonable based on the experience, the time expended, and the risk of loss.

Based on the foregoing, CPG seeks attorney fees and litigation expenses as detailed in the Declaration of L. Rich Humpherys Regarding Attorney Fees and Litigation Expenses.

**e. Westgate's Opposition Arguments to CPG's Fees and Expenses Memorandum**

Westgate views this motion as unnecessary until the court first entertains and decides its



Combined Motions for relief. However, if the court chooses to hear both motions, then Westgate requests an evidentiary hearing in order to introduce evidence opposing CPG's entitlement to attorney fees and litigation expenses.

Utah law only allows attorney fees and expenses as authorized by contract or statutory law, with very few exceptions not relevant here. Courts frequently strike down attorney fees awards where they are based merely on equitable concerns.

Westgate argues that CPG is not entitled to attorney fees and litigation expenses. The cases cited by CPG involve either insurance companies or employment claims. There is no case law supporting equitable awards for fraud. Therefore, the cases are not helpful or persuasive.

Further, Westgate contends that CPG is wrong in its claim that courts allow recovery for breaches of the implied covenant of good faith and fair dealing. Again, this is only true in the insurance and employment context. Westgate is not an insurance company, nor did Westgate employ (or refuse to employ) the defendants. Therefore, the cases cited are inapposite.

Westgate asserts that attorney fees are not awardable here in the interests of justice and equity. The *Hughes* case cited by CPG involved egregious breaches of fiduciary duties and the violation of a trust. Once again, the case is distinguishable, and does not apply to Westgate. Further, if anybody should appeal to justice and equity in this case, it is Westgate, as the entire lawsuit against it was based on theft of confidential information. Moreover, where appropriate, a class action can be used to aggregate many related claims of injured plaintiffs. It was not available here due to CPG's own greed, because it suffered no injury and therefore would not

have been allowed involvement as a plaintiff in a class action suit against Westgate.

Westgate argues that the private attorney general doctrine simply does not apply, as the defendant should be a governmental entity and the plaintiff should sue to benefit all citizens harmed by the government's conduct. None of the cited cases have any relevance to this action. CPG simply ignores important details and tries to craft new law changing the American rule on attorney fees. The case here is not exceptional, there is no statute or contract authorizing attorney fees, statutes and other remedies would have protected CPG's assignors had CPG not interfered and interjected itself as a claimant in this lawsuit.

Finally, Westgate argues that even if the court finds entitlement to attorney fees and expenses, the amount claimed here is unreasonable. Thus, if needed, Westgate requests a hearing to determine reasonableness of fees.

Westgate observes that the declaration of Rich Humpherys contains only vague descriptions of the legal services rendered, and no description of the legal services sought by CPG. Westgate cannot respond specifically to determine how much time and expenses was needed to pursue CPG's claims as opposed to other services performed which were unrelated to the assigned claims. Also, CPG's request for appellate attorney fees is improper.

f. CPG's Reply Arguments For Attorney Fees and Litigation Expenses

CPG observes that Westgate continues its practice of ignoring the jury verdict and any evidence supporting it. Again, Westgate portrays itself as a victim of theft and a good-faith litigant throughout the case.

CPG reiterates that there are four exceptions to the American rule on attorney fees: fraud; bad faith; equity; and the private attorney general doctrine. *See Salvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1263 n.10 (Utah Ct. App. 1996).

Utah appellate courts have never stated that attorney fees award based only on fraud are limited only to claims against insurance companies and employers. In *Crookston*, the court did not say that the ruling hinged on the status of the defendant. In fact, in *Collier v. Heinz*, 827 P.2d 982 (Utah Ct. App. 1992), cited by *Westgate*, the court stated that attorney fees are limited to insurance contracts with respect to breach of contract claims. CPG is not claiming attorney fees for breach of contract. Further, there are too few consumer fraud causes in this state. The fact that courts have removed insurance companies' incentive to act improperly does not mean that this doctrine does not apply to other companies.

