

2000

Joseph R. Boud, Trustee of the Diane Mansell  
Boud Revocable Trust, v. SDNCO, inc. dba  
Wasatch Marine, and KCS International Inc., dba  
Cruisers Yachts : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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**JOSEPH R. BOUD**, Trustee of the  
Diane Mansell Boud Revocable Trust,

Plaintiff/Appellant,

v

**SDNCO, INC.**, dba **WASATCH  
MARINE**; and **KCS  
INTERNATIONAL  
INC.**, dba **CRUISERS YACHTS**,

Defendants/Appellee.

Case No. 20001020-SC

Priority No. 15

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**BRIEF OF APPELLEES**

---

Appeal from a Judgment of the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, Presiding

---

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**International, Inc.**

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## **JURISDICTIONAL STATEMENT**

Jurisdiction is conferred by Utah Code Ann. § 78-2-2(3)(j) (1996), which gives this Court jurisdiction over appeals from the district court in most non-domestic civil proceedings.

## **ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW**

Defendant/Appellee, Cruisers Yachts Division of KCS International Inc. (hereinafter “KCS”), contends the following issues are presented in Plaintiff/Appellant’s brief and by the trial court’s ruling.

- I. Did the trial court properly determine that reasonable minds could not differ on the facts which, as a matter of law, supported summary judgment?
- II. Did the trial court properly conclude that a photograph and statements in KCS’s sales brochure, that the boat purchased by Plaintiff “offer[ed] the best performance and cruising accommodations in its class” and had “superb handling,” did not create an express warranty?
  - A. Was the trial court correct in concluding that the photograph and statements were not specific and amounted to mere sales talk?
  - B. Were the photograph and statements in the sales brochure too vague to form the basis of the bargain as required by the UCC?
  - C. Did subsequent language in the brochure which referred to KCS’s limited warranty disclaim all other warranties from the sales brochure?
  - D. Did Plaintiff waive any right to claim creation of an express warranty when he waived his demand to test drive the yacht and/or when he signed the sales contract?



III. Was the trial court correct in concluding that, as Plaintiff conceded, the UCC and the Utah Consumer Sales Practices Act (“UCSPA”) should be read together and, since the plaintiff could not make out a claim under the UCC, his claim under the UCSPA and claim of negligent misrepresentation must also fail?

Standard of Review. The same standard of review applies to all of the issues presented. This case was decided when the trial court treated KCS’s Rule 12(b)(6) motion to dismiss as a motion for summary judgment. In reviewing the trial court’s grant of summary judgment, the appellate court views the facts in the light most favorable to the nonmoving party and reviews the trial court’s conclusions for correctness, giving no deference to the conclusions of the trial court. *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989). However, the appellate court may affirm the trial court’s grant of summary judgment on any ground available to the trial court, even if the trial court did not rely on the ground in reaching its conclusions. *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993).

These issues were preserved for review in Defendant’s Memorandum in Support of Its Motion to Dismiss (R. 336-45), Defendant’s Reply Memorandum (R. 403-18) and at the hearing on Defendant’s motion (R. 466, pp. 3-22).

#### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

Utah Code Ann. § 70A-2-313 (1997) and Utah Code Ann. § 13-11-4 & -5 (1999) are set out in Addendum A.

## STATEMENT OF THE CASE

This case arose from the purchase of a yacht, valued at more than \$150,000, by Plaintiff Joseph Boud. The yacht had been manufactured by Defendant KCS and Boud purchased it from Defendant Wasatch Marine. (R. 274, ¶ 11)

Plaintiff filed his Second Amended Complaint in this matter, which added KCS as a defendant, on April 24, 2000. (R.271) In that complaint, Plaintiff alleged, *inter alia*, that a photograph of a boat cruising at high speed and language below the photograph which stated that the yacht Boud sought to purchase “offer[ed] the best performance and cruising accommodations in its class” and had “superb handling” contained in a sales brochure distributed by Defendant KCS constituted an express warranty. (R. 275-6, ¶ 19; R.294-5, ¶¶ 115, 121) Plaintiff claimed that the photograph and the statements were an express warranty under Utah Code Ann. § 70A-2-313 (the UCC)(*Id.*) and Utah Code Ann. § 13-11-4 (the Utah Consumer Sales Practices Act or “UCSPA”) (R. 293, ¶ 109). Plaintiff claimed KCS beached the express warranty in the brochure. (R.295, ¶ 122) In addition, Boud alleged that, by making the statements in the brochure, KCS had negligently misrepresented its product. (R. 300, ¶ 143)

KCS filed a motion under Rule 12(b)(6) of the Utah Rules of Civil Procedure to dismiss that portion of Plaintiff’s complaint which involved KCS. (R. 334) KCS argued that the representations and photograph contained in the sales complaint were mere sales talk or “puffing”. In other words, KCS asserted the representations were too general or vague to form an express warranty under Utah Code Ann. § 70A-2-313. (R. 338-9). KCS argued that

because the allegations concerning the UCSPA and the negligent misrepresentation were based on the same parts of the brochure as Plaintiff's UCC claim, if the UCC claim failed due to the nonspecificity of the brochure then Plaintiff's other claims must also fail. (R. 339-44) In addition, KCS argued that the language in the brochure could not have formed the basis of the bargain as required by § 2-313; that subsequent language in the sales brochure disclaimed all warranties but KCS's limited warranty; and that Plaintiff's actions in failing to test drive the yacht and/or signing the sales contract waived any right to claim creation of an express warranty. (R. 342 fn 5; R.343; 404 fn 1)

The trial court held a hearing on the motion on September 11, 2000, and, because the court examined the entire brochure, converted KCS's motion into a motion for summary judgment. (R. 466, p. 3) At the conclusion of the hearing the trial court granted KCS's motion for summary judgment and issued written findings and conclusions. (R. 445-9; Addendum B) The trial court found that the brochure did contain the language asserted by Plaintiff and that Plaintiff read that portion of the brochure before purchasing the boat. (R. 446) The court concluded, as Plaintiff conceded at the hearing, that all of the Plaintiff's claims "hinge upon the existence of an express warranty allegedly created by the . . . sales brochure." (R. 446-7) The court concluded that the referenced portion of the sales brochure was "merely sales talk" and lack sufficient specificity to form an express warranty and to be material to Plaintiff's purchase. (R. 447)

The Plaintiff orally moved to have the trial court's order certified as final and appealable pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. (R. 446, p. 22) KCS

acquiesced in the motion, which the trial court granted. (R. 446-48). This appeal followed.

### **FACTS**

Plaintiff, Joseph Boud, had been a prior customer of defendant Wasatch Marine and, in December of 1998, was shopping for a yacht. (R. 273) Sales personnel at Wasatch Marine told Mr. Boud of the manufacturer's limited warranty and provided Boud with a sales brochure which showed the 1999 KCS model line. (R. 275-6) On page 30 of that brochure appears a photograph of a boat which interested Boud, the Model 3375 Esprit. The photograph shows the yacht moving through the water at an unspecified speed. Below the photograph, the brochure stated, "Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern-drive or inboard power, superb handling and sleeping accommodations for six." The back cover of the brochure stated: "A free copy of the Cruisers Yachts limited warranty is available from your dealer or from Cruisers Yachts Division of KCS International, Inc." (Appendix "C" to Appellant's Brief) The trial court found that Mr. Boud had read the brochure before he agreed to buy the boat from Wasatch Marine. (R. 446) Obviously, KCS played no other role in the sale of the boat to Boud; everything concerning the sale was handled by personnel of Wasatch Marine.<sup>1</sup>

On December 23, 1998, Boud agreed to purchase a 1999 Cruisers Yacht model 3375 Esprit from Wasatch Marine for approximately \$155,000. (R. 275-76) Since the yacht was

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<sup>1</sup>Because this appeal involves only Plaintiff's allegations concerning the sales brochure, the plethora of other facts which led to the sale are not included here.

not to be delivered by Wasatch Marine until May 1, 1999 and to avoid a potential price increase scheduled for mid-January, Plaintiff gave Wasatch Marine a \$15,000 deposit. (R. 276-77) Plaintiff Boud conditioned his purchase of the yacht on his own testing of the delivered yacht. (Boud Affidavit, R. 66, ¶ 19).<sup>2</sup> When the yacht arrived, Boud apparently waived his prior testing condition by making payment in full before taking delivery of the yacht. (R. 278)

Plaintiff finally tested the boat on Utah Lake on May 20, 1999. (R. 279) During the test, Plaintiff found one problem concerning the lifting mechanism for raising the yacht's engines. (R. 279) No other malfunctions or performance deficiencies were reported by Plaintiff after this test drive. Wasatch Marine agreed to immediately repair the problem with the lifting mechanism. (R. 279) Following the first test cruise on Utah Lake on May 20, 1999, Mr. Boud signed a "Motor Vehicle Contract of Sale" (R. 47-48) which completed his purchase of the boat.<sup>3</sup> (R. 67 ¶ 28 and R. 280-1 ¶ 52; Addendum C). That contract provided that the referenced warranty (R. 50; Addendum D) was Mr. Boud's exclusive remedy:

No warranties, express or implied, are made or will be deemed to have been made by either seller or the manufacturer . . . excepting only the current printed warranty . . . which warranty is incorporated herein and made a part hereof . . . [and] such warranty shall be expressly in lieu of any other warranty, express or implied . . . and the remedies set forth in such warranty will be the only remedies available . . .

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<sup>2</sup> Boud submitted an affidavit setting forth his version of the facts in response to an earlier motion brought by the dealer.

<sup>3</sup> The Motor Vehicle Contract of Sale will be referred to as the "Sales Contract" and the Second Amended Complaint will be referred to as the "Complaint."

