

FILED _____

AT _____ O'clock _____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 JERRY ALLAN HILL,)
)
)
 Defendant.)
)
 _____)

Case No. **CRF 2008 26363**

**MEMORANDUM DECISION AND
ORDER ON MOTION FOR
RESTITUTION**

I. PROCEDURAL HISTORY AND BACKGROUND.

Defendant, Jerry A. Hill, (Hill) was charged in a criminal complaint with three felony counts of Grand Theft on November 25, 2008. Each of the three counts covered a certain and different period of time, and charged that Hill had taken money from a local real estate business known as Jordan, Hill and Hall, Inc., d/b/a GMAC Real Estate Northwest (JHH). Information, p. 2. In JHH, Hill was a business partner with Brad Jordan and Patrick Hall.

Following May 15, 2009, preliminary hearing in this case, Magistrate Judge Penny Friedlander announced her decision on the record on May 22, 2009, binding Hill over to District Court to stand trial, and on May 27, 2009, the Information in this case was filed. After several continuances by Hill (the preliminary hearing was continued three times and the trial was continued four times, all on Hill’s motion, see Memorandum Decision and

Order Denying Defendant's Motion for New Trial, pp. 2-3), a jury trial began on May 10, 2010. Four days later, on May 13, 2010, Hill was found guilty of all three counts of Grand Theft. Sentencing was set for July 27, 2010. On July 27, 2010, Hill moved to continue the hearing, which was granted. On August 24, 2010, Hill's sentencing hearing began, but was continued, at Hill's request, to September 28, 2010. The day before the September 28, 2010, sentencing hearing, Hill moved to continue his sentencing, which was denied. At the conclusion of the three-hour sentencing hearing, this Court sentenced Hill to three years fixed followed by three years indeterminate on each of the three counts, with all three sentences to run concurrently. Hill was sentenced to a retained jurisdiction.

On October 12, 2010, Hill, through new private counsel (at all previous times Hill was represented by the Kootenai County Public Defender), filed a Motion for a New Trial. Oral argument on the Motion for a New Trial was heard on February 15, 2011, and on February 22, 2011, this Court filed its Memorandum Decision and Order Denying Defendant's Motion for a New Trial. On April 6, 2011, Hill had his jurisdictional review hearing, at which time this Court suspended Hill's prison sentence and placed him on supervised probation for fourteen years.

Mention of these continuances is pertinent as each continuance granted was to allow Hill more time to study the State's evidence and to develop his own evidence. At all times, this has been a document-intensive case and a case involving forensic accounting. Even with these continuances, Hill has not been able to develop credible evidence that it was he that was owed money by JHH, not the other way around as found by the jury.

Hill's defense at trial was as follows: Hill could not deny that he had used company credit cards and company checks for Hill's own personal expenses. However, Hill justified those actions by claiming JHH owed him several hundred thousand dollars, and Hill was

simply offsetting that by the amounts he surreptitiously took from the business. Hill's claim at trial was that even subtracting out the approximately \$300,000.00 the State proved Hill took from the business, Hill was still owed thousands of dollars by JHH.

Obviously, that defense was not believed by the twelve jurors in Hill's criminal trial.

Similarly, the gestalt of Hill's Motion for New Trial was based on Hill's theory that JHH actually owed Hill several thousand dollars, and that now, with the benefit of private counsel (as opposed to the public defender), and with the benefit of the Affidavit of Suzanne S. Metzger (filed January 26, 2011, in support of Hill's Motion for a New Trial), Hill could now prove that JHH actually owed Hill several thousand dollars. The proof presented by Hill in support of his Motion for a New Trial was not believed by this Court. On February 22, 2011, this Court entered its twenty-two page Memorandum Decision and Order Denying Defendant's Motion for New Trial.

That same unsuccessful theory used at trial by Hill and in Motion for New Trial by Hill is now used by Hill in his defense to the amount sought as restitution by the State for the victims of Hill's crimes. Restitution Memorandum, pp. 1-4.

Following the guilty verdict, the State filed a Motion for Restitution on June 4, 2010, pursuant to I.C. 19-5304. In that Motion for Restitution, the State sought \$177,031.19 for each of the two victims, Brad Jordan and Patrick Hall, or \$354,062.37 collectively. When Hill was sentenced on September 28, 2010, this Court ordered that the restitution issue be left open for ninety days after Hill's jurisdictional review hearing.