Again, *Westgate* claims that Utah case law is not helpful because it is limited to insurance companies. However, *Westgate* made no attempt to dispute the rationale of those cases, which reasoning clearly applies to the instant case. Breaches of good faith duties occurred here just like they occurred in the insurance company cases.

The third basis for awarding attorney fees is the court's inherent equitable discretion. This power has long been recognized, and courts are not discouraged from exercising it to prevent injustice. In recent years, the Utah Supreme Court has increased its emphasis on this equitable authority. In this case, there are multiple claims that individually would not have been pursued without the CPG's legal help in matching the resources of *Westgate's* counsel. This

allows the court to hold Westgate responsible for expensive, aggressive litigation to avoid being held accountable for fraud.

As to the private attorney general doctrine, CPG seeks to perform the function of a private attorney general, benefitting the public by exposing wide-scale fraud of a large corporation. This is certainly not an ordinary case, and awards are upheld for such extraordinary cases.

Finally, Westgate did not sufficiently challenge the reasonableness of the attorney fees sought. The court has discretion as to whether to hold an evidentiary hearing, and if the court chooses to do so, CPG requests that the hearing occur at the same time as the hearing on Westgate's Combined Motions.

### 3. CPG's VERIFIED MEMORANDUM OF COSTS AND DISBURSEMENTS

#### g. Westgate's Response Arguments to CPG's Costs Memo

Westgate argues that CPG failed to serve the memorandum of costs within the five-day period set forth in Utah Rule of Civil Procedure 54(d)(2), and is therefore not entitled to costs.

Rule 54(d)(2) provides that costs, assessed based on a verified memorandum, are to be awarded to a prevailing party provided that they are served within five days after entry of judgment. The court entered its judgment on the jury verdict on December 11, 2008. CPG did not serve the required memorandum until December 23, 2008. Such delay is fatal to CPG's claim for recovery.

#### h. CPG's Reply Argument Supporting its Costs Memo

CPG responds by arguing that the court's entry of judgment on December 11, 2008, was

not a final, appealable judgment because it was not finalized under Rule 54(b). “Parties must request costs within five day s of the trial court’s final, appealable judgment. . .” *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 2007 UT App 327, ¶ 12, 171 P.3d 465. Therefore, the memorandum of costs was not untimely.

Because there are hundreds of remaining unresolved claims, under Rule 54(b), there has not been a final judgment yet. The ruling could also be subject to revision as to the adjudicated consumers because of Westgate’s pending post-trial motions.

Based on the foregoing, CPG argues that its Costs Memo should be considered to have been served and filed on the date that this court makes a Rule 54(b) determination as to the December 11, 2008, Judgment Against Westgate Resorts, LTD on Special Verdicts.

### III.

#### Case Analysis

##### a. Westgate’s Combined Motions Are Denied.

In considering a motion for judgment as a matter of law, the court is mindful of its role of viewing the evidence in the light most favorable to the prevailing party, i.e., CPG. A reversal of the jury verdict is appropriate only if the evidence is insufficient to support that verdict. Further, a court may grant a new trial when the verdict is contrary to the clear weight of the evidence or when one of the other grounds in Rule of Civil Procedure 59(a) are proven.

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. Further, Westgate argues legal theories previously argued at earlier stages of this case. Again, this is understandable because Westgate believes that if the court was wrong then, it is still wrong now. However, the court denies Westgate's motion for judgment as a matter of law because the evidence is not insufficient to support the jury verdict and for other reasons as discussed below.

First, Westgate did not provide admissible evidence, despite its many claims to the contrary, that the Consumer information was stolen from Westgate. Further, assignments of claims are not proof of bad faith, and are and should be allowed.

Second, 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.

Third, the economic loss rule did not bar CPG's fraud claims. The harm suffered by the Consumers went beyond simple breaches of contract, as is evident from the testimony at trial and other evidence adduced. Moreover, CPG provided clear and convincing evidence of fraud, including some fraud committed by Westgate's own employees. Also, there was sufficient evidence of an agency relationship between Westgate and MDI and NRC.

