

2000

Wilson Supply, Inc. dba Pro Power Equipment Co. v. Fradan Manufacturing Corp. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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

Plaintiff and Appellee, :

vs. :

Civil No. 20001035-SC

Fradan MANUFACTURING CORP.,:

Priority No. 15

Defendant and Appellant :

APPELLEE'S BRIEF ON APPEAL

Appeal from Order on Motion for Summary Judgment pursuant to Evidentiary
Hearing entered October 31, 2000, Civil No. 980912305, Third District Court,
Salt Lake County, State of Utah, Honorable David Young

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AUG 17 2001

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996).

STATEMENT OF ISSUES

1. Did the Trial Court correctly find that Appellee Wilson Supply dba Pro Power Equipment Co. (“Wilson”) was in fact, at all relevant times, a “Dealer” as defined by Utah Code Ann. § 13-14a-1(1)(a)?

Standard of Review: This is a question of fact. The Trial Court’s Findings of Fact should only be reversed if the Appellate Court finds that the Trial Court’s actions were clearly erroneous resulting in an abuse of discretion in making such findings.

State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

2. Having found that Wilson was a Dealer, did the Trial Court err in ruling that Appellant Fradan Manufacturing Corp. (“Fradan Manufacturing”) had an obligation, pursuant to Utah Code Ann. § 13-14a-2, to give Wilson payment for Fradan Manufacturing product of which Wilson was in possession at the time Wilson terminated its sales agreement with Fradan Manufacturing?

Standard of Review: This is a question of law. A question of law is reviewed under a correctness standard. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

DETERMINATIVE STATUTES

1. Utah Code Ann. § 13-14a-1et.seg. provides:

§ 13-14a-1 Definitions.

(1)(a) “Dealer” means any person, firm, or corporation engaged in the business of selling and retailing farm equipment, implements, utility and light industrial equipment, attachments, or repair parts, and includes retailers of yard and garden equipment not primarily engaged in the farm equipment business.

2. Utah Code Ann. § 13-14a-2(1) provides:

§ 13-14a-2 Right of return on termination of retailing agreement – Credit on return.

(1) Upon termination of all sales agreements in which the dealer has agreed to offer the products of the manufacturer or wholesaler for retail sale and to stock wholegoods and parts inventories as may or may not be required by the manufacturer or wholesaler, the retailer is entitled to payment or credit from the manufacturer or wholesaler for all new and unsold wholegoods and parts inventories held by the dealer on the date the agreement was terminated.

3. Utah Code Ann. § 13-14a-9(3) provides:

§ 13-14a-9 Continuing obligation of manufacturer or wholesaler.

(3) In the case of a wholesaler who discontinues representing a line for any reason, the manufacturer of that line bears the responsibility to repurchase.

The entire text of these statutes along with the remainder of Title 13, Chapter 14a of the Utah Code Ann. (amended, 1995) (the “Act”) is attached as Appendix B.

STATEMENT OF THE CASE

From approximately September, 1996 through November, 1997, Fradan Manufacturing supplied Wilson’s wholly owned “dba” retail stores, Pro Power Equipment Co. (“Pro Power”), with various products to be sold at retail to end users. Such products included yard and garden equipment consisting of string and brush trimmers, backblowers, engine covers, spark plug guards, and miscellaneous repair parts and hardware parts manufactured by Fradan Manufacturing (“Fradan Inventory”). In October, 1997 Wilson notified Fradan Manufacturing that Wilson was terminating its agreement to retail Fradan Equipment and requested that Fradan Manufacturing repurchase the Fradan Inventory pursuant to Utah Code Ann. § 13-14a-2. Fradan Manufacturing refused such request forcing Wilson to bring the present action.

Although Fradan Manufacturing asserts that the present appeal is from the District Court’s granting of Wilson’s Motion for Summary Judgment and denial of Fradan Manufacturing’s Motion for Summary Judgment, in fact the District Court held two hearings, including an evidentiary hearing, prior to granting Wilson’s Motion. On March 24, 2000, the District Court held a hearing on the summary judgment motions

and Fradan Manufacturing's Motion for Protective Order relating to outstanding discovery requests. (R. 242). On September 19, 2000, the District Court held an evidentiary hearing at which it took live testimony on the issue of whether Wilson was a dealer for purposes of the statute. (R. 252). The case was resolved upon the merits at the evidentiary proceeding which essentially amounted to a trial. The Trial Court found that although Wilson may historically have been both a retailer and a wholesaler, Fradan Manufacturing approached Wilson to retail its products at Wilson's three retail locations and as such Wilson was entitled to the statutory protection offered a dealer. Since there is ample evidence to support the District Court's findings and conclusions, the appeal is not well taken and must be denied.

Procedural History

On December 3, 1998, Wilson filed its complaint seeking judgment for \$39,011.48, interest, fees and costs along with damages as allowed pursuant to Utah Code Ann. § 13-14a-7 ("Complaint"). (R. 1; 8-9). On February 1, 1999, Fradan Manufacturing filed its answer to the Complaint ("Answer"). (R. 25).

On February 1, 2000, Wilson filed its Motion for Summary Judgment. (R. 119). On February 23, 2000, Fradan Manufacturing filed a Cross-Motion for Summary Judgment. (R. 190). On March 24, 2000, the District Court held a hearing on Fradan

Manufacturing's Motion for Protective Order and on the Motions for Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement. (R. 242).

To allow the parties to fully present their positions, on August 3, 2000, the District Court, gave notice of scheduling of an evidentiary hearing on the matter of whether Wilson was a Dealer or a Wholesaler under Utah Code Ann. § 13-14a-1. (R. 250). On September 19, 2000, the District Court held its scheduled evidentiary hearing at which Frank DeBartolo, President of Fradan Manufacturing, and Scott Wilson and Brett Wilson, principals of Wilson, all appeared and gave extensive testimony. (R. 252; Appendix A attached hereto, Transcript of September 19, 2000 Evidentiary Hearing). After taking testimony and receiving argument from the parties, the District Court found that Wilson was a retail dealer and not a wholesaler and as such, Fradan Manufacturing had a duty to buy back the Fradan Inventory. (R. 252). The District Court directed Wilson's counsel to prepare the findings and judgment along with an affidavit of fees and costs. (R. 252).

On October 30, 2000, the District Court entered its Order and Judgment which was approved as to form and content by counsel for Fradan Manufacturing ("Order and

Judgment”). (R. 263). On November 30, 2000, Fradan Manufacturing filed its Notice of Appeal from the Order and Judgment. (R. 271).

Statement of Facts

In the fall of 1996 Scott Fitzgerald, a sales manager for Fradan Manufacturing, approached Wilson requesting that Wilson sell Fradan Inventory through Wilson’s retail outlets doing business as Pro Power Equipment Company. (Appendix A, pp. 34-40; 68; 85). At that time, Wilson retailed commercial landscape maintenance equipment through its retail stores in Murray, Utah and Boise, Idaho. (Appendix A, p. 34). Wilson retailed its product directly through its stores to various commercial end users such as churches, school districts and individual commercial yard maintenance workers. (Appendix A, p. 35; 86). (Appendix A, pp. 36; 54). Wilson agreed with Mr. Fitzgerald that Wilson would sell the Fradan Inventory on a retail basis only due to the fact that at that time, Cantrell Distributing was the wholesale distributor for Fradan Manufacturing in Utah. (Appendix A, pp. 37-38; 44; 82). Both during and after the time Wilson was selling Fradan product at retail, Cantrell was selling product in the state of Utah as Fradan Manufacturing’s representative on a wholesale basis. (Appendix A, p. 83).

Fradan Manufacturing entered into separate dealer contracts with each of Wilson's three retail outlets, Pro Power in Idaho, Pro Power in Utah and Pro Power in Colorado for such outlets to retail the Fradan Inventory. (Appendix A, pp. 82, 85). Shortly after Mr. Fitzgerald's first contact with Wilson requesting that Wilson retail the Fradan Inventory, Mr. Fitzgerald returned to Wilson and gave training to Wilson's retail store personnel in how to sell the Fradan Inventory to the public at the retail level. (Appendix A, p. 43). All of Wilson's sales of the Fradan Inventory, with the exception of minor sales to an affiliate Pro Power of Idaho Falls, were through its wholly owned dba Pro Power and were final retail sales to ultimate end users. (Appendix, pp. 82; 86).

In October, 1997, Wilson gave Fradan Manufacturing written notice that Wilson was terminating its agreements to sell the Fradan Inventory and requested that Fradan Manufacturing repurchase the Fradan Inventory held by Wilson. (R. 206; Appendix A, pp. 45-46). Fradan Manufacturing refused Wilson's request and Wilson brought the present action to require Fradan Manufacturing to repurchase the Fradan inventory pursuant to U.C.A. § 13-14a-1 to 9. (R. 1-9).

SUMMARY OF ARGUMENT

After reviewing the pleadings on file, relevant documents, affidavits and conducting an evidentiary hearing, including taking live testimony from the principals of the disputing parties, the District Court found that Wilson was a Dealer who retailed the Fradan Inventory and as such, Fradan Manufacturing had a duty to repurchase the Fradan Inventory pursuant to U.C.A. § 13-14a-2. This statute expressly provides:

Upon termination of all sales agreements in which the dealer has agreed to offer the products of the manufacturer or wholesaler for retail sale and to stock wholegoods and parts inventories as may or may not be required by the manufacturer or wholesaler, the retailer is entitled to payment or credit from the manufacturer or wholesaler for all new and unsold wholegoods and parts inventories held by the dealer on the date the agreement was terminated.

(See, Appendix B).

Fradan Manufacturing's allegation that its duty to repurchase is somehow obviated by the fact that Wilson sold substantially all of its assets in 1999 is without merit. The "retailer is entitled to payment or credit from the manufacturer or wholesaler for all new and unsold wholegoods and parts inventories held by the dealer *on the date the agreement was terminated.*" U.C.A. § 13-14a-2. (emphasis added). Wilson terminated its agreement in October, 1997 and tried unsuccessfully for over a year to get Fradan Manufacturing to

comply with its duty to repurchase. Wilson has been in possession of the Fradan Inventory even following the sale of other assets of Wilson in 1999.

Finally, Wilson takes exception to Fradan Manufacturing's allegations that: (1) the District Court Judge "displayed usually [s.i.c.] hostility and anger towards FRADAN," (2) Wilson's attorney "urged the court to entertain a 'home-state bias' to sway the judge," (Appellant's Brief at p. 9) and (3) the District Court acted in a "hasty, hostile and biased" fashion towards Fradan Manufacturing. The record does not support these inflammatory allegations.

ARGUMENT

I. BASED ON AMPLE EVIDENCE, THE DISTRICT COURT CORRECTLY FOUND THAT WILSON WAS A DEALER PURSUANT TO U.C.A. § 13-14a-1(1)(a).

The District Court correctly ruled, based on ample evidence, that Wilson was a Dealer who retailed yard and garden equipment. Based on this ruling, Wilson was entitled, under Utah's "buy back" law, to require that Fradan Manufacturing repurchase the Fradan Inventory at the termination of the parties' agreement. Utah Code Ann. § 13-14a-2.

A. Wilson Clearly Fits Within the Statutory Definition of Dealer.

The statute defines retailer or dealer as “any person, firm, or corporation engaged in the business of selling and retailing farm equipment, implements, utility and light industrial equipment, attachments, or repair parts, and includes retailers of yard and garden equipment not primarily engaged in the farm equipment business.” Utah Code Ann. § 13-14a-1(a) (1999). The statute specifically identifies two distinct groups which are excluded from the definition of dealer: (1) persons engaged in the business of sales and service of heavy industrial or construction equipment, or (2) a person, firm, or corporation who serves as the dealer for a membership group purchasing program. Utah Code Ann. § 13-14a-1(1)(b) (1999). Fradan Manufacturing has conceded that Wilson does not fall within either excluded category.

Moreover, Fradan Manufacturing admits that Wilson sold the Fradan Inventory, consisting of yard and garden equipment, at the retail level. (Appendix A at 40). Clearly, Wilson falls squarely within the definition of a “dealer.”

B. Even if Wilson Made Limited Wholesale Sales to an Affiliate, Such Does Not Preclude it From Being a Dealer of the Fradan Inventory.

Fradan Manufacturing’s assertion that Wilson cannot be a Dealer since it engaged in a wholesale business is baseless. First, Wilson was not a wholesaler of Fradan

Inventory. Fradan Manufacturing provided no evidence to the District Court that Wilson operated a wholesale business with Fradan Inventory. With the single limited exception of a few transactions with Wilson's affiliate, Pro Power of Idaho Falls, Wilson made no wholesale sales of the Fradan Inventory to any other third parties.

Second, the limited wholesale sales made by Wilson to its affiliate would not preclude Wilson from the definition of a dealer. By analogy, many home improvement stores offer contractors special reduced pricing. Would Fradan Manufacturing argue that Home Depot or Anderson Lumber are not retail dealers simply because they sale to contractors who resale the product?

Third, assuming arguendo that Wilson made wholesale sales, such does not preclude Wilson from being a dealer under the statute. As set forth above, only two groups are expressly excluded from the definition of dealer. Those business entities that retail products but also distribute "at the wholesale level"(13-14a1.(7)) are not excluded in the statutory definition of dealer. Wilson does not fall within either of the excluded groups.

In a failed attempt to claim Wilson is a wholesaler, Fradan Manufacturing cites the statutory definition of "wholesaler" to include "a dealer, as defined in Subsection (1), who

in addition to retailing distributes equipment at the wholesale level.” (Appellant’s Brief at pp. 11-12). However, this argument in fact supports Wilson’s argument that it is a Dealer.

As stated by Fradan Manufacturing, unambiguous statutes should be given their plain meaning. Statutes should not be rewritten by the courts and, if ambiguity is present, the statute should be harmonized with the legislature’s intent.¹ (Appellant’s Brief pp. 11-15). However, Fradan Manufacturing simply ignores the portion of that definition that provides a wholesaler *may* include a dealer.

Wilson concedes that the statute provides that the some dealers may fall within the definition of wholesaler. However, the statute is drafted using the permissive “may.” See

¹The only cases that Fradan Manufacturing cites to in the Argument section of its Appellant Brief deal exclusively with statutory construction. Specifically, Fradan Manufacturing cites Matrix Funding Corp. v. Auditing Division of the Utah State Tax Commission, 868 P.2d 832, 833 (Utah 1994) (holding that a court must “examine the statute’s plain language and resort to other methods of statutory interpretation only if the language is ambiguous.”); Beynon v. St. George-Dixie Lodge # 1743, 854 P.2d 513, 518 (Utah 1993) (holding that when a statute is ambiguous the court must “harmonize its provisions in accordance with the legislative intent and purpose); and Neel v. State, 889 P.2d 922, 926 (Utah 1995) (stating the courts do not have the “power to rewrite a statute to make it conform to an intention not expressed.”). Wilson acknowledges that these cases are appropriate interpretations of the law but argues that Fradan Manufacturing fails to follow these assertions by ignoring the plain meaning of the statutes in question.

Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (stating that the term “may” generally is to be given a permissive meaning and “shall” generally denotes a mandatory meaning). In other words, a dealer which engages in wholesale sales may or may not be included in the definition of wholesaler. Clearly, if the Utah Legislature had intended to include all dealers which engage in wholesale sales in the definition of wholesaler, it simply had to state any dealer which engages in wholesale sales “shall” be considered a wholesaler.

Wilson’s interpretation of this statute is further supported by the statutes’ definition of “dealer.” As set forth above, the Utah Legislature clearly knew how to include or exclude particular groups within specific definitions as is evidenced by expressly excluding two groups of sellers from the definition of dealer. It would be absurd to interpret the statute so narrowly as to mean that an entity that sold even one piece of equipment at the wholesale level would be precluded from availing themselves of the buy-back protections afforded to a dealer.

C. There was Ample and Undisputed Testimony that Wilson Retailed the Fradan Inventory, Which Qualifies Wilson to be Considered a Dealer Under the Act.

Fradan Manufacturing did not dispute at the District Court that Wilson Supply acted as a retailer of the Fradan Inventory. (Appendix A, p. 40). The evidence before the District Court was that Wilson was, at all relevant times, a retailer of several lines of yard

and garden equipment, including the Fradan Inventory line, prior to Wilson's termination of the sales agreement.

As set forth above, the Act provides that a Dealer is any person, firm or corporation engaged in the business of selling and retailing yard and garden equipment. Because Wilson does not fall within the exceptions as described in § 13-14a-1(b), the statute should not be read so narrowly to create additional exceptions that were not considered nor promulgated by the legislature.

Based on the evidence presented, the District Court expressly found that from its initiation, the business relationship between Fradan Manufacturing and Wilson was that of manufacturer and dealer, respectively. (Appendix A, p. 85). Such evidence included, without limitation: (i) Wilson 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 both 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). Based upon this ample evidence, the District Court concluded that Wilson's sale of Fradan Inventory, through Wilson's wholly owned dba Pro Power, were final retail sales to ultimate end users. (Appendix, pp. 82; 86). This factual finding was reached by the District Court only after extensive briefing by the parties and after both parties had had an opportunity to present testimony and evidence. Consequently, there is no basis for Fradan Manufacturing's claim that the District Court abused its discretion in reaching the conclusion that Wilson was a dealer.