The hearing on the State's Motion for Restitution was set for June 14, 2011, and was heard by this Court on that date. At the close of evidence which occurred on two days, June 14, 2011, and June 16, 2011, the parties agreed to submit closing argument by brief to the Court.

On June 23, 2011, Hill filed his Restitution Memorandum. On June 23, 2011, the State filed an Amended Memorandum of Restitution, seeking \$145,384.15 from Hill for each of the two victims, Brad Jordan and Patrick Hall, or \$290,768.30 collectively. On June 24, 2011, the State filed its Brief in Support of Amended Memorandum of Restitution. On June 24, 2011, Hill submitted a Restitution Memorandum.

II. STANDARD OF REVIEW.

In considering a motion for restitution in a criminal case, courts of criminal jurisdiction normally do not have the authority to award restitution to a crime victim without a statute that allows such a provision. *State v. Gonzales*, 144 Idaho 775, 778, 171 P.3d 266, 269 (Ct.App. 2007). The Court may order a defendant found guilty of any crime which caused an economic loss to the victim to pay restitution. I.C. § 19-5304(2). Economic loss:

...includes, but is not limited to, the value of property taken, destroyed, broken or otherwise harmed, lost wages and direct out-of-pocket losses or expenses such as medical expenses resulting from the criminal conduct, but does not include less tangible damage such as pain and suffering, wrongful death or emotional distress.

I.C. § 19-5304(a); *Gonzales*, 144 Idaho 775, 778, 171 P.3d 266, 269. The victim of the crime should receive restitution only for the economic loss which was *actually* suffered. I.C. § 19-5304(2). In determining whether an order of restitution is proper, and in determining the amount of restitution, the Court should consider the factors set forth in I.C. § 19-5304(7). These factors include, “the amount of economic loss [to the victim], the financial resources needs and earning ability of the defendant, and such other factors as the court deems appropriate.” I.C. § 19-5304(7). Although these factors provide guidelines for the court, the ultimate decision whether and to what extent to which restitution should be granted is within the discretion of the trial court. *State v. Richmond*,

137 Idaho 35, 37, 43 P.3d 794, 796 (Ct.App 2002). The determination of an appropriate restitution amount to be awarded is left to the sound discretion of the district court. *State v. Lombard*, 149 Idaho 819, 822, 242 P.3d 189, 192 (Ct.App. 2010). An award of restitution may be overturned, upon a showing that the trial court abused its discretion in awarding the restitution. *State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct.App. 1989). In determining whether a trial court's discretion was proper, the reviewing court must look at whether the trial court: 1) correctly identified the issue as one involving the exercise of discretion, 2) acted within the boundaries of the court's discretion and was consistent with any legal standards that applied to the choices it had, and 3) reached its decision by an exercise of reason. *State v. Powell*, 125 Idaho 889, 891, 876 P.2d 587, 589 (1994).

When determining restitution, "economic loss shall be based upon the preponderance of evidence submitted to the court..." I.C. § 19-5304(6). Further, the amount of restitution ordered should be equal to the amount of economic loss suffered as a result of the crime. I.C. § 19-5304(14). A defendant's immediate inability to pay, considered alone, is not a reason to refuse ordering restitution. I.C. § 19-5304(7). Although the financial situation of the defendant may be a factor to be considered, a lack of resources is not dispositive of whether restitution should be ordered. *Id.* Likewise, the court may still order a defendant who has filed bankruptcy to pay restitution to the victims of his crimes. *State v. Hamilton*, 129 Idaho 938, 943, 935 P.2d 201, 206 (Ct.App. 1997).

III. ANALYSIS.

A. The Arguments of the Parties.

At the June 14, 2011, and June 16, 2011, restitution hearing, both the State and Hill presented extensive evidence in regard to financial statements of the business Jordan, Hill & Hall (JHH).

