

2007

Larry J. Coet Chevrolet, Pontiac, Buick, Inc. v.
Danny R. Labrum, Labrum Chevrolet, Pontiac,
Buick, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

Appellant,

vs.

DANNY R. LABRUM, individually, and
LABRUM CHEVROLET, PONTIAC,
BUICK, INC.

Appellee.

Case No. 20070005-CA

District Court No. ~~020902795~~

Priority No. _____

APPELLANTS' BRIEF

On Appeal from the Final Order of
the Fourth District Court
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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS
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PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties to the proceeding from which review is sought as required by Rule 24 of the Utah Rules of Appellate Procedure.

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STATEMENT REGARDING JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2-2(3)(j) and UTAH CODE ANN. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL

Issue 1: Did the trial court err in granting Appellee's Motion for Partial Summary Judgment, precluding Appellant from an award of attorneys' fees as provided in the parties' Asset Purchase Agreement, whereby the Appellee acquired a motor vehicle dealership located in Heber City, Utah?

Standard of Review: On appeal, the appellate court reviews the facts and inferences in the light most favorable to the nonmoving party. See Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Whether a party is entitled to summary judgment presents a question of law, the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. See Higgins 855 P.2d at 235; Stangl v. Ernst Home Center, 948 P.2d 356, 360 (Utah Ct. App. 1997). Whether attorney fees are recoverable is a question of law, which we review for correctness. Bonneville Distributing Co. v. Green River Development Associates, Inc., 2007 UT App 175, ¶ 19, --- P.3d ----, 2007 WL 1500822 (quoting R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 16, 40 P.3d 1119); See Jensen v. Sawyers, 2005 UT 81, ¶ 127, 130 P.3d 325.

Issue 2: Did the trial court err in granting Appellee's Motion for Partial Summary Judgment, precluding Appellant from receiving applicable pre-judgment interest on the

\$59,384.79 award (such award determined by the consensus of the Accounting Team) as provided by statute?

Standard of Review: On appeal, the appellate court reviews the facts and inferences in the light most favorable to the nonmoving party. See Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Whether a party is entitled to summary judgment presents a question of law, the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. See Higgins, 855 P.2d at 235; Stangl v. Ernst Home Center, 948 P.2d 356, 360 (Utah Ct. App. 1997).

Issue 3: Did the trial court err in granting Appellee an award of attorneys' fees at the end of trial as a result of the trial court concluding that the Appellee was the prevailing party?

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 reviewed for an abuse of discretion. See Carlson Distributing Company v. Salt Lake Brewing Co, 2004 UT App 227, ¶ 16, 95 P.3d 1171. No deference is given to a trial court's legal conclusions which are reviewed for correctness. See Wilcox v. CSX Corp., 2003 UT 21 ¶ 6, 70 P.3d 85; Springville Citizens for a Better Community v. City of Springville, 1999 UT 25 ¶ 22, 979 P.2d 332. Whether attorney fees are recoverable is a question of law, which we review for correctness. Bonneville Distributing Co. v. Green River Development Associates, Inc., 2007 UT App 175, ¶ 19, --- P.3d ----, 2007 WL 1500822 (quoting R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 16, 40 P.3d 1119).

Issue 4: Did the trial court err in determining the amount of damages to award Appellee at the end of the bench trial as a result of the trial court concluding the evidence supported the amount for the 1991 Ford pick-up and obsolete used parts issues?

Standard of Review: These issues present mixed questions of law and fact. “We uphold [the] lower court's findings of fact unless the evidence supporting them is so lacking that we must conclude the finding[s are] ‘clearly erroneous.’” Chang v. Soldier Summit Dev., 2003 UT App 415, ¶ 12, 82 P.3d 203 (quoting Jefferies v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998)). “ ‘In contrast, we review [the] trial court's conclusions as to the legal effect of a given set of found facts for correctness.’” Id. (quoting Stubbs, 970 P.2d at 1244). Bonneville Distributing Co. v. Green River Development Associates, Inc., 2007 UT App 175, ¶ 18, --- P.3d ----, 2007 WL 1500822.

LIST OF STATUTES DETERMINATIVE OF THE APPEAL

UTAH CODE ANN. §15-1-1 and §15-1-4.

STATEMENT OF CASE

This appeal arises from an order to a Motion for Partial Summary Judgment against Coet, entered on September 2, 2005, and a final Judgment and Order against Coet and for Labrum by the Honorable Derek P. Pullan of the Fourth Judicial District Court of Wasatch County, State of Utah, entered on December 1, 2006.

In August 2001, Coet of Coet Chevrolet entered into an Asset Sale Agreement with Labrum for Labrum to purchase certain assets of Coet Chevrolet. Labrum contracted to buy

the new vehicle inventory, the used vehicle inventory, supplies, and the parts and accessories inventory, all furniture, fixtures, tools, equipment, intangibles, and the real estate of Coet Chevrolet. Labrum performed due diligence prior to the closing of the sale, which included an individualized physical inventory of the parts and a detailed assessment of the new and used cars in Coet's inventories as of the date of closing, November 14, 2001.

The formal closing regarding the purchase of the Chevrolet dealership occurred on or about November 14, 2001. The day following the closing (November 15, 2001), Labrum represented to Coet that a deficiency in the new motor vehicle inventory and in the used motor vehicle inventory existed and demanded a return of a portion of the purchase price. Whereupon, Coet presented two checks totaling \$68,733.31 to Labrum. Soon after the payment of the checks from Coet to Labrum the parties experienced additional disputes regarding other areas of the sale.

On or about November 13, 2003, Coet filed suit. On or about December 4, 2003, Labrum answered and counterclaimed against Coet. On January 20, 2005, under the order, direction, and supervision of the trial judge, the parties agreed that a team of accountants (one accountant selected by Coet and one selected by Labrum) would attempt to resolve specifically designated accounting issues regarding disputed aspects of the sale of the dealership. The parties entered into a Stipulated Case Management Order, stipulating that the accounting issues between the parties if resolved by unanimous agreement of the accounting team, would resolve such accounting issues, leaving only unresolved accounting

issues and all legal issues for resolution by the trial court. Additionally, the parties entered into an Accountants' Evaluation Agreement. In the Accountants' Evaluation Agreement, the parties set out the terms and specific areas for the accountants to attempt to resolve. The issues and amount of attorneys' fees and pre-judgment interest were not included in the explicit areas of consideration for the accountants' determination. Moreover, the Accountants' Evaluation Agreement contained a broad release of claims and claim preclusion provisions. The accountants issued a letter of understanding concerning their evaluation of designated accounting claims, resulting in the payment of \$59,384.79 from Labrum to Coet ("Accountants' Findings"). Labrum paid the amount of \$59,384.79 on or about May 12, 2005. Labrum's payment was approximately 42 months after Coet paid Labrum the demanded \$68,733.31 the day after the closing of the purchase of the dealership. The accountants did not attempt to make a determination regarding attorneys' fees or pre-judgment interest on the amount they awarded Coet, nor were they capable of ascertaining the legal standard for the award of attorneys' fees.

On or about September 2, 2005, the trial court granted Labrum's Motion for Partial Summary Judgment dismissing Coet's claims for attorneys' fees provided in the Asset Sale Agreement and pre-judgment interest allowed by Utah statute. The trial court determined in its Order, prepared by Labrum, that Coet's claims for attorneys' fees and pre-judgment interest were released and waived under Section Nine of the Accountants' Evaluation Agreement upon Labrum's payment to Coet of the amount the Accounting Team determined

was owed. The remaining unresolved issues from the pleadings filed by the parties were litigated during a one day trial on or about August 8, 2006, before Fourth District Judge, Judge Pullan. At the close of oral argument, the trial court announced from the bench that all of Coet's remaining claims against Labrum were dismissed with prejudice and that Labrum was entitled to judgment against Coet in the amount of \$11,455.26, which represented "obsolete parts." Further, the trial court announced that its prevailing party decision would be made "in light of prior settlement of some claims and the Court's judgment entered today." Both parties moved for attorneys' fees. The Court denied Coet's Motion and granted Labrum's in the amount of \$28,550.00. The trial court awarded Labrum's attorneys' fees based upon its determination that Labrum was the prevailing party in that Labrum prevailed on the remaining causes of action litigated at trial and did not consider the amount awarded to Coet by the Accounting Team. Coet paid the judgment of \$40,005.26 (the amount for the parts inventory and the prevailing party attorneys' fees).

FACTS RELEVANT TO ISSUES ON APPEAL

1. Larry J. Coet Chevrolet owned and operated the Chevrolet dealership in Heber City from 1986 until he sold it to Labrum in November of 2001. (R-674, p. 191:14-15).
2. In August 2001 Coet entered into an Asset Sale Agreement for the sale of the dealership to Danny Labrum Chevrolet. (R-674, p. 191:15-17).
3. In August 2001, Coet and Labrum executed the Asset Sale Agreement for the purchase of the dealership. (R-411-433; Plt. Ex.1).

4. On November 14, 2001, Coet and Labrum executed the Asset Sale Agreement - Closing Statement. (R- Plt. Ex. 2; R-353).

5. The Asset Sale Agreement specifically states: "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. Asset Sale Agreement ¶ 11.12 (R-416).

6. In the Agreement, Labrum agreed to purchase the used vehicle inventory, which includes all used motor vehicles which are in the seller's inventory at the time of closing, which vehicles have been previously titled. (R-674, p. 191:19-21).

7. Labrum also agreed to purchase Coet's parts and accessories inventory established by physical count as of the closing, excluding any and all obsolete parts. (R-674, p. 191:21-24).

8. The Agreement defined obsolete parts to mean any part not included in the manufacturer's current parts pricing catalog, any part on which the seal has been opened or is materially damaged, any part which is missing portions of its working mechanisms so that it would not be accepted for return, and parts in excess of a 180-day supply. (R-674, pp. 191:25-196:5).

9. If, after conducting the physical inventory, the value of then existing parts was less than \$68,000.00, the sale price for the dealership would be adjusted downward by the

difference between \$68,000.00 and the actual value of the parts. If the value of the parts exceeded \$68,000, there would be no adjustment. (R-674, p.192:6-11).

10. On November 12, 2001, Coet, Labrum, Lyle Labrum, and Rachel Labrum, conducted a parts inventory. (R-674, p. 194:1-8).

11. After approximately five hours, Labrum agreed that continuing the inventory would not be necessary because he was satisfied that more than \$68,000.00 in parts existed. (R-674, p. 194:16-23).

12. On November 13, 2001, following the conclusion of the physical inventories of parts, used vehicles, new vehicles, and other expenses to be satisfied by either Coet or Labrum, Coet and Labrum executed a document stating, among other things, Danny Labrum and Larry J. Coet agree that parts inventory total \$68,000.00. (R- Plt. Ex. 3; R-351).

13. On November 14, 2001, the parties met in Salt Lake City at a title company for the closing. As part of the closing both parties executed a closing statement. In the statement the parties agreed that used car inventory was valued at \$290,275. No adjustments were made for parts. (R-674, p. 195:8-13).

14. The day following the closing of the sale of the dealership, Labrum demanded, and Coet refunded to Labrum \$68,733.31, a substantial portion of which was not, in fact, owing. (R-511).

15. On November 8, 2001, less than one week before the closing, Mr. Gary Robinson purchased a new truck from Coet. The purchase included a trade of a 1991 Chevy pickup. (R-674, p. 193:4-12).

16. A week before the closing, Coet agreed to allow a customer, Johnny Jessen, to exchange his 1992 Ford pickup for the 1991 Chevy pickup Mr. Robinson was trading in and Coet agreed to pay the \$2,300 balance on the 1992 Ford pickup. (R-674, p. 193:4-12).

17. Mr. Jessen would get the 1991 Chevy pickup at the time he delivered the 1992 Ford pickup to Coet. (R-674, p. 193:13-14).

18. On November 13, 2001, at 6:00 a.m. Mr. Jessen delivered the 1992 Ford pickup to the dealership with the keys and title and drove away with Mr. Robinson's 1991 Chevy pickup. (R-674, p. 193:15-25).

19. On or about December 12, 2001, Coet issued a check for \$2,300 to pay off a lien on a certain vehicle. (R-674, p. 195:16-17). Coet testified it was for the 1992 Ford pickup truck. (R-674, pp. 41:14-42:18).

20. The 1992 Ford pickup truck was included on the used car inventory list, but Coet did not set a price for the Ford pickup, Labrum did not offer a price for the Ford pickup. Coet and Labrum did not negotiate for the 1992 Ford pickup. (R- Pl. Ex.10; R-674, pp. 39:12-25 and 40: 8-9).

21. The total of the used car inventory paid by Labrum, excluding the 1992 Ford pickup, was \$290,275. (R-674, p. 38:24 - 39:13; R-Pl. Ex. 2; R-353).

22. In January 2002 Labrum sold the 1992 Ford pickup to Carl Givens for \$5,000.00.

23. Following a year of negotiations, Coet and Labrum stipulated to having a team of accountants review and attempt to resolve accounting issues. (R-72).

24. On February 9, 2005, Coet and Labrum entered into the Letter of Understanding Concerning Evaluation of Claims (“Accountants Evaluation Agreement”). This Accountants Evaluation Agreement set forth the terms for the Accounting Team. (R-73-79).

25. On February 14, 2005, the trial court entered a Stipulated Case Management Order. The Order directed the parties to submit all of the accounting disputes, including all accounting issues raised as part of the claims or counterclaims in this lawsuit, to an accounting evaluation team (the “Accounting Team”), consistent with the terms of the parties’ letter agreement. (R-82-86).

26. On or around April 27, 2005, the Accounting Team produced its findings and provided them in letter form. The Accounting Team determined that after reviewing the used vehicle inventory, parts inventory, additional expenses agreed to at closing, interest in delayed payment on real estate and new and used vehicle flooring, wholesale cost of purchasing vehicles, new vehicle inventory and other claims, Labrum owed Coet \$59,384.79. (R-104-106).

27. On June 21, 2005, the trial court ruled that it appeared the Accounting Team was unable to resolve all accounting issues and held that the Stipulated Case Management Order was still in effect. (R-133).

28. On September 2, 2005, the trial court entered its Order Granting Labrum’s Motion for Partial Summary Judgment. The trial court ordered that Labrum’s Motion for

Partial Summary Judgment be granted and Plaintiffs' claims for attorneys' fees and pre-judgment interest dismissed with prejudice. (R-318-326).

29. On August 8, 2006, a bench trial was held before Judge Pullan on all remaining issues.

30. At the conclusion of the trial, the trial court announced from the bench its findings and conclusions, declaring that Coet owed Labrum \$11,455.26. (R-657).

31. The court reserved its order after the trial regarding the issue of attorney's fees to allow the parties to brief the question of who was the prevailing party "in light of prior settlements" of some claims and the court's judgment entered at the end of the trial. (R-674, p. 199:12-16).

32. In its November 1, 2006 Ruling, the trial court commented in a footnote regarding the broad applicability of the attorneys fees and costs provisions contained in the Asset Sale Agreement. The trial court commented as follows:

This provision is drafted broadly. It applies to "any action or proceeding . . . taken or brought by either Party concerning this Agreement." By using the verbs "taken" and "brought" in the alternative, the parties expanded the meaning of the term "action." Certainly civil actions "brought" by either party could give rise to an award of attorney's fees, but so could "any action taken . . . Concerning this Agreement . . . whether [the fees] are expended with or without trial."

Here, the parties resolved the bulk of their claims without trial by submitting them to the evaluation team. That method of settlement – during the course of which both parties incurred attorney's fees – constituted an action taken by the parties concerning the Agreement. Absent the release and waiver in the Letter Agreement, the prevailing party as determined by the evaluation team was entitled to recover its costs and attorney's fees.

(R-639).

33. On November 1, 2006, the trial court entered its Ruling, finding that Labrum was the prevailing party based upon Labrum prevailing on all litigated claims and awarded Labrum his attorneys' fees and costs. (R-634-641).