D. The Statute Does Not Exclude A Wholesaler From the Buy-Back Provisions. Public Policy Supports The Buy-Back Provisions Being Extended to Wholesalers.

While there is no express language requiring a manufacturer to repurchase products from a wholesaler, public policy supports finding such provisions extend to wholesalers. The statute specifically provides that "[i]n the case of a wholesaler who discontinues representing a line for any reason, the manufacturer of that line bears the responsibility to repurchase." Utah Code Ann. § 13-14a-9. The policy behind the "buy-back" provisions is to prevent downline entities, generally dealers, from being left with product that it either cannot, or no longer desires, to sell. This policy is equally applicable to a wholesaler who no longer wishes to market a particular line of product for whatever reason. Wilson

elected to terminate its agreements with Fradan Manufacturing because it no longer wished to inventory and sell its product. If Wilson were a wholesaler (which it is not), Wilson would be left with undesirable and unsaleable Fradan Inventory. Clearly, this is the very condition that the legislature was intending to protect against when it passed the Act.

Moreover, the legislature specifically approved requiring the manufacturer to repurchase its product when such product was no longer wanted. Under the statute, when a wholesaler discontinues representing a particular product line, the legislature specifically required the manufacturer to repurchase the dealers' product. It is important to note that under this condition, the statute requires the manufacturer to repurchase this product, not the wholesaler. This suggests that the legislature did not wish to leave the wholesaler with undesirable product when it elected to terminate its relationship with the manufacturer. Therefore, the public policy of the statute is furthered when the manufacturer is required to repurchase its product from a wholesaler wishing to terminate its relationship with the manufacturer.

II. THE 1999 SALE OF ASSETS OF WILSON TO A THIRD PARTY DOES NOT OBVIATE FRADAN MANUFACTURING'S DUTY TO REPURCHASE UNDER THE ACT.

Fradan Manufacturing's argument that Wilson's sale of substantially all of its assets in 1999, extinguished Wilson's "buy-back" claim is meritless. Fradan Manufacturing makes this baseless argument without presenting any law to support it.

The Act provides that the "buy-back" claim arises at the time of the termination of the sales agreement. Specifically, the "retailer is entitled to payment or credit from the manufacturer or wholesaler for all new and unsold wholegoods and parts inventories held by the dealer *on the date the agreement was terminated.*" U.C.A. § 13-14a-2 (1999) (emphasis added).

Wilson terminated its agreement with Fradan Manufacturing in October, 1997. Since that time, Wilson has been in possession of the Fradan Inventory. The Fradan Inventory was expressly excluded from the sale of assets by Wilson in 1999. As such, Fradan Manufacturing's claim that Wilson is now without standing to assert its buy-back claim is meritless.

III. THE TRIAL COURT DID NOT PENALIZE FRADAN OVER FRADAN MANUFACTURING'S REFUSAL TO PROVIDE DISCOVERY.

Fradan Manufacturing argues that the District Court abused its discretion by “unfairly penalizing Fradan regarding an unlitigated discovery dispute” and hence based its decision upon “hasty and cryptic findings of fact.” (Appellant’s Brief, pp. 21-22). Such allegations are without merit.

A purpose of the March 24, 2000 hearing was to allow both parties to argue the discovery dispute that had arisen from Fradan Manufacturing’s refusal to provide Wilson with pricing information. Hence, Fradan Manufacturing’s claim that the discovery dispute was unlitigated is not correct.

Fradan Manufacturing’s argument that the District Court unfairly penalized it over a discovery dispute appears to be based upon the fact that the District Court observed that “Fradan has refused to provide in discovery the pricing information to know whether they were selling at a wholesale price, which would be considered to be a lower price than to a retailer price to Wilson Supply.” (Appendix A, p. 82). This statement does not support a conclusion that the District Court was seeking to penalize Fradan Manufacturing. Instead, the District Court was simply making an observation that by its own actions, Fradan Manufacturing had precluded the Court and the parties from having an opportunity to

review potentially relevant evidence. The District Court held a hearing on Fradan Manufacturing's Motion for Protective Order relating to discovery. As such, there is nothing unlitigated about the discovery dispute whatsoever, and such does not provide a basis for reversal in this appeal.

In addition, as the record of the case demonstrates, the District Court's findings of fact were not cryptic but rather were detailed and deliberate. They encompassed five pages of the trial transcript and were made by the Court only after conducting two separate and extensive hearings at which several witnesses gave testimony. (Appendix A, pp. 82-86). Moreover, Fradan Manufacturing had ample opportunity to object to the form and content of the final order entered by the District Court. It did not, but instead approved it as to form and content. (R. 263-265). In short, Fradan Manufacturing's assertion that the District Court acted in a hasty or punitive fashion due to an unlitigated discovery dispute is baseless.

IV. THE TRIAL COURT DID NOT PENALIZE FRADAN MANUFACTURING BY AFFORDING WILSON A "HOME-STATE BIAS."

Fradan Manufacturing' argument that the District Court ruled against it based on alleged "home-state bias" is baseless. (Appellant's Brief p. 27). Fradan Manufacturing

suggests that Wilson effectively persuaded the District Court to find in its favor based on “local cultural factors.” Id.

Fradan Manufacturing argues that the District Court became biased when the attorney for Wilson stated that Fradan Manufacturing, a New York manufacturer, had declined to comply with applicable Utah statutes. (Appellant’s Brief p. 27; and R. 280, p. 12, lines 5-9). Fradan Manufacturing cites the following statements as alleged support of its argument:

1. “The Court may recall that I [attorney for Wilson] advised the Court at that time that Pro Power Equipment, Inc. is a dba of Wilson Supply. Wilson Supply is a company that has been in business since the early 1930's. It's a company that was started by the grandfather, if you will, of the two current owners of Wilson Supply. It's a family business.” (R. 281, p. 4, lines 13-18).
2. “. . . Wilson Supply, this family business . . .” (R. 281, p. 9, line 18).
3. “. . . the name adopted back in the 1930's isn't a name that's conducive to a retail store.” (R. 281, p. 10, line 9).
4. “It may be school districts that buy a tractor to mow the grass at a school. In instances you see the LDS Church buys lots of tractors for their ward houses, but these are in fact end users.” (R. 281, p. 11, lines 11-13).
5. “Well, that may be the case in New York, that may be the case in other areas of the country, but its not the case in Utah.” (R. 281, p. 16, lines 4-6).
6. “Founded in 1935 by my grandfather.” (R. 281, p. 31, line 5).

7. “. . . that’s the retail sales force where they sell it to Granite School District and the LDS Church and all of these end users.” (R. 281, p. 78, lines 21-23).

Fradan Manufacturing suggests these statements regarding when Wilson was formed, that it was a family owned business, and that it sold products to school districts and churches somehow biased the District Court against Fradan Manufacturing. (Appellant Brief, p. 27). Fradan Manufacturing’s argument that such innocuous statements biased the District Court is without merit and does not provide any basis for reversal on appeal.

CONCLUSION

Based on ample evidence, the District Court correctly found as a matter of fact that Wilson was as a retail dealer of the Fradan Inventory. As a result, the District Court correctly determined that upon the termination of the parties’ agreement, Wilson was entitled to have Fradan Manufacturing repurchase the Fradan Inventory under Utah Code Ann. § 13-14a-2. The District Court’s decision was not an abuse of discretion or otherwise punitive in nature. The District Court reached this determination only after extensive briefing and an evidentiary hearing at which a number of witnesses gave testimony.

WHEREFORE Wilson respectfully requests that since the undisputed material facts and relevant law support the District Court's ruling, this Court should affirm Judge Young's Order in its entirety and enter judgment in favor of Wilson and against Fradan Manufacturing, including an award for the additional costs and attorney's fees Wilson has incurred in defending itself in this appeal.

DATED this 17th day of August, 2001.

McKAY, BURTON & THURMAN

By: 

David L. Bird

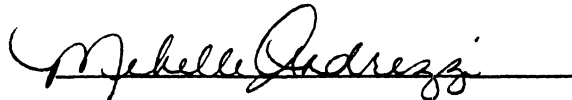
Gregory J. Adams

Attorneys for Wilson Supply, Inc., dba
Pro Power Equipment Co.

CERTIFICATE OF SERVICE

I certify that on the 17th day of August, 2001 a true and correct copy of the foregoing Brief of Appellee was mailed postage prepaid to the following:

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Salt Lake City, Utah 84047



APPENDIX A

TRANSCRIPT OF SEPTEMBER 19, 2001 HEARING

~~Third Judicial District~~

JAN 18 2000

SALT LAKE COUNTY

8.

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P R O C E E D I N G S

(Electronically recorded on September 19, 2000)

THE COURT: Good morning, this is the time set for evidentiary hearing in the matter of Wilson Supply vs. Fradan Manufacturing Corp. The case is 980912305.

Counsel, first your appearances, please.

MR. BIRD: Your Honor, David Bird on behalf of the plaintiff.

MR. MYLAR: Frank Mylar on behalf of Fradan Manufacturing.

THE COURT: You may proceed.

MR. BIRD: Your Honor, we previously argued with respect to cross motions for summary judgment. I think we laid out the legal arguments for the Court. I'm happy to summarize and review those legal arguments, or if it's the Court's preference, I'll simply call my witnesses and proceed, then, with the evidence.

THE COURT: If you wish to make a brief opening statement of some kind, that's fine with me. I do have recollection of the arguments previous.

MR. BIRD: Fine. I will make just the briefest of opening statements, your Honor. From the Court's calendar to have this matter for an evidentiary hearing, it's apparent that the Court is concerned about the issues to definition of a dealer under the Utah buy-back law and whether or not Wilson

1 Supply falls within the definition of a dealer under the Utah
2 buy-back law, and as a result upon the termination of its
3 relationship with Fradan Manufacturing, whether Fradan
4 Manufacturing has an obligation to repurchase the product which
5 Fradan Manufacturing sold to Wilson Supply.

6 In that regard, your Honor, I believe that the Court
7 will likely recall there was a substantial discussion during
8 the cross motions for summary judgment with respect to whether
9 or not the sales of product to Fradan Manufacturing were to
10 Wilson Supply, Inc. or whether those sales were to Pro Power in
11 a relationship between Wilson Supply, Inc. and Pro Power
12 Equipment.

13 The Court may recall that I advised the Court at that
14 time that Pro Power Equipment, Inc. is a dba of Wilson Supply.
15 Wilson Supply is a company that has been in business since the
16 early 1930's. It's a company that was started by the
17 grandfather, if you will, of the two current owners of Wilson
18 Supply. It's a family business.

19 Historically the business of Wilson Supply was a
20 business of product distribution. They had substantial
21 distribution lines in the early part of their business.

22 During the period of time, approximately in the
23 1990's, manufacturers had ceased doing business with a
24 distribution system. Most of the manufacturers with whom
25 Wilson Supply had a long established business relationship

1 determined to go what is known as dealer direct, which is
2 essentially to cut out the middle man.

3 Historically manufacturers used distributors as a
4 means of essentially warehousing their product out in various
5 locations, and they used distributors for purposes of
6 establishing territory. They would place the (inaudible) and
7 the burden on distributors to set up dealers, and essentially
8 infiltrate a sales territory for a manufacturer.

9 It served those purposes for the manufacturers.
10 Typically what happened is once the manufacturer's business
11 matured the manufacturers would go to what is known as dealer
12 direct and cut out the distributor.

13 Wilson Supply had substantial experience with that
14 business cycle. Many of the manufacturers for whom they had
15 been distributors, after Wilson Supply had spent substantial
16 money, resources and time establishing this network for the
17 manufacturer, would then cut out Wilson Supply and go dealer
18 direct. Substantial names would be Polaris and Aaron and
19 products such as that where Wilson Supply developed dealers for
20 these manufacturers and then these manufacturers terminated
21 Wilson Supply.

22 One thing that's very important, your Honor, with
23 respect to those distributorship relationships is those
24 distributorship relationships were typically governed by very
25 complicated, complex, lengthy distributorship agreements.

1 These agreements were drafted by the manufacturers, they were
2 very one-sided. Traditionally these agreements allowed the
3 manufacturers the right to terminate these distribution
4 relationships.

5 But the other thing that's important about those
6 distributorship agreements, your Honor, is that in addition to
7 being essentially one-sided to the manufacturer, they did
8 provide one protection to the distributor, and that is that
9 upon the termination of the distribution agreement, the
10 manufacturer would buy the product back. So whatever product
11 was still in the distributor's warehouse, if you will, the
12 manufacturer would buy it back.

13 They wouldn't buy it back on terribly favorable terms,
14 I would add. There were typically restocking charges, there
15 were typically requirements with respect to what product they
16 would buy back. Those requirements dealt with the condition of
17 the product. Typically the agreement said that you could only
18 sell back new products, unopened in cartons. They weren't very
19 generous, but there were provisions for buying back the
20 product.

21 Again, the essence being if we're going to terminate
22 this relationship then -- and the relationship was terminable
23 in a variety of ways, obviously. It could be terminated by the
24 manufacturer under the terms of the agreement, it could be
25 terminated by the distributor, or sometimes it just expired by

1 the term of the distribution agreement.

2 Historically those agreements would be lengthy
3 agreements, and then they evolved into just these annual
4 agreements, but the essence still being that the product was
5 bought back once the relationship was terminated, there was no
6 ability or use for the product so--

7 THE COURT: And the theory, in part, with respect to
8 that was that these wholesalers weren't in the business of
9 selling retail, and therefore they should -- the manufacturer
10 should take the product back, I'm assuming.

11 MR. BIRD: For a variety of reasons, your Honor. For
12 that reason, and there are other reasons. Once the
13 relationship is terminated when there were problems with the
14 product, the distributor would no longer be able to deal with
15 those problems, be they warranty problems, be they any number
16 of problems. It was a way of basically severing the
17 relationship cleanly.

18 The Utah legislature determined that there were issues
19 associated with manufacturers and their relationship with
20 dealers of their product that were not being covered by
21 distribution agreements, they're not being covered by the same
22 sort of comprehensive contracts that existed between
23 distributors and manufacturers.

24 In this instance when the manufacturers went dealer
25 direct, they were dealing with a lot of mom and pop operations.

1 They weren't dealing with more sophisticated distributors, they
2 were dealing with the mom and pop operations.

3 For the same reasons, when those relationships
4 terminated, if the dealer happened to have 50 lawnmowers
5 sitting in the back of their store and the relationship was
6 terminated for whatever reason, the legislature determined that
7 the appropriate remedy at that point in time was to require the
8 manufacturer to buy back the product.

9 Now again, your Honor, this is one of those situations
10 where the legislature in an effort to evenly balance interests
11 here basically is saying, "Manufacturer, you sold the product
12 to them, the relationship has ended now. It doesn't make any
13 difference how the relationship ended, whether it was ended by
14 you or by the dealer or by an expiration of a term or
15 whatever." The statute doesn't have any requirement as to the
16 basis for the termination, the statute simply provides that
17 once the relationship is terminated the manufacturer buys the
18 product back.

19 Now your Honor, again, it's important, the statute
20 says the manufacturer buys it back at the same price that it
21 sold it for. It's not a situation where the dealer is getting
22 any benefit out of being able to resell the product back. The
23 dealer is simply getting back the exact same amount that the
24 dealer paid for it.

25 The theory, again, being that the dealer has no

1 ability at that point in time to do anything with the product,
2 the relationship is severed. The manufacturer is the one that
3 ought to take its product back and then the manufacturer can
4 sell it to its other chains, if you will. So that's the
5 essence for the statute.

6 Your Honor, where I think the argument became confused
7 in the cross motions for summary judgment, perhaps the reason
8 why the Court has questions with respect to the cross motions
9 for summary judgment, is Fradan Manufacturing's efforts to
10 essentially confuse the relationship between Fradan and the
11 plaintiff in this action, Wilson Supply, and confuse, if you
12 will, Wilson Supply's business operation.

13 As I've indicated to the Court, and after testimony --
14 and frankly, your Honor, the testimony will be very brief here,
15 this is a pretty straightforward simple issue. In the early
16 1990's after having been terminated by most of these
17 manufacturers for whom Wilson Supply had historically been a
18 distributor, Wilson Supply, this family business basically
19 determined, "We've got to be able to survive, we've got to be
20 able to continue in business. How are we going to continue in
21 business?"

22 Well, the direction of business at that time imposed
23 by them by the manufacturers with whom they had been doing
24 business was, "You become a retailer, you become a dealer, and
25 we will deal with you dealer direct, manufacturer dealer

1 direct. That's how you're going to be able to continue in
2 business."

3 The entities for whom they had previously been
4 distributors wanted them to be dealers, not distributors.
5 They're cutting out the middle man, if you will. The middle
6 man no longer serves a function for them. So you become a
7 dealer.

8 Well, Wilson Supply, the name adopted back in the
9 1930's isn't a name that's conducive to a retail store. It
10 doesn't market as a retail store, and so Wilson Supply adopts a
11 dba, it's not a separate business entity, but it's simply a
12 dba, and I'll provide the Court with certified copies of the
13 state filing in that regard, a dba or Pro Power Equipment
14 Company. That's their business, they sell power equipment.