Curtis Clark, a certified public accountant with 33 years of experience, testified on behalf of the State. *Id.* Clark stated that he was hired at the time by JHH to prepare their corporate tax returns for 2006. *Id.* Clark first contacted Hill on April 25, 2007, informing him that he was conducting tax preparations for JHH and that upon review, the accounting schedule reflected Hill having charged a total of \$324,104.61 in expenses to JHH. Plaintiff's Exhibit 1.

Hill countered the State's expert with Susanne Metzger, a certified public accountant. Metzger testified (as a fact witness) stating that while working for the accounting firm of Magnuson & McHugh, she had been involved in the bookkeeping at JHH. Affidavit of Suzanne S. Metzger, pp. 4-5, ¶¶ 7-8. Metzger went on to testify that in her opinion, after reviewing the account schedules, she believed that Hill was actually owed in excess of \$168,000.00 by JHH. *Id.* at 14.

The State argues in its Brief in Support of Amended Memorandum of Restitution that \$145,384.15 be awarded to both Brad Jordan and Patrick Hall, the other two partners in JHH. Amended Memorandum of Restitution, p. 5. Hill argues any restitution which may be owed to the partners should be paid to JHH, thereby avoiding Jordan and Hall from being unjustly enriched. Restitution Memorandum, p. 2. No legal authority was given in support of this argument. However, if restitution was paid back to JHH, potentially this would allow Hill access to the restitution funds as well. Because the loss caused by Hill's theft affected the two other partners, Hall and Jordan, and benefitted only Hill, restitution from the theft should not benefit Hill. Restitution should be awarded to only the victims of the crime who suffered economic loss. *State v. Olpin*, 140 Idaho 377, 378, 93 P.3d 708, 709 (Ct.App. 2004). This rule eliminates the argument that restitution should be paid to the partnership as a whole, which includes Hill as a partner.

Hill goes on to argue that any restitution which may be due would not include any amount owed by him prior to his criminal charges. Restitution Memorandum, p. 2. This would include the \$41,764.85 allegedly owed by Hill as of December 31, 2003. *Id* at 3. The State concedes this point and agrees that the \$41,764.85 debt was acquired prior to the criminal charges. Brief in Support of Amended Memorandum of Restitution, p. 5. Next, Hill argues against Clark's credibility, suggesting that he has a private interest in testifying for the state because his partner was a creditor of JHH. Restitution Memorandum, p. 2. The State bases its argument on the relative reliability and credibility of the expert witnesses testifying on behalf of both parties. Brief in Support of Amended Memorandum of Restitution, p. 3. The State notes throughout trial, Clark never took a position of whether Hill intentionally committed theft or if this was just matter of "bad bookkeeping." *Id*. The State argues that Metzger, on the other hand, immediately formed the opinion that Hill was not guilty of committing a criminal offense and began her investigation with this opinion in place. *Id*. In addition, the State points out that Metzger personally attacked Clark's experience and work in accounting schedules. *Id*. at 4.

Hill also states that the "Delay" loan was a corporate loan obligation and not a personal obligation of Hill and although it is shown as a charge against Hill, no funds were actually expended by JHH. Restitution Memorandum, p. 2. Likewise, Hill suggests that the Maverick and Mullan properties were purchased for the company's benefit and the dispute over the property did not result in any criminal charges; therefore, restitution regarding the properties would be barred by the restitution statute § I.C. 19-5304. *Id*.

The State argues that Metzger wrongfully credited Hill's account with the Maverick and Mullan mortgage payments, even though the property was never transferred to JHH as a company interest. Brief in Support of Amended Memorandum of Restitution, p. 3.

Additionally, the State notes Metzger recorded many of the number “eights” as number “sixes”, wrongly credited Hill for commissions that were not due, and duplicated a \$65,361.51 entry which was never confirmed, all of which made her accounting schedule inaccurate. *Id.*

In circumstances where the amount of restitution is disputed, the award should be based upon the preponderance of evidence that is brought before the court by the parties, victim or presentence investigator. *Lombard*, 149 Idaho 819, 822, 242 P.3d 189, 192. Here, the amount of evidence and documents that were produced by Clark in response to questioning by both parties exceeds that which was produced by Metzger when she was being questioned regarding the financial schedules.