Fourth, the evidence supported a breach of implied covenant of good faith and fair dealing. The Consumers were duped into going to Park City without knowing all the material terms and conditions of the promises made by Westgate, according to trial evidence. Further, special damages of at least \$500 was appropriate, as that amount was used to induce Consumers to travel to Park City.

Fifth, the evidence supported a finding of legal malice, and the case law shows that it is quite common for fraud to be punished with punitive damage awards. *See, e.g., Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 23, 98 P.3d 409, *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, 83 P.3d 1064. There is no evidence to show that the jury was inflamed or ignored its oath in deciding that the punitive damage award was supported by reckless or intentional misconduct on the part of Westgate. Further, any references to hundreds or thousands of misled Consumers was

struck by the court and was not likely to prejudice the jury considering the weight of all the other evidence against Westgate that was presented during the two-week trial.

Sixth, the punitive damages award is appropriate as determined by the jury based upon the evidence at trial; therefore, the court will not disturb the award. Jury Instruction No. 76 contained the seven *Crookston* factors, and there is no evidence that the jury did not consider these factors in fashioning the award. By any measure, Westgate's net wealth and gross revenues were relatively large in comparison to the punitive damages award. Testimony at trial revealed that Westgate Resorts was worth \$500 million in 2007, and during the year before trial, Westgate Resorts generated \$1 billion in gross revenues. The jury was required to take into account the relative wealth of Westgate Resorts. As to the nature of the scheme itself, evidence at trial demonstrated that it was very profitable and extensive, and was perpetrated intentionally or at least recklessly. The jury also should have considered the probability of future recurrence. This is evident from the apparent lack of remorse of Westgate, which continues to insist on the propriety of its actions to this day. Lack of remorse is a predictor of recidivism. *Campbell*, 2004 UT at ¶¶ 29, 35. Thus, it was proper for the jury to infer from the evidence that Westgate had a calloused attitude toward the Consumers, and that such an attitude means that Westgate would be willing to defraud others.

The seventh *Crookston* factor, the amount of actual damages awarded, appears to be the most hotly contested factor between Westgate and CPG. The court has the authority to reduce the punitive damages award if it is excessive and has been the result of passion or prejudice.



However, the court here chooses not to disturb the punitive damages awarded by the jury. True, the United States Supreme Court stated that few awards exceeding the 9-to-1 ratio are likely to comport with due process, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003), this court finds that the punitive damages award in this case does satisfy due process. Westgate's conduct was clearly reprehensible, and Westgate could have faced civil penalties for fraudulent marketing tactics, under Utah Code Annotated Section 57-19-3(a). See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

The compensatory damages are fairly nominal. "The smaller the compensatory damages, the higher the ratio of punitives to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." *Bennett v. Reynolds*, 242 S.W.3d 866, 904-05 (Tex Ct. App. 2007) (quotation and citation omitted). Although some states impose bright-line limits, or "ceilings," to punitive damage awards, Utah is not such a state. "[T]he absolute ceiling approach is too mechanical and could potentially defeat the very purpose of punitive damages." *Crookston*, 817 P.2d at 809. Such a ceiling would not deter harmful conduct, because some defendants "could calculate their exposure to liability in advance." *Id.* Further, and perhaps more relevant to this case, "absolute ceilings do not provide the flexibility to deal adequately with the type of case that involves only minimal actual damages, but where the conduct of the defendant is so flagrant as to justify a large punitive award." *Id.*

The United States Supreme Court stated "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon*, 128 S.Ct. at 2621. Further,

“heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect . . . or when the value of injury and the corresponding compensatory award are small.” *Id.* at 2622.

In upholding the punitive damage award of \$1 million, this court is aware that the award far exceeds the presumptively acceptable 3-to-1 ratio outlined in *Crookston*. The court bases this deviation on the weight of many of the other *Crookston* factors. For example, as already discussed, with the relatively high wealth of Westgate, a ratio within the commonly acceptable range would hardly be a drop in the bucket. If punitives are meant to deter and punish, then a 3-to-1 ratio imposed on Westgate would simply not achieve these purposes. Further, because it appears that Westgate perpetrated the scheme on many unsuspecting victims, the nature of the misconduct, as well as the facts and circumstances of the misconduct, does not weigh in Westgate’s favor. Because it was so difficult to detect many small-scale frauds in the aggregate, the misbehavior of Westgate was highly likely to continue. As stated earlier, Westgate’s continued defiance and absence of remorse are key factors to predicting a recurrence of the conduct. Further, although the parties were not in a fiduciary relationship, the Consumers placed a degree of trust in Westgate which was clearly breached. Because of these factors, the court upholds the award. Therefore, Westgate’s alternative motion for a remittitur of the punitive damages award is denied.

