

2000

# Wilson Supply, Inc. d.b.a. Pro Power Equipment Co. v. Fradan Manufacturing Corp. : Reply Brief

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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WILSON SUPPLY, INC. d.b.a.  
PRO POWER EQUIPMENT CO.

Plaintiff and Appellee,

v.

FRADAN MANUFACTURING CORP.

Defendant and Appellant

No. 20001035-SC

Priority No. 15

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**REPLY BRIEF OF APPELLANT**

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**Appeal from an Order on a Motion for Summary Judgment after an Evidentiary Hearing entered on October 31, 2000, In Civil No. 980912305, in the Third District Court for Salt Lake County, State of Utah, before the Honorable David Young**

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## Table of Contents

<b>TABLE OF AUTHORITIES.....</b>	<b>iii</b>
<b>REPLY TO APPELLEE’S STATEMENT OF FACTS.....</b>	<b>1</b>
<b>SUMMARY OF REPLY ARGUMENT.....</b>	<b>2</b>
<b>POINT I: WILSON FAILED TO REBUT THE CLEARLY ERRONEOUS FINDINGS.....</b>	<b>3</b>
<b>POINT II: WILSON FAILS TO ADDRESS FRADAN’S ARGUMENTS THAT SUMMARY JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF FRADAN BASED UPON WILSON’S COMPLAINT AND MOTION FOR SUMMARY JUDGMENT.....</b>	<b>9</b>
<b>POINT III: WILSON’S CLAIMS MUST FAIL BECAUSE IT SOLD PRO POWER.....</b>	<b>13</b>
<b>POINT IV: FRADAN’S POINTS ON THE DISCOVERY DISPUTE AND BIAS ARE MISREPRESENTED BY WILSON SUPPLY.....</b>	<b>15</b>
<b>CONCLUSION.....</b>	<b>16</b>

**TABLE OF AUTHORITIES**

**STATE CASES**

<i>Beynon v. St. George-Dixie Lodge # 1743, Benevolent &amp; Protective Order of Elks,</i> 854 P 2d 513, 518 (Utah 1993)	12
<i>Clover v. Snowbird Ski Resort,</i> 808 P 2d 1037, 1039-1040 (Utah 1991),	
<i>Neel v. State,</i> 889 P 2d 922, 926 (Utah 1995)	12
<i>Sevy v. Sec. Title Co. of So. Utah,</i> 902 P 2d 629, 635 (Utah 1995 )	16

**STATE STATUTES**

<b>Utah Code Ann. § 13-14a-1(1)(a) (as amended, 1995)</b> .....	<b>3</b>
<b>Utah Code Ann. § 13-14a-1(5) (as amended, 1995)</b> .....	<b>6</b>
<b>Utah Code Ann. § 13-14a-1(7)(b) (as amended, 1995)</b> .....	<b>10</b>
<b>Utah Code Ann. § 13-14a-7 (as amended, 1995)</b> .....	<b>17</b>

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**REPLY TO APPELLEE’S STATEMENT OF FACTS**

Appellee continues to confuse the facts by referring to “Wilson Supply” as a retailer. Contrary to the assertions by Appellee in its Brief, Wilson Supply, Inc. was a wholesaler of lawn and garden equipment at all relevant times as alleged in WILSON’s complaint and on summary judgment. The Court never made any findings that WILSON SUPPLY was anything but a wholesaler (See Appellant’s Brief, Appendix C, p. 82:19-22; p. 83:17-25; p. 84:17-21).

The Court found that WILSON owned Pro Power and that WILSON SUPPLY, as a wholesaler, distributed a number of different lawn and garden equipment products to its three retail outlets, Pro Power. The parties agreed, and the Court found, that Pro Power was a retailer of Fradan inventory (See Appellant’s Brief, Appendix B, R.252; and Appendix C, p. 86:3-8). In addition, the District Court erroneously found that FRADAN “entered into three separate contracts with each of the retail outlets, Pro Power in Idaho, Pro Power in

Utah, and Pro Power in Colorado” (Appellant’s Brief, Appendix C, p. 82:22-24). The only evidence that this finding could have been based upon are the three “Service Agreements” (Appellant’s Brief, Appendix D, Exhibit 2). It is further undisputed in the record that “Wilson Supply, Inc. d.b.a. Pro Power” was sold to a third party and the entity went out of business effective December 13, 1999, when its license with the Division of Corporations expired (Appellant’s Brief, Appendix D, Exhibit 3).