Lastly, Hill argues that the interest charges of \$21,529.24 are inapplicable to a restitution amount because the rate was arbitrarily set by Jordan and Hall at a time prior to his criminal charges. Restitution Memorandum, p. 2. With regard to the interest, the State suggests that the 15% interest rate was based on what Jordan and Hall were paying on the debt while not being reimbursed by Hill, but that if the court finds this rate unreasonable, the State asks that the current rate of 5.375% be used. Brief in Support of Amended Memorandum of Restitution, p. 3. In conclusion, Hill claims that no restitution is owed based on the deductions of the figures he stated. Restitution Memorandum, p. 4.

However, Hill produced no evidence besides Metzger’s testimony and financial schedules which Metzger prepared to show that Hill was not responsible for restitution to the victims. Clark’s testimony was more credible than Metzger’s and Clark’s testimony was superior to Metzger’s both qualitatively and quantitatively. Clark’s opinion and calculations were supported by documentation in the record. Metzger’s opinion was not. Because

Jordan and Hall were the victims of economic loss caused by the crimes committed by Hill, this Court exercises its discretion and orders Hill to pay restitution to his victims.

B. The Amount of Restitution Sought.

Restitution was initially sought in the amount of \$177,031.19 each for Brad Jordan and Patrick Hall, or \$354,062.38 collectively. Memorandum of Restitution filed June 4, 2010. Hill claims this is the amount that is listed in Plaintiff's Exhibit 5. Restitution Memorandum, p. 1. That amount was changed after the restitution hearing to \$145,384.15 each for Brad Jordan and Patrick Hall, or \$290,768.30 collectively. Amended Memorandum of Restitution, p. 1. The difference in the collective amounts is \$62,194.08. Part of that difference is explained by fact that originally the State was requesting restitution for occurrences *before* the January 1, 2004 charging date. The State now concedes this is improper, and "...because the amount taken by the Defendant by the end of 2003, \$41,764.85, falls outside the charging document, that amount should not be awarded to the victims in terms of restitution and should be subtracted from Mr. Clark's total amount of \$332,553.14 leaving \$290,768.29 as a total before an interest rate is assigned and calculated." Brief in Support of Amended Memorandum of Restitution, p. 5. Thus, the State is left with the maximum amount requested of \$145,384.15 each for Brad Jordan and Patrick Hall, or \$290,768.30 collectively. The next issue is whether the State has proven that amount by the preponderance of the evidence.

C. The Amount of Restitution Proven and Hill's Claim that he is Entitled to an Offset of Amounts Owed to Hill by JHH.

As mentioned above, Hill's theory all along has been JHH owed him money, and all Hill was doing was recouping those amounts the business owed him. The only problem is, Hill has never proved this theory. Hill has never proven as a fact that the business owed him money. Even if Hill had proven such, it would not have been a defense in his criminal

case. Idaho Code § 18-2406(1) makes that clear: “It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.” See *State v. Cocharane*, 51 Idaho 521, 6 P.2d 489 (1931). See also, I.C. § 18-2403, ICJI 540 and 551. However, an offset might be relevant in the restitution hearing (I.C. § 18-2406(3)), but Hill again failed to prove the business owed him money at the restitution hearing.

Hill’s biggest allies in mounting this defense (that the business owed him money) were: 1) the sloppy accounting practices employed by JHH, and 2) the fact that Hill was the one of the three principals to oversee financial matters of the business. There is no doubt the business and accounting practices used by the partners in JHH were not good. But Hill was responsible for many of those practices, and those sloppy business practices simply allowed Hill to easily hide his regular thefts from his partners who were not as involved in the financial matters of the business.

But at the jury trial, the jury did not believe Hill. Hill’s testimony was inconsistent. For example, Hill purchased with the JHH credit card, Hill purchased an entire box of seats at the Spokane Arena for Spokane Chiefs Hockey games. Hill then testified that he “intended to pay that back”, which would be expected if it were a personal purchase, but there was no documentation that supported that “intent” to pay the corporation back. There was only Hill’s uncorroborated claim that he told someone to put it down as an account receivable. Perhaps realizing the weakness of that position, Hill next testified he took JHH employees Linda Yacano and two of their top producing agents to a game, and the box was a “benefit to the corporation”, as if to make it look like it was a corporate asset. But then on cross-examination, Hill admitted he had told none of his other two partners about the box seat. Another example is the hot tub Hill purchased from Costco. Since the