**b. CPG’s Attorney Fees Memo is Denied.**

CPG has pointed to no statute or contract authorizing or requiring an attorney fees award.

No exceptions to this general rule are relevant here. Moreover, the court does not find that equity demands an attorney fees award against Westgate. Further, the private attorney general doctrine simply does not apply. 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.

Both parties are instructed to pay for their own costs and attorney fees.

**c. CPG's Costs Memo is Moot.**

There was no Rule 54(b) entry of a final judgment at the time the both parties filed pleadings concerning CPG's Memorandum of Costs and Disbursements. The Costs Memo is now moot. Any costs and disbursements to which CPG is entitled will now be included in the Supplemental Order and Judgment, based on this ruling, which is to be prepared by counsel for CPG.

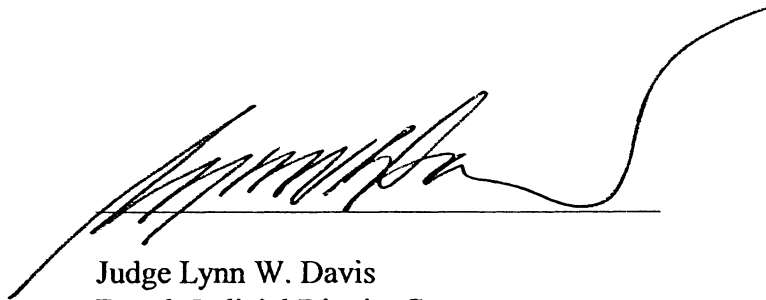
**IV.**

**Ruling and Order**

Based on the foregoing, Westgate's Combined Motions are Denied, CPG's Attorney Fees Motion is Denied, and CPG's Costs Memo is moot. Counsel for CPG is specifically directed by the court to prepare a Supplemental Order and Judgment, which will contain a recital of the award amounts consistent with the jury verdict, as well as any necessary costs and disbursements. However, the court's decision today is to be treated as the final appealable order for the purposes

of Utah Rule of Civil Procedure 54, as this judgment conclusively adjudicates the claims, the rights, and the liabilities of all parties. Finally, the court notes that CPG filed a Combined Motion to Confirm Arbitration Award and For Attorney Fees and Expenses and For Rule 54(b) Certification of Judgment as Final, on March 29, 2010. This ruling does not affect CPG's recently filed Combined Motion. Unless and until a response is filed by Westgate, and/or a Notice to Submit is filed by either party, the court does not address nor comment on CPG's Combined Motion.

Dated this 6 day of April, 2010.

A handwritten signature in black ink, appearing to read 'Lynn W. Davis', is written over a horizontal line. The signature is stylized with a long, sweeping underline that extends to the right.

Judge Lynn W. Davis  
Fourth Judicial District Court

**A certificate of mailing is on the following page.**

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.

MAIL: SCOT A BOYD CHRISTENSEN & JENSEN PC 15 WEST SOUTH TEMPLE STE 800 SALT LAKE CITY, UT 84101

MAIL: L RICH HUMPHERYS CHRISTENSEN & JENSEN PC 15 W SOUTH TEMPLE STE 800 SALT LAKE CITY UT 84101

MAIL: KARRA J PORTER CHRISTENSEN & JENSEN PC 15 W SOUTH TEMPLE STE 800 SALT LAKE CITY UT 84101

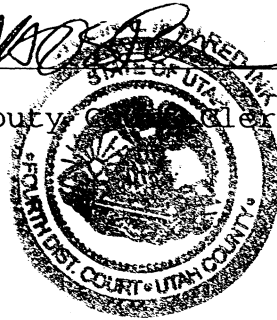
MAIL: TODD M SHAUGHNESSY GATEWAY TOWER W 15 W S TEMPLE STE 1200 SALT LAKE CITY UT 84101

MAIL: DAVID P WILLIAMS 15 W S TEMPLE STE 1200 SALT LAKE CITY UT 84101

Date: \_\_\_\_\_

4/6/10

Deputy Clerk

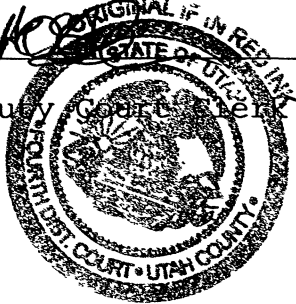


CERTIFICATE OF NOTIFICATION

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.

MAIL: RICHARD W EPSTEIN 100 West Cypress Creek Road Suite 700 Ft Lauderdale, FL 33309

Date: 4/6/10

1/10/10  
Deputy Court Clerk  
The seal of the Fourth District Court, Utah County, is circular. It features a central emblem with a sun rising over a landscape with mountains and a river. The text "STATE OF UTAH" is at the top, "FOURTH DISTRICT COURT" is on the left, and "UTAH COUNTY" is on the right. A banner at the bottom reads "ORIGINAL IF IN RED INK".

**Tab G**

**FILED**

MAY 10 2010

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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, Utah 84101  
Telephone: (801) 323-5000  
Facsimile: (801) 355-3472  
*Attorneys for Defendant/Counterclaimant Consumer Protection Group, LLC.*

**IN THE FOURTH JUDICIAL DISTRICT COURT**

**IN AND FOR UTAH COUNTY, STATE OF UTAH**

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Counterclaimants,

vs.

WESTGATE RESORTS, LTD.,

Counterdefendant.

**SUPPLEMENTAL ORDER AND  
JUDGMENT**

Civil No. 020404068

Division No. 8

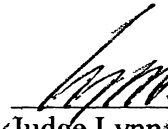
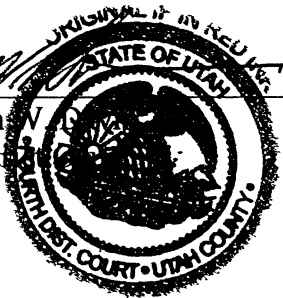
Judge Lynn W. Davis



Pursuant to this Court's Memorandum Decision and Rule 54(b) Order (April 6, 2010) (which is incorporated herein by reference), and having reviewed Consumer Protection Group, LLC's present Memorandum of Costs and Disbursements, and for good cause appearing, it is hereby ORDERED, ADJUDGED AND DECREED that the Judgment entered by this Court December 11, 2008 for \$11,516.79 in damages and \$1,000,000.05 in punitive damages, is hereby supplemented with an award of costs to Consumer Protection Group, LLC in the amount of \$15,623.55, for a grand total Judgment in favor of Consumer Protection Group, LLC against Westgate Resorts, LTD in the amount of \$1,027,140.39.

DATED this 7<sup>th</sup> day of ~~April~~<sup>May</sup>, 2010.

BY THE COURT:

  
\_\_\_\_\_  
Judge Lynn W. [illegible]  
Fourth District  


Tab H

FILED

JUL 01 2010

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

4TH DISTRICT COURT  
PROVO DEPARTMENT

2010 JUN 17 P 6:04

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Attorneys for Plaintiff/Counterdefendant -- Appellant  
Westgate Resources, Ltd.

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY, STATE OF UTAH

WESTGATE RESORTS, LTD.,

Plaintiff/Counterdefendant -  
Appellant,

v.

SHAUN S. ADEL and CONSUMER  
PROTECTION GROUP, LLC,

Defendants/Counterclaimants --  
Appellee.

