

2007

# Larry J. Coet Chevrolet, Pontiac, Buick, Inc. v. Labrum Chevrolet, Pontiac, Buick, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LARRY J. COET CHEVROLET,  
PONTIAC, BUICK, INC.,

Plaintiff/Counterclaim-  
Defendant/Appellant

Appeal No. 20070005-CA

vs.

(Fourth Judicial District Court No.  
030500537)

LABRUM CHEVROLET, PONTIAC,  
BUICK, INC.,

Defendant/Counterclaim-  
Plaintiff/Appellee

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BRIEF OF APPELLEE

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ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, THE  
HONORABLE DEREK P. PULLAN, PRESIDING

---

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UTAH APPELLATE COURTS

AUG - 2 2007

## **IDENTIFICATION OF PARTIES**

The only appellant in this case is Larry J. Coet Chevrolet Pontiac Buick, Inc. (“Coet”).

The only appellee is Labrum Chevrolet, Pontiac, Buick, Inc. (“Labrum”).

Coet’s Brief suggests that Danny R. Labrum *individually* is a party to this appeal. *See* Coet’s Brief p. i and caption. That is incorrect. The Trial Court dismissed Danny R. Labrum from this case. [R. 657; R. 674 at p. 82.] Coet has not appealed that dismissal.

Another party identified in Coet’s complaint was Ronald L. Covey. [*See* R. 9.] However, there is no record that Covey was ever served, and he never actively participated in the case.

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction in this matter pursuant to Utah Code Ann. §§ 78-2-2(3)(j), 78-2-2(4) and 78-2a-3(2)(j).

## **STATEMENT OF ISSUES**

1. Did the Trial Court correctly enter summary judgment in Labrum's favor, ruling that Coet waived and released its claims for attorney fees and pre-judgment interest pursuant to a partial settlement agreement voluntarily entered into by the parties?

Standard of Review: A trial court's entry of summary judgment is reviewed for correctness, granting no deference to its legal conclusions. *Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 7, 92 P.3d 768. The appellate court considers whether the trial court correctly concluded that no genuine issue of material fact exists and whether it correctly applied the law. *Id.* The determination of whether a contract is ambiguous and the meaning of a contract are questions of law. *Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199, 1200-01 (Utah 1983).

Labrum's position on this issue was preserved in the Trial Court. [*See, e.g.*, R. 99-127, 204-300, 441-79, 551-618, 624-630.]

2. Did the Trial Court abuse its discretion in determining that Labrum was the prevailing party on all issues litigated after Labrum's performance of its obligations under the parties' settlement agreement, and therefore entitled to recover its attorney fees incurred after that date?

Standard of Review: Whether a party is the prevailing party in an action is a decision left to the sound discretion of the Trial Court and is reviewed for an abuse of discretion. *See Carlson Distr. Co. v. Salt Lake Brewing Co.*, 2004 UT App 227, ¶ 16, 95 P.3d 1171.

Labrum's position on this issue was preserved in the Trial Court. [*See, e.g.*, R. 551-618, 624-630.]

3. Did the evidence at trial support the Trial Court's findings that Coet made a material misrepresentation in connection with the sale of car parts inventory under the parties' Asset Sale Agreement, and that Labrum reasonably relied on the misrepresentation?

Standard of Review: The issue of whether Coet made a material misrepresentation is a question of fact. The issue of whether Labrum reasonably relied on the misrepresentation is a question of fact. *See Brown v. Richards*, 840 P.2d 143, 148-49 (Utah 1998) (whether plaintiff reasonably relied on misrepresentations is question of fact). A trial court's findings of fact are reviewed under a "clearly erroneous" standard. *See, e.g., Young v. Young*, 1999 UT 38, ¶ 15, 979 P.2d 338; *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); Utah R. Civ. P. 52(a). Factual findings are clearly erroneous if they are "not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994). Coet bears the burden of marshaling all of the evidence supporting the trial court's finding, and then showing that the marshaled evidence is legally insufficient to support the finding. *See, e.g., Tingey v. Christensen*, 1999 UT 68, ¶ 7, 987 P.2d 588; *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998).

Labrum's position on this issue was preserved in the Trial Court. [*See, e.g.*, R. 674 at pp. 113, 117-18, 128-31, 173-74, 182-86.]

4. Did the evidence at trial support the Trial Court's finding that a 1992 Ford truck was in Coet's inventory on November 14, 2001 (the date of the closing of the parties' Asset Sale Agreement)?

Standard of Review: Whether the 1992 Ford truck was in Coet's inventory on November 14, 2001 is a question of fact. A trial court's findings of fact are reviewed under a "clearly erroneous" standard. *See, e.g., Young v. Young*, 1999 UT 38, ¶ 15, 979 P.2d 338; *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); Utah R. Civ. P. 52(a). Factual findings are clearly erroneous if they are "not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994). Coet bears the burden of marshaling all of the evidence supporting the trial court's finding, and then showing that the marshaled evidence is legally insufficient to support the finding. *See, e.g., Tingey v. Christensen*, 1999 UT 68, ¶ 7, 987 P.2d 588; *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998).

Labrum's position on this issue was preserved in the trial court. [*See, e.g.*, R. 674 at pp. 64-70, 84-86, 89, 131, 174-79.]

### **DETERMINATIVE STATUTES**

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal or are of central importance to this appeal.

## **STATEMENT OF THE CASE**

In August 2002, Coet and Labrum entered into an Asset Sale Agreement, whereby Coet agreed to sell, and Labrum agreed to buy, certain assets associated with a Chevrolet car dealership located in Heber, Utah. *See* R. 354-433. The sale closed on November 14, 2001. [R. 674 at p. 117.]

After the closing, a number of disputes arose between the parties. Each party claimed the other party owed money for a host of various reasons. [*See* R. 3-10, 17-31, 108-114.]

Coet filed suit against Labrum on November 13, 2003. Coet alleged claims for breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment. In essence, Coet alleged Labrum had failed to pay various sums owed under the Asset Sale Agreement and that Labrum had improperly used Coet's line of credit to make certain inventory purchases. Coet also asserted a claim for conversion based on an allegation that Labrum sold a used, 1992 Ford truck that Coet claimed was not part of the used car inventory conveyed to Labrum under the Asset Sale Agreement. [R. 3-10.]

Labrum denied all substantive allegations of Coet's complaint and filed counterclaims. Labrum alleged claims for breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment. In essence, Labrum alleged Coet had failed to pay, credit or reimburse various sums owed to Labrum under the Asset Sale Agreement. Labrum also asserted a claim for fraud and misrepresentation. Labrum alleged that just prior to the closing of the Asset Sale Agreement, Larry Coet falsely represented to Labrum that Coet did not have an "Obsolete Parts" problem, referring to the nature and condition of the parts in

inventory in Coet's service department. This representation was important, because the purchase price under the Asset Sale Agreement depended in part on the value of the car parts inventory, excluding Obsolete Parts. Labrum's counterclaim alleged that it relied on Mr. Coet's false representation by agreeing that no adjustment would be made to the purchase price based on the parts inventory. [R. 17-31.]

After the initial pleadings were filed, the case languished for many months. Coet and Labrum informally attempted to resolve their disputes, but had difficulty defining the precise nature of the claims and amounts at issue. Finally, after lengthy negotiations, the parties mutually agreed to make a comprehensive list of all claims they had against each other, and to have those claims submitted to a team of two accountants (the "Evaluation Team"). This agreement was memorialized in a letter agreement dated February 9, 2005, referred to as the Resolution Agreement. [R. 73-79.] A copy of the Resolution Agreement is attached as Addendum 2.

The parties agreed that the purpose of the Resolution Agreement was to "resolv[e] all of the respective claims between the parties, with the exception of whether either party is legally responsible to the other party for parts obsolescence." [R. 76.] The parties agreed that they would each pay any sums unanimously found to be owed by the Evaluation Team, and expressly provided that upon such payment, any and all claims between them would be expressly released, save only those issues on which the Evaluation Team could not reach a unanimous decision and claims relating to Obsolete Parts. [See R. 74-75.] The Obsolete Parts issue was excepted because the parties agreed it would not be appropriate for the

Evaluation Team, comprised of two accountants, to determine whether Coet was legally liable for fraud or misrepresentation. [*See, e.g.*, R. 78-79, 240.]

The Evaluation Team completed their work and issued a report in April 2005. The Evaluation Team determined that each party owed the other on certain claims, with a net result that Labrum owed Coet \$59,384.79. [R. 104-106.] (A copy of the Evaluation Team's report is attached as Addendum 3.) Labrum promptly paid that sum as it had agreed to do in the Resolution Agreement. [R. 102.]

The Evaluation Team left four issues unresolved: (1) the value of parts in inventory at the date of closing and the extent of any Obsolete Parts; (2) whether either party owed the other any sum for the new vehicle inventory; (3) the dollar value of gas and oil inventory at the date of closing; and (4) whether any sum was owed based on the 1992 Ford truck. [R. 104-06.]

After the Evaluation Team issued its report and after Labrum paid the net amount owed to Coet, Coet attempted to go back to the well by demanding additional payments for attorney fees and interest. [*E.g.*, R. 121, 178-190.] Coet had failed to assert those claims in the Resolution Agreement. [R. 73-79.] Labrum argued that claims not expressly preserved in the Resolution Agreement were waived pursuant to the release provisions in Paragraphs 3, 9 and 10 of the Resolution Agreement. [*E.g.*, R. 117-121.]

Labrum then filed a motion for partial summary judgment on the issue of attorney fees and prejudgment interest. [R. 100-101.] The Trial Court granted Labrum's motion and

dismissed Coet's claims for attorney fees and interest. [R. 317-326.] The Trial Court reconsidered and confirmed its ruling in connection with a motion in limine. [R. 510-511.]

The parties then proceeded to trial on the remaining claims and counterclaim. The Trial Court conducted a bench trial on August 8, 2006. Three basic issues were tried: (1) whether Labrum owed Coet anything for the 1992 Ford truck; (2) whether Labrum owed Coet anything for the oil and gas in inventory as of November 14, 2001; and (3) whether Coet was liable to Labrum for misrepresentation or fraud. [R. 674.] Labrum prevailed on all issues at trial. The Trial Court dismissed Coet's claims and entered judgment on Labrum's counterclaim for fraud and misrepresentation in the amount of \$11,455.26. [R. 674 at pp. 190-199, 522, 655-658.]

After the trial, Coet filed a motion to recover of all of its attorney fees, claiming that it was the prevailing party. [R. 526-550.] Labrum filed a cross-motion for recovery of its attorney fees, but limited its request to those attorney fees and costs incurred *after* it had paid the sums owed under the Evaluation Team's report. Labrum asserted that all attorney fees and costs incurred prior to the date of that payment had been waived and released pursuant to the parties' Resolution Agreement. Labrum further asserted that it was the prevailing party on all claims that survived the Resolution Agreement. [R. 551-618.]

On November 1, 2006, the Trial Court entered its Ruling in favor of Labrum on the attorney fees issue. The Trial Court determined that Labrum was the prevailing party on all litigated claims and awarded fees to Labrum. [R. 634-641.] The Trial Court then entered a final Judgment and Order in favor of Labrum in the amount of \$40,005.26. Of that sum,

\$11,455.26 represented a judgment on the fraud/misrepresentation counterclaim, and \$29,715 represented an award of fees and costs. [R. 655-658.] This appeal followed.

### **STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED**

#### **I. COET AGREES TO SELL, AND LABRUM AGREES TO BUY, ASSETS OF A CHEVROLET DEALERSHIP PURSUANT TO AN ASSET SALE AGREEMENT.**

1. Coet owned and operated a Chevrolet dealership in Heber City, Utah. [R. 674 at pp. 14-15.]
2. In August 2001, Coet entered into an Asset Sale Agreement, by which he agreed to sell, and Labrum agreed to buy, certain assets related to the Chevrolet dealership. [R. 411-433; R. , 674 at p. 16.] The Asset Sale Agreement is attached as Addendum 1.
3. The “Purchase Price” for the Assets was \$350,000, “as may be adjusted at the Closing pursuant to the terms of this Agreement.” [R. 429.]
4. The sale ultimately closed on November 14, 2001. [R. 674 at p.117.]
5. The “Assets” to be conveyed under the Asset Sale Agreement included “[a]ll used motor vehicles which are in the Seller’s inventory at the time of Closing . . .” [R. 432.]
6. Coet was required to deliver “good, marketable and legal title to and right of possession of the Assets [including the used vehicle inventory] free and clear of all liens and encumbrances whatsoever.” [R. 427 (Asset Sale Agreement § 5.1(b); *accord* Asset Sale Agreement §§ 5.1(e), 5.1(g), 5.1(k), 6.1(a)).]



## **II. A 1992 FORD TRUCK IS PART OF THE ASSETS SOLD.**

7. Six days before the closing, on November 8, 2001, Gary Robinson purchased a new pickup truck from Coet. [R. 674, p. 64.]

8. At that time, Robinson owned a used 1991 Chevrolet truck, which he proposed trading in to Coet as part of the new truck purchase. [R. 674, pp. 64-65, 70.]

9. However, Robinson's friend, Johnny Jessen, was with Robinson at the Coet dealership. Jessen wanted Robinson's used Chevrolet truck. Jessen owned a 1992 Ford truck, and offered to allow Coet to take his 1992 Ford truck as a trade in substitute for Robinson's Chevrolet truck. The parties agreed that Robinson would take the new Chevrolet truck, Jessen would take Robinson's used Chevrolet truck, and Coet would take Jessen's used 1992 Ford truck as a trade in. [R. 674, pp. 65-66, 84, 89.]

10. Jessen did not have his 1992 Ford truck with him at the Coet dealership on November 8. [R. 674, p. 66.] Robinson left his used Chevrolet truck at the Coet dealership on November 8, and drove away in the new Chevrolet truck. [R. 674, pp. 66-67.] Jessen agreed to deliver the 1992 Ford truck to Coet as soon as possible. [R. 674, p. 68.]

11. Jessen delivered his 1992 Ford truck to Coet at approximately 6:00 a.m. on November 13, 2001. He parked the Ford truck under a carport at the Coet dealership, and put the title (with his signature) and two sets of keys to the truck in Coet's night drop box. He drove away in the 1991 Chevrolet truck. [R. 674, pp. 85, 88.]

12. At the time Jessen delivered the 1992 Ford truck to Coet on November 13, Jessen had paid off a prior loan on the Ford truck, and the title to that truck was clear. [R.

342 (Jessen's title to Ford truck showing release of lien by Zion's bank in 1999); R. 674, p. 86.]

13. As of November 8, 2001, Robinson owed approximately \$2,300 to a credit union on his used Chevrolet truck. [R. 674, pp. 65, 67.]

14. Coet eventually paid off the balance of \$2,300 owed on Robinson's used Chevrolet truck. [See R. 674 at p. 65, 67 (Robinson's testimony that he owed \$2,300 on the Chevrolet truck to a credit union); R. 343 (showing payment by Coet to CUP Federal Credit Union in the amount of \$2,300 with notation "Gary Robinson Pay off").]