(R. 48)

After completing repairs Wasatch Marine delivered the yacht to Lake Powell, as requested by Mr. Boud, on about May 27, 1999. The Bouds next drove the yacht a few days later. Mr. Boud later complained that during the outings at Lake Powell the yacht experienced several other problems. These problems included failure of the engines' gears to mesh smoothly, overheating of the yacht's engines, and failure of the system alarm. (R. 282) Wasatch Marine dispatched mechanics who fixed the overheating problem, however, the difficulty with the gears was not fixed. (R. 283)

During cruises on June 11 and 12, 1999, Boud claimed the yacht experienced other problems, including continued problems with the gears and the system alarm, intermittent difficulties with the air conditioning system, intermittent malfunctioning of the carbon monoxide detector, generator malfunction, and some cosmetic problems with the dashboard and a door. (R. 283-84) Following repair efforts by the mechanics of Wasatch Marine at Lake Powell, Wasatch Marine returned the yacht to Salt Lake City for repairs. (R. 284-85).

Throughout the proceedings below, aside from the reparable problems with the yacht, Plaintiff's primary complaint about the "performance" of the yacht has been that the boat will not plane at a speed of 20 miles per hour with a full load and thus, it is not able to tow younger water skiers at this speed. (R. 69, 283) Wasatch Marine personnel apparently stated that the yacht would plane at 20 miles per hour. (R. 274) In fact, the boat did plane at that speed during the test drive at Utah Lake. (R. 279) Nothing in the sales brochure provided by KCS made any statements regarding planing speeds. Plaintiff has not complained about the

“performance” of the yacht at higher speeds.

Shortly after the return of the yacht to Wasatch Marine Plaintiff rejected the yacht, alternatively revoking acceptance of the yacht. (R. 286-88). Plaintiff subsequently filed suit when Wasatch Marine refused to void the purchase agreement of the yacht. (R. 287).

### **SUMMARY OF THE ARGUMENT**

Defendant KCS first argues that the trial court properly decided this case. Trial courts in Utah have long been vested with the authority to assess facts and determine if summary judgment is appropriate. Here, the court correctly determined that reasonable minds could not differ on the conclusion, drawn from the evidence, that language and a photograph in the KCS sales brochure was mere sales talk and not an express warranty.

Defendant KCS contends that the trial court correctly concluded that language and a photograph in the KCS sales brochure was not specific enough to create an express warranty. The photograph showed a Model 3375 Esprit yacht moving across the water at an undetermined speed. Language below the photograph stated that the boat “offer[ed] the best performance and cruising accommodations in its class” and had “superb handling.” The Utah Supreme Court has stated that promotional materials may create an express warranty under certain circumstances. Specifically, “[i]f it is reasonable to conclude that a reasonable person would have ventured into the transaction on the basis of a particular statement,’ an express warranty is made.” *State v. GAF Corp.*, 760 P.2d 310, 315 (Utah 1988)(citations omitted). To determine reasonableness *GAF* states that the court should “consider such factors, among others, as ‘(1) the ability of the buyer to see and understand for himself, (2)

the vagueness of the statement, and (3) the incredibility of the statement.” *Id.* at 315.

Application of that test here supports the trial court’s conclusion.

Boud was told of the manufacturer's limited warranty, but as an experienced boat buyer, Boud insisted on a test of the boat before completing his purchase. He later abandoned that demand, but his experience gave him the ability to evaluate the brochure language in its proper context.

The trial court correctly ruled that the brochure language was not specific enough to create an express warranty. Cases from Utah and other jurisdictions show that sales language must be sufficiently specific and susceptible of exact knowledge to create an express warranty. The language of the sales brochure is like language which courts have routinely held is mere sales talk or puffery and is unlike language which courts have held creates an express warranty.

The statements made in the KCS sales brochure were so general that a reasonable person with Plaintiff Boud’s boat buying experience would have recognized them as sales talk.

Defendant KCS also argues that several grounds not relied on by the trial court in reaching its decision also support that decision and form alternative bases for affirming the decision. Because the language of KCS’s sales brochure was so general a number of interpretations are possible. Due to the wide variety of potential interpretations, there is simply no possibility that the language could be part of the basis of the bargain as required by Utah Code Ann. § 70A-2-313 (1997).



Additionally, the sales brochure, given to and quoted by Boud, contains a clear statement that all boats are covered by a limited warranty available from the dealer or KCS. This mention and offer of the limited warranty is sufficient to disclaim any express warranty allegedly created by the non-specific commendations in the brochure.

Even assuming an express warranty was created by the brochure's non-specific laudatory language, two separate grounds exist for the court to hold that Mr. Boud's own actions waived or disclaimed any such warranty. First, because Boud initially insisted on a test cruise before paying for and accepting the boat, he waived any express warranty since he clearly wanted to be the judge of whether it exhibited "superb handling" or "offer[ed] the best performance and cruising accommodations in its class." Second, by signing the Sales Contract which expressly provides the limited warranty is the exclusive remedy, Mr. Boud forfeited any claim to an express warranty.

Finally, the trial court ruled, and Boud has conceded, that "Plaintiff's several claims against Defendant [KCS] all hinge upon the existence of an express warranty allegedly created by the referenced portion of the sales brochure." (R. 446-47) Since no express warranty existed, Boud's UCPSA and negligent misrepresentation claims must also fail.

### **ARGUMENT**

POINT I. THE TRIAL COURT PROPERLY DETERMINED THAT REASONABLE MINDS COULD NOT DIFFER ON THE FACTS AND THAT SUMMARY JUDGMENT WAS APPROPRIATE.

Boud initially argues that the trial court should have left the decision as to whether the brochure language created an express warranty to a jury. Boud correctly points out that the

Utah Supreme Court recently held that a "reasonable person" standard is used to determine whether an express warranty has been made. *Rawson v. Conover*, 2001 UT 24 ¶ 55, 20 P3d 876. But, Boud argues that a trial judge's "specialized knowledge of the law" disqualifies him or her from applying that standard.

Contrary to Boud's claim, Utah trial courts have long been vested with the power to assess facts and determine if summary judgment is appropriate. For example, in *Olympus Hills Shopping Center v. Smith's Food and Drug Centers*, 889 P.2d 445, 450 (Utah Ct. App. 1994), the court of appeals recited the trial court's duty to assess facts:

A trial court may properly grant a motion for summary judgment or directed verdict only when reasonable minds could not differ on the facts to be determined from the evidence presented. [citations omitted] The trial court must assess those facts in the light most favorable to the party opposing the motions and must conclude, as a matter of law, that they do not support the claim presented.

In *AMS Salt Industries, Inc., v. Magnesium Corp.*, 942 P.2d 315, 321 (Utah 1997) the supreme court observed "legal duties are often found to exist in the context of contractual . . . relationships." The court also noted that "the question of whether a duty exists is a question of law" and pointed out that:

[T]o determine whether a duty exists, a court may have to evaluate relevant facts and available evidence. However, in doing so the court does not necessarily take upon itself the role of fact finder. . . . [G]eneral fact questions and applications of legal standards to specific facts are the types of questions to be decided by a jury, but only 'if reasonable persons could differ about them on the evidence.' Thus, where there could be no reasonable difference of opinion on these questions in light of the available evidence, 'the decision is one of law for the trial

judge or for an appellate court.'

*AMS*, 942 P.2d at 319-20 (citations omitted). Therefore, if "the trial court determines . . . that reasonable minds could not differ as to the conclusion to draw from the evidence . . . then the trial court should rule on the issue as a matter of law." *AMS*, 942 P.2d at 320.

Plaintiff's self-serving declaration that reasonable minds could differ on the interpretation of the facts in this case does not make it so. The trial court properly addressed, as a matter of law, the sufficiency of the brochure language and photograph and concluded that reasonable minds could not differ that they was mere sales talk, not an express warranty.

**POINT II. NO EXPRESS WARRANTY WAS CREATED BY THE LANGUAGE OR PHOTOGRAPH CONTAINED IN THE SALES BROCHURE.**

The district court correctly concluded that KCS did not create an express warranty because the photograph and brochure's language were not specific enough to do so. (R. 466 at p. 21). Under Utah law an express warranty may created in any one of three ways:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Utah Code Ann. § 70A-2-313(1) (1997) (Addendum A). Language of a sales brochure can create an express warranty under subsections (a) or (b), under certain circumstances. *State v. GAF Corp.*, 760 P.2d 310, 315 (1988). Although not addressed in *GAF*, the "sales talk" exception in 2-313(2) is at issue here. Judge Frederick correctly concluded that no express

warranty was created by the language or photograph in the KCS sales brochure. Additionally, Judge Frederick's decision did not address the alternative issues<sup>4</sup> raised by KCS below, including the disclaimer created by the brochure's mention of a limited warranty (R. 342 at fn 5) or Mr. Boud's conduct which waived any other warranties, including his signing the Sales Contract that disclaims any express warranties. (R. 404 at fn 1) Each of these reasons also supports the conclusion that no express warranty was created by the sales brochure here. For any or all of these reasons, each of which is addressed below, KCS contends that the judgment of the trial court should be upheld.

A. The trial court correctly concluded that the language and photograph in the sales brochure are mere sales talk and are not specific enough to create an express warranty.

Judge Frederick correctly concluded that the language in the manufacturer's brochure which stated the yacht had the “best performance and cruising accommodations in its class” and “superb handling” lacked the requisite specificity to form an express warranty. For over a century, Utah has clearly recognized that a salesman may give general praise to his own wares “for the purpose of enhancing them in the buyer’s estimation . . .” *Hirschberg Optical Co. v. Dalton, Nye & Cannon Co.*, 27 P. 83, 83 (Utah 1891). The practice, known as “puffing” or “sales talk” is permissible provided “it is kept within reasonable bounds . . .” *Id.*; *Park v. Moorman Mfg. Co.*, 241 P.2d 914, 917 (Utah 1952).