Insufficient evidence exists in the record for the Court to find that “Cantrell” was the distributor of all Fradan product in Utah. WILSON’s citation to the Court’s finding of fact on this point are insufficient.

### **SUMMARY OF REPLY ARGUMENT**

WILSON SUPPLY fails to address the substance of FRADAN’s argument that the District court made findings of fact that are clearly erroneous and not supported by sufficient evidence in the record. Instead WILSON focuses on a legal argument that nothing in the definition of “dealer” under the statute expressly excludes WILSON from being considered a dealer. WILSON ignores the obvious application of the definition of a “wholesaler” which clearly excludes a retail dealer from benefit of the repurchase requirement in that an entity that is defined as a wholesaler has no right of repurchase from a manufacturer. WILSON then makes an incorrect statement on page 11 of its Brief that the only distribution of its product was “a few transactions with Wilson’s affiliate, Pro Power of Idaho Falls.” The truth is WILSON’s own exhibits submitted to the District Court show that WILSON distributed to

retail dealers in Utah, Idaho, and Colorado in addition to sales to Nevada and California. In fact, almost half of WILSON's transactions involving FRADAN products appear to be distributed by WILSON to retail dealers.

WILSON further never addresses the argument that summary judgment should have been ordered in FRADAN's favor prior to an evidentiary hearing in that WILSON claims in its complaint and on summary judgment that it wholesaled a portion of the FRADAN product and that all transactions were between Fradan and Wilson Supply, rather than Pro Power. The position WILSON currently takes on appeal and at the evidentiary hearing on September 19, 2000, actually contradict the allegations in the complaint, the evidence and arguments on summary judgment, and all of the documents submitted as evidence. For these reasons and any other lawful reason found in the record on appeal, this Honorable Court should reverse the District Court's ruling and enter summary judgment and attorney fees in favor of FRADAN.

### **POINT I**

#### **WILSON FAILED TO REBUT THE CLEARLY ERRONEOUS FINDINGS**

Point I of WILSON's brief states that the court correctly "found that Wilson was a dealer pursuant to U.C.A. § 13-14a-1(1)(a)." (The Court actually found that "Pro Power" was a retail dealer and as such, was entitled to have FRADAN repurchase its inventory as a matter of law. See, R.252.) WILSON then claims that nothing in the definition of "retail dealer" expressly excludes WILSON from being treated as a dealer for purposes of the

repurchase right. WILSON then essentially repeats the erroneous findings without addressing the underlying evidence of which nothing in the record supports. Because WILSON failed to address this argument, this Court should conclude that the findings are in fact without sufficient support and judgment must be entered in favor of FRADAN.

Pursuant to this Court's marshaling requirement, FRADAN's brief details the evidence in the record most favorable to the Court's findings. Although this was made more difficult because the ultimate question of whether Pro Power was a retail dealer was decided as a matter of law and not as a finding of fact (See Appendix B, R. 252 and R. 264), FRADAN nonetheless marshaled all evidence that could possibly support the purported findings of the court. WILSON did not dispute this marshaling in its brief. Instead, WILSON relies upon the following paraphrased findings to support the District Court's ultimate conclusion and judgment:

- (i) Wilson [sic] retailed its product directly through its three stores to various commercial end users such as churches, school districts, and individual commercial yard maintenance workers (Appendix A, pp. 85-86),
- (ii) Cantrell Distributing was the wholesale distributor for Fradan Manufacturing in Utah (Appendix A, p. 82),
- (iii) Cantrell continued to sell product in the state of Utah as Fradan Manufacturing's representative on a wholesale basis during and after the time Fradan sold product to Wilson for Wilson to sell on a retail basis (Appendix A, p. 83), and

- (iv) Fradan Manufacturing, as manufacturer of the Fradan Inventory, entered into three separate contracts with each of Wilson's retail outlets, Pro Power in Idaho, Pro Power in Utah, and Pro Power in Colorado (Appendix A, pp. 82, 85).

Appellee's Brief, pp. 14-15. WILSON then states, "Based upon this ample evidence, the District Court concluded that Wilson's sale of Fradan Inventory, through Wilson's wholly owned d.b.a. Pro Power, were final retail sales to ultimate end users." Appellee's Brief, p. 15. WILSON fails to address in its brief FRADAN's assertion that the above findings are not supported by sufficient evidence and are not accurately stated as reflected in the trial court record.