15. Labrum sold the 1992 Ford truck three months later in January 2002, after making repairs or spending money to have it repaired. Coet never made any hint of any claim to ownership of the 1992 Ford truck until long after it was sold. [R. 674 at pp. 91-92; R. 674 at p. 122.]

### **III. COET FALSELY STATES THAT HE DOES NOT HAVE AN OBSOLETE PARTS PROBLEM.**

16. The Asset Purchase Agreement provided that the \$350,000 Purchase Price would be reduced if an inventory of all vehicle "Parts" did not show a value of at least \$68,000 in Parts inventory. Section 1.2(b) of the Asset Sale Agreement provided, in relevant part:

(b) Parts. Based upon a physical inventory of Parts taken immediately prior to the Closing, if the value of the then existing Parts is less than \$68,000.00, the Purchase Price will be reduced to reflect the difference between \$68,000.00 and the valuation of the inventoried parts and accessories.

...

[R.431.]

17. “Parts” was specifically defined in the Agreement to exclude “Obsolete Parts.” “Obsolete Parts” was defined to consist of: (1) parts not included on the manufacturer’s current pricing list; (2) any part on which the seal had been broken or was materially damaged; (3) parts that would not be accepted for return by its manufacturer; or (4) parts in excess of a 180-day supply. [R. 432.]

18. One or two days before the closing, on November 12 or 13, 2001, prior to the closing of the sale, Danny Labrum, Rachael Labrum, Lyle Labrum and Larry Coet met at the dealership to conduct an inventory of car parts in the service department. [R. 674, pp. 113, 125, 128.]

19. After a few hours of counting parts piece by piece, Danny Labrum determined there was roughly \$68,000 worth of parts, not taking into consideration any Obsolete Parts. There was no meaningful method for Danny Labrum to identify which parts might be Obsolete Parts. [R. 674, pp. 127-29.]

20. Danny Labrum testified that upon concluding that there was roughly \$68,000 in parts, he asked Larry Coet if any of these were Obsolete Parts. Coet responded, “I don’t have an obsolescence problem.” [R. 674, p. 128.] Rachael Labrum corroborated Danny Labrum’s testimony. [R. 674, p. 113.]

21. Coet’s statement was not true. For example, after closing the sale, Labrum learned that GM refused to accept a return of \$18,000 worth of parts. [R. 674, p. 131.]

22. Coet knew or should have known his statement was untrue. For example, Coet maintained an inventory record dated November 1, 2001 that stated the Coet had \$25,299.07 worth of parts that had not been moved for over 12 months. [R. 690, Ex. D-12];<sup>1</sup> R. 674, p. 131.] The Asset Purchase Agreement defined “Obsolete Parts” to include “Parts in excess of a one hundred eighty (180) day supply.” [R. 432.] Coet did not disclose this inventory record to Labrum, and Labrum had no access to it, prior to the Closing. [R. 674, pp. 117-18, 131.]

23. Coet’s statement was important to Labrum. Labrum proceeded forward with the closing in reliance on Coet’s statement that he did not have an obsolescence problem. Labrum signed closing statements that provided for no adjustment to the purchase price based on Obsolete Parts. [R. 674, pp. 129-30.]

**IV. LABRUM CLOSES THE ASSET SALE AGREEMENT IN REASONABLE RELIANCE ON COET’S MISREPRESENTATIONS.**

24. Coet and Labrum closed the Asset Sale Agreement on November 14, 2001. At the closing, Coet’s attorney, Gary Howe, was present. Labrum had no counsel present. [R. 674 at p. 117.]

25. At the closing, Labrum signed an “Asset Sale Agreement - Closing Statement.” [R. 352-353.] The Closing Statement stated that “the parties agree that as of the Closing the conditions set forth in §1.2(b) did not require any adjustment to the Purchase Price.” [R. 353.] The parties also signed a separate document that stated, in part, “Danny Labrum and

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<sup>1</sup> A copy of the trial exhibit D-12 is attached as Addendum 4.

Larry J. Coet agree that parts inventory total \$68,000.00.” [R. 351.] Labrum testified that he signed these two documents at the closing in reliance on Larry Coet’s representation that he did not have an Obsolete Parts problem. [R. 674 at p. 130.]

26. The Closing Statement also provided for a \$495 reduction to the Purchase Price based on the value of used vehicles in inventory as of the Closing Date. [R. 353.]

27. The 1992 Ford truck was present on the lot at the dealership at the time of the closing on November 14, 2001. [R. 674 at p. 92; R. 674 at pp. 118-22.]

**V. THE PARTIES AGREE TO A DISPUTE RESOLUTION MECHANISM, AND AGREE TO WAIVE AND RELEASE ALL CLAIMS NOT EXPRESSLY PRESERVED.**

28. After the closing, the parties each raised many disputed claims about sums that were owed by each other. [See, e.g., R. 3-10, 17-31, 108-114.]

29. Following at least a year of negotiations, Coet and Labrum finally agreed to submit their claims to an “Evaluation Team,” a team comprised to two accountants. [See R. 73-79.] The terms of the parties’ agreement were memorialized in a letter agreement dated February 9, 2005, referred to as the Resolution Agreement. [R. 73-79.] A copy of the Resolution Agreement is attached as Addendum 2.

30. The Resolution Agreement “set out the terms of our understanding and agreement with respect to an attempt to resolve disputes between [Coet] and [Labrum].” [R. 79.]

31. Pursuant to the Accountants' Evaluation Agreement, Coet Chevrolet designated Becky Taylor, and Labrum Chevrolet designated Steven Racker, as "Evaluation Team members" to "conduct an evaluation of the various claims of the respective parties." [R. 79.]

32. In the Resolution Agreement, the parties agreed to submit all of their respective claims and counterclaims to the Evaluation Team. The Evaluation Team was directed to review and analyze the parties' respective claims and endeavor to arrive at a consensus as to the total value of each claim, whether or not the amounts claimed had been paid, and whether either party owed the other any amount with respect to such claim. Coet and Labrum agreed to be bound by the unanimous decision of the Evaluation Team with respect to each claim. Upon payment of any sums owed, full releases of "any and all " claims were to be effective. The only exceptions were those specific claims on which the Evaluation Team could not reach a unanimous conclusion and Labrum's claims relating to Obsolete Parts. [*See generally* R. 73-79, *esp.* R. 74-75.]

33. With respect to Obsolete Parts, the parties agreed that the Evaluation Team would attempt to determine the dollar value of "Obsolete Parts" in inventory at the time of closing, as well as the parts that were not "Obsolete Parts." However, the issue of whether either party was legally liable to the other based on Obsolete Parts was specifically excluded because the parties agreed it would not be appropriate for two accountants to decide whether Coet was legally liable for fraud or misrepresentation. [*See* R. 78.]

34. In the negotiations leading up to the Resolution Agreement, Labrum made it clear to Coet that all claims of any nature had to be included in the Resolution Agreement, *i.e.*, “everything needs to be put on the table and addressed or waived.” [R. 263.]

35. Section 3 of the Resolution Agreement stated the “Objective of [the] Evaluation” as follows:

The Evaluation is intended by Coet and Labrum to be, and shall be conducted by the Evaluation Team as, an independent examination, assessment, and application of the relevant provisions of the Asset Sale Agreement and related documents, *for the purpose of resolving all of the respective claims between the parties, with the exception of whether either party is legally responsible to the other party for parts obsolescence.*

[R. 76 (emphasis added).]

36. Consistent with the stated purpose and Labrum’s insistence that “everything needs to be put on the table and addressed or waived,” the parties included in the Resolution Agreement a detailed list of all of their respective claims, ranging from a claim for \$31.31 for interest in a GMAC account to a claim for \$46,715 for new car inventory. [R. 76-79.] Although it was given a full opportunity to list all of its claims in the Accountant’s Evaluation Agreement [*see* R. 222-223, 239-240, 263], Coet did not include any claim for attorney fees or prejudgment interest in the parties’ Resolution Agreement. [*See* R. 76-79.]

37. The Evaluation Team produced their written conclusions on about April 27, 2005. They unanimously concluded that each party owed the other various sums on various claims, with the net result that Labrum owed Coet \$59,384.79. R. 104-106; *see* Addendum 3.

38. Consistent with the parties' Agreement, on May 13, 200 Labrum paid \$59,384.79 to Coet as it had agreed to do in the Resolution Agreement. [R. 102.]

39. Upon payment of the \$59,384.79, the release language of the Resolution Agreement became effective. The release is contained in Section 9 of the Resolution Agreement and states, in relevant part:

9. Binding Effect; Admissibility of Evaluation Results; Release of Claims. . . . Upon payment by Labrum of any such sum (if any), Coet, for and on behalf of himself, itself and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, releases and forever discharges Labrum and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, ***from any and all claims, demands, suits, causes of action or obligations of whatever nature, known or unknown, contingent or non-contingent, that anyone claiming through or under Coet may have or believe to have against Labrum, including without limitation all claims that relate in any way to the lawsuit*** with Civil Number 030500537, currently pending in the Fourth Judicial District Court of Wasatch County, State of Utah (the "Lawsuit"), ***and any claims asserted or that could have been asserted in that lawsuit***, excepting from this release only such claims as to which there is not a unanimous decision by the Evaluation Team. Upon payment by Coet of any such sum (if any), Labrum, for and on behalf of himself, itself and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, releases and forever discharges Coet and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, from any and all claims, demands, suits, causes of action or obligations of whatever nature, known or unknown, contingent or non-contingent, that anyone claiming through or under Labrum may have or believe to have against Coet, including without limitation all claims that relate in any way to the lawsuit with Civil Number 030500537, currently pending in the Fourth Judicial District Court of Wasatch County, State of Utah, and any claims asserted or that could have been asserted in that lawsuit, excepting from this release only such claims as to which there is not a unanimous decision by the Evaluation Team and claims relating to parts obsolescence. With respect to parts obsolescence, any unanimous finding or conclusion by the Evaluation Team with respect to the value of parts that are or are not Obsolete Parts shall be binding on both Coet and Labrum.



[R. 74-75 (emphasis added).]

40. Section 10 of the Accountants' Evaluation Agreement precludes the assertion of any claims not specifically raised in the Accountants' Evaluation Agreement, as follows:

10. Preclusive Effect on Additional Claims. The parties acknowledge and agree that the claims raised in this letter agreement constitute all of the accounting-type claims for damages related to the Asset Sale Agreement and closing. The parties shall be precluded from raising or asserting (in the Lawsuit or otherwise) any claims for damages related to the Asset Sale Agreement and the Closing, except for: (i) any accounting issues that are not resolved by the Evaluation Team and (ii) any legal issues that must be resolved in order to achieve a complete resolution of the accounting issues specifically addressed in this Agreement.

[R. 74.]

41. The Evaluation Team could not reach a unanimous conclusion on four issues or claims: (1) the dollar value of parts that were "Obsolete Parts" or not "Obsolete Parts" on the date of closing; (2) whether a \$9,000 payment was for a new vehicle or a used vehicle; (3) Coet's claim for \$4,300 based on the 1992 Ford truck; and (4) Coet's claim for \$6,076 based on alleged gas and oil in inventory at the date of closing. [R. 104-106.]

42. Claims on which the Evaluation Team could not reach a unanimous conclusion, and the legal issue of whether either party owed the other based on the Obsolete Parts claim were specifically excepted from the release provisions of the Resolution Agreement. *See* Resolution Agreement §§ 2(b), 3, 9; R. 74-76, 78. Claims for interest or attorney fees were not excepted from the release provisions of the Resolution Agreement. *See id.*

## **VI. LABRUM PREVAILS ON ALL CLAIMS AT TRIAL.**

43. Of the four issues left undecided by the Evaluation Team, one issue (the \$9,000 payment for the new or used vehicle inventory) was voluntarily dismissed [*see* R. 332 (“the parties have narrowed the issues to three disputed facts”)], and the remaining three issues were tried to the Fourth Judicial District Court, the Honorable Derek P. Pullan presiding, on August 8, 2006. Labrum prevailed on all issues presented to the Trial Court at trial. [R. 674, *esp.* R. 674 at pp. 190-199; R. 655-658.]

44. After the trial, the Trial Court awarded to Labrum the attorney fees and costs it incurred *after* the effective date of the release of all claims under the Resolution Agreement. [R. 634-641.]

### **SUMMARY OF ARGUMENTS**

One of the most difficult obstacles to resolving this case without litigation was that Coet’s alleged claims were a moving target. It seemed Coet’s claims and demands changed every time Labrum attempted to resolve them. Therefore, when the Resolution Agreement was being negotiated, Labrum insisted that Coet specifically identify and place *all* of its claims on the table. Labrum did not want to agree to have the Accounting Team reach a result, only to find that Coet was claiming something new or different. Labrum therefore made sure that the Resolution Agreement, to which both parties agreed, specifically required both parties to list *all* of their claims, and to have all of those claims submitted to the Evaluation Team, save only the non-accounting issue of whether Coet was legally liable for fraud or misrepresentation. Labrum also made sure that the Resolution Agreement contained

broad release language to assure that Coet could not later assert any additional claim for payment of any additional sum. These protections were carefully negotiated, specifically drafted into the language of the Resolution Agreement, and agreed to by both parties. Labrum fully performed his obligations under the parties' Resolution Agreement, and the broad release language of that Agreement became effective. Under that Agreement, Coet waived and released his claims for attorney fees and prejudgment interest.

After the effective date of the release, however, Coet forced Labrum to continue to incur costs and attorney fees by continuing to pursue unresolved claims. As a result, Labrum was forced to incur an additional \$29,715 in attorney fees between May 13, 2005 (the date of Labrum's payment) and September 14, 2006 (the date of Labrum's motion for fees). It is undisputed that Labrum was the prevailing party on all claims litigated after the effective date of the parties' mutual release. The Trial Court was well within its discretion in awarding those fees to Labrum. Moreover, this Court should enter an order requiring Coet to pay all additional attorney fees and costs incurred by Labrum from September 15, 2006 until the conclusion of this case.

The Trial Court's judgment in favor of Labrum on its fraud/misrepresentation claim cannot be overturned unless the Trial Court's findings are clearly erroneous and unsupported by the record. Coet has failed to marshal the evidence supporting the Trial Court's findings. Those findings are more than adequately supported by the trial record.

Similarly, the Trial Court's finding that the 1992 Ford truck was "in inventory" on November 14, 2001 (the closing date) is adequately supported by the record and is not clearly

erroneous. In fact, it is undisputed that the 1992 Ford truck was in inventory on that date. As a matter of law, it was therefore conveyed to Labrum under Section 1.1(b) of the Asset Sale Agreement.

## **ARGUMENT**

### **I. THE TRIAL COURT PROPERLY RULED THAT COET WAIVED AND RELEASED ITS CLAIMS FOR ATTORNEY FEES AND INTEREST PURSUANT TO THE RESOLUTION AGREEMENT.**

#### **A. Coet Does Not Assert any Disagreement with the Trial Court's Findings of Fact, which Must Be Accepted as True.**

In deciding whether a summary judgment was appropriate, an appellate court need only review whether the Trial Court erred in applying the relevant law and whether a material fact was in dispute. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 16, 73 P.3d 325. In this case, when the Trial Court granted Labrum's motion for partial summary judgment, it set forth in detail the undisputed facts on which its ruling was based. [R. 317-326.] Coet does not now dispute any of those facts. [See Coet's Brief, pp. 15-28.] The facts on which summary judgment was based must therefore be accepted as true.

The only issue on this appeal is whether the Trial Court erred by ruling as a matter of law, based on undisputed facts, that Coet waived and released its claims for attorney fees and prejudgment interest under the Resolution Agreement.

#### **B. Summary Judgment Was Proper under the Clear and Unambiguous Language of the Resolution Agreement.**

This appeal requires the Court to apply the clear and unambiguous release language in Section 9 of the parties' Resolution Agreement. [See R. 74-75.]

A release is a type of contract and may generally be enforced on the same grounds as other contracts. *Horgan v. Industrial Design Corp.*, 657 P.2d 751, 753 (Utah 1982). The law favors the good faith settlement of claims, and the encouragement and preservation of such settlements “constitute strong arguments for enforcing releases.” *Id.* (citations omitted) (affirming summary judgment based on release executed by the parties). *See also, Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1039-40 (Utah 1989) (holding release relieved defendants of liability for negligence claim and affirming summary judgment); *American Towers Owners Ass’n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1186-87 (Utah 1996) (affirming summary judgment based on unambiguous release); *Otsuka Electronics (USA, Inc.) v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1279-82 (Utah Ct. App. 1997) (holding release barred counterclaims and affirming summary judgment).

In this case, the release language in the Resolution Agreement is clear and unambiguous. [See R. 74-75.] It bars Coet’s claims for interest and attorney fees as a matter of law. The release language provides that “upon payment by Labrum” (which has been done), “Coet . . . releases and forever discharges Labrum . . . ***from any and all***” claims and causes of action “of ***whatever nature***,” including “***all claims*** that relate in any way to the lawsuit” and “***any claims asserted or that could have been asserted***” in the lawsuit, “***excepting from this release only such claims as to which there is not a unanimous decision by the Evaluation Team.***” [R. 74 (emphasis added).]

The release language speaks for itself, and nothing more really needs to be said about the release language. As a matter of law, it bars Coet’s claims for attorney fees and interest.

But, at the risk of overkill, Labrum further notes that several other provisions of the Resolution Agreement support the Trial Court's summary judgment.

First, several provisions of the Agreement make it clear that the parties' claims were limited to those specifically listed in the Resolution Agreement and that only those claims specifically included in the Agreement and left unresolved by the Evaluation Team, together with the legal questions relating to Obsolete Parts, would survive the release. For example, Section 3 expressly stated that the parties' purpose in submitting their claims to the Evaluation Team was to "resolv[e] *all* of the respective claims between the parties, with the exception of whether either party is legally responsible to the other party for parts obsolescence." [R. 76.] Further, in Section 2.f, the parties were required to, and did, list all of their "additional claims," which the parties expressly agreed were "limited to" 12 enumerated items. [R.76-77.] And by Section 10, the parties were expressly precluded from raising or asserting (in this lawsuit or otherwise) any claims for damages related to the Asset Sale Agreement and the Closing, except for: (i) any accounting issues that are not resolved by the Evaluation Team and (ii) any legal issues that must be resolved in order to achieve a complete resolution of the accounting issues specifically addressed in this Agreement (*i.e.*, the Obsolete Parts legal questions). [R. 74.]

In addition, the parties specifically and expressly reserved only one legal issue from the effect of the release language, namely the legal issues surrounding Labrum's Obsolete Parts claim. [See R. 74-76, 78, Resolution Agreement §§ 2.b, 3, 9.] The express reservation of this particular claim by implication excludes the reservation of all other claims, including

Coet's claims for attorney fees and interest. This long-accepted doctrine of contract and statutory interpretation is expressed in Latin by the legal maxim "*expressio unius est exclusio alterius*"—the expression of the one is the exclusion of the other. *See generally* 5 Margaret N. Kniffin, *Corbin on Contracts* 315-16, § 24.28 (1998).

Extrinsic evidence can also be used to determine whether a contract is ambiguous. *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 7, 78 P.3d 600 ("When determining whether a contract term is ambiguous, the court is not limited to the contract itself."). "Relevant, extrinsic evidence 'of the facts known to the parties at the time they entered the [contract]' is admissible to assist the court in determining whether the contract is ambiguous." *Id.* (quoting *Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 2001 UT 11, ¶ 39, 20 P.3d 287).

Considering the circumstances under which the Resolution Agreement was negotiated and signed, it is even more clear that all claims, including claims for attorney fees, costs, and interest were validly released according to the terms of the Resolution Agreement. For example, by email letter dated May 12, 2004 counsel for Labrum specifically informed Coet that Labrum's intent in negotiating the terms of the Resolution Agreement was to require "both parties to get everything on the table and resolved." [R. 263.] Moreover, Labrum's counsel stated that "[i]f we are going to proceed, everything needs to be put on the table and addressed or waived. The agreement I have drafted lists our issues, requires payment according to the unanimous findings of the accountants, and provides for a release of all other claims by both sides (except for certain issues related to parts obsolescence and any issue with respect to which there is not a unanimous decision by the accountants)." [R. 263.]

There can be no dispute that the intent and language of the Resolution Agreement required both parties to identify and include “all” of their respective claims and counterclaims in the Resolution Agreement. By express language of the Agreement, all other claims were released and waived.

**C. As a Matter of Law, Claims that Are Not Expressly Preserved in a Settlement Agreement Are Waived.**

The Resolution Agreement was in fact a type of settlement agreement. By that Agreement, the parties voluntarily settled claims by submitting them to the Evaluation Team for consideration, and agreeing to abide by the Evaluation Team’s conclusions.

There are many cases holding that a settling party waives any claims not expressly preserved in a settlement agreement. For example, in *Krumme v. Westpoint Stevens, Inc.*, 238 F.3d 133 (2d Cir. 2000), ten company executives participated in an Executive Permanent Insurance (“EPI”) Program. The EPI included a deferred compensation agreement that allowed them to annually receive 30% of their final base salary after retirement. The EPI agreement contained a fee-shifting provision that required the employer to pay the executives’ attorney fees in case of dispute. 238 F.3d at 135-36. A dispute arose after a hostile takeover of the company. Nine of the executives opted to receive a lump sum payment and signed a release of “all obligations,” effective upon acceptance of the lump sum payments. The payments were subsequently made. The executives then sued, seeking (among other things) recovery of their substantial attorney fees pursuant to the EPI agreement. *Id.* at 136-37. The court held that a broad, general release automatically includes



a release of any obligation to pay attorney fees unless those fees are specifically and expressly excepted from the release. *Id.* at 145. Because attorney fees were not expressly reserved in the release, the executives' claims were barred. *Id.*; *see also Estate of Givens*, 938 S.W.2d 679, 681-82 (Mo. Ct. App. 1997) (holding language in release such as “from any and all liability,” “of whatever name or nature,” and “any other matter whatsoever involving my relationship with [the Bank]” unambiguously included release of attorney fees); *Jana-Rock Constr., Inc. v. New York State Dept. Transp.*, 699 N.Y.S.2d 528, 529 (N.Y. S. Ct. App. Div. 1999) (holding release unambiguously included release of interest on settlement amount, notwithstanding reference to a future claim proceeding); *Adams v. American Int’l Group, Inc.*, 791 N.E.2d 26, 32 (Ill. Ct. App. 2003) (holding release of “any and all claims” unambiguously included release of claims for pre-judgment interest).

In this case, the release unambiguously covers “any and all claims” of “whatever nature” including “all claims that relate in any way to the lawsuit” and “any claims asserted or that could have been asserted” in the lawsuit. The release carves out specific narrow exceptions to the release, namely, claims as to which there is not a unanimous decision by the Evaluation Team and legal issues relating to the claim for Obsolete Parts. The release contains no exception for attorney fees or interest. Those claims therefore fall within the expressed release provisions of the Resolution Agreement.

**D. The Resolution Agreement Terms Were Not Conflicting.**

Coet concedes on appeal that the Resolution Agreement is clear and unambiguous. *See* Coet's Brief, p. 16. In a somewhat contradictory turn, Coet does argue that the Resolution Agreement has conflicting provisions. *See* Coet's Brief, pp. 17-20. Coet states:

The [Resolution] Agreement did not appear to be ambiguous, but contained provisions which conflicted, or were not in harmony, with other more specific terms. . . . Admittedly, when viewed in isolation, Paragraph Nine's [of the Resolution Agreement] plain language may lead to the conclusion that Coet's claim for attorneys' fees and pre-judgment interest, as provided in the Asset Sale Agreement may have been waived or released. On its face the [Resolution] Agreement appears to limit Coet's claims. However, if the Court considers all four corners of the [Resolution] Agreement, the Court will be able to harmonize the facially conflicting terms.

Coet's Brief, pp. 17-18.

Coet fails to identify *any* term of the Resolution Agreement that is inconsistent with the broad release provisions of Paragraph 9, making it difficult to comprehend how the Resolution Agreement is allegedly in conflict with itself. It may be that Coet argues the broad release provision in Paragraph 9 of the Resolution Agreement is in conflict with the attorney fee provision of the Asset Sale Agreement. *See* Coet's Brief, p. 18. If that is Coet's claim, then it fails to follow a reasonable line of logic. The very purpose of the Resolution Agreement was to address and attempt to resolve all claims asserted under the Asset Sale Agreement, including any claim for attorney fees. The parties agreed to: 1) identify all claims and include them in the Resolution Agreement; 2) have the Evaluation Team address all of the parties' claims, save only the legal issue of liability for Obsolete Parts; 3) be bound by the Evaluation Team's unanimous conclusions; 4) fully release "any and all claims" "of

whatever nature” upon payment of sums found be owed, save only those claims specifically excepted from the release language. There is no logical argument that the broad release language of the Resolution Agreement is somehow inconsistent with the attorney fee provision of the Asset Sale Agreement.

Coet may also be arguing that Paragraph 9 of the Resolution Agreement is inconsistent with other terms of the Agreement that refer to “accounting” issues. *See* Coet’s Brief, p. 19. Coet’s argument is not entirely clear on this point, either. It is clear, however, that Labrum insisted that “everything needs to be put on the table and addressed or waived” [R. 263], and that the parties mutually agreed the very purpose of the Resolution Agreement was to resolv[e] all of the respective claims between the parties.” [R. 76.] It just so happens that the only “non-accounting” issue submitted by either party was the issue of whether Coet was legally liable for fraud or misrepresentation. That issue was expressly excepted from the broad release provisions of Paragraph 9 and in other places in the Resolution Agreement. [R. 74, 76.]

**E. The Stipulated Case Management Order Has No Bearing on Whether Coet Waived its Claims for Attorney Fees and Interest.**

Coet relies heavily on the Stipulated Case Management Order (“CMO”) and Coet’s accompanying, but untrue, arguments that the Trial Court ordered, directed and supervised the Evaluation and ceded its legal authority to the Evaluation Team. These arguments fail.

Coet repeatedly argues, for some unclear reason, that the Trial Court ordered, directed and supervised the Evaluation process. That simply is not true. The CMO, by which the

Court adopted the parties' Resolution Agreement, was a stipulated document. This is demonstrated by its title— "Stipulated Case Management Order"—and the signatures of both counsel immediately prior to the Court's signature. Moreover, the record demonstrates that the Resolution Agreement was the parties' agreement, negotiated and drafted by the parties for many months prior to any involvement by the Trial Court. [See R. 219-269.] The fact is that the Court accommodated the parties' agreement to submit their claims to the Evaluation Team, but it certainly did not require it, beyond approving the parties' stipulated order. And there is absolutely no evidence in the record to support the untrue statement that the Trial Court "directed, ordered, and supervised" the Evaluation in this case. See Coet's Brief, pp. 33, 35. Coet's repeated reliance on the suggestion that the Court ordered and supervised the Evaluation is badly misplaced.

More importantly, the CMO specifically provided that the parties would submit their claims "consistent with the parties' letter agreement, a copy of which is attached [to this CMO] as Exhibit A." [R. 85.] Thus, the CMO specifically deferred to the specific, governing language of the Resolution Agreement. As a matter of law, the CMO could not, and did not, resurrect fee and interest claims that were released pursuant to broad release provisions of Paragraph 9 of the Resolution Agreement.

To the extent public policy comes into play in this case, it strongly supports Labrum's position. Litigants should be encouraged to resolve cases through alternative dispute resolution mechanisms, and to resolve them to finality. In a case where the parties agreed to put all their issues on the table so that everything could be resolved, and agreed to release

and waive everything else, it would be extremely unfair to allow one of the parties to subsequently return to the well and seek additional recovery on claims that were never asserted during the alternative dispute resolution process. If this were allowed, subsequent litigants would be strongly discouraged from engaging in alternative dispute resolution, because there would be little hope of finality in any such process.

Finally, contrary to Coet's arguments, the Trial Court did not cede anything—legal authority or otherwise—to the Evaluation Team. The parties, both represented by counsel, voluntarily agreed to submit all of their claims to the Evaluation Team, save only the legal issue of fraud or misrepresentation in connection with Obsolete Parts. It was by the parties' expressed agreement, not court-ceded authority to decide legal issues, that all other claims and issues were submitted to the Evaluation Team. It was by a clear and unambiguous agreement of the parties that they had to either identify their claims in the Resolution Agreement or expressly waive and release them.

Coet failed to include its alleged claims for attorney fees and interest anywhere in the Resolution Agreement. Labrum entered into the Resolution Agreement with the expressed expectation that all of the parties' claims would be listed and evaluated by the Evaluation Team, and that upon payment of amounts owed as determined by the Evaluation Team, "any and all" claims of "whatsoever nature" would be released, except those claims expressly reserved. Labrum sought to preclude the assertion of new and never-ending additional claims by getting everything on the table and resolved once and for all. That is what the parties bargained for and that is what the parties should get.

**II. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION TO DETERMINE THAT LABRUM WAS THE PREVAILING PARTY AT TRIAL AND ENTITLED TO RECOVER ITS FEES.**

The question of whether a party is the “prevailing party” for purposes of an attorney fee award is left to the sound discretion of the Trial Court. *See Carlson Distr. Co. v. Salt Lake Brewing Co.*, 2004 UT App. 227, ¶ 16, 95 P.3d 1171. The Trial Court’s determination is reviewed only for an “abuse of discretion.” *Id.*

A “good starting point” for determining “prevailing party” status is the net judgment rule. *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 221 (Utah Ct. App. 1990). However, trial courts also use a “flexible and reasoned approach,” recognizing that “mechanical application of . . . the net judgment rule could create absurd results.” *A.K.&R. Whipple Plumbing and Heating v. Guy*, 2004 UT 47, ¶ 11, 94 P.3d 270.

The Trial Court was well within its discretion when it denied Coet’s claim for all attorney fees and granted Labrum’s claim for fees incurred after the May 13, 2005 release date. Labrum’s May 13 payment effected a general release of all of Coet’s claims, including a full release of any past claim for attorney fees. Coet’s payment did not end this case, however. Even after May 13, Coet continued to assert two claims related to the Asset Sale Agreement, namely, its claim for payment for the 1992 Ford truck and its claim for payment for oil and gas inventories. As a result, Labrum was forced to incur additional attorney fees after May 13 to defend itself against Coet’s claims and to assert its own claims.

Thus, the only relevant question is: who is the prevailing party and therefore entitled to recover attorney fees and costs with respect to claims asserted after May 13, 2005? It is

beyond dispute that Labrum was the prevailing party on all of those claims. All of Coet's remaining claims against Labrum for breach of the Asset Sale Agreement were dismissed at the trial. Labrum was awarded \$11,455.26 on its counterclaim.

Labrum's position on this issue is consistent with the letter and spirit of both the Asset Sale Agreement and the Resolution Agreement. The Asset Sale Agreement provided that the prevailing party in any proceeding concerning the Asset Sale Agreement would be entitled to recover attorney fees. [R. 416.] The Resolution Agreement acted as a partial modification, or partial accord and satisfaction, of the Asset Sale Agreement. The Resolution Agreement, together with Labrum's payment of the sums found owing by the Evaluation Team, effected a full release and satisfaction of all claims that existed as of May 13, 2005, save only those claims specifically excepted from the release. [R. 74-75.] After May 13, 2005, Coet continued to pursue claims for breach of the Asset Sale Agreement on two issues. By doing so, Coet forced Labrum to incur additional attorney fees after May 13, 2005, giving rise to a *new* claim for attorney fees under Section 11.10 of the Asset Sale Agreement. The Trial Court was well within its discretion in awarding these fees to Labrum, because it is undisputed that Labrum is the prevailing party on these claims.

It is important to emphasize that Labrum did not claim, and was not awarded, any fees or costs incurred prior to May 13, 2005. Labrum acknowledged in the Trial Court that, along with Coet, Labrum had waived and released any claim for attorney fees incurred prior to May 13, 2005. The Trial Court awarded to Labrum only those fees Labrum incurred *after* May 13, 2005. Because Coet forced Labrum to incur those fees on minor claims on which Coet

ultimately lost, the Trial Court was well within its discretion when it determined Labrum was the prevailing party and was entitled to recover fees after the effective date of the release.

Coet's policy argument that settlement agreements should be considered in determining "prevailing party" status should not apply in this case, because Coet expressly waived its claim for attorney fees and interest as part of the settlement. Coet cannot make any policy argument or cite to any authority to support the argument that a litigant who waives its claims for attorney fees as part of a settlement should be subsequently awarded its fees because it "prevailed" in the settlement it obtained. Moreover, as the Trial Court correctly noted, the reasons litigants settle cases involve many diverse motives, making it extremely unworkable for Trial Courts to try to figure out who "prevailed" in a negotiated settlement. *See* R. 636.

Under the facts of this case, the Trial Court was well within its discretion when it determined Labrum is the prevailing party. The parties started with a clean slate on May 13, 2005. It is undisputed that Labrum prevailed on every single issue litigated after that date.

### **III. THE EVIDENCE AT TRIAL SUPPORTS THE TRIAL COURT'S FINDINGS THAT COET IS LIABLE FOR FRAUD OR MISREPRESENTATION.**

Coet argues that Labrum failed to meet the evidentiary standard for the elements of fraud. In particular, Coet attacks the Trial Court's findings that Coet made a material misrepresentation that he did not have an Obsolete Parts problem and that Labrum acted in reasonable reliance this misrepresentation. *See* Coet's Brief, p. 37.



In making this argument, Coet bears a heavy burden. The issue of whether Coet made a material misrepresentation is a question of fact. The issue of whether Labrum reasonably relied on the misrepresentation is a question of fact. *See Brown v. Richards*, 840 P.2d 143, 148-49 (Utah 1998) (whether plaintiff reasonably relied on misrepresentations is question of fact). The Trial Court's findings cannot be overturned unless they are "clearly erroneous." *See, e.g., Young v. Young*, 1999 UT 38, ¶ 15, 979 P.2d 338; *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); Utah R. Civ. P. 52(a). The Trial Court's findings must be upheld unless they are "not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

First, Coet has miserably failed in its burden to marshal all of the evidence supporting the Trial Court's findings. *See, e.g., Tingey v. Christensen*, 1999 UT 68, ¶ 7, 987 P.2d 588; *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998). Coet fails to marshal *any* evidence relating to the fact that Coet made a material misrepresentation, and only marshals *part* of the evidence relating to Labrum's reasonable reliance on the misrepresentation.

It is an undisputed fact that Mr. Coet made a misrepresentation of fact to Labrum about the extent of Coet's Obsolete Parts problem. [R. 674 at pp. 113, 128.] In marshaling the evidence that Coet made a misrepresentation of fact, Coet cites only to Rachael Labrum's testimony. Coet's Brief, p. 37. Danny Labrum's testimony supporting this fact was even more compelling:

A. [By Mr. Labrum] . . . I asked him if there was any Obsolete Parts, and he says, “I don’t have an obsolescence problem.”

[R. 674 at p. 128.] Mr. Coet never denied making this misrepresentation, and the record is completely devoid of any evidence controverting this fact.

The question of whether this representation was material is a classic fact question. Evidence supporting the Trial Court’s conclusions includes the following:

- The Asset Purchase Agreement contained a specific term providing that the purchase price for the assets would be reduced based on the volume of “Obsolete Parts.” [ R. 431.]
- Labrum explained that if there were Obsolete Parts, “it’s money that’s just sitting idle. You can’t use it.” [R. 674 at p. 130.]
- Labrum had no access to any of Coet’s computer systems prior to closing, and had no method of checking inventory records on Coet’s computers. [R. 674 at pp. 116-18, 131.]
- While Labrum conducted a physical count of parts in inventory prior to closing, Coet had no method of determining which of the parts in inventory were Obsolete Parts. [R. 674 at pp. 127-29.]
- The fact that Danny Labrum asked whether there was an Obsolete Parts problem demonstrates that it was an important issue to him. [See R. 674 at p. 129.]

- Labrum continued with the closing in reliance on Coet's representation. [R. 674 at pp. 129-30.]

Coet next attacks Labrum's reliance on Coet's misrepresentation. The evidence at trial was sufficient to support a finding that Labrum's reliance was reasonable. For example, the undisputed evidence demonstrated that, despite several hours of physically counting parts in inventory, Labrum had no access to Coet's computers and had no method to determine which of those parts were Obsolete Parts. [See R. 674 at pp. 116-18, 127-29, 131.] In addition, Danny Labrum testified that the representation was important to him, and that he proceeded forward with the closing in reliance on Coet's representation. [R. 674 at p. 130.] Indeed, Labrum specifically relied on Coet's representation when he signed closing statements indicating that no adjustment needed to be made to the purchase price based on Obsolete Parts. [R. 674 at p. 130.]

Coet does not attack any other element of Labrum's claim for fraud and misrepresentation. The evidence, carefully heard and considered by the Trial Court, fully supports the Trial Court's findings. Because there is evidence in the record to support the Trial Court's findings, they must be sustained on appeal.

**IV. THE EVIDENCE AT TRIAL SUPPORTS THE TRIAL COURT'S RULING THAT THE 1992 FORD TRUCK WAS IN INVENTORY AT THE TIME OF CLOSING.**

The Asset Sale Agreement provided:

Section 1.1. **Assets to be Purchased and Sold.** The assets (the "Assets") to be purchased and sold hereunder relate to the Dealership and shall include, the following:

\* \* \*

(b) Used Vehicle Inventory. All used motor vehicles which are in the Seller's inventory at the time of Closing which vehicles have been previously titled. . . .

[R. 432-33.]

The issue at trial was whether the 1992 Ford truck was “in the Seller’s inventory at the time of Closing.” The Trial Court found and ruled that it was. There was more than sufficient evidence to support the Trial Court’s finding.

In fact, the evidence left it *undisputed* that the 1992 Ford truck was in inventory at the time of the Closing on November 14, 2001. It is undisputed that Johnny Jessen delivered the truck to the dealership at approximately 6:00 a.m. on November 13, 2001, and that the truck was physically present at Coet’s dealership at the time of Closing. [See Statement of Facts ¶¶ 11, 27, *supra*; R. 674 at pp. 85, 88, 92, 118-22.] On appeal, Coet even admits, “There is no dispute that the 1992 Ford pickup was on the dealership lot and included in the inventory paperwork.” *See* Coet’s Brief, p. 39.

Although not entirely clear, Coet seems to base this appeal solely on the allegation that Labrum never paid for the truck. *See* Coet’s Brief, pp. 38-41. The evidence at trial on this point was disputed. For example, at the closing on November 13, 2001, both parties signed a “Closing Statement.” The Closing Statement provided for a reduction in the Purchase Price of \$495.00 based on the “Used Vehicle Inventory as of the Closing Date.” [R. 353.] By this document, the parties agreed that the value of the used car inventory was \$290,275. [R. 353.] It is undisputed that the Ford truck was part of the inventory as of the date of closing. It is

also undisputed that Labrum paid the amount agreed upon by the parties for the used car inventory.

More importantly, Coet's argument misses the mark. It is irrelevant whether each used car in inventory was assigned a separate and definitive price. It is undisputed that the parties' negotiated a purchase price for all of the "Assets" of the dealership, including all used cars "in the Seller's inventory at the time of Closing." It is undisputed that the 1992 truck was in the Seller's inventory at the time of Closing. It is undisputed that the parties both agreed that only a \$495.00 adjustment would be made to the purchase price based on the used cars in inventory at the time of Closing. [R. 353.]

Because there is sufficient evidence to sustain the Trial Court's finding that the truck was in the Seller's inventory at the time of Closing, the Trial Court's ruling and judgment on the 1992 truck issue must be sustained.

**V. LABRUM SHOULD BE AWARDED ITS FEES AND COSTS INCURRED ON THIS APPEAL.**

Both parties have asserted that the attorney fee provision of the Asset Sale Agreement remains effective. Coet's appeal has forced Labrum to continue to incur costs and attorney fees.

In addition to affirming the Trial Court's award of fees to Labrum, this Court should enter an order that Labrum is entitled to recover all reasonable and necessary costs and fees incurred since September 15, 2006. September 15, 2006 is the date of Labrum's motion for fees in the Trial Court, and is the last day for which fees were awarded to Labrum. Labrum

is entitled to recover the additional fees and costs it has been forced to incur since that date. This Court should remand this case to the Trial Court for a determination of the amount of those costs and fees.

**CONCLUSION**

Labrum respectfully requests that the Trial Court's Judgment be affirmed, and that Labrum be awarded its costs and fees on appeal.

Dated this 1<sup>st</sup> day of August, 2007.

**SNOW, CHRISTENSEN & MARTINEAU**

By Keith A. Call  
Keith A. Call  
Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of August, 2007, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE** to the following:

Gary R. Howe, Attorney  
Thomas B. Price, Attorney  
Callister Nebeker & McCullough  
Gateway Tower East, Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133

By: Keith A. Call  
Keith A. Call

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## **ADDENDA**

1. Asset Sale Agreement (R. 411-433)
2. Resolution Agreement (letter agreement dated 2/9/05) (R. 73-79)
3. Evaluation Team Report (R. 104-106)
4. Larry J. Coet Chevrolet Monthly Summary Report dated 10/31/01 (Trial Exhibit D-12, R. 690)



Tab 1

# EXHIBIT 1

*Asset Sale Agreement*

## Asset Sale Agreement

**THIS ASSET SALE AGREEMENT** (this "**Agreement**") is made effective this \_\_\_\_\_ day of August, 2001 between **LARRY J. COET CHEVROLET, PONTIAC, BUICK, INC.**, a Utah corporation, whose address is 901 South Main, Heber City, Utah 84032 ("**Seller**"); and **LABRUM CHEVROLET PONTIAC BUICK, INC.**, a Utah corporation, whose address is 2003 West Brynn Circle, West Jordan, Utah 84088, ("**Buyer**").

### RECITALS:

A. Seller is the owner of certain assets used in the operation of "Larry J. Coet Chevrolet, Pontiac, Buick," a new and used motor vehicle dealership located at 901 South Main, Heber City, Wasatch County, Utah. The Dealership is operated under a dealer agreement with General Motors Corporation ("**Manufacturer**").

B. Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, certain assets of Seller, subject to the terms and conditions of this Agreement.

C. The parties desire to set forth herein their entire agreement concerning the purchase of non real property assets. This Agreement shall supersede all prior negotiations or agreements between the parties, oral and/or written, concerning the subject matter of this Agreement.

### AGREEMENT:

**NOW, THEREFORE**, in consideration of the premises, the mutual covenants and undertakings of the parties hereto, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

### ARTICLE 1 SALE AND PURCHASE OF THE ASSETS

Section 1.1. **Assets to be Purchased and Sold.** The assets (the "**Assets**") to be purchased and sold hereunder relate to the Dealership and shall include, the following:

(a) *New Vehicle Inventory.* Seller's new automobile and truck inventory (the "**New Vehicle Inventory**") as of the Closing (defined below), which shall include only those new motor vehicles that have never been titled; that are considered new and unused in the automobile sales industry; and whose ownership is evidenced by a Manufacturer's Statement of Origin (an "**MSO**"). New Vehicle Inventory may include demonstrators only if undamaged with odometer readings not exceeding Three Thousand (3,000) miles.

(b) Used Vehicle Inventory. All used motor vehicles which are in the Seller's inventory at the time of Closing which vehicles have been previously titled. The used motor vehicle inventory may include demonstrators if such demonstrators have been titled or have odometer readings greater than Three Thousand (3,000) miles.

(c) Sublet & Supplies. Sublet, gas, oil, grease, etc., shall be purchased as an inventory item at current values, based upon a physical inventory which shall be taken immediately prior to the Closing. No unusable or partially used items shall be purchased by Buyer.

(d) Parts and Accessories Inventory. The motor vehicle parts and accessories inventory (the "**Parts**") of the Seller established by physical count as of the Closing, *excluding* any and all obsolete parts. Obsolete parts ("**Obsolete Parts**") shall consist of the following: (1) any part which is not included in the subject manufacturer's current parts pricing list; (2) any part on which the seal has been opened or is materially damaged in any way; (3) any part which is missing a portion or portions of its working mechanism(s) so that it would not be accepted for return by its manufacturer; or (4) Parts in excess of a one hundred eighty (180) day supply. The Parts may include motor vehicle parts and accessories manufactured or sold by Manufacturer as well as those manufactured or sold by Manufacturer's distributors or other reputable third party suppliers.

(e) FF&E. The furniture, fixtures, tools and equipment (collectively, the "**FF&E**") to be purchased by Buyer that are specified on attached Exhibit "A." Upon request prior to Closing, Seller shall provide Buyer with all documentation and information in Seller's possession or reasonably available to Seller evidencing the items and original costs for such items. Buyer shall be entitled to take a physical inventory of the FF&E to assure that all such items are accounted for and functional as of the Closing; provided, however, that no item shall be omitted from the FF&E to be purchased by Buyer unless such item is designated as "Assets Not Subject to the Asset Sale Agreement" as set forth on Exhibit "B." The FF&E must be in good condition and good working condition, as the case may be.

(f) Intangibles. The following intangible assets (the "**Intangibles**") of the Seller: goodwill; the opportunity to acquire the dealer agreements with Manufacturer; the opportunity to obtain the Seller's present telephone number(s) and Yellow Pages advertisements; and the opportunity to acquire from Manufacturer any specialized displays used in connection with the business of Seller.

(g) Real Estate. Dealership real estate located at 901 South Main, Heber City, Utah 84032, shall be purchased by DRL Real Estate, L.L.C., simultaneously with the Closing.

Section 1.2 **Purchase Price for the Assets.** The purchase price (the "**Purchase Price**") for the Assets shall be Three Hundred Fifty Thousand Dollars (\$350,000.00), as may be adjusted at Closing pursuant to the terms of this Agreement.

(a) **New Vehicle Inventory.** An inventory of new vehicles of the Dealership shall be completed immediately prior to Closing. The actual cash value of new vehicles shall be the dealer cost of such vehicle less manufacturer holdback advertising allowances, and/or incentives received or due and payable on said vehicles. The manufacturer holdback advertising allowances, and/or incentives received, or due and payable on the New Vehicle Inventory shall remain the property of the Seller. Any additional equipment (add-ons) that have been installed at dealer cost less any items at dealer cost that have been removed from said vehicles, shall be added to or subtracted from the actual cash value of the New Vehicles. Buyer shall purchase the New Vehicle Inventory at its actual cash value by paying said actual cash value of the New Vehicle Inventory to Seller's flooring source at Closing.

(b) **Parts.** Based upon a physical inventory of Parts taken immediately prior to the Closing, if the value of the then existing Parts is less than \$68,000.00, the Purchase Price will be reduced to reflect the difference between \$68,000.00 and valuation of the inventoried parts and accessories. The Parts shall be valued at the listed price in the current price book for Parts provided that said inventoried Parts are still in the original, unopened factory packaging and are not Obsolete Parts. New, undamaged, returnable jobber Parts will be purchased based upon the same criteria, priced at the current price book. The Parts physical inventory shall be conducted at a time immediately prior to Closing by representatives of the Seller and Buyer. If a resolution of the valuation of the Parts cannot be achieved then in that event an independent third party appraiser mutually acceptable to the parties shall be engaged by the parties whose valuation shall be binding on the parties. The cost of such shall be paid equally by the parties. The Parts inventory (and the value thereof) as determined as of the Parts inventory date shall be increased or decreased, as appropriate, to reflect purchases and sales of Parts from the Parts inventory date to the date of Closing.

(c) **Used Vehicle Inventory.** An inventory of the used vehicles of the Seller shall be completed immediately prior to Closing. Used motor vehicles shall be valued at a mutually agreed upon price by Buyer and Seller as of the date of Closing using as a starting point the wholesale Kelly Blue Book with "Options" valuation pertaining to such vehicles. If the parties are not in agreement with the valuation as indicated in the Kelly Blue Book with Options guidelines, then in that event, the parties shall select an independent third-party appraiser mutually acceptable to the parties who shall appraise the used vehicles in question at their actual cash value and the valuation rendered by such third-party appraiser shall be binding upon the parties regarding the purchase price of such vehicles. The cost of such a third-party appraisal shall be borne equally by the parties. Buyer shall purchase the Used Vehicle Inventory at its actual cash value by paying said actual cash value of the Used Car Inventory to Seller's flooring

source at Closing. The Asset Purchase Price will be increased or decreased depending upon whether the value of the used cars purchased exceeds or is less than the inventory value on the books of Seller.

(d) FF&E. The furniture, fixtures, tools and equipment (Exhibit "A") shall be purchased based upon an inventory and valuation conducted by Buyer and Seller. If any item(s) set forth in Exhibit "A" are not part of the FF&E closing inventory conducted immediately prior to Closing then a valuation shall be attributed to such item(s) and deducted from the purchase price.

(e) Purchase of New and Used Vehicle Inventory. The Buyer shall purchase the New and Used Vehicle Inventory but only up to a maximum of \$1,500,000.00, or greater as may be agreed upon by the parties and Buyer's lender, holding the Seller harmless therefrom.

(f) Termination Rights. Seller hereby assigns to Buyer Seller's termination rights under its dealer agreements with Manufacturer, pursuant to which Buyer may have the right to return to Manufacturer all unwanted parts purchased by Buyer pursuant to this agreement. In that regard, the parties acknowledge that Manufacturer has made available to its authorized dealers (including Seller) various incentive programs (the "**Programs**"), the intent of which is to encourage those dealers to use parts available through Manufacturer and to minimize the return of those parts.

Section 1.3 Service Contract Programs. All liabilities and obligations of Seller pursuant to any extended service/warranty programs or the like (the "**Service Contracts**") offered by Seller or an affiliated entity (but not Manufacturer) to Seller's customers are Seller's sole responsibility, and Seller shall indemnify and hold harmless Buyer and its affiliated entities from and against all costs, damages, actions and liabilities relating to the same. Notwithstanding the foregoing, Buyer (at their sole option) may elect at the Closing to undertake in writing responsibility for all or part of the Service Contracts, in which case the Purchase Price for the Assets shall be reduced by an amount that is mutually acceptable to Buyer and to Seller and that reasonably reflects the liability so undertaken by Buyer.

Section 1.4 Accounts Receivable. All accounts receivable (the "**Accounts**") of Seller as of the Closing shall be excluded from the terms and conditions of this Agreement and shall remain the sole property of Seller. Following the Closing, Buyer shall cooperate with the then-owner of the Accounts to facilitate realization by such owner of the sums represented by the Accounts.

Section 1.5 Accounts Payable. All liabilities and accounts payable of Seller shall remain the sole responsibility of Seller unless Buyer agrees in writing to assume a liability or account payable.

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Section 1.6 **Statements of Origin.** At the Closing, Seller shall provide and deliver to Buyer an MSO for each vehicle in the New Vehicle Inventory, free and clear of all liens and encumbrances whatsoever and titles for each used vehicle free and clear of all liens and encumbrances whatsoever. The total purchase price for the New and Used Vehicle Inventory shall not exceed One Million Five Hundred Thousand Dollars (\$1,500,000), unless otherwise agreed by the parties and Buyer's lender in writing.

## ARTICLE 2 PAYMENT OF THE PURCHASE PRICE

Section 2.1 **Payment of the Purchase Price.** The Purchase Price for the Assets as set forth in Article 1 shall be paid as follows:

- (a) Cash payment of Three Hundred Fifty Thousand Dollars (\$350,000.00) as adjusted pursuant to the terms of this Agreement.
  
- (b) *Earnest Money Deposit.* The Buyers shall deliver to Snow, Christensen & Martineau for deposit in the law firm's trust account the sum of \$5,000.00 at the time of the execution of this Agreement. If the transaction set forth in this agreement fails to close pursuant to the terms and conditions of this Agreement, by virtue of the defalcation or breach of the Agreement by the Seller, then and in that event, the Earnest Money Deposit shall be refunded to the Buyers in total. However, if the Closing of this Agreement does not proceed as a result of Buyers' defalcation or breach, then and in that event, \$5,000.00 of the Earnest Money Deposit shall be delivered to the Seller as liquidated damages with no further claim against the Buyers.

## ARTICLE 3 LIABILITIES

Section 3.1 **Buyer Assumption of Liabilities.** As of the Closing, the Buyer shall assume responsibility for and pay the following liabilities of Seller:

- (a) *Maintenance and Lease Agreements.* From and after the date of Closing, the Buyer shall assume and pay all maintenance agreements, service agreements and lease

agreements relating to items included in the FF&E as set forth in Exhibit "C" attached hereto, to the extent Buyer has agreed to such assumption within forty five (45) days after Seller has made available to Buyer full and complete copies of all such maintenance, service and lease agreements. From and after the Closing, Buyer shall indemnify and hold Seller harmless from and against any and all claims, actions, proceedings, damages, costs and fees, (including reasonable attorney's fees) arising from, or in any way attributable, to Buyer's failure to pay or otherwise satisfy the terms and conditions of the maintenance agreements, service agreements and/or lease agreements as set forth in Exhibit C, which Buyer has agreed in writing to assume. Seller shall obtain all written consents to assignments as required and shall pay any fees or penalties related to such assignments.

Section 3.2 **Other Liabilities.** Except those liabilities specifically assumed by the Buyer pursuant to section 3.1 above, the Seller shall be responsible for and pay all obligations and liabilities of the Seller, including but not limited to all liens and encumbrances of every kind against the Assets and any other obligations, liabilities or claims by Seller's creditors which were accrued and matured prior to the time of Closing. Under certain circumstances some liabilities may be pro-rated between the parties as they agree in writing.

#### **ARTICLE 4 DEALER AGREEMENT**

Seller represents and warrants to Buyer that Seller operates the dealership under a dealer agreement (the "**Dealer Agreement**") with Manufacturer, and that the Dealer Agreement is current, in good standing and is not subject to cancellation or modification by reason of non-performance by Seller. Seller is not aware of any conditions or facts which would prevent the issuance of a new dealer agreement (the "**New Dealer Agreement**") to one or more of the parties constituting Buyer on comparable terms as the existing Dealer Agreement. The issuance to Buyer by Manufacturer of the New Dealer Agreement is a condition precedent to the consummation of the terms of this Agreement and Buyer's obligation to perform hereunder. Within two weeks immediately following Buyer's payment to Seller of the Earnest Money Deposit (as described in section 2.1 (a) above), Buyer shall file an application (and all related papers reasonably known by Buyer to be required in connection with such application) with Manufacturer for a New Dealer Agreement, which application shall present such individuals (including, without limitation, their expertise and financial resources) in the best possible light. Buyer shall diligently and expeditiously pursue approval of such application by Manufacturer, and shall use Buyer's best, good faith efforts to have the New Dealer Agreement issued by 1 November 2001. Seller hereby informs Buyer that, to Seller's best knowledge, Manufacturer's standard procedures for approval of new dealer agreements typically require between sixty (60) and ninety (90) days.



**ARTICLE 5**  
**CONDITIONS PRECEDENT TO CLOSING**

Section 5.1 Conditions of Buyer's Obligation to Close. Buyer's obligation to consummate the transactions contemplated by this Agreement and to make any payments is subject to the fulfillment (or the waiver thereof by Seller in writing) of the following conditions on or before the Closing:

(a) Issuance of New Dealer Agreement. The New Dealer Agreement shall have been issued to Danny R. Labrum, or a designee appointed by the Buyer by Manufacturer under customary and usual terms and conditions generally contained in Manufacturer's standard Dealer Agreement.

(b) Condition of Title. Buyer has been reasonably assured that Buyer will receive good, marketable and legal title to and right of possession of the Assets free and clear of all liens and encumbrances whatsoever.

(c) Manufacturers' Parts Programs. Seller shall have assigned to Buyer, at Closing, its termination rights under the Dealer Agreement with Manufacturer and any and all of Seller's rights (to receive payments of money or otherwise) under the Manufacturer's Parts Programs.

(d) Condition of Seller's Business. As of Closing, there shall not have been any material adverse change in Seller's business and prospects not contemplated as of the date of this Agreement. All representations made by Seller shall be essentially true, accurate and correct as of Closing and there shall be no breach of any warranties or covenants made hereunder by Seller.

(e) Execution and Delivery of Documents. Seller shall have executed and delivered to Buyer, through escrow at Closing, any and all documents reasonably required to consummate the transactions contemplated by this Agreement.

(f) Delivery of Records, Books, Etc. Seller shall have made available to Buyer such records and books relative to the Assets as Buyer reasonably may request to effect an orderly transfer of the Assets at time of Closing.

(g) Delivery of Bills of Sale and/or Titles for the Assets. Seller shall have executed and delivered to Buyer, at time of Closing, appropriate bills of sale, assignments and other conveyance documents for the Assets, and shall execute and deliver appropriate documents as required by the respective flooring lenders to transfer the MSO for each of the vehicles in the New Vehicle Inventory and titles to the Used Vehicle Inventory to the Buyer or their assigns, all free and clear of all liens and encumbrances.

(h) No Opposition. No suit, action, or proceeding shall be pending or threatened at any time prior to or at the time of Closing before or by any court or governmental body (a) seeking to restrain or prohibit, or to obtain damages or other relief in connection with, the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby; or (b) that might materially and adversely affect the business or properties or condition, financial or other, or results of operations of Seller.

(i) Permits, Etc. Seller shall have assigned to Buyer, or Buyer shall have obtained, all such permits, licenses, approvals, authorizations, variances, agreements, and warranties from federal, state, and local governmental authorities, which Buyer shall, in the exercise of its sole discretion, deem necessary or desirable for the operation by Buyer of the business of Seller after the Closing.

(j) Representations and Covenants. The representations and warranties of Seller contained in this Agreement or otherwise made in writing by Seller or on Seller's behalf pursuant hereto or otherwise made in connection with the transactions contemplated hereby shall be true and correct at and as of the Closing with the same force and effect as though made on and as of such date; each and all of the covenants, agreements, and conditions to be performed or satisfied by Seller hereunder at or prior to the Closing shall have been duly performed or satisfied; and Seller shall have furnished Buyer with such certificates and other documents evidencing the truth of such representations and warranties and the performance and satisfaction of such covenants, agreements, and conditions as Buyer shall have reasonably requested.

(k) Instruments of Transfer. Seller shall have delivered to Buyer bills of sale, assignments, deeds, and other instruments of transfer and assignment in accordance with the provisions hereof, transferring to Buyer all of Seller's right, title, and interest in and to the Assets, including the assigned contracts, to be transferred, sold, assigned, and conveyed by Seller to Buyer pursuant to the provisions of this Agreement. The form of such instruments shall be satisfactory in all reasonable respects to Snow, Christensen & Martineau, counsel to Buyer.

(l) Financing. Buyer shall have obtained from Zions Bank and the SBA financing in an amount and on terms and conditions satisfactory to Buyer, in its sole discretion.

(m) Real Estate Closing. The Buyer and Seller shall have met all requirements and simultaneously Close on the Real Estate pursuant to that certain Real Estate Purchase and Sale Agreement between Seller and DRL Real Estate, L.L.C., of even date herewith.

Section 5.2 Conditions of Seller's Obligation to Close. Seller's obligation to consummate the transactions contemplated by this Agreement are subject to the fulfillment (or

the waiver thereof by Buyer in writing) of the following conditions on or before the Closing Date:

(a) Compliance with Obligations. Buyer shall have materially complied with all of Buyer's obligations to be performed hereunder, including the payment of the Purchase Price, on or before Closing.

(b) Buyer Representations. All representations made hereunder by Buyer shall be true, accurate and correct as of the Closing and there shall be no breach in the warranties or covenants made hereunder by Buyer.

(c) Delivery of Documents. Buyer shall have executed and delivered to Seller any and all documents reasonably required to consummate the transactions contemplated by this Agreement.

(d) Payment of Purchase Price. Buyer shall have paid to Seller, through escrow at Closing, the entire Purchase Price for the Assets as required pursuant to Article 2 of this Agreement

## ARTICLE 6 REPRESENTATIONS AND WARRANTIES

Section 6.1 Seller's Representations and Warranties. Seller hereby represents and warrants to Buyer as follows, and covenants that the same are true and accurate as of the date hereof and will remain true and accurate as of the Closing:

(a) Ownership of the Assets. Seller is the owner of good and marketable title to the Assets; the Assets are (or will be at the Closing) free and clear of all liens, debts, adverse claims, obligations or encumbrances of every kind; and Seller has the unconditional right to sell, convey and transfer the Assets to Buyer as contemplated by this Agreement.

(b) Binding Agreement. Upon execution and delivery hereof and at the Closing, this Agreement and the obligations contemplated herein shall be legal, valid and binding obligations of Seller and shall be enforceable against Seller in accordance with their respective terms.

(c) Other Agreements. Except as herein otherwise provided, the execution and delivery of this Agreement and the consummation of the transactions provided for herein will not result in a material breach of any term or provision of, or constitute a default or permit acceleration of maturity under, any indenture, mortgage, deed of trust, security agreement, pledge agreement, loan agreement, or other agreement, document or instrument to which Seller

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is a party or by which Seller is bound which would affect the Assets or prevent or impair the consummation of this Agreement or the transfer of the Assets to Buyer as contemplated herein.

(d) Suits and Proceedings. There are no suits or proceedings pending or threatened in any court or before any administrative board, commission, or by any federal, state or other governmental department or agency, which directly or indirectly affect or involve Seller and (a) which would materially, adversely affect the Assets, or (b) which, if determined adversely, would have a material adverse effect on the transactions contemplated by this Agreement or the business prospects of the Dealership.

(e) Third Party Approvals. Except as otherwise specified herein, no consents or approvals of any third party or parties are required prior to the execution, delivery and performance by Seller of this Agreement and the other documents contemplated hereby.

(f) No Material Adverse Changes. Since the date of this Agreement and prior to the Closing, there has not and will not have been:

- (1) Any material adverse change in the Assets;
- (2) Any sale or any other disposition of any material part of the Assets except in the ordinary course of business of the Dealership;
- (3) Any damage, destruction, or casualty loss (not covered by insurance) materially and adversely affecting the Assets.
- (4) Any other material event or condition adversely affecting the Assets.

(g) Taxes. All taxes, charges and assessments on the Assets or the Dealership of any type or character which have or will become due and payable prior to the Closing will have been paid in full by Seller on or prior to such date.

(h) Defaults/Breaches. Seller has in all material respects complied with, observed and performed all of its obligations, and is not in default or breach (or would not be in default or breach with the lapse of time or the giving of notice or both) under, any agreement or commitment (oral or written) to which Seller is a party and by which the Assets are bound.

(i) Organization and Corporate Power. Seller is a corporation duly organized, validly existing, and in good standing under the laws of its jurisdiction of incorporation and is duly qualified and in good standing as a foreign corporation in each other jurisdiction in which it owns or leases properties, conducts operations, or maintains a stock of

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goods, with full power and authority (corporate and other) to carry on the business in which it is engaged and to execute and deliver and carry out the transactions contemplated by this Agreement.

(j) Financial Statements. Seller has delivered to Buyer consolidated balance sheets of Seller as at the close of its fiscal year for each of the three years ending December 1998, 1999 and 2000, respectively, and interim balance sheet for the six (6) months ending June 30, 2001, together with related statements of operations, statements of changes in stockholders' equity, and statements of cash flows for the respective years then ended.

The financial statements specified above, including in each case the notes to such financial statements, are hereinafter sometimes collectively referred to as the "Financial Statements." All of the Financial Statements are true, correct, and complete, have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods (except as set forth in such notes or statements) and fairly present the financial condition of Seller and the results of its operations as at the dates thereof and throughout the periods covered thereby. The Financial Statements reflect or provide for all claims against, and all debts and liabilities of, Seller, fixed or contingent, as at the dates thereof, and there has not been any change between the date of the most recent Financial Statements and the date of this Agreement that has materially or adversely affected the business or properties or condition or prospects, financial or other, or results of operations of Seller, and no fact or condition exists or is contemplated or threatened, which might cause any such change at any time in the future.

(k) Personal Property. Seller owns and has good and marketable title to all the tangible and intangible Personal Property and assets, other than the assets referred to in the Exhibit C, reflected upon the most recent balance sheet included in the Financial Statements or used by Seller in its business if not so reflected, free and clear of all mortgages, liens, encumbrances, equities, claims, and obligations to other persons, of whatever kind and character, except as set forth in the Exhibit C. None of the fixed assets and machinery and equipment is subject to contracts of sale, and none is held by Seller as lessee or as conditional sales vender under any lease or conditional sales contract and none is subject to any title retention agreement, except as set forth in the Exhibit C. The fixed assets and machinery and equipment, taken as a whole, are in a state of good repair and maintenance and are in good operating condition; inventory is up to normal commercial standards and no inventory that is obsolete or unmarketable is reflected in the most recent balance sheets included in the Financial Statements. Upon the sale, assignment, transfer, and delivery of the Assets to Buyer hereunder, there will be vested in Buyer good and marketable title to the tangible and intangible personal property constituting a part thereof, free and clear of all mortgages, liens, encumbrances, equities, claims, and obligations to other persons, of whatever kind and character, except for the rights of third persons arising under contracts for the sale of inventory in the ordinary course of business, each of which is listed in the Exhibit C.

(l) Ordinary Course of Business. Seller, from the date of the balance sheet contained in the most recent Financial Statements to the date hereof,

(1) has operated its business in the normal, usual, and customary manner in the ordinary and regular course of business;

(2) has not sold or otherwise disposed of any of its properties or assets, other than inventory sold in the ordinary course of business;

(3) except in each case in the ordinary course of business,

(a) has not amended or terminated any outstanding lease, contract, or agreement,

(b) has not incurred any obligations or liabilities (fixed, contingent, or other), and

(c) has not entered any commitments;

(4) has not made any transactions outside the ordinary course of business in its inventory or any additions to its property or any purchases of machinery or equipment, except for normal maintenance and replacements;

(5) has not mortgaged, pledged, or subjected to lien or any other encumbrances, any of its assets, tangible or intangible;

(6) has not sold or transferred any tangible asset or cancelled any debts or claims except in each case in the ordinary course of business;

(7) has not entered into any other transaction or transactions that individually or in the aggregate are material to Seller, other than in the ordinary course of business.

(m) Litigation and Compliance with Laws. Exhibit D contains a brief description of all litigation or legal or other actions, suits, proceedings, or investigations, at law or in equity, or before any federal, state, municipal, or other governmental department, commission, board, agency, or instrumentality, domestic or foreign, in which Seller or any of its officers or directors, in such capacity, is engaged, or, to the knowledge and belief of Seller, with which Seller or any of its officers or directors is threatened in connection with the business or affairs or properties or assets of Seller. Seller is in compliance with all laws and governmental

rules and regulations, domestic and foreign, and all requirements of insurance carriers, applicable to its business or affairs or properties or assets, including, without limitation, those relating to environmental protection, water or air pollution, and similar matters.

(n) Environmental Matters. To the best of Seller's knowledge (but without having undertaken any independent inquiry), the Dealership and Property is not in violation of any federal, state or local law, ordinance or regulation relating to industrial hygiene or to the environmental conditions on, under or about the Property, including, but not limited to, soil and groundwater condition. During the time in which Seller has owned the Property, neither Seller nor, to the best of Seller's knowledge, any third party has released onto, under, about or from the Property any Hazardous Materials. For purposes of this Agreement, "Hazardous Materials" shall include substances defined as "hazardous substances," "hazardous materials," "hazardous wastes," "retrograde material," "contaminant," "pollutant," "toxic substances" or the like in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. § 1901, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq.; the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq.; the Clean Air Act, 42 U.S.C. § 7401, et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq.; the Oil Pollution Act of 1990 (33 U.S.C. § 2701 et seq.; the Occupational Safety and Health Act (29 U.S.C. § 651 et seq.; the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11001 et seq.); A.R.S. § 549-201(16), 49-901(3), and 49-921(5); and in the regulations adopted pursuant to such laws; and any substance or material which has been determined by any state, federal or local governmental authority with jurisdiction over the Property to be capable of posing a risk of injury to health or safety.

(o) Extraordinary Events. From the end of its most recent fiscal year to the date hereof, neither the business nor properties of the business have been materially and adversely affected in any way as the result of any fire, explosion, accident, casualty, labor disturbance, requisition, or taking of property by any governmental body or agency, flood, embargo, or Act of God or the public enemy, or cessation, interruption, or diminution of operations, whether or not covered by insurance.

(p) Material Information. Neither the Financial Statements nor this Agreement (including the Schedules and Exhibits hereto) nor any certificate or other information or document furnished or to be furnished by either Seller to Buyer contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact required to be stated herein or therein or necessary to make the statements herein or therein not misleading.

(q) Continuing Representations. The representations and warranties of Seller herein contained (a) relating to non tax matters shall survive the Closing for a period of

one year and (b) relating to tax matters shall survive the Closing for the applicable statute of limitations.

Section 6.2 **Buyer's Representations and Warranties.** Buyer hereby represents and warrants to Seller as follows, and covenants that the same are true and accurate as of the date hereof and will remain true and accurate as of the Closing Date:

(a) **Binding Agreement.** Upon execution and delivery hereof and at the Closing, this Agreement and the obligations contemplated herein shall be legal, valid and binding obligations of the Buyer and shall be enforceable against Buyer in accordance with their respective terms.

(b) **Organization and Corporate Power.** Buyer is a corporation duly organized, validly existing, and in good standing under the laws of its jurisdiction of incorporation and is duly qualified and in good standing as a foreign corporation in each other jurisdiction in which it owns or leases properties, conducts operations, or maintains a stock of goods, with full power and authority (corporate and other) to carry on the business in which it is engaged and to execute and deliver and carry out the transactions contemplated by this Agreement.

(c) **Due Authorization; Effect of Transaction.** No provisions of the Certificate of Incorporation or Bylaws of Buyer, or of any agreement, instrument, or understanding, or any judgment, decree, rule, or regulation, to which Buyer is a party or by which Buyer is bound, has been or will be violated by the execution and delivery by Buyer of this Agreement or the performance or satisfaction of any agreement or condition herein contained upon its part to be performed or satisfied, and all requisite corporate and other authorizations for such execution, delivery, performance, and satisfaction have been duly obtained. Upon execution and delivery, this Agreement will be a legal, valid, and binding obligation of Buyer and Stockholder, enforceable in accordance with its terms. Buyer is not in default in the performance, observance, or fulfillment of any of the terms or conditions of its Articles of Incorporation or Bylaws.

(d) **Other Agreements.** Except as herein otherwise provided, the execution and delivery of this Agreement and the consummation of the transactions provided for herein will not result in a material breach of any term or provision of, or constitute a default or permit acceleration of maturity under, any indenture, mortgage, deed of trust, security agreement, pledge agreement, loan agreement, or other agreement or instrument to which Buyer is a party or by which Buyer is bound which would impair the consummation of this Agreement.

(e) **Suits and Proceedings.** There are no suits or proceedings pending or threatened in any court or before any administrative board, commission, or by any federal, state or other governmental department or agency, which directly or indirectly affect or involve Buyer



and which, if determined adversely, would have a material adverse effect on the transactions contemplated by this Agreement.

(f) Defaults/Breaches. Buyer has in all material respects complied with, observed and performed all of its obligations, and is not in default or breach (or would not be in default or breach with the lapse of time or the giving of notice or both) under, any agreement or commitment (oral or written) to which Buyer is a party.

## **ARTICLE 7**

### **CONDUCT OF SELLER'S BUSINESS PENDING THE CLOSING**

Section 7.1. **Conduct of Seller's Business Pending the Closing.** Pending the Closing, Seller will do the following:

(a) Conduct of Business. Seller's business shall be conducted only in the ordinary and usual course and substantially in accordance with its prior business practices, with a view to maintaining the goodwill, the Assets, Seller's customer relationships and its business reputation.

(b) Employees. If requested by the Buyer, Seller shall use its best efforts to cause the present employees, as selected by Buyer, to accept employment with Buyer after the Closing. Buyer shall not, however, have any obligation to offer employment to any employee of Seller.

(c) Employee Compensation. From the date hereof to the Closing Date, Seller shall not engage or employ any new employees except in the normal course of business or increase the rate of compensation payable, or to become payable, to any present employee, or pay any bonus or extraordinary compensation to any such employee, other than normal pay increases, bonuses and other compensation practices of Seller in the normal course of business.

#### **Section 7.2. Access to Information, Etc.**

(a) Access to Information Pending. Pending the Closing, Seller shall provide to Buyer (and Buyer's counsel, accountants and other representatives), without charge, full and complete access (in such manner so as not to unreasonably interfere with the normal conduct of Seller's business) to the books, records and information of Seller concerning the Assets and Seller's business which is reasonably necessary for the orderly transfer of the Assets and the consummation of the transactions contemplated by this Agreement.

(b) Approvals. If required, Buyer and Seller will promptly and expeditiously make all appropriate filings or applications with third parties (including, without limitation, the

application for the New Dealer Agreement), give all notices concerning the transactions contemplated by this Agreement, and will cooperate with one another in developing and presenting any data or information necessary in connection therewith.

(c) Prompt Notice of Events. Pending Closing, (1) Seller shall give Buyer prompt notice of any material developments affecting the Assets, and (2) Seller and Buyer shall give prompt notice to each other of the occurrence of any event which would cause any of the representations made by Seller or by Buyer to be untrue in any material respect.

## **ARTICLE 8 CLOSING**

The Closing of the transactions contemplated hereby (the "**Closing**") shall take place at Escrow Offices, or such other location as mutually agreed to by the parties, as provided in the Real Estate Purchase and Sale Agreement, on the first to occur of (1) within a reasonable time as agreed to by the parties after the New Dealer Agreement is confirmed in writing to the Buyer by the Manufacturer as required herein, or (2) November 15, 2001, or at such other time, date and/or place as the parties mutually may designate in writing. Although this Agreement is intended to be executed and delivered in advance of the Closing, final closing, consummation and completion hereof shall remain conditional upon satisfaction or written waiver of the conditions precedent set forth in this Agreement. The Closing may be extended by Buyer, in Buyer's discretion, for up to an additional ninety (90) days beyond 15 November 2001 to allow time for issuance of the New Dealer Agreement, provided that the Buyer theretofore have used its best, diligent, good-faith efforts to timely perform all of Buyer's obligations in connection with such issuance but, despite such diligence by Buyer, the New Dealer Agreement remains unissued as of 15 November 2001.

## **ARTICLE 9 DEFAULT**

If either party fails to perform any of its obligations hereunder and such condition is not cured within ten (10) days after written notice thereof by the other, such party shall be in default hereunder and the non-defaulting party shall be entitled to proceed at law and in equity to enforce its rights under this Agreement. Buyer's rights shall include, without limitation, the right to seek specific performance of this Agreement. Seller's rights shall include, without limitation, the right to retain the portion of the Earnest Money Deposit as set forth in Paragraph 2.1(b) of this Agreement as liquidated damages. The parties recognize and agree that, due to the fluidity of the motor vehicle dealership market generally and the unique nature of the Dealership, the full extent of Seller's damages in the event of Buyer's breach of its obligation to close this transaction is difficult or impossible to measure, and that the Earnest Money Deposit represents the parties' best, good-faith estimate of Seller's damages arising from any such breach by Buyer.

## ARTICLE 10 ACQUISITION OF NEW VEHICLES AFTER CLOSING

The Buyer acknowledges that the President of the Seller, Larry J. Coet, shall have the unconditional right to purchase from the Buyer by special order from the manufacturer one motor vehicle every other year commencing on the date of Closing, said vehicles to be purchased at the Buyer's triple net cost of such vehicles plus dealer's preparation charges. Such vehicles must be purchased for personal use only and not for resale. The term of the Seller's rights to purchase new vehicles from the Buyer shall terminate ten years immediately following the Closing Date. Such vehicles shall not be models with limited production without the approval of Buyer.

## ARTICLE 11 MISCELLANEOUS PROVISIONS

Section 11.1. **Survival of Representations and Warranties.** The respective obligations of Buyer and Seller hereunder and all representations and warranties made in this Agreement, all exhibits hereto, and all certificates and documents delivered pursuant hereto, shall survive the Closing.

Section 11.2. **Binding Agreement.** This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto. Buyer's obligations hereunder shall be the joint and several obligations of all of the parties who comprise Buyer from time to time.

Section 11.3. **Captions.** The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope or interpretation of any of the terms or provisions of this Agreement or the intent hereof.

Section 11.4. **Counterparts.** This Agreement may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

Section 11.5. **Severability.** The provisions of this Agreement are severable, and should any provision hereof be void, voidable, unenforceable or invalid, such void, voidable, unenforceable or invalid provision shall not affect the other provisions of this Agreement.

Section 11.6. **Waiver of Breach.** Any waiver by either party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of, or consent to, any subsequent breach of this Agreement.

Section 11.7. **Cumulative Remedies.** The rights and remedies of the parties hereto shall be construed cumulatively, and none of such rights and remedies shall be exclusive of, or in lieu or limitation of, any other right, remedy or priority allowed by law.

Section 11.8. **Amendment.** This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

Section 11.9. **Interpretation.** This Agreement shall be interpreted, construed and enforced according to the substantive laws of the state of Utah. Any disputes arising as a result of the terms and conditions of this Agreement shall be resolved in a Court situated in the State of Utah.

Section 11.10. **Attorneys' Fees.** In the event any action or proceeding is taken or brought by either party concerning this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees, whether such sums are expended with or without suit, at trial, on appeal or in any bankruptcy or insolvency proceeding.

Section 11.11. **Notice.** All notices provided for herein shall be in writing and shall be given by first class mail, certified or registered, postage prepaid, addressed to the parties at their respective addresses set forth above or at such other address(es) as may be designated by a party from time to time in writing.

Section 11.12. **Brokers.** Seller represents and warrants to Buyer that no broker or finder acted for it or is entitled to any fee or commission in respect of the transactions contemplated hereby. Seller shall indemnify and hold Buyer harmless in respect of any breach of the foregoing representation and warranty. Similarly, Buyer represents and warrants to Seller that no broker or finder acted for Buyer or is entitled to any fee or commission in respect of the transactions contemplated hereby. Buyer shall indemnify and hold Seller harmless in respect of any breach of the foregoing representation and warranty.

Section 11.13. **Time of Essence.** Time is of the essence to this Agreement.

Section 11.14. **Costs.** All costs and expenses, including attorneys' fees, incurred by each party in conjunction with this Agreement shall be paid by the party which has incurred such costs and expenses.


Section 11.15. **Assignment.** Buyer may freely assign his rights, and delegate his duties, under this Agreement, provided that no such assignment shall relieve Buyer of the ultimate performance of his obligations hereunder.

Section 11.16. **Interpretation.** This Agreement is the result of arm's length negotiations between, and the collaborative efforts of, sophisticated businessmen. Consequently, this Agreement shall be interpreted in an absolutely neutral fashion, with no regard to the identity of the "drafter" of this Agreement.

**DATED** effective the date first written above.

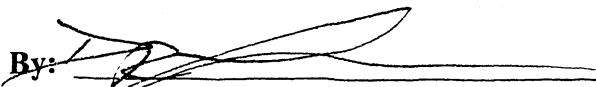
**SELLER:**

**LARRY J. COET PONTIAC CHEVROLET BUICK,  
INC., a Utah corporation**

By:   
LARRY J. COET, President

**BUYER:**

**LABRUM CHEVROLET PONTIAC BUICK, INC., a  
Utah corporation**

By:   
DANNY R. LABRUM, President

11/16

Exhibit "A" to  
Asset Sale Agreement

FURNITURE, FIXTURES, TOOLS, AND EQUIPMEN

Exhibit "B" to  
Asset Sale Agreement

ASSETS NOT SUBJECT TO THE ASSET SALE AGREEMENT



Exhibit "C" to  
Asset Sale Agreement

EQUIPMENT OBLIGATIONS ASSUMED BY BUYER

- |  |   |
|--|---|
| 1. Parts Inventory and Catalogue Inventory System and Equipment Use Agreement dated April 24, 2001 | Lessor: Bell & Howell<br>1909 Old Mansfield Road<br>Wooster, Ohio                   |
| 2. ADP Computer Software Lease Agreement dated May 26, 1999  | Lessor: ADP Leasing<br>99 Jefferson Rd<br>Sippany, N.J. 07054-0449                  |
| 3. B&G use of equipment Agreement dated August 9, 1999   | Kenz & Leslie Distributing Co., Inc.<br>PO Box 1066<br>Arvada, CO 80001-1066        |
| 4. Crus Oil - use of equipment Agreement dated March 15, 2001                                      | Crus Oil, Inc.<br>2260 South West Temple<br>Salt Lake City, Utah 84415-2631         |
| 5. Lucent Technologies Maintenance Agreement for telephone system dated March 15, 2001             | Lucent Technologies<br>169 Mountain Way Drive, #107<br>Orem, Utah 84058             |
| 6. ADT Fire & Alarm Service Agreement Dated June 14, 1996  | ADT Security Services, Inc.<br>836 East 300 South<br><br>Salt Lake City, Utah 84102 |
| 7. Aramark – Uniforms  | PO Box 65525<br>Salt Lake City, Utah 84165  |



EXHIBIT "D" To  
Asset Purchase Agreement

NONE

Tab 2

# EXHIBIT 2

*Resolution Agreement Letter dated February 9, 2005*

# SNOW, CHRISTENSEN & MARTINEAU

Reed L. Martineau  
David W. Slagle  
A. Dennis Norton  
Allan L. Larson  
John E. Gates  
R. Brent Stephens  
Kim R. Wilson  
Michael R. Carlston  
David G. Williams  
Rex E. Madsen  
Max D. Wheeler  
David W. Slaughter  
Stanley J. Preston  
Shawn E. Draney  
John R. Lund  
Rodney R. Parker  
Richard A. Van Wagoner  
Andrew M. Morse  
Camille N. Johnson  
Dennis V. Dahle  
Korey D. Rasmussen  
Terence L. Rooney  
David L. Pinkston  
Julianne Blanch

Brian P. Miller  
Judith D. Wolferts  
Keith A. Call  
Kara L. Pettit  
Elizabeth L. Willey  
Heather S. White  
Robert R. Harrison  
Robert W. Thompson  
Jill L. Dunyon  
Scott H. Martin  
Tristan B. Smith  
Maralyn M. Reger  
Kenneth L. Reich  
Joseph P. Barrett  
Rebecca C. Hyde  
D. Jason Hawkins  
Richard A. Vazquez  
Bradley R. Blackham  
Sam Harkness  
David F. Mull  
Bryan M. Scott  
P. Matthew Cox  
Ryan B. Bell

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmlaw.com

February 9, 2005

Thurman & Sutherland 1886  
Thurman, Sutherland & King 1888  
Thurman, Wedgwood & Irvine 1906  
Irvine, Skeen & Thurman 1923  
Skeen, Thurman, Worsley & Snow 1952  
Worsley, Snow & Christensen 1967

John H. Snow 1917-1980

Of Counsel  
Harold G. Christensen  
Joseph Novak

Writer's Direct Number.  
(801) 322-9144

Gary R. Howe, Attorney  
CALLISTER NEBEKER & McCULLOUGH  
10 East South Temple, Suite 900  
Salt Lake City, Utah 84133

Re: Coet Chevrolet v. Labrum Chevrolet et al.;  
Letter of Understanding Concerning Evaluation of Claims

Dear Gary:

This letter will set out the terms of our understanding and agreement with respect to an attempt to resolve disputes between Larry J. Coet Chevrolet Pontiac Buick, Inc. ("Coet") and Labrum Chevrolet Pontiac Buick, Inc. ("Labrum"). All terms not otherwise defined in this letter shall have the meaning given them in the Asset Sale Agreement between the parties.

1. Composition of the Evaluation Team. Coet and Labrum shall each choose a certified public accountant who, working as the co-equal of the individual selected by the other party (hereinafter the "Evaluation Team"), shall conduct an evaluation of the various claims of the respective parties ("Evaluation"). Coet designates Becky Taylor, and Labrum designates Steven Racker, as Evaluation Team members. Ms. Taylor and Mr. Racker signify their acceptance of these appointments by signing below.

2. Scope of Work. The Evaluation shall comprise the following tasks:

a. Review and Analysis of Used Vehicle Inventory Claims. With reference to the Asset Sale Agreement, the Evaluation Team shall determine the total actual cash value of the Used Vehicle Inventory as of November 15, 2001. The Evaluation Team shall discuss, review and analyze the parties' respective claims with respect to Used Vehicle Inventory, and endeavor to arrive at a consensus as to the total value of such claims, whether or not such amounts have been paid as agreed upon by the parties, and

whether either of the parties owes the other party any amount with respect to such claims and, if so, the amount owed. Among other potential issues, Coet claims that on November 15, 2001, Labrum asserted a claim against Coet for the purchase of the Used Vehicle Inventory in the amount of \$41,470.00, which Coet claims was paid in full on November 15, 2001. Coet claims that the amount owed by Labrum for the purchase of the Used Vehicle Inventory is \$46,715.00.

b. **Parts.** With reference to the Asset Sale Agreement, the Evaluation Team shall determine the dollar value of parts in inventory as of November 15, 2001 that were Obsolete Parts (as defined in the Asset Sale Agreement), as well as the parts in inventory as of November 15, 2001 that were not Obsolete Parts. The Evaluation Team shall not endeavor to determine whether either party owes any sum to the other party based on parts obsolescence, but shall limit the Evaluation to a determination of the value of Obsolete Parts and non-Obsolete Parts as of November 15, 2001.

c. **Additional Expenses Agreed to at Closing.** The Evaluation Team shall discuss, review and analyze the parties' respective claims with regard to asphalt paving, balance of the ADP contract, computer acquisition, and payment of 50% of the employee medical plan payment for November 2001. The Evaluation Team shall endeavor to arrive at a consensus as to the total value of such claims, whether or not such amounts have been paid as agreed upon by the parties, and whether either of the parties owes the other party any amount with respect to such claims and, if so, the amount owed.

d. **Interest from Delayed Pay Off.** The Evaluation Team shall discuss, review and analyze the parties' respective positions relating to claims for interest expense due to an alleged delayed pay off on the real estate and new and used car flooring lines. The Evaluation Team shall endeavor to arrive at a consensus as to the total value of such claims, whether or not such amounts have been paid as agreed upon by the parties, and whether either of the parties owes the other party any amount with respect to such claims and, if so, the amount owed.

e. **New Vehicle Inventory.** With reference to the Asset Sale Agreement, the Evaluation Team shall determine the total actual cash value of the New Vehicle Inventory as of November 15, 2001. The Evaluation Team shall discuss, review and analyze the parties' respective claims with respect to Used Vehicle Inventory, and endeavor to arrive at a consensus as to the total value of such claims, whether or not such amounts have been paid as agreed upon by the parties, and whether either of the parties owes the other party any amount with respect to such claims and, if so, the amount owed. Among other potential issues, Coet now claims that Labrum asserted that Coet owed Labrum the sum of \$27,263.31, which Coet claims was paid to Labrum on November 15, 2001. Coet now claims it is owed \$32,911.65.

f. **Other Claims.** The Evaluation Team shall discuss, review and analyze the following additional claims of the parties and the parties' respective positions with respect to such claims. The Evaluation Team shall endeavor to arrive at a consensus as to the total value of all such claims, whether or not such amounts have been paid as agreed upon by the parties, and whether either of the parties owes the other party any amount with respect to such claims and, if so, the amount owed. Such claims are limited to the following:

- i) Labrum claims Coet owes Labrum approximately \$31.31 for interest on GMAC funding paid to Coet's account.
- ii) Labrum claims Coet owes Labrum approximately \$7,618 for warranty claims and predelivery inspections.
- iii) Labrum claims Coet owes Labrum approximately \$120.06 in fuel credits.
- iv) Labrum claims Coet owes Labrum approximately \$3,045.16 in GM floor plan interest.
- v) Labrum claims Coet owes Labrum approximately \$7,600.92 for GM holdbacks.
- vi) Labrum claims Coet owes Labrum approximately \$27.04 for repairs for Joe Rush.
- vii) Labrum claims Coet owes Labrum approximately \$497.81 for American Express payments
- viii) Labrum claims Coet owes Labrum approximately \$232.37 for parts purchased from GM
- ix) Coet claims Labrum owes Coet for a 1992 Ford Three Quarter Ton pickup truck, VIN 2PTHF26M2NCA2221, which Coet claims was a used vehicle taken in on trade prior to the closing and that the underlying lien was paid off by Coet and the vehicle sold by Labrum. Coet claims the dollar amount of the trade-in allowance is \$4,300.00.
- x) Coet claims Labrum owes Coet for gas and oil inventory in existence as of the date of closing in the amount of \$6,076.00.

- xi) Coet claims Labrum owes Coet for parts charged to Coet's GM Open Account beginning November 15, 2001 through December 27, 2001 in the amount of \$8,573.41.
- xii) Coet claims Labrum owes Coet for other charges on GM Open Account from November 28, 2001 through January 17, 2002 in the amount of \$3,339.33.

3. Objective of Evaluation. The Evaluation is intended by Coet and Labrum to be, and shall be conducted by the Evaluation Team as, an independent examination, assessment, and application of the relevant provisions of the Asset Sale Agreement and related documents, for the purpose of resolving all of the respective claims between the parties, with the exception of whether either party is legally responsible to the other party for parts obsolescence.

4. Reference Resources. In conducting the Evaluation, the Evaluation Team shall have access to and shall rely on, the Asset Sale Agreement, related documents, and such books and records as Coet and Labrum, or either of them, (i) actually utilized to establish the Used Vehicle Inventory actual cash value for purposes of the Asset Sale Agreement and (ii) such additional documents, records, and books of account that Coet and Labrum may provide to the Evaluation Team. In addition, the Evaluation Team may, in its discretion, consult with such persons as members of the Evaluation Team shall deem reasonable in furtherance of arriving at a consensus on the issues set forth above.

5. Methodology of Evaluation. The Evaluation Team shall carry out its tasks as a two-member team, and shall conduct such consultations with Coet or Labrum or their respective representatives as the members of the Evaluation Team shall deem reasonable in furtherance of arriving at a consensus on the issues set forth above, including, without limitation, joint or separate consultations with either Coet or Labrum. The Evaluation Team shall employ such skill, due diligence, methods, practices, procedures, and tests as certified public accountants customarily use in an engagement of similar scope and complexity.

6. Terms of Engagement. Coet shall be solely and separately responsible and liable for payment of any fees incurred or charged by the accountant designated by him. Labrum shall be solely and separately responsible and liable for payment of any fees incurred or charged by the accountant designated by him.

7. Deadline for Results of Evaluation; Impasse.

- a. The Results of the Evaluation ("Results"):

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(1) shall be presented in writing to Coet and Labrum jointly no later than March 15, 2005;

(2) shall present the Evaluation Team's findings and conclusions with respect to each of the issues described above;


(3) may be accompanied by such explanatory or supporting documentation as the Evaluation Team may find helpful; and

(4) shall be the joint property of Coet and Labrum.

b. It is anticipated that the Results shall be the unanimous conclusion of the members of the Evaluation Team, and the Evaluation Team members are directed to use their best efforts to arrive at a unanimous conclusions on all issues described above. To the extent the members of the Evaluation Team cannot arrive at a unanimous conclusion with respect to any particular issue, the Evaluation Team may submit separate reports (or separate sections within the same report) to report their separate findings and conclusions with respect to any such issue. If at any time during the Evaluation it becomes clear to the members of the Evaluation Team that they cannot reach a unanimous decision on any issue, the Evaluation Team or either of its members shall immediately advise Coet and Labrum of the impasse. A unanimous conclusion by the accountants that they cannot reach a conclusion on any particular accounting item because one of the parties has not supported its claim after requests by the accountants that it do so shall result in that particular claim being waived.

8. Release and Waiver. In consideration of the employment by the Evaluation Team of such skill, due diligence, methods, practices, procedures, and tests as certified public accountants would customarily use in an engagement of similar scope and complexity, Coet and Labrum, each on behalf of itself, and all its officers, directors, employees, agents, insurers, affiliates, successors and assigns, waives and releases the Evaluation Team and each member of the Evaluation Team and their respective employers from any and all claims, complaints, losses, demands, damages, actions, causes of action, or suits of whatever kind or nature with respect to or arising out of the dispute between the parties and the issues described above.

9. Binding Effect; Admissibility of Evaluation Results; Release of Claims. Coet and Labrum agree that the unanimous findings and conclusions of the Evaluation Team shall be binding on the parties, and each party accepts and agrees to abide by the unanimous findings and conclusions of the Evaluation Team. The report(s) and results of the Evaluation Team shall be admissible in any legal proceeding between the parties to prove or disprove any fact in issue. Each party agrees to pay to the other party any sum(s) the Evaluation Team unanimously determines is owed by such party to the other party. Upon payment by





Gary R. Howe, Attorney  
CALLISTER NEBEKER & McCULLOUGH  
February 9, 2005  
Page 6

Labrum of any such sum (if any), Coet, for and on behalf of himself, itself and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, releases and forever discharges Labrum and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, from any and all claims, demands, suits, causes of action or obligations of whatever nature, known or unknown, contingent or non-contingent, that anyone claiming through or under Coet may have or believe to have against Labrum, including without limitation all claims that relate in any way to the lawsuit with Civil Number 030500537, currently pending in the Fourth Judicial District Court of Wasatch County, State of Utah (the "Lawsuit"), and any claims asserted or that could have been asserted in that lawsuit, excepting from this release only such claims as to which there is not a unanimous decision by the Evaluation Team. Upon payment by Coet of any such sum (if any), Labrum, for and on behalf of himself, itself and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, releases and forever discharges Coet and its owners, principals, affiliates, officers, directors, agents, employees, affiliates, successors and assigns, from any and all claims, demands, suits, causes of action or obligations of whatever nature, known or unknown, contingent or non-contingent, that anyone claiming through or under Labrum may have or believe to have against Coet, including without limitation all claims that relate in any way to the lawsuit with Civil Number 030500537, currently pending in the Fourth Judicial District Court of Wasatch County, State of Utah, and any claims asserted or that could have been asserted in that lawsuit, excepting from this release only such claims as to which there is not a unanimous decision by the Evaluation Team and claims relating to parts obsolescence. With respect to parts obsolescence, any unanimous finding or conclusion by the Evaluation Team with respect to the value of parts that are or are not Obsolete Parts shall be binding on both Coet and Labrum.

10. Preclusive Effect on Additional Claims. The parties acknowledge and agree that the claims raised in this letter agreement constitute all of the accounting-type claims for damages related to the Asset Sale Agreement and closing. The parties shall be precluded from raising or asserting (in the Lawsuit or otherwise) any claims for damages related to the Asset Sale Agreement and the Closing, except for: (i) any accounting issues that are not resolved by the Evaluation Team and (ii) any legal issues that must be resolved in order to achieve a complete resolution of the accounting issues specifically addressed in this Agreement.

If this letter accurately states the terms of our understanding and agreement with respect to the engagement of accountants to attempt to resolve the disputes and issues described above, please indicate, on behalf of your clients, your acceptance and approval below on the enclosed duplicate of this letter and



Gary R. Howe, Attorney  
CALLISTER NEBEKER & McCULLOUGH  
February 10, 2005  
Page 7

return a fully-executed copy. Please note that we are prepared to immediately nominate Labrum's member of the Evaluation Team and to provide the evaluation resources identified in Section 4 above. Accordingly, we request that your clients give this matter their immediate attention.

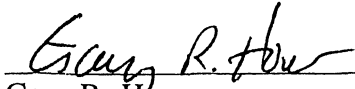
Sincerely yours,

**SNOW, CHRISTENSEN & MARTINEAU**



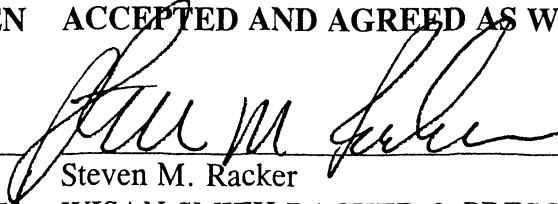
Keith A. Call

**ACCEPTED AND AGREED AS WRITTEN**



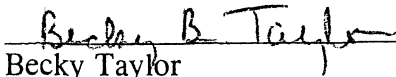
Gary R. Howe  
CALLISTER NEBEKER & McCULLOUGH  
Counsel for Larry J. Coet Chevrolet Pontiac  
Buick, Inc.

**ACCEPTED AND AGREED AS WRITTEN**



Steven M. Racker  
WISAN SMITH RACKER & PRESCOTT  
Certified Public Accountant appointed by  
Labrum Chevrolet Pontiac Buick, Inc.

**ACCEPTED AND AGREED AS WRITTEN**



Becky Taylor  
BECKY TAYLOR & ASSOCIATES, CPA  
Certified Public Accountant appointed by  
Larry J. Coet Chevrolet Pontiac Buick, Inc.

Tab 3

# EXHIBIT 3

*Letter of Understanding*

Keith A. Call, Attorney  
Snow Christensen & Martineau  
10 Exchange Place, Eleventh Floor  
Salt Lake City, Utah 84111

Gary R. Howe, Attorney  
Callister Nebeker & McCullough  
10 East South Temple, Suite 900  
Salt Lake City, Utah 84133

Re: Coet Chevrolet v Labrum Chevrolet et al:  
Letter of understanding concerning evaluation of claims

Dear Keith and Gary:

Pursuant to the letter of understanding concerning evaluation of claims dated February 9, 2005, Steven M. Racker, CPA and Becky B. Taylor CPA ("Evaluation Team") have conducted an evaluation of various claims by Larry J. Coet Chevrolet Pontiac Buick, Inc. ("Coet") and Labrum Chevrolet Pontiac Buick, Inc. ("Labrum"). The results of our evaluation are as follows:

A. Review and analysis of Used Vehicle Inventory Claims

The Evaluation Team has reviewed and analyzed the Parties' respective claims with respect to Used Vehicle Inventory.

The Evaluation Team concludes that Labrum owes Coet \$46,175.00.

B. Parts

The Evaluation Team was unable to determine the dollar value of parts in inventory as of November 15, 2001 that were Obsolete Parts (as defined by the sales agreement) nor were they able to determine amounts at November 15, 2001 that were not Obsolete Parts.

C. Additional Expenses Agreed to at Closing

The Evaluation Team reviewed and analyzed the additional expenses agreed to at closing as shown on the closing statement dated November 15, 2001 and have concluded all amounts were agreed to by the parties and amounts were properly allocated on the closing statement and that no amounts are due either party for such expenses.

**L0425**

12/2

D. Interest from Delayed Pay Off

The Evaluation Team reviewed and analyzed the claims for interest for an alleged delayed pay off on real estate and new and used car flooring lines. The Evaluation Team concludes that Labrum owes Coet \$1,035.98.

E. New Vehicle Inventory

The Evaluation Team reviewed and analyzed the parties' respective claims with respect to new vehicle inventory.

The Evaluation Team came to a consensus that Labrum owes Coet \$16,911.65. However there is \$9,000.00 still in dispute.

Labrum asserts that he made a payment on December 7, 2001 to Wells Fargo on a new vehicle amounting to \$9,000.00 and that such amount should be credited against the new vehicle inventory.

Coet believes that the \$9,000.00 payment was against a used vehicle and therefore should not affect the purchase price.

The Evaluation Team was not able to come to an agreement on whether the \$9,000.00 payment was for a new vehicle or a used vehicle.

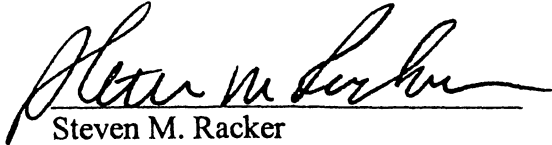
F. Other Claims

The Evaluation Team reviewed and analyzed additional claims and concluded the following:

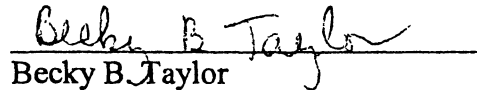
- i. No amounts are owed either party for this claim.
- ii. Coet owes Labrum \$7,211.16 for warranty claims and predelivery inspections that were credited to Coet's account.
- iii. No amounts are owed either party of this claim.
- iv. Coet owes Labrum \$2,897.24 in GM floor plan interest.
- v. Coet owes Labrum \$3,702.99 for GM holdbacks.
- vi. No amounts are owed either party for this claim.
- vii. Coet owes Labrum \$515.00 for American Express payments.
- viii. No amounts are owed either party for this claim.

- ix. The Evaluation Team could not agree on a wholesale value for the 1992 Ford Three Quarter Ton pick up truck.
- x. The Evaluation Team could not determine the existence of or dollar value of gas and oil inventory at the date of closing.
- xi. Labrum owes Coet \$7,784.96 for parts charged to Coet's GM open account beginning November 15, 2001 through December 27, 2001.
- xii. Labrum owes Coet \$1,803.59 for other charges on Coet's GM open account from November 28, 2001 to January 17, 2002

Very Truly Yours,



Steven M. Racker  
Wisan, Smith, Racker & Prescott, LLP  
Certified Public Accountant  
Appointed by Labrum Chevrolet Pontiac  
Buick, Inc.



Becky B. Taylor  
Becky Taylor & Associates  
Certified Public Accountant  
Appointed by Larry J. Coet Chevrolet  
Pontiac Buick, Inc.

Tab 4



# EXHIBIT 4

*Monthly Summary Report dated November 1, 2001*

4OCT2001 Month End OCT 2001

MONTHLY SUMMARY REPORT

Page 1

Sort Source: 100

	NBR OF PARTS	PERCENT	PARTS PIECES	PERCENT	PARTS COST	PERCENT
Inventory Balance	4,516		5,230		51,410.70	
Active Parts	352	7.79	1,682	32.16	12,524.40	24.36
NS Parts	3,082	68.24	738	14.11	13,377.15	26.02
MO Parts	35	0.77	118	2.25	1,071.82	2.08
AP Parts	897	19.86	2,644	50.55	23,753.90	46.20
DP Parts	27	0.59	48	0.91	683.43	1.32
SP Parts						
DEL Parts	123	2.72				

Parts With No Cost

Parts With Negative On-Hand

Core/Exchange	29	0.64	29	0.55	1,167.50	
Memos On File	871					
Parts Added	204	4.51	49	0.93	1,958.33	3.80
Active Parts						
NS Parts	204	100.00	49	100.00	1,958.33	100.00
MO Parts						
AP Parts						
DP Parts						
SP Parts						

Parts & Memos Deleted 155

Inventory Movement - Sales

0 to 3 Months	1,144	25.33	1,894	36.21	13,038.98	25.36
4 to 6 Months	507	11.22	526	10.05	3,333.40	6.48
7 to 12 Months	504	11.16	715	13.67	3,321.47	6.46
Over 12 Months	1,934	42.82	1,830	34.99	25,299.07	49.20
New Parts No Sales	427	9.45	265	5.06	6,417.78	12.48

Inventory Movement - Receipts

0 to 3 Months	571	12.64	1,259	24.07	14,201.05	27.62
4 to 6 Months	261	5.77	371	7.09	3,507.90	6.82
7 to 12 Months	297	6.57	391	7.47	3,560.20	6.92
Over 12 Months	2,309	51.12	3,043	58.18	27,906.66	54.28
New Parts No Receipts	1,078	23.87	166	3.17	2,234.89	4.34

Outstanding Orders

Stockorders	28	0.62	143		1,116.18	
Supplemental Orders	30	107.14	143	100.00	1,116.18	100.00
Customer Orders						
Backorders						
Stockorder Backorders						
Supplementl Backorders						
Customer Backorders						

Outstanding Forced Orders