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<sup>4</sup> The appellate court “may affirm the judgment on any ground, even one not relied upon by the trial court.” *White v. Deseelhorst*, 879 P.2d 1371, 1376 (Utah 1994). “However, any rationale for affirming a decision must find support in the record.” *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992). The issues not specifically addressed by Judge Frederick provide additional grounds for this Court to affirm the trial court's summary judgment.

While the court does not address what constitutes “sales talk” or “puffery”, in *GAF*, 760 P.2d at 315, the court stated that for promotional materials to create an express warranty under § 2-313(a) (affirmation of fact or promise) or § 2-313(b) (description of goods), the materials “must be judged objectively against the meaning a reasonable person would have taken from the statement.” The court stated that “[i]f it is reasonable to conclude that a reasonable person would have ventured into the transaction on the basis of a particular statement,’ an express warranty was made.” *GAF*, 760 P.2d at 315, *quoting* 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed. 1983). The court delineated a three-part test to determine reasonableness: “In determining reasonableness, a court should consider such factors, among others, as ‘(1) the ability of the buyer to see and understand for himself, (2) the vagueness of the statement, and (3) the incredibility of the statement.’” *GAF*, 760 P.2d at 315, *citations omitted*. When these three factors are evaluated in this case the conclusion must be reached that the trial court was correct that no express warranty was created by the sales brochure. Boud makes no attempt to fully apply the *GAF* factors. Instead, the appellant's brief is a confusing attempt to obfuscate the simple issue the district court decided.

*1. Plaintiff Boud had ample “ability to see and understand for himself” the meaning of the brochure language.*

The first factor in the *GAF* test asks whether the buyer had “the ability to see and understand for himself.” 760 P.2d at 315. In this case, Plaintiff Boud had the ability to see and understand for himself. In addition to being an experienced buyer of multiple boats,

Boud had previously been a customer of Wasatch Marine. (R. 64, 273) In fact, Boud's experience level was such that he insisted on test driving the boat in this case before consummating the purchase. (R. 66, 276) The fact that he subsequently abandoned this condition can not be held against Defendant KCS, since Boud makes no such claim. Boud clearly knew the world of boat purchases and had the experience and ability to evaluate the statements in the sales brochure for himself.

*2. The trial court correctly ruled that the language and photograph of the sales brochure were too vague to form an express warranty.*

The second *GAF* factor evaluates the "vagueness of the statement." 760 P.2d at 315. Plaintiff Boud urges that such language is specific, but fails to cite any case law where guidelines are given to determine such specificity. In fact, examination of the relevant cases supports the trial court's conclusion that the language of the brochure was not specific enough to create an express warranty. Few Utah case have addressed "sales talk" in the creation of an express warranty but those that have, as well as cases from other jurisdictions, demonstrate that a much higher degree of specificity is required than was present in KCS's sales brochure to create an express warranty.

In *Hirschberg Optical*, the territorial court first recognized the existence of "sales talk" when it reversed the trial court's judgment against an optical supplier. *Hirschberg Optical v. Dalton, Nye & Cannon Co.*, 27 P. 83 (Utah 1891). The court observed:

'The general praise of his own wares by a seller, commonly called "puffing," for the purpose of enhancing them in the buyer's estimation, has always been allowed, provided that it is kept within reasonable bounds; that is, provided the praise is

general, and the language is not a positive affirmation of a specific fact affecting the quality, so as to be an express warranty, and is not the intentional assertion of a specific and material fact known to the party to be false, so as to be a fraudulent representation.’

27 P. at 83.

The sales talk exception provision of former Utah Code § 81-1-12 (1943) was cited in *Park v. Moorman Mfg. Co.*, 241 P.2d 914 (Utah 1952), where the court reviewed, in part, statements by a feed company salesman to the plaintiff. The court held that the salesman’s statements that a certain brand of feed and self-feeding system “was equal or superior to any feeding method then in use,” “that great time and effort would be saved under the self-feeding plan” and “would be less expensive than the plan then being used by [plaintiff]” “were a matter of puffing or sales talk and not statements of ‘fact’ or ‘promise’ as contemplated by section 81-1-12.” 241 P.2d at 916-17. However, the court did hold that the salesman’s statement that “a minimum egg yield of 65%” could be expected using a particular type of feed was held to be an express warranty. *Id.* at 917-18.

More recently in *State v. GAF* the Utah Supreme Court held that a claim sufficient to survive a motion for summary judgment was made out because a manufacturer’s promotional literature may have created an express warranty. The literature stated that a certain type of shingle roof was “a 25-year roof” and that the shingle was a “top-of-the-line, high quality, self-sealing shingle with a product life of at least 25 years.” 760 P.2d at 312-13.

In both *Park* and *GAF*, specific claims were made—in *Park* that at least 65% egg production could be expected and in *GAF* that the product was self sealing and would last

at least 25 years. These specific claims about the products in those cases created express warranties. When the claims are more general or vague, no such warranty is created.

Such was the result in *Moore v. Sanchez*, 313 P.2d 461, 464 (Utah 1957), where the plaintiff's salesmen made "various laudatory representations about the excellence of the stock, and what a bargain it was at the price offered." In holding that these statements were nothing more than "puffing" the court stated:

It is hardly to be expected that they would give the defendants the benefit of a wholly unbiased and critical appraisal of their wares. Such is not wont of those who have something to sell, a fact well known since the memory of man runneth not to the contrary, and which gives rise to one of the best known maxims of the law: "caveat emptor," which is applicable here. Moreover, . . . the extolling of the virtues of their products does not go beyond what is reasonably expected in such transactions and is properly classified as sales "puffing" and not as warranties of quality.

*Moore*, 313 P.2d at 464.

These cases, with *Hirschberg Optical*, demonstrate that the Utah courts have consistently required that sales language must be sufficiently specific and capable of precise interpretation to create an express warranty. The imprecise brochure language here is sales talk containing obviously general comparisons and/or commendations of KCS's product.<sup>5</sup> It is impossible to see how the language "best performance and cruising accommodations in its class" and "superb handling" is sufficiently specific to create an express warranty. In comparison to *Park* and *GAF*, where specific figures and claims about the products were

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<sup>5</sup> As noted in the Facts, above, Mr. Boud, in his Memorandum Opposing the Motion to Dismiss filed below, included the claim that the dealer warranted the boat would plane at 20 mph, which it did at the Utah Lake test cruise. In his brief, Boud does not mention this issue.



made, no such specific claims were made in the KCS sales brochure. Rather, the language in the brochure are the “various laudatory representations” which the *Moore* court characterized as “puffing.” Opinions from other states confirm this conclusion.

This theme of specificity required to create an express warranty is also found in cases from other jurisdictions, some cited by Boud. The Missouri Court of Appeals has stated that “Representations of fact capable of determination are warranties, but mere expressions of opinion, belief, judgment or estimate by a dealer in sales talk are not.” *Interco, Inc., v. Randustrial Corp.*, 533 S.W.2d 257, 263 (Mo. Ct. App. 1976) (citation omitted). The Tenth Circuit has stated “the more specific the statement, the more likely it constitutes a warranty.” *Downie v. Abex Corp.*, 741 F.2d 1235, 1240 (10th Cir. 1984) (citation omitted). The Washington Supreme Court stated that “more general statements such as . . . a Honda bike is a good one for children are seller's opinion or commendation rather than affirmations of fact.” *Federal Signal v. Safety Factors*, 886 P.2d 172, 179 (Wash. 1994) (citation omitted).

Cases not cited by Boud provide even more illumination on the requirement of specificity. As the Utah Supreme Court relied on a Texas case in *GAF*, 760 P.2d at 315, Texas cases may also be helpful here. In *Autohaus, Inc. v. Aguilar*, 794 SW.2d 459 (Tex. Ct. App. 1990), the plaintiff purchased a Mercedes Benz after a salesman told him that it was “the best engineered car in the world” and that it was “a far superior product” to what the plaintiff had in the past. 794 S.W.2d at 460-61. Reviewing the trial court’s finding that such statements constituted an express warranty, the Texas appeals court considered at length the defense of sales talk/puffing. With citations to other cases, the court listed various aspects

of this defense that are applicable here.

First, “One consideration in determining whether a statement is puffing or opinion is the specificity of the statement. Imprecise or vague representations constitute mere opinions.” *Id.* at 462. Second, while another factor is “the levels of the knowledge of the buyer and seller,” *Id.* at 463, the court noted that “the initial determination must be whether the statement made is specific enough to be an actionable misrepresentation.” *Id.* at 464. Third, “a general statement concerning a future event should be looked at differently than a statement concerning a past or present event or condition, especially when examining the specificity of a statement involving the future performance of a car.” *Id.* at 464. Finally, the Texas court noted that “statements that compare one product to another and claim superiority are not actionable misrepresentations.” *Id.* Applying these principles to the salesman’s statements, the appellate court held the statements did not constitute an express warranty and reversed the trial court’s judgment. *Id.* at 465.

In *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F.Supp 1194, 1200-01 (S.D. W.Va. 1986), *aff’d without opinion*, 813 F.2d 1228 (4th Cir. 1987), the plaintiff sued, among others, the manufacturer of siding materials, claiming in part that the manufacturer’s advertising pamphlet created an express warranty by the statement that the material was “specifically formulated” “to provide durability and weatherability.” *Id.* The trial court granted the manufacturer’s motion for judgment on the pleadings, holding that “the statement relates to the value of the product and falls short of the factual affirmation or description which forms the basis of the bargain.” *Id.*

One of the most succinct explanations of the difference between sales talk and language that create warranties was offered by the Kansas Supreme Court in *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281, 290 (Kan. 1974):

[R]epresentations of fact capable of determination are warranties, but mere expressions of opinion, belief, judgment or estimate by a dealer in sales talk are not. Where opinions are coupled with representations of fact which relate to such matters and are susceptible of exact knowledge, they constitute more than a mere opinion and are properly regarded as representations of fact, and, to the extent that they are representations of fact, they constitute warranties.

This definition was referred to in *Chase Resorts, Inc. v. Johns-Manville Corp.*, 476 F.Supp 633 (E.D. Mo. 1979), where the plaintiff claimed, in part, that the defendant's catalog created an express warranty. It described the golf course sprinkler equipment sold to plaintiff as "water and lightning protected" and that it "would provide years of trouble free service." When the system was rendered inoperable by lightning, plaintiff was not satisfied with the manufacturer's limited warranty and sued. Citing *Young & Cooper*, the court granted the defendant summary judgment, observing, "How many years of trouble free performance and what constitutes trouble free performance are at least two questions relating to these opinions which are not susceptible of exact knowledge and are not properly regarded as representations of fact." *Id.* at 638.

The common theme in all of these cases is that general or vague statements which merely are "various laudatory representations" of the product are not sufficient to create an express warranty. If anything, the representation in the KCS sales brochure that the 3375

Esprit “offer[ed] outstanding performance” and “superb handling” are less specific than the claims made in *Autohaus, Inc.* (“the best engineered car in the world” and “a far superior product”), *Roxalana Hills, Ltd.* (product was “specifically formulated . . .to provide durability and weatherability”), and *Chase Resort Inc.* (sprinkler equipment was “water and lightning protected” and “would provide years of trouble free service”). Arguably the statements in *Roxalana Hills, Ltd.* and *Chase Resorts Inc.* are far more specific in that they indicate certain quantifiable characteristics about the products in those cases. Yet, in all three cases the courts held that the statements in question did not create express warranties. If those more specific statements were insufficient to create express warranties, then plainly the general statements in the KCS brochure were not enough to create an express warranty here.

Boud cites the Utah Territorial Supreme Court’s opinion in *Hirschberg Optical Co. v. Dalton, Nye & Cannon Co.* for the proposition that sales opinion must be labeled as such. That is simply not the law. As one authority explains:

[T]here should be no magic because the prefatory words “In my opinion . . .” are or are not used if the circumstances indicated clearly that a real statement of opinion or fact has, or has not, been made. There are some statements, for example, that are by their nature so dependent on personal opinion that no reasonable person would regard them as statements of fact even though asserted positively. Such statements do not become express warranties.

1 William D. Hawkland, *Uniform Commercial Code Series*, § 2-313:3 at 2-544 (1998). In short, labeling a statement as an opinion neither adds to nor subtracts from the statement.

While Boud avoids addressing the factors identified by the court in *GAF* and used by the trial court to conclude that no express warranty was created here, his brief provides a

smattering of quotes from cases from around the country to create a patchwork of “factors” that have never been suggested or mentioned in any Utah case. These cases offer little guidance to this Court in determining whether the brochure language and photograph have the requisite specificity to create a specific warranty. None of these cases recite facts or state any law that, when applied to the facts here, would suggest a different outcome.

*3. The claims made in the sales brochure were incredible enough to require Boud to obtain verification.*

The third part of the *GAF* test for reasonableness examines the incredibility of the statements in the promotional materials. 760 P.2d at 315. The court provides no guidance on how this examination should be conducted. However, KCS contends that, given Boud’s level of expertise in the purchase of boats and the nature of the statements, a reasonable person similarly situated would recognize the statements as mere sales talk and seek to test the Boud himself before buying, as Boud initially insisted.

The broad representations which Boud claims is a warranty concern the quality of the boat. In commenting on the trustworthiness of such representations, one authority has stated:

The rule that the seller is bound by false representations as to the nature of the goods contained in advertising material which has become part of the inducement of the contract, is limited to representations of fact, and does not include mere statements of opinion as to the nature or quality of the property. It is especially important that this should be the rule as to representations of the quality of goods sold, for there is nothing on which people are more apt to differ, and nothing on which they are less apt to trust each other.

3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:114 at 86 (3d ed. 1995) (citations omitted). A reasonable person obviously would have taken the brochure's

statements in the same vein as most other general statements of product quality—with a grain of salt.

The trial court was correct in concluding that the language and photograph in the sales brochure were not specific enough to create an express warranty. While the trial court did not specifically refer to the framework provided by the court in *GAF* to conduct its analysis, that framework was what the trial court in essence used. The detailed analysis set out above demonstrated the soundness of the trial court’s conclusion.

B. The brochure language is not part of the Plaintiff’s bargain.

UCC Section 2-313 also requires that for statements made by the seller to become an express warranty, those statements must become part of the basis of the bargain. The trial court did not rely on this factor to reach its decision but this does provide an alternative grounds to affirm the trial court’s conclusion. The language of KCS’s sales brochure was so general that a myriad of interpretations are possible. Because of the wide variety of potential interpretations, there is simply no possibility that the language or photograph could be part of the basis of the bargain.

For example, with regard to the language the boat “offer[ed] the best performance in its class,” Mr. Boud has not attempted to define the class of boats (is it the size class, price class, equipment class, color class, accommodations class, or country of manufacture class?) referred to in the Esprit 3375 brochure, much less make any specific, detailed comparisons with other boats that could possibly be in such a class in an attempt to show this alleged

express warranty was breached.<sup>6</sup> The inability to do so suggests that Boud really does know this commendation is vague. Rather, Boud seems content to take advantage of this broad commendation language by attempting to parlay it into a global warranty that covers his discontent with everything from balky gears to misaligned doors to loose screws. Boud does not claim that these things are not also covered by the limited warranty—or that KCS has breached that limited warranty—he simply uses the express warranty claim as a cover for his buyer's remorse. Regarding the brochure's statement that the boat possessed "superb handling," Boud does not attempt to argue that the handling of this particular boat was bad since he does not complain of any handling problems at all.

C. The brochure's mention of a limited warranty disclaims an express warranty.

The forty page 1999 Cruisers Yachts sales brochure, given to and quoted by Boud, contains the following statement on the back cover: "A free copy of the Cruisers Yachts limited warranty is available from your dealer or from Cruisers Yachts Division of KCS International, Inc." This mention and offer of the limited warranty is sufficient to disclaim any express warranty allegedly created by the non-specific commendations in the brochure.

The UCC requirement that express warranties and disclaimers be "construed wherever reasonable as consistent with each other," Utah Code Ann. § 70A-2-316(1) (1997) plainly

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<sup>6</sup> Boud does argue that "future discovery *might* provide some additional, underlying information identifying on what basis these statements were made." (Appellant's Brief, p. 39, emphasis added). However, Boud submitted no Rule 56(f) affidavit, so this Court may not consider this argument. *Jackson v. Layton City*, 743 P.2d 1196, 1198 (Utah 1987). It is doubtful that such a request would have been granted, since even now Boud merely describes a "'fishing expedition' for purely speculative facts." *Cox v. Winters*, 678 P.2d 311, 314 (Utah 1984).

controls this issue. Mr. Boud seems to believe he need only remember the pictures and descriptions in the brochure, and can safely ignore other parts. Even if Boud misconstrues the law to require that those portions be read or pointed out to him, his argument still fails because Boud's complaint admits he was told about the limited warranty by the dealer even before he paid his initial deposit! (R. 275) It is abundantly clear that Mr. Boud had, from the very outset, information in his hand alerting him to the fact that the boat was covered by the manufacturer's limited warranty.

D. Boud waived or disclaimed any express warranty.

Even assuming an express warranty was created by the brochure's non-specific laudatory language, there are two separate grounds for the court to hold that Mr. Boud's own actions waived or disclaimed any such warranty.

First, because Boud insisted on a test cruise before paying for and accepting the boat, he waived any express warranty since he clearly wanted to be the judge of whether it exhibited "superb handling" or offered the "best performance and cruising accommodations in its class."

The Tenth Circuit, in *Cargill Inc. v. Stanford*, 553 F.2d 1222, 1225 (10<sup>th</sup> Cir. 1977) noted that the UCC contains an objective test of mutuality of assent as "manifested by the conduct of the parties." There is no mutuality of assent between the buyer and the manufacturer here, where the buyer had initially reserved the right to test the goods before accepting delivery. By so doing, Mr. Boud obviously did not consider the claimed express warranty effective since he preferred to make his own determination of the condition of the



boat before accepting it. (R. 66, 466) This condition is certainly reasonable, even expected, of any buyer paying a large sum of money for a large boat.

That Mr. Boud evidently changed his mind and paid for the boat in full before the test cruise, at the urging of the dealer, is certainly not KCS's doing, and Mr. Boud makes no claim that it is.

Second, by signing the Sales Contract immediately after the test drive, Mr. Boud forfeited any claim to an express warranty because the Sales Contract expressly provides the limited warranty is the exclusive remedy.<sup>7</sup> (Addenda C & D) Boud avoids detailed mention of the May 20, 1999 Sales Contract he signed, which conspicuously invalidates any prior express warranty. The supreme court enforced a similar provision contained in the sales document at issue in *Rawson v. Conover*, 2001 UT 24 ¶ 56, 58, 20 P.3d 876 ("terms that might otherwise be considered a basis of the bargain are not express warranties if the final written contract effectively disclaims and/or excludes any such warranties."). *See also* 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:290 at 177 (3d ed. 1995) ("A contract may exclude any express warranty not included in the contract. As the sales contract is based upon the agreement of the parties, there is no question as to the ability of the parties to agree that there should not be any express warranties.") This Court should,

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<sup>7</sup> The Sales Contract (Addendum C) provided, in part:

"No warranties, express or implied, are made or will be deemed to have been made by either seller or the manufacturer . . . excepting only the current printed warranty . . . which warranty is incorporated herein and made a part hereof . . . [and] such warranty shall be expressly in lieu of any other warranty, express or implied . . . and the remedies set forth in such warranty will be the only remedies available . . ."

alternatively, enforce its provisions here, despite Mr. Boud's attempts to claim the Sales Contract is not enforceable.

In his Complaint, Mr. Boud asserts there was no consideration for the Sales Contract, yet he also acknowledges that consideration did exist by admitting that the dealer advised him it would not undertake the warranted repairs until he signed. (R.. 67, ¶ 25; 280, ¶ 50).

Mr. Boud also alleges that he did not take the time to read the document (R. 281, ¶ 50)

However, the supreme court has acknowledged the general rule that:

[W]here a person signs a document, he is not permitted to show that he did not know its terms, and in the absence of fraud or mistake he will be bound by all its provisions, even though he has not read the agreement and does not know its contents.

*Semenov v. Hill*, 1999 UT 58 ¶ 12, 982 P.2d 578, 581, (quoting 17 C.J.S. Contracts §41(f) (1963)).

Mr. Boud also alleges he signed the sales agreement "under duress," yet his detailed affidavit and detailed Complaint do not specify any facts that would support such a conclusory assertion. *See, Gold Standard v. Getty Oil Co.*, 915 P.2d 1060, 1064-5 (Utah 1996) (mere fact that a contract is entered into under stress or pecuniary necessity is insufficient to constitute duress). In fact, at the hearing below this issue surfaced as follows:

THE COURT:	Well, he didn't take a test drive.
MR. ROGERS:	He did not until after he'd paid in full.
THE COURT:	Right.
MR. ROGERS:	For it.
THE COURT:	But my - - I don't have before me, do I, a dispute that he was prohibited before he paid for taking - -
MR. ROGERS:	Well, it wasn't even present. It had to be ordered from the factory.

THE COURT: Sure, but his option to pay - -  
MR. ROGERS: *If he wanted.*  
THE COURT: Wasn't coerced out of him.  
MR ROGERS: *If he wanted to buy it, if he wanted to lock in the price he needed to do it at the time with the deposit.*

(R. 466, p. 13-4)(emphasis added). Clearly, Mr. Boud's desire to buy the boat, at a good price, was his only motivating influence in paying for the boat and signing the agreement, not any sort of actionable duress. The only problem Mr. Boud found with the boat at the Utah Lake test cruise before he signed the Sales Contract was a malfunctioning mechanism for raising the outdrives, a problem apparently remedied before he took delivery at Lake Powell. The fact that other problems, most of which were corrected, later surfaced at Lake Powell can not retroactively provide sufficient duress to render Mr. Boud's signature invalid.

**POINT III. WHERE PLAINTIFF'S EXPRESS WARRANTY CLAIM AGAINST KCS FAILS, HIS OTHER CLAIMS AGAINST KCS ALSO FAIL.**

As the trial court concluded, and "as plaintiff conceded at the hearing, . . . Plaintiff's several claims against the Defendant . . . all hinge upon the existence of an express warranty allegedly created by the referenced portion of the sales brochure." (R.446-7) Therefore, having conceded this dependance on the existence of an express warranty as an element of his UCSPA claim (R. 466, p. 14) and of the negligent misrepresentation claim (Appellant's Brief, p. 46), if this Court agrees that no express warranty was created or became a part of Boud's bargain, then Boud has no further claim against KCS.

Nevertheless, Boud pleads his case to keep these claims alive in his brief. They are addressed in turn.

A. The trial court correctly ruled that the Plaintiff's UCSPA claim is linked to the UCC and must fail.

Not only is sales talk a defense to a UCC express warranty claim, it is also a defense to a Utah Consumer Sales Practices Act ("UCSPA") claim, Utah Code Ann. § 13-11-1 et seq.. In *State v. GAF Corp.* the court applied the UCC express warranty provisions of 70A-2-213 to defining the existence of a UCSPA claim, citing § 70A-2-313. *GAF Corp.*, 760 P.2d at 314-15. Therefore, if the express warranty is not created, has been disclaimed or waived, no action lies under § 13-11-4(2)(a). Similarly, in *Autohaus, Inc. v. Aguilar*, the court considered the UCC sales talk exception and held that "if the statements alleged to be misrepresentations are in fact only puffing or opinion, they cannot be actionable representations under the DPTA."<sup>8</sup> 794 S.W.2d at 462. This position is consistent with the *GAF* decision. However, Boud's Complaint is deficient in pleading this claim.

Boud argues that the § 13-2-4(2)(a) requirement of "knowingly or intentionally" misrepresenting the boat's performance characteristics<sup>9</sup> is met if KCS "knew or had reason to know" that the boat was defective, as opposed to the previous requirement of "intent to deceive." KCS does not quibble with Boud's characterization of the law, only his attempt to plead the facts. Boud's Complaint alleges that KCS knowingly intended its brochure to

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<sup>8</sup> DPTA is the acronym of the Texas Deceptive Trade Practices-Consumer Protection Act, §§ 17.41 to 17.63, Tex. Bus. & Com. Code Ann. (Vernon 1987 & Vernon Supp. 1990), which is substantially similar to the UCPSA cited by plaintiff.

<sup>9</sup> Boud argues that KCS' use of the term "best performance" is a specific representation of a "performance characteristic" as required in the statute. As noted above in Point II.A., Boud fails to understand that the term "best performance" does not describe or represent a specific characteristic of performance.

go to prospective purchasers. (R. 276, ¶ 20). That is not an enumerated violation of -4(2)(a), and Boud cannot rehabilitate his pleadings or his concession by his arguments on appeal.

**B. The trial court correctly ruled that Plaintiff's negligent misrepresentation claim is fatally deficient.**

As noted, Mr. Boud admits that if the brochure language and photograph do not create an express warranty, it will not support a claim for negligent misrepresentation (Appellant's Brief, p. 46). KCS agrees with that assessment. Indeed, if the sales brochure's statements are sales talk, the required "material facts" element of all his claims against KCS, including his negligent misrepresentation claim, is missing from his Complaint, as are the required "other elements of fraud." *Jardine v. Brunswick Corp.*, 423 P.2d 659, 662 (Utah 1967).

But even if the brochure language was material, plaintiff's admitted actions nonetheless support a complete defense to a claim of negligent misrepresentation. As stated in *Jardine*:

The one who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect. The evidence shows with ample clarity that [plaintiff] was at least remiss as was [defendant] in this regard. He was no neophyte, but was a man of considerable business experience.

*Id.* at 662-3.

Despite being an experienced boat owner/buyer (R. 273; 341, fn 3), plaintiff read the sales brochure (R. 276-7), was told about the limited warranty (R. 275) and conditioned his

purchase on a test cruise, but then paid for the boat *in full* before he took his test cruise (R. 278), all without first obtaining the offered copy of the limited warranty (R. 288). It would be totally inconceivable for a finder-of-fact to decide that it is reasonable and prudent for a person to pay for and buy a new Hyundai without first reviewing its warranty or test-driving it, much less a new \$150,000 yacht. Such are not the actions of a reasonable, prudent person seeking to protect their own interests.

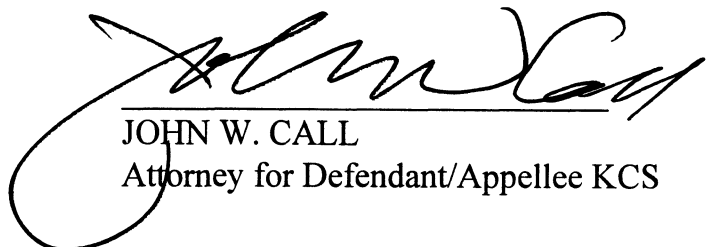
Any argument by Mr. Boud that the dealer's actions prevented his exercise of prudent conduct does not operate against KCS since Boud makes no claim that KCS is separately responsible for the actions of the defendant dealer. Therefore, it can be said as a matter of law plaintiff's claim of negligent misrepresentation is fatally deficient.

### **CONCLUSION**

The trial court correctly concluded that the language contained in the KCS sales brochure is not specific enough to create an express warranty. For this reason, and for additional, independent reasons set forth in this brief which also support the trial court's ruling, Defendant KCS requests this Court affirm the ruling of the trial court granting judgment in KCS's favor.

DATED this 7<sup>th</sup> day of June, 2001.

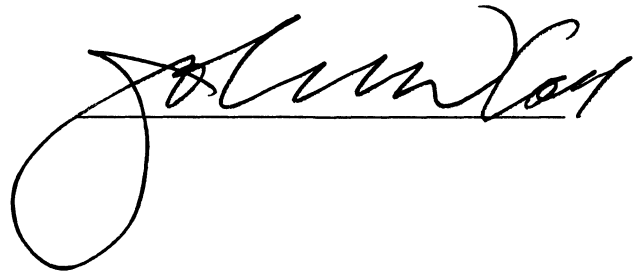
NYGAARD, COKE & VINCENT

  
JOHN W. CALL  
Attorney for Defendant/Appellee KCS

**MAILING CERTIFICATE**

I hereby certify that two copies of the foregoing Brief of Defendant/Appellee was mailed by United States mail, postage prepaid this 7<sup>th</sup> day of June, 2001 to counsel for Plaintiff/Appellant at:

Jon H. Rogers  
803 North 300 West, Suite N144  
Northgate Business Center  
Salt Lake City, Utah 84103

A handwritten signature in black ink, appearing to read "Jon H. Rogers", is written over a horizontal line. The signature is stylized with a large, looping initial "J" and a long, sweeping underline.

## **ADDENDUM A**

**Utah Code Ann. § 70A-2-313 (1997) and Utah Code Ann. § 13-11-4 & -5 (1999)**



**§ 70A-2-313. Express warranties by affirmation, promise, description, sample**

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

#### **§ 13-11-4. Deceptive act or practice by supplier**

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's mail, telephone, or personal contact and if the sale price exceeds \$25, unless the supplier's cancellation policy is communicated to the buyer and the policy offers greater rights to the buyer than this Subsection (2)(m), which notice shall be a conspicuous statement written in dark bold at least 12 point type, on the first page of the purchase documentation, and shall read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER.";

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false; or

(p) if a consumer indicates his intention of making a claim for a motor vehicle repair against his motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told he was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement.

**§ 13-11-5. Unconscionable act or practice by supplier**

- (1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.
- (2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.
- (3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

## **ADDENDUM B**

**Trial Court's Findings, Conclusions and Order**

**FILED DISTRICT COURT**  
Third Judicial District

OCT 17 2000

By C. B. Bailey  
SALT LAKE COUNTY  
Deputy Clerk

JOHN W. CALL, USB #0542  
NYGAARD, COKE & VINCENT  
Attorneys for Defendant Cruisers Yachts  
Division of KCS International Inc.  
333 North 300 West  
Salt Lake City, Utah 84103  
Telephone: (801) 328-2506

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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JOSEPH R. BOUD, Trustee of the )  
Diane Mansell Boud Revocable Trust, )

Plaintiff, )

v. )

SDNCO, INC., dba WASATCH MARINE; )  
and KCS INTERNATIONAL INC., dba )  
CRUISERS YACHTS, )

Defendants. )

FINDINGS, CONCLUSIONS,  
ORDER OF DISMISSAL and  
RULE 54(b) CERTIFICATION

Civil No. 990910029

Judge J. Dennis Frederick

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Defendant Cruisers Yachts Division of KCS International, Inc.'s ("Cruisers") Motion to Dismiss came on for hearing before the Court on Monday, September 11, 2000, the Honorable J. Dennis Frederick, District Judge, presiding. Plaintiff was represented by his attorney Jon H. Rogers, Defendant Cruisers was represented by its attorney John W. Call and Defendant SDNCO, Inc., was represented by its attorney Robert W. Wilde. The Court

indicated that it was converting the Defendant's Motion to Dismiss to a Rule 56 Motion for Summary Judgment inasmuch as matters outside the pleadings, specifically the entire sales brochure quoted in Plaintiff's Complaint, was considered by the Court. The Court had considered the memoranda previously submitted by the parties in support of and opposing the motion. The Court then heard the arguments of Defendant Cruiser's counsel and Plaintiff's counsel, while Defendant SDNCO's counsel took no position on the motion. Accordingly, the Court makes and enters the following:

#### **FINDINGS OF FACT**

1. The Court finds, for purposes of Cruiser's motion, that Defendant Cruisers, manufacturer of the subject boat, published in its 1999 sales brochure, at page 30, a photograph of its model 3375 with a caption containing the following language:

Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern-drive or inboard power, superb handling and sleeping accommodations for six.

2. The Court finds, for purposes of Cruiser's motion, that the Plaintiff read the referenced portion of the sales brochure prior to his purchase of the subject model 3375 boat.

Having made and entered the foregoing Findings of Fact relevant to the Defendant Cruiser's motion, the Court enters the following:

#### **CONCLUSIONS OF LAW**

1. The Court concludes, as plaintiff conceded at the hearing, that Plaintiff's several

claims against the Defendant Cruisers all hinge upon the existence of an express warranty allegedly created by the referenced portion of the sales brochure.

2. The Court concludes that the referenced portion of the sales brochure is merely sales talk and lacks the specificity necessary to form the basis of an enforceable express warranty under either the Utah UCC provisions or the Utah Consumer Sales Practices Act.

3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff's purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure.

#### **ORDER OF DISMISSAL**

Having made and entered the foregoing Findings of Fact and Conclusions of Law,  
**IT IS HEREBY ORDERED** as follows:

1. All of Plaintiff's claims against the Defendant Cruisers Yachts Division of KCS International, Inc., are hereby dismissed, with prejudice.

#### **CERTIFICATION**

Upon the oral request of Plaintiff's counsel made at the conclusion of the hearing, and with the concurrence of Defendant Cruisers' counsel, the Court hereby determines that there is no just reason for delay of the Plaintiff's right to appeal the foregoing dismissal of Defendant Cruisers from the captioned matter. Accordingly, the Court expressly directs that this Order

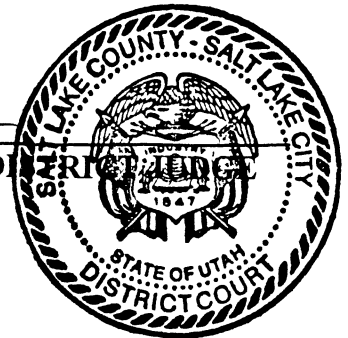


of Dismissal be considered a final judgment, pursuant to Rule 54(b), U.R.C.P.

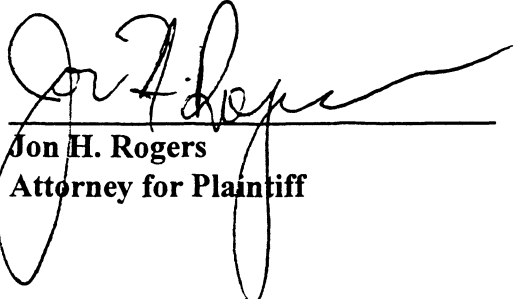
DATED this 17<sup>th</sup> day of Oct ~~September~~, 2000.

BY THE COURT:

J. DENNIS FREDERICK, DISTRICT JUDGE



The foregoing Findings, Conclusions, Order of Dismissal and Rule 54(b) Certification is Approved as to form only:

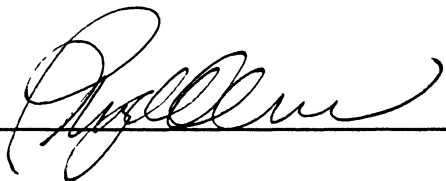
  
Jon H. Rogers  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that on September 15, 2000, a true and correct copy of the foregoing FINDINGS, CONCLUSIONS, ORDER OF DISMISSAL AND RULE 54(b) CERTIFICATION was mailed, postage prepaid, and addressed as follows:

**Jon H. Rogers  
Attorney at Law  
803 North 300 West, Suite N144  
Northgate Business Center  
Salt Lake City, Utah 84103  
Attorneys for Plaintiff**

**Robert H. Wilde  
Wilde and Associates  
935 East South Union Avenue, Ste. #D-102  
Midvale, Utah 84047  
Attorneys for Defendant Sdnco, Inc. d/b/a  
Wasatch Marine**



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**ADDENDUM C**

**Motor Vehicle Contract of Sale**

# FOR VEHICLE CONTRACT OF SALE

DIANE MANSEL BOUD REVOCABLE TRUST AND JOSEPH BOUD TRUSTEE

05/20/99

DATE OF SALE

ATCH MARINE  
7 S. 500 W.  
LAKE CITY, UT 84115

9074 S COBBLE CANYON RD

SANDY, UT 84093

CITY COUNTY STATE ZIP CODE  
8019479692 8012669878  
RES. PHONE BUS. PHONE

and Co-Purchaser(s), if any, (hereafter referred to as "Purchaser") hereby agree to purchase the following vehicle from Seller/Dealer (hereafter referred to as "Seller"), subject to all conditions, warranties and agreements contained herein, including those printed on the reverse side hereof.

DEMO	YEAR	MAKE	SERIES	BODY TYPE	CYL	COLOR
	99	CRUISERS	3375	BOAT	16	GREEN
RSUSW49D999			ODOMETER	STOCK NO.	DEL. DATE	SALESPERSON
				49D999	05/20/99	STUART NELSO

## PURCHASE PRICE AND OTHER SUMS DUE

PRICE OF VEHICLE	160211.45
SERIES/OPTIONS	
CASH PRICE (add lines 1-5)	160211.45
REBATE \$	0.00
DOWN/REBATE APPLIED TO PURCHASE	( 0.00)
TOTAL (line 6 minus 8)	160211.45

## TRADE-IN AND/OR OTHER CREDITS

ODOMETER	
BODY TYPE	

DE OWED ON TRADE-IN: 0.00  
DE OWED TO:  
DS:

D BY: GOOD UNTIL:

ATION: ACC. #:

INTY AS TO BALANCE OWED ON TRADED-IN VEHICLE:  
warrants that he/she has given Seller a true pay-off amount on any vehicle traded in, is not correct and is greater than the amount shown above, Purchaser will pay the seller on demand.

IN ALLOWANCE	0.00
VE OWED ON TRADE-IN*	0.00
LOWANCE ON TRADE-IN (line 10 minus 11)	0.00
SITE/CASH DOWN PAYMENT (omit amt. line 8)	15000.00
. CREDITS (total lines 12 & 13)	( 15000.00)
TOTAL FROM LINE 9	160211.45
CE CONTRACT	0.00
	0.00
TOTAL-TAXABLE ITEMS (total lines 15-17)	160211.45
E ALLOWANCE (line 10)	0.00
AXABLE AMOUNT (line 18 minus line 19)	\$ 160211.45
SALES/USE TAX ON "TAXABLE AMOUNT"	10173.43
SE & REGISTRATION FEES	34.50
ERTY ASSESSMENT FEE(S)	0.00
INSPECTION/EMISSIONS TEST	0.00
WASTE TIRE RECYCLING FEE	9.00
IAL LUXURY TAX	0.00
ER DOCUMENTARY SERVICE FEE	141.50
. OF ALL ITEMS ABOVE (lines 18, 21-27)	170569.88
. CREDITS (line 14)	( 15000.00)
VE DUE (total line 29 minus 30)	
MONTH 19	155569.88

## THIS SECTION FOR SELLER'S USE ONLY PERTAINING TO TRADE-IN

☐ Title (if not, explain):

REGISTRATION	BILL OF SALE	POWER OF ATTORNEY	ODOMETER STATEMENT	PROPERTY TAX	AUTHORIZATION FOR PAYOFF
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## NOTICE ONLY TO BUYERS OF USED VEHICLES

The information you see on the window form (Buyer's Guide) for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

I HAVE RECEIVED A COPY OF THE FTC USED CAR BUYERS GUIDE.

x

## FINANCING DISCLOSURE

INSTRUCTION: One of the two following disclosures, either "A" or "B", must be acknowledged. If Purchaser agrees to be responsible for financing, or if this is a cash-only or cash-plus-trade-in only transaction, then Purchaser must sign disclosure "A". If Seller agrees to arrange for financing, then both Seller and Purchaser must sign disclosure "B". BY SIGNING, PURCHASER AFFIRMS THAT HE/SHE HAS READ THE DISCLOSURE AND AGREES THERETO. IF SIGNING DISCLOSURE "B", DO NOT SIGN UNTIL ALL BLANKS HAVE BEEN FILLED IN.

## PURCHASER AGREES TO ARRANGE FINANCING

"(A)" THE PURCHASER OF THE MOTOR VEHICLE DESCRIBED IN THIS CONTRACT ACKNOWLEDGES THAT THE SELLER OF THE MOTOR VEHICLE HAS MADE NO PROMISES, WARRANTIES, OR REPRESENTATIONS REGARDING SELLER'S ABILITY TO OBTAIN FINANCING FOR THE PURCHASE OF THE MOTOR VEHICLE. FURTHERMORE, PURCHASER UNDERSTANDS THAT IF FINANCING IS NECESSARY IN ORDER FOR THE PURCHASER TO COMPLETE THE PAYMENT TERMS OF THIS CONTRACT ALL THE FINANCING ARRANGEMENTS ARE THE SOLE RESPONSIBILITY OF THE PURCHASER.

SIGNATURE OF PURCHASER

## SELLER AGREES TO ARRANGE FINANCING

"(B)" THE PURCHASER OF THE MOTOR VEHICLE DESCRIBED IN THIS CONTRACT HAS EXECUTED THE CONTRACT IN RELIANCE UPON THE SELLER'S REPRESENTATION THAT SELLER CAN PROVIDE FINANCING ARRANGEMENTS FOR THE PURCHASE OF THE MOTOR VEHICLE. THE PRIMARY TERMS TO THE FINANCING ARE AS FOLLOWS:

INTEREST RATE BETWEEN % AND % PER ANNUM, TERM BETWEEN MONTHS AND MONTHS. MONTHLY PAYMENT BETWEEN \$ PER MONTHS AND \$ PER MONTH BASED ON A DOWN PAYMENT OF \$

IF SELLER IS NOT ABLE TO ARRANGE FINANCING WITHIN THE TERMS DISCLOSED, THEN SELLER MUST, WITHIN SEVEN CALENDAR DAYS OF THE DATE OF SALE, MAIL NOTICE TO THE PURCHASER THAT HE/SHE HAS NOT BEEN ABLE TO ARRANGE FINANCING. PURCHASER THEN HAS 14 DAYS FROM DATE OF SALE TO ELECT. IF HE/SHE CHOOSES, TO RESCIND THE CONTRACT OF SALE, PURSUANT TO SECTION 41-3-401.

IN ORDER TO RESCIND THE CONTRACT OF SALE, THE PURCHASER SHALL:

- (1) RETURN TO SELLER THE MOTOR VEHICLE PURCHASED;
- (2) PAY THE SELLER 30 CENTS FOR EACH MILE THE MOTOR VEHICLE HAS BEEN DRIVEN AND
- (3) COMPENSATE SELLER FOR ANY PHYSICAL DAMAGE TO THE MOTOR VEHICLE.

IN RETURN, SELLER SHALL GIVE BACK TO THE PURCHASER ALL PAYMENTS OR OTHER CONSIDERATION PAID BY THE PURCHASER, INCLUDING ANY DOWN PAYMENT AND ANY MOTOR VEHICLE TRADED IN. IF THE TRADE-IN HAS BEEN SOLD OR OTHERWISE DISPOSED OF BEFORE THE PURCHASER RESCINDS THE TRANSACTION, THEN THE SELLER SHALL RETURN TO THE PURCHASER A SUM EQUIVALENT TO THE ALLOWANCE TOWARD THE PURCHASE PRICE GIVEN BY THE SELLER FOR THE TRADE-IN, AS NOTED IN THE DOCUMENT OF SALE.

SIGNING THIS DISCLOSURE DOES NOT PROHIBIT THE PURCHASER FROM SEEKING HIS OWN FINANCING.

SIGNATURE OF PURCHASER

SIGNATURE OF SELLER

OTHER TERMS AGREED TO: NONE ☐ AS FOLLOWS ☐

BALANCE PAID = 171046.33 known 170569.88  
OWED TO BOUDS = 476.45 IN CHECK

s arranged insurance on vehicle through

Insurance company. Policy #

on the reverse side of this document, unless Seller has given to Purchaser an Express Warranty in writing. Seller makes no Warranty, express or implied, with respect to the merchantability, fitness for use or otherwise concerning the vehicle, parts or accessories described herein. Unless otherwise indicated in writing, any warranty is limited to that provided by the manufacturer, if any, as explained by Paragraph 4 on the reverse side hereof.

rees that this contract includes all of the terms, conditions and warranties on both the face and reverse side hereof, that this agreement cancels and supersedes any prior agreement and as of the date issues the complete and exclusive statement of the terms of the agreement relating to the subject matters covered hereby. PURCHASER BY HIS/HER EXECUTION OF THIS AGREEMENT ACKNOWLEDGES HE/SHE HAS READ ITS TERMS, CONDITIONS AND WARRANTIES BOTH ON THE FACE AND THE REVERSE SIDE HERE OF AND HAS RECEIVED A TRUE COPY OF THIS AGREEMENT, AND FURTHER PAY THE "BALANCE DUE" SET FORTH ABOVE ON OR BEFORE THE DATE SPECIFIED.

DATE  
USER

VEHICLE TO BE  
TITLE IN NAME OF  
SIGNATURE

Signature

## CONDITIONS AND WARRANTIES

IT IS FURTHER UNDERSTOOD AND MUTUALLY AGREED:

The agreement on the reverse side hereof is subject to the following terms, conditions, and warranties made by Purchaser, which have been mutually agreed upon:

1. Purchaser agrees to deliver the original bill of sale and the title to any used vehicle traded herein along with the delivery of such vehicle in the same condition and containing the same equipment as when appraised reasonable wear and tear excepted, and Purchaser warrants such used vehicle to be his property free and clear of all liens and encumbrances except as otherwise noted on the reverse side hereof.
2. If the Purchaser does not pay the "BALANCE DUE" by the date indicated on the reverse side of this agreement, then the Seller may set off against it's damages any cash deposit or down payment received from the Purchaser. In the event a used vehicle has been taken in trade, Purchaser authorizes Seller to sell the used vehicle, and Seller shall be entitled to reimburse itself out of the proceeds of such sale for its expenses and losses incurred or suffered as the result of Purchaser's failure to complete the purchase.
3. Seller shall not be liable for delays or damages caused by the manufacturer, accidents, sureties, fires, or other causes beyond the control of the Seller.
4. **NO WARRANTIES, EXPRESS OR IMPLIED, ARE MADE OR WILL BE DEEMED TO HAVE BEEN MADE BY EITHER SELLER OR THE MANUFACTURER OF THE NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS FURNISHED HEREUNDER, EXCEPTING ONLY THE CURRENT PRINTED WARRANTY APPLICABLE TO SUCH VEHICLE OR VEHICLE CHASSIS, WHICH WARRANTY IS INCORPORATED HEREIN AND MADE A PART HEREOF AND A COPY OF WHICH WILL BE DELIVERED TO PURCHASER AT THE TIME OF DELIVERY OF THE NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS, SUCH WARRANTY SHALL BE EXPRESSLY IN LIEU OF ANY OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THE REMEDIES SET FORTH IN SUCH WARRANTY WILL BE THE ONLY REMEDIES AVAILABLE TO ANY PERSON WITH RESPECT TO SUCH NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS.**

**NO WARRANTIES, EXPRESS OR IMPLIED, ARE MADE BY SELLER WITH RESPECT TO USED MOTOR VEHICLES OR MOTOR VEHICLE CHASSIS FURNISHED HEREUNDER EXCEPT AS MAY BE EXPRESSED IN WRITING BY SELLER FOR SUCH USED MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS, WHICH WARRANTY, IF SO EXPRESSED IN WRITING, IS INCORPORATED HEREIN AND MADE A PART HEREOF.**

5. In case the vehicle sold to Purchaser is a used or demonstrator vehicle, no warranty or representation is made by Seller as to the extent such vehicle has been used, regardless of the mileage shown on the odometer of said used vehicle.
6. In the event it becomes necessary for Seller to enforce any of the terms, conditions or warranties in this agreement, Purchaser agrees to pay reasonable attorney's fees, court costs, and collection fees.
7. Purchaser may not transfer or assign his/her interest in this Agreement, unless Seller consents in writing.
8. **LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS AGREEMENT.**
9. Purchaser REPRESENTS that he/she is 18 years of age or older.
0. Purchaser grants to Seller a purchase money security interest in the purchased vehicle and to any proceeds of the vehicle to secure full payment of the purchase price. This security interest covers all equipment, accessories, and parts that Purchaser adds to the vehicle. Purchaser also grants Seller a security interest in the proceeds of any physical damage insurance policy on the vehicle.
1. If the vehicle bought by Purchaser is a used vehicle, the information you see on the window form [Buyer's Guide] for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in this contract of sale.
2. **IN THE CASE OF ANY VEHICLE TRADED IN AS PART OF THE CONSIDERATION TOWARD A PURCHASE, PURCHASER REPRESENTS AND WARRANTS:**
  - (a) **THAT, UNLESS OTHERWISE DISCLOSED ON THE REVERSE SIDE HEREOF, POLLUTION CONTROL EQUIPMENT, AIR BAGS AND ALL SAFETY RELATED EQUIPMENT INSTALLED BY THE MANUFACTURER HAS NOT BEEN REMOVED OR RENDERED INOPERATIVE;**
  - (b) **THAT THE YEAR OF MANUFACTURE AND THE BALANCE OWED ON THE TRADED-IN VEHICLE ARE AS STATED ON THE REVERSE SIDE HEREOF;**
  - (c) **THAT, UNLESS OTHERWISE DISCLOSED ON THE REVERSE SIDE HEREOF, THE ODOMETER READING ACCURATELY STATES ACTUAL MILES THE TRADED-IN VEHICLE HAS BEEN DRIVEN;**
  - (d) **THAT PURCHASER HAS AND WILL PROVIDE TO SELLER GOOD TITLE TO THE TRADED-IN VEHICLE, AND THAT TRANSFER OF THE TRADED-IN VEHICLE TO SELLER AS A TRADE-IN ON THE PURCHASE OF ANOTHER VEHICLE IS RIGHTFUL; AND**
  - (e) **THAT THE TRADED-IN VEHICLE HAS NEVER HAD ITS TITLE OR REGISTRATION BRANDED AS "SALVAGED", "RESTORED," "REPAIRED," OR SIMILAR TERM, PURSUANT TO UTAH CODE ANN. §§41-1a-1004 AND 41-1a-1005 OR STATUTE(S) OF ANOTHER STATE SUBSTANTIALLY SIMILAR IN CONTENT. IF PURCHASER BREACHES THIS REPRESENTATION AND WARRANTY THEN PURCHASER AGREES TO BE LIABLE FOR AND PAY THE SELLER THE DIFFERENCE BETWEEN THE TRADE-IN ALLOWANCE AS STATED ON THE REVERSE SIDE AND THE REDUCED VALUE ATTRIBUTABLE TO MISREPRESENTATION REGARDING THE TITLE OR REGISTRATION.**
3. Purchaser also grants the Seller a security interest in the vehicle purchased by Purchaser for the purpose of securing Seller against losses proximately caused by Purchaser's breach, if any, of the warranties made in the preceding paragraph.
4. Any written notice required to be given Purchaser if mailed by ordinary mail, postage prepaid, to Purchaser's mailing address as stated on the reverse side hereof shall be deemed reasonable and effective notification.
5. The rate of interest as set forth in the Financing Disclosure section (B) of the reverse side may involve a variable rate, if therein noted. Purchaser will rely on any credit agreement representing financing to provide the credit disclosures required by law, including disclosures regarding variable rates of interest.

## ADDENDUM D

### Limited Warranty



# Cruisers yachts

## A DIVISION OF KCS INTERNATIONAL INC. LIMITED WARRANTY

**REGISTRATION OF PURCHASE:** The "Federal Boat safety Act of 1971" requires all boat manufacturers to maintain a record of all first retail purchasers and their current address for the purpose of notification in case of defective parts or equipment, or in case of non-compliance with standards or regulations set forth by this act. Failure to complete and return your factory warranty card for our records will waive your right to notification of defect and/or repair at manufacturers expense. **THIS LIMITED WARRANTY CAN BE ACTIVATED ONLY BY SUBMITTING THE "LIMITED WARRANTY REGISTRATION CARD" TO CRUISERS YACHTS WITHIN THIRTY (30) DAYS OF THE DATE OF PURCHASE.**

**WARRANTY COVERAGE:** CRUISERS YACHTS, a division of KCS INTERNATIONAL INC. warrants to you, Consumer, subject to the limitations and exclusions described below, that those parts of the new boat manufactured by CRUISERS YACHTS, and purchased from an authorized Cruisers Yachts dealer, are free from defects in material and workmanship under normal use and service. The duration of this warranty is as follows: (1) The structural sections of the hull and deck for a period of 5 years beginning the date of delivery to the first consumer (2) As the other parts and components manufactured by CRUISERS YACHTS for a period of 1 year beginning the date of delivery (except for exclusions listed below) (3) CRUISERS YACHTS warrants the gelcoat finish below the waterline against blistering for a period of 2 years from the date of sale, provided the bottom of the boat is maintained.

**WARRANTY CLAIM PROCEDURES:** If a defect is discovered during the applicable warranty period, Consumer must promptly notify the selling dealer (or CRUISERS YACHTS) of such in writing. In no event shall such notification be received by the dealer (or CRUISERS YACHTS) later than 30 days of the discovery of the defect. All warranty claims must first be made to the dealer from whom the boat was purchased. The dealer will contact CRUISERS YACHTS, who at that time will determine whether the defect is covered by this limited warranty and advise the dealer. For warranty service the boat must be returned to the selling dealer or if determined by CRUISERS YACHTS to our factory. A boat may not be returned to the factory unless prior written authorization, in accordance with instructions set forth in CRUISERS YACHTS return authorization, from CRUISERS YACHTS SERVICE MANAGER. Transportation, preparation, disassembly and reassembly cost to and from the dealer or CRUISERS YACHTS will be the responsibility of the owner.

**REMEDY:** Within a reasonable time after notification, CRUISERS YACHTS will repair any defect in materials or workmanship or at its option, correct such defect by replacing nonconforming goods or parts. Such repair and/or new parts are warranted for the unexpired portion of the original warranty, or for 90 days, whichever is longer. Warranty work (parts and/or labor) shall be at CRUISERS YACHTS expense. These remedies are the Consumers exclusive remedies for breach of warranty.

**LIMITATION AND EXCLUSIONS:** This warranty applies only if the boat is used under noncommercial normal use and service, and shall not apply to the following: (1) Boats subjected to negligence, abuse, misuse, or accident. (2) Boats subjected to improper operation, trailering, maintenance or storage, commercial use or use for purposes other than those for which the boat was designed. (3) Defects or damages caused by a force or impact which exceeds design specifications, including but not limited to, exposure to harmful solvents and electrolysis. (4) Defects or damages caused by unauthorized attachments or modifications. (5) Any statements, representations or warranties given by dealers or third persons other than those provided within this warranty. (6) Any unit which is part of a rental fleet, used for racing or commercial purposes. (7) The following consequential damages: (a) loss of time, (b) inconvenience, (c) towing charges, (d) expenses for travel, lodging, telephone and fuel, (e) loss or damage to personal property or loss of revenue, (f) loss of use of the boat (g) haul out, launch, lift charges. (8) This warranty specifically does not apply to engines, stern drives, transmission, generators, propellers, improper adjustment of controls, adjustment or realignment to any components including, but not limited to the drive train, and any other parts expressly warranted by the manufacturer thereof. (9) Also excluded are gelcoat crazing, gelcoat fading, stainless steel hardware, windshields, glass breakage, all vinyl upholstery, cockpit seat wood, acrylic top enclosures, carpet, electronics, gauges and other equipment or accessories manufactured by manufacturers other than Cruisers Yachts, which are separately warranted by such other manufacturers (appropriate adjustments therefore being provided by their respective manufacturers). (10) Any published or unannounced catalog or performance characteristic of speed, fuel and oil consumptions and static or dynamic attitude in the water. (11) Cruisers Yachts shall not be effective or actionable if any repair or replacement work is performed by any unauthorized party.

**THE FOREGOING WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER EXPRESSED WARRANTIES, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, DO NOT EXTEND BEYOND THE DURATION OF THE EXPRESS WARRANTIES PROVIDED HEREIN.**

**IN NO CASE SHALL CRUISERS YACHTS BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES BASED UPON BREACH OF WARRANTY, BREACH OF CONTRACT, STRICT TORT, OR ANY OTHER LEGAL THEORY. THIS LIMITATION DOES NOT APPLY TO CLAIMS FOR PERSONAL INJURY.**

**SOME STATES DO NOT ALLOW THE EXCLUSION AS LIMITATION OR INCIDENTAL OR CONSEQUENTIAL DAMAGES OR LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU.**

**TRANSFERABILITY:** All rights and terms of this limited warranty may be transferred to new owners of the covered product by completing a TRANSFER OF WARRANTY FORM and submitting it to Cruisers Yachts.

**THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH MAY VARY FROM STATE TO STATE.**

**CRUISERS YACHTS reserves the right to improve its products through changes in design and/or material without being obligated to owners of boats of similar or the same model or prior manufacture.**

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