34. On or about December 1, 2006, in the Judgment and Order signed by the trial court, Coet's claims were dismissed in their entirety, with prejudice. Labrum was awarded Judgment against Coet in the amount of \$40,005.26 together with interest. The Judgment \$11,455.26 for claims Labrum made against Coet and \$28,550.00 for Labrum's attorneys' fees awarded as the prevailing party. (R-657).

SUMMARY OF ARGUMENT

On January 20, 2005, in order to expedite a resolution to some of the disputed claims between Coet and Labrum, the parties (under supervision of the court in the telephonic Scheduling Conference) stipulated to present all the accounting claims to the Accounting Team. The Accounting Team would attempt to resolve all of the accounting issues. On February 10, 2005, the parties signed and executed the Accountants Evaluation Agreement delineating the terms of the agreement and instructions for the accountants. It also set out the specific accounting claims for the Accounting Team to address. After the signing of the Accountants Evaluation Agreement, Defendant prepared the Stipulated Case Management Order. Both parties agreed to the Order and it was signed on February 14, 2005.

The Order supported and clarified the Accountants Evaluation Agreement by repeating the specifics of the narrow scope, role, and purpose of the Accounting Team, as well as, the claims affected by the release. The Accounting Team's role was limited to reviewing only

the specific accounting issues it could unanimously agree upon, and left the unresolved accounting issues and all legal issues for resolution by the trial court. The Accountants Evaluation Agreement did not release any legal claims. As such, any and all legal claims have not been waived.

The telephonic Scheduling Hearing, Stipulated Case Management Order and Accountants Evaluation Agreement all provided authority and context for the Accounting Team to resolve accounting issues the best it could. Neither the parties nor the trial court, wanted nor expected, the Accounting Team to determine legal issues, such as attorneys' fees, pre-judgment interest and prevailing party status. The trial court erred in allowing itself to be convinced to misapply the release of claim language and by ceding its powers to the Accounting Team, instead of harmonizing the language to the topic of the Accountants Evaluation Agreement with the conflicting terms and language. Only a court can determine if attorneys' fees are to be awarded and its amount. Only a court can determine if pre-judgment interest is awarded and the amount. Only a court can determine which litigant is the prevailing party.

Additionally, the trial court erred in identifying Labrum as the prevailing party in the matter. While determining the prevailing party may be complicated and tap the equitable powers of the court, it is important that the court make the determination which fulfills the parties' written agreement, is the equitable conclusion, and does not destroy public policy by encouraging litigants who have a strong case to refuse alternative dispute resolution methods for fear of forfeiting an award of attorneys' fees and interest.

The trial court also erred when it found that Labrum relied upon Coet's comment regarding the obsolete parts inventory. Standing alone, Coet's comments did not meet the elements of fraud, nor its standard of proof. Importantly, Labrum had the duty to use due diligence and inspect the parts inventory. It was Labrum's decision and his alone, that stopped the parts inventory inspection short of completion. It was Labrum who declared that he was satisfied the parts inventory met or exceeded \$68,000.00. It was Labrum who executed two different documents demonstrating his satisfaction that the parts inventory met or exceeded \$68,000.00.

Relatedly, the evidence found by the trial court does not support a finding for Labrum relative to a certain 1992 Ford pickup truck. A 1992 Ford pickup was delivered to Coet's Chevrolet about the time of the dealership's sale to Labrum. While the 1992 Ford was listed on an inventory list, Labrum and Coet did not negotiate and agree upon a price transferring the 1992 Ford from Coet to Labrum. Labrum, with the trial court's support, wants to include the 1992 Ford as a "throw-in" to Labrum in the purchase. Coet wants to be paid for the pickup truck that he owned and was sold without his permission nor compensation. The evidence demonstrates that Labrum never purchased the 1992 Ford pickup truck, but he testified that he sold it for \$5,000.00.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO AWARD APPELLANT ATTORNEYS' FEES PURSUANT TO THE ASSET PURCHASE AGREEMENT.

The trial court granted Labrum's Motion for Partial Summary Judgment precluding Coet from an award of attorneys' fees accrued in enforcing the Asset Sale Agreement allowed by the attorneys' fees clause contained in the Asset Sale Agreement.¹ The trial court erroneously granted Labrum's Motion for Partial Summary Judgment by determining Coet waived his rights to any attorneys' fees, costs, and interest by the failure to include them in the Accountant's Evaluation Agreement. (R- 319-320). This Court grants no deference to the trial court's legal conclusions in its decision to grant Partial Summary Judgment. See Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). Whether attorneys' fees are recoverable is a question of law. Bonneville Distributing Co. v. Green River Development Associates, Inc., 2007 UT App 175, ¶ 19, --- P.3d ----, 2007 WL 1500822 (quoting R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 16, 40 P.3d 1119).

The Asset Sale Agreement and the terms contained therein are unambiguous. Neither Coet nor Lambrum asserted that the attorneys' fees clause was ambiguous. Neither do they dispute the validity of the clause. There is no dispute that Coet accrued fees and costs to

¹ 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. See Asset Sale Agreement, Section 11.10 (R-416).

enforce the Asset Sale Agreement. The Accounting Team determined that Labrum owed Coet \$59,384.79. It has not been disputed that Labrum should pay interest for nearly four years he had the use of Coet's money. The dispute comes in how the trial court interpreted the Asset Sale Agreement, the Accountants' Evaluation Agreement, the Accountants' Findings, the Stipulated Case Management Order and the amount of authority the trial court conceded to the Team of Accountants to determine accounting and apparent legal issues and controversies.

Neither Coet nor Labrum argued that the terms of the Accountants' Evaluation Agreement were vague or ambiguous. As a result, there was no need to consider parole evidence outside the provisions of the four corners of the Accountants' Evaluation Agreement to determine the intent of the parties. (R-320). The standard for interpreting contracts is articulated well in Green River Canal Company, 2003 UT 50, ¶ 17, 84 P.3d 1134.

“The underlying purpose of construing or interpreting a contract is to ascertain the intentions of the parties to the contract.” WebBank v. American Gen. Annuity Svc. Corp., 2002 UT 88, ¶ 17, 54 P.3d 1139. When interpreting a contract, “we look to the writing itself to ascertain the parties’ intentions, and we consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.” *Id.* at ¶ 18 (quoting Jones v. ERA Brokers Consol., 2000 UT 61, ¶ 12, 40 P.3d 1129). “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Id.* At ¶ 19 (quoting Cent. Fla. Invests. Inc. v. Parkwest Assoc., 2002 UT 3, ¶ 12, 40 P.3d 599).

It is clear and unambiguous that the trial court ordered the parties to pick and use the Accountant Team to resolve the disputed accounting issues (R-72). Coet and Labrum discussed the Accountant Team with the trial court during the Scheduling Conference. The

trial court, in its Stipulated Case Management Order, ordered the parties to use the Accounting Team. In the Stipulated Case Management Order, the trial court specifically outlined the issues the Accounting Team were to address.

(1) The Court enunciated its desire to have each of the parties select an accountant/CPA with the expectation that those issues regarding funds claimed by the parties that could be resolved by the accountant by mutual affirmation will likely help the parties achieve an efficient and just resolution of this matter; and

...

1. **Submission of Accounting Disputes to Accounting Evaluation Team.** The parties shall submit all of the accounting disputes, including all accounting issues raised as part of the claims or counterclaims in this lawsuit, to an accounting evaluation team, consistent with the terms of the parties' letter agreement, a copy of which is attached as Exhibit A.

(R-85). Additionally, the Accountants' Evaluation Agreement expressly lists the issues the Accounting Team was to attempt to unanimously resolve. The use of the accountants saved time, fees, and judicial resources. This appeal arises due to the trial court's failure to harmonize apparently conflicting language and terms of the Accountants' Evaluation Agreement relative to the legal issues of attorneys' fees and pre-judgment interest.

The Accountants' Evaluation Agreement did not appear to be ambiguous, but contained provisions which conflicted, or were not in harmony, with other more specific terms.

Harmonizing conflicting or apparently ambiguous contract language before concluding that provisions are actually ambiguous is an important step in the hierarchy of rules for contract interpretation. A trial court must first " 'attempt to harmonize all of the contract's provisions and all of its terms' when determining whether the plain language of the contract is ambiguous." Wagner v. Clifton, 2002 UT 109, ¶ 16, 62 P.3d 440 (citation omitted). "[I]t is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and

all of its terms, which terms should be given effect if it is possible to do so.” LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988). Thus, to harmonize the provisions of a contract, “we examine the entire contract and all of its parts in relation to each other and give a reasonable construction of the contract as a whole to determine the parties’ intent.” Brixen & Christopher Architects v. Elton, 777 P.2d 1039, 1043 (Utah Ct.App.1989).

Gillmor v. Macey, 2005 UT App 351, ¶ 19, 121 P.3d 57. Admittedly, when viewed in isolation, Paragraph Nine’s 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 Accountants Evaluation Agreement appears to limit Coet’s claims. However, if this Court considers all four corners of the Accountants Evaluation Agreement, the Court will be able to harmonize the facially conflicting terms.

Our rules of contract interpretation require, “[i]f the language within the four corners of the contract is unambiguous,” that courts “ ‘first look to the four corners of the agreement to determine the intentions of the parties ...’ from the plain meaning of the contractual language.” Central Fla. Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 12, 40 P.3d 599 (citations omitted).

Gillmor v. Macey, 2005 UT App 351, ¶ 34, 121 P.3d 57. From the four corners of the Accountants Evaluation Agreement, this Court can harmonize the waiver of Paragraph Nine and the exclusive area of accounting issues in the remaining three corners of the documents. The trial court identified that the attorneys’ fees clause contained in the Asset Purchase Agreement was to be read broadly. However, the trial court showed its error that the attorneys’ fees clause was waived by the inconsistent language of the Accountants Evaluation Agreement. The trial court held,

This provision is drafted broadly. It applies to “any action or proceeding . . . taken or brought by either Party concerning this Agreement.” By using the

verbs “taken” and “brought” in the alternative, the parties expanded the meaning of the term “action.” Certainly civil actions “brought” by either party could give rise to an award of attorney’s fees, but so could “any action taken . . . Concerning this Agreement . . . whether [the fees] are expended with or without trial.”

Here, the parties resolved the bulk of their claims without trial by submitting them to the evaluation team. That method of settlement – during the course of which both parties incurred attorney’s fees – constituted an action taken by the parties concerning the Agreement. Absent the release and waiver in the Letter Agreement, the prevailing party as determined by the evaluation team was entitled to recover its costs and attorney’s fees.

(R-639).

Additionally, the Accountants’ Evaluation Agreement is very specific in some areas: the specific list of areas for the accounting team to consider (§2); the deadline for results (§7); and the effect on other (non-accounting-type) claims (§10)². All of these paragraphs, terms, and language are explicit and deal with accounting issues, exclusively. Other paragraphs, terms, and language of the Accountants’ Evaluation Agreement read without the context of the specific paragraphs are broad and out of harmony with the remaining portions in that they deal with issues in addition to accounting issues, for example, the binding effect and release of claims (§9) and objective of the evaluation (§3) (R-73-79). By properly harmonizing all of the terms of the Accountants’ Evaluation Agreement, the trial court would

² 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).

have found that Coet should have been awarded his attorneys' fees pursuant to the Asset Purchase Agreement and that the judicially mandated task for the Accounting Team was to address accounting issues only and not legal issues such as the award of attorneys' fees. The Court should consider that the paragraphs with specific terms and conditions should be given more weight and consideration than the general, boiler-plate, and over-reaching paragraphs. See Docutel Olivetti Corp. v. Dick Brady Sys., Inc., 731 P.2d 475, 480 (Utah 1986) (Howe, J., concurring in part, dissenting in part) (citing Restatement (Second) of Contracts § 203(c) for the rule that general terms of a contract are not given as much weight as specific terms); accord Mayer v. Pierce County Med. Bureau, 909 P.2d 1323, 1327 (1995). Moreover, it is not the role of the parties, nor of the trial court, to hand over to the Accounting Team the duty to determine legal issues.

In the context of the trial court's involvement, suggestion and supervision, it is unambiguous as to the desire of the singular and specific role the Accounting Team were to play. The Minute entry of the Telephonic Scheduling Conference, held January 20, 2005³, (R-72), the Accountants' Evaluation Agreement (R-73-79), and the Stipulated Case Management Order (R-82-86), all state the same thing, the Accounting Team was to attempt to resolve accounting issues with unanimity. If there arose accounting issues where a unanimous consensus was unobtainable, the court would resolve them at trial. It is clear and

³ Mr. Call would move to allowing [sic] the accountants to proceed with all issues both the disputed amount and the counterclaim issues . . . Court will further require that before discovery begins that each party's accountant go over all the disputed amounts and see if the parties can reach a resolution. (R-72).

unambiguous that the Accounting Team, following the trial court's order, was to address, specifically and exclusively, accounting issues.

The trial court did not impart its power to the Accounting Team to determine whether attorneys' fees were to be awarded, and if so, the amount to be awarded, nor if and what amount the interest on the results of the Accountant's Findings award should be. Both of those issues are legal issues to be determined only by the court.

Whether attorney fees are recoverable in an action is a question of law [that] we [the Utah Court of Appeals] review for correctness. "Courts generally review a trial judge's decision on the amount of attorney fees for abuse of discretion. In most decisions dealing with fee awards, "appellate deference is owed to the trial judge who actually presided over the proceeding and has first-hand familiarity with the litigation." . . . Further, our courts have addressed methodologies for determining which party or parties, perhaps among multiple parties or claims, occupy prevailing party status in various contexts. . . . Indeed [c]ourts have, in extraordinary situations, declined to award attorney fees to a prevailing party in spite of an enforceable contractual provision."

A.K. & R. Whipple Plumbing and Heating v. Guy, 2002 UT App 73, ¶¶ 7, 8 and 12, 47 P.3d 92 (internal citations omitted). Labrum argues that because the attorneys' fees, costs, and interest issues were not included in the Accountants' Evaluation Agreement, the accountants did not reach a determination and Coet is, therefore, precluded from being awarded either fees or interest. Even if the issues of fees, costs, and interest were included in the Accountants' Evaluation Agreement, it would be clearly inappropriate for the accountants to address them. Jensen v. Sawyers, 2005 UT 81, ¶ 127, 130 P.3d 325 (Attorney fees are awarded only when authorized by statute or by contract. The award of attorney fees is a matter of law).

Labrum asserts that the broad language contained in Paragraph Nine of the Accountants' Evaluation Agreement precludes any award of attorneys' fees, costs, or interest. Importantly, however, Paragraph Nine's language regarding the release of claims is so broad that if read literally, as Labrum argued, without harmonizing the inconsistencies, the parties would only be able to pursue claims of parts obsolescence and unresolved accounting claims before the trial judge, precluding all other issues. The Accounting Team left unresolved four claims: (1) Labrum Chevrolet's claim for \$18,862.50 based on obsolete parts, (2) Coet's claim for \$4,300.00 based on a used 1992 Ford truck in inventory at the time of the closing; (3) Coet Chevrolet's claims for \$6,076.00 based upon alleged oil and gas inventory; and (4) an unclear \$9,000.00 issue related to new car inventory (R-Df. Ex. 17; 590-592).⁴ However, the trial court dealt with only three issues, (1) the 1992 Ford pickup; (2) did Labrum pay Coet for oil, gas, and grease purchased under the Asset Sale Agreement; and (3) did Coet make a fraudulent representation or negligent misrepresentation as to the issue of obsolete parts. (R-R-674, p 196:3-13). If the trial court applied the language of Paragraph Nine as Labrum suggests, the court would have been precluded from hearing and ruling on many issues, including Labrum's claims of fraudulent representation and negligent misrepresentation.

Clearly, the trial court failed to harmonize the disparate and inconsistent terms of the unambiguous Accountants Evaluation Agreement. Paragraph Nine should be read in the

⁴ Issue four was dismissed by stipulation of the parties.

context of the accounting issues that were determined by the accountants and binding upon the parties. It reads,

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 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 an 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 claim, 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 the value of parts that are or are not Obsolete Parts shall be binding on both Coet and Labrum.

(R-78-79).

Unfortunately, the trial court applied Paragraph Nine of the Accountants' Evaluation Agreement, as if it had given its authority to determine fees, costs, and interest to a team of two non-legally trained accountants. Inferentially, if the trial court expected the accountants to determine the amount of fees and pre-judgment interest, the Accounting Team would have had to determine the amount of the award without any discovery, submission of bills, costs in evidence, or guidance as to the award and amount of interest. Surely, this mistake by the trial court should be corrected. After all, Coet had delivered to Labrum \$68,733.31, less than 24 hours after closing, in November 2001. The Accounting Team unanimously agreed that \$59,384.79 was to be returned to Coet.

Attorneys' fees are awarded in certain circumstances when provided by statute, the Utah Rules of Civil Procedure, agreement by the parties and when the court deems it warranted. The Court alone determines the appropriateness of the award. Rule 73 of the Utah Rules of Civil Procedure states "when attorney fees are authorized by contract or by law, a request for attorneys fees shall be supported by affidavit or testimony." The Court then determines the reasonableness of the attorneys' fees. See Amyx v. Columbia House Holdings Inc., 2005 UT App. 118, ¶ 2, 110 P.3d 176. Here, the Asset Purchase Agreement specifically provided for attorneys' fees and costs. As such, a party is allowed its attorneys' fees and costs under the Rules of Civil Procedure and are allowed them as a matter of course to the prevailing party. When determined appropriate by the Court, attorneys' fees are considered costs and included in the award of costs. Utah Rule of Civil Procedure 54(d)

states “costs shall be allowed as of course to the prevailing party unless the court otherwise directs.” The determination and evaluation of the amount of the award of attorneys’ fees is clearly outside the scope and authority given to the Accounting Team as set forth in the Evaluation Agreement and Stipulated Case Management Order and is a separate legal issue for resolution only by the Court.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT INTEREST ON THE AWARD AS PROVIDED BY STATUTE.

The trial court held in its Order Granting Labrum’s Motion for Partial Summary Judgment, that due to Coet’s failure to specifically include the award of pre-judgment interest in the Accountants Evaluation Agreement, Coet released and waived a pre-judgment interest award (R-317-326). The trial court erred in its Order, because the Accountants Evaluation Agreement was authorizing the Accounting Team to determine accounting issues and not legal issues. See discussion supra, Part I. This Court should reverse the trial court’s Order, relative to the award of pre-judgment interest, based upon the trial court’s failure to harmonize the terms, language, and condition of the Letter Agreement. Id. “A trial court’s decision to grant or deny pre-judgment interest presents a question of law which we review for correctness.” Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 16, 82 P.3d 1064 (quotations and citation omitted).

The Accountants Evaluation Agreement cannot fairly be read to waive Coet’s claim of pre-judgment interest on the money Labrum possessed for nearly four years. The Accountants Evaluation Agreement does not state, explicitly nor implicitly, that Coet was

waiving his right to an award of pre-judgment interest. Also at the time Coet signed the Accountants Evaluation Agreement, Coet was not entitled to pre-judgment interest because it had not yet been determined by the Accounting Team that Labrum owed Coet money from 2001, which would have accrued interest. See de Kwiatkowski v. Bear, Stearns & Co. Inc. Civ. No. 964798VM, 2000 WL 729118, (S.D.N.Y. June 6, 2000) (Where an entitlement to pre-judgment interest exists as a matter of law, its award may properly be determined by the court even after a jury verdict on damages). See Mallis v. Bankers Trust Co., 717 F.2d 683, 693 (2nd Cir.1983) (“Plaintiff’s failure to pursue his request for pre-judgment interest during the trial or even to demand such interest in his complaint does not amount to a waiver of the right to interest”); Buffalo Oil Terminal, Inc. v. William B. Kimmins & Sons, Inc., 248 N.Y.S.2d 499, 501 (Sup.Ct. Erie County 1964) aff’d 23 A.D.2d 970, 260 N.Y.S.2d 621 (4th Dep’t 1964) (“Plaintiff’s failure to request the court to instruct the jury to fix the interest on any verdict they might render, does not constitute a waiver of the right to interest”).

Pre-judgment interest on an award is determined by the Court after judgment⁵ on the

⁵ This Court, while addressing the issue of allowing interest on overdue debts determined in an administrative setting, instead of a judicial setting, held,

This would be particularly so where, as Vali alleges happened here, the principal amount was arrived at through a negotiated settlement which contemplated administrative resolution of the interest issue another day. As both parties recognize, the law favors settlements. See Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 607-09 (Utah 1979). A rule disallowing interest when the principal amount is determined through settlement, whether under administrative auspices or otherwise, would certainly have a chilling effect on settlements in cases where the amount of disputed principal can be resolved by negotiation even though no settlement can be reached concerning interest.

specific causes of action under UTAH CODE ANN. §15-1-4. The Utah Supreme Court has ruled that “[o]ur Statute, §15-1-4, U.C.A. 1953, provides that unless otherwise agreed by the parties, judgment shall bear interest . . . This interest follows the judgment as a matter of law.” Dairy Distributors, Inc. v. Local Union 976 Western Conference of Teamsters, 396 P.2d 47 (Utah 1964). Rule 54(e) of the Utah Rules of Civil Procedure states “The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and with costs, if the same have been taxed or ascertained.” Utah R. Civ. P. 54(e). As such, award of interest is also a legal issue, and not an accounting issue and is not waived by the Letter Agreement.

Pre-judgment interest could have been properly awarded by the trial court either at the submission of the Accounting Team’s Accountants’ Findings to the end of the trial, because by then Plaintiff’s losses were fixed, could be measured by facts and figures, and were calculable within a mathematical certainty. In its Accountants’ Findings, the Accounting Team determined that Labrum owed Coet \$59,384.79. The trial court would have been able to measure the interest based upon the known amount of loss and the particular time Labrum had use of Coet’s money. “Prejudgment interest is properly awarded when the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. [A] court may only award prejudgment interest if damages are calculable

Vali Convalescent and Care Institutions v. Division of Health Care Financing, 797 P.2d 438, 445 n.12 (Utah App.,1990).

within a mathematical certainty.” Orlob v. Wasatch Med. Mgmt., 2005 UT App 430, ¶ 35, 124 P.3d 269 (alteration in original) (quotations and citation omitted).

Under the present facts, an award of pre-judgment interest to Coet is warranted. Labrum delayed payment and held and used Coet’s money (\$68,733.31) for 42 months. “Paying money later with interest is, in legal effect, precisely the same as paying it when due without interest. ‘The policy reason for this rule is that, because of the delay, the debtor has the beneficial use of monies that do not belong to him, while the creditor is denied the beneficial use of those same monies to which it is legally entitled.’” Vali Convalescent & Care Inst. v. Division of Health Care Fin., 797 P.2d 438, 445 (Utah Ct.App.1990) (quoting Boards of Educ. v. Salt Lake County Comm’n, 749 P.2d 1264, 1267 (Utah 1988)). Mont Trucking, Inc. v. Entrada Industries, Inc., Interstate Brick Div., 802 P.2d 779, 782 n.1 (Utah App.,1990); See Baker v. Dataphase, Inc., 781 F.Supp. 724, 731 (D.Utah1992) (Under Utah law, pre-judgment interest represents an amount awarded as damages due to the defendants’ delay in tendering an amount clearly owing under an agreement or other obligation.).

III. THE TRIAL COURT ERRED IN DETERMINING APPELLEE AS THE “PREVAILING PARTY” AND AWARDING HIM ATTORNEYS FEES AND COSTS.

The trial court erred in determining Labrum the prevailing party and awarding him attorneys’ fees. The Asset Purchase Agreement contains the following attorneys’ fees provision at 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.

(R-416). In its August 8, 2006, verbal Ruling from the bench, the trial court stated, “[t]he Court reserves the issue of attorney’s fees to allow the parties to brief the question of who is the prevailing party in light of prior settlements of some claims and the Court’s judgment entered today. . . .” (R-674, p. 199:12-15). After each side had submitted their briefs, the trial court erroneously determined that Labrum was the prevailing party based upon the misleading fact that “Labrum prevailed on all litigated claims.” (R-636). While it is true that Labrum did prevail on all litigated claims, relying on that misleading fact misguided the trial court’s analysis.

The term “prevailing party” is defined as “a party in whose favor a judgment is rendered.” A.K. & R. Whipple Plumbing & Heating v. Guy, 2002 UT App 73, ¶ 11, 47 P.3d 92 (quoting Black’s Law Dictionary 1145 (7th Edition 1999)). As such, “a party . . . is not a prevailing party until after a determination on the merits is made by either a jury or a trial court judge.” J.V. Hatch Constr., Inc. v. Campros, 971 P.2d 8, 13 (Utah Ct.App.1998) (emphasis omitted), and “[w]here a contract . . . provides for attorneys fees to the prevailing party, a party does not even become entitled to such fees until the jury has determined which party has prevailed in the case.” Meadowbrook, LLC v. Flower, 959 P.2d 115, 117 (Utah 1998).

The Utah Court of Appeals outlined the methodologies trial courts should consider when determining which party was the prevailing party. See A.K. & R. Whipple Plumbing

and Heating v. Guy, 2002 UT App 73, 47 P.3d 92. The net judgment rule is “a good starting point in making determinations of which party prevailed.” Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217, 221 (Utah Ct. App. 1990). The net judgment rule requires consideration of all contractual claims within the context of a litigation. See, e.g., Stichting Mayflower Recreational Foods v. Newpark Resources, Inc., 917 F.2d 1239, 1248 (10th Cir. 1990) (interpreting Utah law and stating “because the contract disputes in this case all arose out of the same transaction, the court should consider all of the contract claims together in making a determination of who is the prevailing party.”); Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (A party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of their agreement.)

Coet asserts that there are essentially two monetary awards to be considered in determining the prevailing party for purposes of the attorneys’ fees provision in the Asset Sale Agreement. Pursuant to the trial court’s order, many causes of action and accounting issues were resolved by the Accounting Team. The Accounting Team determined that Labrum owed Coet \$59,384.79. The second sum is derived from the trial proceedings in this matter on August 8, 2006, in which the trial court found judgment against Coet and for Labrum in the amount of \$11,455.26. These two figures result in a net judgment of \$47,929.53 in the favor of Coet.

Coet successfully vindicated his contractual rights before the Accounting Team. As such, the trial court should have considered all of the claims together in making a

determination that Coet is the prevailing party. Using the net judgment rule yields the following net judgment in favor of Coet:

Amount awarded to Coet by Accounting Team:	\$59,384.79
Amount awarded to Labrum at Trial:	<u>\$11,455.26</u>
Net Judgment in favor of Coet:	\$47,929.53

The amount awarded by the Accounting Team should be considered as part of the net judgment. The Accounting Teams' findings were the equivalent of a summary judgment finding against Labrum. Utah courts regularly make attorneys' fees awards based on the net judgment rule after summary judgment proceedings. See, e.g., Stichting, 917 F.2d at 1248-49 (discussing prevailing party and noting defendant's success on certain claims at summary judgment); Leonard v. Sunset Morg. Co., L.P., Civ. No. 1:CV92BSJ, 2005 WL 977075 (D. Utah April 26, 2005) (awarding plaintiffs' attorneys' fees based on grant of summary judgment). That the result was reached by an Accounting Team, and not by the trial court should make no difference for purposes of calculating the net judgment.

The Utah Appellate Court in A.K. & R. Whipple Plumbing matter, recognized the need for a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party. A.K. & R. Whipple Plumbing and Heating v. Guy, 2002 UT App 73, ¶ 15, 47 P.3d 92. The trial court refused to consider the amount awarded by the accounting team in determining the prevailing party under the net judgment rule, the trial court should have considered it under the "flexible and reasoned approach." The "flexible and reasoned approach" recognizes 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, 274 (Utah 2004). Implicit in the approach is the “notion that courts should not ignore common sense when deciding which party prevailed.” Id.

One important factor under the “flexible and reasoned approach” is “comparative victory.” For example, in Mountain States Broadcasting v. Neale, 783 P.2d 551, 558 (Utah Ct. App. 1989), in determining the prevailing party, the court emphasized the fact that one party had won more than four times what the other party won. Here, Coet’s award from the accounting team was almost six times the amount that Labrum received at trial.

Another important factor is the amount awarded versus the amount sought. In this litigation, Coet sought \$63,086.65 for the new and used car inventory. The Accounting Team awarded Coet \$59,384.79. Thus, Coet recovered a significant portion of the amount it sought.

Moreover, it would create an “absurd result” to “ignore common sense” and conclude that a party that prevails on a claim for nearly \$11,000.00 has prevailed over a party that won almost \$60,000.00 earlier in the same litigation. The “flexible and reasoned approach” renders Coet the prevailing party and entitles it its fees.

Coet would have been determined the prevailing party had the trial court appropriately used the flexible and reasoned approach. Coet brought certain legal and accounting-type claims before the trial court. The trial court issued an order to resolve the accounting issues as determined by the Accounting Team, thus saving the expense of having to get experts, have them investigate, conduct an accounting and then have them present evidence through examination and cross-examination. By appointing the Accounting Team to resolve the

accounting issues, through unanimity, the trial court was involved in the supervision, methodology and areas of attention of the Accounting Team. Unlike typical settlements, in this matter, the trial court cannot say that it did not know why the parties settled that portion of the case before it. The trial court knew exactly why and for what amount the parties settled and could in good faith and legitimacy include the non-litigated result in its determination of the prevailing party. The flexible and reasoned approach allows the trial court to use its discretion to determine the prevailing party. Coet prevailed overwhelmingly in the final analysis of the matters originally brought before the trial court.

Accordingly, under both the net judgment rule and the flexible and reasoned approach, Coet is the prevailing party in this matter. As a result, Appellant is entitled to recover its attorneys' fees and costs in this action.

Additionally, an important public policy is adversely affected with the trial court's holding. The trial court provided its general analysis regarding the difficulty of determining the prevailing party when partial settlements occur without the trial court's involvement. The trial court typically would not know the rationale or basis for the parties for settling. (R-636-637). The important and main distinction in this matter is the reason and the process with which the settlement of non-litigated issues were resolved. Importantly, the trial court directed, ordered and supervised the non-litigated resolution of some of the claims pled between the litigants. The parties did not settle claims before the suit was filed. They did not settle claims absent the court's direction or involvement. Only after (1) the parties filed against each other; (2) the court ordered them to select a team of accountants; (3) to resolve

the expressly specified “accounting-type claims;” and (4) which unanimous agreement was binding; did the parties enter into the Letter Agreement and follow the trial court’s order. It is misleading and incorrect to describe and compare the use of the court-ordered Accounting Team in this specific form of alternative dispute resolution, with general arbitration, mediation, or negotiation. In discussing the furtherance of alternative dispute resolution to litigation of claims, this Court held it,

agree[d] with these courts that it is good public policy to encourage exploration of alternative dispute resolution methods by allowing the prevailing party to recover costs so incurred. Without such a rule, parties may well be disinclined to seriously explore these avenues. . .

Stevenett v. Wal-Mart Stores, Inc., 1999 UT App 80, ¶ 38, 977 P.2d 508. Other jurisdictions addressing similar issues have all held that a court should consider what occurred in the alternative dispute resolution forums when determining the prevailing party. See Martineau v. City of Concord, New Hampshire, Civ. No. 93-268-M, 1994 U.S. Dist. Lexis 15801, at *11-12, 1994 WL 587832, at *4 (D.N.H. Oct. 24, 1994) (awarding prevailing party costs expended in connection with mediation efforts); Gibson v. Bobroff, 49 Cal.App.4th 1202, 57 Cal.Rptr.2d 235, 239 (1996) (holding court has discretion to award necessary expenses incurred from unsuccessful court-ordered mediation to prevailing party); Ledbetter v. Todd, 418 So.2d 1116, 1117 (Fla.Dist.Ct.App.1982) (holding trial court erred in refusing to award plaintiff costs incurred from mandatory medical mediation). The trial court was the primary influence to use the Accounting Team and was privy to the Accounting Team’s Accountant’s Findings. It is appropriate for this Court to overturn the trial court’s holding as Labrum as

the prevailing party and direct the trial court to consider the non-litigated outcomes in determining the prevailing party.

Utah courts favor alternative methods of dispute resolution and the efficient use of the court's time and resources. Failure to reverse this decision will only alert litigants that it is to their detriment to use even court-ordered, directed, and supervised alternative methods of dispute resolution when a litigant has an attorneys' fees clause or statute and has a strong case against the opposing party. The litigant will not risk losing fees to allow anyone but an Article III judge to determine the matter at trial and receive an award of attorneys' fees, costs and pre-judgment interest. To act otherwise, if the trial court's decision is not overturned, would ensure the loss of attorneys' fees, costs, and pre-judgment interest.

IV. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT APPELLANT OWED APPELLEE FOR OBSOLETE PARTS AND USED VEHICLE INVENTORY.

The trial court err in its determination regarding its conclusions as to the legal effect of the set of found facts in the matter. The trial court's legal conclusions based upon the recognized facts lack correctness and must be reversed.

A. Labrum Failed to Meet the Evidentiary Standard and the Elements of Fraud, Relative to the Parts Inventory.

The trial court erred when it misapplied the facts, undisputed, admitted and established to Labrum's claim of fraud regarding the parts inventory of the dealership sale. The elements

of fraud⁶ are well established.

The trial court found in its findings of facts that, on November 12, 2001, Coet, Labrum, Labrum's brother, and sister-in-law, conducted a physical inventory of the parts owned by the dealership. (R-674, p. 194:1-19). Section 1.2 of the Asset Sale Agreement stated in part, "[b]ased 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" (R-Pl. Ex. 1; 433). After several hours of conducting the November 12, 2001, parts inventory, but prior to its conclusion, Labrum declared he was satisfied there was more than \$68,000.00 in the parts inventory. (R-674, pp. 194:4-19; 7:1-3). Immediately, thereafter (the same night), Labrum executed a document prepared by Coet attesting to Labrum's satisfaction that at least \$68,000.00 of parts inventory existed. (R-351). The following day, at the closing of the dealership purchase, Labrum signed closing documents that also attested to Labrum's satisfaction that there was at least \$68,000.00 in the parts inventory. (R-Pl. Ex.2).

⁶ The elements of a claim for fraudulent misrepresentation are: (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. Larsen v. Exclusive Cars, Inc., 2004 UT App 259 ¶ 7, 97 P.3d 714.

The trial court held that Labrum relied to his detriment on Coet's "misrepresentation" that Coet did not have an obsolete part problem. (R-674, pp. 194:19-23 and 197:10-198:11).

It appears that the court relied upon Rachel Labrum's testimony,

A. I didn't at the time even know what obsolete meant. I remember afterwards asking Danny what that meant, and he told me what obsolete parts were, but I just remember them – Danny saying, "Do we have obsolete parts," and Larry saying there wasn't a problem. We didn't – I don't remember details about looking at - - we didn't get papers on obsolete parts or anything.

(R-674, p. 113:11-16). The trial court held that the elements of fraud were met by Coet's statement⁷, and that Labrum relied upon that single statement was induced to sign the closing statement without an obsolete parts adjustment. (R-674, p. 198:14-16). The issue on appeal is whether the trial court erred in its legal conclusion based upon the facts, that Labrum acted reasonably or not in relying upon Coet's statement. Typically, the question of reasonable reliance is a question of fact, however, there are instances where courts may conclude that as a matter of law, there was no reasonable reliance. See Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1067 (Utah 1996). Notwithstanding (1) Labrum's experience in a dealership's parts department and being involved in a comptrollers position in a dealership in Phoenix, Arizona (R-674, p. 135:3-6); (2) Labrum's own physical and literal inventory of the dealership's parts; (3) the two separate documents signed days apart, by Labrum attesting to his satisfaction that there was at least \$68,000.00 worth of parts in the parts inventory;

⁷ The elements of fraud must be proven by clear and convincing evidence. Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 292 (Utah App. 1994) (citing Andalex Resources, Inc., v. Myers, 871 P.2d 1041, 1046-1047 (Utah App. 1994)).

and (4) the lack of evidence which rose to the requisite standard of proof at trial, the trial court awarded Labrum \$11,455.26 for alleged obsolete parts in the inventory. The trial court's conclusions as to the legal effect of the established set of facts fails to meet the standard for correctness and is clearly erroneous. Bonneville Distributing Co. v. Green River Development Associates, Inc., 2007 UT App 175, ¶ 18, --- P.3d ----, 2007 WL 1500822.

Coet appeals the trial court's ruling regarding the alleged obsolete parts. Labrum, pursuant to the Asset Sale Agreement, conducted the physical inventory, signed two different documents and offered testimony contrary to the facts of the matter. Coet seeks the \$11,455.26, plus interest, to be returned to Coet.

B. Labrum Failed to Present Sufficient Competent Evidence to Show that He Had Purchased the Subject 1992 Ford Pickup With The Other Used Vehicle Inventory.

After the Accounting Team provided their Evaluation Letter, the trial court ruled that only three narrow issues remained to be tried before it. (R-639). One of the issues was whether Labrum owed Coet for a 1992 Ford pickup truck. (R-639; R-674, p. 196:4-6). The trial court held that, “[t]his issue turns on whether the truck was, quote ‘in the seller’s inventory at the time of closing and previously titled.’” (R-674, p. 196:6-8). The trial court concluded that the 1992 Ford pickup was in the seller’s inventory at the time of closing. . . and that it was a previously titled vehicle. (R-674, p. 196:14-16). The trial court held that Labrum paid Coet \$290,275 at closing and has no further obligation to him.” (R-674, p. 196:18-19; Pl. Ex. 10).

There is no dispute that the 1992 Ford pickup was on the dealership lot and included in the inventory paperwork. On November 8, 2001, less than one week before the closing, Mr. Gary Robinson purchased a new truck from Coet. The purchase included a trade of a 1991 Chevy pickup. (R-674, 193:4-12). A week before the closing, Coet agreed to allow a customer, Johnny Jessen, to exchange his 1992 Ford pickup for the 1991 Chevy pickup Mr. Robinson was trading in and Coet agreed to pay the \$2,300 balance on the 1991 Chevy pickup. (R-674, 67:14-25). Mr. Jessen would get the 1991 Chevy at the time he delivered the 1992 Ford pickup to Coet. (R-674, 193:13-14). On November 13, 2001, at 6:00 a.m. Mr. Jessen delivered the 1992 Ford pickup to the dealership, with the keys and title and drove away with Mr. Robinson's 1991 Chevy pickup. (R-674, 85: 13-23; 193:15-25). On or about December 12, 2001, Coet issued a check for \$2,300 to pay off a lien on some vehicle. (R-674, p.195:16-17; R-Pl. Ex. 11; R-674, pp. 40:21-41:12). In January 2002 Labrum sold the 1992 Ford pickup to Carl Givens for \$5,000.00. (R-674, p. 61:19-24).

It is undisputed by the parties that the total of the used car inventory paid by Labrum, was \$290,275. (R-674, p. 38:24 - 39:13; R-Pl. Ex. 2; R-353). The trial court found that the parties agreed the value of the used vehicle inventory was \$290,275.00. (R-674, p. 196:16-18). What is disputed by Coet is that the evidence fails to establish that the 1992 Ford Truck should have been included in the used vehicle inventory Labrum purchased in the Asset Sale Agreement. It is undisputed that Labrum had an opportunity to inspect the used vehicle inventory, take notes and then negotiate with Coet over the price of each individual car. (R-

674, pp. 35:21-36:11). The negotiations were memorialized by a certain list of cars with prices, descriptions and Labrum's handwriting. (Pl. Ex. 10).

On Plaintiff's Exhibit 10, every vehicle/entry has a handwritten figure to the side of the computer generated figure, but one. The entry for the 1992 Ford pickup does not have a handwritten bid by it. (R-Pl. Ex. 10). Labrum testified that the hand-written figures in Plaintiff's Exhibit 10 was made by him. (R-674, pp. 147:12-148:6 and 153:3-6). Coet testified that he never negotiated with Labrum over the purchase price of the 1992 Ford pickup. In fact, Coet had never seen the pickup. Coet testified,

Q. Was there any discussion about that particular vehicle?

A. No. I never saw the vehicle. I've never seen it to this day.

Q. Has Mr. Labrum paid you any portion of the purchase price for that vehicle?

A. No.

Q. Notwithstanding your dealership paid off a lien that didn't encumber that vehicle, but paid off a lien that allowed Mr. Robinson to get free title – or clear title to the trade in; is that correct?

A. Correct.

(R-674, p. 40:2-15). Notwithstanding Labrum's testimony that he did inspect and listed the 1992 Ford pickup on his own list (Df. Ex. 4), and that he purchased all of Coet's used vehicle inventory (R-674, p. 155:20-25), Labrum testified that it was Plaintiff's Exhibit 2 that he relied upon at the closing. (R-674, p. 156:11-19). Importantly, adding up Labrum's handwritten figures contained on Plaintiff's Exhibit 10, amounts to \$290,275. That is the exact amount which Labrum agreed to pay Coet in the closing documents and ultimately paid to Coet. (Pl. Ex. 2).

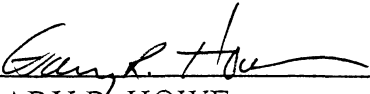
Additionally, Labrum's claim that he inspected the pickup truck and entered on his own worksheet (Defendant's Exhibit 4), included that the total sale price for the used vehicle inventory was in excess of \$295,000.00. (R-674, p. 154:15-21). Labrum's testimony that the amount on the document he created was \$5,000.00 more than the used vehicle inventory figures on both of Plaintiff's Exhibits 2 and 10, indicate that, Labrum's documents support Coet's claim that he was owed by Labrum for the 1992 Ford pickup.

CONCLUSION

WHEREFORE, as the detailed analysis above makes clear, the trial court erred on several issues in the resolution of the disputes between Coet and Labrum. The trial court erred in its holding that: Coet waived his right to attorneys' fees, costs and pre-judgment interest in the Accountants Evaluation Agreement; Labrum was the "prevailing party" at the conclusion of the bench trial; Labrum's detrimental reliance on Coet's remark regarding the obsolete parts and the determination of the ownership issue relative to the 1992 Ford pickup.

Coet respectfully request that this Court reverse and remand with instructions to the trial court to enter an order: (1) for an award to Coet for his attorneys' fees and costs; and/or (2) for an award to Coet for pre-judgment interest on his award determined by the Accounting Team; and/or (3) holding Coet as the prevailing party regarding the entire matter; and/or (4) find that Labrum failed to meet the elements and standard of proof for fraud relative to the parts inventory obsolescence and for the trial court to reconsider the ownership status of the 1992 Ford pickup.

Respectfully submitted this 12th day of June, 2007.



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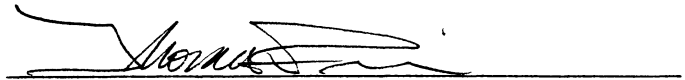
ADDENDUM

- A. (R-411-433), Asset Sale Agreement; Plaintiff's Exhibit 1.
- B. (R-73-79), Letter of Understanding Concerning Evaluation of Claims, February 9, 2005.
- C. (R-72), Minutes of Telephonic Scheduling Conference, January 20, 2005.
- D. (R-81-86), Stipulated Case Management Order, February 18, 2005.
- E. (R-104-106), Letter of Understanding Concerning Evaluation of Claims.
- F. (R-351), Verification document; Plaintiff's Exhibit 3.
- G. (R-344), Used Vehicle Inventory List; Plaintiff's Exhibit 10.
- H. (R-352-353), Asset Sale Agreement - Closing Statement; Plaintiff's Exhibit 2.
- I. (R-317-326), Order Granting Labrum's Motion for Partial Summary Judgment, September 2, 2005.
- J. (R-674, pp. 191-199), Oral Ruling, August 8, 2006.
- K. (R-634-641), Ruling, November 1, 2006.
- L. (R-655-658), Judgment and Order, December 1, 2006.
- M. (R-509-511), Ruling, August 3, 2006.
- N. R-131-133), Ruling, June 21, 2005.
- O. Utah Code Ann. §15-1-1.
- P. Utah Code Ann. §15-1-4.

CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, Gateway Tower East, Suite 900, 10 East South Temple, Salt Lake City, Utah 84133, and that in said two (2) true and correct copies of the attached **APPELLANTS' BRIEF** were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 12th day of June, 2007.

Keith A. Call
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145-5000

A handwritten signature in black ink, appearing to read "Keith A. Call", is written over a horizontal line.

ADDENDUM “A”

(R-411-433)

Asset Sale Agreement; Plaintiff’s Exhibit 1.

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

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

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.

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(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.

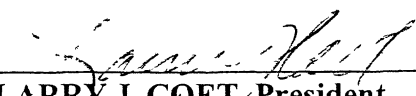
Section 11.15. **Assignment.** Buyer may freely assign his rights, and delegate his duties, under this Agreement, provided that no such assignment shall relieve Buyer of the ultimate performance of his obligations hereunder.

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

11/5

Exhibit "A" to
Asset Sale Agreement

FURNITURE, FIXTURES, TOOLS, AND EQUIPMENT

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Exhibit "B" to
Asset Sale Agreement

ASSETS NOT SUBJECT TO THE ASSET SALE AGREEMENT

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

Salt Lake City, Utah 84102 |
| 7. Aramark – Uniforms | PO Box 65525
Salt Lake City, Utah 84165 |

EXHIBIT "D" To
Asset Purchase Agreement

NONE

ADDENDUM “B”

(R-73-79)

Letter of Understanding Concerning Evaluation
of Claims, 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
Trystan 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"):

(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

75

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

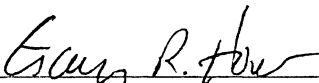
return a fully-executed copy. Please note that we are prepared to immediately nominate Labrum's member of the Evaluation Team and to provide the evaluation resources identified in Section 4 above. Accordingly, we request that your clients give this matter their immediate attention.

Sincerely yours,

SNOW, CHRISTENSEN & MARTINEAU

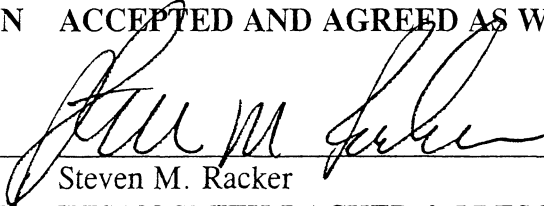

Keith A. Call

ACCEPTED AND AGREED AS WRITTEN



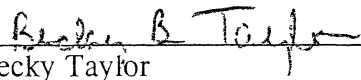
Gary R. Howe
CALLISTER NEBEKER & McCULLOUGH
Counsel for Larry J. Coet Chevrolet Pontiac
Buick, Inc.

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.

ADDENDUM “C”

(R-72)

Minute Telephonic Scheduling Conference,
January 20, 2005

4TH DISTRICT COURT - HEBER COURT
WASATCH COUNTY, STATE OF UTAH

LARRY J COET CHEVROLET PONTIA,	:	MINUTES
Plaintiff,	:	TELEPHONIC SCHEDULING CONF.
	:	
vs.	:	Case No: 030500537 CN
	:	
DANNY R LABRUM Et al,	:	Judge: DEREK P PULLAN
Defendant.	:	Date: January 20, 2005

Clerk: diannb

PRESENT

Plaintiff's Attorney(s): GARY R HOWE
Defendant's Attorney(s): KEITH A CALL

HEARING

This is the time set for a telephonic scheduling conference.

Mr. Howe addressed the Court and indicated that he would prepare a proposed scheduling conference and submit it to counsel for approval and then forward to the Court for signature and filing.

Response by Mr. Call, moving to dismiss the Complaint and indicating that there is not a necessity for a scheduling order. Mr. Call indicated that the parties have stipulated to having two accountants go over the accounting.

Mr. Call would move to allowing the accountants to proceed with all issues both the disputed amount and the counterclaim issues.

Response by Mr. Howe, indicating that most the issues are minor.
Response by Mr. Call.

Argued by Mr. Howe. Argued by Mr. Call.

Court will order that Mr. Howe prepare a proposed Scheduling Order and submit it to the Court by February 1, 2005.

Court will further require that before discovery begins that each partys' accountant go over all the disputed amounts and see if the parties can reach a resolution.

ADDENDUM “D”

(R-81-86)

Stipulated Case Management Order

February 18, 2005

JOHN E. GATES (1169)
KEITH A. CALL (6708)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0900

Attorneys for Defendants Danny R. Labrum and Labrum Chevrolet Pontiac Buick, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY
STATE OF UTAH

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

Plaintiff,

vs.

DANNY R. LABRUM, individually, and
LABRUM CHEVROLET PONTIAC
BUICK, INC. and RONALD L. COVEY,
individually and as Personal Guarantor

Defendants.

**STIPULATED CASE
MANAGEMENT ORDER**

Civil No.: 030500537

Judge: Derek P. Pullan

A scheduling conference was conducted telephonically by the Honorable Derek P. Pullan, District Court Judge on January 20, 2005. Gary R. Howe represented the Plaintiff and Keith A. Call represented Defendants Danny R. Labrum and Labrum Chevrolet Pontiac Buick, Inc.

The Court requested counsel to prepare a Proposed Case Management Order that incorporates, at a minimum, the following concepts:

- (1) The Court enunciated its desire to have each of the parties select an accountant/CPA with expectation that those issues regarding funds claimed by the parties that could be resolved by the accountant by mutual affirmation will likely help the parties achieve an efficient and just resolution of this matter; and
- (2) That counsel submit to the Court a Stipulated Case Management Order including the concepts set forth in paragraph (1) above and setting forth a reasonable time to complete pretrial activities in this case after the accountants have completed their work.

Based upon the directive of the Court, the parties stipulate and agree as follows:

1. Submission of Accounting Disputes to Accounting Evaluation Team. The parties shall submit all of the accounting disputes, including all accounting issues raised as part of the claims or counterclaims in this lawsuit, to an accounting evaluation team, consistent with the terms of the parties' letter agreement, a copy of which is attached as Exhibit A.

2. Pretrial Deadlines If All Accounting Issues Are Resolved by Accountants' Evaluation. If the accounting evaluation team is successfully able to resolve all accounting issues between the parties, leaving only legal issues (and accompanying factual background) for resolution by the Court, then the following deadlines shall apply:

- a. The parties shall exchange disclosure statements pursuant to Utah R. Civ. P. 26(a) by April 1, 2005.
- b. The deadline for amending pleadings and/or to join parties shall be May 2, 2005.

c. All fact discovery shall be completed by July 1, 2005. The parties shall be limited to 25 written interrogatories, including subparts. All written discovery shall be served so as to conform with this deadline. The parties shall be limited to five depositions for each side. The discovery methods allowed by the Utah Rules of Civil Procedure may be used, subject to the limitations expressed in those rules.

d. The parties do not anticipate the need for expert witnesses at this time. If either party desires to engage an expert witness, the parties shall attempt in good faith to establish deadlines for written expert reports. If the parties cannot agree, they may bring the issue to the Court for resolution.

e. Any dispositive motions shall be filed with the Court on or before July 22, 2005.

f. The parties may file a Rule 16(b) request for a scheduling and management conference with the Court immediately upon the close of fact discovery or at such earlier time as appropriate to establish the date for trial. The estimated length of trial under this scenario is currently two days, but this estimate may change after the accountants' evaluation is complete. A jury has been demanded.

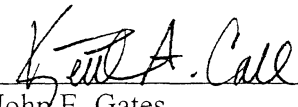
3. Pretrial Deadlines If One or More Accounting Issues Are Not Resolved by Accountants' Evaluation. If the accounting evaluation team is not successfully able to resolve all accounting issues between the parties, leaving accounting issues as well as legal issues (and accompanying factual background) for resolution by the Court, then the following deadlines shall apply:

- a. The parties shall exchange disclosure statements pursuant to Utah R. Civ. P. 26(a) by April 1, 2005.
- b. The deadline for amending pleadings and/or to join parties shall be May 2, 2005.
- c. All fact discovery shall be completed by September 15, 2005. The parties shall be limited to 50 written interrogatories, including subparts. All written discovery shall be served so as to conform with this deadline. The parties shall be limited to ten depositions for each side. The discovery methods allowed by the Utah Rules of Civil Procedure may be used, subject to the limitations expressed in those rules.
- d. The parties shall provide the written reports of any experts anticipated to be used in their case in chief by no later than October 17, 2005. The parties may submit rebuttal expert reports by no later than November 30, 2005. Rebuttal expert reports shall be limited to rebutting information contained in the other parties' expert reports submitted for their respective cases in chief.
- e. Any dispositive motions shall be filed with the Court on or before December 16, 2005.
- f. The parties may file a Rule 16(b) request for a scheduling and management conference with the Court immediately upon the close of fact discovery or at such earlier time as appropriate to establish the date for trial. The estimated length of trial under this scenario is currently three days, but this estimate may change after the accountants' evaluation is complete. A jury has been demanded.

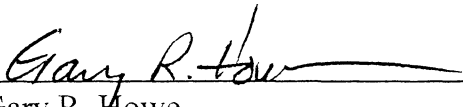
Dated this 14th day of February, 2005.

SNOW, CHRISTENSEN & MARTINEAU

CALLISTER NEBEKER & McCULLOUGH



John E. Gates
Keith A. Call
Attorneys for Defendants Danny R. Labrum
and Labrum Chevrolet Pontiac Buick, Inc.



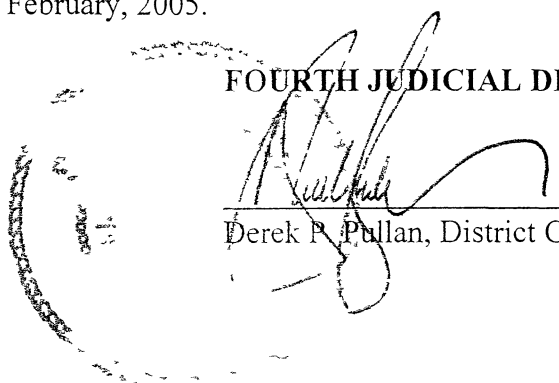
Gary R. Howe
Attorneys for Plaintiff

CASE MANAGEMENT ORDER

The Court having reviewed the foregoing Stipulated Case Management Order, hereby adopts the deadlines and limitations agreed upon by counsel and orders that they be followed for the management of this action.

Dated this 18 day of February, 2005.

FOURTH JUDICIAL DISTRICT COURT



Derek P. Pullan, District Court Judge

N \211153\Pleadings\Stipulated CMO wpd

ADDENDUM “E”

(R-104-106)

Letter of Understanding Concerning
Evaluation of Claims.

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

10/15

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.

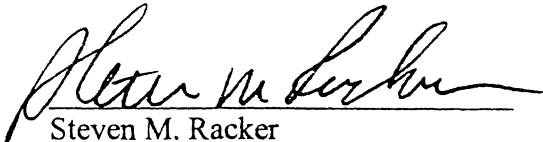
F. Other Claims

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

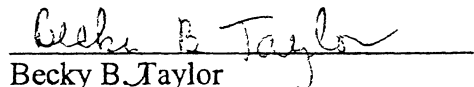
- i. No amounts are owed either party for this claim.
- ii. Coet owes Labrum \$7,211.16 for warranty claims and predelivery inspections that were credited to Coet's account.
- iii. No amounts are owed either party of this claim.
- iv. Coet owes Labrum \$2,897.24 in GM floor plan interest.
- v. Coet owes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

L0427

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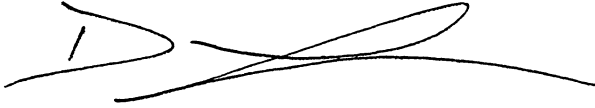
ADDENDUM “F”

(R-351)

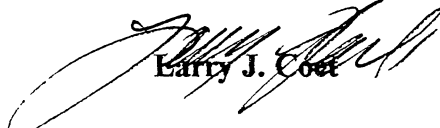
Verification document; Plaintiff’s Exhibit 3

Danny Labrum and Larry J. Coet agree that parts inventory total \$68,000.00

Danny Labrum

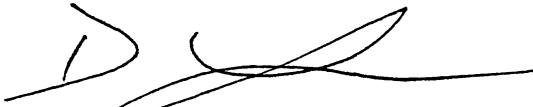


Larry J. Coet



The agreed upon Used Vehicle Inventory dollar amount is \$290,275.00

Danny Labrum



Larry J. Coet

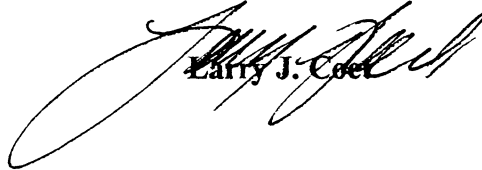


The agreed upon New Vehicle Inventory dollar amount is \$914,450.97

Danny Labrum



Larry J. Coet



Danny Labrum agrees to pay one half of November's (2001) employees hospitalization premium of \$4,989.00 which is \$2,494.00.

Danny Labrum



Larry J. Coet agrees to pay \$700.00 per new 2000 vehicles now in inventory if Danny Labrum cannot floor those mentioned vehicles as new vehicles

Larry J. Coet



ADDENDUM “G”

(R-344)

Used Vehicle Inventory List

Plaintiff's Exhibit 10

CONTROL ACCOUNT	AMOUNT	24000.....	24100.....	30100.....	31400.....	IF MAKE.....	MODEL	TRIAL.....	AGE.	
1-2673	31400	3,606.42	✓6,956.42	✓2200	3,350.00-					
1-2749	31400	57.25	✓23,757.28	✓20900	23,700.00-					
1-2756	24100	160.29-	-	✓1550	99 FORD	F150	1FTSW31F3XEE21056	79		
1-2772	24000	2,010.50	✓2,010.50		93 OLDS	DLTLA	1G2N454T4P011501	17		
							SS			
1-20523	31400	8,327.36-	✓5,527.14	✓5500.00	13,275.00-					
1-20518	24000	200.00-	200.10-		98 CAD	DEVI	1G2-254V1WJ749193	52		
1-21143	24100	231.51	✓231.51		99 CHEV	420	1G0GK19L63XZ187196	222		
1-21174	31400	1,154.50-	✓16,610.50	✓15350.00	17,775.00-					
1-21175	24100	4,333.44	✓4,333.44	✓4300	94 CHEV	410	1G2EH18577J634262	27		
1-21193	24100	2,929.50-	✓6,010.50	✓6900	97 FORD	F150	1FTDF17264B873335	86		
1-21199	31400	3,135.50-	✓17,564.04	✓16550	20,700.00-					
1-21206	24100	14,000.00	-	✓14,000.00	✓15300	99 FORD	F150	1FTF106L0X1577933	19	
1-21347	24000	2,502.26-	✓3,497.74	✓10300	12,000.00-	99 FORD	GFAN	1G2WF5216XFL27853	55	
1-21539	24000	11,000.00	✓11,000.00	✓12200	99 BUIC	LESA	1G44F5216X445314	17		
1-22113	24100	5,775.01-	✓17,049.00	✓17500	22,505.00-	99 CHEV	SUR	3G0NF16R44G19144	55	
1-22226	24100	385.50-	10.50	1,900.00	2,800.00-	92 FORD	F250	2FTHF16M0C0421217	16	
1-22235	24100	1,200.00	✓1,200.00		94 CHEVROLET	TRUCK	1G0GK19L63XZ187196	33		
1-22256	31400	2,525.00-	✓8,900.00	✓8900	11,425.00-					
1-25049	24100	2,433.12	✓2,433.12	✓300	91 GMC	474	1G7EH144637C0711	2491		
1-25030	31400	20,205.50	✓20,205.50							
1-2755	24100	21,050.00-			99 FORD	FOUR	JT34M5456X0013257	75		
2-21143	31400	5,977.50-	✓18,022.50	✓17775	24,000.00-					
2-21137	31400	1,200.00-	✓12,700.00	✓11500	13,700.00-					
2-27042	24100	1,873.25	✓1,873.25	✓500	95 FORD	F150	1FTEF1411FFA44056	165F		
2-27137	24000	1,800.00	✓1,800.00	✓300	92 OLDS	DLTL	1G3N454T4P011501	411		
2-27223	24000	300.00	✓300.00	✓300.00	95 CHEV	NEWY5	1G29F649F0X155643	105		
2-27306	31400	600.00	✓600.00							
2-27121	31400	1,703.83	✓5,943.83	✓5200	4,240.00-					
2-27142	24100	2,450.40-	✓4,509.60	✓4900	7,000.00-	99 FORD	E300	1FAFF10R37W215555	105	
4-2732	24000	6,005.00	✓6,005.00	✓3400	96 FORD	TALP	1FALF5355476213323	133		
2467	31400	3,643.52	✓16,423.52	✓10500.00	12,720.00-					
2752	24000	196.07	✓6,971.07	✓6950.00	6,775.00-	97 GEO	NETF	2G1MF52164719513	237	
2753	24000	124.92	✓7,799.92	✓8200	7,675.00-	00 CHEV	CAVA	1G1JC524017114672	237	
2762	24000	3.95-	✓8,821.05	✓9300	8,815.00-	00 FORD	SUNF	1G2JEF24647179132	189	
2770	31400	175.00	✓11,275.00	✓11500	11,100.00-					
2772	24000	12,475.00-			12,475.00-	01 FORD	GFAN	1G2WF5216XFL27853	104	
2773	24000	10.50	✓12,185.50	✓10900.00	12,175.00-	01 FORD	GFAN	1G2WF5216XFL27853	104	
2775	24000	59.50-	✓15,155.50	✓16000	15,225.00-	01 FORD	EDNA	1G2H454T4P011501	82	
2777	31400	1,775.00-	✓18,075.00	✓17925	19,850.00-					
2778	24100	9,614.50	10.50-	✓9,625.00		01 BUIC	CENT	1G4W35LJ611136202	46	
2779	24000	7,056.25	✓7,056.25	✓6200		99 H/L	ELAN	1G2H454T4P011501	42	
2781	24000	6,775.00	✓6,775.00	✓6250		95 FORD	GFAN	1G2NE12T04C774151	46	
2785	30100	13,100.00-			13,100.00-					
2787	24100	11,000.00	✓11,000.00	✓9925		95 CHEV	ELAZ	1GNDT13W4421-7662	21	
2796	30100	296.98-			296.98-					
2153	30100	454.79			454.79					
2192	30100	526.39-			526.39-					
21151	30100	196.73-			196.73-					
21332	30100	213.05	✓23,323.15		213.05					
21539	30100	17,513.82-			17,513.82-					

330,894.25

6,956.39 123,123.15 223,519.31 31,223.02-211,820.90-

207,571.10

207,289.59
197,664.59

330,894.25

320,987.24

ADDENDUM “H”

(R-352-353)

Asset Sale Agreement - Closing Statement
Plaintiff's Exhibit 2

ASSET SALE AGREEMENT - CLOSING STATEMENT

1. Purchase Price for the Assets (1.2) \$350,000.00

Adjustments

- a. Value of New Vehicle Inventory as of the Closing Date 11-14-01 - \$914,450.97 less payoff of New Vehicle Flooring Line as of Closing Date to Wells Fargo Bank - \$920,442.32; Net Reduction in Purchase Price (\$5,991.35)
- b. Parts - 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.
- c. Value of Used Vehicle Inventory as of the Closing Date 11-14-01 - \$290,275.00; less payoff of Used Vehicle Flooring Line as of Closing Date to Wells Fargo Bank - \$290,770.00; Net Reduction in Purchase Price (\$ 495.00)
- d. As of the Closing all of the FF&E listed on Exhibit "A" attached to the Asset Sale Agreement were present at the dealership, hence not adjustment was required as per §1.2(d)

SUBTOTAL (\$6,486.35)

2. Expenses incurred by the Seller pursuant to the request of the Buyer which subsequent to the execution of the Asset Sale Agreement, which expense the Buyer agrees to reimburse to the Seller at Closing.

- a. Granite Construction Co. - asphalt paving \$ 819.00
- b. Alliance System Computer deposit ADP, Inc.
balance of the contract to be paid by Buyer 3,312.00
- c. EBC Computers - Orem - acquisition
of the ProSonic EP 268 942.00

SUBTOTAL \$ 5,073.00



3. Fifty percent (50%) of the Employee Hospital and Medical
plan payment for the month of November, 2001
(50% of \$4,989.00)

SUBTOTAL

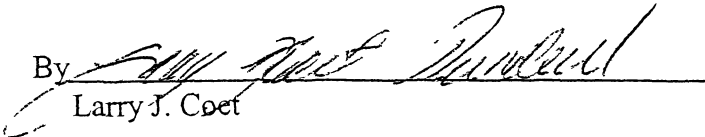
\$ 2,494.00

TOTAL DUE AT TIME OF CLOSING


\$351,082.00 ⁷² ₆₄₀

351 080.65

LARRY J. COET CHEVROLET-PONTIAC-BUICK

By 
Larry J. Coet

LABRUM CHEVROLET-PONTIAC-BUICK

By 
Danny R. Labrum

258

ADDENDUM “I”

(R-317-326)

Order Granting Labrum’s Motion for Partial
Summary Judgment, September 2, 2005

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Attorneys for Defendants Danny R. Labrum
and Labrum Chevrolet Pontiac Buick, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

<p>LARRY J. COET CHEVROLET, PONTIAC, BUICK, INC.</p> <p>Plaintiff,</p> <p>vs.</p> <p>DANNY R. LABRUM, individually, and LABRUM CHEVROLET PONTIAC BUICK, INC. and RONALD L. COVEY, individually and as Personal Guarantor</p> <p>Defendants.</p>	<p>ORDER GRANTING LABRUM'S MOTION FOR PARTIAL SUMMARY JUDGMENT</p> <p>Civil No.: 030500537</p> <p>Judge: Derek P. Pullan</p>
---	---

Defendants, Danny R. Labrum individually ("Mr. Labrum") and Labrum Chevrolet Pontiac Buick, Inc.'s ("Labrum Chevrolet") moved the court for partial summary judgment on June 6, 2005. Mr. Labrum and Labrum Chevrolet sought dismissal of Plaintiff, Larry J. Coet Chevrolet, Pontiac.

Buick, Inc.'s ("Plaintiff") claims for attorneys' fees and pre-judgment interest. Plaintiff filed its memorandum in opposition on or about June 29, 2005. Mr. Labrum and Labrum Chevrolet filed their reply memorandum on or about July 11, 2005.

The Court held a hearing on the matter on July 29, 2005. Mr. Labrum and Labrum Chevrolet were represented by Keith A. Call. Plaintiff was represented by Gary R. Howe. The Court heard argument from both parties.

Mr. Labrum and Labrum Chevrolet contend that the parties entered into a letter agreement dated February 9, 2005 ("Letter Agreement"), by which the parties agreed upon a procedure for addressing, and hopefully resolving, the parties respective claims. Mr. Labrum and Labrum Chevrolet contend that a release provision in the Letter Agreement is broad enough to include a release of Plaintiff's claims for attorneys' fees and pre-judgment interest. Mr. Labrum and Labrum Chevrolet contend that the only "legal issues" excepted from the release provision in the Letter Agreement related to the obsolescence of parts. Mr. Labrum and Labrum Chevrolet further contend that the Letter Agreement is clear and unambiguous in this regard.

In opposition to the motion, Plaintiff argues that the purpose of the Letter Agreement was to place before the evaluation team solely accounting issues, and that legal issues such as the issue of entitlement to attorneys' fees and pre-judgment and the amount of such fees and interest were reserved from Letter Agreement. Plaintiff contends the Letter Agreement was limited by a Stipulated Case Management Order, signed and entered by the Court on or about February 18, 2005,

after the execution of the Letter Agreement, which Plaintiff contends requires only “accounting issues” to be submitted to an evaluation team.

Having reviewed the parties’ memoranda and having heard the argument of counsel, the Court enters the following findings and conclusions.

The Court FINDS that there is no genuine dispute as to the following material facts:

1. Plaintiff and Labrum Chevrolet entered into an Asset Sale Agreement in August 2001, providing for the sale of certain assets relating to the Chevrolet dealership in Heber City, Utah from Plaintiff to Labrum Chevrolet.

2. After the sale closed, several disputes arose between the parties giving rise to the underlying claims in this action.

3. Plaintiff filed its Complaint in this lawsuit on November 13, 2003.

4. The Court conducted a telephonic scheduling conference on January 20, 2005. During the scheduling conference, the parties discussed the advantages of involving an accounting team to evaluate the accounting issues in this case.

5. Subsequent to the telephonic scheduling conference with the Court, the parties entered into the Letter Agreement, which is dated February 9, 2005.

6. The parties stated the objective of the accountants’ evaluation in Section 3 of the Letter Agreement as follows:

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.

7. The Letter Agreement also contained a broad release provision as follows:

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 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.

8. The Letter Agreement also contained the following provision:

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.

9. The Court signed and entered a Stipulated Case Management Order (“CMO”) on or about February 18, 2005. The CMO, which is part of the record in this case, provides, among other things, “The parties shall submit all of the accounting disputes, including all accounting issues raised as part of the claims or counterclaims in this lawsuit, to an accounting evaluation team, consistent with the terms of the parties’ letter agreement, a copy of which is attached as Exhibit A.” Exhibit A to the CMO was the parties’ signed Letter Agreement. The CMO further provided, “If the accounting evaluation team is successfully able to resolve all accounting issues between the parties, leaving only legal issues (and accompanying factual background) for resolution by the Court, then the following deadlines shall apply: . . .” The CMO also provided, “If the accounting evaluation

team is not successfully able to resolve all accounting issues between the parties, leaving accounting issues as well as legal issues (and accompanying factual background) for resolution by the Court, then the following deadlines shall apply: . . .”

10. The evaluation team chosen by the parties conducted an evaluation and issued their letter decision on or about April 28, 2005. The evaluation team determined that each of the parties owed the other party certain sums on certain claims. The net result, as determined by the evaluation team, was that Labrum Chevrolet owed Plaintiff \$59,384.79.

11. After the evaluation team issued its letter decision, Labrum Chevrolet issued a check payable to Plaintiff in the amount of \$59,384.79 and delivered the check to counsel for Plaintiff.

12. Plaintiff rejected Labrum Chevrolet’s check because Plaintiff disagreed with Mr. Labrum’s and Labrum Chevrolet’s position that delivery of the check effectuated a complete release of all of Plaintiff’s claims (including claims for attorneys’ fees and interest). Plaintiff claimed Labrum Chevrolet also owed Plaintiff for attorneys’ fees and interest notwithstanding the Letter Agreement and delivery of the check by Labrum Chevrolet.

13. Subsequently, the parties agreed that Plaintiff could cash the check without further prejudice to its ability to claim attorneys’ fees and interest, in exchange for an agreement that interest, if any were owed, would cease to accrue as of the date the check cleared the bank.

14. After this agreement was reached, Plaintiff cashed the check.

The Court reaches the following CONCLUSIONS OF LAW:

A. The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract. *See e.g., Novell, Inc. v. The Canopy Group, Inc.*, 2004 Utah App. 162 ¶ 20, 92 P.3d 768.

B. If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law. *Id.*

C. An ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. *Id.*

D. The Letter Agreement in this case is clear and unambiguous.

E. The CMO did not limit the scope of the "purpose" or "release" language in the Letter Agreement. While the CMO did repeatedly reference the submission of "accounting issues" to the evaluation team, it specifically provided that the evaluation would be conducted "consistent with the terms of the parties letter agreement," which was referenced and attached as an exhibit to the CMO.

F. Section 3 of the Letter Agreement unambiguously states the purpose and objective of the Letter Agreement, which was to resolve all of the respective claims between the parties, with the exception of those related to legal responsibility of the parties for parts obsolescence.

G. Even if the parties submitted to the evaluation team solely issues related to accounting, Section 9 of the Letter Agreement provides that upon payment by Labrum Chevrolet of

such sum unanimously agreed to by the evaluation team, Plaintiff released and forever discharged

Labrum Chevrolet from any and all claims of whatever nature, known or unknown, contingent or non-contingent, including without limitation all claims relating in any way to the lawsuit.

H. Plaintiffs' claims for attorneys' fees and interest were released and waived under Section 9 of the Letter Agreement upon payment by Labrum Chevrolet of the sums determined by the accountants to be owed to Plaintiff.

I. Based on the clear and unambiguous language of the Letter Agreement, Labrum and Labrum Chevrolet are entitled to summary judgment on Plaintiffs' claims for attorneys' fees and pre-judgment interest.

J. In addition, the broad release of contractual obligations includes a release of any obligation to pay attorneys' fees and interest unless the attorneys' fees and interest are expressly carved out of the release. *Krumme v. Westpoint Stevens, Inc.*, 238 F.2d 133 (2nd Cir. 2000); *Estate of Givens*, 938 S.W. 2d 679, 681-82 (Mo. Ct. App. 1997); *Adams v. American Int'l Group, Inc.*, 791 N.E.2d 26, 32 (Ill. Ct. App. 2003).

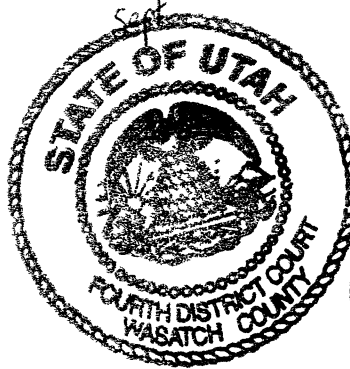
K. In addition, the express mention of certain exceptions in the release at issue in this case, by implication excludes all other possible exceptions. Thus, the failure to except attorneys' fees and pre-judgment interest from the broad release provisions of Section 9 of the Letter Agreement results in a release and waiver of such claims.

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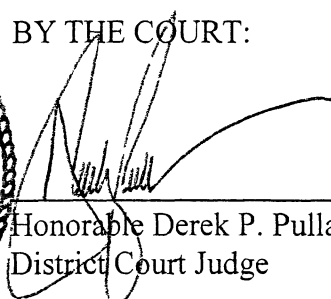
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Based on the foregoing, it is HEREBY ORDERED, ADJUDGED AND DECREED that Labrum's Motion for Partial Summary Judgment is granted. Plaintiffs' claims for attorneys' fees and pre-judgment interest are dismissed with prejudice.

DATED this 2 day of ~~August~~^{Sept}, 2005.

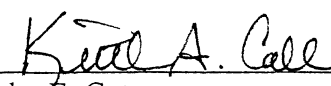


BY THE COURT:

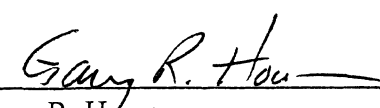

Honorable Derek P. Pullan
District Court Judge

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU


John E. Gates
Keith A. Call
*Attorneys for Defendants Danny R. Labrum
and Labrum Chevrolet Pontiac Buick, Inc*

CALLISTER NEBEKER & MCCULLOUGH

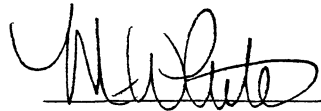

Gary R. Howe
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I state that I am employed in the law offices of Snow, Christensen & Martineau, attorneys for Plaintiff herein; that she served the attached **ORDER GRANTING LABRUM'S MOTION FOR PARTIAL SUMMARY JUDGMENT**, Case No. 030500537, Fourth Judicial District Court, Salt Lake County, upon the following parties by placing a true and correct copy thereof in an envelope to:

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

and causing the same to be mailed postage prepaid via U.S. Mail this 19 day of August, 2005.



ADDENDUM “J”
(R-674-pp 191-199)
Oral Ruling, August 8, 2006

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

2001 FEB 28 P 4:51 *mm*

LARRY J. COET CHEVROLET PONTIAC,)

Plaintiff,)

vs.)

DANNY R. LABRUM, et al,)

Defendant.)

) Case No. 030500537 CN

) (Volume I)

ORIGINAL

Bench Trial
Electronically Recorded on
August 8, 2006

BEFORE: THE HONORABLE DEREK P. PULLAN
Fourth District Court Judge

APPEARANCES

For the Plaintiff:

Gary R. Howe
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SLC, UT 84133
Telephone: (801) 530-7300

For the Defendant:

Keith A. Call
10 Exchange Pl. #1100
SLC, UT 84145
Telephone: (801) 521-9000

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone. (801) 377-2927

1-4

1 The record should reflect that the parties are both present
2 together with their respective Counsel.

3 Initially let me extend my appreciation and gratitude to
4 Counsel for your careful preparation for today's trial. To the
5 clients, you've been represented today by skilled advocates.
6 Their many hours in the practice of law, years have been spent,
7 hours of study, careful thought and writing have all been brought
8 to bear for your benefit today at trial. They have conducted
9 themselves as models of professionalism and civility, and I
10 extend to them my gratitude for that.

11 The Court has carefully listened to almost a full day of
12 testimony today. Based on the testimony and exhibits that have
13 been presented to me, I now enter the following findings of fact.
14 Plaintiff Larry J. Coet Chevrolet has owned and operated the
15 Chevrolet dealership in Heber City since 1986. In August 2001
16 Coet entered into an asset sale agreement for the sale of the
17 dealership to the defendant, Danny Labrum Chevrolet.

18 In the agreement Labrum agreed to purchase the used
19 vehicle inventory, which includes all used motor vehicles which
20 are in the seller's inventory at the time of closing, which
21 vehicles have been previously titled. Labrum also agreed to
22 purchase the Coet's parts and accessories inventory established
23 by physical count as of the closing, excluding any and all
24 obsolete parts.

25 The agreement defined obsolete parts to mean any part

1 not included in the manufacturer's current parts pricing list,
2 any part on which the seal has been opened or is materially
3 damaged, any part which is missing portions of its working
4 mechanisms so that it would not be accepted for return, and parts
5 in excess of a 180-day supply.

6 Under the agreement if after conducting the physical
7 inventory the value of then existing parts was less than \$68,000
8 the sale price for the dealership would be adjusted by the
9 difference between \$68,000 and the actual value of the parts. If
10 the value of the parts exceeded \$68,000 there would be no
11 adjustment.

12 The parts were to be valued at the listed price in the
13 current price book for parts. Obsolete parts were not -- were to
14 be excluded from the inventory. After the sale Labrum would have
15 a one time opportunity to return parts to GM.

16 In the agreement Labrum also agreed to purchase Coet's
17 gas, oil, grease as an inventory item at current values based on
18 a physical inventory which shall be taken immediately prior to
19 closing. Finally, under several provisions in the agreement,
20 Coet had a duty to deliver title to the used vehicle inventory
21 free and clear of all liens or encumbrances.

22 Prior to the closing date Labrum had access to three
23 years of Coet's financial statements and Coet's operating reports
24 for three months in 2001. Ms. Mullaly testified that she was
25 hired by Coet on August 31st, 2002, and at that time Coet's

1 records, in her words, were a mess. Her initial focus was to
2 reconcile accounts receivable, a task which she testified proved
3 difficult.

4 On November 8th, 2001, less than one week before the
5 closing, Gary Robinson purchased a new truck from Coet. At the
6 time of the purchase Robinson owned a 1991 Chevy pickup.
7 Robinson was going to trade in the 1991 pickup in connection with
8 the sale, but he had a friend, Johnny Jessen, who wanted the
9 truck. At that time Jessen owned a 1992 Ford pickup. He and
10 Robinson agreed to exchange trucks. Robinson traded in the 1992
11 Ford pickup to Coet as part of his new vehicle purchase. Coet
12 agreed to pay off the \$2300 balance owing to Federal Credit Union
13 on the 1991 Chevy. Jessen would get the 1991 Chevy at the time
14 he delivered his 1992 Ford pickup to Coet.

15 The sale as described was completed on November 8th,
16 2001. On November 10th or 12th, 2001 the Ford pickup was listed
17 in Coet's used vehicle inventory. Its value was listed at \$1900.
18 On November 13th, 2001 at 6 a.m. Jessen delivered the 1992 Ford
19 pickup to the dealership. He left the keys in the truck and
20 deposited the signed title in Coet's drop box. He then drove
21 away in his new -- in Robinson's old -- 1991 Chevy pickup.

22 On the evening of November 13th, 2001 Labrum and an
23 associate conducted an inspection of the used vehicles on the lot
24 at the dealership. After the inspection Labrum and Coet
25 negotiated a \$290,275 sale price for the used car inventory.

1 On November 12th, 2001 Larry Coet, Danny Labrum, Rachel
2 Labrum and a man named Lyle, who I think is a brother-in-law?

3 MR. CALL: Danny's brother, Lyle Labrum.

4 THE COURT: Okay, Lyle Labrum met at the dealership to
5 conduct a parts inventory. Mr. Coet and Mr. Labrum took turns
6 identifying each part number and then counting the number of that
7 particular part in the inventory. Rachel Labrum and Lyle Labrum
8 recorded these numbers.

9 During this inventory Mr. Labrum could have identified
10 any part the seal of which had been opened -- the seal of which
11 had been opened. Mr. Labrum could have also identified any
12 part which was not included in the current parts pricing list.
13 Mr. Labrum was in the best position to know which parts were
14 materially defective or damaged such that GM would not accept
15 them or which were in excess of a 180-day supply.

16 Late in the evening after four to five hours of this
17 parts inventory, Labrum agreed that continuing the inventory
18 would not be necessary because he was satisfied that more
19 than \$68,000 in parts existed. When asked Mr. Coet stated to
20 Mr. Labrum, "I don't have an obsolete parts problem." Based on
21 that statement the parties -- and the inventory, the parties
22 agreed that no adjustment would be necessary for parts under the
23 asset sales agreement.

24 Coet's records show that as of October 31st, 2001 Coet
25 had approximately \$79,000 in parts, and that obsolete parts in

1 stock for more than 12 months were valued at more than \$25,000.
2 After the closing Labrum determined that \$3,228.36 existed in
3 non-GM parts, approximately \$3800 in non-refundable GM parts,
4 \$560 in multi-parts which were missing certain parts or
5 mechanism, \$7,600 in damaged parts, \$3,357 in old parts
6 superceded by a new part number, and \$261.18 in discontinued
7 parts.

8 The sale of the dealership closed on November 14th, 2001.
9 The parties met in Salt Lake City at a title company for the
10 closing. As part of the closing both parties executed a closing
11 statement. In the statement the parties agreed that used car
12 inventory was valued at \$290,275. No adjustments were made for
13 parts, and no adjustments were made for oil, gas or grease.

14 Labrum paid Coet \$351,080 at the closing and commenced
15 operations and management of the dealership on November 15th,
16 2001. On or about December 12th, 2001 Coet issued a check for
17 \$2,300 to pay off a lien on some vehicle. It's disputed as to
18 whether it was the Robinson's vehicle, the 1991 Chevy that was
19 traded in. It's disputed as to what vehicle that payoff was for,
20 but Coet did issue a payoff check in the amount of \$2300 on
21 December 12th, 2001.

22 In January 2002 Labrum sold the 1992 Ford pickup to Carl
23 Givens for \$5,000. The vehicle had remained on the lot until
24 that time. Labrum had performed repair work, including the
25 installation of a new windshield. From the time of closing on

1 the dealership to the date the vehicle was sold, Coet made no
2 claim to the 1992 Ford pickup truck.

3 Based on those findings of fact the Court reaches the
4 following conclusions of law. Three issues are presented to the
5 Court for decision. First, after the closing did Labrum or Coet
6 own the 1992 Ford pickup. This issue turns on whether the truck
7 was, quote, "in the seller's inventory at the time of closing and
8 previously titled."

9 Second, did Labrum pay Coet for oil, gas and grease
10 purchased under the asset sale agreement, and third, did Coet
11 make a fraudulent representation or negligent misrepresentation
12 as to the issue of obsolete parts such that Labrum is entitled to
13 damages.

14 The Court concludes that the 1992 Ford pickup was in the
15 seller's inventory at the time of closing. It was -- and that it
16 was a previously titled vehicle. The parties agreed that the
17 value of that inventory, including the 1992 Ford pickup, was
18 \$290,275. Labrum paid Coet that amount at closing and has no
19 further obligation to him.

20 To the extent that Coet's claims for breach of contract,
21 breach of the covenant of good faith and fair dealing, unjust
22 enrichment and conversion are based on that transaction, the
23 Court concludes that those causes of action fail.

24 At the time the parties closed on the transaction on the
25 sale of the dealership, they intended final settlement of all

1 obligations to each other. Where adjustments needed to be made
2 based on physical inventories the parties made those adjustments.
3 No adjustment was made as to oil, gas and grease; therefore, the
4 Court concludes that Coet's claims fail as to that issue.

5 In the absence of any claim for fraud or negligent
6 misrepresentation the same would be true as to adjustments for
7 parts. On the face of the closing documents the parties agreed
8 that no adjustment was necessary relating to parts under the
9 asset sale agreement.

10 Turning to the issue of fraud, the elements of fraud
11 claim are that Coet made a representation concerning a presently
12 existing material fact which was false, which he either knew to
13 be false or made recklessly knowing that he had insufficient
14 knowledge upon which to base the representation. Coet did this
15 for the purpose of inducing Labrum to act upon it, and Labrum
16 acting reasonably and in ignorance of its falsity did in fact
17 rely, and was thereby induced to act to Labrum's injury and
18 damage.

19 In the case of Jardine vs. Brunswick, the Utah Supreme
20 Court held that, "Where one having a pecuniary interest in a
21 transaction is in a superior position to know material facts and
22 carelessly or negligently makes a false representation concerning
23 them, expecting the other party to rely and act thereon, and the
24 other party reasonably does so and suffers loss in that
25 transaction, the representor can be held responsible if the other

1 elements of fraud are also present."

2 In the instant case the Court concludes that Coet made a
3 representation of presently existing material fact which was
4 false. He told Labrum in the context of the parties -- parts
5 inventory that Coet did not have an obsolete parts problem. That
6 statement was false. In fact, Coet had approximately \$18,000 in
7 obsolete parts representing between 22 to 25 percent of its total
8 inventory.

9 The statement was made knowing that Coet had
10 insufficient knowledge upon which to base that representation.
11 The Court reaches that conclusion based on -- I believe it's
12 Exhibit D-11 which shows that approximately \$25,000 in parts had
13 not been moved for approximately -- or for more than 12 months.

14 The statement was made to induce Labrum to rely, and in
15 fact Labrum did rely and was induced to act by signing a closing
16 statement without an obsolete parts adjustment. This caused
17 damage to Labrum in the amount of \$18,862.50. However, as to
18 some of this amount Labrum's reliance was not reliable -- or was
19 not reasonable.

20 Also in the case of Jardine vs. Brunswick, the Court --
21 the Utah Supreme Court has held, "The one who complains of
22 being injured by a false representation cannot heedlessly accept
23 as true whatever is told him, but has the duty of exercising
24 such degree of care to protect his own interests as would be
25 exercised by an ordinary, reasonable and prudent person under the

1 circumstances; and if he fails to do so is precluded from holding
2 someone else to account for the consequences of his own neglect."

3 The Court concludes that an ordinary reasonable person
4 in Mr. Labrum's position would have identified by the current
5 manufacturer's price list non-GM parts, discontinued parts, old
6 part -- and old parts. Labrum, on the other hand, was in the
7 best position to ascertain whether the parts in his inventory
8 were damaged or incomplete such that GM would not accept return.
9 As to these parts amounting to -- or valued at \$11,455.26 Labrum
10 reasonably relied to its detriment on the misrepresentation of
11 Coet and is therefore entitled to judgment in that amount.

12 The Court reserves the issue of attorney's fees to allow
13 the parties to brief the question of who is the prevailing party
14 in light of prior settlements of some claims and the Court's
15 judgment entered today, and also to allow the parties to file fee
16 affidavits pursuant to Rule 73.

17 Counsel, how long would it take you to brief that
18 question of prevailing party?

19 MR. CALL: Your Honor, I'm currently in the throws of a
20 motion for preliminary injunction scheduled to be heard in Ohio
21 on August 28th, which has be deeply consumed between now and then.
22 I would prefer, if it would please the Court, to have a couple of
23 weeks past that date.

24 THE COURT: Do you have any objection to that, Mr. Howe?

25 MR. HOWE: No objection.

ADDENDUM “K”

(R-634-641)

Ruling, November 1, 2006

FILED
4TH DISTRICT
STATE OF UTAH
WASATCH COUNTY

2006 NOV -1 PM 2:24



**IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH**

<p>LARRY J. COET CHEVROLET, PONTIAC, BUICK, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>DANNY R. LABRUM, individually, and LABRUM CHEVROLET PONTIAC BUICK, INC., and RONALD L. COVEY, individually and as personal guarantor,</p> <p>Defendants.</p>	<p>RULING</p> <p>Case No. 030500537</p> <p>Judge Derek P. Pullan</p>
---	---

This matter comes before the Court on cross-motions for attorney's fees and costs.

Plaintiff Larry J. Coet Chevrolet, Pontiac, Buick, Inc. ("Coet") filed its motion for an award of attorney's fees and costs on August 29, 2006. Defendants Danny R. Labrum and Labrum Chevrolet Pontiac Buick, Inc. (collectively "Labrum") filed a memorandum in opposition to Coet's motion and in support of Labrum's request for attorney's fees on September 15, 2006. Coet filed a reply and opposition memorandum on October 2, 2006. Labrum filed a reply memorandum and request to submit for decision on October 10, 2006. The parties have not requested oral argument.



Having considered the pleadings, the Court now enters the following:

RULING

In August 2001, the parties entered into an Asset Sale Agreement (“the Agreement”) whereby Coet sold the Chevrolet dealership in Heber City to Labrum. After the sale closed, a dispute arose as to who owed what to whom. Coet brought this action against Labrum who counterclaimed.

In February 2006, the parties through their counsel entered into a Letter Agreement to resolve the bulk of their respective claims. Each party designated a certified public accountant to act as a member of an evaluation team. The team would conduct an independent examination, assessment, and application of the Agreement “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.” (Letter Agreement, ¶ 3).

Unanimous findings by the evaluation team were “binding on the parties,” each of whom agreed to pay the other any sum the team determined was owed. Upon payment, each party “released and forever discharged [the other] from any and all claims, demands, suits, causes of action or obligations of whatever nature, known or unknown, contingent or non-contingent . . . including without limitation all claims that relate in any way to [this action], . . . and any claims asserted or that could have been asserted in [this action].” (Letter Agreement, ¶ 9). Excepted from this release were issues upon which the team did not reach unanimous agreement and issues relating to liability for parts obsolescence.

The evaluation team unanimously agreed that Labrum owed Coet \$73,711.18 and Coet owed Labrum \$14,326.39. The net result was that Labrum owed Coet \$59,384.79. Labrum paid this amount to Coet on May 13, 2005. Coet accepted the payment but contended that it was entitled to be paid more

money for interest and attorney's fees. The Court rejected Coet's contention, ruling on two separate occasions that Coet's claims for attorney's fees and interest were released and waived under the Letter Agreement. (Order Granting Labrum's Partial Motion for Summary Judgment, 9/2/05; Ruling, 8/3/06).

After the evaluation team completed its work, three narrow issues were tried to the Court: (1) whether Labrum owed Coet for a 1992 Ford truck; (2) whether Labrum owed Coet for oil, gas, and grease; and (3) whether Coet made a fraudulent or negligent misrepresentation regarding obsolete parts entitling Labrum to damages. Neither party contends that the Letter Agreement constituted a release and waiver of attorney's fees incurred to prosecute these remaining claims in the district court.

At trial, the Court ruled in favor of Labrum on all claims. Labrum was awarded \$11,455.26 in damages.

Each party contends that it is the "prevailing party" and is entitled to attorney's fees under the Agreement. The Agreement reads:

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.¹

¹This provision is drafted broadly. It applies to "any action or proceeding . . . taken or brought by either Party concerning this Agreement." By using the verbs "taken" and "brought" in the alternative, the parties expanded the meaning of the term "action." Certainly civil actions "brought" by either party could give rise to an award of attorney's fees, but so could "any action taken . . . concerning this Agreement . . . whether [the fees] are expended with or without trial."

Here, the parties resolved the bulk of their claims without trial by submitting them to the evaluation team. That method of settlement—during the course of which both parties incurred attorney's fees—constituted an action taken by the parties concerning the Agreement. Absent the release and waiver in the Letter Agreement, the prevailing party as determined by the evaluation team was entitled to recover its costs and attorney's fees.

Agreement, p. 18.

A “prevailing party” includes one “in whose favor a judgment is rendered, regardless of the amount of damages awarded” and one who “successfully defends and avoids adverse judgment.”

A.K.&R. Whipple Plumbing & Heating v. Guy, 47 P.3d 92, 95 (Utah Ct. App. 2002); R.T. Nielsen Company v. Cook, 40 P.3d 1119, 1126 (Utah 2002).

Determining who is the prevailing party is more complicated “in cases involving multiple claims and parties . . . and where the ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case.” A.K. & R. Whipple Plumbing & Heating v. Guy, 2004 UT 427, ¶ 10, 94 P.3d 270, quoting, Mountain States Broad Co. v. Neale, 776 P.2d 643, 649, n. 7 (Utah Ct. App. 1989) (Mountain States I). Such cases “demonstrate the need for a flexible and reasoned approach” based on common sense. *Id.*.

The starting point for that approach is the net judgment rule. However, because the net judgment rule—when “mechanically applied in all cases”—can lead to absurd results, two “additional perspectives” may be considered—“comparative victory” and “who won a greater percentage of the amount it had claimed in damages or offsets.” A.K. & R. Whipple, 2004 UT 427, ¶¶ 12, 13, quoting, Mountain States Broad Co. v. Neale, 783 P.2d 551 (Utah Ct. App. 1989) (Mountain States II). Thus, a party who obtains a judgment for a small fraction of what he sought may not necessarily be a “prevailing party” entitled to attorney’s fees. Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah Ct. App. 1990).

There is a dispute as to whether the Court should consider amounts awarded to the parties by the evaluation team. Coet argues that these amounts are relevant in determining who is the prevailing party. Labrum contends that a settlement of some issues in advance of trial is immaterial because any payments made do not constitute a judgment. In support of its position, Labrum also cites the Court to Cantrell v. International Broth. Of Electric Workers, 69 F.3d 456 (10th Cir. 1995).

In Cantrell, the Tenth Circuit Court overruled Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311, 1312 (10th Cir. 1974) which held a defendant was not a prevailing party under Rule 54(d) if the plaintiff voluntarily dismissed the complaint with prejudice. The Court held that “in cases not involving a settlement, when a party dismisses an action with or without prejudice, the district court has discretion to award costs to the prevailing party under Fed. R. Civ. P. 54(d).” From this statement, Labrum infers that where settlement has occurred, the district court has no discretion to award costs to the prevailing party. This inference is tenuous. The Cantrell court did not decide whether a partial settlement of claims in advance of trial should be considered in determining which party prevailed after trial.

At the time a complaint or counterclaim is filed, a party knows something of the facts supporting his own claims, and usually less about the facts supporting his opponent’s. As the case proceeds, this limited understanding grows. It is not uncommon for parties—whose views have been illuminated by discovery—to resolve claims in advance of trial. Parties may do so for a variety of reasons—personal, economic, legal, or strategic. In some instances, the reason may be wholly unrelated to the merits of the settled claim. Likewise, pre-trial settlements are accomplished by a variety of means—unilateral concession, negotiation, stipulation, mediation, arbitration. These methods in turn vary in the degree to

they are grounded in an evaluation of the underlying facts and law.

Thus, a partial settlement in advance of trial may say nothing about the factual or legal merit of the settled claim. Admittedly, in this case the method resolution required an assessment of the facts. Nevertheless, this is not always the case. The motives for and methods of pre-trial settlement are simply too diverse. For that reason, a rule requiring the Court to consider pre-trial settlements in determining who is the prevailing party is unworkable. Prevailing party analysis must be grounded only in claims litigated through trial and resulting in a judgment.²

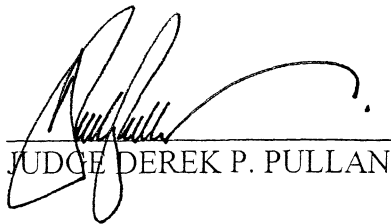
In this action, Labrum prevailed on all litigated claims. The Court concludes that he is the prevailing party. Labrum seeks attorney's fees incurred as to these litigated claims after May 13, 2005, (the date he paid Coet the amount determined by the evaluation team). After that date, Labrum's attorney's fees related to the prosecution of litigated claims only.

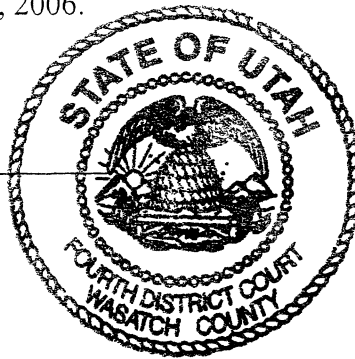
For the reasons stated in Labrum's memoranda and fees affidavit, the Court finds that Labrum's fees meet the requirements of state law. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). Coet does not challenge Labrum's attorney's fees on these grounds.

²One exception to this rule would be cases in which a partial pre-trial settlement was reduced to judgment. This could occur in many ways, including a confession of judgment or judgment after confirmation of an arbitration award. Utah R. Civ. P. 58A(f); Utah Code Ann. 78-31a-126 (after confirmation of arbitration award, court shall enter a judgment conforming to the award).

The Court requests that counsel for Labrum prepare an order and judgment consistent with this decision.

DATED this 1 day of November, 2006.


JUDGE DEREK P. PULLAN



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030500537 by the method and on the date specified.

METHOD NAME

Mail KEITH A CALL
ATTORNEY DEF
10 EXCHANGE PLACE 11TH FLR
POB 45000
SALT LAKE CITY, UT
84145-5000

Mail GARY R HOWE
ATTORNEY PLA
10 E S TEMPLE #900
GATEWAY TOWER E
SALT LAKE CITY UT 84133

Dated this 1 day of Nov., 2006.


Deputy Court Clerk

ADDENDUM “L”

(R-655-658)

Judgment and Order, December 1, 2006

UTAH
ST-
WAS.
2006 DEC -1 PM 4:48
[Signature]

JOHN E. GATES (1169)
KEITH A. CALL (6708)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0900

Attorneys for Defendants Danny R. Labrum
and Labrum Chevrolet Pontiac Buick, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

LARRY J. COET CHEVROLET, PONTIAC, BUICK, INC. Plaintiff, vs. DANNY R. LABRUM, individually, and LABRUM CHEVROLET PONTIAC BUICK, INC. and RONALD L. COVEY, individually and as Personal Guarantor Defendants.	JUDGMENT AND ORDER Civil No.: 030500537 Judge: Derek P. Pullan
--	---

This matter was tried to the Court on August 8, 2006 before the Honorable Judge Derek P. Pullan. Danny R. Labrum, individually, and Labrum Chevrolet Pontiac Buick, Inc. (collectively "Labrum") were represented by Keith A. Call and Larry J. Coet Chevrolet, Pontiac, Buick, Inc.

[Handwritten mark]

("Coet") was represented by Gary R. Howe. Coet presented evidence on two claims against Labrum, and Labrum presented evidence on a counterclaim against Coet.

At the close of Coet's case-in-chief, Danny R. Labrum (individually) moved for a directed verdict. Coet did not object to the motion. Accordingly, the Danny R. Labrum's motion was GRANTED, and all claims against Danny R. Labrum individually are dismissed with prejudice.

At the conclusion of the trial, the Court announced from the bench its findings and conclusions, concluding that all of Coet's claims should be dismissed with prejudice and that Labrum was entitled to judgment against Coet in the amount of \$11,455.26.

After the trial, the parties briefed the issue of entitlement to attorneys fees and costs. Coet sought recovery of costs and fees in the amount of \$44,958.29. Labrum sought recovery of fees in the amount of \$29,715. On November 1, 2006, the Court entered its written Ruling, by which the Court determined that Coet is not entitled to recover its attorneys fees or costs and Labrum is entitled to recover its attorneys fees in the amount requested. By stipulation after November 1, 2006, Labrum has agreed to reduce the amount of attorneys fees it seeks to \$28,550.

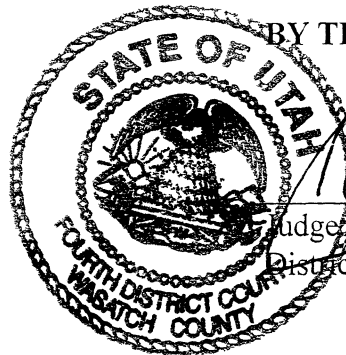
Based on the foregoing, and for the reasons stated by the Court at the trial and in the November 1, 2006 Ruling, it is HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. All of Plaintiffs' claims are hereby dismissed in their entirety, with prejudice.
2. Labrum Chevrolet Pontiac Buick, Inc. is hereby awarded JUDGMENT against Larry J. Coet Chevrolet, Pontiac, Buick, Inc. in the amount of \$40,005.26, together with interest thereon from the date of this Judgment and Order at the rate of 6.36 percent per annum.

3. Labrum is entitled to recover its additional reasonable attorneys' fees and costs incurred in connection with this matter and may submit supplemental affidavits of such fees and costs as appropriate.

Dated this 1 day of ~~November~~, 2006.
DEC.

BY THE COURT:



[Signature]
Judge Derek P. Pullan
District Court Judge

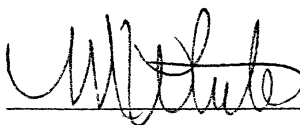
N:\21115\3\Pleadings\Judgment and Order (Labrum) wpd

CERTIFICATE OF SERVICE

I certify that on the 20 day of November, 2006, a true and correct copy of **JUDGMENT**

AND ORDER, was served by hand delivery to:

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



ADDENDUM “M”

(R-509-511)

Ruling, August 3, 2006

2006 AUG -3 AM 9.33

Case No. 030500537

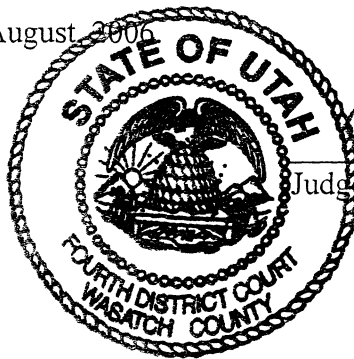
Coet does not disagree with this reading of the Court's prior order. However, Coet argues that in issuing that order, the Court was not aware of an important fact. Specifically, immediately after the sale of the dealership to Labrum, Coet refunded to Labrum \$63,000.00 which was not in fact owing. Coet argues that for the next several years it was denied use of these funds and

Labrum is obligated to pay interest on them.

In its order granting partial summary judgment to the Labrum Defendants, the Court ruled that "[Coet's] claims for attorneys' fees and interest were released and waived under Section 9 of the Letter Agreement upon payment by Labrum Chevrolet of the sums determined by the accountants to be owed to [Coet]." Therefore, the Court dismissed with prejudice Coet's claims for attorneys' fees and prejudgment interest. Coet has never moved to reconsider this ruling. Therefore, it remains the law of the case.

The Court grants the Labrum Defendants' motion in limine. At trial, Coet shall be precluded from presenting any evidence or argument relating to interest on attorneys' fees.

Dated this 3rd day of August, 2006.



Judge Derek P. Pullan

A handwritten signature in black ink, appearing to read "Derek Pullan", written over a horizontal line.

A handwritten signature in black ink, appearing to read "C. H. Burger", written below the line for Judge Pullan's signature.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030500537 by the method and on the date specified.

METHOD NAME

~~Mail~~
Fax

KEITH A CALL
ATTORNEY DEF 801-307-0400
10 EXCHANGE PLACE 11TH FLR
POB #5000
SALT LAKE CITY, UT
84145-5000

~~Mail~~
Fax

GARY R HOWE
ATTORNEY PLA 801-304-9127
10 E S TEMPLE #800
GATEWAY TOWER E
SALT LAKE CITY UT 84133

Dated this 3 day of August, 2006.


Deputy Court Clerk

ADDENDUM “N”

(R-131-133)

Ruling, June 21, 2005

IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH

Larry J Coet Chevrolet,
Pontiac, Buick, Inc.
Plaintiff,

vs.

Danny R. Labrum, et al.,
Defendant.

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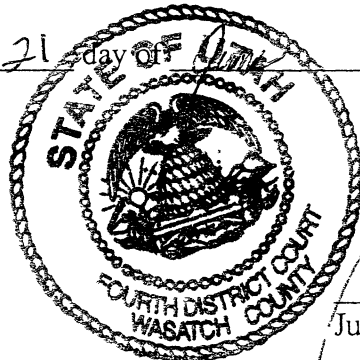
RULING

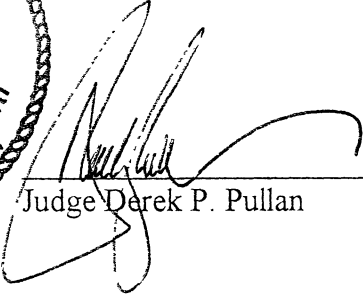
Case No. 030500537

This matter comes before the Court on Plaintiff Larry J. Coet Chevrolet, Pontiac, Buick, Inc.'s Motion for Rule 16 (b) Management Conference.

It appears that the Accounting Team was unable to resolve all accounting issues. Paragraph 3 of the Stipulated Case Management Order now in effect contemplated these circumstances and imposed a longer period of fact discovery in the event of continuing accounting disputes. At this juncture, the Court does not perceive any reason why this extended schedule has been rendered unworkable. Still, other issues appear to be in dispute, and the parties believe that a scheduling conference will be helpful. Therefore, Plaintiff Coet's motion for scheduling conference is granted.

Dated this 21 day of June, 2005.





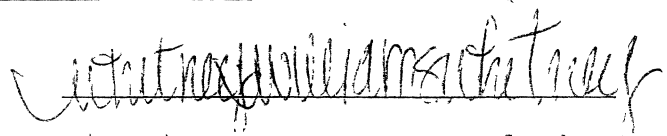
Judge Derek P. Pullan

4TH DISTRICT COURT - HEBER COURT
WASATCH COUNTY, STATE OF UTAH

LARRY J COET CHEVROLET PONTIA, : NOTICE OF
Plaintiff, : SCHEDULING CONFERENCE
:
:
vs. : Case No: 030500537 CN
:
DANNY R LABRUM et al., : Judge: DEREK P PULLAN
Defendant. : Date: June 21, 2005

SCHEDULING CONFERENCE is scheduled
Date: 07/21/2005
Time: 09:00 a.m.
Location: COURTROOM 1
WASATCH COUNTY COURTHOUSE
1361 SOUTH HIGHWAY 40
HEBER, UT 84032
Before Judge: DEREK P PULLAN

Dated this 22nd day of June, 2005.


District Court Deputy Clerk

IF YOU NEED AN INTERPRETER, PLEASE NOTIFY THE COURT at
(435)654-4676 (five days before your hearing, if possible). In all
criminal cases and in some other proceedings, the court will
arrange for the interpreter and will pay the interpreter's fees.
You must use an interpreter from the list provided by the court.

In compliance with the Americans with Disabilities Act, individuals
needing special accommodations (including auxiliary communicative
aids and services) during this proceeding should call WASATCH
COUNTY 4TH DISTRICT at (435)654-4676 at least three working days
prior to the proceeding.

Case No: 030500537
Date: Jun 21, 2005

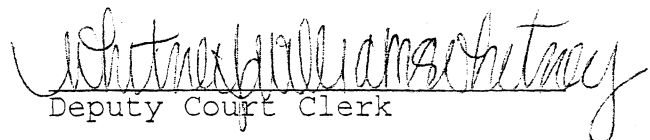
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030500537 by the method and on the date specified.

METHOD NAME

Mail	KEITH A CALL ATTORNEY DEF 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY, UT 84145-5000
Mail	CHRISTIAN W CLINGER ATTORNEY PLA 3760 S HIGHLAND DR STE 415 SALT LAKE CITY UT 84106
Mail	JOHN E GATES ATTORNEY DEF 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145
Mail	GARY R HOWE ATTORNEY PLA 10 E S TEMPLE #900 GATEWAY TOWER E SALT LAKE CITY UT 84133

Dated this 22nd day of June, 2005.


Deputy Court Clerk

ADDENDUM “O”

Utah Code Ann. §15-1-1

Westlaw.

UT ST § 15-1-1

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West's Utah Code Annotated Currentness

Title 15. Contracts and Obligations in General

Chapter 1. Interest

→ § 15-1-1. Interest rates--Contracted rate--Legal rate

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Laws 1907, c. 46, § 1; Laws 1935, c. 42, § 1; Laws 1981, c. 73, § 1; Laws 1985, c. 159, § 6; Laws 1989, c. 79, § 1.

Codifications C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, § 44-0-1; C. 1943, § 44-0-1.

CROSS REFERENCES

Consumer Credit Code, see § 70C-1-101 et seq.

Negotiable instruments, interest, see § 70A-3-112.

Statutes of limitation, effect of interest payment, see § 78-12-44.

LAW REVIEW AND JOURNAL COMMENTARIES

Lee, *Trail Mountain Coal Co. v. Utah Division of State Lands & Forestry: Can States Retroactively Alter Their Own Contractual Obligations?*, 1997 B.Y.U. L. Rev. 943 (1997).

LIBRARY REFERENCES

Interest ↪ 31, 32.

Westlaw Key Number Searches: 219k31; 219k32.

C.J.S. Interest and Usury; Consumer Credit §§ 37, 38.

NOTES OF DECISIONS

ADDENDUM “P”

Utah Code Ann. §15-1-4

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West's Utah Code Annotated Currentness

Title 15. Contracts and Obligations in General

Chapter 1. Interest

→ Interest on Judgments

(1) As used in this section, "federal postjudgment interest rate" means the interest rate established for the federal court system under 28 U.S.C. Sec. 1961, as amended.

(2)(a) Except as provided in Subsection (2)(b), a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties, which shall be specified in the judgment.

(b) A judgment rendered on a deferred deposit loan subject to Title 7, Chapter 23, Check Cashing Registration Act, shall bear interest at the rate imposed under Subsection (3) on an amount not exceeding the sum of:

(i) the total or the principal balance of the deferred deposit loan;

(ii) interest at the rate imposed by the deferred deposit loan agreement for a period not exceeding 12 weeks as provided in Subsection 7-23-105(4);

(iii) costs

(iv) attorney fees, and

(v) other amounts allowed by law and ordered by the court.

(3)(a) Except as otherwise provided by law, other civil and criminal judgments of the district court and justice court shall bear interest at the federal postjudgment interest rate as of January 1 of each year, plus 2%

(b) The postjudgment interest rate in effect at the time of the judgment shall remain the interest rate for the duration of the judgment.

(c) The interest on criminal judgments shall be calculated on the total amount of the judgment.

(d) Interest paid on state revenue shall be deposited in accordance with Section 63A-8-301.

(e) Interest paid on revenue to a county or municipality shall be paid to the general fund of the county or municipality.