First, the Court did not find that the initial business relationship between "Wilson Supply" and "Fradan" was one of a retailer and a manufacturer as stated on page 14 of its Brief. Instead, the actual record states:

So the Court finds that the initial business relationship that was created with Pro Power was intended to be a manufacturer to a retailer direct, and it is on that basis that they are obligated to rebuy.

(Emphasis added) Appellant's Brief, Appendix C, p. 85:2-5. This statement by the Court really strikes at the heart of why the findings are erroneous in that all of the evidence shows that Fradan dealt directly with Wilson Supply. All of FRADAN's shipping invoices show that all of the product was shipped from FRADAN in New York to Wilson Supply in Murray, Utah. None of the product was shipped from FRADAN to any of the Pro Power retail outlets. Moreover, the first written document between the parties was a request from

Wilson Supply addressed and sent to Fradan requesting immediate shipment (Appellant's Brief, Appendix D, Exhibit 8). Finally, Wilson Supply's own invoices show that it distributed the Fradan product to its retail outlets. *Id.* at Exhibit 1.

WILSON SUPPLY does not deny that the only evidence upon which to base the finding that FRADAN had three separate "retail dealer" agreements with each Pro Power store are the three separate Service Agreements (See Appellant's Brief, Appendix D, Exhibit 2). These Service Agreements are not "Sales Agreements" within the definition of Utah Code Ann. § 13-14a-1(5) in that they only deal with providing warranty service of Fradan products. It was clearly erroneous for the Court to find and, error in law to conclude, that this service agreement constituted a "Sales Agreement" under the statute.

Second, regarding (i) as stated on page 14 of WILSON's Brief, FRADAN always admitted that Pro Power retailed Fradan equipment and parts through its three retail outlets (WILSON again mis-quotes the record by stating that "Wilson retailed Fradan product). However, this does not address the question of whether WILSON SUPPLY, as a business entity, is a wholesaler. The facts were undisputed that WILSON SUPPLY has long been a wholesaler of lawn and garden equipment and parts. Moreover, it is undisputed that WILSON "distributed a portion of the Fradan inventory at the wholesale level" (Appellant's Brief, Appendix B, R. 184, ¶ 7). In addition, WILSON's own invoices show that almost half of the business activity related to Fradan equipment was WILSON distributing to retail dealers.

Contrary to WILSON's claim on page 11 of its brief, 16 of the approximate 34 transactions of Fradan product were between Wilson Supply as a wholesaler and its retail outlets. Specifically, a close look at the invoices reveals that on 3/11/97, 3/17/97, 3/18/97, 3/19/97, 3/27/97, 3/31/97, 4/2/97, 4/10/97, 4/11/97, 5/22/97, 7/7/97, 9/29/97, 10/3/97, 10/3/97, and 2/24/98 (Appellant's Brief, Appendix D, Exhibit 1) Wilson Supply distributed Fradan product to its three retail outlets for sales to third parties. For all of these dates, the invoices show that Wilson Supply sold to either Pro Power of Utah, who then in turn retailed the product or that Wilson Supply had already distributed to its Idaho and Colorado stores and those stores were retailing the product to third parties. In addition, two other additional entries (5/20/97 and 9/4/97) show Wilson Supply selling the product to Nevada and California. Therefore, WILSON's own invoices defy the court's findings that Fradan sold directly to Pro Power or that Cantrell distributed to Pro Power or Wilson Supply.

Regarding WILSON's designated findings (ii) and (iii), WILSON failed to answer the challenge that no credible evidence suggest that Cantrell distributed Fradan products to Wilson or its Pro Power dealers. If it had, Cantrell, not FRADAN, would be liable to repurchase the inventory under the statute. The best evidence regarding Cantrell selling in Utah is from Brett Wilson's "assumption" that Cantrell may have had the right to sell Fradan product to dealers in Utah (Appellant's Appendix E, p. 38:2-4). This testimony, however, is insufficient evidence because no evidence suggested that Cantrell sold to Wilson or Pro Power and no evidence suggests Cantrell was an exclusive distributor in Utah. The

testimony of Frank DeBartolo was clear that Cantrell did not have Utah as a territory. Moreover, no evidence suggested that Cantrell distributed Fradan product in Idaho and Colorado whereas WILSON's own records show it distributed to those states (Appellant's Appendix D, Exhibit 1). Finally, all testimony regarding Cantrell is moot or irrelevant by virtue of the fact that FRADAN sold to Wilson Supply, Inc. regardless of the status of Cantrell. Therefore, to the extent it is relevant, the finding that Cantrell was the wholesale distributor of Fradan product in Utah is clearly erroneous.

