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2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
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SHIRLEY E. FAUST, CLERK
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Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA
8 COUNTY

9 KELLY LOGGING, INC.,
10 Plaintiff,
11 vs.
12 FIRST INTERSTATE BANK,
13 Defendant.

Dept. No. 1

Cause No. DV-12-928

**ORDER, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ENTRY OF FINAL JUDGMENT**

14 This matter is before the Court on Plaintiff's Kelly Logging, Inc.'s
15 (Kelly) Motion for Review of Punitive Damage Award (doc. # 203) and
16 Kelly's Motion for Attorney's Fees and Costs (doc. # 198). The ruling of
17 the Court is dispositive of the other motions by First Interstate Bank
18 (1st Interstate), to Reduce Unconstitutionally Excessive Punitive
19 Damages Award (doc. # 203), Renewed Motion for Judgment (doc. #
20 211) and Rule 59 Motions (doc. #226 & #239). The motions have been
fully briefed, oral arguments given and evidence presented.

The Court apologizes for the delay in issuing this order and
would offer the explanation that the Court was waiting on a decision

1 from the Montana Supreme Court on a case before the Supreme Court
2 dealing with punitive damages. As the Judge is leaving office on April
3 30, the time for issuing the following opinion cannot be further delayed.

4 1. The award of punitive damages by the jury of \$16,760,000.00 is
5 upheld by the Court.

6 2. Kelly is Awarded Attorney Fees in the amount of \$7,500,482.00
7 and costs in the amount of \$90,820.25.

8 3. Final Judgment in the Amount of \$24,637,852.25 (includes
9 compensatory damages of \$286,550.00) is entered with interest
10 accruing at the statutory rate on that amount from August 14, 2014.

11 **I. Findings of Fact and Conclusions of Law on Punitive**
12 **Damages Review**

13 Based upon the evidence in the record and the jury instructions
14 given, the Court concludes the jury's decision to award punitive
15 damages should be affirmed because there was substantial credible
16 evidence the 1st Interstate acted with "actual malice" as defined in §27-
17 1-221(2) MCA ("...the defendant has knowledge of facts or intentionally
18 disregards facts that create a high probability of injury to the plaintiff
19 and; (a) deliberately proceeds to act in conscious or intentional
20 disregard of the high probability of injury to the plaintiff; or (b)

1 deliberately proceeds to act with indifference to the high probability of
2 injury to the plaintiff.”)

3 **A. Federal review under the *Gore* Guideposts**

4 The U.S. Supreme Court has held that punitive damages can be
5 imposed to further “legitimate interests in punishing unlawful conduct
6 and deterring its repetition.” *McCulley v. U.S. Bank of Montana*, 2015
7 MT 100, ¶ 43, citing: *BMW of N. Am. v. Gore*, 517 U.S. 559, 568
8 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416
9 (2003) (“punitive damages serve a broader function; they are aimed at
10 deterrence and retribution.”) The Court’s task in reviewing the
11 constitutionality of a punitive damage award is to identify the
12 “outermost limit of the due process guarantee” (*Campbell*, 538 U.S. at
13 425), not to choose a number the Court regards as appropriate on the
14 facts of the case. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672,
15 678 (7th Cir. 2003) (“[t]he judicial function is to police a range, not a
16 point,” citing *Gore*, 517 U.S. at 582–83 and *TXO Prod. Corp. v.*
17 *Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)); see also *Cooper*
18 *Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433–434
19 (2001) (noting that within substantive limits on an award, the jury has
20 discretion in establishing the precise number).

1 “There are procedural and substantive constitutional limitations
2 on these awards. The Due Process Clause of the Fourteenth
3 Amendment prohibits the imposition of grossly excessive or arbitrary
4 punishments on a tortfeasor.” *Campbell*, 538 U.S. at 416. The
5 Supreme Court has instructed that three “guideposts” are to be used to
6 determine whether a punitive damages award is grossly excessive:
7 “(1) the degree of reprehensibility of the defendant’s misconduct; (2)
8 the disparity between the actual or potential harm suffered by the
9 plaintiff and the punitive damages award; and (3) the difference
10 between the punitive damages awarded by the jury and the civil
11 penalties authorized or imposed in comparable cases.” *Id.* at 416-17;
12 *McCulley*, ¶ 44.

13 **(1) Reprehensibility of 1st Interstate’s Misconduct.**

14 In *Campbell*, the Supreme Court stated that the “most important
15 indicium of the reasonableness of a punitive damages award is the
16 degree of reprehensibility of the defendant’s conduct,” which is
17 evaluated by considering whether:

18 [i] the harm caused was physical as opposed to economic; [ii] the
19 tortious conduct evinced an indifference to or a reckless
20 disregard of the health or safety of others; [iii] the target of the
conduct had financial vulnerability; [iv] the conduct involved
repeated actions or was an isolated incident; and [v] the harm

1 was the result of intentional malice, trickery, or deceit, or mere
2 accident.

3 *Campbell*, 538 U.S. at 419; *McCulley*, ¶ 45. The Supreme Court
4 subsequently recognized that “misconduct engaged in to obtain
5 financial gain or augment profit was highly culpable deserving greater
6 punishment.” See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494
7 (2008).

8 Considering the aforesaid “reprehensibility” factors and guidance
9 given by the U.S. Supreme Court, this Court notes the harm in this
10 case is economic. Personal injury is more reprehensible than
11 economic harm, except that “infliction of economic injury, especially
12 when done intentionally through affirmative acts of misconduct ... or
13 when the target is financially vulnerable, can warrant a substantial
14 penalty.” *Gore*, 517 U.S. at 576; *McCulley*, ¶ 48. The unanimous jury
15 here determined 1st Interstate was liable for the damages caused by
16 its wrongful offset and tortious breach of the implied covenant. The
17 jury also unanimously determined that 1st Interstate engaged in actual
18 malice. The jury heard considerable evidence that 1st Interstate led
19 and facilitated Kelly into applying for stimulus funds under the guise
20 that it would help its customer survive, when 1st Interstate knew it was
to help itself regardless of whether Kelly would survive. It then took

1 Kelly's money and cut off its credit and bonding, which was critical for
2 Kelly to survive. Kelly's banking expert, Mr. Beaton, called this Kelly's
3 "lifeblood." Even though Kelly did not suffer personal injury, the Court
4 finds 1st Interstate's conduct especially reprehensible, given Kelly's
5 vulnerability under the circumstances. Throughout trial, 1st Interstate
6 demonstrated a cavalier attitude, refusing to even acknowledge that
7 what it had done was a wrongful offset, even after this Court had ruled,
8 and the jury had been instructed, that it clearly was improper.