15 Though historically they distributed for snowmobiles
16 and marine products, eventually they got down to a core
17 business, if you will, of outdoor lawn and garden equipment.
18 Their business is business to commercial users. It's not
19 really to yourself for a lawnmower to mow your back lawn,
20 though coincidentally they did sell me a lawnmower to mow my
21 back lawn, but that's not their business.

22 Their business is commercial accounts, landscapers.
23 The product they sell is not really the smaller lawnmower type
24 product, it is really commercial tractors and commercial
25 trimmers and products associated with commercial landscapers.

1 So their customer is a commercial landscaper, but this
2 is not a customer who then buys this product and turns around
3 and resells it. These are people who use the product. They
4 are end users, if you will, your Honor.

5 It's a classic case of a retailer to an end user, and
6 in this instance, your Honor, we'll put on evidence that the
7 invoices for the Fradan products were all sold to end users,
8 with one exception that it was sold to an affiliate of Wilson
9 Supply. But all of the product is sold to end users.

10 These are commercial landscapers. It may be school
11 districts that buy a tractor to mow the grass at a school. In
12 instances you see the LDS Church buys lots of tractors for
13 their ward houses, but these are in fact end users. These are
14 not dealers who are reselling the product, they are end users.

15 So as Wilson Supply evolves and forms this dba, Pro
16 Power Equipment, what they do is they change from a warehouse,
17 which is the way they formally did business, you know, as a
18 distributor. All they need is a warehouse because they don't
19 sell products to end users, they warehouse products, and as
20 dealers need products they ship it out.

21 Well, so they changed from a warehouse to retail
22 stores. In 1996, the date at issue here, Wilson Supply has two
23 retail stores and is in the process of establishing a third
24 retail store. They have a retail store in Salt Lake City, they
25 have a retail store in Idaho, and they're in the process of

1 establishing a retail store in Denver. That's the way they did
2 business, they converted from a warehouse to retail stores.

3 Now the operative facts here, your Honor -- again, the
4 testimony will be, and I'm proffering some of the testimony to
5 shorten this, your Honor. The testimony will be that once
6 Scott Fitzgerald, an employee of Fradan Manufacturing, came to
7 the retail store of Wilson Supply, which has on the exterior of
8 the store, "Pro Power Equipment Company." The signage is Pro
9 Power Equipment Company.

10 You go in there's a sales floor and there's salesmen
11 there, and there's product sitting on the floor. It's not like
12 a Target or a KMart or what have you because their customers
13 are commercial landscapers, so the floor is cement -- kind of
14 like a Home Depot, I guess. The floor is cement, but it's a
15 retail store.

16 Scott Fitzgerald comes into the retail store,
17 approaches Pro Power Equipment, which is the dba of Wilson
18 Supply, solicits their business. And rather than continuing to
19 tell you the testimony, we will put on the evidence in that
20 regard, your Honor, as to those contacts and that business
21 relationship.

22 We'll also introduce into evidence the invoices
23 that -- for all the product that Wilson Supply dba Pro Power
24 Equipment sold to show the Court that this product was sold to
25 end users.

1 Your Honor, again I think it's imperative and I think
2 it will become clear to the Court when we show the Court the
3 certified copies of the state filings that there are not two
4 separate business entities here. Wilson Supply and Pro Power
5 Equipment are one in the same entity.

6 Pro Power Equipment is simply the dba of Wilson
7 Supply, the name they adopted because it's a retail store at
8 this point, a retail oriented name to advise their customers --
9 you know, those people who come into the store what their
10 business is, it's to sell power equipment, power lawn supply
11 equipment.

12 So it's clear, your Honor, that there are not two
13 separate entities. Wilson Supply does not sell to Pro Power
14 Equipment as Fradan Manufacturing attempted to convey to the
15 Court in their cross motion for summary judgment, suggesting
16 that somehow Wilson Supply bought from Fradan Manufacturing and
17 then turned around and sold to Pro Power Equipment.

18 You can't sell to yourself, your Honor. There aren't
19 two entities here, there's only one entity. The fact of the
20 matter is, Fradan Manufacturing knew that at the time. Scott
21 Fitzgerald knew that at the time.

22 The other thing that's going to be very apparent
23 through the testimony, your Honor, is that it's disingenuous
24 for Fradan to suggest that they were setting up Wilson Supply
25 as a distributor when the testimony will be that they told

1 Wilson Supply that they already a distributor for Utah.

2 Cantrell out of California already had the Utah
3 territory. So it's again disingenuous for them to say, "We
4 were setting these guys up to be a distributor," when in fact
5 they already had a distributor, and Wilson Supply could only
6 have been operating as a dealer, which is in fact what they
7 did.

8 The contacts between Wilson Supply and Fradan
9 Manufacturing are not numerous. This is a very short business
10 relationship. What happened is Wilson Supply places the order
11 for the first product to put in the stores, they have problems
12 with the product.

13 Your Honor, we're not here to argue about the quality
14 of the product because I don't think that's germane to the Utah
15 buy-back law, the fact that most of the product that was sold
16 came back to Pro Power and Wilson Supply from their customers
17 who returned the product because of problems with it is not
18 germane to this issue.

19 The issues associated with the product (inaudible) not
20 designed for the Utah climate. There were -- it's not jetted
21 properly, there were cold starting issues. These are not
22 warranty issues, and so when Fradan Manufacturing says there
23 were never any warranty claims, that's because the Pro Power
24 Equipment people were calling Fradan and saying, "They won't
25 start." Well, that's not a warranty issue. Or they say the

1 recoiler starters have problems. Well, the response to that
2 was simply, "Send another box of recoilers." You know, "Here,
3 replace them with these recoilers."

4 But in this short relationship, short business
5 relationship, the other, I guess, germane issue here is that
6 had there not been problems, Pro Power and Wilson Supply
7 wouldn't have sought to terminate the relationship.

8 But they acquired the equipment, they find out
9 immediately that this is not a product that they want to carry,
10 and immediately seek to terminate this relationship.

11 Then under operation of the Utah buy-back law
12 basically say to Fradan Manufacturing, "Look, here's the
13 product we bought." It's still in the cartons, your Honor. I
14 mean we're not trying to sell them back used equipment. This
15 is brand new equipment, still in the carton, it's been
16 warehoused the whole time, and Wilson Supply simply says,
17 "Here, you take back your product under Utah buy-back law and
18 pay us back exactly what we paid for it."

19 We're not seeking any penalty here, we're not seeking
20 any bonus, we're not seeking any premium, we're not trying to
21 harm you, Fradan Manufacturing. All we're saying is the law
22 allows us to each be put back to our respective positions. You
23 take back your product and sell it however you want and give us
24 back the money.

25 That's where the rubber hit the road. Fradan

1 Manufacturing said, "No, we're not going to take back the
2 product." Their argument in that regard is, "We have no
3 obligation to take it back, this is a completed sale."

4 Well, that may be the case in New York, that may be
5 the case in other areas of the country, but it's not the case
6 in Utah. In Utah the statute specifically provides that on the
7 termination of that relationship the manufacturer will take
8 back the product. Again, the legislature in their efforts to
9 balance these respective--

10 THE COURT: (Inaudible) statute without arguing too
11 much, let's just get the facts.

12 MR. BIRD: Okay, let's do that. In summary, your
13 Honor, again I want to point out to the Court that the statute
14 itself -- and Mr. Mylar has made great efforts and previously
15 handed the Court his version of the statute with the words,
16 "wholesaler and manufacturer" highlighted throughout, and I
17 guess in closing, your Honor, I'll suggest to the Court why
18 that's irrelevant and how the legislature clearly attempted to
19 require that the manufacturer buy back the product.

20 The most salient issue there, your Honor, is there is
21 no provision in the statute that says that even under Mr.
22 Mylar's definition where he says that the statute defines
23 wholesaler, the most interesting part about the statute is the
24 legislature defines wholesaler, but nowhere does it say the
25 manufacturer doesn't have the obligation of buying it back from

1 even the wholesaler. In fact, the statute says that the
2 manufacturer does have the obligation to buy it back.

3 So even (inaudible) Wilson Supply to be a wholesaler,
4 and again, it's interesting that the statute uses that
5 terminology rather than distributor, the statute still provides
6 the obligation of the manufacturer to buy it back.

7 And again, the reasons for that are clear. I mean
8 it's simple and equitable. If the relationship is terminated
9 just buy back your equipment.

10 So your Honor, if I may, I propose to call two
11 witnesses, Brett Wilson--

12 THE COURT: Does Mr. Mylar want to make an opening
13 statement?

14 MR. MYLAR: Thank you, your Honor. May I approach the
15 bench? I have a few exhibits that I want -- I think will be
16 constructive of the (inaudible) I have.

17 Mr. Bird gave a lot of general statements that didn't
18 apply to the facts of this case, just generally talking about
19 relationships in general between businesses. The law that -- I
20 think we need to stand back and look at this law and what the
21 purpose of intent was, and then we'll be able to see clearly
22 what the issues are.

23 This law is not unique to Utah, it's one of these
24 (inaudible) types of laws that's around the country to protect
25 retailers, and the whole concept of it is is if John Deere

1 moves in down the block and he starts selling directly to a
2 retailer, and then he's disappointed for whatever reason with
3 that retailer, he can't go down a block lower and just start
4 deciding to have a deal with some other retail outlet and
5 therefore undercut the one that's already there in the area.

6 It's strictly for protecting retailers, and that's in
7 fact what the statute says. All of these things from a
8 statutory interpretation perspective, what appellate courts
9 look for, is what the statute is designed to protect.

10 It says equipment repurchase from retail dealers.
11 Okay, so that's the focus. I will say that there is absolutely
12 no evidence, no ability to find a repurchase by a manufacturer
13 from a wholesaler in this statute. It doesn't exist, there's
14 no reason for that protection.

15 What I talked about with the John Deere situation does
16 not apply when you're dealing with a wholesale distributor. In
17 fact, the statute does talk about distributor.

18 We need to lay some groundwork here, number one. This
19 statute clearly is to protect retailers. Everywhere the buy-
20 back is mentioned there is -- the obligation is always
21 either/or. Either the manufacturer or the wholesaler has to
22 buy back from the retailer.

23 THE COURT: What do you do if somebody is filling both
24 functions?

25 MR. MYLAR: It addresses that very clearly. Now if we

1 look at -- if you have the statute there -- and by the way,
2 this is the statute that was supplied by the plaintiff's
3 attorney at the last hearing, and if you go to what's been
4 (inaudible) page 98, subparagraph 7, it says, "Wholesaler, as
5 an entity business or as the conduct requires may mean," and A
6 could apply, but B clearly applies in this situation.

7 B says, "A dealer as defined in subsection (1)." That
8 means that this is a retail dealer as defined in subsection
9 (1), "who in addition to retailing distributes equipment at the
10 wholesale level." There is absolutely no question that that's
11 what Wilson is. They've admitted to it in their affidavit,
12 they've pled it in their complaint that they distribute
13 equipment at the wholesale level.

14 Even this termination letter from October 23rd that I
15 gave you a copy of there, at the bottom it says, "Distributors
16 of Outdoor Power Equipment since 1935."

17 I'll also say in 1995 the legislature made this a
18 little bit more clear, because this clause that I just read to
19 you, they added, "a dealer as defined in subsection (1) who in
20 addition to," they added those words, "who in addition to." So
21 they want to make it clear that if you're a retailer, but in
22 addition to retailing you distribute equipment at the wholesale
23 level, then you are defined as a wholesaler.

24 Now the plaintiffs misunderstand my argument, because
25 it is part of my argument that they are one in the same entity.

1 In fact, if you look at the diagrams here, I think sometimes
2 it's constructive to look at some of these diagrams, figure 1
3 is a general concept of what happens in many of these
4 situations where a manufacturer sells to a wholesaler, a
5 wholesaler distributes to retailers.

6 Now the wholesaler -- there is no (inaudible) buy back
7 between the manufacturer and the wholesaler under the statute,
8 but if in fact the wholesaler sells to a retailer, the
9 wholesaler has to buy it back.

10 Now in the situation that we're under right now is
11 figure 2. They said, and we agree, that Wilson Supply -- that
12 Pro Power was a dba of Wilson Supply. Wilson Supply, though,
13 is the distributor. Dunn and Bradstreet say they are a
14 distributor and a wholesaler, the yellow pages, Wilson is
15 clearly marked as a wholesaler distributor.

16 So they've advertised themselves that way, Fradan
17 relied upon Dunn and Bradstreet that they were actually a
18 wholesale distributor in the original dealings in this case,
19 and in fact this is what this paragraph 2 is -- 7(b), excuse
20 me, under the statute is figure 2. They are indeed a
21 wholesaler and a retailer.

22 They've admitted that, they've actually admitted in
23 their complaint and in the affidavit that they have also
24 wholesaled and distributed Fradan equipment. Now I don't know
25 how much, and it's not relevant how much. The bottom line is

1 what they're trying to do is get the best of both worlds.

2 What they're trying to do is get the best of both
3 worlds. They're trying to act like they're only a retailer for
4 purposes of requiring the manufacturer to buy back the product,
5 and yet they were acting as a distributor and wholesaler to get
6 a lower price, which is typical when a manufacturer sells to a
7 wholesaler.

8 Now I'll get into the reason of this. The reason the
9 legislature, not only in Utah but across the country seeks to
10 protect the retailer and not the wholesaler, is because the
11 wholesaler has a lot more leverage to get rid of the product.
12 They have different sales forces going around their territory,
13 whether it be Idaho in this case and Utah and Colorado, and
14 they can sell all that, not only to other wholesalers and
15 distributors, but they can also sell it to any retailer they
16 want, plus they may retail it themselves.

17 Now the thing that they're trying to do here is
18 they're trying to pretend like they're only a retailer for
19 purposes of buy-back because that's the only option that they
20 have under the statute. They have to show this Court that they
21 are not a wholesaler, otherwise they cannot get around this
22 clear reading of the statute, which I think is made more clear
23 under the 1995 amendment, where it says, "in addition to."

24 Now if you turn the page on figure 3, this is another
25 potential outcome of the statute, the Utah buy-back law. If a

1 manufacturer sells directly to somebody that only is a
2 retailer, as defined in the statute, then indeed the
3 manufacturer has to buy back.

4 Under Fradan that's what they typically do in New York
5 where they are a manufacturer. They are acting like a
6 distributor in New York. In other states they don't do that.
7 In other states the typical situation is they're selling to
8 distributors, they go out to different retail outlets. And
9 under the facts of this case Wilson initially had even its own
10 retail outlets, Pro Power, in three different states, but they
11 were still the wholesale distributor, and that was through the
12 direct agreement (inaudible).

13 Now I think when we left actually last March at the
14 hearing there was some confusion as to what the effect of
15 subparagraph 9-3 was in the code, and that's what figure 4
16 addresses, your Honor.

17 Under subparagraph 9-3 if a wholesaler discontinues a
18 line, then the manufacturer has to buy back from the retailer.
19 That is if they give notice and say, "We're not going to carry
20 this line anymore," but that is assuming a separate retailer,
21 not that they're the same entity--

22 THE COURT: Why would that be so?

23 MR. MYLAR: Because the statute has already defined a
24 retailer -- a wholesaler who also retails as a wholesaler.
25 They cannot ever be treated under the statute now as simply

1 only a retailer because every part of the statute talks about
2 the buy-back requirement belonging -- the requirement either
3 goes to the manufacturer or the wholesaler. Nothing in that
4 statute ever says that a manufacturer ever repurchases from a
5 wholesaler, because there's no need to protect them, number
6 one, but number two and more importantly, it's just doesn't say
7 it anywhere in the statute.

8 So this idea--

9 THE COURT: Let me go back to your figure 2, and
10 Wilson Supply discontinues carrying the line, what would be the
11 status of all of the retailers, wouldn't they all fall within
12 your figure 4?

13 MR. MYLAR: Not the retailers that are also Wilson
14 Supply. They've admitted they're the same entity, and we agree
15 they're the same entity, so you're right, it can't buy itself
16 from themselves, they aren't -- the retailers that are Pro
17 Power are clearly all in line with B, part of the wholesaler,
18 and they are defined together with Wilson Supply as a
19 wholesaler.

20 THE COURT: So you have a wholesaler that has five
21 retail outlets and sells to those five retail outlets the
22 product of a manufacturer, and then that wholesaler decides --
23 and let's say they sell to 10 other retail outlets, so they've
24 got 15 retail outlets, five of which are wholly owned
25 subsidiaries.

1 MR. MYLAR: All right.

2 THE COURT: Now they decide we're no longer going to
3 carry this product. That's going to have a bearing on all of
4 their retailers.

5 MR. MYLAR: That's right.

6 THE COURT: So they cancel with the manufacturer, and
7 you're saying that 10 retailers can require the manufacturer to
8 buy it back, but the five wholly owned subsidiaries cannot.