Regarding finding (iv) as stated on page 14 and 15 of WILSON's Brief, this finding is clearly erroneous for the reasons stated above that the only evidence that could possibly support the idea that FRADAN had three separate sales agreements with each Pro Power outlet is the Service Agreements. A service agreement is just what the testimony in this case stated: an agreement whereby a business could official service a manufacturer's product when returned under warranty. Nothing in these "agreements" or the testimony suggest anything more. In fact, the testimony was that Fradan did not have any sales agreements directly with dealers during the relevant time period (Appellee's Appendix, p. 69:2-9).

Since the entire ruling of the Court is premised upon the erroneous findings that Fradan had three separate sales agreements with each of three Pro Power stores and that it dealt directly with these stores, rather than going through Wilson Supply, the Trial Court judgment must be reversed.

## POINT II

### **WILSON FAILS TO ADDRESS FRADAN'S ARGUMENTS THAT SUMMARY JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF FRADAN BASED UPON WILSON'S COMPLAINT AND MOTION FOR SUMMARY JUDGMENT**

WILSON fails to address the critical issues raised in FRADAN's brief regarding the failure of the District Court to grant summary judgment in favor of FRADAN based upon the allegations in WILSON's complaint and the evidence submitted and argued on summary judgment. WILSON's complaint, paragraph 6 states that Wilson Supply was a wholesale distributor of lawn and garden equipment. Paragraph 8 of the Complaint states that WILSON originally "agreed to sell at retail, and or distribute at the wholesale level those items supplied to it by Fradan as a manufacturer." Furthermore, on summary judgment, WILSON admitted, supported by affidavit of Brett Wilson that WILSON in fact "distributed a portion of the Fradan Inventory at the wholesale level" (Appellant's Brief, Appendix B, R. 184, ¶ 7). These facts alone required summary judgment in FRADAN's favor and the court erred in law by failing to grant it. However, the court had other undisputed evidence at this stage upon which to grant summary judgment.

All evidence presented to the court on or before March 25, 2000, when the cross motions for summary judgment were originally argued, showed that all business dealings regarding the FRADAN products were between Wilson Supply and Fradan. All documents and invoices showed that all Fradan products were shipped directly from Fradan to Wilson

Supply. None of the product was shipped to Pro Power by Fradan. In spite of this undisputed evidence, the Court erred in law in even scheduling a limited evidentiary hearing on the question of whether “Wilson Supply is a dealer or a wholesaler pursuant to U.C.A. 13-14a-1, et seq.” (R. 250).

Setting an evidentiary hearing with such an ambiguous and narrow scope was confusing and an err in law. It would have been procedurally more appropriate to merely set the matter for a complete full trial. However, the undisputed facts before the Court on March 25, 2000, require judgment for Fradan as a matter of law because Wilson Supply was admittedly in business as a wholesale distributor, had originally agreed to wholesale Fradan product, and admittedly did wholesale a portion of the product. Based upon these facts, Wilson Supply fits within the definition of “Wholesaler” under the statute as a matter of law.

The Act defines a “Wholesaler” as follows:

(7) “Wholesaler” as an entity’s business or as the context requires may mean:

(b) a dealer, as defined in Subsection (1), who in addition to retailing distributes equipment at the wholesale level.

(Emphasis added). Utah Code Ann. § 13-14a-1(7)(b) (as amended, 1995). It was undisputed before the District Court that Wilson Supply “as an entity” was a wholesale distributor of lawn and garden equipment, as alleged in paragraph 6 of the Complaint. Based upon subsection (7) of the statute as underlined above for emphasis, the Court did not need to even go to sub-paragraph (b) since Wilson Supply was generally engaged in the business of

wholesaling. It was not merely a “dealer, as defined in Subsection (1). It was undisputed, and the Court’s findings support that Pro Power was a “retail dealer” and that it was owned by Wilson Supply. No evidence suggests that Pro Power distributed product for any manufacturer. If it had distributed product, it would fit within the definition of “Wholesaler” under (7)(b) of the statute. Instead, the facts of this case show that Wilson Supply is unquestionably a “Wholesaler” who also once owned three retail stores in three separate states.

