

1 KASSANDRA MCQUILLEN, SBN 227914
ATTORNEY AT LAW
2 211 S. Curry Street
Tehachapi, CA 93561
3 Telephone: (661) 823-9454
Facsimile: (661) 823-9492

4 Attorney for Plaintiffs
5 DONALD PESTELL, HANNA PESTELL,
6 PESTELL INTERNATIONAL

FILED
SUPERIOR COURT, METROPOLITAN DIVISION
COUNTY OF KERN

AUG - 6 2010

TERRY McNALLY, CLERK
BY _____ DEPUTY

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF KERN, METROPOLITAN DIVISION – UNLIMITED CIVIL**

10 DONALD PESTELL; HANNA PESTELL;
11 and PESTELL INTERNATIONAL MINING)
AND EXPLORATION, LTD., a Canadian)
12 Corporation,)

13 Plaintiffs,)

14 vs.)

15 AMERICAN CARRIAGE, INC.; MARK)
16 FECHNER; JOCELYN FECHNER; MARK)
AND JOCELYN FECHNER TRUST, and)
17 DOES 1-20, inclusive,)

18 Defendants.)

19 _____)
20 AMERICAN CARRIAGE, INC.; MARK)
21 FECHNER; JOCELYN FECHNER; MARK)
AND JOCELYN FECHNER TRUST,)

22 Cross-Complainants,)

23 vs.)
24)

25 DONALD PESTELL; HANNA PESTELL;)
26 and PESTELL INTERNATIONAL MINING)
AND EXPLORATION, LTD, a Canadian)
27 company; and ROES 1-20, inclusive,)

28 Cross-Defendants.)

Case No.: S-1500-CV-264437 WDP

STATEMENT OF DECISION

Honorable William D. Palmer

Trial Date: December 14, 2009

Time: 9:00 a.m.

Dept.: 15

1 The above-entitled cause came on regularly for trial on December 14, 2009, in Department 15 of
2 the above-entitled court, the Honorable William D. Palmer, Judge, presiding without a jury, and
3 was tried on that date and on December 15 ,17, and 18, 2009. Kassandra McQuillen appeared as
4 counsel for plaintiffs and Robert H. Brumfield, III, of Kronick, Moskovitz, Tiedemann & Girard
5 appeared as counsel for all named defendants.

6
7 Oral and documentary evidence was introduced on behalf of the respective parties and the cause
8 was argued at trial, extensive post-trial briefing on legal and factual matters was conducted
9 between December 18, 2009 and January 21, 2010, and the matter was submitted for decision.
10 On March 19, 2010 the parties submitted a stipulation to amend the original complaint to add an
11 allegation of waiver of conditions of the loan agreement based upon facts ascertained at trial. The
12 Court, in response to the request of Defendants, makes the following Statement of Decision:

13
14 **1. FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

15 With regard to the issue of the first cause of action for breach of contract relating to the
16 first loan from plaintiffs Donald and Hanna Pestell to defendant American Carriage, Inc. in the
17 amount of \$545,000, the Court's decision is that defendants breached the contract by not using
18 the loan monies for their intended purpose. This finding is based on the testimony of defendants
19 Mark Fechner and Jocelyn Fechner at trial as well as documentary evidence produced at trial.

20 All parties to the action stipulated, and both plaintiff Donald Pestell and defendants Mark
21 Fechner and Jocelyn Fechner testified at trial, and Trial Exhibit 03 and 04 reflect, that the loan in
22 the amount of \$545,000 was a loan to be used specifically for the completion of the Pestells'
23 motor coach and not to be used for any other purpose. Defendant Jocelyn Fechner testified at
24 trial, and evidence presented at trial supported a finding that the loan monies were used for
25 business purposes and for purposes other than completion of the Pestells' motor coach including
26 payment of an equity line of credit on a property owned by Defendant Mark and Jocelyn Fechner
27 Family Trust, payment for personal vacations and expenses of defendants Mark Fechner and
28

1 Jocelyn Fechner, and payment for business expenses relating to the Fechners' other business
2 ventures.

3 **2. WAIVER OF CONDITIONS OF CONTRACT**

4 With regard to the issue of the first cause of action for breach of contract relating to the
5 first loan from plaintiffs Donald and Hanna Pestell to defendant American Carriage, Inc. in the
6 amount of \$545,000, the Court's decision is that the stated conditions for repayment, sale of
7 American Carriage, Inc. and its assets, or sales of future coaches, were waived pursuant to
8 California Civil Code § 1698. This decision is based on testimony at trial by defendants Mark
9 Fechner and Jocelyn Fechner that the assets of American Carriage, Inc. were sold and proceeds
10 from the sale were not used to repay the subject loans. Evidence at trial showed that the assets
11 were sold to Mark Fechner for use in his new business servicing motor coaches. Mark Fechner
12 also testified to using the American Carriage, Inc. customer list to solicit business for his new
13 endeavor without permission from the corporation.

14 The decision is also based on testimony at trial by defendant Mark Fechner that he had
15 been approached as President of American Carriage, Inc. in the past year about new coach orders
16 but declined them on the basis that American Carriage, Inc. was no longer able to build new
17 coaches. Based on Mr. Fechner's trial testimony the court finds that American Carriage, Inc.,
18 through the conduct of its officers and owners, has rendered itself unable to perform either
19 condition upon which repayment was contingent thereby waiving those conditions for repayment
20 through that conduct. To allow a denial of either of the conditions, based on testimony and
21 evidence presented at trial, would be inequitable.

22
23 **3. ESTOPPEL REGARDING CONDITIONS OF CONTRACT**

24 With regard to the issue of the first cause of action for breach of contract relating to the
25 first loan from plaintiffs Donald and Hanna Pestell to defendant American Carriage, Inc. in the
26 amount of \$545,000, the Court's decision is that defendant American Carriage, Inc. should be
27 estopped from relying on the conditions for repayment of the loans pursuant to California Civil
28 Code § 1698.

1 This decision is based on testimony at trial by defendants Mark Fechner and Jocelyn
2 Fechner that the assets of American Carriage, Inc. were sold to Mark Fechner dba Motorcoach
3 Services and proceeds from the sale were not used to repay the subject loans. Testimony at trial
4 by defendant Mark Fechner also showed that he had been approached as President of American
5 Carriage, Inc. in the past year about new coach orders but declined them on the basis that
6 American Carriage, Inc. was no longer able to build new coaches.

7 Based on the evidence produced at trial, the Court finds that American Carriage, Inc.,
8 through the actions of its owners and officers, has rendered itself unable to perform either
9 condition upon which repayment was contingent and should thereby be estopped from denying
10 there has been a waiver of those conditions based on those actions. To allow a denial of the
11 either of conditions, based on testimony and evidence presented at trial, would be inequitable.

12
13 **4. SECOND CAUSE OF ACTION FOR THE COMMON COUNT OF MONEY**
14 **LENT.**

15 With regard to the issue of the second cause of action for the common count of money
16 lent relating to the second loan from plaintiff Pestell International Mining and Exploration, Ltd.
17 to defendant American Carriage, Inc. in the amount of \$425,000, the court's decision is that
18 Defendants received the money and have not repaid the amount and therefore owe the full
19 amount.

20 This decision is based on the stipulated facts, Trial Exhibit 13, trial testimony of Donald
21 Pestell and Mark Fechner wherein it was established by both witnesses that Mr. Pestell did not
22 agree that the \$425,000 constituting the second loan was part of the first loan. All parties testified
23 that there was no written loan agreement for the \$425,000 loan and testified that the money was
24 intended as a loan with the expectation of repayment. Based on this testimony, there was not a
25 preponderance of the evidence that there were conditions for repayment of the second loan and
26 therefore the court finds that the obligation of the second loan attaching conditions does not
27 require analysis of the waiver or estoppel issues.
28

1
2 **5. PREJUDGMENT INTEREST**

3 Based on the above analysis, evidence presented at trial, and principles of equity, the
4 Court's decision is that American Carriage, Inc. owes \$545,000 to Donald and Hanna Pestell
5 under the first loan agreement and American Carriage, Inc., owes \$425,000 to Pestell
6 International Mining & Exploration, Ltd., under the second loan in the present action. Evidence
7 at trial showed American Carriage, Inc. was closed sometime in March 2008 and has not since
8 resumed operations. Mark Fechner, testifying as the current president of American Carriage,
9 Inc., stated that American Carriage, Inc. had no plans to resume its business operations in the
10 future.

11 Both loans became due and payable upon the closure of American Carriage, Inc. which
12 occurred no later than April 1, 2008 and therefore the Court finds that prejudgment interest at the
13 legal rate for both loans began to accrue as of April 1, 2008.

14
15 **6. ALTER EGO LIABILITY AND UNITY OF INTEREST**

16 The Court finds that the repayment obligation of both loans in the first instance is that of
17 American Carriage, Inc., and that the evidence presented at trial clearly supports a finding that
18 American Carriage, Inc. was the alter ego of all remaining defendants.

19 The Court cites *Associated Vendors, Inc. v. Oakland Meat Co.* 210 Cal.App.2d 825 as
20 instructive on the issue of alter ego liability. The Court refers particularly to page 837 of
21 *Associated Vendors*, supra, wherein the Court stated there are two primary considerations in
22 applying the alter ego theory: "(1) That there be such a unity of interest and ownership that the
23 separate personalities of the corporation and the individual no longer exist; and (2) that, if the
24 acts are treated as those of the corporation alone, an inequitable result will follow."