9 MR. MYLAR: That's correct.

10 THE COURT: So the wholesaler acts as (inaudible) in
11 cancelling the agreement with the manufacturer at that time.

12 MR. MYLAR: Correct, and part of the reason, I think,
13 behind that part of the code is again, they're trying to
14 protect the retail outlet. A distributor--

15 THE COURT: Well, everyone (inaudible) retail outlet.

16 MR. MYLAR: Well, but that's not what I'm saying.
17 See, the wholesaler is a retailer and they've admitted to that.

18 THE COURT: I know they have, I know they have here,
19 but under that theory why wouldn't the five retailers be just
20 as important to the legislature as the 10?

21 MR. MYLAR: Because they're part of a wholesaler,
22 they're actually -- see, it's very similar to Wilson. Wilson
23 owned -- at that time owned Pro Power. It doesn't now, it sold
24 it actually about a year ago, I think, so it doesn't own those
25 retail outlets anymore, but it owned those outlets during the

1 critical time of this case, and it was the same.

2 Pro Power -- in fact, Brett Wilson signed things as
3 Pro Power just as much as he signed them as Wilson, it appears,
4 in the context of this case, and that in the dealings with the
5 two were basically one in the same.

6 THE COURT: So you're saying the legislature felt that
7 they should distinguish -- I mean the wholly owned subsidiary
8 of the wholesaler from the strictly retail outlet.

9 MR. MYLAR: Absolutely, and if that weren't the case,
10 the manufacturer would have to buy back every time because one
11 wholesaler would be a fool to just decide that, "Well, we'll
12 also have retail outlets and sell something." They could just
13 sell one or two pieces of equipment and say, "Well, look, we're
14 a retailer, therefore you have to buy it back from us." It
15 would be (inaudible) they would be able to circumvent the
16 meaning and intent of the statute just by--

17 THE COURT: Well, at the same time, it's the
18 manufacturer's product that's being sold to the public at
19 large, and in my example of having five wholly owned
20 subsidiaries that are retail outlets and having 10 completely
21 independent retail sources, the wholesaler goes to 15 companies
22 effectively and says, "We're no longer carrying this
23 manufacturer's product." So 10 of them have the capacity to go
24 and say, "Buy all our products back," and five of them you're
25 saying do not.

1 MR. MYLAR: Right.

2 THE COURT: And so the manufacturer -- or the
3 wholesaler doesn't have complete unfettered discretion because
4 the wholesaler is going to be stuck with the inventory or five
5 of his retail outlets.

6 MR. MYLAR: That's correct.

7 THE COURT: And he's not carrying it anymore. Why
8 shouldn't the theory be the same, just simply say, "Look,
9 manufacturer, you made the stuff, they're no longer going to
10 carry it--" and especially when they are retail outlets, even
11 though they're wholly owned subsidiaries and wholesale outlets,
12 "you ought to be obligated to take it back."

13 MR. MYLAR: I think there are a couple of reasons for
14 that. Number one is that there is going to be a higher volume,
15 typically, that you're dealing with a wholesaler rather than a
16 retailer, and so there's going to be a lot more at stake, and
17 in fact, that works better than that works that way because
18 then there's more incentive to in fact distribute it. You're
19 going to get a lower cost, typically, in buying it in the first
20 place, which makes it easier for you to get rid of it at a
21 discount, if necessary.

22 As a practical matter, they have a broader -- a retail
23 store is confined somewhat to whatever the geographical
24 location of the traffic of that store is. A distributor is not
25 confined, they have a whole large territory -- in this

1 instance, at least, three states, that they could look at to
2 move that equipment.

3 So it is a business dealer's dealings between a
4 manufacturer and a wholesaler to get that equipment out.

5 THE COURT: All right.

6 MR. MYLAR: So I think that it's important, your
7 Honor, to see what the statute has defined, regardless of what
8 anyone wants to say about the quality or whatever situation
9 whatsoever, this statute under subparagraph (7), and especially
10 (b), there's no way around that that defines how Wilson Supply
11 has been operating. There's no question that that's how
12 they've defined themselves and advertised themselves in the
13 yellow pages and in their own stationery where it says they've
14 distributed this equipment since 1935.

15 There's no way around the fact that in this instance
16 we are not talking about anything that retailers are holding as
17 far as equipment goes. Wilson holds -- in fact, at this point
18 they've sold Pro Power and Wilson retains the product. So they
19 don't even have -- at least as far as I can see, they don't
20 even have a retail outlet anymore.

21 So they didn't actually distribute it out, but it
22 doesn't matter whether they did or not at this point because
23 their retailers that we're talking about in this instance are
24 one in the same with Wilson Supply. They are as they said
25 basically the same entity. Because of that, the statute

1 defines them as a wholesaler, and they cannot get around that
2 clear wording of the statute.

3 THE COURT: Okay. Well, let's take the evidence that
4 we need and see where we go. Now any of the evidence that you
5 can stipulate to, I would invite you to do that because it
6 seems to me that you're looking primarily at an argument of
7 law, isn't that--

8 MR. MYLAR: That's true.

9 MR. BIRD: I think that's correct. Mr. Mylar can make
10 his proposed exhibits, I'll stipulate to their admissibility.
11 I've given Mr. Mylar my proposed exhibits. I don't know if
12 there's any issues.

13 MR. MYLAR: The only ones I really hadn't -- I just
14 saw these today, I don't know exactly about these figures on
15 some that just say, "Fradan invoices." But otherwise the ones
16 that certainly say Wilson Supply--

17 THE COURT: Well, you can allow their admissibility as
18 illustrative of the testimony, I'm assuming.

19 MR. MYLAR: Yes.

20 THE COURT: So each side's exhibits are received. How
21 have they been marked?

22 COURT CLERK: They have not, I don't have the
23 originals.

24 MR. BIRD: Let me just give you the originals, your
25 Honor.

1 COURT CLERK: I assume this one would be No. 1, then?

2 THE COURT: No.

3 MR. BIRD: And I have copies for the Court as well.

4 THE COURT: All right, thank you.

5 MR. BIRD: I've put the markings in the lower right
6 hand corner. I'll mark them as Plaintiff's Exhibits 1, 2 and
7 3, your Honor.

8 THE COURT: All right.

9 MR. BIRD: Your Honor, again, I'd like to reserve my
10 statutory argument until we conclude.

11 THE COURT: Right. I know you--

12 MR. BIRD: I certainly take exception to--

13 THE COURT: Both opening statements contained a little
14 bit of argument, and I understand that.

15 MR. BIRD: Your Honor, I would call Brett Wilson.

16 COURT CLERK: You do solemnly swear that the testimony
17 you are about to give in this case now pending before the Court
18 will be the truth, the whole truth, and nothing but the truth,
19 so help you God?

20 THE WITNESS: I do.

21 COURT CLERK: Please be seated. Please state and
22 spell your name for the record.

23 THE WITNESS: My name is Brett Wilson, B-r-e-t-t-,
24 W-i-l-s-o-n.

25 THE COURT: Okay, and the Plaintiff's Exhibits 1 is

1 Fradan invoices, Exhibit 2 is Fradan Manufacturing document --
2 I don't know what it would be -- oh, service dealer agreement,
3 and Exhibit No. 3 is a certified copy of the computer generated
4 transcript from the Department of Commerce. So those three are
5 received without objection.

6 (Exhibit Nos. 1 through 3 received into evidence)

7 MR. BIRD: Your Honor, I'll note that with respect to
8 two of the invoices -- excuse me, two of the exhibits,
9 Plaintiff's Exhibit 1 and Exhibit 3, those are multiple sheet
10 invoices, and I think that will become self explanatory.

11 THE COURT: Right.

12 BRETT WILSON

13 having been first duly sworn,

14 testifies as follows:

15 DIRECT EXAMINATION

16 BY MR. BIRD:

17 Q. Mr. Wilson, would you identify your position with
18 Wilson Supply?

19 A. At the time and currently I am president of Wilson
20 Supply.

21 Q. When you say at the time--

22 A. At the time in question, 1996.

23 Q. So all times relevant to this dispute you have been
24 the president of Wilson Supply?

25 A. Yes.

1 Q. Would you describe for me the business of Wilson
2 Supply?

3 A. Historically, now?

4 Q. Historically.

5 A. Founded in 1935 by my grandfather. Basically we were
6 in the automotive industry and through time evolved -- and this
7 is obviously over a course of several years -- became involved
8 in the marine industry, the automotive industry, industrial
9 products, recreation products, eventually into the chainsaw
10 industry -- and these were all primarily separate divisions in
11 our company. We were primarily a wholesaler, and by wholesale
12 I mean two-step distributor at that point in time, and this
13 would be up through 1960's, early 1970's.

14 At that point in time we had four divisions, and I
15 became employed in probably 1975, so I can speak more clearly
16 about anything that happened from then on. We had four
17 divisions. We had the marine division, the recreation
18 division, the chainsaw division and the marine division -- did
19 I repeat that? In general--

20 THE COURT: You said marine twice. You said marine--

21 THE WITNESS: Okay, marine, chainsaw and the
22 industrial division.

23 We were involved in selling products throughout the
24 intermountain west, primarily, out of a single location, a
25 warehouse, if you will, where we did some retail activity. As

1 time had gone by we were distributing major product lines like
2 Polaris snowmobiles, which was a major product line.
3 Eventually we got into Aaron which became a major part of our
4 chainsaw division, which shifted into lawn and garden because
5 it became broader.

6 Q. BY MR. BIRD: Let me stop you there and ask a couple
7 of questions. You described your business at that historical
8 time as two-step distribution. What did you mean by that?

9 A. Meaning that we were formally a distributor who sold
10 to dealers.

11 Q. And how did you actually do that, what was those two
12 steps?

13 A. Well, technically we would buy product from the
14 manufacturer, we would put together our own sales programs and
15 go out and actively solicit for the business, and then the
16 dealers eventually would sell to the end user.

17 Q. You used Polaris as an example. Were you a two-step
18 distributor for Polaris?

19 A. Yes.

20 Q. What did you distribute for Polaris?

21 A. Snowmobiles and ATV's.

22 Q. Did you have a written agreement with Polaris?

23 A. Yes.

24 Q. What was the nature of the agreement?

25 A. It was a very lengthy contractual obligation that was

1 very tainted towards the manufacturer.

2 Q. Do you recall the title of the agreement, what type of
3 an agreement it was?

4 A. I just know that it stated it was a non-exclusive
5 distributor agreement. I don't know the title.

6 Q. What happened to the agreement with Polaris?

7 MR. MYLAR: Your Honor, I would object, this is
8 getting awful confusing (inaudible) other agreements rather
9 than what we should be talking about.

10 THE COURT: The objection is on relevance?

11 MR. MYLAR: Yes.

12 THE COURT: What's the relevance?

13 MR. BIRD: Your Honor, the relevance is again to show
14 historically how Wilson Supply evolved from a distributor, and
15 in fact in the 1960's, as Mr. Wilson has indicated, they were
16 in fact a distributor to the point where in 1996 they were a
17 retailer.

18 THE COURT: I think it's knowledge that they were a
19 retailer at this time. Isn't that right, Mr. Mylar?

20 MR. MYLAR: That's correct.

21 THE COURT: Okay, so the objection is sustained.

22 Q. BY MR. BIRD: In 1996 would you then simply describe
23 the business of Wilson Supply?

24 A. In 1996, the fall of 1996 specifically, we were a
25 company that had two retail stores trying to set up a third and

1 we retailed commercial equipment to existing commercial end
2 users.

3 Q. Where were your retail stores located?

4 A. We had one in Boise -- it was actually in Garden City,
5 Idaho, and we had one in Salt Lake, or in the Salt Lake area,
6 Murray.

7 Q. How did you first come in contact with Fradan
8 Manufacturing?

9 A. I'm not really exactly positive. I know that Scott
10 Fitzgerald called me on the phone was the initial personal
11 contact.

12 Q. What is your understanding of Mr. Fitzgerald's
13 position in 1996?

14 A. That at that point in time he claimed to be the sales
15 manager of Fradan.

16 Q. What did Mr. Fitzgerald say to you when he contacted
17 you on the phone or when you spoke on the phone?

18 A. He wanted to come and meet with us. He specifically
19 wanted to talk about his product and wondered if we had an
20 interest in the product.

21 Q. What type of products were you retailing in 1996?

22 A. Commercial landscape maintenance equipment.

23 Q. How were you selling that product?

24 A. Directly through our stores.

25 Q. The retail stores you described in Boise and Murray?

1 A. Yes.

2 Q. And to whom were you selling the product?

3 A. Various commercial end contractors, end users. Like I
4 think you mentioned earlier, churches, school districts, small
5 cutters, people that had one lawnmower in the back of their
6 pick-up truck who mowed commercially.

7 Q. Would you describe these people as end users of the
8 product that you sold?

9 A. Absolutely.

10 Q. When did you first meet with Mr. Fitzgerald?

11 A. Fall of 1996, probably early.

12 Q. Where did you meet?

13 A. At our store in Murray, Utah.

14 Q. Mr. Fitzgerald came to your store?

15 A. Yes.

16 Q. Do you recall the meeting with Mr. Fitzgerald?

17 A. Yeah, vaguely. He came into the store--

18 Q. Before you get there, who was present at the meeting?

19 A. Well, I believe at that point in time it was really
20 just me and Scott Fitzgerald. I think maybe by lunchtime there
21 was additional people.

22 Q. What did Mr. Fitzgerald say to you at the meeting?

23 A. Well, he was determined and interested in selling us
24 products, and he showed us the product line, showed us some
25 pricing structures. I showed him our facility.

1 Q. What did your facility consist of? First, tell me
2 about the facility.

3 A. My store basically was a 15,000 square foot facility
4 with a service department, storage and a retail showroom.

5 Q. What was the signage on the exterior of the building?

6 A. It said, "Wilson" on the front corner, and it said,
7 "Pro Power" on the side corner.

8 MR. MYLAR: Your Honor, I would object again, I think
9 he's going on and on about (inaudible) retail stores.

10 THE COURT: I don't know why we do that. There is a
11 stipulation that if you look at Mr. Mylar's second figure, they
12 agree that Wilson Supply was a wholesaler and Pro Power was a
13 retail outlet.

14 MR. BIRD: Maybe we would like to deal specifically
15 with Mr. Mylar's diagram.

16 THE COURT: Well, they agree that Pro Power was a
17 wholly owned subsidiary of Wilson Supply. That's your
18 testimony as well, right?

19 THE WITNESS: It was a dba, yes.

20 THE COURT: Well, wholly owned dba, it doesn't make
21 any difference.

22 THE WITNESS: Yes.

23 THE COURT: I guess in fact if it's a dba it's not a
24 separate entity.

25 MR. BIRD: It isn't a separate entity, your Honor, and

1 again, that's my point, and we've offered Exhibit 2, it's been
2 accepted, it's a certified copy to evidence the fact that there
3 is no separate entity here.

4 MR. MYLAR: And we stipulate to that.

5 THE COURT: Yes.

6 Q. BY MR. BIRD: Was there any discussion with Mr.
7 Fitzgerald about how Wilson Supply would sell the product?

8 A. Yes, absolutely. We clearly at that point in 1996,
9 our focus was on retailing to our commercial customers through
10 our retail stores, and it was very clear to Scott Fitzgerald
11 that that is how we went to business, and he was interested in
12 selling us on that basis because he knew we could get to the
13 marketplace and sell his product.

14 Q. Did you tell Mr. Fitzgerald you would wholesale his
15 product?

16 A. I didn't indicate that I would.

17 Q. Did you tell him that you would retail it?

18 A. Yes, I did.

19 Q. Did Mr. Fitzgerald describe for you any relationship
20 they had with other vendors in Utah?

21 A. You mean other people they sold to?

22 Q. People they sold to in Utah.

23 A. Well, he had told me that Cantrell Distributing was
24 their distributor in Utah.

25 Q. What did that mean to you, that Cantrell Distributing

1 was their distributor?

2 A. I assumed that that meant that Cantrell, who was
3 located in California, had the rights to sell Fradan product to
4 dealers in Utah.

5 Q. So was there any discussion about you becoming --
6 Wilson Supply or Pro Power Equipment becoming a wholesaler for
7 Fradan Manufacturing?

8 A. I showed no interest, and Scott Fitzgerald made it
9 clear that Cantrell had the area and that he didn't want to
10 sell in the area until that relationship had been finalized.

11 Q. Did Pro Power in fact become a dealer for Fradan
12 Manufacturing?

13 A. Yes, it did.

14 Q. Now it's already been admitted into evidence, Exhibit
15 3, but Mr. Wilson, directing your attention to Exhibit 3 --
16 excuse me, Exhibit 2, can you identify Exhibit 2 for the Court?

17 A. They are servicing dealer agreements with Fradan, the
18 purpose is to give them -- to have Fradan be aware of who is
19 selling their product in the area and make them warranty
20 stations so that they can service the product.

21 Q. Did Wilson Supply have any written agreement with
22 Fradan Manufacturing establishing Wilson Supply as anything
23 other than a dealer?

24 A. No.

25 Q. And in fact, directing your attention back to the

1 exhibit, I note that there are three different service dealer
2 agreements. Why are there three different agreements?

3 A. For each of our three locations.

4 Q. Each of the three retail locations?

5 A. Yes.

6 Q. At some point in time did Pro Power -- Wilson Supply
7 dba Pro Power place an order for product from Fradan
8 Manufacturing?