Since Wilson Supply, as its name suggests, was generally in business as a Wholesaler and in fact always used the name Wilson Supply as a Wholesaler since 1934, it cannot claim the benefits that the Legislature intended for a retail dealer who is not engaged in distributing equipment. For purposes of applying this portion of subsection (7), it does not matter whether Wilson Supply wholesaled any Fradan equipment since, as a business entity, it was a Wholesaler and could have and in fact admittedly did distribute Fradan product in this case. The only way around this conclusion in this case was for the Court to find that FRADAN simply never dealt with WILSON SUPPLY, but only dealt with the three Pro Power stores. The undisputed facts, however, will not allow for such a conclusion.

WILSON claims in its brief that subsection (7) requires a factual look into the context of the actual transactions in a particular case. Although the Court found Wilson Supply was a wholesaler and Pro Power was a retailer, even if Wilson Supply, apart from Pro Power, was a “dealer as defined in Subsection (1),” the context would still require the Court to treat it as

a wholesaler under Subsection (7)(b) in that WILSON admittedly distributed Fradan product at the wholesale level. This means they were not merely a “retail dealer” who had no means of distributing the product to other retail outlets. For this reason, and based upon WILSON’s own invoices (Exhibit 1) and testimony (Affidavit of Brett Wilson) that it retailed and distributed a portion of the Fradan product, WILSON must be treated as a “Wholesaler” with no right to demand a manufacturer to repurchase its inventory.

WILSON incorrectly goes into “policy” arguments for why this Honorable Court should accept the idea that it serves the public by requiring a manufacturer to repurchase equipment and parts from a Wholesaler. Such an invitation requires this Court to depart from its long established precedent that it will not “rewrite a statute to conform to an intention not expressed” *Neel v. State*, 889 P.2d 922, 926 (Utah 1995) and “Whenever possible, statutes should be construed so that no portion is superfluous” *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513, 518 (Utah 1993).

The entire definition of “Wholesaler” under subsection (7) and the entire statute’s repeated references to “manufacturer or wholesaler” would lose their meaning if the Court were to adopt WILSON’s public policy argument. The statute not only failed to provide wholesalers a right to demand repurchase of its inventory by a manufacturer, but it obligates them to repurchase from dealers, unless the “dealer” is also engaged in wholesaling. This Court must apply this plain meaning of the statute, even though it may deem other wording more preferable. The intent from the plain meaning is that a wholesaler, as a business entity,

has other opportunities to distribute a manufacturer's product and is not confined to a particular retail location or customers. It would be a simple matter for a Wholesaler to agree to repurchase from a retailer and then demand that the manufacturer repurchase from the Wholesaler, thereby circumventing the plain wording of the statute, if WILSON's interpretation of the statute is adopted. Large portions of the statute would be superfluous. Therefore, this Court must conclude that entities who engage generally in the business of wholesaling and "retail dealers" who engage in distributing, may not obtain the right to demand a manufacturer to repurchase its inventory.

### **POINT III**

#### **WILSON'S CLAIMS MUST FAIL BECAUSE IT SOLD PRO POWER**

WILSON fails to provide any factual or substantive reasons why it lacks standing or otherwise lost its legal claim, if it had any, to force FRADAN to repurchase its inventory after it sold its Pro Power retail stores. Whether one looks at this issue that WILSON lacks standing, sold its legal rights, or cannot argue that it is a "retail dealer" all amount to the same result based upon essentially the same reasoning. It is undisputed that WILSON SUPPLY sold its retail outlets and that WILSON SUPPLY, as a business entity was always a distributor and had been since 1934. Moreover, WILSON's own evidence shows Wilson Supply, Inc. d.b.a. Pro Power ceased to exist as a business entity on about December 13, 1999 (Appellant's Appendix D, Exhibit 3, page 2). Curiously, it appears Pro Power never

existed until December 13, 1996, after Wilson Supply began its relationship with FRADAN.

*Id.*

If the retail dealers (Pro Power) were entitled to require FRADAN to repurchase inventory from them, the Court would have had to find Pro Power still retained the inventory and that it still existed as an entity. However, the Court record is clear that Pro Power was the retail arm of Wilson Supply and Pro Power was both sold and went out of business in 1999. The record further states that Wilson Supply, Inc. held the inventory and in fact repurchased a portion of the inventory previously distributed to its Idaho store (Appellant's Appendix D, Exhibit 1). Therefore, based upon the District Court findings that FRADAN dealt directly with Pro Power as a retailer and "upon that basis is obligated to rebuy," both the sale of Pro Power's three stores and the fact that Pro Power is no longer a legal entity, require the Court to dismiss WILSON's complaint as a matter of law.

The District Court completely ignored this important legal argument even though it was raised many times. The District Court cannot, however, have it both ways by treating the business relationship as one that was purely between FRADAN and the three Pro Power stores on one hand, and conclude that a sold and non-existent entity still has a right of repurchase of inventory that it no longer holds, but is in fact held by a wholesaler (WILSON SUPPLY).

#### **POINT IV**

#### **FRADAN'S POINTS ON THE DISCOVERY DISPUTE AND BIAS ARE MISREPRESENTED BY WILSON SUPPLY**

In its Brief, WILSON incorrectly treats the issue regarding the Court's punitive discovery sanctions and potential bias as separate issues on pages 18-20. Such issues, however, cannot stand alone, but are part of the larger substantive argument that the essential facts upon which the District Court's decision is based are clearly erroneous. The constant reference in the Court's findings to the alleged failure to provide discovery raise a serious question that the Court acted emotionally and not based upon sound evidence.

WILSON misrepresents the District Court record when it claims the discovery dispute was litigated. While it is correct that both motions for summary judgment were set for hearing along with FRADAN's motion for a protective order, the record shows that the Motion for Protective Order was never argued nor ruled upon. In fact, the attorneys for the parties stipulated that the discovery dispute would be moot if the Court decide the motions for summary judgment. Again, the discovery issues regarding what price FRADAN sold to its various distributors was not relevant since WILSON admitted in its complaint and on summary judgment that it was a wholesaler. However, the unsupported findings with constant references to discovery issues in the Court's findings, together with the invitation for improper bias, serve to leave this Court with a "firm and definite conviction that a

mistake has been made.” *Sevy v. Sec. Title Co. of So. Utah*, 902 P.2d 629, 635 (Utah 1995).

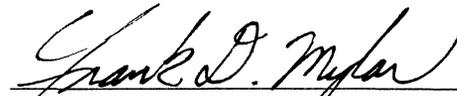
### **CONCLUSION**

All evidence from the District Court shows that Wilson Supply, Inc. was a wholesaler and wholesaled FRADAN product. As such, it is a Wholesaler under the statute and Wholesalers are never given a right to demand repurchase of inventory from a manufacturer, regardless of whether the wholesaler repurchased that same inventory from retailers or retained the product because it failed to distribute the inventory for whatever reason. In addition, when a retailer no longer exists as an entity or no longer possesses the disputed inventory, no ongoing right exists to require a manufacturer to repurchase even if it was at one time so obligated.

The statute in question is essentially a request for mandatory injunctive relief. As such, any claim under the statute becomes moot at the point the retail dealer no longer holds the inventory and is no longer liable for payment to a wholesaler or manufacturer. Such is the case with Pro Power.

**WHEREFORE:** This Honorable Court should reverse the district court judgment and enter summary judgment for FRADAN and order WILSON SUPPLY to pay all of FRADAN's attorney fees and costs in this matter, both on appeal and in the district court, as required by Utah Code Ann. § 13-14a-7 (as amended, 1995) and by the decisions of this Court. Fradan Manufacturing, Inc. respectfully thanks this Court for considering this appeal.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day September 3, 2001.



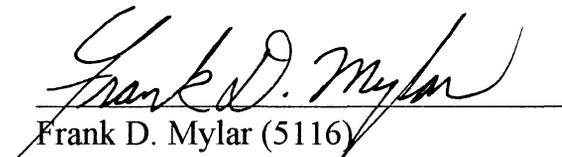
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**CERTIFICATE OF MAILING**

I certify that on this 4th day of September, 2001, I caused to be mailed, postage prepaid, two exact copies of Defendant/Appellant's Reply Brief to the following address:

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