9 The Court finds that Kelly was financially vulnerable. The Court
10 disagrees with 1st Interstate's assertion that there were "mitigating
11 factors" on this issue. 1st Interstate knew Kelly was especially
12 vulnerable because its own analysis had shown that the logging
13 industry was in a severe recession, Kelly needed more than \$1.9
14 million to survive the recession, and Kelly's primary objective was to
15 save logging jobs. Knowing these things, 1st Interstate then
16 wrongfully offset \$762,000 of the \$1,080,000 that had been deposited,
17 and prematurely terminated the Revolving Line.

18 The Court finds that 1st Interstate's conduct involved repeated
19 actions and took place over years. Beginning in early 2009, and
20 continuing for months, 1st Interstate led Kelly to apply for stimulus

1 money so 1st Interstate could take it. Even when 1st Interstate knew
2 \$1.9 million was not enough for the intended purpose of Kelly's
3 survival, it never told that to Kelly. In August 2009, it wrongfully offset
4 the funds. Between August and October 2009, it then withheld all
5 credit – even though it was required by contract to provide a revolving
6 line of credit. It then misled Kelly about the SBA-guaranteed loan. In
7 2010, 1st Interstate's president, Mike Hickey, finally made its true
8 intent known when he told the Kelly family they "better go lawyer up."
9 At this point, 1st Interstate gave up any pretext of having a fiduciary
10 relationship with Kelly Logging, but rather, through its actions, literally
11 shut down the largest independent logging company in Montana and
12 the state of Idaho. At this point in time, Kelly Logging employed
13 between 40 and 50 employees. During spring breakup, Kelly Logging
14 would pay all of the health insurance premiums for employees that
15 were unable to work because of forest conditions (spring breakup).
16 During months of high production, Kelly Logging employed up to 70
17 people. These people and their families had a vocation that was
18 dependent upon Kelly Logging staying in business. This action was not
19 just about Kelly Logging, but about a small community that was
20 dependent upon Kelly Logging staying in business. 1st Interstate was

1 literally the lifeline that Kelly Logging had to carry it through the
2 recession, and it breached its fiduciary responsibility in putting its own
3 selfish interest ahead of what possible scenarios were available for the
4 survivability of Kelly Logging. It gave Kelly Logging an umbrella by way
5 of the stimulus loan and, then, when the first drop of rain in the storm
6 to come hit the umbrella, 1st Interstate surreptitiously stole the umbrella
7 back.

8 There was substantial evidence that 1st Interstate acted with
9 malice, trickery, or deceit and not by accident. It unilaterally and
10 intentionally offset funds and terminated the Revolving Line in direct
11 violation of the Change in Terms Agreement, industry standards,
12 Montana law, and 1st Interstate's own policies. The jury heard
13 substantial evidence that 1st Interstate's tortious conduct evinced a
14 clear disregard to the Kelly's financial circumstances and was
15 concerned only for itself. Specifically, several of the lenders testified
16 regarding 1st Interstate's pursuit of its financial interests – without
17 regard to the plight or interests of Kelly and with reckless disregard for
18 the consequences of its conduct. 1st Interstate's actions were
19 intentional and resulted from a premeditated plan developed and
20

1 executed over many months. There was no evidence of anything
2 done “by accident.”

3 Leading up to the deposit of the stimulus funds, 1st Interstate
4 told Kelly it would work with them and provide them a restructured
5 operating line. After Kelly received the stimulus funds, 1st Interstate
6 took the funds, paid off its line, and then terminated all credit. 1st
7 Interstate’s tactics here are similar to the “bait-and-switch” tactics
8 noted by the Supreme Court in affirming punitive damages in
9 *McCulley, supra*, ¶ 51.

10 For all of these reasons, under this factor, a high level of punitive
11 damages is not “grossly excessive.”

12 **(2) The disparity between the actual or potential harm**
13 **suffered by the plaintiff and the punitive damages**
14 **award.**

14 1st Interstate’s argument is that the ratio between the punitive
15 and actual damages in this case is 58:1 – in excess of a purported,
16 and mistaken, 1:1 rule under federal due process standards.

17 *Campbell, supra*, indicates that single-digit-ratios are more likely
18 to meet due process standards than ratios of 500 to 1. *Campbell*, 538
19 U.S. at 425. In that case, the U.S. Supreme Court found that the
20 \$1,000,000 compensatory award for a year and a half of emotional

1 distress was substantial and completely compensated plaintiffs. *Id.*, at
2 426. Thus, it suggested that the facts “likely would justify a punitive
3 damages award at or near the amount of compensatory damages.”
4 *Id.*, at 429. The Utah Supreme Court later dispelled that notion,
5 entering judgment for punitive damages in the amount of
6 \$9,018,780.75. *State Farm v. Campbell*, 98 P.3d 409 (Utah 2004).

7 The “single digit test” referred to by 1st Interstate is not a bright
8 line rule. In fact, the U.S. Supreme Court has affirmed a punitive
9 damage award 526 times greater than actual damages. *TXO*
10 *Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In
11 *TXO*, it affirmed a \$10,000,000 punitive award despite there being only
12 a \$19,000 compensatory award. *TXO*, 509 U.S. at 446, 466. See also
13 *TXO*, 509 U.S. at 467 (Kennedy, J., concurring in part and concurring
14 in the judgment) (“The Constitution identifies no particular multiple of
15 compensatory damages as an acceptable limit for punitive awards; it
16 does not concern itself with dollar amounts, ratios, or the quirks of
17 juries in specific jurisdictions.”)

18 The Montana Supreme Court has likewise rejected 1st
19 Interstate’s simple mathematical, ratio approach. *Marie Deonier*,
20 *supra*, ¶ 65 (“We have consistently rejected the notion that the

1 constitutional line is marked by a simple mathematical formula, even
2 one that compares actual and potential damages to the punitive
3 award”), quoting: *Gore, supra* (the Court rejected the district court’s 5:1
4 ratio limitation.)

5 Thus, where, as here, there is extremely reprehensible conduct,
6 a high punitive damages award should not be overturned based on a
7 ratio that the Supreme Court has repeatedly declined to establish. As
8 noted in *Gore, TXO, and Mathias, supra*, and essentially adopted in
9 the Montana cases, “the judicial function is to police a range not a
10 point.” Here, 1st Interstate is asking this Court to ignore its limited
11 function.

12 The purpose of punitive damages is to punish the defendant and,
13 thereby, discourage it and warn others from acting similarly in the
14 future. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492-93
15 (2008).

16 Thus, it is appropriate for the jury to take into consideration a
17 variety of other factors in determining a punitive damages award,
18 including the amount of money at stake and the wealth of the
19 defendant. See *TXO*, 509 U.S. at 462 (stating that although the
20 punitive damages award was certainly large, in light of the amount of

1 money potentially at stake, the bad faith of petitioner, the fact that the
2 scheme employed in this case was part of a larger pattern of fraud,
3 trickery and deceit, and petitioner's wealth, the Court was not
4 persuaded that the award was so "grossly excessive"); *Pacific Mut.*
5 *Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (concluding that the
6 financial position of the defendant is one factor that could be taken into
7 account in assessing punitive damages); *Eichenseer v. Reserve Life*
8 *Ins. Co.*, 934 F.2d 1377, 1384 (5th Cir. 1991) ("While the Due Process
9 Clause requires that punitive damages not be grossly excessive, it
10 does not require that punitive damages be ineffectual and impotent.
11 The corporate size of [defendant] is another factor that supports the
12 award of punitive damages against it").

13 Although the jury in this case awarded \$286,550 in
14 compensatory damages, the amount of money potentially at stake in
15 this case was far greater. Kelly was Montana's largest logging
16 company at one time, with annual gross revenues in excess of \$8
17 million. The Court and the jury heard from Ed Regan, the head of RY
18 Timber, who testified about the integrity and honor of Bill Kelly, the
19 Kelly family and Kelly Logging and how it could be relied upon to
20 perform any work that it committed to. The amount wrongfully offset

1 was \$762,000. Thus, 1st Interstate knew, and the jury heard, that the
2 amounts potentially at stake were enormous. Further, while a \$16.76
3 million punitive damage verdict is large, the jury rationally considered
4 1st Interstate's net worth and awarded 2% of 1st Interstate's
5 \$838,000,000 net worth. The Court concludes that the magnitude of
6 both the actual harm and the potential harm, and the need for
7 deterrence, drove this rational decision.

8 Further, 1st Interstate's argument regarding the purported ratio in
9 this case ignores Kelly's attorney's fees and costs. As explained
10 below, the Court has awarded Kelly attorney's fees of \$7,500,482.00,
11 and costs of \$90,820.25. The Court includes these amounts in
12 analyzing the disparity factor. See, e.g., *In re USA Commercial Mortg.*
13 *Co.*, 2013 WL 3944184 (D. Nev. July 30, 2013) at *28 (adding \$2.5
14 million attorney's fee award to \$79,000 compensatory damages award
15 and upholding \$5.1 million in punitive damages as a less than 2:1
16 multiplier); *Blount v. Stroud*, 915 N.E.2d 925, 943-44 (Ill. 2009), cert.
17 den. 131 S. Ct. 503 (2010) (“[T]he majority of the courts across the
18 country that have considered this issue have agreed that an award of
19 attorney's fees should be taken into account as part of the
20 compensatory damages factor in the Gore analysis”); *Willow Inn, Inc.*

1 *v. Pub. Svc. Mut. Ins. Co.*, 399 F.3d 224, 234-37 (3d Cir. 2005)
2 (incorporating the attorney's fee and costs award as part of
3 compensatory damages for purposes of the ratio consideration);
4 *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447 (10th
5 Cir.1987), cert. denied, 486 U.S. 1032 (1988) (costs of litigation to
6 vindicate rights is an appropriate element to consider in justifying a
7 punitive damages award.)

8 Under Montana law: a) the post-trial awards constitute additional
9 compensation to plaintiffs (*State ex rel., Foss v. Dist. Ct. of Fourth Jud.*
10 *Dist. In and For Ravalli County*, 216 Mont. 327, 334, 701 P.2d 342,
11 347 (1985) (permits attorney's fees to be awarded to the prevailing
12 party if authorized by contract); Mont. Code Ann. § 25-10-101(3)
13 (permits costs to be awarded to plaintiff upon a judgment in plaintiff's
14 favor over \$50), and b) here, the award is based on contract and one
15 of the purposes for a contractual provision for attorney's fees is to
16 make the successful party whole. *Smith v. Howery*, 217 Mont. 23, 701
17 P.2d 1381 (1985) (40% contingent fee award); *Weinberg v. Farmers*
18 *State Bank of Worden*, 231 Mont. 10, 36, 752 P.2d 719, 735 (1988);
19 *West v. The Club at Spanish Peaks, LLC*, 2008 MT 183, ¶ 95, 343
20 Mont. 434, 186 P.3d 1228 (40% contingent fee award within the

1 discretion of the Court). These factors distinguish this case from those
2 cited by 1st Interstate in opposing inclusion of attorney's fees and
3 costs in the disparity analysis.

4 **(3) The jury's punitive damages award is not grossly**
5 **excessive.**

6 The 58:1 ratio as calculated by 1st Interstate is warranted given
7 the actual and potential damages in this case. In most cases, the ratio
8 will be within a constitutionally acceptable range – and remittitur will
9 not be justified on this basis – except when the ratio is 'breathhtakingly'
10 disproportional. *Gore*, 517 U.S. at 583.

11 "Ratios greater than those [the Supreme Court has] previously
12 upheld may comport with due process where a particularly egregious
13 act has resulted in only a small amount of economic damages." See
14 *Campbell*, 538 U.S. at 425 (internal quotations and citation omitted).
15 In such circumstances, "low awards of compensatory damages may
16 properly support a higher ratio than high compensatory awards," and
17 the determination of whether a punitive damages award is grossly
18 excessive may include a consideration of not just the damages that a
19 plaintiff actually suffered, but also the amount of potential damage that
20 could have resulted from the defendant's reprehensible conduct. See

1 *Id.*; see also *Gore*, 517 U.S. at 582; *Planned Parenthood of the*
2 *Columbia/Williamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d
3 949, 962 (9th Cir.2005) (“[I]n cases where there are insignificant
4 economic damages but the behavior was particularly egregious, the
5 single-digit ratio may not be a good proxy for constitutionality.”);
6 *Swinton v. Potomac Corp.*, 270 F.3d 794, 818-19 (9th Cir.2001)
7 (affirming constitutionality of 28:1 ratio when compensatory damages
8 were “necessarily low” because plaintiff’s back pay damages were
9 measured by his \$8.50 hourly wage). Indeed, under such
10 circumstances, a higher ratio of punitive damages is warranted to
11 ensure that the traditional purposes of punishment and deterrence are
12 served. See *Gore*, 517 U.S. at 568.

13 The amount of actual damages in this case is not so large as to
14 make a double-digit ratio “grossly excessive.” As noted above, there
15 was substantial evidence in this case of the enormous amounts at
16 stake, multiple times the actual damages awarded. Further, the verdict
17 of \$286,550 is a relatively small amount when compared to the \$2.6
18 million actual damages award that caused concern in *Campbell*. See
19 *Campbell*, 538 U.S. at 416. Further, much higher ratios than the one
20 in this case have been found to comport with due process. See *TXO*,

1 509 U.S. at 461 (\$19,000 in actual damages and \$10 million in punitive
2 damages, a 526-to-1 ratio, for slander of title); *Kemp v. Am. Tel. &*
3 *Tel. Co.*, 393 F.3d 1354 (11th Cir.2004) (\$115 in compensatory
4 damages and \$250,000 in punitive damages, a 2,172-to-1 ratio, for
5 fraudulent billing practices); *Parrott v. Carr Chevrolet, Inc.*, 331 Or.
6 537, 17 P.3d 473 (2001) (\$11,496 in compensatory damages and \$1
7 million in punitive damages, an 86-to-1 ratio, for misrepresentations
8 related to the sale of a vehicle); *Estate of Overbey v. Chad Franklin*
9 *National Auto Sales North, LLC*, 361 S.W.3d 364, 374 (Mo., 2012)
10 (111:1 ratio for misrepresentations related to the sale of a vehicle).

11 Considering 1st Interstate's conduct, the amounts potentially at stake,
12 and the relatively small amount of compensatory damages, a 58:1 ratio
13 does not make the punitive damage award in this case grossly
14 excessive.

15 **(4) Disparity between punitive award and civil**
16 **penalties.**

17 The parties agree that there are no civil penalties for 1st
18 Interstate's misconduct and this third due process factor has no
19 bearing in this case.

20 **B. The punitive damages award comports with Montana**
law.

1 Under § 27-1-221(1), MCA, when an award of punitive damages
2 is made by a jury, the trial court must independently review the jury's
3 award considering the following factors: (i) the nature and
4 reprehensibility of the defendant's wrongdoing; (ii) the extent of the
5 defendant's wrongdoing; (iii) the intent of the defendant in committing
6 the wrong; (iv) the profitability of the defendant's wrongdoing, if
7 applicable; (v) the amount of actual damages awarded by the jury; (vi)
8 the defendant's net worth; (vii) previous awards of punitive or
9 exemplary damages against the defendant based upon the same
10 wrongful act; (viii) potential or prior criminal sanctions against the
11 defendant based upon the same wrongful act; and (ix) any other
12 circumstances that may operate to increase or reduce, without wholly
13 defeating, punitive damages.

14 These factors are largely subsumed into the federal due process
15 analysis (above), and the Supreme Court has noted with approval that
16 Montana's review standards are the kind of standards that meet
17 federal due process. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,
18 22-23 (1991).

19 **(1) The nature and reprehensibility of the**
20 **defendant's wrongdoing.**

1 This statutory factor is subsumed into the first *Gore* guidepost set
2 forth above. The Court will not repeat that analysis. 1st Interstate
3 claims its conduct was not reprehensible. As explained above, the
4 Court disagrees.

5 **(2) The extent of the defendant's wrongdoing.**

6 This statutory factor is also subsumed in the first *Gore* guidepost
7 analysis, above. 1st Interstate claims its conduct consisted of a single,
8 isolated, wrongful act. As explained above, the Court disagrees. See
9 *McCulley, supra*.

10 **(3) The intent of the defendant in committing the**
11 **wrong.**

12 This statutory factor is also subsumed in the first *Gore* guidepost
13 analysis, above. 1st Interstate claims its intent was "to help, not harm."
14 As explained above, the Court disagrees. As the Court found above,
15 1st Interstate acted with malice, trickery, and/or deceit, and not by
16 accident.

17 The jury heard considerable evidence that, beginning in early
18 2009 and continuing for months, 1st Interstate improperly led Kelly to
19 apply for stimulus money, only so 1st Interstate could take it. In
20 August 2009, 1st Interstate wrongfully offset the funds. Between
August and October 2009, it then withheld all credit even though it was

1 required by contract to provide a revolving line of credit. There was
2 further evidence about 1st Interstate's maliciousness in refusing to
3 release Kelly's collateral after the loan was paid down. This act
4 prevented Kelly from being able to obtain sufficient replacement
5 financing for sufficient working capital. 1st Interstate then misled Kelly
6 about the SBA-guaranteed loan. In 2010, Mr. Hickey finally told Kelly
7 they "better go lawyer up." There were numerous trial exhibits
8 (including 302, 193, 172, 309, 195, 315, 169, 201) and witnesses
9 (Frances Kelly, Mike Hickey, Ryan Jones, Sean Roberts, Ed Garding,
10 Jerry Kelly, Mick Taleff, and Jim Beaton) establishing these events.

11 There was substantial evidence that 1st Interstate had
12 alternatives and could have actually "helped" Kelly rather than doing
13 what it did. The fact that it chose none of those other options also
14 presented substantial evidence of its obvious intent.

15 Kelly presented evidence that 1st Interstate had a policy that
16 directed its employees to exercise "extreme caution" when considering
17 a setoff. (Ex. 164) The policy further directed employees to examine
18 the facts and loan documents, consult with "supervisory personnel
19 knowledgeable of the law, and to consult with legal counsel where the
20 facts are debatable." The policy demonstrates that 1st Interstate

1 knew, or should have known, of the risks associated with setoffs. Yet,
2 Ryan Jones, Sean Roberts, and Mike Hickey all testified that they did
3 not know about the policy, and did not follow it when sweeping Kelly's
4 account. CEO Ed Garding testified that he did not know about the
5 policy until after this litigation. Kelly's banking experts, Mr. Beaton and
6 Taleff, testified about the severity of setoffs and the foreseeability and
7 likelihood of harm.

8 Kelly's banking experts also testified that 1st Interstate's own
9 analysis indicated the WIPRS funds were not adequate to pay off the
10 loan and still have working capital. Yet, 1st Interstate never shared
11 this information with Kelly. Rather, it proceeded to promise Kelly that it
12 would work with Kelly to determine how best to use the WIPRS funds.

13 Based on all of these facts, there is substantial evidence that 1st
14 Interstate's only interest was its own. It was aware of facts that
15 created a high probability of injury to Kelly and proceeded to act with
16 indifference to that probability. Kelly Logging experts testified that by
17 refusing to share with Kelly what it knew, 1st Interstate gained an
18 unfair advantage over Kelly.

19 1st Interstate's post-sweep conduct was further evidence of its
20 malicious intent.

1 Further, the “backroom” personnel noted 1st Interstate would
2 need a Change in Terms to convert the Revolving Line to a non-
3 revolving line of credit. This, in itself, is another breach of the fiduciary
4 obligation. 1st Interstate failed to obtain the required Change in Terms
5 and unilaterally closed the Revolving Line. 1st Interstate knew this
6 would mean a loss of working capital to Kelly and the consequences
7 that would follow. The actual Change in Terms is referenced in
8 internal documents but 1st Interstate didn’t look for it until just days
9 before trial, after repeated requests by Kelly’s counsel, at which time
10 the Change in Terms could not be located. There were numerous trial
11 exhibits (including 317, 51, 158, 182, 318, 325, 161, 197, 163 and 247)
12 and witnesses (Mike Hickey, Ryan Jones, Sean Roberts, Jerry Kelly,
13 Billie Jean Goforth, Mick Taleff, Ed Garding, Jim Beaton, Dave Olson,
14 and Leslie O’Dell) establishing these events.

15 The Court rejects 1st Interstate’s approach in evaluating the
16 evidence of its intent. 1st Interstate claims on the one hand that the
17 Court may not consider the things it told Kelly in the process leading
18 up to the setoff, because those were never reduced to a written loan
19 agreement. On the other hand, 1st Interstate claims the Court should
20 consider Mr. Jones’ alleged understanding that he could take the

1 money, even though that, too, was never reduced to a written loan
2 agreement. The jury was given all of this evidence and decided the
3 issue unanimously in Kelly's favor. For the Court to conclude that 1st
4 Interstate's intent was "to help, not harm" would contradict or otherwise
5 be inconsistent with the Findings of Fact and Conclusions of Law
6 implicit in the jury's verdict.

7 **(4) The profitability of the defendant's wrongdoing, if**
8 **applicable.**

9 As explained above, although 1st Interstate argues it did not
10 intend to injure anyone, it appears clear - as the jury obviously
11 determined - its intent in wrongfully offsetting the accounts and then
12 unilaterally terminating the loan was its motivation to put profits
13 ("pennies from heaven") ahead of its fiduciary obligations, implied and
14 express, to its customer, Kelly Logging and the best interest of Kelly
15 Logging. Nowhere in the record is there any evidence that 1st Interstate
16 sat down with Kelly Logging, or any of its representatives, and
17 disclosed what the 1st Interstate's intentions were. 1st Interstate's
18 conduct was profitable. Records reflect it was paid in full for all
19 principal and interest more than two months before maturity. (Ex. 318)
20 It avoided the expense, risk, and delay of a workout with Kelly and/or

1 foreclosure. It was able to eliminate a substantial criticized loan from
2 the Missoula portfolio, and reduce its capital reserves accordingly.

3 Under Montana law, a defendant's willingness to sacrifice its
4 customer's best interests for profit will obviously support a punitive
5 damage award. *Cartwright*, 276 Mont. at 33, 914 P.2d at 996.

6 **(5) The amount of actual damages awarded by the**
7 **jury.**

8 This statutory factor is subsumed in the second *Gore* guidepost
9 analysis, above.

10 **(6) The defendant's net worth.**

11 As discussed above, Kelly presented evidence through Mick
12 Taleff based on 1st Interstate's most recent SEC filing that its net
13 worth was approximately \$838,000,000. (Ex. 327) The jury's award
14 of \$16,760,000 represents 2% of 1st Interstate's net worth. This was
15 an amount Kelly's counsel suggested was appropriate to serve the
16 twin purposes of a punitive damages award. 1st Interstate claims that
17 undue emphasis was placed on 1st Interstate's net worth. The Court
18 disagrees.

19 The Montana legislature intends punitive damages to be
20 awarded "for the sake of example and for the purpose of punishing a

1 defendant.” § 27-1-220(1), MCA. “[A] defendant’s financial condition is
2 logically one of the essential factors to consider in determining an
3 amount of punitive damages that will appropriately accomplish the
4 goals of punishment and deterrence.” *Seltzer*, 2007 MT 62, ¶ 132. A
5 certain award of punitive damages “may constitute a significant level of
6 punishment for an individual of modest means, but it could amount to
7 an inconsequential penalty for an individual with vast financial
8 resources.” *Id.* “Punitive damage awards should not be a routine cost
9 of doing business.” *Id.*, ¶ 133. The function of deterrence is not
10 served where a wealthy defendant can absorb a punitive damages
11 award with little or no discomfort. *Id.*

12 Given 1st Interstate’s net worth of \$838,000,000, awarding less
13 than the full punitive damage award would render illusory several
14 provisions of the Montana Constitution and negate the goals of
15 punitive damages - to punish and deter reprehensible conduct.
16 Indeed, there is no doubt when the jury reached its high punitive
17 damages award in this case, they, as instructed (Instr. No. 31A), paid
18 particular attention to 1st Interstate’s significant wealth in order to
19 punish and deter similar reprehensible conduct.

1 **(7) Previous awards of punitive or exemplary**
2 **damages against the defendant based upon the same**
3 **wrongful act.**

4 There is no evidence of previous awards of punitive damages
5 against 1st Interstate for the conduct at issue in this litigation.

6 Therefore, there is no indication that upholding the punitive damage
7 award will result in 1st Interstate being punished more than once for
8 conduct that was proved in this case. See *Cartwright*, 276 Mont. at 41,
9 914 P.2d at 1001.

10 **(8) Potential or prior criminal sanctions against the**
11 **defendant based upon the same wrongful act.**

12 There is no evidence of any prior criminal sanctions against 1st
13 Interstate for the same or similar conduct, and there do not appear to
14 be any criminal sanctions applicable to the conduct at issue.

15 **(9) Any other circumstances that may operate to**
16 **increase or reduce, without wholly defeating,**
17 **punitive damages.**

18 The Court does not find any other circumstances that may
19 operate to increase or reduce punitive damages. The Court has
20 considered each party's arguments and citations regarding the
 reasonable amounts of other punitive damage awards upheld in
 Montana and in other courts, including the U.S. Supreme Court.
 Based upon that review, the Court does not believe that those other

1 cases warrant the Court to increase or reduce the jury's punitive
2 damage award under § 27-1-221(7), MCA.

3 **II. Findings of Fact and Conclusions of Law on Attorney's Fees**
4 **and Costs**

5 1. Kelly and 1st Interstate had numerous loan agreements and
6 Change in Terms agreements that contained an attorney's fees and
7 expenses provision as follows:

8 ATTORNEYS' FEES; EXPENSES. Lender may hire or pay
9 someone else to help collect this Note if Borrower does not pay.
10 Borrower will pay Lender that amount. This includes, subject to
11 any limits under applicable law, Lender's attorneys' fees and
12 Lender's legal expenses, whether or not there is a lawsuit,
including attorneys' fees, expenses for bankruptcy proceedings
(including efforts to modify or vacate any automatic stay or
injunction), and appeals. If not prohibited by applicable law,
Borrower also will pay any court costs, in addition to all other
sums provided by law. (See Trial Ex. 157 and 615A)

13 This contractual provision is reciprocal pursuant to § 28-3-704, MCA.

14 2. Kelly entered into and signed a contingent fee agreement on
15 August 8, 2012 for legal services employing the law firms of Paoli
16 Kutzman, PC and Strauch Law Firm, PLLC to pursue claims against
17 1st Interstate. The agreement provides for 44% contingency fee of the
18 full jury award at trial, and 50% on appeal.

19 3. Kelly did not have the means to pay legal fees or litigation
20 costs in order to prosecute the case. In this particular case, Kelly

1 would not have had access to justice but for a contingency fee
2 arrangement with experienced counsel willing and able to prosecute
3 the action and advance costs, all with a substantial risk of no recovery.

4 4. Kelly retained, as an expert witness lawyer Mick Taleff of
5 Great Falls, Montana, to review the pleadings, other materials, perform
6 an investigation, and render an expert opinion on the reasonableness
7 of the contingency fee and costs claimed. 1st Interstate presented no
8 expert testimony on the issues.

9 5. Strauch Law Firm's costs incurred total \$486.53 as of
10 November 12, 2014. Paoli Kutzman's costs incurred total \$90,333.72
11 as of November 12, 2014. The total costs incurred by Paoli Kutzman
12 and Strauch Law Firm on behalf of Plaintiff totals \$90,820.25. The
13 costs were billed at the actual cost, with no mark-ups.

14 6. 1st Interstate presented no testimony or evidence challenging
15 the presented costs nor did it object to these costs at the hearing.
16 These costs were reasonable and necessarily incurred.

17 7. Mr. Taleff testified that the contingency fee is reasonable. He
18 explained the difficulty and high risk associated with representing
19 plaintiffs in general, and particularly the difficulty in successfully
20 representing plaintiffs in complex commercial cases, because of the

1 volume of documents and the nature of the disputes, in his experience.
2 Based on the Court's own observation of civil litigation for years from
3 the bench, it is clear that plaintiffs' lawyers bear enormous risk in
4 taking on cases under fee arrangements which rely on prevailing
5 before they are paid. Even then, often additional years pass while
6 post-trial motions and appeals are resolved.

7 8. Mr. Taleff noted that his examination of the file, interviews
8 with the lawyers, and his observation of the testimony and argument at
9 trial and in motions hearings before trial pointed out the great difficulty
10 in obtaining discovery and the rigor required in order to organize and
11 prepare the case for trial. Mr. Taleff noted the exceptional skill of
12 plaintiffs' counsel not only by reputation, but as a matter of his
13 personal experience and knowledge, and the difficulties presented by
14 the conduct of the defense in this case.

15 9. Mr. Taleff described the risks of losing, which are taken and
16 absorbed by counsel representing injured people on a routine basis,
17 and the long delays in receiving any payment at all, even when a
18 plaintiff prevails, as Kelly has done in this case. The Court notes that
19 risk and delay are some of the reasons it is inappropriate to compare
20 the hourly rate of lawyers who get paid to defend cases with those who

1 represent injured people. As the Court noted at the hearing, defense
2 lawyers get paid whether they win or lose, and are paid regularly. Mr.
3 Taleff also described the unique difficulty, risks, and challenges in
4 bank cases.

5 10. An attorney may be entitled to an entire fee where it is
6 impossible to segregate the attorney's time between claims entitling
7 the party to attorney fees and other claims. *Blue Ridge Homes, Inc. v.*
8 *Thein*, 345 Mont. 125, ¶ 79, 191 P3d 374, 2008 MT 264 (2008). Mr.
9 Taleff testified that it would not be feasible or practicable to attempt to
10 segregate time spent on the contract claims because all of the claims
11 are based on a common core set of facts. Defendants did not
12 demonstrate that the claims are segregable, or how they could be
13 segregated. Nor did they make a credible argument to dispute that the
14 entire case was based on a common core set of facts. The Court finds
15 that all claims in this case were based on a common core set of facts,
16 and that it was not possible for Plaintiff's lawyers to segregate their
17 contingency fee solely on the contract claim.

18 11. The issues in this case were novel, unique, difficult, and
19 time-consuming. They were complex, both factually and legally, and
20 unique with regard to wrongful offset, the effect on the existing loan,

1 the damage claims for future lost profit and conduct that would justify
2 punitive damages where there were also contract claims, among
3 others. The case involved tens of thousands of documents. Mr. Taleff
4 testified that this case was one of the most complex commercial bank
5 cases he has ever seen.

6 12. Kelly's attorneys expended substantial time and effort on the
7 case, with two principal attorneys, up to three paralegal and staff
8 members, and two additional attorneys who assisted with the case.
9 This was an extremely hard-fought case that required a significant
10 amount of discovery, depositions, time and preparation, and analysis,
11 both pre-trial and during trial. The Court recognized the difficulty and
12 work required to find and use evidence of the reprehensible conduct
13 by 1st Interstate summarized above. The case was fought with
14 disputes over nearly every issue, especially discovery. Motions to
15 compel and motions for protective orders were filed and heard. At one
16 point, the Court ordered Kelly's requested discovery could only be
17 obtained if the two principal attorneys reviewed documents on a
18 computer at 1st Interstate's reading room. 1st Interstate produced
19 several documents only weeks before trial necessitating Kelly to
20 depose a new witness. Kelly filed a motion for sanctions as a result of

1 the late disclosure. Following the Court's Entry of Judgment, 1st
2 Interstate filed a Writ of Supervisory Control with the Montana
3 Supreme Court.

4 13. Kelly's success is important, not only for it, a loyal bank
5 customer, but for other businesses in Montana that may find
6 themselves in a similar situation with their lender. Protecting the
7 interests of a company such as Kelly, and trying to assist it to stay in
8 business as a long-time entity as well as advocating for the rights of
9 Kelly in the face of boilerplate bank documents, and a very aggressive
10 defense, was highly important to not only the Kelly's but the
11 community at large. The jury appreciated the character and
12 importance of the case by returning a significant verdict against 1st
13 Interstate.

14 14. Although the verdict does not reflect all of the actual
15 compensatory damages Kelly sought, the jury did return a very
16 substantial punitive damage award.

17 15. The experience, skill, and reputation of Mr. Paoli and Mr.
18 Strauch are excellent, well-respected, testified to by Mr. Taleff and
19 known to the Court. 1st Interstate did not challenge that both attorneys
20 have good reputations that are well-deserved.

1 16. The contingency fee sought here is consistent with that
2 customarily charged for similar legal services in Missoula and
3 throughout Montana for cases of this magnitude and complexity. In
4 this case, the contingency fee was critical for Kelly to access the
5 courts and seek justice. Mr. Taleff testified the 44% contingent fee is
6 well within the normal range of contingent fees and it is reasonable.
7 1st Interstate presented no evidence – expert or otherwise, that the
8 contingent fee is unreasonable.

9 17. Absent the contingent fee agreement, Kelly had no ability to
10 pay for the legal services rendered and no feasible way to proceed
11 with its case. It is not reasonable for 1st Interstate to suggest that a
12 second mortgage on the Kelly's home or equipment be made to pay
13 for attorney's fees and costs for a lawsuit when there is no guarantee
14 Kelly would prevail.

15 18. There was a significant risk Kelly would not recover. 1st
16 Interstate and its attorneys defended the case aggressively and with
17 significant effort.

18 19. Determination of attorney fees is largely discretionary with
19 the district court and will not be disturbed on appeal in the absence of
20 an abuse of that discretion. *Donnes v. Orlando*, 221 Mont. 356, 361,

1 720 P.2d 233 (1986). The presiding trial judge is in the best position to
2 determine reasonableness of attorney's fees. *Id.* Montana Courts
3 routinely award contingent fee attorney's fees and costs. *West v. Club*
4 *at Spanish Peaks, L.L.C.*, 2008 MT 183, ¶ 95, 343 Mont. 434 186 P.3d
5 1228.

6 20. A Court is well within its discretion to award the full amount
7 agreed upon under a contingency fee agreement as long as the
8 amount of attorney's fees is reasonable. *Stimac v. State*, 248 Mont.
9 412, 417, 812 P.2d 1246, 1249 (1991) (33% contingent fee award);
10 *Riordan v. State Farm Mutual Auto Insurance Company*, 589 F.3d 999,
11 1008 (9th Cir. 2009) (35% contingent fee). The reasonableness of the
12 requested fee is based upon the eight principle factors addressed
13 above. *Stimac v. State, supra.*

14 21. Montana's Constitution guarantees that "Courts of justice
15 shall be open to every person, and speedy remedy afforded for every
16 injury of person, property, or character." Mont. Const. Art. II, § 16.
17 The Supreme Court held that the access to court right is a fundamental
18 constitutional right. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶
19 63, 310 Mont. 123, 54 P.3d 1, cert. denied, 538 U.S. 936 (2003).

1 22. Corporations and similar entities cannot appear in court
2 without an attorney. *H&H Development, LLC v. Ramlow*, 2012 MT 51,
3 ¶ 18, 364 Mont. 283, 272 P.3d 657. Thus, a corporation's
4 constitutional right to a jury trial requires access to an attorney. As a
5 matter of law, Kelly was required to hire lawyers to pursue this case.
6 In this particular instance, Kelly would not have had access to an
7 attorney to prosecute this case absent a contingent fee agreement,
8 which placed all of the risk of recovering fees and costs on the
9 attorney. Therefore, Kelly's access to justice required a contingency
10 fee agreement. *See, e.g., In Re Abrams & Abrams, P.A.*, 605 F3d
11 238, 245 (4th Cir. 2010) (Contingent fee agreements provide
12 individuals of limited means access to counsel, the Courts and
13 Justice); *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990) ("Ignoring
14 reasonable contingent fee agreements or automatically reducing them
15 would impair claimants' ability to secure representation.")

16 23. When an attorney enters into a contingent fee agreement
17 based on a percentage of the judgment or award recovered by the
18 client and the total amount recovered includes interest, the attorney is
19 entitled not only to a percentage of the actual damages recovered, but
20

1 also to a percentage of the pre-judgment and post-judgment interest
2 recovered. *Smith v. Howery*, 217 Mont. 23, 27, 701 P.2d 1381 (1985).

3 24. The contingency fee request is reasonable and within the
4 parameters for similar cases in Montana. 44% of the total award of
5 \$17,046,550.00, or \$7,500,482.00, is a reasonable attorney's fee in
6 this case. 50% of the total award is a reasonable attorney's fee on
7 appeal.

8 25. The contingent fee in this case of \$7,500,482.00 was
9 actually incurred at the time of the jury's verdict. *West v. Club at*
10 *Spanish Peaks, L.L.C.*, 2008 MT 183, ¶ 95, 343 Mont. 434, 186 P.3d
11 1228. A party who pursues its rights in court is entitled to be made
12 whole by awarding to that party its attorney's fees and expenses.
13 *Rowden v. American Evangelical Assoc.*, 2007 WL 2463830.

14 **III. Punitive damage cap under § 27-1-220(3), MCA.**

15 Section 27-1-220(3), MCA, provides that punitive damage
16 awards may not exceed \$10 million or 3% of the defendant's net worth,
17 whichever is less. The Court notes that two other Montana District
18 Courts have recently held that the cap is unconstitutional: *Masters v.*
19 *Comerica*, Silverbow County Cause No. DV-2011-372; and *Olson v.*
20 *Hyundai*, Lake County Cause No. DV-11-304.

1 Kelly argues that the statutory cap is unconstitutional because it
2 violates the Montana Constitution's "inviolate" right to a jury trial; the
3 Montana Constitution's open-court provision; substantive due process;
4 the Montana Constitution's equal protection guarantee; and it fails
5 under strict, middle-tier, and rational basis scrutiny. 1st Interstate
6 argues the cap is a proper exercise of legislative authority.

7 The 7th Amendment of the United States Constitution states, "the
8 right of jury trial shall be preserved, and no fact tried by a jury, shall be
9 otherwise re-examined in any Court of the United States, than
10 according to the rules of common law." Montana's Constitution, Art. II,
11 § 26 guarantees that "[t]he right of trial by jury is secured to all and
12 shall remain inviolate." In cases where juries historically made the
13 award at issue prior to the adoption of the Constitution, the right to a
14 jury to make such an award must remain in place after the adoption of
15 the Constitution in order "to preserve "the substance of the common-
16 law right of trial by jury.'" *Feltner v. Columbia Pictures Television, Inc.*,
17 523 U.S. 340, 354-55 (1998) (Seventh Amendment provides right to
18 jury trial on all issues pertinent to award of statutory damages in
19 copyright infringement action, including amount itself.)
20

1 In 1889, when Montana's first Constitution was ratified,
2 determination of the amount of punitive damages was a function for
3 the jury. Punitive damages were recognized as a way to punish the
4 guilty and deter future misconduct. See *Amiable Nancy*, 16 U.S. 546,
5 558 (1818); see also *Barry v. Edmunds*, 116 U.S. 550, 562-63 (1886);
6 *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 106-07 (1893).
7 Under the common law as it existed at the time the Montana
8 Constitution was adopted, the jury imposed the punitive damage
9 verdict. *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (noting that
10 assessing damages by way of punishment "has been always left to the
11 discretion of the jury.") Like other jury functions, the right to have a
12 jury determine punitive damages is protected by the Seventh
13 Amendment and Article II, § 26 and is entitled to the greatest
14 deference. *Sandman v. Farmers Ins. Exchange*, 1998 MT 286, 291
15 Mont. 456, 969 P.2d 277 (rejecting a request for new trial on the
16 amount of punitive damages). See also *Cartwright v. Equitable Life*
17 *Assur. Soc. of U.S.*, 276 Mont. 1, 23, 914 P.2d 976, 990 (1996) ("This
18 Court's role is not to agree or disagree with a jury's verdict. Once we
19 conclude that substantial evidence supports the verdict, our inquiry is
20 complete.")

1 The punitive damages cap imposed by § 27-1-220(3), MCA
2 necessarily changes and impairs the right of a trial by jury as existed
3 historically. Because a party seeking punitive damages in 1889 would
4 have had the right to have a jury determine the award of punitive
5 damages, the statutory reduction of Kelly's punitive damages award
6 pursuant to § 27-1-220(3) would unconstitutionally infringe on Kelly's
7 right to a jury trial. In contrast to the federal due process and § 27-1-
8 221(1), MCA review above, the cap is not based on the facts or
9 circumstances of a case; it caps the punitive damages award at the
10 lesser of \$10 million or 3% of defendants' net worth, regardless of the
11 facts and circumstances of the particular case. See *Lewellen v.*
12 *Franklin*, 441 S.W.3d 136 (Mo., 2014).

13 Therefore, the cap is unconstitutional because it violates the
14 "inviolable" and fundamental right to a jury trial.

15 The Court has reviewed Kelly's equal protection constitutional
16 analysis and agrees the punitive damage cap fails the strict scrutiny
17 test, the middle-tier scrutiny test and the rational basis test. This
18 statutory cap on punitive damages also violates the substantive due
19 process clause found in Article II § 17 of the Montana Constitution,
20 which provides "[N]o person shall be deprived of life, liberty or property

1 without due process of law.” The due process clause contains a
2 substantive component which bars arbitrary governmental actions
3 regardless of the procedures used to implement them, and serves as a
4 check on oppressive governmental action. *Newville v. State, Dept. of*
5 *Family Serv.*, 267 Mont. 237, 249, 883 P.2d 793, 799 (1994). As
6 stated above, it appears to this Court the legislatively imposed \$10
7 million maximum cap is arbitrary and not rationally related to the stated
8 purposes of punitive damages - deterrence and punishment.

9 Based upon the foregoing, this Court concludes the punitive
10 damage cap provided in §27-1-220(3), MCA, is unconstitutional, on its
11 face and as applied to this case considering the significant financial
12 wealth of 1st Interstate and the enormous actual and potential injury to
13 its long-time customer and important Montana business, Kelly Logging.

14 **IV. Entry of Final Judgment**

15 Based upon the foregoing, this Court’s Judgment dated October
16 21, 2014 (Dkt. 237), is hereby amended as follows: a) the Court affirms
17 the jury’s punitive damages award against First Interstate Bank in the
18 full amount awarded, \$16,760,000.00; b) the Court awards Kelly’s
19 attorney’s fees of \$7,500,482.00 and costs/expenses of \$90,820.25; c)
20 final judgment in the full amount of \$24,637,852.25 is entered, together

1 with interest on that amount at the statutory rate from August 14, 2014.

2 The Court denies 1st Interstate's post-trial motions.

3 Although this Court has determined this punitive damage cap
4 found in §27-1-220(3) MCA is unconstitutional, this Court will still
5 address how that cap should be applied in this case if the Supreme
6 Court of Montana later upholds the constitutionality of that statutory
7 cap. §27-1-220(3) MCA caps the punitive damages award at the
8 lesser of \$10 million or 3% of defendants' net worth. This Court notes
9 that 3% of 1st Interstate's \$838 million net worth exceeds \$25 million.
10 Accordingly, if the Supreme Court of Montana later upholds the
11 constitutionality of the statutory cap contained in §27-1-220(3) MCA,
12 given this Court's review of the jury's verdict, this Court recommends a
13 reduction of the jury's verdict to no less than the \$10 million maximum.
14 In that event, given the Court's findings herein, it further recommends
15 that Kelly should also be awarded its contingency fee based on the
16 revised total judgment amount, plus its costs and expenses and post-
17 judgment interest.

18 DATED this 21st day of April, 2015.

19
20 
ED McLEAN.
DISTRICT JUDGE

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c: Charles Hingle, Esq./Kyle Gray, Esq./Michael Manning, Esq.
David Charles, Esq./Danielle Coffman, Esq./Ian McIntosh, Esq.
David Paoli, Esq./Timothy Strauch, Esq.