9 A. Yes.

10 Q. Do you recall how much product was purchased?

11 A. Dollar amount somewhere around \$40,000.

12 Q. How was it determined what product that you would
13 purchase?

14 A. Just product that we felt we could move through our
15 retail stores.

16 Q. And that was discussed with Mr. Fitzgerald?

17 A. Yes.

18 Q. Was the order placed with Mr. Fitzgerald?

19 A. Yes.

20 Q. Prior to the time the order was placed, had you had
21 any contact with anyone at Fradan Manufacturing other than
22 Scott Fitzgerald?

23 A. No.

24 Q. What did Wilson Supply do with the product that it
25 purchased from Fradan Manufacturing?

1 A. Well, we shipped some to our various locations, kept
2 the remainder in Murray, and were prepared to sell it retail.

3 Q. And did you in fact sell it at retail, that product?

4 A. We sold some, yes.

5 Q. Directing your attention to Plaintiff's Exhibit 1, can
6 you identify that document?

7 A. Yes.

8 Q. Would you describe it for the Court?

9 A. It's a list of -- the header page showing the
10 customers that we sold the product to at retail.

11 Q. Are these all of the customers to whom Fradan
12 Manufacturing product was sold?

13 MR. MYLAR: Your Honor, I object again for a couple of
14 reasons. Number one, he's already admitted in the complaint
15 and his affidavit that he sold Fradan at the retail and
16 distributor/wholesale level, it's an admitted fact already in
17 this case.

18 We're certainly not controverting that he's retailed
19 it, but he's also admitted both in the complaint and in his
20 affidavit for summary judgment that he's also wholesaled and
21 distributed at the wholesale level, and so I don't know why
22 we're even--

23 THE COURT: I don't know what the legal objection is.

24 MR. MYLAR: The legal objection is relevance, number
25 one and number two, it's already been an established fact on

1 both of these issues.

2 MR. BIRD: Your Honor--

3 MR. MYLAR: (Inaudible) actually as well as
4 (inaudible).

5 MR. BIRD: Excuse me, your Honor, I didn't mean to
6 interrupt Mr. Mylar. This is about the fifth time that Mr.
7 Mylar has said that we have admitted in our complaint and
8 affidavit that we have wholesaled Fradan Manufacturing
9 equipment. It's simply not true, your Honor.

10 I direct the Court to paragraph 5 and 6 of the
11 complaint. In paragraph 5 we say, "Wilson is a dealer of
12 utility, light industrial equipment, yard and garden equipment
13 and repair parts associated therewith." We say, "Wilson is a
14 dealer."

15 In paragraph 6 we say, "In addition to retailing
16 utility, light industrial equipment, yard and garden equipment
17 and repair parts associated therewith, from time to time Wilson
18 also distributes such equipment at a wholesale level."

19 We never say anywhere that we wholesaled Fradan's
20 equipment. We did not, and this document evidences that we
21 never wholesaled their equipment. We retailed their equipment
22 because that was the agreement with Fradan and with Scott
23 Fitzgerald that we would retail the equipment.

24 And again, Mr. Mylar continues to assert that we have
25 somehow admitted that we were wholesaling their product when we

1 have not.

2 THE COURT: All right, the objection is overruled.

3 Q. BY MR. BIRD: Now back to the exhibit, Mr. Wilson. Is
4 this a complete statement of all of the sales of Fradan
5 product?

6 A. Yes.

7 Q. What happened? I note that on certain, and
8 particularly down to Pro Power of Idaho Falls, would you
9 identify Pro Power of Idaho Falls?

10 A. It's an affiliate company, at least that's what we
11 call them.

12 Q. I note that with respect to the items Pro Power of
13 Idaho Falls, they show minus 4 and minus -- what does that
14 mean?

15 A. It means that those products were returned.

16 Q. Any of the other products sold here returned to Wilson
17 Supply?

18 A. I don't have any evidence that they were paperwork
19 wise, but I believe that several of them were. I have product
20 in my warehouse--

21 MR. MYLAR: I object, your Honor, he said he doesn't
22 have personal knowledge.

23 THE COURT: The objection is sustained.

24 Q. BY MR. BIRD: As to the other customers identified on
25 the exhibit, are these end users?

1 A. Yes, as defined end user, yes. They are commercial
2 people who use them commercially in their business to maintain
3 facilities.

4 Q. You've described for me the first meeting with Scott
5 Fitzgerald. Did you ever have any other meetings with Scott
6 Fitzgerald?

7 A. He came to our place in -- I believe it was late
8 November and put on a sales school.

9 Q. And when you say put on a sales school, what does that
10 mean?

11 A. He came and trained our retail store personnel.

12 Q. Trained them to do what?

13 A. Technical product knowledge, benefits, features and
14 benefits of the product.

15 Q. And who did he train?

16 A. Well, I at that point in time had brought in my retail
17 store managers and some of their personnel to a meeting that we
18 have annually where we would talk about pricing structures and
19 products that we had, and Scott Fitzgerald came in and educated
20 our employees on the Fradan product line.

21 Q. What was the job of the employees that he trained?

22 A. Well, they were -- every employee was basically a
23 retail -- either customer service representative or salesmen
24 out of our retail stores. I might mention that we had no field
25 salesmen that did anything but retail product.

1 Q. With respect to the second meeting, was there any
2 discussion in that second meeting by Mr. Fitzgerald about
3 Wilson Supply wholesaling Fradan's equipment?

4 A. He indicated that he would like to have us consider
5 that in the future, but that Cantrell was the distributor.

6 MR. MYLAR: I object, your Honor, that's hearsay.

7 THE COURT: It's hearsay, except that I'm assuming
8 that Fitzgerald is a party.

9 MR. BIRD: Mr. Fitzgerald is an employee, and I think
10 the objection was raised against interest in a clear exception
11 to the hearsay rule.

12 THE COURT: The objection is overruled, his answer
13 will stand.

14 Q. BY MR. BIRD: Mr. Wilson, did you ever notify Fradan
15 Manufacturing of any problems with the product that was sold?

16 A. Personally or as a company?

17 Q. As a company.

18 A. Yes. I had several employees that were in contact
19 with them on somewhat of a regular basis, and I had talked to
20 him once.

21 Q. What was the nature of the complaint?

22 MR. MYLAR: Objection, your Honor, this is relevant.
23 He even stated in his opening how it's not relevant.

24 THE COURT: Yeah, it's irrelevant. I can't see the
25 reason--

1 MR. BIRD: The only reason, your Honor, is getting to
2 the termination of the relationship.

3 THE COURT: I don't care what caused it, they did it.

4 Q. BY MR. BIRD: Mr. Wilson, at some point in time did
5 you terminate the relationship between Pro Power Equipment and
6 Fradan Manufacturing?

7 A. Yes, I notified them.

8 Q. How did you notify them?

9 A. In writing.

10 Q. When you notified them in writing did you make any
11 requests of them?

12 A. Yes, I requested in the initial letter that they buy
13 back the product.

14 Q. Did you specify at what rate they should buy back the
15 product?

16 A. No, not that I recall.

17 Q. Have you ever sought to require Fradan Manufacturing
18 to purchase the product back at any amount other than exactly
19 what you paid for it?

20 A. No, never.

21 Q. What is the condition of the product that Wilson
22 Supply has on hand of Fradan Manufacturing?

23 MR. MYLAR: Objection, again, your Honor, it's simply
24 not relevant (inaudible).

25 THE COURT: Yeah, if I order them to buy it back, I

1 think we ought to (inaudible) know.

2 MR. BIRD: I was referring to the condition. I simply
3 was going to elucidate from the witness that it's boxed,
4 cartoned, brand new, never been out of the carton.

5 THE COURT: I think we know that, I think everybody
6 agrees to that.

7 Q. BY MR. BIRD: When you notified Fradan Manufacturing
8 that you were terminating the relationship and you desired them
9 to buy back the product, what was their response?

10 A. Well, a gentleman named Jack Howard at the time called
11 me and wondered why, and I basically told him the same thing
12 that the letter said, that we were dissatisfied with the
13 product, and I asked him about repurchase, and he said, "Well,
14 at this point in time we will entertain repurchasing, but only
15 if we've established some other customer in your area."

16 THE COURT: Establish what?

17 THE WITNESS: Another customer in your area, looking
18 for somebody else to replace us.

19 Q. BY MR. BIRD: In fact, Mr. Wilson, when you were first
20 contacted by Fradan Manufacturing, where did the product
21 actually come from from Fradan Manufacturing?

22 A. I'm not sure I understand.

23 Q. Did it come from the manufacturing facility in New
24 York, or wherever the manufacturing facility is?

25 A. I believe the product was shipped out of New York,

1 yes.

2 MR. MYLAR: Your Honor, I would object, lack of
3 foundation.

4 THE COURT: The objection is sustained, it's a
5 speculation.

6 Q. BY MR. BIRD: Do you know whether any product was
7 shipped from any other Fradan customers?

8 A. Yes, there was some backpack (inaudible) shipped in
9 from another Fradan distributor.

10 MR. MYLAR: Again, your Honor, I would object on
11 foundation (inaudible) provide some--

12 THE COURT: I'll let you deal with that on cross
13 examination.

14 Q. BY MR. BIRD: Do you know who the customer was?

15 A. I can't remember, I believe it's in the letter.

16 Q. The letter you're referring to--

17 A. The initial letter I sent terminating our
18 relationship.

19 MR. BIRD: Your Honor, that's the letter that Mr.
20 Mylar has introduced. I don't think it's numbered at this
21 point. Your Honor, I believe that's all I have on direct
22 examination.

23 THE COURT: All right, thank you. Let's take a recess
24 prior to cross.

25 (Short recess taken)

1 THE COURT: You may continue. If you'll resume the
2 witness stand, please. You may cross examine.

3 MR. MYLAR: Thank you, your Honor. At this time I
4 would like to get all the exhibits numbered. I apologize for
5 (inaudible).

6 (Counsel marks exhibits with court clerk)

7 CROSS EXAMINATION

8 BY MR. MYLAR:

9 Q. Would you please identify in Exhibit No. 2 there in
10 the lower left hand corner, who does it say is the distributor
11 in this service dealer agreement?

12 A. It says Wilson Supply.

13 Q. Could you look at all of those and make sure for the
14 Court and the record for who it says it is distributor for all
15 those service agreements?

16 A. It says Wilson Supply.

17 Q. I'd also like to take a look at Exhibit No. 6. Would
18 you please examine those for the Court, I've got a box around
19 what I believe to be Wilson Supply and one on Pro Power. Did
20 you place that on behalf of Wilson Supply, or did Wilson Supply
21 place those ads?

22 A. I'm not sure who exactly did place that ad.

23 Q. But that's something that Wilson Supply--

24 A. Wilson Supply handled their own yellow page
25 advertising, but I might note that this is 1999. I'm not sure

1 of the relevance.

2 Q. It is true, though, that you've always advertised
3 Wilson Supply in fact as a wholesaler?

4 A. I don't know that that's true.

5 Q. During the relevant time of this suit, 1996 through--

6 A. I can only see 1999, so I don't recall exactly what we
7 advertised year-by-year.

8 Q. So you claim that you don't remember back in 1997 or
9 1998 whether you actually advertised as a wholesaler in the
10 yellow pages?

11 A. That would be correct.

12 Q. But you don't deny that you may have?

13 A. How am I supposed to answer that?

14 Q. Is it true that you may have advertised?

15 A. It's possible our company advertised.

16 Q. It's just that you don't know; is that your testimony?

17 A. That's correct.

18 MR. MYLAR: Your Honor, we don't need to admit an
19 affidavit that's already been admitted into evidence, so I'm
20 not exactly sure how to handle this, but I do have a copy of
21 his affidavit that I would like to have the witness take a look
22 at.

23 THE COURT: Certainly (inaudible).

24 Q. BY MR. MYLAR: Would you please identify that
25 affidavit for the record, take a second or two to look through

1 the pages and can you testify whether that's your affidavit
2 that you signed back in March of this year?

3 A. Yes, it's second affidavit of Brett Wilson in support
4 of plaintiff's motion for summary judgment, and yes, I did sign
5 it.

6 Q. Could you please take a look at paragraph No. 6?
7 Would you read that for the record?

8 A. "Wilson Supply sold the majority if not essentially
9 all of the Fradan inventory to retail customers."

10 Q. It's true, isn't it, that even at that time you agree
11 that there was some inventory that was distributed?

12 A. I believe at that point in time I wasn't sure exactly.

13 Q. It is true, however, that you do and have distributed
14 at the wholesale level?

15 A. I don't want to be coy or anything, but what exactly
16 are we talking about wholesale, because there are several
17 different definitions and contexts. Are we talking about the
18 one in the Utah buy-back law, or are we talking about the fact
19 that you would discount a product a small amount and somebody
20 would claim that was a wholesale price, or exactly what?

21 Q. Did you ever talk with anyone from Cantrell?

22 A. No.

23 MR. MYLAR: I have no further questions, your Honor.

24 THE COURT: Thank you. Any redirect?

25 MR. BIRD: Very briefly, your Honor.

REDIRECT EXAMINATION

1
2 BY MR. BIRD:

3 Q. Mr. Wilson, if you could direct your attention back to
4 Plaintiff's Exhibit 2.

5 A. Yes.

6 Q. You indicate you read in this box the distributor is
7 Wilson Supply. Who placed that information in that box?

8 A. I would have to assume Fradan wrote that in. It's
9 office use only, do not write in this box.

10 MR. MYLAR: Object again, your Honor, it's a
11 speculation, no foundation.

12 THE COURT: You asked the question, he's got the right
13 to respond, you brought it up. So the objection is overruled,
14 and the answer will stand.

15 Q. BY MR. BIRD: Do you recognize the signature in the
16 box?

17 A. Not entirely, but I would -- it appears to be Scott,
18 and I'm assuming Scott Fitzgerald.

19 Q. So that we're clear, I want you to review each of
20 those three boxes. Did you place any of that information on
21 any of those three boxes?

22 A. No, I did not.

23 Q. In fact, from whom did you obtain this document?

24 A. This document came from Fradan.

25 Q. Specifically from Mr. DeBartolo?

1 A. Well, it's just in the process of this case that it
2 came to us through him, yes.

3 Q. In fact, after the course of your terminated
4 relationship, Mr. DeBartolo sent this to you by letter?

5 A. I think it's just been evidence in the hearing.

6 Q. Mr. Mylar directed your attention to your affidavit
7 and asked whether you could refer to a portion of your
8 affidavit about distributing or wholesaling, rather, product.
9 Directing your attention back to Exhibit 1, is this in fact
10 comprehensive of all of the sales?

11 A. Yes, it is, it's complete.

12 Q. Is it in fact -- and in fact those are all end users,
13 there's no distribution (inaudible)?

14 A. Yes.

15 MR. BIRD: Nothing further, your Honor.

16 THE COURT: Any further questions?

17 MR. MYLAR: No, your Honor.

18 THE COURT: Thank you, Mr. Wilson, you may step down.

19 Next witness?

20 MR. BIRD: Your Honor, I call Scott Wilson.

21 COURT CLERK: You do solemnly swear that the testimony
22 you are about to give in this case now pending before the Court
23 will be the truth, the whole truth, and nothing but the truth,
24 so help you God?

25 THE WITNESS: Yes.

1 COURT CLERK: Please be seated. State and spell your
2 name.

3 THE WITNESS: Scott Wilson, S-c-o-t-t, W-i-l-s-o-n.

4 MR. BIRD: Your Honor, I intend to be very brief with
5 Mr. Wilson. I believe we have stipulations on these issues,
6 and I believe we have self authenticating documents.

7 My purpose in calling Mr. Wilson was to describe the
8 business relationship of Wilson Supply and Pro Power. I'll ask
9 him just two or three quick questions. Again, I don't mean to
10 be repetitive or delve into those issues we have stipulations
11 on, but I want to make sure the record is clear in this regard.

12 SCOTT WILSON

13 having been first duly sworn,

14 testifies as follows:

15 DIRECT EXAMINATION

16 BY MR. BIRD:

17 Q. Mr. Wilson, what is your position with Wilson Supply?

18 A. I'm vice president.

19 Q. What are your duties at Wilson Supply?

20 A. Well, basically accounting work and operations
21 management.

22 Q. Were your position and duties the same in 1996?

23 A. Yes.

24 Q. Were you responsible for the preparation of tax
25 returns for Wilson Supply?

1 A. Well, I was responsible for financial statements, at
2 least at that point in time. I have done some tax returns
3 recently.

4 Q. You coordinated with the accountant to prepare the tax
5 returns?

6 A. Yes.

7 Q. Would you describe for me the relationship between
8 Wilson Supply and Pro Power?

9 A. Well, they're one in the same, one tax return.

10 Q. So the tax return that is filed is the tax return for
11 Wilson Supply and includes Pro Power Equipment as part of that?

12 A. That's correct.

13 Q. Do you have an understanding as to the legal
14 relationship between Pro Power and Wilson Supply?

15 A. Pardon me?

16 Q. Do you understand the legal relationship between
17 Wilson Supply and Pro Power?

18 A. Well, Pro Power is a dba of Wilson Supply.

19 MR. BIRD: Your Honor, that's all I have of Mr.
20 Wilson.

21 THE COURT: Thank you. Do you have any cross?

22 MR. MYLAR: No, your Honor.

23 THE COURT: Thank you. You may step down, Mr. Wilson.

24 Next witness?

25 MR. BIRD: Your Honor, those are the only witnesses I

1 have, and the evidence (inaudible).