**ORDER GRANTING  
STIPULATED MOTION TO CERTIFY  
JUDGMENTS AS FINAL PURSUANT TO  
RULE 54(b)**

District Court No. 020404068

Honorable Lynn W. Davis

Having reviewed the Stipulated Motion to Certify Judgments as Final Pursuant to Rule 54(b) ("Motion"), and for good cause shown:

THE COURT HEREBY FINDS:

The following 15 sets of claimants assigned their claims to Consumer Protection Group, LLC: George Baty, Holly and Jon Beck, Howard and Karen Brandt, Stephen and Kristy Brower, Darren and Irene Davis, David and Kristen Detienne, Larry and Sherrill Dorius, Diane Eastman, Robert and Diane Ellis, Kurtis and Karen Heser, Susan Hubbar, Mark and Luanne Huntington,


Byard and Joan Price, Rodney Sorensen, and Gregory and Relda White. Those 15 sets of claimants tried their claims to a jury, which resulted in a judgment entered December 11, 2008. There are other parties whose claims were not resolved in the December 11, 2008 judgment. But for the claims of the other parties, the judgments against the 15 sets of claimants would be final for purposes of appeal. Thus, there is no just reason to delay any appeal of issues involving the 15 sets of claims because they are distinct from the remaining claims.

THE COURT THEREFORE HEREBY FINDS AND ORDERS:

1. The Motion is GRANTED;
2. Because issues raised in the post-trial motions involving the 15 sets of claimants are currently before the Utah Supreme Court, there is no just reason to delay having any other issues related to the 15 sets of claimants resolved by the Utah Supreme Court at the same time.
3. The judgments entered December 11, 2008, and May 10, 2010, as well as all previous orders affecting the rights of the 15 sets of claimants whose claims are resolved in the December 11, 2008 judgment, are hereby certified as final for purposes of appeal under Rule 54(b).

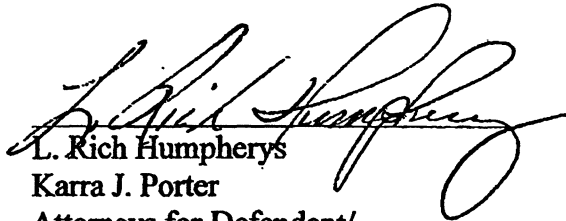
DATED this 1 day of July, 2010.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Lynn W. Davis  
Fourth District Court Judge

APPROVED AS TO FORM:

Christensen & Jensen PC

A handwritten signature in black ink, appearing to read "L. Rich Humpherys", is written over a horizontal line.

L. Rich Humpherys

Karra J. Porter

Attorneys for Defendant/

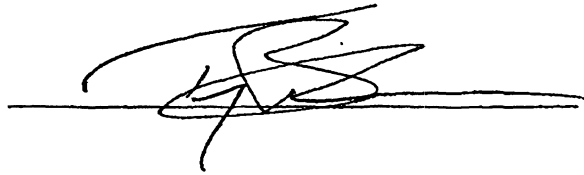
Counterclaimant – Appellee

Consumer Protection Group, LLC

CERTIFICATE OF SERVICE

This is to certify that on the 17<sup>th</sup> day of June, 2010, the foregoing [proposed] ORDER GRANTING STIPULATED MOTION TO CERTIFY JUDGMENTS AS FINAL PURSUANT TO RULE 54(b) was sent via first-class mail, postage prepaid, to the following:

L. Rich Humpherys  
Karra J. Porter  
Christensen & Jensen  
15 West South Temple, Suite 800  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to be "L. Rich Humpherys", is written over a horizontal line.

Tab I



1 of 1 DOCUMENT

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CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 14

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*USCS Const. Amend. 14, § 1*

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* STATUTES CURRENT THROUGH THE 2001 2ND SPECIAL SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2001 UT 98 AND 2001 UT APP 329. \*\*\*

TITLE 13. COMMERCE AND TRADE  
CHAPTER 11. CONSUMER SALES PRACTICES

*Utah Code Ann. § 13-11-17 (2001)*

§ 13-11-17. Actions by enforcing authority

(1) The enforcing authority may bring an action:

- (a) to obtain a declaratory judgment that an act or practice violates this chapter;
- (b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter; and
- (c) to recover, for each violation, actual damages, or obtain relief under Subsection (2)(b), on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(2) (a) The enforcing authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this chapter in a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by final judgment of courts of general jurisdiction and appellate courts of this state that was either reported officially or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(b) (i) On motion of the enforcing authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, but only if it appears that the defendant is threatening or is about to remove, conceal, or dispose of the defendant's property to the damage of persons for whom relief is requested. An appropriate order may include an order:

- (A) to reimburse consumers found to have been damaged;
- (B) to carry out a transaction in accordance with consumers' reasonable expectations;
- (C) to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result;

or

(D) to grant other appropriate relief.

(ii) The court may assess the expenses of a master or receiver against a supplier.

(c) If an act or practice that violates this chapter unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(d) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under Subsection (2) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(e) An action may not be brought by the enforcing authority under Subsection (2) more than two years after the occurrence of a violation of this chapter.

(3) (a) The enforcing authority may terminate an investigation or an action other than a class action upon acceptance of the supplier's written assurance of voluntary compliance with this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action.

(b) An assurance is not evidence of a prior violation of this chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation.

(4) (a) In addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to \$1,000 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

**HISTORY:** L. 1973, ch. 188, § 17; 1983, ch. 58, § 8; 1993, ch. 4, § 55; 1995, ch. 198, § 2; 1995, ch. 237, § 2.

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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* STATUTES CURRENT THROUGH THE 2001 2ND SPECIAL SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2001 UT 98 AND 2001 UT APP 329. \*\*\*

TITLE 13. COMMERCE AND TRADE  
CHAPTER 11. CONSUMER SALES PRACTICES

*Utah Code Ann. § 13-11-19 (2001)*

§ 13-11-19. Actions by consumer

(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.

(3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.

(4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection 13-11-21(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under Section 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Subsection 13-11-7(1)(e).

(8) An action under this section must be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the transaction on which suit is brought.

**HISTORY:** L. 1973, ch. 188, § 19; 1983, ch. 58, § 9; 1993, ch. 4, § 56; 1995, ch. 198, § 3.

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\*\*\* STATUTES CURRENT THROUGH THE 2010 GENERAL SESSION \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH 2010 UT 23 (4/23/2010); 2010 UT App 70 (4/23/2010) AND APRIL  
15, 2010 (FEDERAL CASES) \*\*\*

TITLE 76. UTAH CRIMINAL CODE

CHAPTER 10. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, WELFARE, AND MORALS  
PART 16. PATTERN OF UNLAWFUL ACTIVITY ACT

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 76-10-1605 (2010)*

§ 76-10-1605. Remedies of person injured by a pattern of unlawful activity -- Double damages -- Costs, including attorney fees -- Arbitration -- Agency -- Burden of proof -- Actions by attorney general or county attorney -- Dismissal -- Statute of limitations -- Authorized orders of district court

(1) A person injured in his person, business, or property by a person engaged in conduct forbidden by any provision of *Section 76-10-1603* may sue in an appropriate district court and recover twice the damages he sustains, regardless of whether:

(a) the injury is separate or distinct from the injury suffered as a result of the acts or conduct constituting the pattern of unlawful conduct alleged as part of the cause of action; or

(b) the conduct has been adjudged criminal by any court of the state or of the United States.

(2) A party who prevails on a cause of action brought under this section recovers the cost of the suit, including reasonable attorney fees.

(3) All actions arising under this section which are grounded in fraud are subject to arbitration under Title 78B, Chapter 11, Utah Uniform Arbitration Act.

(4) In all actions under this section, a principal is liable for actual damages for harm caused by an agent acting within the scope of either his employment or apparent authority. A principal is liable for double damages only if the pattern of unlawful activity alleged and proven as part of the cause of action was authorized, solicited, requested, commanded, undertaken, performed, or recklessly tolerated by the board of directors or a high managerial agent acting within the scope of his employment.

(5) In all actions arising under this section, the burden of proof is clear and convincing evidence.

(6) The attorney general, county attorney, or, if within a prosecution district, the district attorney may maintain actions under this section on behalf of the state, the county, or any person injured by a person engaged in conduct forbidden by any provision of *Section 76-10-1603*, to prevent, restrain, or remedy injury as defined in this section and may recover the damages and costs allowed by this section.

## Utah Code Ann. § 76-10-1605

(7) In all actions under this section, the elements of each claim or cause of action shall be stated with particularity against each defendant.

(8) If an action, claim, or counterclaim brought or asserted by a private party under this section is dismissed prior to trial or disposed of on summary judgment, or if it is determined at trial that there is no liability, the prevailing party shall recover from the party who brought the action or asserted the claim or counterclaim the amount of its reasonable expenses incurred because of the defense against the action, claim, or counterclaim, including a reasonable attorney's fee.

(9) An action or proceeding brought under this section shall be commenced within three years after the conduct prohibited by *Section 76-10-1603* terminates or the cause of action accrues, whichever is later. This provision supersedes any limitation to the contrary.

(10) (a) In any action brought under this section, the district court has jurisdiction to prevent, restrain, or remedy injury as defined by this section by issuing appropriate orders after making provisions for the rights of innocent persons.

(b) Before liability is determined in any action brought under this section, the district court may:

(i) issue restraining orders and injunctions;

(ii) require satisfactory performance bonds or any other bond it considers appropriate and necessary in connection with any property or any requirement imposed upon a party by the court; and

(iii) enter any other order the court considers necessary and proper.

(c) After a determination of liability, the district court may, in addition to granting the relief allowed in Subsection (1), do any one or all of the following:

(i) order any person to divest himself of any interest in or any control, direct or indirect, of any enterprise;

(ii) impose reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, to the extent the Utah Constitution and the Constitution of the United States permit; or

(iii) order the dissolution or reorganization of any enterprise.

(d) However, if an action is brought to obtain any relief provided by this section, and if the conduct prohibited by *Section 76-10-1603* has for its pattern of unlawful activity acts or conduct illegal under *Section 76-10-1204*, *76-10-1205*, *76-10-1206*, or *76-10-1222*, the court may not enter any order that would amount to a prior restraint on the exercise of an affected party's rights under the *First Amendment to the Constitution of the United States*, or *Article I, Sec. 15 of the Utah Constitution*. The court shall, upon the request of any affected party, and upon the notice to all parties, prior to the issuance of any order provided for in this subsection, and at any later time, hold hearings as necessary to determine whether any materials at issue are obscene or pornographic and to determine if there is probable cause to believe that any act or conduct alleged violates *Section 76-10-1204*, *76-10-1205*, *76-10-1206*, or *76-10-1222*. In making its findings the court shall be guided by the same considerations required of a court making similar findings in criminal cases brought under *Section 76-10-1204*, *76-10-1205*, *76-10-1206*, or *76-10-1222*, including, but not limited to, the definitions in *Sections 76-10-1201*, *76-10-1203*, and *76-10-1216*, and the exemptions in *Section 76-10-1226*.

**HISTORY:** C. 1953, § 76-10-1605, enacted by L. 1987, ch. 238, § 5; 1989, ch. 22, § 46; 1993, ch. 38, § 84; 2008, ch. 3, § 244.

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\*\*\* Current through rules received as of October 1, 2010 \*\*\*

STATE RULES  
UTAH RULES OF CIVIL PROCEDURE  
PART VI. TRIALS

*URCP Rule 42 (2010)*

**Rule 42. Consolidation; separate trials**

(a) *Consolidation.* -- 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.

(1) A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

(b) *Separate trials.* -- The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

**HISTORY:** Amended effective November 1, 2003

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\*\*\* Current through rules received as of October 1, 2010 \*\*\*

STATE RULES  
UTAH RULES OF CIVIL PROCEDURE  
PART VII. JUDGMENT

*URCP Rule 59 (2010)*

Rule 59. New trials; amendments of judgment

(a) *Grounds.* -- Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) *Time for motion.* -- A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* -- When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* -- Not later than 10 days after entry of judgment the court of its own initiative may order



a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* -- A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.