hot tub wound up in Hill's house, he had to admit the personal use. At trial, Clark testified that when he initially interviewed Hill in 2007 about the various purchases, Hill told Clark he thought he was doing the corporation a favor because they would be able to deduct the purchase from the corporate income taxes. Contradicting Hill's "thought" at the time he made that purchase he was doing the corporation a favor are: such act is still a fraud upon the IRS; to perform the act Hill would have to assume the corporation did not need the cash—which it did (as shown by Hill's own elaborate "trading checks" scheme to deal with shortages and problems with cash flow); and Hill obfuscated the records to make detection of the act difficult.

The myriad reasons Hill claims JHH owed him hundreds of thousands of dollars are simply not supported by any document. At trial, Hill told the jury he was always owed money by the corporation; even when the corporation was formed he was owed money by the corporation. But Hill produced no evidence to support that claim. The Maverick and Mullan properties were owned by Hill, and Hill claims they were to be brought into the corporation. But Hill said they were his properties and refused to provide Clark (or this Court, or the jury) with any documentation to support his claims they were corporate properties encumbered by corporate debt.

Certified Public Accountant Curtis Clark testified at the trial and at the restitution hearing. Clark's testimony at the restitution hearing regarding the schedules Clark prepared for trial was clear and easily understood. Clark prepared those records from accounting information he found at JHH back in 2007 when he was hired by JHH to do a tax return for 2006. Clark reviewed credit card statements, cancelled checks, invoices and receipts found at JHH. Clark was extensively cross-examined by Hill's attorney, but not at all impeached.

Hill's attorney tried to raise a claim of bias by Clark. Clark was asked about the fact that at the time he performed his initial work, a partner in his accounting firm (Clark, Anderson & McNellis) was owed money by JHH. Clark testified such would have been a conflict of interest that would have prevented him from being able to audit JHH, but did not prevent him from preparing taxes for JHH or conducting the accounting procedures he did for JHH or for the State in conjunction with this case. Hill's expert did not contradict that testimony by Clark. Clark was first contacted in 2006 by Brad Jordan and Patrick Hall, because those two owners knew the books of the corporation were a mess, knew Hill was in charge of those books and records, and Jordan and Hall wanted to see what transactions all shareholders were making so they could determine what all three shareholders owed the company. While Jordan and Hall may have suspected wrongdoing by Hill in 2006, Hill has not produced any evidence that any such suspicion by them tainted Clark's objective review of corporate books, receipts, invoices, cancelled checks and credit card statements.

The jury obviously found Clark credible and Hill not credible. The Court specifically makes the same findings on credibility.

At the restitution hearing, Suzanne Metzger testified on behalf of Hill. Metzger on cross-examination admitted she was biased in favor of Hill because she had an opinion of what happened based on prior years of working with JHH and its sloppy bookkeeping. Suzanne Metzger was biased in that she reached her conclusion and her opinion that the Crimson King, Mullan and Maverick properties were all JHH properties that should not have been attributed to Hill (as Clark testified), solely upon what Hill told her. Metzger did not support that opinion with any documentation and was confronted at hearing with much documentation that she had never seen regarding the paper trail of those properties. The

evidence is consistent that Hill refused to convey these properties to the corporation. Hill's testimony on this issue is confusing, but Hill has produced *no* evidence to support any claim that he in fact conveyed these properties to JHH. When confronted with the paper trail of the personal items Hill bought using the JHH company credit card or company checks, Metzger testified she had "Seen it before" where shareholders and partners used a company credit card for personal purposes and pay that company credit card off with a company check. Incredibly, Metzger based her opinion at the restitution hearing on Hill's statements to Metzger that Hill had told Brad Jordan and Patrick Hall that he was doing these things. Aside from that testimony being hearsay by Metzger (such objection was sustained), when Hill testified at the restitution hearing, he did not testify that he told such things to Metzger. At trial, Hill never testified that he told Brad Jordan and/or Patrick Hall about any of these purchases of personal items Hill had made using corporate funds. Thus, what Metzger claims Hill told her (that Hill had told Jordan and Hall that he was doing these things), those claims were never made by Hill to the jury. Those claims were never made by Hill to the Court at the restitution hearing. At trial, Brad Jordan specifically testified Hill never told him he was taking money from JHH through credit card purchases for personal expenses. Jordan testified all three shareholders had company credit cards, but they were to be used for gas, meals with clients or meals recruiting agents, and for meetings and conventions.