2 THE COURT: Okay.

3 MR. MYLAR: Your Honor, I'd like to call Frank
4 DeBartolo to the stand.

5 THE COURT: Thank you.

6 COURT CLERK: You do solemnly swear that the testimony
7 you are about to give in this case now pending before the Court
8 will be the truth, the whole truth, and nothing but the truth,
9 so help you God?

10 THE WITNESS: Yes.

11 COURT CLERK: Please be seated. Please state and
12 spell your name.

13 THE WITNESS: My name is Frank DeBartolo. It is
14 spelled capital D-e, capital B-a-r-t-o-l-o.

15 FRANK DEBARTOLO

16 having been first duly sworn,

17 testifies as follows:

18 DIRECT EXAMINATION

19 BY MR. MYLAR:

20 Q. Would you please tell the Court your position with
21 respect to Fradan Manufacturing?

22 A. Yes, I'm president of Fradan Manufacturing. I do a
23 little bit of everything.

24 Q. As far as president is involved?

25 A. In everything that the business does, whether it be

1 manufacturing or the office, whatever.

2 Q. Was that the case also back in 1996 and 1997?

3 A. Yes.

4 Q. Would you also tell the Court your first, I guess,
5 introduction or familiarity with Wilson Supply?

6 A. It goes back to around November, to the fall, and--

7 Q. The fall of what year?

8 A. Of 1996, and what it was is I guess because of the
9 time difference I was still working late that night and I
10 received a phone call from one of the Mr. Wilsons, I don't know
11 which one.

12 Q. One of the two that are--

13 A. Yes, that are here. Basically it was -- they were
14 interested in our product, and I usually basically ask the
15 similar questions because at times people want to buy from us,
16 and sometimes it can be just a homeowner calling us or a dealer
17 or distributor, so we basically to address him I asked him what
18 he wanted to do. Basically it was for distributing the
19 product.

20 Q. Did you get into any specifics in that phone call
21 about--

22 A. Not too much, just that we were interested, naturally,
23 and basically I told him that one of our sales people would
24 contact him. In this case it was Scott Fitzgerald.

25 Q. Did he then follow up and contact him?

1 A. Yes. When the morning came naturally I was excited,
2 we have another distributor in another part of the country, so
3 I told Scotty and Scotty was excited and immediately gets on
4 the phone, does the things he normally does to get business.

5 Q. As part of your ordinary business process, do you ever
6 do anything when you get a call like that to verify whether
7 someone is actually a distributor?

8 A. Yeah, a lot of times we'll get dealers calling us that
9 want to be a -- they want to purchase naturally at a lower
10 price. What we try to do is ask questions. We have a Dunn and
11 Bradstreet book, which is really a simple thing. We just look
12 at that to sometimes get an idea of who we're talking to.

13 MR. MYLAR: It just struck me, is there any way you
14 could take judicial notice of what Dunn and Bradstreet is, or
15 should I--

16 THE COURT: I think the better way to deal with that
17 is would there be a stipulation, because I'm not about to take
18 judicial notice of a book that I don't have in front of me.

19 MR. BIRD: I'm not sure what stipulation counsel is
20 asking for.

21 MR. MYLAR: Stipulation as to what Dunn and Bradstreet
22 is.

23 MR. BIRD: Oh, the existence of Dunn and Bradstreet as
24 a business report?

25 MR. MYLAR: Yes.

1 MR. BIRD: I'll stipulate to the existence of Dunn and
2 Bradstreet as a business report.

3 Q. BY MR. MYLAR: In the course of your business was that
4 something you normally would rely upon to verify?

5 A. Yes, that would be one of them. It's the simplest one
6 because it's just on the desk, they would just pick it up, and
7 then naturally make phone calls.

8 Q. And that's a national -- reports nationally on
9 (inaudible) is that correct?

10 A. Yes.

11 Q. You had also mentioned there was the issue regarding
12 price. How would that affect whether it be a retailer or a
13 wholesaler with respect to the price issue?

14 A. Traditionally in our industry manufacturers sell to
15 distributors/wholesalers at about 40 percent on merchandise and
16 50 percent, 55 percent on parts. Dealers usually buy 20 to 25
17 percent on whole goods and 25 to 30 percent.

18 Again, this is what Fradan basically does. I'm sure
19 it could be a little bit different with other manufacturers,
20 but it is less -- a retailer always buys cheaper than a
21 wholesaler, because a wholesaler needs to be able to go sell
22 the product to a dealer.

23 Q. What price structure, then, did you use--

24 THE COURT: Did you mean that the way he just
25 testified, a retailer always buys cheaper than a wholesaler?

1 THE WITNESS: Exactly. The reason why I say that is
2 because a wholesaler has to be at a price advantage to be able
3 to sell to a dealer.

4 THE COURT: Well, let me ask this, if you have \$100,
5 and you're selling a product that retails for \$100, you're
6 saying that a retailer buys cheaper than a wholesaler?

7 THE WITNESS: Correct.

8 THE COURT: That doesn't make sense. A wholesaler
9 buys cheaper than a retailer because the wholesaler has to have
10 a mark-up to--

11 THE WITNESS: I'm sorry, then, I misphrased it. What
12 I'm saying is a retailer pays more than a wholesaler.

13 THE COURT: That's what I--

14 THE WITNESS: I said it backwards.

15 Q. BY MR. MYLAR: I apologize, your Honor.

16 MR. BIRD: Your Honor, I object to this line of
17 questioning, and let me just explain the reason for my
18 objection.

19 In the course of discovery we propounded
20 interrogatories on Fradan Manufacturing and asked them to
21 provide us copies of invoices to dealers and distributors so
22 that we could ascertain these very issues. They refused to do
23 so, they claimed that it was irrelevant and confidential.

24 We sent Mr. Mylar a letter explaining why it was
25 relevant, all of these very issues, but they still refused to

1 provide that information, so I object to them now testifying
2 about matters which they refused to disclose at discovery.
3 They would not disclose any of their dealings with any of the
4 other dealers, any of the other distributors.

5 Cantrell, we specifically asked about Cantrell. They
6 refused to provide that information. We asked what prices they
7 sold, they refused to provide any of that information. Now
8 he's testifying about what their pricing structure was.

9 THE COURT: Mr. Mylar, your response to that?

10 MR. MYLAR: Yes, your Honor, actually they were asking
11 for confidential business reports, marketing plans and all
12 sorts of different things that are clearly outside any realm--

13 THE COURT: Well, it seems pretty relevant to me to
14 know if they were selling to Pro Power or to Wilson at the same
15 price they were selling to Cantrell (inaudible).

16 MR. BIRD: Your Honor, may I read the specific
17 interrogatory and the response?

18 THE COURT: Yes.

19 MR. BIRD: The interrogatory says, "Please identify
20 all parties purchasing Fradan product from Fradan's factory
21 during the time period 1997 to the present." That is a very
22 short time period, the time period at issue, "including but not
23 limited to manufacturers, distributors, dealers, end users and
24 consumers, indicating the type of customer they were and
25 (inaudible)." All we're asking is for this very information.

1 Answer to interrogatory No. 6, "Irrelevant and
2 confidential." I then sent Mr. Mylar a letter saying -- this
3 is our letter of October 20, 1999. "Dear Frank," we asked him
4 to supplement -- "today we have not received supplementation
5 and hereby request the same." We specifically directed his
6 attention to the interrogatories and we asked for -- we tell
7 him the reason why they're relevant, and he again refuses to
8 respond. Now they're testifying about the very information
9 they refused to provide.

10 THE COURT: Okay, the objection is sustained.

11 MR. MYLAR: There was some questions with respect to
12 Cantrell. I feel like I need to follow up with that, just--

13 THE COURT: You can ask your question, your next
14 question and determine whether he objects.

15 Q. BY MR. BIRD: With respect to Cantrell, did you hear
16 Mr. Wilson's testimony regarding Cantrell?

17 A. Yes, I did.

18 Q. Can you describe to the Court who Cantrell is?

19 MR. BIRD: Objection, your Honor, same reason. We
20 asked--

21 THE COURT: The objection is overruled, you asked
22 about Cantrell.

23 MR. BIRD: Well, but we asked for the information from
24 Mr. Debartolo--

25 THE COURT: Okay, we're not going to go into the

1 information.

2 MR. BIRD: Fine.

3 THE COURT: The relationship we can go into.

4 MR. BIRD: That's fine.

5 THE WITNESS: Cantrell was a distributor in the
6 California area.

7 Q. BY MR. MYLAR: And during the time when you were
8 starting a distributorship with Wilson Supply, what was the
9 relationship of Cantrell with Fradan?

10 A. Cantrell was a distributor in the California area.

11 Q. Did it distribute--

12 THE COURT: Now that's a little bit confusing. Did
13 Cantrell have a distributorship right over the State of Utah?

14 THE WITNESS: To my knowledge, no. If he had, your
15 Honor, we would then have sold the product through Cantrell to
16 Mr. Wilson.

17 THE COURT: That would have been your normal practice.

18 THE WITNESS: Correct, because what happens if you
19 were to--

20 THE COURT: I know how it works.

21 THE WITNESS: --the salesmen, the other distributors
22 would go crazy, "You're selling in my territory."

23 Q. BY MR. MYLAR: Was there ever an issue between -- to
24 your knowledge, was there an issue between Wilson Supply and
25 Fradan with respect to what territory Cantrell would have?

1 A. Yes.

2 Q. Could you please describe that to the Court?

3 A. What it was was that Cantrell had a warehouse, I
4 believe, near Nevada -- I'm not 100 percent sure, but it's
5 near -- out of California. He had asked if he could sell in
6 the Utah area, and I remember myself with Scotty saying, "This
7 can't be. If we're going to have Wilson as a distributor in
8 that area, he's out." He was angry at us, Cantrell.

9 Q. So is it your testimony, then, that Cantrell was not
10 allowed, therefore, to distribute--

11 A. Correct.

12 Q. And that was because Wilson Supply was the distributor
13 for Utah?

14 A. Exactly.

15 MR. MYLAR: Your Honor, I apologize, I thought this
16 was entered by the plaintiffs, I don't have extra copies of it,
17 but I would like to approach the witness with this. I guess I
18 could get it marked (inaudible) copies of it.

19 THE COURT: That's all right.

20 MR. BIRD: Your Honor, I'll stipulate.

21 THE COURT: Thank you. What was the exhibit number?

22 MR. MYLAR: Number eight.

23 THE COURT: Defendant's 8 is received without
24 objection.

25 (Exhibit No. 8 received into evidence)

1 Q. BY MR. MYLAR: Would you describe what -- to your
2 knowledge what Exhibit No. 8 is?

3 A. Yes, it was a letter -- this was in the beginning
4 dated November 1st that they needed product immediately,
5 samples, not their whole order, and basically what I picked out
6 here it said, "So I can set my force in the fields in getting
7 orders, please advise."

8 Q. What do you interpret that to mean?

9 A. My interpretation, "out in the field," is to send new
10 salesmen to go out and solicit product. That's what we would
11 expect from a distributor.

12 Q. Is there anything significant about the time of
13 year -- you said that was in the fall of 1996.

14 A. Yeah, in other words, we needed to hurry up because
15 our products are basically sold in the spring and summer. Here
16 it is the fall. If you're going to set up a dealer network,
17 this is the prime time to do it during December, January,
18 February to get products into the dealers so they would have it
19 for the spring.

20 Q. So the retailers would have it in their retail
21 business, right?

22 A. Correct.

23 Q. I'd like to ask a question here about Exhibit No. 2,
24 Plaintiff's Exhibit No. 2. Would you please describe what that
25 document is for the Court?

1 A. Okay, it's what we refer to as our service dealer
2 agreement. We have our dealers fill it out so that we have a
3 listing on who is selling the product throughout the United
4 States, also for when warranty comes we know what to pay them
5 as far as their shop to labor rate.

6 Q. So that's not a sales agreement, then, is it?

7 A. No, it's basically used for us to explain to our
8 dealers to take the machine out of the box, put it together,
9 make sure you explain to the customer how to use it, and then
10 naturally if the machine breaks, so we know what to pay them,
11 and to truly know that he is a dealer so that we don't send out
12 checks to homeowners that are not dealers.

13 Q. Would that be typical, then, for you to sign such an
14 agreement with a dealer even though you're using a distributor
15 or wholesaler?

16 A. Yes. What happens is through the years I've noticed
17 that there is distributors that have their own stores. We
18 treat their stores as a separate entity. The reason for it is
19 because you've got -- again, it breaks down to money.

20 If we pay 15 percent over the retail -- I'm sorry, 15
21 percent off the list price of a warrantied item, well, if a
22 distributor is buying at 50 off, then we're overpaying on a
23 warranty situation. So it's important for us to know who is a
24 distributor, who is the dealer. So when the stuff is sold to a
25 retailer or a dealer and he submits a warranty, we know how

1 much to pay him on replacement parts.

2 Q. In your dealings with Wilson Supply, did you ever come
3 across the name Pro Power during the time when you were selling
4 materials and goods to--

5 A. I myself because I don't get involved too much in the
6 sales, I basically opened the letter, the first letter that
7 said Pro Power on it. Originally we have another distributor,
8 Pro Power Equipment, which is located in Florida. So when I
9 was looking at it I couldn't understand who it was. I really
10 didn't know who it was until it was clarified to me, "Oh, this
11 is Wilson's Pro Power, Utah," and then it was explained to me.

12 Q. What was the date of that, though, when you received
13 the Pro Power?

14 A. The letter?

15 Q. The letter.

16 A. I don't have it in front of me, whatever the actual
17 letter that you have here, so I think it's stamped on the date.
18 I don't know the actual date.

19 Q. Are you talking about a letter that's involved with
20 the sales agreement or are you talking about after the
21 termination?

22 A. The one that said that it was -- they are putting the
23 document in writing to show and explain the buy-back law in
24 Utah.

25 Q. So this was after the termination of the relationship

1 with Fradan and Wilson.

2 A. That's when I wound up seeing it.

3 Q. So that was the first time you saw a letter from Pro
4 Power?

5 A. Yes.

6 Q. And during all those other times did you only deal,
7 then, with Wilson Supply?

8 A. Only Wilson Supply. All our invoices are addressed to
9 Wilson Supply.

10 Q. I hand you what has been marked as Exhibit No. 7.
11 Would you describe what that is for the Court?

12 A. These are invoices. Just looking at the invoice
13 prices I'm assuming that they're parts, not whole goods because
14 the price would be probably higher.

15 Q. And is that from Fradan then to Wilson Supply?

16 A. Correct.

17 Q. Is that typical of all of the invoices, then, that you
18 sent?

19 A. All of them.

20 Q. Have you ever sent any to Pro Power, for instance?

21 A. Never.

22 Q. They only went to Wilson?

23 A. Correct.

24 MR. MYLAR: Your Honor, I don't have any further
25 questions for this witness.

1 THE COURT: Thank you. Any cross?

2 CROSS EXAMINATION

3 BY MR. BIRD:

4 Q. Mr. DeBartolo, you testified that in November of 1997
5 you received a phone call from one of the Mr. Wilsons?

6 A. Correct.

7 Q. How did the individual identify himself?

8 A. The reason why I was able -- I'm terrible at writing
9 things down and giving messages, but the interesting part how I
10 know it was a Wilson is because when he told me the name of the
11 company it was the same name as his name. In other words,
12 Wilson Supply, Mr. Wilson.

13 Q. And you say you wrote that down?

14 A. Yes, and it was on a piece of scratch paper and his
15 phone number, and then when I told Scotty about it, he said,
16 "Well, what's the guy's name?" I said, "That's the same name,"
17 because that's why it stuck in my head, it was the same name.

18 Q. Scotty is Scott Fitzgerald?

19 A. Correct.

20 Q. What was his position with Fradan Supply in 1997?

21 A. Scotty dealt with all our sales.

22 Q. When you say he dealt with all your sales, what does
23 that mean?

24 A. He went out and sold all our product. Sales manager,
25 I guess, would be a more technical name.

1 Q. To whom did he sell the products?

2 A. We sold -- at the time we only had distributors, so he
3 was running all over the country selling to distributors.

4 Q. In 1997 you didn't sell any product dealer direct?

5 A. Correct, we only started that, I believe, about two
6 years ago, and we started in the New York area, and we slowly
7 moved it -- because our building was based there, it was easy
8 to ship product out. There was no need for having a
9 distributor in our local area.

10 Q. It's true, is it not, Mr. DeBartolo, that in 1997
11 Cantrell was selling product in Utah?

12 A. Correct.

13 Q. In fact, it continued to sell product in Utah and
14 continued to sell product specifically in St. George, Utah
15 after you supposedly established Wilson Supply as a distributor
16 for Utah; is that your testimony?

17 A. What I'm saying -- my testimony is that when Wilson
18 Supply came on board, Cantrell was not supposed to come into
19 this area.

20 Q. That's not my question. After Wilson Supply,
21 according to you, was established as the distributor for Utah,
22 it's true, is it not, that Cantrell continued to sell product
23 in Utah?

24 A. To my understanding, no. I would not know if that's
25 the case.

1 Q. Do you know for a fact that it is not the case?

2 A. Well, I know that he was told not to.

3 Q. If in fact Cantrell continued to sell product in Utah
4 after you alleged Wilson Supply was set up as a distributor,
5 that would be inconsistent with Wilson being the distributor
6 for Utah; is that not correct?

7 A. No, it would mean that I would turn around and yell at
8 Cantrell to stay out of his territory.

9 Q. What was Wilson's alleged territory?

10 A. I don't honestly know the actual, but I know it was
11 Utah, I think it was Idaho. I don't have it here in front of
12 me, but I can have -- we have charts that show every
13 distributor and what territories they actually had.

14 Q. Who established that territory?

15 A. This would have been done through Scott and Mr.
16 Wilson.

17 Q. So you had no involvement in that?

18 A. Basically no.

19 Q. You had no personal knowledge of that territory?

20 A. No personal knowledge, I didn't travel the country.

21 Q. In fact, Mr. DeBartolo, other than this phone call
22 with a Mr. Wilson, have you had any personal contact with
23 anyone at Wilson Supply?

24 A. I don't know. A lot of times what I do do is I get
25 phone calls all over, and because I'm a mechanic engineer, I

1 love to get involved in the service. There could have been a
2 time where one of his people called us -- you know, if they had
3 a complaint or a problem, that would be the only (inaudible).

4 Q. I'm not asking what could have been the case. Do you
5 remember any contact with anyone at Wilson Supply?

6 A. The way I'm answering the question is there could have
7 been somebody from their repair shop or maybe one of Mr.
8 Wilsons, but--

9 Q. You don't recall any contact with anyone at Wilson
10 Supply?

11 A. I just said that I can't answer that. What I'm saying
12 is I may have spoken to somebody that had a service problem.

13 Q. Let me ask you specifically, do you recall any
14 discussion with anyone at Wilson Supply with respect to the
15 business relationship between Fradan and Wilson Supply?

16 A. Absolutely not, no, it was done with Scotty.

17 Q. So you were not present at any of the discussions that
18 Mr. Fitzgerald had with Wilson Supply.

19 A. Correct.

20 Q. You were never present in Wilson Supply's Pro Power
21 retail stores?

22 A. Correct.

23 Q. Never met with them in their stores.

24 A. Never met with them.

25 Q. Never saw their stores.

1 A. Never saw it.

2 Q. Never were a party to any of the communications that
3 Mr. Fitzgerald had with them.

4 A. Correct.

5 Q. There's no written agreement that you have with Wilson
6 Supply or Pro Power--

7 A. No.

8 Q. Do you have written agreements with Cantrell?

9 A. No, we have no written agreements with anybody. I'm
10 kind of old fashioned when it comes to that.

11 Q. To this date you don't have a written agreement with
12 anyone?

13 A. With any distributor in the United States.

14 Q. Well, do you have a written agreement to whom you sell
15 product?

16 A. No, nothing. One of the reasons is because I'm not a
17 lawyer, and I've seen some of these agreements and they're
18 sometimes 50 pages long. It's frightening if you look at the
19 Declaration of Independence all written on one piece of paper.

20 Q. Directing your attention to Exhibit 2, the information
21 in the box on Exhibit 2, do you recognize that signature?

22 A. Yes, it's Scotty's signature.

23 Q. Scott Fitzgerald?

24 A. Scott Fitzgerald.

25 Q. Also the second page and the third?

1 A. Yes, they're all the same.

2 Q. That information was put on there by Scott Fitzgerald
3 at Fradan Manufacturing?

4 A. Correct.

5 MR. BIRD: That's all I have, your Honor.

6 THE COURT: Any further questions of this witness?

7 MR. MYLAR: Just a couple, your Honor.

8 REDIRECT EXAMINATION

9 BY MR. MYLAR:

10 Q. Although I think your testimony was that you didn't
11 work any of these deals, did you subsequently as the president
12 of Fradan Manufacturing become aware that there was a
13 distributorship set up between Fradan and Wilson Supply?

14 A. Yes. We're a small company, and everything that
15 basically goes on in the office I get to hear.

16 Q. So you know there was a territory and a
17 distributorship set up?

18 A. Yes. I also -- I don't have it with me, but maybe we
19 can get it faxed here, we usually have a piece of paper because
20 sometimes people will call us that are trying to buy direct, so
21 what we'll generally do is one of the gals will say, "Well, we
22 have a distributor in such and such an area." So we do have a
23 piece of paper that specifies what their territories are.

24 Q. And you've seen that for Wilson?

25 A. Yes.

1 Q. Is it true that sometimes the territories may not
2 encompass a whole state but a part of a state and a part of
3 another state; is that possible?

4 A. I guess that does happen. I know of other
5 manufacturers -- with us we try to always simplify it by just
6 actually cutting out the physical state, and then I know at
7 times we'll have one distributor fight against another one if
8 something does take place like right on the line.

9 Q. Now if in fact, for instance, the mention was about
10 St. George, and I don't think we've heard any evidence about
11 St. George, but St. George, if it were on the very southern tip
12 of the state by Nevada and Arizona, and closer to California,
13 is it possible that the territory for Wilson encompassed all of
14 the major Salt Lake metropolitan area and Idaho and Colorado,
15 but it may have actually not included St. George in the
16 southern tip of the state; is that possible? I'm saying is
17 that possible?

18 A. I guess it could be possible, but not having a map to
19 look at it -- we try to make it as simple as we can.

20 THE COURT: (Inaudible) speculate on where the
21 jurisdiction of the distributors were?

22 MR. MYLAR: Well, your Honor, I was anticipating that
23 they may have evidence showing that Cantrell sold to St.
24 George. If they did I think it's reasonable to look at St.
25 George as a different market potential.

1 THE COURT: Well, it seems to me they ought to know
2 where their distributors are.

3 Q. BY MR. MYLAR: Right, but it's your understanding,
4 though -- what is your testimony as to what your recollection
5 was as to what the area was for Wilson Supply?

6 A. It would be Utah and just above it, which I think is
7 Idaho, and California and Nevada, my understanding, was
8 Cantrell.

9 MR. MYLAR: No further questions, your Honor.

10 THE COURT: Mr. Bird?

11 MR. BIRD: Nothing, your Honor.

12 THE COURT: Any further witnesses?

13 MR. MYLAR: No, your Honor.

14 MR. BIRD: Your Honor, I would like to just recall the
15 two Wilsons for one question on each of them.

16 THE COURT: Well, Mr. DeBartolo, you may step down,
17 thank you for your testimony. All right.

18 MR. BIRD: I first call Scott Wilson.

19 THE COURT: You'll still recall you're under oath,
20 sir.

21 FURTHER DIRECT EXAMINATION

22 BY MR. BIRD:

23 Q. Scott, did you ever place a telephone call to Fradan
24 Manufacturing in or around November of 1997 and request
25 distributorship for Wilson Supply?

1 A. No, I did not.

2 MR. BIRD: No further questions, your Honor.

3 THE COURT: Any cross?

4 MR. MYLAR: No.

5 MR. BIRD: I call Brett Wilson.

6 FURTHER DIRECT EXAMINATION

7 BY MR. BIRD:

8 Q. Brett, same question, did you ever contact Fradan
9 Manufacturing in November of 1997 and speak to Mr. DeBartolo
10 and request a distributorship for Wilson Supply?

11 A. No, I did not.

12 MR. BIRD: No further questions, your Honor.

13 THE COURT: Okay, thank you.

14 MR. MYLAR: Just one, your Honor.

15 THE COURT: Oh, did you have a question? If you'll
16 stay, then, please.

17 FURTHER CROSS EXAMINATION

18 BY MR. MYLAR:

19 Q. You don't remember whether Wilson Supply was listed
20 among the wholesalers in the yellow pages in 1997?

21 MR. BIRD: Your Honor, object, this is beyond--

22 MR. MYLAR: It goes to his recollection, this is
23 important to what he recollects.

24 THE COURT: I'm going to let him answer the question,
25 but the question is not relevant to whether -- I mean they were

1 wholesales, that's openly been acknowledged.

2 MR. MYLAR: It goes to his recollection, though. He's
3 asked him a recollection question. I believe he testified last
4 time that he just simply doesn't remember whether it was listed
5 as a wholesaler or not in 1997, and I think it's relevant
6 whether he recollects whether there was a phone call made in
7 1996 or 1997.

8 THE COURT: So you're using it as a credibility--

9 MR. MYLAR: Yes.

10 THE COURT: Okay.

11 THE WITNESS: Could you repeat the question?

12 Q. BY MR. MYLAR: Do you remember whether you were aware
13 that Wilson Supply was listed as a wholesaler in the yellow
14 pages in 1997?

15 A. Let me answer it this way, we were not always listed
16 as wholesaling in the yellow pages, so I can't tell you if 1996
17 was the year.

18 Q. So you don't remember, then; is that correct?

19 A. If I saw the book I certainly would.

20 MR. MYLAR: Thank you, no further questions.

21 THE COURT: All right. That concludes the evidence.
22 Any argument?

23 MR. BIRD: Thank you, your Honor. Now that we've
24 spent a substantial amount of the Court's time establishing
25 what perhaps is agreed to by all of the parties, and that is

1 the nature of a business relationship between Fradan
2 Manufacturing and Wilson Supply, I believe it is absolutely
3 clear at this point that all the parties have stipulated and
4 the evidence before the Court in terms of the certified copies
5 is that Wilson Supply and Pro Power are one in the same entity.

6 Pro Power was the derivation that Wilson Supply had
7 evolved into in 1997 in terms of how they marketed product.
8 The product that they marketed, they marketed at retail, they
9 did not market at wholesale, they marketed at retail. They
10 were establishing retail stores.

11 Mr. DeBartolo is not present during any of the
12 meetings with Scott Fitzgerald and Wilson Supply. That is also
13 clear. Mr. Fitzgerald isn't here to tell us what occurred in
14 those meetings, but Brett Wilson and Scott Wilson are both here
15 to tell us what occurred in those meetings, and what occurred
16 in those meetings is that Mr. Fitzgerald came into the retail
17 store, solicited sales at this retail store, knowing that they
18 were going to retail the product.

19 The sales force that Mr. DeBartolo in the exhibit
20 refers to when they talk about getting their sales force out
21 into the field, that's the retail sales force where they sell
22 it to Granite School District and the LDS Church and all of
23 these end users. These are not -- not all of these people come
24 into the actual store, but they're all end users.

25 The fact of the matter is, your Honor, it's absolutely

1 clear and there's no contradictory evidence, all of the sales
2 are at the retail level. They retailed this product, they
3 retailed it knowing Fradan Manufacturing knew they were
4 retailing the product, contrary to what Mr. DeBartolo is
5 testifying to to the effect that he doesn't have anyone other
6 than distributors. In this instance he clearly did, and they
7 solicited Wilson Supply.

8 They sent Mr. Fitzgerald out here to Utah, he met with
9 them in their retail store, he set them up as dealers, each of
10 the retail stores are set up as dealers. Whatever Fradan
11 Manufacturing put on their internal document back at Fradan
12 Manufacturing isn't relevant. What is relevant is they set
13 these three retail stores up as dealers, and as dealers, when
14 the relationship terminated, Fradan Manufacturing is obligated
15 to buy the product back.

16 THE COURT: Why don't you reserve your argument for
17 rebuttal.

18 MR. BIRD: Okay.

19 THE COURT: Your response, Mr. Mylar?

20 MR. MYLAR: Thank you, your Honor. First of all, your
21 Honor, I'd like to first say that a lot of this talk and what
22 the conceptions are are actually, I believe, irrelevant, and I
23 do believe the price and all these things are irrelevant, the
24 fact is that there is no doubt that Wilson is a supplier and a
25 distributor. It's even called Wilson Supply, and it says

1 they've done so since 1934.

2 I think if you look back through all the documents
3 that have been filed in this case, because I think there were
4 several that were attached to both summary judgment motions,
5 all of them are between Fradan and Wilson and back and forth
6 between Wilson and Fradan.

7 I think that there's also some significance here
8 that's very important. It was the place that the attorney made
9 a statement about whether or not -- whether actually any of
10 this product was distributed, whether Fradan's product was
11 distributed at the wholesale level.

12 I point the Court to their motion for summary
13 judgment, their memorandum in support of their motion for
14 summary judgment, and I ask you to look at paragraph 10.
15 Paragraph 10 says, "In addition to selling and retailing the
16 Fradan inventory to the public, Wilson Supply also distributed
17 a portion of the Fradan inventory at the wholesale level to
18 other dealers for sale to the public."

19 They have stated that, that's been their (inaudible)
20 statement all along, and what they are doing is impermissible
21 because they want to act like a wholesaler in all of the
22 business dealings with Fradan, and now they want to say that
23 no, we're actually only a retailer, and therefore as only a
24 retailer you have to buy back the product. That is simply
25 incorrect.

1 I also want to point the Court to the fact that it
2 seems inconceivable to me that an owner of Wilson Supply could
3 not remember whether they were listed as a wholesaler. The
4 only uncontroverted evidence was that in 1996 Frank DeBartolo
5 looked at Dunn and Bradstreet and found that they were listed
6 as a wholesaler/distributor.

7 It's also quite logical that if somebody does forget
8 whether their yellow page ad listed you as a wholesaler they
9 might also forget an important phone conversation. In fact,
10 they never asked the question of whether they remembered the
11 phone conversation in 1996. The question purported to both the
12 Wilson brothers was whether they had received a phone call
13 from -- called Frank DeBartolo in 1997.

14 Frank DeBartolo remembers getting the phone call,
15 remembers that Wilson connected with the name. That is an
16 interesting point as far as -- but it's not relevant, it's not
17 really that relevant to the real meat and potatoes of this
18 particular case.

19 This is an issue largely of statutory construction.
20 This Court needs to look at that entire statute and see, as I
21 indicated earlier, that it's for retailers, it is not for an
22 entity that is both a wholesaler and a retailer.

23 That is the law, that is the way the legislature for
24 better or for worse has decided to define Wilson Supply. So
25 the legislature has defined him for better or for worse that

1 they are considered a wholesaler under this statute. As a
2 wholesaler, for better or for worse, they are stuck with the
3 product that their own retailers didn't sell or that they
4 (inaudible) and I submit that to the Court at this point.

5 THE COURT: All right, thank you. The Court finds the
6 following facts: Number one, that Fradan's product was
7 marketed by Pro Power at retail, number two, that Fradan has
8 refused to provide in discovery the pricing information to know
9 whether they were selling at a wholesale price, which would be
10 considered to be a lower price than to a retailer price to
11 Wilson Supply, and anticipating that Wilson Supply would then
12 distribute to Pro Power.

13 That being so, the Court must construe that as the
14 evidence would consider appropriate. Cantrell was the
15 wholesaler for the State of Utah at the time that this
16 relationship was initiated.

17 It was Fradan's individual employee, Fitzgerald, who
18 put on the documents in Exhibit 2 the notation that the
19 wholesale/supplier was Wilson Supply. The Court cannot find
20 that the business relationship that was engaged in here was one
21 in which Fradan was dealing with an individual wholesaler, i.e.
22 Wilson when in fact Fradan entered into three separate
23 contracts with each of the retail outlets, Pro Power in Idaho,
24 Pro Power in Utah and Pro Power in Colorado.

25 The Court further finds that it was acknowledged that

1 at or after the time when this agreement was initiated Cantrell
2 continued to sell product in the State of Utah as the
3 manufacturer's representative on a wholesale basis.

4 Mr. DeBartolo testified that there was some conflict
5 between him and the Cantrell persons who were selling product
6 in Utah because the relationship, according to Mr. DeBartolo,
7 was beginning to initiate a Wilson coverage as a wholesaler in
8 the Utah and Idaho territories. But that relationship was not
9 matured and was not clearly distinguished factually at or about
10 the time of the initial agreement between the parties.

11 Since Fradan put the information in the box on the
12 agreement as to the wholesale/supplier, the Court must conclude
13 that was put in there in some way to the advantage, I suppose,
14 and under this scenario of Fradan.

15 You've given me an example which is beneficial, Mr.
16 Mylar, of four business relationships in your exhibit, this
17 Defendant's Exhibit 4. In the first you say the
18 manufacturer -- this case would be Fradan -- the wholesaler,
19 who in this case would be Cantrell and/or Wilson, if you
20 dispute that, and the retailer would be Pro Power.

21 If that's so, under Exhibit 1 from Pro Power, there
22 would be no right to repurchase, it would have to be the --
23 well, it would have to be Cantrell who would have to
24 repurchase, or it would have to be Wilson who would have to
25 repurchase from these three manufacturers. It doesn't make

1 sense to require Wilson to repurchase from its own entity,
2 which is Pro Power.

3 I understand the theory behind that, but it is either
4 going to have to be Cantrell's purchase in that case because
5 Cantrell remained the wholesaler until it was clarified, and it
6 wasn't made very clear.

7 In the second example you've given the example where
8 Wilson and Pro Power are both a retailer and a wholesaler, and
9 in this case factually, since you haven't given any information
10 as to the price, I can't conclude that they bought as
11 wholesaler, so I must conclude that they bought as retailers
12 because that discovery was not given.

13 In the third example, the manufacturer deals directly
14 with the retailer, then the manufacturer has an obligation to
15 repurchase. That's the nature of the relationship that seems
16 to be that which was created.

17 In the fourth example, if you even take the fourth
18 example and use it as the wholesaler that basically does no
19 retail business, but the wholesaler discontinues doing
20 business, in that case the manufacturer must buy back. Here
21 we've got Wilson writing back and discontinuing doing business.

22
23 It seems to me that the strategy behind this
24 legislation was to not leave variable entities subject to
25 inventory that they could not sell that a manufacturer could

1 reasonably take back and market through other sources.

2 So the Court finds that the initial business
3 relationship that was created with Pro Power was intended to be
4 a manufacturer to a retailer direct, and that is on that basis
5 that they're obligated to rebuy.

6 In the second, if I were to find in the alternative,
7 that Wilson -- that they really didn't deal with Wilson Supply,
8 they set up their three contracts independently with Fradan
9 Manufacturing and Pro Power outlets in Idaho, Utah and
10 Colorado.

11 The second business relationship in your figure 2
12 where they are both the same, I don't find that while Wilson
13 Supply was in fact a wholesaler, that one -- there's no reason
14 one cannot be a wholesaler of multiple products and a retailer
15 of individual products.

16 So that being so, even though Wilson Supply was in the
17 phone book or -- they don't know, it was put in at a certain
18 time, even if I found against Wilson that indeed they were, I
19 don't find that the transaction with Fradan that they were
20 because that was the -- that was a different transaction.

21 So really, the figure that applies best to this
22 relationship is the manufacturer dealt directly with the retail
23 outlet and thus must be obligated to repurchase their product.

24 The second alternative factually would probably be
25 more in Exhibit 4 where the wholesaler determines not to do any

1 more retail work, and in that case the manufacturer must buy
2 back from the ultimate retailer.

3 All of the sales -- I would add another factor that
4 all of the sales that were engaged in by Pro Power Equipment
5 were retail final sales to ultimate users, and that gives me
6 even more factual basis upon which to conclude that the
7 business relationship here was one of a retailer as engaged in
8 by Pro Power.

9 On that basis, Mr. Bird, your position is found to be
10 by me meritorious. You may prepare a judgment consistent.
11 Fradan is obligated to buy back the inventory that is in the
12 category consistent with the return.

13 MR. BIRD: Your Honor, I'll prepare an order in that
14 regard. I request an opportunity to provide to the Court under
15 the statute, the statute requires that the prevailing party
16 (inaudible) the statute says the Court shall award the
17 prevailing party attorney's fees. I'd like to prepare an
18 affidavit in that regard and submit it to the Court and
19 counsel.

20 THE COURT: You may.

21 MR. BIRD: Thank you, your Honor.

22 THE COURT: Thank you. The Court is in recess.

23 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)

)

COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.


That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

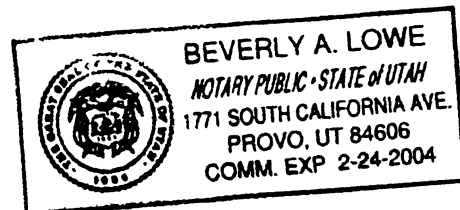
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 8th day of January 2001.

My commission expires:
February 24, 2004


NOTARY PUBLIC
residing in Utah County



APPENDIX B

TITLE 13, CHAPTER 14a

(e) the fair market value, but not less than the franchisee's depreciated acquisition cost of all special tools, equipment, and furnishings acquired from the franchisor or sources approved by the franchisor that were recommended or required by the franchisor and are in good and usable condition; and

(f) the cost of transporting, handling, packing, and loading motor vehicles, supplies, parts, accessories, signs, special tools, equipment, and furnishings.

(2) The franchisor shall pay the franchisee the amounts specified in Subsection (1) within 90 days after the tender of the property to the franchisor if the franchisee:

(a) has clear title to the property; and

(b) is in a position to convey title to the franchisor.

(3) If repurchased inventory, equipment, or demonstrator vehicles are subject to a security interest, the franchisor may make payment jointly to the franchisee and to the holder of the security interest.

History: C. 1953, 13-14-307, enacted by L. 1996, ch. 277, § 19; 1997, ch. 162, § 10.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, added the exceptions in Subsections (1)(a), (1)(a)(ii), (1)(b), and (1)(b)(ii) and added the conditional language

limiting the franchisor to a pro rata share at the end of Subsection (1)(d).

Effective Dates. — Laws 1996, ch. 277 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

CHAPTER 14a

EQUIPMENT REPURCHASE FROM RETAIL DEALERS

Section		Section	
13-14a-1.	Definitions.		agreement — Limitations on pledge of personal assets — Cancellation of retailing agreement.
13-14a-2.	Right of return on termination of retailing agreement — Credit on return.		
13-14a-3.	Right of return on death of dealer — Continuation of business by heirs or survivors — Right to sell business.	13-14a-6.	Security interest of wholesaler or manufacturer not affected.
13-14a-4.	Termination of retailing agreement at will.	13-14a-7.	Attorneys' fees and court costs — Punitive damages.
13-14a-5.	Notice or consent required before changing terms of retailing	13-14a-8.	Contractual right of return — Election of penalties.
		13-14a-9.	Continuing obligation of manufacturer or wholesaler.

13-14a-1. Definitions.

(1) (a) "Dealer" means any person, firm, or corporation engaged in the business of selling and retailing farm equipment, implements, utility and light industrial equipment, attachments, or repair parts, and includes retailers of yard and garden equipment not primarily engaged in the farm equipment business.

(b) "Dealer" does not include:

(i) a person who is engaged in the business of sales and service of heavy industrial or construction equipment; or

(ii) a person, firm, or corporation who serves as the dealer for a membership group purchasing program.

(2) "Independent wholesaler" means a person, firm, or corporation who stocks inventory for resale to retail dealers and who holds title to that inventory.

(3) "Manufacturer" means any person, firm, or corporation engaged in the business of manufacturing and distributing for retail sale farm implements, machinery, utility and light industrial equipment, attachments, or repair parts, and includes manufacturers of yard and garden equipment not primarily intended for farm use.

(4) "Parts inventory" means repair parts held for resale and used to service farm implements, machinery, attachments, utility and light industrial equipment, and yard and garden equipment.

(5) "Sales agreement" means a written, verbal, or implied on-going agreement between a dealer and a manufacturer or wholesaler under which the dealer agrees to sell at retail those items supplied by the manufacturer or wholesaler. "Sales agreement" can include an assignment of an exclusive sales area by the manufacturer or wholesaler or the filing of UCC security documents by the manufacturer or wholesaler.

(6) "Wholegoods" or "wholegoods inventory" means assembled or complete units of farm implements, machinery, utility and light industrial equipment, and yard and garden equipment and includes assembled or complete attachments.

(7) "Wholesaler" as an entity's business or as the context requires may mean:

(a) an independent wholesaler engaged in the business of distributing for retail sale the items listed in Subsection (4) or (6), that is obligated under Section 13-14a-2 to accept new and unsold wholegoods and parts from retailers on behalf of the manufacturer, but the obligation of the wholesaler may not exceed the obligation of the manufacturer; or

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

History: C. 1953, 13-14a-1, enacted by L. 1989, ch. 63, § 1; 1995, ch. 317, § 1.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added Subsections (1)(b)(ii), (2), and (5), renumbering the other subsections accordingly; in Subsection (7)(a), substituted "an independent wholesaler" for "a manufacturer's representative or agent, or in-

dependent wholesaler, except where the agent or wholesaler holds exclusive national distribution rights for a product," substituted "(4) or (6)" for "(2), (3), or (4)" and "is" for "may be," and inserted "new and"; in Subsection (7)(b) added the language beginning "who in addition" at the end; and made numerous stylistic changes.

13-14a-2. Right of return on termination of retailing agreement — Credit on return.

(1) Upon termination of all sales agreements in which the dealer has agreed to offer the products of the manufacturer or wholesaler for retail sale and to stock wholegoods and parts inventories as may or may not be required by the manufacturer or wholesaler, the retailer is entitled to payment or credit from the manufacturer or wholesaler for all new and unsold wholegoods and parts inventories held by the dealer on the date the agreement was terminated.

- (2) (a) Except as otherwise provided in this section, the amount of payment or credit due for unsold and undamaged wholegoods is 100% of the original invoice price paid by or invoiced to the dealer, plus any freight charges paid by or billed to the dealer, less any volume, sales, or special discounts on the wholegoods previously paid to the dealer.
- (b) The manufacturer shall bear the freight charges incurred by the dealer in shipping any wholegoods inventory to the manufacturer's choice of destination. The dealer is responsible for freight charges from the dealer's location to the wholesaler on inventory purchased from that wholesaler.
- (3) (a) Payment or credit due to the dealer on wholegoods inventory that has been in the dealer's inventory for more than 36 months from the date of invoice may be adjusted downward from the original invoice price to cover demonstration or rental use. The amount of adjustment shall be agreed upon by the dealer and the manufacturer or wholesaler, but in no case shall the adjustment cause the value of the wholegood to go below the wholesale value listed for that equipment in the edition of the trade-in guide customarily used by dealers or if the equipment is not listed in the trade-in guide, the local retail auction price will prevail at the dealer's choice.
- (b) If an agreement cannot be made on adjustment, the adjustment shall be submitted to arbitration under procedures approved by both the manufacturer and the dealer. The manufacturer shall pay the cost of the arbitration.
- (4) (a) The amount of payment or credit due to the dealer for parts inventory is 100% of the current wholesale price of the parts listed in the manufacturer's or wholesaler's price book.
- (b) The dealer is entitled to reimbursement for any handling or packaging incurred to return the parts inventory to the manufacturer or wholesaler in the amount of 5% of the currently listed wholesale price of the returned parts. The manufacturer or wholesaler shall bear the freight cost to return the inventory to their choice of destination.
- (5) (a) New, unsold parts that are listed and priced in the manufacturer's or wholesaler's price book at the time of the termination of the agreement are eligible for return.
- (b) Parts with superseded part numbers are eligible for return at 85% of the price listed for the superseding part number, if they meet the criteria of being new and unsold.
- (c) Parts that have been deleted from the price book within the previous 24 months prior to termination of the sales agreement shall be repurchased at 50% of the last published price.
- (d) Parts that are not eligible for return are:
- (i) parts that are normally sold at retail in packages of two or more due to precision machining, such as piston rings or connecting rod bearing liners, if one of the parts is missing; and
 - (ii) any parts that are improperly identified.
- (e) Package quantity between the dealer and the manufacturer or wholesaler will not be cause for rejection of a returned part.
- (f) Parts manuals, service manuals, and owners manuals that the dealer has purchased and held for resale at retail shall be repurchased at current wholesale cost.

(6) Upon the payment or credit due to the dealer's account of the amounts required by this section, title to the wholegoods, attachments, and parts inventories is vested in the manufacturer or wholesaler and the manufacturer or wholesaler is entitled to possession of those items.

(7) All credits due and the final payments to the dealer shall be made within 60 days of the date of shipment of the inventory back to the manufacturer or wholesaler.

(8) Special tools for repair of the manufacturer's equipment that the dealer maintains or tools that the manufacturer requires the dealer to maintain shall be repurchased by the manufacturer upon termination of the agreement. The repurchase price shall be the fair market value, but may not be less than 25% of the replacement cost for a usable tool.

(9) The manufacturer shall repurchase for fair market value:

(a) any sign that the dealer has purchased for the exclusive advertisement of the manufacturer's or wholesaler's product; and

(b) any computer or communication equipment the dealer has purchased for direct interface with the manufacturer or wholesaler.

(10) In calculating the fair market value of any item the manufacturer or wholesaler shall repurchase under Subsection (9), the depreciation of the item may not exceed 10% a year for the useful life of the item, but may not go below 25% of the replacement cost.

(11) (a) A representative or agent of a manufacturer who does not stock inventory for resale or does not hold or anticipate holding title to any inventory is exempt from the repurchase obligations of this chapter.

(b) If a sales agreement is terminated, the manufacturer bears the responsibility to repurchase inventory sold by a manufacturer's representative or agent.

History: C. 1953, 13-14a-2, enacted by L. 1989, ch. 63, § 2; 1995, ch. 317, § 2.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, rewrote this sec-

tion, making numerous stylistic and substantive changes, including the addition of Subsections (9) to (11).

13-14a-3. Right of return on death of dealer — Continuation of business by heirs or survivors — Right to sell business.

(1) Upon the death of a dealer, the death of a general partner in a partnership operating as a dealer, or the death of a majority shareholder in a corporation operating as a dealer, the manufacturer or wholesaler shall repurchase the inventory under Section 13-14a-2.

(2) Subsection (1) does not apply if the heirs of the decedent, the remaining partners, or the remaining shareholders elect to continue to operate the dealership and reaffirm an existing agreement or enter into a new agreement with the manufacturer or wholesaler within 180 days or any longer period as they may agree.

(3) A manufacturer may not unreasonably withhold approval of a new sales agreement from a third party if:

(a) the dealer elects to sell the dealer's business to the third party; or

(b) on the death of a dealer, the death of a general partner in a partnership operating as a dealer, or the death of a majority shareholder in a corporation operating as a dealer, the heirs of the decedent, the

remaining partners, or the remaining shareholders elect to sell the business to the third party.

History: C. 1953, 13-14a-3, enacted by L. 1989, ch. 63, § 3; 1995, ch. 317, § 3. **Amendment Notes.** — The 1995 amendment, effective May 1, 1995, added Subsection (3).

13-14a-4. Termination of retailing agreement at will.

Any retailing agreement between a dealer and a manufacturer or wholesaler that is entered into or renewed after May 1, 1989, shall terminate at will, notwithstanding any agreement or law to the contrary, upon written notice of termination from the dealer. Any right arising from a prior breach of the contract survives a termination under this section.

History: C. 1953, 13-14a-4, enacted by L. 1989, ch. 63, § 4.

13-14a-5. Notice or consent required before changing terms of retailing agreement — Limitations on pledge of personal assets — Cancellation of retailing agreement.

(1) Each manufacturer, wholesaler, financing subsidiary or division of the manufacturer, or any independent lender shall give the dealer prior written notice and obtain the dealer's consent before:

- (a) changing either the time or manner of payment;
- (b) making any changes in notes or security;
- (c) adding or releasing guarantors; or

(d) granting extensions or renewals in payment schedules on any contract that is executed by the dealer in behalf of and in the name of any third purchaser of goods or services in which the dealer is obligated to assume contingent liability for the repurchase of that contract upon default by that third party.

(2) A person who signs a security agreement or guarantee agreement with a manufacturer or wholesaler may not be required to pledge or encumber his personal assets in a value in excess of the amount of the indebtedness secured.

(3) If any manufacturer or wholesaler fails to give notice or obtain consent under Subsection (1), or fails to comply with Subsection (2), the guarantee or security agreement affected is considered cancelled and terminated.

History: C. 1953, 13-14a-5, enacted by L. 1989, ch. 63, § 5.

13-14a-6. Security interest of wholesaler or manufacturer not affected.

This chapter may not be construed to affect in any way any security interest that the wholesaler or manufacturer may have in the inventory of the dealer. Any repurchase under this chapter is not subject to the provisions of Title 70A, Chapter 6. The retailer, manufacturer, or wholesaler may furnish a represen-

tative to inspect all parts and certify their acceptability when packed for shipment.

History: C. 1953, 13-14a-6, enacted by L. 1989, ch. 63, § 6.

13-14a-7. Attorneys' fees and court costs — Punitive damages.

The court, in any action to compel compliance with this chapter, shall award costs and reasonable attorneys' fees to the prevailing party. The court may award punitive damages.

History: C. 1953, 13-14a-7, enacted by L. 1989, ch. 63, § 7; 1995, ch. 317, § 4.

Amendment Notes. — The 1995 amend-

ment, effective May 1, 1995, added the second sentence.

13-14a-8. Contractual right of return — Election of penalties.

If the agreement between a dealer and a manufacturer or wholesaler confers rights and duties covering the return of wholegoods and parts inventories upon termination of the agreement, the dealer may elect to proceed under the agreement. The dealer is not considered to have made this election to the extent that the rights and duties conferred by this chapter exceed those conferred by the sales agreement.

History: C. 1953, 13-14a-8, enacted by L. 1989, ch. 63, § 8.

13-14a-9. Continuing obligation of manufacturer or wholesaler.

(1) If a manufacturer or wholesaler is purchased by or merges with another company, the purchasing or surviving entity shall bear all of the responsibilities of the original or purchased manufacturer or wholesaler under this chapter.

(2) If a manufacturer sells a product line, the purchasing entity bears the responsibility of repurchase.

(3) In the case of a wholesaler who discontinues representing a line for any reason, the manufacturer of that line bears the responsibility to repurchase.

History: C. 1953, 13-14a-9, enacted by L. 1989, ch. 63, § 9; 1995, ch. 317, § 5.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, designated the

existing paragraph as Subsection (1), deleted "or otherwise loses its corporate identity" after "company" in Subsection (1), and added Subsections (2) and (3).