2006

Scott Ockey and Catherine Condas v. Iron Mountain Alliance, Inc., Iron Mountain Holding Group L.C., Iron Mountain Associates, LLC, White Pine Associates, Inc., George Condas, Nick J. Condas, Chris Condas, Ellen Bayas, John Lehmer, Alexandra Ockey, John COndas, Susi Kontgis, Marina Condas, Hermione Bayas, Ellen Ockey-Johnson, Keith Kelley, Walt Brett and Tom Guald: Reply Brief

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[redacted]

IN THE UTAH SUPREME COURT

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SCOTT OCKEY and CATHERINE CONDAS,	:	
Plaintiffs/Appellant,	:	
-vs-	:	
	:	Supreme Court No. 20060142-SC
IRON MOUNTAIN ALLIANCE, INC., a Utah corporation, IRON MOUNTAIN HOLDING GROUP L.C., IRON MOUNTAIN ASSOCIATES, LLC, WHITE PINE ASSOCAITES, INC., GEORGE CONDAS, NICK J. CONDAS, CHRIS CONDAS, ELLEN BAYAS, JOHN LEHMER, ALEXANDRA OCKEY, JOHN CONDAS, SUSI KONTGIS, MARINA CONDAS, HERMIONE BAYAS, ELLEN OCKEY-JOHNSON, KEITH KELLEY, WALT BRETT and TOM GUALD,	:	
Defendants/Appellees.	:	

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REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE SCOTT OCKEY

Appeal from the Third Judicial District Court, Summit County
The Honorable Robert K. Hilder

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ARGUMENT

Defendants, particularly Lehmer, dedicate a considerable portion of their briefs to issues and arguments they failed to raise in the trial court. As to at least two of those issues, the failure precludes appellate review.

Conversely, defendants leave unaddressed several issues and arguments Ockey raised in the trial court and again on appeal. For example, neither defendant addresses Ockey's claim that title to his interest in the family ranch vested in him on termination of his Trusts, rendering void the trustees' attempt to convey his interest eight years later. Defendants apparently concede the point. The concession moots defendants' ratification arguments on the quiet title claim since a void conveyance may not be ratified. *See Consolidated Realty Group v. Sizzling Platter, Inc.*, 930 P.2d 268, 273, n. 7 (Utah Ct. App. 1996) (noting that "void" contracts are "incapable of confirmation or ratification.").

Defendants likewise fail to address Ockey's arguments regarding the absence of evidence on the elements of ratification, one of the primary theories adopted by the trial court in dismissing Ockey's conversion claim. As noted in the points that follow, these and defendants' other concessions should significantly narrow the scope of the Court's review.

I. LEHMER IMPROPERLY RAISES ISSUES NEVER PRESENTED TO THE TRIAL COURT

Lehmer's first two issues were never raised in the trial court and may not now be considered on appeal. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 672 (Utah 1982) ("This Court will not consider on appeal issues which were not

submitted to the trial court and concerning which the trial court did not have the opportunity to make any findings of fact or law."). Lehmer provides no citation to the record for these issues, as required by Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure, because none exists.

As articulated by Lehmer, the first issue is "whether under the quiet title statute one can maintain a quiet title action against a party who has never claimed title to the subject real property...." *Lehmer's Opening Brief* at 2. Although Ockey's quiet title claim was the subject of cross motions for summary judgment, Lehmer's first issue was not raised or argued in that context.

Lehmer's second issue also addresses Ockey's quiet title claim: whether "quiet title claims are moot where a plaintiff has acknowledged that he transferred any interest he had to a separate company and agreed another company can retain title no matter how the quiet title claims are adjudicated." *Lehmer's Opening Brief* at 2. The first part of the issue, concerning transfer "to a separate company," was never submitted to the trial court. Under the long-standing rule articulated in *Turtle Management*, these two issues and the corresponding argument should not be considered.

II. SIGNIFICANT PORTIONS OF LEHMER'S STATEMENT OF FACTS ARE NOT SUPPORTED BY THE RECORD

Lehmer's "Statement of Facts" distorts several key facts. Many of the distortions are used to support Lehmer's arguments and are best addressed in the context of Ockey's response to those arguments. Several of the distortions, however, merit a direct response:

- *"When Mr. Ockey turned 28 years old on September 6, 1986, his undivided interest in the Ranch vested. At this point, had Mr. Ockey demanded his*

portion of the Ranch be divided, then under paragraph 4.q. of the Trusts the trustee would have had the option to divide the Ranch itself or to compensate Mr. Ockey 'in money.'" Lehmer's Opening Brief at 9.

The record contains no evidence that the trust estates ever included "money" or any other liquid asset. Consequently, although the trust agreements provided the theoretical authority to distribute the principal "in money," in reality the trustees only had the option of "granting, transferring or assigning an undivided interest..." in the Ranch. (R. 225) The trust estates were comprised solely of undivided interests in the Ranch from creation until termination of the Trusts.[1] Nothing else was available for distribution.

- *"IMAI failed to make two $30,000 payments, something Mr. Ockey was aware of in 1992." Lehmer's Opening Brief* at 10.

Nothing in the record supports the claim that Ockey was aware of the missed payments. At best, the cited testimony (TT 257-58) supports the conclusion that, on an unidentified date, Ockey overheard Nick discussing IMAI's default. (TT 258)

- *"Instead of declaring a default, however, Mr. Lehmer, after Uncle Nick had obtained consent from family members, decided to forgive these payments if R&J would agree to pledge IMAI stock as collateral for future payments ...." Lehmer's Opening Brief* at 10.

There is no competent evidence that "Uncle Nick had obtained consent from family members..." for the stock pledge arrangement with Jackson and Rothwell. The trial testimony Lehmer cites in support of the statement reads:

> Q. You say that the family agreed to accept the stock as collateral. You don't know whether Scott Ockey agreed to take the stock as collateral do you?

[1] In fact, eight years after termination of the Trusts, the trustees purported to convey to IMA Ltd the only property in the trust estates, Ockey's Ranch interests.

A. It was my understanding that the entire family had been questioned and that that's what they chose to do, yes.

Q. You never talked to Scott Ockey about that issue, did you?

A. I didn't speak with him directly about that in that matter [*sic*] that I recall today.

(TT 95) The cited testimony contains no reference to "Uncle Nick." And if Lehmer had a foundation for his "understanding," it was not based on anything he learned from Ockey. More importantly, if Ockey was ever told of the stock pledge arrangement, it was years later, after Lehmer made the arrangement without Ockey's consent.

- *"Assuming Mr. Ockey were correct, if anyone received Mr. Ockey's share of the IMAI stock, it was Alexandra Ockey and Uncle Nick, from whom Mr. Ockey had obtained his undivided interest in the Ranch (via the Trusts), and who, therefore, were not lessors under the Option Agreement to that extent." Lehmer's Opening Brief* at *13.*

The claim that Alexandra Ockey and Nick received Ockey's share of the IMAI stock is argument, not fact. Although difficult to follow, the argument is, apparently, that since Alexandra and Nick each purchased 1/6 of the stock IMAI offered for sale in 1993, somehow they purchased Ockey's share of the company.

The argument was not raised at the trial court, likely because it does not track with the facts. On June 30, 1993, Lehmer took delivery of the Jackson and Rothwell stock as a "means of transferring the ownership of [IMAI] to the various members of the Condas Family." (R. 2995) The next day, instead of transferring ownership as promised, Lehmer installed himself, Nick Condas and John Condas as the new directors and officers of IMAI, canceled all existing shares without authority, then decided to sell newly issued

stock to himself, Nick , Alexandra and others. (R. 2997-3000) Nick and Alexandra purchased newly issued stock, not "Ockey's share of the IMAI stock...." *Id.*

- *"Mr. Ockey certainly was aware of the stock transfers by the fall of 1993 (or early 1994 at the latest), when he overheard a conversation between Uncle Nick and Suzi Lehmer Kontgis (Grandchild) in which Uncle Nick agreed to sell some of his IMAI stock to Ms. Kontgis ...." Id.*

If by "the stock transfers" Lehmer is referring to the transfers made by Jackson and Rothwell as a "means of transferring the ownership of [IMAI] to the various members of the Condas Family...," Lehmer is confused. (R. 2995) What Ockey learned when he overheard the conversation is that Nick owned IMAI stock. Notice that Nick owned stock was not notice of the "stock transfers."

- *"Uncle Nick told [Ockey] to look through his stacks of records concerning the Ranch, IMAI, and the State Lease to satisfy any concerns he had." Lehmer's Opening Brief* at 13.

The statement is made in support of Lehmer's argument that Ockey knew the facts underlying his conversion claim before the three-year limitations period expired. But there is no evidence of when Nick extended the invitation or whether the "stacks of records" contained any information about the facts underlying the conversion claim. The cited trial court finding only notes that "Nick directed him to all relevant records concerning the Ranch..." (R. 4598), and the cited trial testimony establishes only that Ockey had "full access to Nick's papers...." (TT 292)

III. QUIET TITLE AND DECLARATORY JUDGMENT CLAIMS

Ockey's quiet title and declaratory relief claims were the subject of cross motions for summary judgment decided by the trial court in February 2001. Ockey filed one of

the motions and Lehmer filed the other. (R. 2311 & 2396) All defendants joined in Lehmer's opposition to Ockey's motion, including IMAI and IMHG. (R. 2469)[2]

Although he never raised the issue before the trial court, Lehmer now asserts he is the "wrong defendant" with regard to the claims. He is not, apparently, the wrong defendant to attack the claims. He does so with four distinct arguments. Each is addressed in turn.

A. Ockey Transferred an LLC Interest to His Company, not His Claim to His Ranch Interest.

Lehmer's first argument is that Ockey allegedly transferred his interest in the family ranch "to his company, OK Investments." *Lehmer's Opening Brief* at 23. As noted, this issue was waived when not raised in the trial court. *See Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 672 (Utah 1982).

If it had been raised, Ockey would have pointed out that the only support Lehmer offers for the argument is the language of the July 1998 settlement agreement between Ockey and the developer of the Ranch (the "Settlement Agreement"). As characterized by Lehmer, the relevant language is: "OK [Investments] has acquired all of Ockey's right, title and interest in and to [the Ranch Interest]." *Lehmer's Opening Brief* at 23.

The actual language of the agreement reflects the fact that Ockey was seeking recognition of his interest in the Ranch, but he had no recognized interest to convey to OK Investments. Instead, he had a membership interest in IMHG: "OK has acquired all of Ockey's right, title and interest in and to IMHG as well as the IMHG Property." (R.

[2] IMAI's brief does not address the quiet title and declaratory judgment claims.

1158) Had Lehmer raised the issue in the trial court, Ockey could have pointed out that the claim to title necessary to maintain his quiet title claim was never transferred.

B. The Quiet Title Claim is not Moot Because Adjudication of the Claim Will Affect Title.

Lehmer's second argument is that, by virtue of language in the Settlement Agreement, "adjudication of the quiet title claims will have no effect on title to the Ranch ..." and, therefore, the quiet title claim is moot. *Lehmer's Opening Brief* at 25.

Lehmer misreads the Settlement Agreement. The agreement anticipates Ockey prevailing on his quiet title claim and being "vested with and/or entitled to become vested with equitable or legal title to any part or all of the IMHG property, in his own right, and not as a partner of IMA, Ltd. or member of IMHG ...." (R. 1159) Ockey agreed that, if he prevails on his quiet title claim, he will "sell to IMA all of [his] right, title and interest in ..." the Ranch, but not before acquiring title himself. (R. 1162)

Adjudication of the quiet title claim will affect title because it will vest title in Ockey. The effect may not be long-lasting, but Lehmer cites no authority mandating an effect on title meeting a minimum temporal requirement. The claim is not moot.[3]

C. The Trustees' Authority Before Termination of the Trusts has no Impact on the Post-termination Quiet Title Claim.

Lehmer's third argument is another that was not presented to the trial court. He argues that because Ockey "was not guaranteed he would receive title to a portion of the

[3] Lehmer's mootness argument also ignores the other Settlement Agreement benefits Ockey receives if he prevails on the quiet title claim, such as the right "to have a proposal submitted to ASC Utah" by which certain proceeds owed by ASC Utah would be paid to Ockey "in a different way than the others in IMHG...," including Lehmer. (R. 1163)

Ranch ... he cannot maintain a quiet title action." *Lehmer's Opening Brief* at 24. Had Lehmer raised the argument, Ockey would have countered that his quiet title claim is not based on a guarantee found in the Trusts. Rather, it is based on the legal consequence of the Trusts' termination. As noted in Ockey's opening brief, when the Trusts terminated, the remaining estate of the trustees also terminated, leaving Ockey with both equitable and legal title to the Ranch interests, the only assets in the Trusts.[4]

D. Ockey Did not Ratify the Trustees' Attempted Conveyances.

Lehmer's final argument on the quiet title claim is the only argument accepted by the trial court in granting Lehmer's summary judgment motion: that Ockey ratified the trustees' "conveyances" of his Ranch interests. (R. 3747) The argument is that Ockey accepted "millions of dollars in benefits after knowing the benefits were made possible by the conveyance he now claims was defective (or even void)." *Lehmer's Opening Brief* at 27.

The first problem with the argument is its factual premise is unfounded. Nothing in the record establishes that the benefit Ockey received was "made possible" by the conveyance of his Ranch interest. Lehmer offers no supporting cite; he simply assumes that Ockey would not have received "millions of dollars in benefits" if the trustees had conveyed the Ranch interest to Ockey as required by the Trusts and the law. Lehmer's assumption fails to account for the other possibilities, including the possibility that, given control of his interest, Ockey might have derived substantially more benefit than what he

[4] *See Ockey's Opening Brief* at 13-15.

received under the current development scheme. Regardless of the possibilities, the argument fails for lack of factual support.

Next, Lehmer argues "Mr. Ockey's 1994 conveyance does not require ratification, as there is no evidence Mr. Ockey would have made any different decision concerning the transfer of the Ranch Interest to IMALTD in 1994." *Lehmer's Opening Brief* at 27. The argument is legally and factually flawed.

First, the notion that we are dealing with "Mr. Ockey's 1994 conveyance" is, of course, wrong. The conveyance was made by Ellen Bayas and Nick Condas purporting to act as Ockey's trustees eight years after the Trusts terminated. (R. 2676) The fact that Ockey signed a document titled "Directive to Convey Trust Property" changes nothing. (R. 2426) By the document, Ockey, as "beneficiary ...," directed "the trustee of the Trust to convey the entire undivided ownership interest held by the Trust in ..." the Ranch. *Id.* At the time, however, Ockey was no longer a beneficiary under the Trusts and the trustees had nothing to convey. The Trusts had terminated and the attempted 1994 conveyances were void *ab initio*.[5]

[5] This is the first point of Ockey's opening brief. As noted, Defendants apparently concede the point. One likely reason for the concession is that arguing the point would draw attention to one of Lehmer's early failures as a fiduciary. Ockey did not know the truth regarding the trustees' lack of authority but Lehmer did. In May 1989, Lehmer was negotiating with Tom Clyde, counsel for Jackson and Rothwell, when he received a letter from Mr. Clyde addressing defects in title to the Ranch. One of the defects was created by the fact that certain trustees, including Ockey's, had executed documents after the trusts' termination dates. As Mr. Clyde put it: "There is a concern that the trusts should have distributed to the beneficiaries, and as a result, the signatures of the trustees are subject to challenge." (R. 3012)

The argument fairs no better as a legal proposition. The argument is that an unauthorized act is deemed authorized absent evidence that the principal would have acted differently given the chance. Lehmer cites nothing in support of the proposition and Ockey is aware of no supporting law.

Lehmer's final ratification argument -- regarding the effect of the Settlement Agreement -- is the only ratification argument he made in support of his summary judgment motion. He asserts that through the Settlement Agreement "Ockey ratified any defect in the conveyance ..." of his Ranch interests. *Lehmer's Opening Brief* at 28. As noted in Ockey's opening brief, however, a void conveyance cannot be ratified. Lehmer ignores the point, but it is dispositive. The conveyances were void *ab initio* and could not be ratified four years later even if Ockey intended to ratify them.

If Ockey could ratify a void conveyance, he did not do it by settling with the developer. Ockey settled with the developer to allow the development to proceed (R. 1157-58) In doing so, however, he made clear his intent to not ratify the 1994 conveyances. Instead of affirming the conveyances, he affirmed his intent to attack the conveyances through his quiet title and declaratory relief claims, claims that are indisputably reserved in the Settlement Agreement. The void conveyances were not ratified by operation of the Settlement Agreement.

IV. CONVERSION AND FIDUCIARY DUTY CLAIMS

IMAI and Lehmer both address the trial court's handling of the conversion claim at trial. But neither addresses the trial court's handling of the claim in response to Ockey's earlier summary judgment motion. As argued in Ockey's opening brief, the motion was

legally and factually sound and should have been granted.[6] Defendants concede the point by failing to address it.

Defendants' concession should be dispositive. If the Court concludes otherwise, however, none of defendants' arguments effectively supports the trial court's erroneous handling of the claim, or its handling of the fiduciary duty claim.

A. The Trial Court Erred in Concluding it Could not Fashion an Equitable Remedy for Lehmer's Breach and Conversion.

Acting as Ockey's agent pursuant to a written power of attorney, Lehmer took delivery of the Jackson and Rothwell stock as a "means of transferring ownership of [IMAI] to..." Ockey and the other members of the extended family. (R. 2995) When Lehmer surrendered the stock to IMAI for cancellation without first ensuring new stock would be issued to Ockey in proportion to his ownership interest, he deprived Ockey of his share of the stock. The act of surrendering the stock to IMAI was both a breach of Lehmer's fiduciary duty to Ockey and conversion of Ockey's share of the stock.

Lehmer does not argue otherwise. He does not defend his conduct; rather, he argues that he is effectively insulated from liability because Ockey has no equitable remedy against him.[7] Lehmer points to the trial court conclusion that it could not force Lehmer to convey a portion of his 23% ownership interest in IMAI to Ockey because doing so would be awarding "damages in the disguise of equity ...." (TT 1043)

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[6] See Ockey's opening brief at 19-22.

[7] The court first concluded Ockey has no adequate remedy at law. (R. 4603; TT 1020)

As Ockey pointed out in his opening brief, the error in the analysis lies in its characterization of stock. A certificate of stock is "written acknowledgment by the corporation of the interest of a shareholder in the corporate property ...." 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §5091 (perm. ed. rev. vol. 1986). A stock certificate is merely evidence of ownership. *See Owyhee, Inc. v. Robbins Marco Polo*, 407 P.2d 565, 567 (Utah 1965) ("the certificate is not the stock itself, but is merely the evidence of stock ownership."); *see also* Utah Code Ann. §16-10a-625(1)(1992) ("Shares may but need not be represented by certificates.").

The trial court reached its "no remedy" conclusion because it could not get past a conceptual barrier posed by two facts. The first is that Lehmer no longer has the stock he received from Jackson and Rothwell. As stated by the trial court:

> The stock originally received from Jackson and Rothwell no longer exists. Lehmer does not possess any such shares and, therefore, the allegedly converted property cannot be returned. Because Lehmer does not possess the allegedly converted property, return of the stock by Lehmer as an equitable remedy is not available to [Ockey].

(R. 4604) The fact that the Jackson and Rothwell stock "no longer exists" is not pertinent to the conversion analysis. Certainly, Ockey would have no claim if Lehmer had surrendered the stock to the corporation for cancellation *and* reissuance of new certificates, including one to Ockey representing a 13.89% interest in the company. Under this scenario, the fact remains that the "stock originally received from Jackson and Rothwell no longer exists...." (R. 4604) But no one would claim the stock was converted.

What is pertinent to the analysis is what the stock certificates represented: Ockey's and the other family members' ownership interests in IMAI. By surrendering the stock certificates to the corporation for cancellation without first ensuring the corporation would issue Ockey a new certificate for 13.89% of the company's stock, Lehmer dispossessed Ockey of his 13.89% stake in the company.

The trial court's analysis also hung up on its related idea that the IMAI stock Lehmer now owns is "different from" the stock he converted. As the court put it in discourse with Ockey's counsel: "I don't think there is evidence in this case that today John Lehmer is holding your client's stock." (TT 1048) But identifying to whom stock certificates are issued does not address the question. Lehmer dispossessed Ockey of his ownership interest in the company and he has the means to restore it.

Under the trial court's analysis, the only scenario under which Ockey would have a remedy for Lehmer's malfeasance is if Lehmer had retained the Jackson and Rothwell stock certificates. Under this scenario, he would be "holding" Ockey's stock and, presumably, could be ordered to return it. But by "surrendering" the stock certificates to the company and then voting as a self-appointed director to cancel the stock certificates, Lehmer effectively made himself judgment proof under the trial court's analysis.

The error in the trial court's reasoning is further highlighted by its concession that, but for the statute of limitations, IMAI could be forced to issue stock to Ockey. (TT 1044) Conceptually, ordering IMAI to restore Ockey's ownership interest is no different from ordering Lehmer to do so. Assuming IMAI uses treasury stock to restore the interest (the only reasonable option since issuing new stock would dilute existing

shareholders' interests), in both cases the defendant is conveying an ownership interest held by it. No legal or factual impediment precludes the equitable remedy Ockey seeks from Lehmer.

B. The IMAI Stock Value Increase Does not Preclude an Equitable Remedy.

Lehmer complains that the interest in IMAI Ockey seeks to recover is more valuable than the interest he would have received but for Lehmer's misconduct. Of course, had Lehmer not dispossessed Ockey of his interest in 1993, Lehmer would have no cause to complain that Ockey seeks stock worth more than its 1993 value. In other words, Lehmer has no one to blame but himself for the possibility that Ockey may now recover stock worth more than it was worth when converted.

Lehmer's reference to the "New York rule" ignores the trial court's finding that the IMAI stock could not be valued as of the date of conversion (or any other relevant date), leaving Ockey with no adequate remedy at law. (R. 4603; TT 1020) As Lehmer concedes, the New York rule is not applicable given the trial court's ruling:

> Only where damages cannot be determined, and therefore a remedy at law is unavailable, may a plaintiff recover stock, and then because it is the only way to compensate the plaintiff for his loss.

Lehmer's Opening Brief at 37. Here, a remedy at law it is unavailable and the only way to compensate Ockey for Lehmer's breach of fiduciary duty and conversion is to compel Lehmer to provide Ockey his 13.89% interest in IMAI.

C. Nick Condas's Statements are Inadmissible Hearsay.

Specifically addressing the fiduciary duty claim, Lehmer argues he "fulfilled any fiduciary duty he had to Mr. Ockey by first consulting with Uncle Nick before ..." dispossessing Ockey of his share of the IMAI stock. *Lehmer's Opening Brief* at 45. He claims, as he did at trial, that Nick told him the "family" consented to canceling the Jackson and Rothwell stock. *Id.* What he does not claim is that Ockey consented to canceling the stock. Lehmer owed the fiduciary duty to Ockey and only by securing Ockey's consent was Lehmer free to cancel Ockey's stock.

Moreover, whatever Nick might have told Lehmer regarding "family" consent was inadmissible hearsay.[8] Lehmer argues Nick's statements are not hearsay because they were not offered for their truth "but instead merely to show Mr. Lehmer's state of mind when deciding what to do with the IMAI stock." *Id.* at 46. Lehmer never explains what his "state of mind" has to do with his fiduciary obligation to ensure Ockey received his share of the IMAI stock. Without this explanation, Lehmer's argument renders the hearsay statements immaterial.[9]

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[8] The admissibility of Nick's alleged statements to Lehmer was the subject of Lehmer's pretrial motion in limine. (R. 4294) Over Ockey's objection, the trial court granted the motion before the start of trial. For unknown reasons, the trial court's order does not appear in the record. Lehmer's appellate counsel now claims that his motion in limine "apparently was never ruled upon...." *Lehmer's Opening Brief* at 46, fn 13. As Ockey noted in his opening brief, the motion was granted and Ockey is in the process of securing from Lehmer's trial counsel a written stipulation regarding the matter.

[9] In another footnote, Lehmer raises for the first time a claim that Nick had "apparent authority" to communicate Ockey's consent to the conversion. *Lehmer's Opening Brief* at 46, fn 14. The claim was waived when not raised in the trial court. If it had been

D. Ockey Never Ratified the Conversion of His Stock.

The trial court's conclusion that Ockey ratified the stock conversion is inconsistent with the law. Among other elements, the law requires that the ratified act be done on behalf of the principal. *See Restatement (Second) of Agency* §82 (1958). Defendants do not even suggest that cancellation of the stock was done on behalf of Ockey.

Defendants do not address this legal deficiency, or any of the other missing ratification elements noted in Ockey's opening brief. Instead, they support their argument with three contentions that find no support in the record. The first is that development of the ranch was "made possible by Mr. Lehmer maintaining the State Lease in 1993." *Lehmer's Opening Brief* at 47. No one disputes that the State Lease lands added value to the development, but the amount of that value and the prospects for the development without the State Lease are simply not known. There is no evidence that development of the Ranch was "made possible by Mr. Lehmer maintaining the State Lease in 1993." *Id.*

The second unsupported contention is pure speculation: "Had IMAI simply distributed the stock in proportion to ownership interest in the Ranch... it could not have raised the $6,000 needed to maintain the State Lease...." *Id.* at 48.[10] The assertion, offered as an excuse for defendants' conduct, has no legal or factual basis. Nothing

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(continued) raised, it would find no support in the record, a fact highlighted by the complete lack of any citation of the record in the footnote Lehmer uses to raise the claim.

[10] IMAI makes the same claim, but tries to tie it to the trial court's findings: "[Ockey's argument] is contrary to the trial court's specific findings of fact that without the ability to use IMAI stock to fund the State Lease and pursue development, there would not have been any lot sale proceeds because the development would not have happened." *IMAI's Brief* at 9. IMAI offers no cite to the "trial court's specific findings of fact..." on the point because they do not exist.

precluded Lehmer and IMAI from both distributing the stock in proportion to Ranch ownership and issuing new stock for sale. Lehmer acknowledged as much at trial. He testified it was "possible" to "issue the original 5000 shares to the family members in proportion to their interest in the ranch and then sell the new stock to those who wanted to buy it." (TT 157; see also TT 150) He was skeptical about IMAI's ability to sell newly issued stock, but he conceded "[w]e could have handed out the stock to all of the people who owned the land ...." (TT 146) Canceling the Rothwell and Jackson stock was not a precondition to later stock sales.

Finally, the notion that Ockey ratified the conversion of his stock by accepting money from the Ranch development ignores the fact that the money was paid to him solely on account of his membership interest in IMHG. Ockey received 13.89% of that part of the development proceeds distributed by the developer to IMHG. These proceeds have nothing to do with IMAI. If Ockey's ownership interest in IMAI had not been converted, he also would have received a portion of the development proceeds distributed by the developer to IMAI.[11]

[11] In discussion regarding the amount Ockey received from development of the Ranch, Lehmer and IMAI repeatedly feature a theme that they also raised at trial: that Ockey's family made him rich. The idea is a tacit "end justifies the means" argument that fails to account for the law. Defendants' conduct is not measured by the degree to which they made Ockey rich. Rather, it is measured by the law and the law does not vary with the amount Ockey received on account of his interest in the Ranch. The other problem with the theme is nothing in the record supports it. No evidence exists that the "[family's] decisions concerning the development of [the] family ranch..." had anything to do with the amount Ockey received on account of his interest in the Ranch. *Lehmer's Opening Brief* at 1.

E. Ockey had Preemptive Rights in all Issued IMAI Stock.

Ockey's summary judgment motion on the conversion claim addressed as a separate matter the question of whether Ockey had preemptive rights. The idea was to first establish Ockey as an IMAI shareholder by prevailing on the conversion claim and then establish Ockey's shareholder preemptive rights in connection with all shares issued by IMAI, not just those issued for cash. After the trial court ruled in favor of Ockey on the preemptive rights issue, defendants moved for reconsideration and the court reversed itself. (R. 4549)

In opposing Ockey's motion, defendants argued Utah Code Ann. §16-10a-630 (1992) applied retroactively to limit the preemptive rights otherwise allowed by IMAI's 1992 articles of incorporation. Lehmer now retracts the argument and instead asserts that when stock was issued for services in 1995, section 16-10a-630 applied because it was "the law" in Utah. The argument is based on section 7 of IMAI's 1992 articles, which Lehmer quotes as: "[s]hareholders will have preemptive rights in the corporation as provided by law." *Lehmer's Opening Brief* at 38. By limiting the quote to this single phrase, Lehmer avoids addressing the impact of the rest of section 7, which reads:

> Preemptive Rights. Shareholders will have preemptive rights in the corporation as provided by law in the event that **any** additional shares are authorized and issued, so their relative ownership of the corporation's shares remains unchanged if the shareholder exercises his or her preemptive rights. This shall **specifically require** the corporation to extend the offer to purchase additional shares to the shareholders of each class of stock, so they may preserve their percentage interest in the corporation as a whole....

(R. 3017-20) (emphasis added). All IMAI stock was issued under the preemptive rights language of section 7, language that extends preemptive rights to "any" stock issue.

If the operative statute is section 16-10a-630 as Lehmer claims, the express exception to the section's limitation on preemptive rights applies. The exception abrogates the limitation if the articles "expressly provide [for no limit] ...." Utah Code Ann. §16-10a-630(2). Section 7 of IMAI's articles does just that by allowing shareholders unlimited preemptive rights. The limitation Lehmer relies on is inapplicable.

Referring to the 1995 amendment to IMAI's articles, which refers specifically to preemptive rights in shares issued as compensation for services, Lehmer argues "between 1993 and 1995, no IMAI shareholders exercised preemptive rights to purchase stock when new stock was issued [for] services ... because they had none until the amendment created them." *Lehmer 's Opening Brief* at 39. There is no evidence that between 1993 and 1995 IMAI interpreted the law in a manner Lehmer advocates. The more likely scenario is that "no IMAI shareholders exercised preemptive rights to purchase stock when new stock was issued [for] services..." because the corporation never bothered to offer the preemptive rights.

The trial court's original ruling on this issue granting Ockey's motion for summary judgment was correct. (R. 4525) By reversing itself in response to Lehmer's motion to reconsider, the trial court committed error. (R. 4548)

V. STATUTE OF LIMITATIONS

A. Ockey Neither Knew nor had Reason to Know of the Conversion.

The first question pertinent to the statute of limitations issue is did Ockey know or have reason to know of the events giving rise to his conversion claim within the

limitations period. Defendants' analysis of the question ignores the relevant events. All of the events giving rise to the claim occurred on July 1, 1993, the day Lehmer "delivered and transferred [the stock] to the Company for cancellation." (R. 2995)

Rather than addressing the events of July 1, 1993, defendants focus on IMAI's sale of stock to various family members over the following two years. For example, Lehmer claims the "best evidence" of Ockey's knowledge of the events underlying his conversion claim "is Mr. Ockey's testimony that he knew about IMAI's practice of issuing stock for services in 1995 ...." *Lehmer's Opening Brief* at 41. Lehmer explains that Ockey's knowledge of stock issued for services "demonstrates Mr. Ockey knew before June 1996 that others -- including his own mother -- had the IMAI stock he claims should have gone to him." *Id.* at 42. Ockey has never claimed that the stock purchased by or issued for services to others is rightfully his. And before early 1997, Ockey did not even know that there ever existed IMAI stock that "should have gone to him." *Id.*

The date Ockey learned that IMAI stock existed that should have gone to him is the critical issue and defendants fail to address it. What they do address is simply not pertinent to the statute of limitations analysis. For example, Lehmer never explains how the "best evidence" he cites -- IMAI's practice of issuing stock for services in 1995 -- gave Ockey reason to know of the conversion two years earlier.

Next, both defendants argue Ockey "failed to marshal his own testimony indicating he knew [about the stock transfers] in 1995...." *Id.* Lehmer supports the argument with references to the trial testimony Ockey allegedly failed to marshal. *Id.* Lehmer misreads Ockey's brief. Each reference to stock transfers Lehmer cites is also

cited by Ockey. Any differences in the citations are matters of characterization. For example, the first piece of testimony Lehmer claims Ockey missed is: "by 1995, [Ockey] knew that J&R had gone into default and delivered the IMAI stock to Mr. Lehmer. (R. TT:256)" *Id.* Ockey cites the same testimony on page 37 of his opening brief as follows: "The trial court also considered Ockey's testimony that places his knowledge of the family's IMAI stock acquisition at a point in time that is likely less than three years after the acquisition. (TT 256)" The actual trial testimony involved cross-examination using Ockey's deposition transcript:

> Q Question, "In the 1993 did you know that Jackson and Rothwell had gone into default and the family would be acquiring their stock in IMAI?"
>
> A My answer was "No, not until some later date, a later date."
>
> Q Question, "Do you recall how much later?"
>
> A Answer, "Probably at least a year maybe more."
>
> Q So, you did know that Jackson and Rothwell has [*sic*] defaulted in 1993 or perhaps a year later, correct?
>
> A To the best of my knowledge, yes.

(TT 256)

Lehmer next mischaracterizes Alexandra Ockey's trial testimony. He claims that between "June 1993 and January 1994 ... Alexandra Ockey, discussed 'what was going on at the Ranch' with Mr. Ockey, causing her to believe Mr. Ockey knew about the IMAI stock cancellation before June 1996. (R. TT: 569.)" *Lehmer's Opening Brief* at 42. Ockey cites the same testimony on page 33 of his opening brief as follows: "Alexandra Ockey testified that prior to 1989 her "recollection is that... [Scott] understood what was

going on..." at the ranch. (TT 569) Consistent with Ockey's characterization, the actual trial testimony says nothing about IMAI stock or the dates Lehmer references. (TT 569)

Again, the question is whether Ockey knew or had reason to know of the events giving rise to the conversion claim within the limitations period. Defendants agree that the issue is appropriately viewed in the larger context of what was happening with the Ranch development at the time. But they fail to acknowledge that part of the relevant context is Ockey's justified belief that he had no ability to control or possess his Ranch interest because it was still held in trust. The belief was fostered by Lehmer. For example, the power of attorney Lehmer used to take delivery of Ockey's share of the Jackson and Rothwell stock states that the Trusts still held Ockey's Ranch interest.[12]

Lehmer knew Ockey's power of attorney was perpetuating a fraud regarding the Trusts' continuing control over Ockey's Ranch interest. Years earlier, Lehmer had communicated with Tom Clyde, counsel for Jackson and Rothwell, concerning the fact that the corpus of Ockey's Trusts should have been distributed to him. (R. 3011-13) Despite the fiduciary duties he owed Ockey, Lehmer said nothing.

Six months after Lehmer took delivery of the stock, the truth was still being withheld when several family members, including Ockey, were asked to sign a document titled "Directive to Convey Trust Property." (R. 2426) By the document, Ockey and the

[12] Referring to Ockey's interest in the Ranch, the power of attorney states: "[t]he land of which I am a tenant in common owner ... is described in Exhibit A hereto (the "Property"), along with a description of my present ownership interest." (R. 3452) Ockey's "present ownership interest" is described on Exhibit A as a beneficiary interest under the Trusts. (R. 3456)

others, each as "beneficiary," directed "the trustee[s] of the Trust[s] to convey the entire undivided [Ranch] ownership interest held by the Trust[s] ...." *Id.* Pursuant to the directive, Ockey's trustees purported to convey his Ranch interest to IMA Ltd. in January 1994. By all appearances, the result of the conveyance was Ockey no longer had a beneficial interest in the Ranch property but instead a future personal property interest in a limit partnership.

The important point for present purposes is that, even if Ockey had been told in 1994 that the family acquired the Jackson and Rothwell stock, he would have no reason to know that a portion of the stock should have been distributed to him. At best, he would have reason to believe that his trustees acquired a portion to be held in trust.

Finally, the issue must be viewed in light of the fact that, prior to the conversion, Ockey signed a power of attorney appointing Lehmer, his first cousin and a practicing attorney, to look after his interests, whatever they might be. Under these circumstances, if Ockey was less attentive than the law demands (a conclusion not supported by the record), his neglect does not excuse defendants' intentional misconduct.

B. Defendants Concealed the Events Relevant to the Conversion Claim.

Like the analysis regarding Ockey's knowledge, Defendants avoid the germane concealment analysis by focusing on who owned IMAI stock rather than focusing on the July 1, 1993 conversion events. For example, Lehmer begins this point of his brief as follows: "Mr. Ockey's attempt to invoke the concealment version of the discovery rule also fails because there is no evidence Mr. Lehmer, or anyone else, concealed the fact family members other than Mr. Ockey owned the IMAI stock." *Lehmer's Opening Brief*

at 44. Ockey has never claimed anyone concealed the fact family members own stock. The point is irrelevant.

Lehmer understands that the relevant question is whether the July 1, 1993 events were concealed. Thus, he asserts that he, "along with John Condas and Nick Condas, circulated minutes of a July 1, 1993 IMAI shareholders meeting describing precisely what they had done." *Id.* The record contains no evidence that the minutes were "circulated." In fact, all of the evidence is to the contrary. In his opening brief, Ockey detailed the trial testimony of every family member who addressed the issue.[13] They unanimously testified they knew nothing about the events of July 1, 1993. Defendants do not address their testimony or any other aspect of Ockey's argument on the concealment version of the discovery rule. The rule should have operated to toll the conversion statute of limitations and the trial court's contrary conclusion was error.

VI. LEHMER'S FAILURE TO MARSHAL THE EVIDENCE RELEVANT TO HIS CROSS-APPEAL MANDATES DISMISSAL

The trial court's finding that Ockey had no adequate remedy at law is the subject of Lehmer's cross-appeal.[14] But Lehmer completely fails to marshal evidence in support of the finding. That failure alone is dispositive of Lehmer's cross-appeal. *See Chen v. Stewart,* 2004 UT 82, 100 P.3d 1177.

In an effort to avoid the marshaling requirement, Lehmer now characterizes the issue as whether "Mr. Ockey first had ... to show a remedy at law was unavailable before

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[13] See Ockey's Opening Brief at 37-39.

[14] IMAI filed its own cross-appeal on the same issue but does not address it.

the equitable remedy [he] sought was appropriate." *Lehmer's Opening Brief* at 36.[15] However characterized, the issue has a factual component. The question is whether the trial court correctly found that the IMAI stock could not be valued with the requisite degree of certainty. The evidence supporting the finding came from several sources. For example, Lehmer, who owns approximately 23.5% of the company, testified there is no market for the stock, he does not know its value and, at least indirectly, the value of the stock depends on how well the underlying real estate development performs. (TT 106)

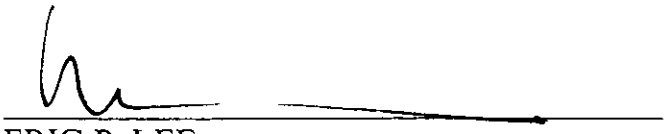
Alexandra Ockey owns 13.26% of the IMAI stock. (TT 520-21) She could not put a value on it, but agreed that its value was dependent on the success of the development efforts. (TT 521) Keith Kelly, one of the developer's principals, testified that the amount IMAI would receive as its share of the development proceeds "will depend on a couple of different factors, both of which at this point are uncertain, ultimate revenue and ultimate costs...." (TT 795) Mr. Kelly identified many variables which will affect revenue and costs in unknown ways. (TT 795-806) Lehmer argues Ockey "presented no evidence

[15] In his Docketing Statement, Lehmer correctly characterized the issue as a question of fact.

that the IMAI stock could not be valued...," but he ignores the record.[16] *Id.* at 37. The Court should affirm the trial court's finding on the lack of a legal remedy.

Dated this 5th day of April 2007.

CLYDE SNOW SESSIONS & SWENSON



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[16] Lehmer also speculates, without support, that Ockey "chose to waive his right to damages not because they were impossible to calculate, but because the calculation did not result in a large damage award." *Lehmer's Opening Brief* at 37. The truth is Ockey retained and designated an experienced and recognized expert to address the valuation issue. The expert determined that the stock could not be valued with any reasonable degree of certainty, mandating the equitable remedy election. (TT 1021)

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE SCOTT OCKEY were mailed, postage prepaid, on the 5th day of April 2007 to the following:

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