At the restitution hearing, Metzger was candid in admitting that she was "basing her opinion on what Hill told me." The problem is, what Hill told Metzger is hearsay through Metzger. And, what Hill told Metzger (that Hill had told his partners what he was doing), is not corroborated by what Hill testified to under oath before the jury or before the Court.

Metzger's testimony at the restitution hearing was confusing. The few conclusions she reached were not supported by any facts. Again, the basis of her opinion was "what Hill told me", and this Court finds Hill to not be credible.

Clark's rebuttal testimony truly dissected Metzger's testimony on several issues. Clark pointed out that Metzger has transposed numbers and made numerous assumptions not supported by the evidence.

Clark's figures are supported by the evidence, and are adopted by the Court.

D. To Whom is Restitution Owed?

Hill writes:

The restitution amount determined by the Court should be paid to Jordan, Hill and Hall Inc., dba: GMAC Real Estate Northwest the victim named in the Information. This would protect any creditors in the Jordan, Hill and Hall Inc. bankruptcy proceeding. In addition naming the correct victim avoids unjust enrichment to Brad Jordan and Patrick Hall. To the extent that Jerry Hill stole from Jordan, Hill and Hall he was stealing from an entity in which he owned one third of the shares. Ordering the restitution to be paid directly to Brad Jordan and Patrick Hall would result in them receiving Jerry Hill's share of the corporate assets in addition to their own.

Restitution Memorandum, pp. 1-2. While no law was cited by Hill to support this argument, Hill's argument at first blush makes sense. Hill stole from JHH. Hill was a one-third owner of JHH. Why then should the other two partners in JHH, Brad Jordan and Jerry Hall, get 100% of the amounts Hill stole from JHH, when Hill owned a third of JHH? In other words, to a one-third extent, Hill was stealing from himself.

However, Hill is not a "victim" under I.C. § 19-5304(1)(e). Thus, Hill cannot claim one-third of the amounts owed.

Additionally, restitution is an equitable concept. *Ellis v. Butterfield*, 98 Idaho 644, 656, 570 P.2d 1334, 1346 (1997). Hill is not entitled to restitution with his unclean hands. *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004).

Were Hill to have supported this argument with any legal authority, this Court would be more than willing to consider such. Due to the fact that Hill cannot be a victim and due to the equitable considerations, this Court finds Hill's argument has no merit.

There is no import to Hill's cryptic mention above of JHH's bankruptcy. There is "no rationale" for concluding the Bankruptcy Code bars a state court from ordering the defendant in a criminal case to pay restitution to a victim whose civil claim against the defendant for the damage covered by the restitution order has been discharged in bankruptcy. *People v. Moser* 50 Cal.App.4th 130, 136 (Cal.App.3d Dist. 1996).

This Court finds Hill owes restitution to Brad Jordan and Jerry Hall. It is these two individuals alone who suffered the loss at Hill's hands. The business apparently no longer exists. If there is a bankruptcy component to this restitution award, then that is for Brad Jordan and Jerry Hall to address, not this Court.

E. The Applicable Interest Rate.

Hill argues, "These interest charges of \$21,529.24 were calculated at a rate arbitrarily set by Brad Jordan or Patrick Hall." Restitution Memorandum, p. 3. The State points out that "Mr. Clark testified that the interest rate of 15% was utilized because that was the interest rate the partners were paying." Brief in Support of Amended Memorandum of Restitution, p. 5. Clark testified at the restitution hearing that 15% is what JHH was paying at the time for "hard money loans." There is no good reason advanced by Hill that 15% should not be the applicable rate. For every dollar Hill stole from JHH for his hot tub, Chief tickets and myriad other items, that was a dollar out of the JHH corporation, a corporation that frequently, according to Hill's own testimony, had cash flow problems and had to borrow money. That money was loaned to JHH at 15%. At the restitution hearing, Metzger criticized the choice of interest rate to which Clark testified, however,

Metzger failed to give any testimony about what her opinion as to the appropriate interest rate.