25 Testimony at trial of defendant Jocelyn Fechner, as shareholder and financial officer of
26 American Carriage, Inc., clearly indicates a unity of interest and ownership between American
27 Carriage, Inc. and all remaining Defendants such that to ignore that unity of interest would be
28 inequitable to Plaintiffs under the circumstances of this case. The evidence clearly establishes

1 that Defendants Mark and Jocelyn Fechner dealt with corporate, individual, and trust assets
2 without regard to the fact that there were at least three separate legal entities involved (Mark and
3 Jocelyn Fechner are considered as a community entity in this analysis).

4 Jocelyn Fechner testified that she made all financial decisions for American Carriage,
5 Inc. and authorized herself to divert loan monies from the corporation to her Family Trust
6 because American Carriage, Inc. did not need the loan installment. Mrs. Fechner further testified
7 that she instructed a bank, as Treasurer of American Carriage, Inc. and trustee of her family trust,
8 to deposit corporate funds directly into her family trust account rather than into the corporate
9 bank account. This is just one example of the unity of interest evidenced at trial.

10 Evidence supporting this unity of interest includes the diversion of an entire loan
11 installment in the amount of \$140,000 from the corporation to the Mark and Jocelyn Fechner
12 Family Trust by Jocelyn Fechner without authorization by American Carriage, Inc. or Plaintiffs,
13 for the use by the Fechners' Family Trust; use of corporate funds for personal expenses of Mark
14 and Jocelyn Fechner including personal gifts, family vacations, issuance of unearned shareholder
15 dividends, incorporation and advertising expenses for a new business ventures of the Fechners,
16 payment of undocumented personal loans of shareholders, and repeated use of corporate assets
17 for personal gain without corporate authorization or legal basis for such use and during the time
18 the loans were allegedly needed to keep American Carriage, Inc. operating in order to complete
19 the Pestells' coach. The Court finds this use of corporate funds and assets was done in bad faith,
20 without regard for the pre-existing creditors of American Carriage, Inc., and for the benefit of the
21 Fechners as individuals and their Family Trust, of which Mark and Jocelyn Fechner are the sole
22 trustees.

23 The *Associated Court* at page 838 also discusses the relationship between actual fraud
24 and a finding of some form of bad faith in a trial court's necessary analysis of the alter ego issue.
25 The Court in the present case finds that Defendants' actions to insure the individuals' and Family
26 Trust's own economic well being in the face of pending business failure for the corporation,
27 supports a finding of adequate "bad faith" to support an application of the alter ego doctrine.
28 Evidence and testimony of Mark Fechner and Jocelyn Fechner at trial supports a finding that

1 both Mark Fechner and Jocelyn Fechner routinely took dividends or distributions or other assets
2 from the corporation during the time the corporation apparently could not meet its liabilities, in
3 years 2007 and 2008.

4 The Court finds, based on the concurring testimony of defense's expert witness, Jerry
5 Randall, and plaintiffs' expert witness, Kenneth Vaughan, that American Carriage, Inc. did not
6 have a positive retained earnings in 2007 or 2008, and could not meet its liabilities in 2007 and
7 2008, and that any distribution of corporate assets in the form of dividends in the years 2007 and
8 2008 violated California Corporations Code § 500, thus creating liability for the individual
9 Defendant directors Mark and Jocelyn Fechner consistent with California Corporations Code §
10 316.

11

12 **7. INEQUITABLE RESULT IF UNITY OF INTEREST IGNORED**

13 The Court finds that to ignore the unity of interest between American Carriage, Inc. and
14 all remaining defendants would lead to an inequitable result because evidence at trial clearly
15 indicates that Jocelyn Fechner, as treasurer of American Carriage, Inc., frequently made financial
16 decisions involving the corporation's assets and use of the Pestell loan monies that resulted in
17 personal financial gain to herself, her husband Mark Fechner, and their Family Trust to the
18 detriment of Plaintiffs during the time of the Pestell loans.

19 Evidence at trial showed the intent of the Pestell loans was only for the completion of
20 their motor coach but that Jocelyn Fechner used those loan monies for personal gain for herself
21 and her family members. As such, to ignore the commingling of corporate monies and assets
22 with those of the Fechners and their Family Trust would result in a windfall to the Fechners and
23 their Family Trust derived from the loan monies received by American Carriage, Inc. from
24 Plaintiffs and therefore an inequitable result.

25

26 **8. FRAUDULANT MISREPRESENTATION**

27 With regard to the issue of the third cause of action for fraudulent misrepresentation, the
28 Court finds that the Defendants' actions, although apparently based upon a misunderstanding of

1 the law, and the relationship between a small corporation and its owner operators, does not
2 support a finding of the required state of mind for fraud.

3 Based upon the evidence presented at trial the Court finds that Defendants apparently
4 disregarded the separate entities composing their business entities composing their business
5 operations with, at least tacit, approval of their professional advisors. None of those advisors
6 testified at trial and no evidence of such approval was produced at trial.

7 Although the former referred to facts do not justify ignoring an application of the alter
8 ego doctrine, they do dictate a conclusion that actual fraud was not committed. The Court finds
9 that Defendants exercised extremely poor decision making and bad faith but not to the level of
10 intent required to constitute fraudulent misrepresentation.

11
12 **9. PUNITIVE DAMAGES DENIED**

13 The Court does not find that punitive damages are appropriate in this case because the
14 case arises out of a contract and California Civil Code § 3294 does not authorize such an award
15 nor do the facts in this case support such an award and Plaintiffs' inappropriate reference to the
16 assets of the Fechners is disregarded in rendering the Court's decision.

17
18 **10. COUNTERCLAIM**

19 The Court finds that Defendants' counterclaim that the monies loaned from Plaintiffs to
20 American Carriage, Inc. were additional consideration to the original coach agreement is without
21 merit and denied based upon the stipulation of all parties that all monies were loans, testimony of
22 all parties to the action to the same, and evidence presented at trial. No argument was made that
23 the monies were either an investment or additional consideration nor was any evidence presented
24 to support such claims.

25
26 **12. AMOUNT AWARDED**

1 The amount awarded as damages for the first loan totaling \$545,000 was determined by
2 evidence presented at trial in the form of testimony, checks, and acknowledgments of receipts of
3 loan monies totaling \$545,000.

4 The amount awarded as damages for the second loan in the amount of \$425,000 was also
5 based upon evidence presented at trial including a check from Pestell International Mining &
6 Exploration, Ltd., to American Carriage, Inc. and an acknowledgment of receipt of loan for that
7 amount from American Carriage, Inc.

8
9 **13. OFFSET OF MONIES DUE ON ORIGINAL COACH AGREEMENT**

10 The Court finds that the original motor coach agreement was not in dispute in the present
11 case and that the monies loaned from Plaintiffs to American Carriage, Inc. were part of a
12 separate contract and shall be treated separately.

13 Mark Fechner and Donald Pestell each testified at trial that neither American Carriage,
14 Inc., nor Donald or Hanna Pestell ever agreed that the loan monies that are the subject matter of
15 this case were to be considered as an offset or credit to the purchase price under the original
16 coach agreement.

17 The Court also finds no evidence was presented at trial indicating that American
18 Carriage, Inc. ever attempted to collect the final payment on the motor coach agreement in the
19 amount of \$144,000 or negotiate it as an offset for loan amounts. Evidence was presented at trial
20 regarding the condition of the coach upon delivery and costs of repair and completion of the
21 coach which may actually offset the final coach payment but such evidence has been disregarded
22 because the motor coach agreement was not at issue in the present case.

23 As such, the Court finds that evidence relating to the delivery or payment terms under the
24 original motor coach agreement should be disregarded. The Court was not asked to make a
25 determination relating to the original motor coach agreement at trial and will not do so now. If
26 American Carriage, Inc. believes it has a claim for \$144,000 due under a separate contract not at
27 issue in the present case, American Carriage, Inc. should pursue remedies pursuant to that
28 contract.

1
2 Judgment is hereby ordered to be entered as follows:
3

4 1. On the first cause of action for breach of contract judgment is entered in favor of Plaintiffs
5 Donald Pestell and Hanna Pestell in the amount of \$545,000 plus prejudgment interest at the
6 legal rate from April 1, 2008 against all named defendants, American Carriage, Inc., Mark
7 Fechner, Jocelyn Fechner, and the Mark and Jocelyn Fechner Family Trust.

8 2. On the second cause of action for the common count of money lent judgment is entered in
9 favor of Plaintiff Pestell International Mining & Exploration, Ltd. in the amount of \$425,000
10 plus prejudgment interest at the legal rate from April 1, 2008 against all named defendants,
11 American Carriage, Inc., Mark Fechner, Jocelyn Fechner, and the Mark and Jocelyn Fechner
12 Family Trust.

13 3. On the third cause of action for fraudulent misrepresentation, on both counts, plaintiffs shall
14 take nothing and judgment is entered in favor of defendants.

15 4. On the fourth cause of action for promise without intent to perform, plaintiffs shall take
16 nothing and judgment is entered in favor of defendants.

17 5. On the Cross-Complaint, cross-complainants shall take nothing and judgment is entered in
18 favor of cross-defendants.

19 6. The Court denies an award of attorney fees for any party.

20 7. Plaintiffs shall recover costs in ^{an}the amount of \$TO BE DETERMINED in post judgment
21 8. The court denies an award of punitive damages. proceedings.

22 AUG - 6 2010

22 WILLIAM D PALMER

23 Dated: _____

23 _____
24 Judge of the Superior Court