The Court finds the applicable rate to be 15%. The issue of interest rate is in the court's discretion. I.C. § 19-5304(4). The Court finds it is fair for the Court to apply 15% interest to these amounts beginning March 1, 2006. These thefts occurred over time, and March 2006 is the mid-point of the time period in which Hill's thefts occurred (January 2005 - May 2007). While it is explained that the State used the 15% interest rate, it is not clear from what point in time the State calculated interest at that rate to run. The Court will sign the restitution order and civil judgment in the amended amount requested (\$145,384.15 for each partner). If interest calculated beginning March 1, 2006, produces a different figure, counsel for the State is instructed to prepare an amended order to pay restitution and an amended civil judgment.

F. Credit for the Sale of Hill's Residence.

Hill makes the following argument:

Deducting the above discussed figures from the requested restitution would result in no restitution being owed by Jerry Hill. This is prior to making an adjustment for the sums already paid by Jerry Hill. The evidence is that \$216,231.27 was paid to the corporation upon sale of Jerry Hill's residence.

Restitution Memorandum, p. 4. No citation is made by Hill to any exhibit. Even if there were a citation, this restitution hearing is not the place for Hill to make claims about other corporate matters. This restitution hearing is not the place for Hill to make claims of set-off, or to bring in collateral issues. Hill can bring a civil action if he feels JHH owes him money.

G. Hill's Ability to Pay Restitution.

Finally, the Court is cognizant that Hill might not have the present ability to pay the restitution ordered. Hill did not argue in his briefing that he was unable to pay any

restitution amount. However, there was testimony as to this issue. Hill began his testimony at the June 16, 2011, restitution hearing answering questions about his present job at the Post Falls Jiffy Lube since May 2011, where he makes \$8.00 per hour working no more than thirty hours per week, and where he anticipates no increase in wages. Hill testified he went bankrupt in 2008, that he owns no personal property over \$1,000, has only about \$100.00 in checking at the time of hearing, and owns no real property. Hill testified he has diabetes that causes him problems with his feet and legs at work.

However, as noted above, the “immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.” I.C. § 19-5304(7). Although the financial situation of the defendant may be a factor to be considered, a lack of resources is not dispositive of whether restitution should be ordered. *Id.* The Court may order restitution in contemplation of a future ability to pay, thereby saving the victims the cost and inconvenience of a separate civil proceeding. *State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct.App. 1989). Likewise, the court may still order a defendant who has filed bankruptcy to pay restitution to the victims of his crimes. *State v. Hamilton*, 129 Idaho 938, 943, 935 P.2d 201, 206 (Ct.App. 1997).

The Court is not persuaded that the highest wage Hill is presently capable of is \$8.00 per hour. The Court finds Hill credible that such is in fact his current wage, but there is no indication with Hill’s abilities that such employment is his pinnacle of wage earning. The Court finds even with Hill’s current wage, restitution is warranted. The Court specifically finds no proof has been presented why Hill is not capable of earning a higher hourly wage or working more hours per week. In their respective lifetimes Jordan and Hall might not see all restitution paid by Hill, but that is no reason to foreclose Jordan and Hall from restitution owed. Nor is it reason to reduce the amount of such restitution. The

amount of restitution ordered should be equal to the amount of economic loss suffered as a result of the crime. I.C. § 19-5304(14).

III. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds the State’s Amended Memorandum of Restitution is appropriate, and restitution is ordered by Hill to Brad Jordan in the amount of \$145,384.15, and to Patrick Hall in the amount of \$145,384.15.

IT IS HERBY ORDERED THAT defendant Jerry Hill pay restitution to Brad Jordan in the amount of \$145,384.15, and to Patrick Hall in the amount of \$145,384.15. The Order to Pay Restitution as Condition of Probation and Civil Judgment in these amounts is signed and filed contemporaneous with this Memorandum Decision and Order, subject to clarification as to any change in calculation given the interest inception date of March 1, 2006.

DATED this 25th day of July, 2011.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Martin Neils
Prosecuting Attorney – Art Verharen

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy