

2000

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

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,

v.

FRADAN MANUFACTURING CORP.

Defendant and Appellant

No. 20001035-SC

Priority No. 15

BRIEF OF APPELLANT

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

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ORAL ARGUMENT REQUESTED BY APPELLANT

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JURISDICTION

This Court has jurisdiction over this appeal under Utah Code Ann. § 78-2-2(3)(j) (1996). This is a case of first impression in Utah Appellate Courts interpreting the statute, Equipment Repurchase from Retail Dealers, Chapter 14a, Title 13, Utah Code Annotated (as amended, 1995).

STATEMENT OF ISSUES

Question 1

Did the district court err in law by failing to grant summary judgment and award attorney fees and costs to Appellant (FRADAN) under Utah Code Ann. § 13-14a-7 (1995) by failing to rule that Appellee (WILSON SUPPLY) is a wholesaler within the meaning of Utah Code Ann. § 13-14a-1(7) (as amended, 1995) and, therefore, not entitled to repurchase of goods by a manufacturer (FRADAN) under Utah Code Ann. § 13-14a-2 (as amended, 1995)?

Standard of Review: Review of a district court's grant of summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure is a question of law. No deference is given to the trial court's conclusions of law or its decision to grant summary judgment and both are reviewed for "correctness." *In re Gonzalez*, 1 P.3d 1074, (Utah 2000); *Beynon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks*, 854 P.2d 513, 518 (Utah 1993); *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). In a case involving statutory construction and interpretation, the Appellate Court accords the trial court's conclusions of law no deference, but reviews them for correctness. *Beynon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks*, 854 P.2d 513, 518 (Utah 1993); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1039-1040 (Utah 1991); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

Citations to the Record: These issues were preserved and argued in the trial court throughout the entire proceedings. A few of the obvious citations are: R. 002, ¶ 6 and 8; R. 123, ¶ 10; R. 184, ¶ 7; R. 167; 234, ¶ 1; R. 193, ¶ 1-3; R. 202; and R. 244.

Question 2

Did the trial court err in law in its interpretation of Utah Code Ann. §§ 13-14a-2(1) and 13-14a-9(3) by ordering a manufacturer (FRADAN) to repurchase equipment from a wholesaler (WILSON SUPPLY) after WILSON SUPPLY sold all of its retail stores?

Standard of Review: In a case involving statutory construction and interpretation, the Appellate Court accords the trial court's conclusions of law no deference, but reviews

them for correctness. *Beynon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks*, 854 P.2d 513, 518 (Utah 1993); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1039-1040 (Utah 1991); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

Question 3

Are the trial court's findings of fact that WILSON SUPPLY was a "retailer" for purposes of this case and that a third party (Cantrell) was the wholesaler of FRADAN goods to WILSON SUPPLY clearly erroneous and improperly based upon an unlitigated discovery dispute?

Standard of Review: A finding of fact by the trial court, whether based upon oral or written evidence, will only be disturbed on appeal if insufficient evidence exists in the record and the finding can be considered "clearly erroneous." Utah R.Civ.P. 52(a); The trial court's findings are clearly erroneous only if the ruling "contradicts the great weight of evidence or if [the] court is left with a 'definite and firm conviction that a mistake has been made.'" *Sevy v. Sec. Title Co. of So. Utah*, 902 P.2d 629, 635 (Utah 1995). The appellate court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

Citations to the Record: Neither the Court nor WILSON SUPPLY entered formal findings of fact or conclusions of law. The record is very unclear and cryptic (Appendix C). However, nothing in the record suggests WILSON SUPPLY purchased any FRADAN

product through a distributor named “Cantrell” as found by the court (R. 281, p. 83, lines 19 and 23 and p. 84, line 4). The court’s findings that WILSON SUPPLY was a retailer for purposes of the buy back law is found in R. 281, p. 85, lines 2-5, is based improperly upon the Judge’s view of what the Legislature intended. These findings are based upon an incorrect view of the law in that WILSON SUPPLY was admittedly a wholesaler. See R. 002, ¶ 6 and 8; R. 123, ¶ 10; R. 184, ¶ 7; R. 167; 234, ¶ 1; R. 193, ¶ 1-3; R. 202; and R. 244.

DETERMINATIVE STATUTES AND RULES

The entire text of Chapter 14a of Title 13 of the Utah Code Ann. (as amended, 1995) is relevant and determinative and is attached as the addendum of this brief. However, the following sub-sections of Chapter 14a are most relevant and determinative.

1. Utah Code Ann. § 13-14a-1(7)(b):

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

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

2. Utah Code Ann. § 13-14a-2(1):

(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.

STATEMENT OF THE CASE

This is an appeal from a denial of Appellant's (FRADAN's) motion for summary judgment and an order granting Appellee's motion for summary judgment, following an evidentiary hearing which was narrowly focused on the issue of "whether Wilson Supply is a dealer or a wholesaler within the legal meaning of U.C.A. 13-14a-1, et seq." (R. 250). The Honorable Judge David Young presided at the initial summary judgment hearing on March 24, 2000 and at the follow-up hearing on September 19, 2000. At the conclusion of the hearing on September 19, 2000, Judge Young spontaneously ruled from the bench and concluded as a matter of law that Appellee is a dealer under Chapter 14a of Title 13 of the Utah Code Annotated. (Appendices A and C). This ruling was reduced to an order by Appellee's counsel, signed by Judge Young on October 31, 2001 (Appendix B, R. 263). This matter is, therefore, before the court on a review of the entry of summary judgment.

Statement of Relevant Facts

As alleged in Appellee's Complaint, this case arises out of an unwritten business relationship between Appellant (FRADAN), who manufactures lawn and garden equipment (R. 002, ¶ 7), and Appellee (WILSON SUPPLY), who is a wholesale distributor of lawn and garden equipment (R. 002, ¶ 6 and R. 195, ¶ 14). The business relationship extended from about October 1996 through December 1997. WILSON SUPPLY "agreed to sell at retail, and or distribute at the wholesale level, those items supplied to it by FRADAN as a manufacturer." (Plaintiff's Complaint, R. 002, ¶ 8). During this entire time period

WILSON SUPPLY owned and operated three retail stores (Pro Power) in Utah, Idaho, and Colorado (R. 227, ¶ 10). WILSON SUPPLY was in the business of both retailing and wholesaling utility light industrial equipment, yard and garden equipment, and associated repair parts (R. 002, ¶ 6). All of WILSON SUPPLY's retailing was conducted through its three Pro Power stores. From about November 1996 through December 1997, FRADAN shipped several items of lawn and garden equipment and parts directly to WILSON SUPPLY at its Murray warehouse headquarters at WILSON's request (Appendix D, Exhibit 8). No equipment or parts were shipped by FRADAN to any of the retail stores in Colorado, Idaho, or Utah. All written documents and correspondence were between WILSON SUPPLY and FRADAN (R. 133, 135, 137, 138, 140, 142, 144 through 159, 204, and 206; and Appendix D, Exhibit 8). WILSON SUPPLY's official letterhead identifies it as a "Distributor of Outdoor Power Equipment since 1935" (R. 206). It was also identified as a wholesaler in the *Dunn & Bradstreet* business listings (R. 211, ¶ 3). WILSON SUPPLY was further identified as a wholesaler in the Salt Lake City Yellow Pages while Pro Power was identified as a Retailer (Appendix D, Exhibit 5). Although WILSON SUPPLY distributed most of the FRADAN equipment to its three retail stores for retail sale, it also "distributed a portion of the Fradan Inventory at the wholesale level" (Appendix B or R. 184, ¶ 7).

On about October 23, 1997, WILSON SUPPLY mailed a letter to FRADAN, stating it wanted to terminate its relationship with FRADAN (R. 206). On about February 25, 1998, Brett Wilson, owner of WILSON SUPPLY, sent a letter to FRADAN using Pro Power

letterhead for the first time in the parties' business relationship (R. 170). The three Pro Power retail stores listed on the Pro Power letterhead have a different address from WILSON SUPPLY, although the Utah store is located apparently next to WILSON SUPPLY (R. 170 and 206). The parties have never disputed that WILSON SUPPLY acts as a wholesale distributor and, prior to 1999, also did retail sales business through its d.b.a. Pro Power (Appendix B and R. 184, ¶ 7).

WILSON SUPPLY sold Pro Power and all of its retail stores sometime in 1999 to a non-party (Horizons, Inc.), but WILSON SUPPLY retained the unsold equipment it originally purchased from FRADAN (R. 227, ¶ 9). FRADAN argued at the trial court that this new fact alone requires dismissal in that only retail dealers may assert a right of repurchase of equipment under Utah law (R. 195, ¶¶ 14-16; R. 199; and R. 247).

SUMMARY OF ARGUMENT

This is a case of first impression in Utah regarding the interpretation and application of a Utah statute relating to "Equipment Repurchase from Retail Dealers," Chapter 14a of Title 13, Utah Code Annotated. The Court made several errors by failing to apply the plain meaning and express wording of the statute. The most crucial part of the statute is the definition of "Wholesaler" in Utah Code Ann. § 13-14a-1(7)(b) (as amended, 1995), which essentially states that a retail dealer who also distributes some equipment at the wholesaler level, is considered a "Wholesaler." Under Utah Code Ann. § 13-14a-2(1), retail dealers may require either a wholesaler or a manufacturer to repurchase its product. However,

nothing in the entire statute allows a “Wholesaler” to require a manufacturer to repurchase its Wholesaler inventory. Despite this clear statutory language and WILSON SUPPLY’s admissions in its complaint (R. 002, ¶ 6 and 8) and on summary judgment (R. 123, ¶ 10 and 184, ¶ 7) that it is a wholesaler and a retail dealer, the trial court found “as a matter of law” that WILSON SUPPLY, d.b.a. Pro Power is a retailer for purpose of requiring FRADAN to repurchase equipment (Appendix B, R. 264). It reached this conclusion by conceiving of what it believed was the policy intended by the Legislature (R. 281 p. 84, lines 23-25) instead of applying the clear wording of the statute.

This ruling is even more perplexing given the fact that Pro Power was sold in 1999, prior to the motions for summary judgment. Therefore, there is no Pro Power or Wilson Supply, d.b.a. Pro Power, and no “retail dealer” entitled to repurchase of equipment. The only entity left is WILSON SUPPLY, a wholesaler(if it yet remains), and it holds the equipment purchased from FRADAN. The court again incorrectly applied the statute and held that a “Wholesaler” was entitled to have equipment re-purchased from a manufacturer. FRADAN argued strenuously that the right of repurchase under the statute lies solely with a “retail dealer” and a “Wholesaler” never has a right of re-purchase. Nonetheless, the court ignored these arguments and held that under Utah Code Ann. § 13-14a-9(3), FRADAN, a manufacturer, must repurchase from WILSON SUPPLY, a wholesaler.

It is very unclear from the record whether the district court relied upon Findings of Fact in that its final determination that WILSON SUPPLY is a retailer was made as “a matter

of law (Appendix B, R. 264). To the extent any material findings of fact were determined by the judge, such findings are clearly erroneous and were based upon an abuse of discretion when the court unjustly and without notice sanctioned FRADAN based upon an unlitigated discovery dispute. The trial court displayed usually hostility and anger towards FRADAN regarding a discovery dispute of which the parties agreed was simply not relevant at the summary judgment stage and was the subject of an unheard, but pending Motion for Protective Order filed by FRADAN of which the parties and the court had previously agreed to put on hold because the summary judgment would moot the discovery dispute. WILSON SUPPLY's attorney further urged the court to entertain a "home-state bias" to sway the judge from a clear application of the statute (R. 280, pp. 11-12; R. 281, pp. 4,10, 11,16, 31, 35, and 78). The result was that the Court expressly made findings, not based upon the record, but out of punitive motives for FRADAN's alleged failure to answer discovery (Appendix C, R. 82-86). Some of the findings include that FRADAN sold its product and dealt directly with three separate retail dealers in Idaho, Colorado, and Utah (Appendix C, R. 281, p. 82, lines 19-24) and that a non-party (Cantrell) distributed to WILSON SUPPLY (Appendix C, R. 281, p. 82, lines 13-16; p. 83, lines 19-24; and p. 84, lines 3-6).

The court's decision shows that all findings were based upon a hasty, hostile, and biased reaction by the Judge rather than a detached, neutral decision-maker. FRADAN never even had an opportunity to litigate or obtain a ruling on its motion for a protective order and WILSON never filed a motion to compel the discovery in question. The actions by the

district court, as evidenced in its bench ruling, are sufficient to leave this court with a definite and firm conviction that a mistake was made justifying a complete reversal or remand for a full trial on the merits.

Apart from the factual disputes relating to pricing and whether a third non-party was a distributor in Utah, the fact remains that WILSON SUPPLY, as a business entity, is just what its name indicates: a wholesaler distributor of lawn and garden equipment and parts. The company's only retail business was sold and WILSON SUPPLY, as a wholesaler, retained the FRADAN products. Based upon these undisputed facts and the plain meaning of the statute, summary judgment and attorney fees should be entered in favor of FRADAN.

POINT I

WILSON SUPPLY IS A WHOLESALER UNDER U.C.A. § 13-14A-1(7)(b)

The initial threshold issue in this case is whether WILSON SUPPLY must be treated as a "wholesaler" or "retail dealer" as defined in the statute. During the entire summary judgment proceedings, including the narrowly-focused evidentiary hearing, FRADAN continued to emphasize that the admitted fact that WILSON SUPPLY was a wholesaler, in addition to acting as a retail dealer through its d.b.a. Pro Power, required the court to conclude as a matter of law that FRADAN was not required to repurchase equipment from WILSON SUPPLY under Utah Code Ann. § 13-14a-2(1) (as amended, 1995). The trial court incorrectly concluded that WILSON SUPPLY, as either a wholesaler or retail dealer, was entitled to the protection afforded to a retail dealer.

A. Statutory Construction and Interpretation:

The trial court erred because it failed to apply well-accepted rules of statutory construction and interpretation. The first rule is that a court must first “examine the statute’s plain language and resort to other methods of statutory interpretation only if the language is ambiguous.” *Matrix Funding Corporation v. Auditing Division of the Utah State Tax Commission*, 868 P.2d 832, 833 (Utah 1994). If doubt or ambiguity exist, the court should analyze the entire act and ““Harmonize its provisions in accordance with the legislative intent and purpose.”” *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513, 518 (Utah 1993), quoting *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980). “Whenever possible, statutes should be construed so that no portion is superfluous.” *Id* at 243, fn. 20. Finally, the Court has no power to rewrite a statute to make it conform to an intention not expressed in the statute. *Neel v. State*, 889 P.2d 922, 926 (Utah 1995). In this case, the trial court failed to apply the plain meaning of the statute or harmonize its interpretation with the entire act, which results in rendering the statutory definition of “wholesaler” superfluous.

B. Wilson Supply Is a Wholesaler Within the Plain Meaning of the Act:

While some states have various laws requiring a manufacturer or wholesaler to repurchase goods upon termination of a retail sales agreement, Utah appears to be the only state that has carefully defined the term “wholesaler” as it relates to “retail dealer.” The relevant code section states:

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

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

(Emphasis added). Utah Code Ann. § 13-14a-1(7)(b) (as amended, 1995). The underlined portion, “who in addition to retailing distributes equipment at the wholesale level” was added by the Utah Legislature in 1995 to more clearly exclude wholesalers from taking advantage of the protections afforded retail dealers under the statute. The 1995 amendment shows the Legislature’s intent to clarify that retail dealers who are also engaged in wholesale activities must be treated as wholesalers and cannot enforce a right to repurchase against a manufacturer. The plain meaning of the statute requires a court to treat a retail dealer as a “wholesaler” if the dealer generally, as a business entity, engages in distributing any amount of lawn and garden equipment at the wholesale level. By operation of law, a retail dealer who distributes lawn and garden equipment at the wholesale level is defined as a “wholesaler” and should not be referred to as a retail dealer for purposes of requiring a manufacturer to repurchase equipment.

In this case, WILSON SUPPLY, as an entity, alleges in its Complaint and provided sworn testimony that it was in the business of distributing lawn and garden equipment at the wholesale level in addition to retailing (R. 002, ¶ 6; R. 123, ¶ 10; and Appendix B, R. 184, ¶ 7). WILSON SUPPLY further provided sworn testimony that it distributed a “portion of the Fradan inventory at the wholesale level.” (R. 123, ¶ 10 and Appendix B, R. 184, ¶ 7). Moreover, WILSON SUPPLY alleges in its complaint that it entered into an agreement with FRADAN in which “Wilson agreed to sell at retail, and or distribute at the wholesale level,

those items supplied to it by Fradan as a manufacturer.” (R. 002, ¶ 8). Furthermore, WILSON SUPPLY represented itself as a wholesale distributor on its own letterhead, in the *Dunn & Bradstreet* listing, and in the Salt Lake City Yellow Pages (R. 167; R. 193, ¶ 3; and R. 202). Finally, all correspondence between WILSON and FRADAN during the business relationship was either from WILSON SUPPLY addressed to FRADAN or from FRADAN addressed to WILSON (R. 33, 35, 133, 135, 137, 138, 140, 142, 144-159, 167, and 204), including the initial correspondence where WILSON requested prompt shipment to its wholesale warehouse (Appendix D, Exhibit 8). The only document sent in the name of Pro Power (WILSON’s retail dealer) to FRADAN was sent after the business relationship had terminated between WILSON and FRADAN (R. 170). To fall within the plain wording of the statutory definition, WILSON SUPPLY merely needed to engage in some, but not all or even mostly, distributing at the wholesale level to be treated as a “wholesaler.” The statute defines wholesaler not merely as a wholesaler that happens to engage in some retail sales, but as “a dealerwho in addition to retailing distributes equipment at the wholesale level.” (Emphasis added) Utah Code Ann. § 13-14a-1(7)(b) (as amended, 1995). It matters not under the statute whether WILSON SUPPLY actually distributed FRADAN equipment, although Brett Wilson admitted they did (See Appendix B, R. 184, ¶ 7 and Appendix D, Exhibit 1). Since WILSON SUPPLY admitted it has been a wholesale distributor since 1935 and continued to act as a wholesaler of lawn and garden equipment during the relevant time, it was an error in law for the court to conclude WILSON was a

retail dealer for purposes of Utah's repurchase law. The plain wording of the statute required the court to refer to WILSON as a wholesaler for purposes of the right of a retail dealer to have a manufacturer or wholesaler repurchase its inventory. It was error in law for the court not to enter summary judgment for FRADAN based solely upon the affidavit of Brett Wilson, president of WILSON SUPPLY (See Appendix B, ¶ 7)

C. A Manufacturer Is Never Required to Repurchase from a Wholesaler:

After deciding WILSON's business was defined as a "Wholesaler" under the statute, it then should have applied the plain meaning of Utah Code Ann. § 13-14a-2(1) and concluded that a wholesaler has no right to demand repurchase of its equipment from a manufacturer. The statute states:

(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.

(Emphasis added). Utah Code Ann. § 13-14a-2(1). This section speaks only of an agreement between a "dealer" and a manufacturer or wholesaler. No where does it state that a manufacturer should ever repurchase equipment from a wholesaler. The plain meaning of the statute is unambiguous and does not allow a court to conclude that a wholesaler can take advantage of the repurchase right. It was, therefore, an error in law for the trial court to "rewrite" the statute by providing protection for a dealer who also distributes at the wholesale

level when the plain language of the statute does not provide such protection. See generally, *Matrix Funding Corporation*, 868 P.2d at 833 and *Neel*, 889 P.2d at 926.

If the language of the statute was ambiguous or uncertain, the court should have looked to the entire act to “harmonize its provisions in accordance with legislative intent and purpose.” *Beynon*, 854 P.2d at 518. The title of Chapter 14a, “Equipment Repurchase from Retail Dealers” gives no hint that a wholesaler would ever have a right of repurchase. Of course, titles are not controlling and what really matters most are the various sections and subsections of the act.

In this case, every reference in the statute even remotely relating to a dealer’s right to demand repurchase is stated in terms of the manufacturer or wholesaler obligation to repurchase from the “dealer.” Utah Code Ann. § 13-14a-2 references the phrase “manufacturer or wholesaler” a total of sixteen times, three of which are in subparagraph 2(1) alone. Of special note is § 13-14a-1(5) “Sales Agreement” which references the phrase four times. This subsection makes clear that the “Sales Agreement” which forms the basis for asserting a repurchase claim can only be between a “dealer and a manufacturer or wholesaler.” The reverse implication is that an agreement between a wholesaler and a manufacturer could not be a “Sales Agreement” within the meaning of this act. The legislature, by the plain language, did not see fit to govern the relationship between a wholesaler and a manufacturer and the trial court should not have taken it upon itself to do so.

The entire act references the phrase “manufacturer or wholesaler” a total of 33 times. No where in this act does any language exist that could purport to grant a “wholesaler” the right to force a “manufacturer” to repurchase goods from a “wholesaler.” The plain language can only be interpreted to allow a dealer to require either a manufacturer or wholesaler to repurchase the dealer’s inventory. Again, since WILSON is a “Wholesaler” as defined by the statute, this court should direct the district court to enter summary judgment and attorney fees in favor of FRADAN. Any other interpretation of this statute would render meaningless the language defining “wholesaler” in subsection (7)(b).

The court’s conclusion that FRADAN must repurchase inventory from WILSON SUPPLY would allow all wholesalers to circumvent the plain language of the statute and thus render the legislature’s definition of wholesaler under Utah Code Ann. § 13-14a-1(7)(b) superfluous, contrary to sound principles of statutory interpretation. See generally, *Beynon*, 854 P.2d at 518. All wholesalers could open up a retail outlet at their existing warehouse or occasionally retail a portion of their inventory from various manufacturers and then demand all manufacturers to repurchase all of their wholesale and retail inventory. A wholesaler, based upon the trial court’s reasoning, could even voluntarily take back inventory from its retail dealers and demand that the manufacturer repurchase the equipment, just as WILSON apparently did with its Idaho store (See Appendix D, Exhibit 1). Such an outcome, based upon the trial court’s conclusions of law, would impermissibly render § 13-14a-1(7)(b) superfluous and all wholesalers could avoid repurchase liability and be treated as dealers.

The only logical interpretation is that dealers, who are wholesalers, like WILSON was, may not assert rights of repurchase against a manufacturer. This is true regardless of the volume of distributing by a retailer.

POINT II

BASED UPON THE FINDINGS OF THE TRIAL COURT, UTAH CODE §§ 13-14a-2(1) and -9(3) DO NOT REQUIRE FRADAN TO REPURCHASE INVENTORY FROM WILSON SUPPLY, d.b.a. PRO POWER AFTER PRO POWER WAS SOLD TO A NON-PARTY WHOLESALER

The trial court made a few findings of fact that were not supported by the record which will be addressed in Point III. However, even if the facts were not clearly erroneous, as a matter of law, the court should have entered judgment in favor of FRADAN based upon the fact that WILSON sold its retail outlets during the pendency of this litigation.

The court made a hasty and spontaneous ruling from the bench at the conclusion of the summary judgment hearing of September 19, 2000 (Appendix C, R. 281 pp. 82-86). In this ruling, the court made the following relevant findings (FRADAN argues in Point III that these findings and others are clearly erroneous):

1. Fradan's product was marketed by Pro Power at retail.
2. A non-party named "Cantrell" was the wholesaler for Utah.
3. Fradan entered into three separate contracts with the retail outlets, Pro Power in Idaho, Pro Power in Utah, and Pro Power in Colorado.
4. Cantrell continued to sell product in the State of Utah as the manufacturer's representative on a wholesale basis.
5. The wholesaler to Pro Power was Cantrell and/or WILSON SUPPLY.

6. WILSON, as a wholesaler of FRADAN, discontinued doing business with FRADAN.
7. The initial business relationship that was created with Pro Power was intended to be a manufacturer to a retailer direct, and that is on that basis that they're obligated to rebuy.
8. All sales engaged in by Pro Power were retail sales.

(Appendix C, R. 281 pp. 82-86). Prior to the above ruling, it was undisputed that WILSON SUPPLY sold Pro Power, consisting of all of its retail outlets (R. pp. 195, ¶ 14; R. 208; R. 212, ¶ 13; R. 214; R. 217, ¶ 1; and R. 231, ¶ 1). It was further undisputed that WILSON only retailed products through Pro Power and that WILSON owned and operated Pro Power as a retailer in three states (R. 281, p. 36). Nevertheless, the trial court treated WILSON SUPPLY and Pro Power as two separate entities for purposes of applying the law (See Finding of Fact Numbers 3 and 7).

Utah Code Ann. § 13-14a-9(3) requires a manufacturer to repurchase a product from a retail dealer if the wholesaler discontinues representing a line of product. For the reasons stated above and argued in the trial court, this section does not require a manufacturer to repurchase inventory from a wholesaler when the wholesaler terminates its agreement with the manufacturer. For the reasons stated in Point I, this would render meaningless the wording in § 13-14a-1(7). The plain meaning of this section is that a manufacturer must repurchase inventory held by all retail dealers who received inventory from a wholesaler that discontinued representing a manufacturer's line of product. However, this section does not require a manufacturer to repurchase inventory held by the wholesaler who terminates its

relationship with the manufacturer. Rather the manufacturer must repurchase equipment held by the Retail Dealers that was distributed to them by the wholesaler who later terminates its relationship with the manufacturer.

Circumventing the obvious application of subsection 13-14a-9(3), the court treated Pro Power and WILSON SUPPLY as separate entities. The court found that WILSON terminated its relationship with FRADAN (See R. 206 and R. 281, p. 84, lines 20-21) and, therefore, FRADAN must repurchase the inventory from a separate entity (Pro Power). Of course the court should have treated WILSON SUPPLY and Pro Power as one entity, which under the statute, as a business entity, is defined as a “Wholesaler” since it is engaged in both retail sales and wholesale distributing (§ 13-14a-1(7)(b)). However, since the court treated Pro Power as a separate retail dealer from WILSON SUPPLY, the court could not factually require FRADAN to repurchase an inventory from a retail dealer that was sold to another entity. In the alternative, since WILSON held the inventory all this time, and the product was not held by the three retail outlets in Utah, Idaho, and Colorado, the retail dealer (Pro Power) cannot assert a claim for repurchase. In fact, the record shows WILSON SUPPLY actually repurchased at least 8 string trimmers from its Idaho store on February 4, 1998. It further stated in affidavit form that WILSON, not Pro Power, retained all of the FRADAN inventory (R. 227, ¶ 9).

The court raised the question that surely WILSON SUPPLY could not be required to repurchase from itself, Pro Power (although WILSON did repurchase from Pro Power in

Idaho (Appendix D, Exhibit 1)), giving this as an additional reason why FRADAN must purchase the product from Pro Power (R. 281, p. 83, lines 24-25 through 84, lines 1-2). FRADAN agrees that the statute does not contemplate a Wholesaler, who also retails, to “repurchase from itself.” The logical result, however, is that no repurchase occurs at all under such circumstances. The fact that Pro Power was sold further solidifies this result.

WILSON SUPPLY, d.b.a. Pro Power no longer exists as an entity since it was purchased by Horizon, Inc. When Pro Power was sold, WILSON lost any claim it might have asserted against FRADAN and essentially lost standing before the court. The official Plaintiff/Appellee, has no claim to assert because it does not exist as an entity (See Appendix D, Exhibit 3). As a matter of law, based upon the undisputed facts, to the extent Appellee has standing or even exists as an entity, it stands before this court as a wholesaler, who retained inventory received directly from FRADAN. Having sold its retail stores, it cannot now assert the right of repurchase that belongs exclusively to retail dealers under § 13-14a-2(1). Therefore, as a matter of law, this Court should enter judgment in favor of FRADAN based upon the fact that WILSON SUPPLY sold its retail businesses and cannot stand in the position of a retail dealer under any set of facts.

POINT III

THE TRIAL COURT’S FINDINGS ARE CLEARLY ERRONEOUS, NOT SUPPORTED BY SUFFICIENT EVIDENCE, AND THE RESULT OF AN ABUSE OF DISCRETION BY THE COURT IN UNFAIRLY PENALIZING FRADAN REGARDING AN UNLITIGATED DISCOVERY DISPUTE

The trial court erred in law when it set an evidentiary hearing to determine whether “Wilson Supply is a dealer or a wholesaler pursuant to U.C.A. 13-14A-1, et seq.” given the admitted facts stated in Points I and II. (See, R. 250). Although the trial court decided this case on summary judgment and concluded that WILSON SUPPLY was a retailer dealer as a matter of law (R. 264), the court also purported to make several findings of fact. FRADAN contends that many of these findings are irrelevant and that, based upon WILSON’s admissions and allegations in its complaint that they are a wholesaler and a retailer, the court erred in law concluding that a right of repurchase exists. Moreover, it is very unclear from the record what the findings and conclusions are since they run together and seemed to be a punitive spontaneous reaction to an unlitigated discovery dispute (See Appendix C, R. 281, pp. 82-86). Moreover, the court’s own minute entry only made the finding that “Pro Power” sold as a retailer (Appendix B, R. 252 and Appendix C, R. 281, p. 86, lines 3-8). This was an admitted fact from the beginning and does not change the required legal conclusion that WILSON SUPPLY is not entitled to have its equipment repurchased by FRADAN. Nonetheless, to the extent that the Supreme Court could decide that the ultimate decision in this case is based upon factual findings in the record, FRADAN asserts that such findings are

“clearly erroneous” and based upon an apparent hostility towards FRADAN that was in turn based upon the court’s misunderstanding of a discovery dispute.

This Court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). In this case, the record does not support several key findings of fact and such findings were likely induced by a misunderstanding of the law and an abuse of discretion in spontaneously meting out a discovery sanction.

The trial court made several hasty and cryptic findings of fact in ruling from the bench which were never reduced to official findings of fact and conclusions of law by the trial court. Instead, the final order merely states that the court, “having concluded as a matter of law that Wilson Supply, Inc., d.b.a. Pro Power Equipment Co. is a dealer under the statutory definition contained in Chapter 14a of Title 13, Utah Code Annotated.” (R. 264). The final order merely refers to findings and conclusions made on the record. The following is an attempt to restate the possible findings of fact:

1. Fradan’s product was marketed by Pro Power at retail.
2. “Fradan has refused to provide in discovery the pricing information to know whether they were selling at a wholesale price, which would have been considered a lower price than to a retailer price to Wilson Supply, and anticipating that Wilson Supply would then distribute to Pro Power.”
3. A non-party, “Cantrell” was the wholesaler for the State of Utah.
4. Fradan entered into three separate contracts with the retail outlets, Pro Power in Idaho, Pro Power in Utah, and Pro Power in Colorado.

5. Cantrell continued to sell product in the State of Utah as the manufacturer's representative on a wholesale basis.
6. The relationship between Wilson and Fradan had not "matured" into that of a wholesaler with a manufacturer.
7. "Cantrell remained the wholesaler until it was clarified, and it wasn't made very clear."
8. "I must conclude that they bought as retailers because that discovery [regarding the price charged generally to distributors for Fradan product] was not given."
9. Because of the failure to provide discovery, the relationship that existed was one where a retailer dealt directly with the manufacturer.
10. The wholesaler to Pro Power was Cantrell and/or WILSON SUPPLY.
11. WILSON, as a wholesaler of FRADAN, discontinued doing business with FRADAN.
12. The initial business relationship that was created with Pro Power was intended to be a manufacturer to a retailer direct, and that is on that basis that they're obligated to rebuy.
13. While WILSON SUPPLY was a wholesaler and wholesaled multiple products, they were not wholesalers for purposes of the transaction with FRADAN.
14. All sales engaged in by "Pro Power" were retail sales.

Appendix C, R. 281, pp. 82-86. FRADAN asserts that all of these findings are the result of an unjust, punitive, and abusive action taking by the trial court based upon an unlitigated discovery dispute.

The discovery issues stem from FRADAN's objection to certain discovery that would have required FRADAN to produce marketing plans, price information, and client lists to what was then a hostile competitor (WILSON SUPPLY). After attempting three times

through supplemental discovery answers to resolve the issue with WILSON's counsel, FRADAN filed a motion for a protective order (R. 56) because FRADAN did not want such information made public. Per the agreement of the parties' counsel at the summary judgment hearing, the motion for a protective order was put on hold, pending the court's decision on the parties' cross motions for summary judgment (R. 280, p. 2) because a summary judgment ruling would make the issues "moot" and the information was not necessary to decide the summary judgment motions (R. 280, p. 2, lines 13-15).

Unfortunately, the record is confused on this point in that it states the Protective Order should be argued which may "moot the other motion." (R. 280, p. 2, line 10-16). However, the record shows that the Motion for Protective was not argued or mentioned again by the court (R. 280, pp. 1-16 and R. 281, pp.1-86). The parties' counsel prior to the hearing agreed that the Protective Order would be moot if the court decided the case by summary judgment, and, therefore, it did not need to be argued prior to a ruling from the judge on the cross motions for summary judgment. If the Protective Order Motion had been argued, FRADAN would have proceeded first since it was FRADAN's motion. WILSON never brought a motion to compel discovery.

In the evidentiary hearing of September 19, 2000, WILSON's counsel objected after a line of questioning on the fact that FRADAN sold to WILSON at a wholesale price (R. 211, ¶ 4; R. 226, ¶ 3; and R. 281, p. 59, line 16). The court, after cursory argument, abruptly sustained WILSON's objection to inquiries regarding the fact that WILSON paid FRADAN

a wholesaler's price for the equipment (R. 281, p. 61, line 10). (WILSON SUPPLY never denied receiving a wholesaler's price, but merely argued on summary judgment that as a high volume retailer they received FRADAN equipment at a wholesale price. See, R. 226, ¶ 3). FRADAN then moved on in its questioning at the direction of the court in that it is legally irrelevant what price WILSON paid FRADAN because WILSON already admitted they wholesaled a portion of the FRADAN equipment and were generally in the business of wholesaling lawn and garden equipment. Moreover, price is not expressly a criteria under the statute (§ 13-14a-1(7) in determining whether a dealer should be treated as a wholesaler.

The crucial question is whether WILSON SUPPLY, as a business entity, is a wholesaler. If a dealer is a wholesaler, it has other channels and means to sell the equipment at a high volume level rather than piece by piece to consumers. However, the court abused its discretion and turned the discovery issue into a punitive sanction against FRADAN by making several erroneous findings of fact (See R. 281, p. 82, lines 8-24; p. 84, lines 7-16). The court's equally unsupported findings regarding "Cantrell" being the distributor to WILSON was also based upon the unlitigated discovery dispute in that WILSON's counsel made the same discovery argument regarding information requested regarding Cantrell (See, Appendix C, R. 281, p. 82, line 14; p. 83, lines 1, 5, 19, 23; and p. 84, line 4).

The court's references to Cantrell being the wholesaler to WILSON SUPPLY are not supported by any evidence in the record. The only remote reference is the testimony of Brett Wilson who claimed a former employee of FRADAN said that Cantrell was FRADAN's

distributor in Utah (R. 281, p. 37, line 23) and that Brett Wilson “assumed” Cantrell sold FRADAN product to dealers in Utah (R. 281, p. 38, lines 2-4). Upon such “assumed” and scant evidence the court could not find that Cantrell was the exclusive wholesaler in Utah. Moreover, the undisputed evidence shows that FRADAN sold directly to WILSON SUPPLY (R. 133 through 159, and 167 and Appendix D, Exhibit 8). In fact, Brett Wilson admitted the product was shipped from FRADAN in New York to WILSON SUPPLY (R. 281, p. 46, lines 23-25). No evidence was submitted that Cantrell was the exclusive wholesaler in Utah during the time WILSON purchased from FRADAN. The record shows only that WILSON purchased directly from FRADAN, not from Cantrell. Moreover, it is immaterial how many wholesalers FRADAN may have had in Utah. The only material question is whether WILSON SUPPLY is a wholesaler within the meaning of § 13-14a-1(7)(b). Furthermore, WILSON admittedly distributed FRADAN product to its retail stores in Idaho and Colorado (Appendix D, Exhibit 1. No evidence suggests that WILSON was not a wholesaler in Idaho and Colorado.

Findings 4 and 12 and any findings that suggest FRADAN dealt directly with the 3 separate Pro Power retail stores, is based solely upon Plaintiff’s Exhibit 2 and the testimony by Brett Wilson regarding the “Service Agreement” between FRADAN and the three Pro Power stores (R. 281, p. 38, lines 17-20). These “Service Agreement,” however, did not establish a “retail sales agreement” within the meaning of § 13-14a-1(5), in that the documents are clearly defining the ability of the retail store to “service” FRADAN

equipment. Such evidence was far too slim for the court to make the leap of faith that FRADAN contracted directly with each separate retail outlet, especially considering the fact that all of the FRADAN product was shipped to WILSON SUPPLY (R. 133-159, and Exhibits 7 and 8). The address on all of the invoice documents show WILSON SUPPLY, not “Pro Power.” FRADAN never shipped equipment to the Pro Power stores. Moreover, WILSON’s own documents (Exhibit 1) shows that it distributed some FRADAN product to its Idaho retail store and to Colorado). Therefore, the court’s findings that FRADAN dealt only and directly with the three retail stores in Colorado, Idaho, and Utah are clearly erroneous, not supported by the evidence before the court, and obviously based upon an improper and unjust discovery sanction.

Although it is impossible to sort out the punitive effect of the surprise discovery sanction on the court’s findings and conclusions, it is clear that it had a substantial impact on the overall decision in the case. Prior to the discovery issue, however, FRADAN became concerned that WILSON SUPPLY was trying to improperly elicit a sort of “home-state bias” in favor of WILSON (See R. 280, p. 12, lines 5-9; R. 281, p. 4, lines 13-18; p. 9, line 18; p. 10, line 9; p. 11, lines 11-13; p. 16, lines 4-6; p. 31, line 5; and p. 78, line 22). Although everyone would like to think that all district court judges are above being biased by local cultural factors, the fact is WILSON’s attorney would not have repeatedly made these comments if he were not trying to elicit an unfair bias in favor of his client.

Regardless of the motives, the court's findings are confusing, contradictory, and clearly erroneous and must be set aside and judgment should be entered for FRADAN. In the alternative, the matter should be remanded for a new trial, allowing the discovery dispute to be fully and fairly litigated prior to the trial.

CONCLUSION

Whether it is good or poor public policy to treat wholesalers and manufacturers similarly regarding the duty to repurchase inventory may be debatable. However, such debate and public policy formulations are not the proper role for the courts. To avoid such policy roles, courts must apply the plain language of statutes. In this case, WILSON SUPPLY is a wholesaler as a business entity under Utah Code Ann. § 13-14a-1(7) merely because it was both a wholesaler and a retailer. It matters not whether it actually wholesaled any of FRADAN's product or whether it competed with other distributors in the State of Utah. All that is relevant is that as an entity WILSON SUPPLY was in the business of distributing lawn and garden equipment at the wholesale level. The affidavit of Brett Wilson (Appendix B, R. 164) alone establishes these material facts and mandates summary judgment for FRADAN as a matter of law.

The fact that WILSON SUPPLY sold all of its retail Pro Power stores, yet retained the inventory as a wholesaler, together with the fact that WILSON SUPPLY, d.b.a. Pro Power has not existed as a business entity since 1999, gives further support for requiring judgment in favor of FRADAN.

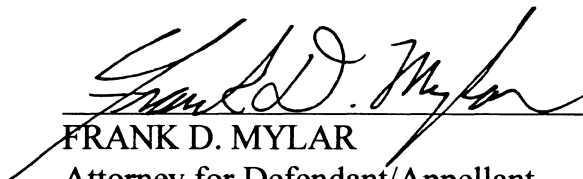
Finally, it was an abuse of discretion for the court to penalize and sanction FRADAN based upon an unlitigated discovery dispute that was not fully and fairly heard by the court. All findings of fact are clearly erroneous in that they are expressly based upon the Court's decision to spontaneously sanction FRADAN rather than the factual record on summary judgment.

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

REQUEST FOR ORAL ARGUMENT AND PUBLISHED OPINION

Appellant respectfully requests oral argument and a published opinion in this matter to provide future guidance to manufacturers, wholesalers, and dealers doing business in Utah.

RESPECTFULLY SUBMITTED this 18th day July, 2001.


FRANK D. MYLAR
Attorney for Defendant/Appellant
Fradan Manufacturing, Inc.

CERTIFICATE OF MAILING

I certify that on this 23 day of July, 2001, I caused to be mailed, postage prepaid,
two exact copies of Defendant/Appellant's Brief and Appendices to the following address:

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APPENDICES

APPENDIX A: Equipment Repurchase from Retail Dealers, Utah Code Ann. 13-14a-1, et seq. (as amended, 1995)

APPENDIX B: Select Documents from Trial Court Docket

APPENDIX C: District Court's Bench Ruling on Summary Judgment, R. 281, pp. 82-86

APPENDIX D: Select Portions of Hearing Exhibits 1, 2, 3, 4, 5, and 8

APPENDIX E: Relevant Transcript Sections, R. 281

APPENDIX A

Equipment Repurchase from Retail Dealers

Utah Code Ann. 13-14a-1, et seq. (as amended, 1995)

(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 amendment, 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).

APPENDIX B

SELECT DOCUMENTS FROM TRIAL COURT

<u>Docket #</u>	<u>Docket Description</u>
183-187:	Affidavit of Brett Wilson in Support of Summary Judgment
250:	Notice of Evidentiary Hearing
252:	Court Minutes, Evidentiary Hearing
263-265:	Final Order and Judgment on Summary Judgment

David L. Bird (0335)
Gregory J. Adams (6159)
McKAY, BURTON & THURMAN
600 Gateway Tower East
10 East South Temple
Salt Lake City, UT 84133
Telephone: 801/521-4135
Facsimile: 801/521-4252

FILED OCT 11 1998
Third Judicial District
FEB 12 2000
SALT LAKE COUNTY
By _____ Deputy Clerk

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff,

vs.

FRADAN MANUFACTURING CORP.,

Defendant.

Civil No. 980912305

Judge David Young

**AFFIDAVIT OF BRETT WILSON IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

I, BRETT WILSON, upon being duly sworn, depose and say:

1. I am the President of Plaintiff Wilson Supply, Inc., d.b.a Pro Power Equipment

00183

Co. ("Wilson Supply"), and have personal knowledge of all facts asserted herein.

2. From in or about September, 1996 through in or about November, 1997 Wilson Supply received various items of yard and garden equipment, as well as parts inventory ("Fradan Inventory") from Fradan Manufacturing Corp. ("Fradan Manufacturing").

3. The Fradan Inventory included, though was not limited to, string and brush trimmers, backblowers, engine covers, spark plug guards, miscellaneous repair parts and hardware.

4. At all times Wilson Supply dealt with Fradan Manufacturing, Wilson Supply was in the business of selling and retailing inventory and equipment of the type and nature of the Fradan Inventory.

5. At all times Wilson Supply dealt with Fradan Manufacturing, Wilson Supply engaged in the business of selling and retailing the Fradan Inventory.

6. Wilson Supply sold and retailed the Fradan Inventory pursuant to agreement of the parties that Wilson Supply would sell at retail those items, including the Fradan Inventory, supplied by Fradan Manufacturing ("the Agreement").

7. In addition to selling and retailing the Fradan Inventory, Wilson Supply also distributed a portion of the Fradan Inventory at the wholesale level.

8. On or about October 23, 1997 I wrote a letter on behalf of Wilson Supply to Jack Howard of Fradan Manufacturing notifying Fradan Manufacturing that Wilson Supply was terminating its agreement with Fradan Manufacturing to offer Fradan Inventory to Wilson

Supply's customers and requested that Fradan Manufacturing retake possession of and repurchase the Fradan Inventory held by Wilson Supply at that time. See October 23, 1997 letter from Brett Wilson of Wilson Supply to Jack Howard of Fradan Manufacturing, attached hereto as "Exhibit A."

9. The Fradan Inventory held by Wilson Supply as of October, 1997, the date of termination of the Agreement, is itemized on the attached "Exhibit A."

10. Fradan Manufacturing refused my October 23, 1997 request on behalf of Wilson Supply that Fradan Manufacturing retake possession of and repurchase any and all outstanding Fradan Inventory held by Wilson as of the date of the termination of the Agreement.

11. On or about February 25, 1998 I again wrote Fradan Manufacturing reiterating that Wilson Supply had terminated its Agreement with Fradan Manufacturing to offer Fradan Inventory to Wilson Supply's customers and again requested that Fradan Manufacturing retake possession of and repurchase its existing Fradan Inventory with Wilson Supply.

12. Fradan Manufacturing again refused my February 25, 1998 request that Fradan Manufacturing retake possession of and repurchase any and all outstanding Fradan Inventory held by Wilson as of the date of the termination of the Agreement and continues to refuse such request.

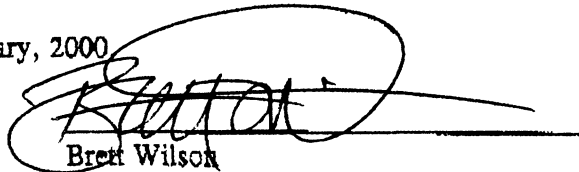
13. Wilson Supply is still in possession of the Fradan Inventory itemized on the attached "Exhibit A."

14. The original invoice price paid by or invoiced to Wilson of the Fradan Inventory & Parts at the time of termination of the agreement between the parties was \$37,452.14. See

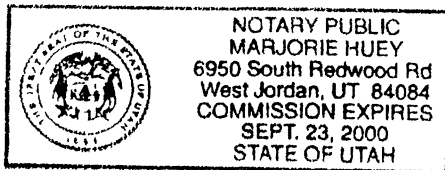
Exhibit A.

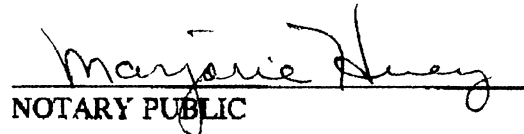
16. The total freight charges paid or billed to Wilson Supply for the Fradan Inventory & Parts at the time of termination of the agreement between the parties was \$1,559.34, which amount, coupled with the original invoice price paid by or invoiced to Wilson of the Fradan Inventory & Parts of \$37,452.14, totals \$39,011.48.

DATED this 31 day of January, 2000


Brett Wilson

SUBSCRIBED AND SWORN to before me this 31st day of January, 2000.




NOTARY PUBLIC

My commission expires:

Sept 23, 2000

Residing at:

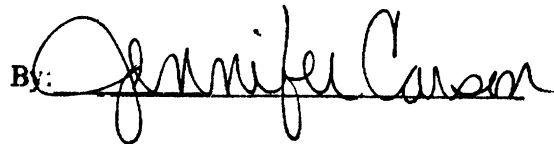
Salt Lake County

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of February ~~January~~, 2000 a true and correct copy of the foregoing AFFIDAVIT OF BRETT WILSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, to the following:

Frank D. Mylar
1149 Princeton Avenue
Salt Lake City, Utah 84105

James H.K. Bruner
90 State Street
Albany, New York 12207

By: 

2 ADAN PARTS & WHOLEGOODS

Y INC — INVENTORY EVALUATION REPORT (RETCJ4) — FOR: BRETT

— DATE: 98.08.17 — PAGE: 001

6 0) Formula

—		Vend—	Description—	SC—	UM	Pkg	Sfty	AvgCost	Avail	Stock	Proc	RProc	Order	B/U—	Qmo	4mos	12mos	Freq
06	444 0		PFRALL CRANKCASE	E	EA	1	0	37.15	1	1	0	0	0	0	0	0	0	0
02	444 0		PFRALL PISTON	E	EA	1	0	8.50	2	2	0	0	0	0	0	0	0	0
02	444 0		PFRALL RING SET	E	EA	1	0	2.45	3	3	0	0	0	0	0	0	0	0
04	444 0		PFRALL PISTON PIN	E	EA	1	0	1.75	2	2	0	0	0	0	0	0	0	0
02	444 0		PFRALL PISTON PIN	E	EA	1	0	0.10	4	4	0	0	0	0	0	0	0	0
06	444 0		PFRALL WASHER	E	EA	1	0	1.00	4	4	0	0	0	0	0	0	0	0
02	555 0		PFRALL CLUTCH HSG	E	EA	1	0	9.75	1	1	0	0	0	0	0	0	0	0
01	555-0		PFRALL COVER	E	EA	1	0	9.75	2	2	0	0	0	0	0	0	0	0
06	444 0		PFRALL STARTER	D	EA	1	0	18.00	0	0	0	0	3	3	0	0	1	0
02	555 0		PFRALL STARTER	C	EA	1	0	17.50	0	0	0	0	0	0	0	0	4	1
06	444 0		PFRALL THROTTLE	D	EA	1	0	9.95	0	0	0	0	0	0	0	0	2	0
06	444 0		PFRALL THROTTLE PL	D	EA	1	0	3.15	0	0	0	0	1	1	0	1	2	2
07	444 0		PFRALL LEVER	E	EA	1	0	1.05	0	0	0	0	1	1	0	0	0	0
06	444 0		PFRALL KNOB	F	EA	1	0	0.75	0	0	0	0	1	1	0	0	0	0
06	444 0		PFRALL FUEL CAP	C	EA	1	0	3.43	0	0	0	0	0	0	0	1	3	1
04	444 0		PFRALL CHOKE ROD	D	EA	1	0	1.70	1	1	0	0	0	0	0	0	2	0
02	555 0		PFRALL GROMMET	E	EA	1	0	0.93	0	0	0	0	1	1	0	0	0	0
01	444 0		PFRALL ENGINE	E	EA	1	0	3.55	10	10	0	0	0	0	0	0	0	0
02	444 0		PFRALL ENGINE	E	EA	1	0	4.05	11	11	0	0	0	0	0	0	0	0
02	444 0		PFRALL MOUNT	E	EA	1	0	3.00	12	12	0	0	0	0	0	0	0	0
04	555 0		PFRALL FLEX SHAFT	E	EA	1	0	13.00	2	2	0	0	0	0	0	0	0	0
03	444 0		PFRALL TUBE	C	EA	1	0	4.25	2	2	0	0	0	0	0	0	3	0
04	444 0		PFRALL TUBE	C	EA	1	0	4.75	2	2	0	0	0	0	0	0	3	0
02	444 0		PFRALL HANDLE	D	EA	1	0	3.48	4	4	0	0	0	0	0	0	1	1
11	555 0		PFRALL GUARD	D	EA	1	0	8.25	0	0	0	0	3	3	0	1	2	4
13	555-0		PFRALL PLUG COVER	F	EA	1	0	1.48	2	2	0	0	0	0	0	0	0	0
01	444 0		PFRALL CYLINDER	E	EA	1	0	0.70	2	2	0	0	0	0	0	0	0	0
05	444 0		PFRALL MANIFOLD	E	EA	1	0	0.29	0	0	0	0	1	1	0	0	0	0
07	000 0		PFRALL BOLT	E	EA	1	0	0.38	0	0	0	0	0	0	0	0	0	0
06	000 0		PFRALL BUTTON	E	EA	1	0	0.28	0	0	0	0	5	0	0	0	0	0
04	000 0		PFRALL WING NUT	E	EA	1	0	0.70	7	7	0	0	0	0	0	0	0	0
05	000 0		PFRALL BOLT	E	EA	1	0	0.15	7	7	0	0	0	0	0	0	0	0
07	000 0		PFRALL BOLT	E	EA	1	0	0.18	4	4	0	0	0	0	0	0	0	0
11	000 0		PFRALL O-RING	E	EA	1	0	3.02	2	2	0	0	0	0	0	0	0	0
			PFRALL BP BLOWER	C	EA	1	0	269.00	18	18	0	0	0	0	0	2	3	2
			PFRALL BRUSHCUTTR	E	EA	1	0	222.00	10	10	0	0	0	0	0	0	0	0
			PFRALL G BLOWER	E	EA	1	0	530.95	3	3	0	0	0	0	0	0	0	0
			PFRALL G BLOWER	E	EA	1	0	671.95	3	3	0	0	0	0	0	0	0	0
			PFRALL EDGER	E	EA	1	0	190.00	39	39	0	0	0	0	0	0	0	0
			PFRALL TRIMMER	E	EA	1	0	180.00	106	106	0	0	0	0	0	0	-3	0

1 AVGJUST= \$37,452.14 CIRCOST= \$37,452.14

EXHIBIT A

THIRD DISTRICT COURT-SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

WILSON SUPPLY INC.,
Plaintiff,

VB.

FRADAN MANUFACTURING CORP.,
Defendant.

: NOTICE OF EVIDENTIARY HEARING

: Case No: 980912305

: Judge: DAVID S. YOUNG

: Date: 08/02/2000

Clerk: chriswc

The Court acting sua sponte schedules an evidentiary hearing on the issue of whether Wilson Supply is a dealer or a wholesaler pursuant to U.C.A. 13-14a-1 et seq. Counsel are requested to adjust their schedules to attend on September 19, 2000, at 8:30 a.m. and argue the matter. Dated this 3rd day of August, 2000.


Judge DAVID S. YOUNG

THIRD DISTRICT COURT-SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

WILSON SUPPLY INC. : MINUTES
Plaintiff, : EVIDENTIARY HEARING
:
:
Vs. : Case No: 980912305 CN
FRADAN MANUFACTURING CORP, Judge: DAVID S. YOUNG
Defendant, : Date: September 19, 2000

Clerk: taunah

PRESENT

Plaintiff's Attorney(s): DAVID L. BIRD
Defendant's Attorney(s): FRANK D MYLAR
Video
Tape Number: 2000-43

HEARING

TIME: 8:32 This matter comes now before the Court for hearing RE issue whether Wilson Supply is a dealer or a wholesaler pursuant to UCA 13-14a-1. Respective counsel make their opening statements.

TIME: 9:09 Brett Wilson and Scott Wilson testify for the plaintiff. Plaintiff exhibits #1-3 received.

TIME: 9:51 Frank DeBartolo testifies for the defense. Defense exhibits #4-8 received.

TIME: 10:18 Testimony from Scott Wilson and Brett Wilson.

TIME: 10:21 Respective counsel make their closing arguments.

TIME: 10:27 The Court states findings for the record. The Court finds Pro Power sold as a retailer, not a wholesaler. The Court finds Fradan Manufacturing Corp must buy back their product/inventory.

Mr. Bird is to prepare findings and judgment consistent with the findings and the ruling of the Court. Mr. Bird will file an affidavit of fees and costs.

FILED DISTRICT COURT
Third Judicial District

OCT 31 2000

By

SALT LAKE COUNTY

Deputy Clerk

David L. Bird (0335)
Gregory J. Adams (6159)
McKAY, BURTON & THURMAN
Gateway Tower East, Suite 600
10 East South Temple Street
Salt Lake City, UT 84133
Telephone: (801) 521-4135

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff, :

vs. :

FRADEN MANUFACTURING CORP., :

Defendants. :

ORDER AND JUDGMENT

Civil No. 980912305

Judge David Young

This matter came before the Court on September 19, 2000 at 8:30 a.m. before the Honorable David S. Young. Plaintiff, Wilson Supply, Inc., d.b.a. Pro Power Equipment Co. was represented by its counsel, David L. Bird of McKay, Burton & Thurman. Defendant, Fraden Manufacturing Corp. was represented by its counsel, Frank D. Mylar. Plaintiff and Defendant had filed Cross Motions for Summary Judgment, which Motions were heard by the Court. The Court, on its own Motion, scheduled this matter for an evidentiary hearing on September 19, 2000 on the issue of

whether Wilson Supply, Inc., d.b.a. Pro Power Equipment Co. is a dealer under Chapter 14a of Title 13, Utah Code Annotated. After taking evidence of the parties, including testimony from witnesses for both Plaintiff and Defendant, having received and reviewed evidence, having considered argument of counsel, having made and entered Findings of Fact on the record and having concluded as a matter of law that Wilson Supply, Inc., d.b.a Pro Power Equipment Co. is a dealer under the statutory definition contained in Chapter 14a of Title 13, Utah Code Annotated. The Court makes and enters the following:

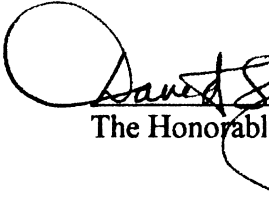
ORDER AND JUDGMENT

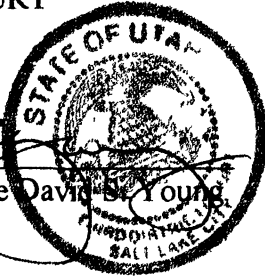
1. Defendant, Fraden Manufacturing Corp. shall pay Plaintiff, Wilson Supply, Inc., for all remaining new and unsold whole goods and parts inventory held by Wilson Supply, Inc., on October 23, 1997, the date of termination of the sales agreement between Wilson Supply, Inc. and Fraden Manufacturing, at the amount originally invoiced by Fraden Manufacturing up to the amount of \$39,011.48. To the extent Wilson is unable to return new parts included in the invoice for \$539.68, Fraden Manufacturing shall be entitled to a credit for the parts not so returned.
2. Fraden Manufacturing shall bear the freight charges incurred by Wilson Supply, Inc. in shipping the whole goods inventory to Fraden Equipment Corps. choice of destination.
3. Wilson Supply, Inc. is entitled to reimbursement for handling and packaging incurred in return of the parts inventory in the amount of 5% of the wholesale price.
4. Wilson Supply, Inc. is entitled to an award of costs and reasonable attorneys fees as

the prevailing party in accordance with §13-14a-7 Utah Code Annotated, pursuant to an Affidavit of Counsel for Wilson Supply, Inc. Such award of attorneys fees to be augmented by a further award of reasonable attorneys fees in obtaining compliance with the terms of this Order.

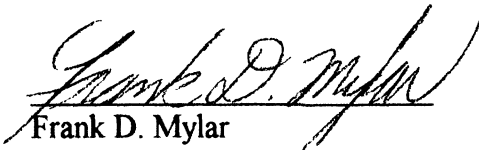
DATED this 31st day of October, 2000

BY THE COURT


The Honorable David S. Young



Approved as to form and content


Frank D. Mylar

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of October, 2000 a true and correct copy of the foregoing Order and Judgment was mailed, first class, postage prepaid to the following:

Frank D. Mylar
6925 Union Park Center, Suite 600
Salt Lake City, Utah 84047



APPENDIX C

District Court's Bench Ruling on Summary Judgment

Docket No. 281, pp. 82-86

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)

APPENDIX D

SELECT PORTIONS OF HEARING EXHIBITS

- Plaintiff's Exhibit 1: Wilson Invoices of Fradan Product.**
- Plaintiff's Exhibit 2: Fradan Service Dealer Agreements**
- Plaintiff's Exhibit 3: Evidence that Pro Power is out of Business as Wilson Supply, d.b.a. Pro Power.**
- Defendant's Exhibit 4: Diagrams of U.C.A. §§ 13-14a-1(7)(b), -2, and -9(3).**
- Defendant's Exhibit 5: Yellow Pages showing Wilson as a Wholesaler.**
- Defendant's Exhibit 8: Initial Written Correspondence from Wilson Supply to Fradan.**

Fradan Invoices

Date	Location	Cust#	Customer Name	Invoice #	SE30	ST30	BB50
03/11/97	PFRA	050501	Triple A Landscaping	552596			1
03/12/97	PFRA	0976	T & T Landscaping	552633		2	
03/17/97	PFRA	0749	Justin Mattinson	552808			1
03/18/97	PFRA	050501	Rex Weatherwax	P06446		1	
03/19/97	BFRA	2378	Wilcox Landscaping	000282			1
03/25/97	PFRA	0878	Charlton Lawn	553121			1
03/26/97	PFRA	1717	South Paw Landscape	553100			1
03/27/97	BFRA	233015	Tates Rent	000463		1	
03/31/97	PFRA	050501	Rob Thomas	553433			1
04/02/97	CFRA	0COD02	Colorado Landscape Solutio	P06548	1		
04/10/97	PFRA	050501	Jeff Iverson	554024			1
04/11/97	BFRA	2263	Perma Green	000756		1	
04/21/97	PFRA	1717	South Paw Landscape	554615			1
05/06/97	PFRA	0866	Diamond Tree Experts	555546		1	
05/12/97	PFRA	0735	Hilltop Landscaping	555997		1	
05/20/97	PFRA	0572	Peppermill/Rainbow Casino	556563			1
05/21/97	PFRA	8200	Granite School District	556550			5
05/22/97	BFRA	233015	Tates Rents, Inc.	001581		1	
05/23/97	PFRA	0COD	Richard Higley	556871		1	
07/07/97	PFRA	1571	J P Realty	559891			1
07/07/97	CFRA	7175	Douglas County Governmen	P07494		2	
08/18/97	PFRA	1717	South Paw Landscape	562724			1
08/26/97	PFRA	0976	T & T Landscaping	563264		-2	
08/28/97	PFRA	0825	Wilderness Landscaping	563435			1
09/05/97	PFRA	0DIS15	Power Trim	563826		2	1
09/29/97	BFRA	1570	Pro Power of Idaho Falls	565332		1	1
10/03/97	PFRA	1570	Pro Power of Idaho Falls	565333			4
10/03/97	PFRA	1570	Pro Power of Idaho Falls	565334		4	
10/13/97	PFRA	0825	Wilderness Landscaping	565944			-1
02/04/98	PFRA	1570	Pro Power of Idaho Falls	553433		-4	-4
02/20/98	PFRA	0735	Hilltop Landscaping	569035		-1	
05/14/98	PFRA	0501	Transit Instruments	571874			1
05/28/98	PFRA	0977	Triple A Landscape	572404			1
10/30/98	PFRA	0977	Triple A Landscape	577843			1
TOTAL					1	11	21

* Can't find original invoice.



WIN SUPPLY, INC.
 3 SOUTH 500 WEST
 RAY, UTAH 84123
 1 266-3200

KEY CUST # DATE TYPE INVOICE
 050501 03/11/97 502506

ORDER TO
 PRO POWER EQUIPMENT COMPANY
 4107 SOUTH 500 WEST
 SALT LAKE CITY, UT 84123

ORDER TO
 TRIPLE A LANDSCAPING
 117 CANDLEWESS BLVD
 SALT LAKE CITY, UT 84123

Item#	Part#	Terms (1010)	Ship Via	FOB	Page		
1-109		FLOORING	WILL CALL	Origin	1 of 1		
2-109					1 of 1		
					1 of 1		
Item#	Part#	Description	CC	UN	Price	Qty	Ext
2-109	0 3030	PERA DP BLOWER	CC	UN	441.48	1	441.48

SALES DRAFT
 PRO POWER EQUIPMENT CO.
 MURRAY, UT. 84123

3/ 1/97 60831411 02:20:23P

IC UNIT NUMBER EXP TOTAL
 18 387368589 1299 \$451.48

SIGNATURE X 

301372 TRAN TYPE PADC AUTH# 017003



Service charge of 1.5% per month
 will be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total 425.
 Sales Tax (6.230%) 26.
 Total 451.

*** INVOICE ***

LS IN SUPPLY, INC.
03 SOUTH 500 WEST
MURRAY, UTAH 84123
01 255 2202

CUST # 0749 DATE 03/17/97 TYPE INVOICE

03 SOUTH 500 WEST
MURRAY, UTAH 84123
01 255 2202

03 SOUTH 500 WEST
MURRAY, UTAH 84123
01 255 2202

Item	Desc	Term	Qty	Unit	Price	Total
1	PRO PAIR		1			
2	PRO PAIR		1			
3	PRO PAIR		1			

SN 5005482

SN 9405339

SALES DRAFT
PRO POWER EQUIPMENT CO.
MURRAY, UT. 84123

01/1/97 60831411 03:32:30P

CO NT NUMBER EXP TOTAL
84 87352534 1299 \$1047.32

SN TURE X SHELLIE MATTINSON

11 31385 TRAN TYPE PADC AUTH# 017609

Price charge of 1.5% per month
is charged on all post due invoices.
No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub Total 720.0
Sales Tax (6.2302%) 44.7

Total

01 PDS

pd Home Source
Joe Matt

N SUPPLY, INC.
 SOUTH 500 WEST
 Y, UTAH 84123
 266-3288

KEY

CUST#
 050501

DATE
 03/18/97

TYPE

INVOICE#
 P06446

----- S O L D T O -----
 | PRO POWER EQUIPMENT COMPANY
 | 4107 SOUTH 500 WEST
 |
 | SALT LAKE CITY, UT 84123
 |
 |-----|

----- S H I P T O -----
 | REX WEATHERWAX
 |
 | FARMINGTON UT
 |
 |-----|

	Req#	Terms	Shipvia	FOB	Page
.18	P06446	COD	WILL CALL	Origin	1 of
ks					Slm C]
					P01 10

B/O Part#	Description	CC- UM	Retail	Net	Extended
0 ST30	PFRA TRIMMER	EA	299.99	269.00*	269.0
0 E200-4	PPOW EDGER	EA	399.00	349.00*	349.0

Service charge of 1.5% per month
 will be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total	618.0
Sales Tax	38.
Total	656.

SUPPLY, INC.
HINDEN BLVD.
CITY, ID 83714
376-4449

STD

CUST# 2378 DATE 03/19/97

000282

----- S O L D T O -----
WILCOX LANDSCAPE MAINT.
10673 PALM DRIVE
BOISE, ID 83713

----- S H I P T O -----
WILCOX LANDSCAPE MAINT.
10673 PALM DRIVE
BOISE ID 83713

19	Req# 000282	Terms NET 10 EOM	Shipvia WILL CALL	FOB Origin	Page 1 of 1
6					Slm Cl
					P02 10

B/O Part#	Description	CC- UM	Retail	Net	Extende
0 BB50	BFRA BP BLOWER	EA	449.99	449.95*	449.9

vice charge of 1.5% per month
be charged on all past due invoices.
No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total 449.9

Sales Tax 22.1

Total 472.0

88) 15.05

***** INVOICE *****

ELDON SUPPLY, INC.
103 SOUTH 500 WEST
JERICHO, UTAH 84123
(801) 226-3200

CUST # 0070 DATE 03/25/97 TYPE 10001
070 0070 03/25/97 0001

----- S O L D T O -----
CHARLTON LAWN
4672 WEST 44TH SOUTH
WEST AVENUE UT 84123

----- S O L D T O -----
CHARLTON LAWN
4672 WEST 44TH SOUTH
WEST AVENUE UT 84123

Q#	Req#	Terms(BP104)	Shipvia	FOB	Q#
201 25-17	N	NET 10 DOM	WILL CALL	Origin	1

Q#	Part#	Description	CC	Unit	Price	Qty	Ext
	0 0050	SPRINKLER BLOWER	EA		140.00	1	140.00
	0 TBC 2310	STAIN TRIMMER	EA		200.00	1	200.00

Wood Brothers

Service charge of 1.5% per month
will be charged on all past due invoices.
Q1: No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total	70.
Sales Tax (6.230%)	4.

*** INVOICE ***

CON SUPPLY, INC.
 1201 SOUTH 500 WEST
 RAY, UTAH 84150
 (801) 233-1233

NEW CUST # 1717 DATE 03/25/97 TYPE INVOICE# E53100

SHIP TO
 SOUTH PAW LANDSCAPE MANAGEMENT
 3155 N PLAIN CITY RD

SHIP TO
 SOUTH PAW LANDSCAPE MANAGEMENT
 3155 N PLAIN CITY RD

RAY, UTAH 84150

CODEN UT 04404

Part	Term	Ship via	F08	Page
225 045	000	WILL CALL	01010	1 of 1
ATK				01010

Part	Description	CD- UN	Detail	Net	Excess
0 000 000	PTAN EDGER	EA	309.00	292.40	272.80
0 000 000	PTAN TRIMMER	EA	397.00	251.00	243.10
0 000 000	PTAN BLOWER	EA	449.00	241.00	241.00

SALES DRAFT
 FID POWER EQUIPMENT CO.

SALES DRAFT
 FID POWER EQUIPMENT CO.
 MURRAY, UT. 84123

3/26/97 68831411 02:26:09P

COUNT NUMBER EXP TOTAL
 84817338126 1299 \$1289.35

GNA URE X

#1447 TRAN TYPE PDC AUTH# 018499

Handwritten: Paid
 Bank one Home Source Card

018499

Sub-Total
 Sales Tax (6.230%)

I SUPPLY, INC.
 (HINDEN BLVD.
 I CITY, ID 83714
 376-4449

NEW

CUST#
 233015

DATE
 03/27/97

TYPE

INVOICE#
 000463

----- S O L D T O -----
 TATES RENTS INC
 2923 W IDAHO STREET
 BOISE, ID 83702

----- S H I P T O -----
 TATES RENTS INC
 401 E FIRST
 MERIDIAN ID 83642

	REQ#	TERMS	SHIPVIA	FOB	PAGE
5 27	000463	NET 10 EOM	WILL CALL	ORIGIN	1 OF 1
21 S					SLM CLI
					P02 10/
B/O PART#	DESCRIPTION	CC- UM	RETAIL	NET	EXTENDED
0 ST30	BFRA TRIMMER	EA	299.99	239.96*	239.90

SERVICE CHARGE OF 1.5% PER MONTH
 IS CHARGED ON ALL PAST DUE INVOICES.
 NO CLAIMS OR ADJUSTMENTS MADE AFTER
 FIVE DAYS FROM DATE OF DELIVERY AND
 NEVER WITHOUT THIS INVOICE.

SUB-TOTAL

239.9

TOTAL

239.9

243 (100) 15.08

*** INVOICE ***

LEON SUPPLY, INC.
101 05TH 500 WEST
ST. LOUIS, MO 64123
314-240-3100

NOT

COST # 080801 DATE 03/31/97 TYPE 10001 INVOI. 25340

--- CREDIT TO
PRO POWER EQUIPMENT COMPANY
1107 21ST ST. ST. LOUIS

200 THOMAS

ST. LOUIS, MO 64123

ST. LOUIS

Item	Part	Terms	Ship Via	Unit	Price
100-1007		100	100	100	100
100-1007		100	100	100	100

Item	Description	QTY	Unit	Price	Total
100-1007	100-1007	100	100	100	100
100-1007	100-1007	100	100	100	100

NOTE: 100-1007

*Paid
CK #649*

A charge of 1.5% per month
be charged on all past due invoices.
No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total

375.00

Sales Tax (6.230%)

ION SUPPLY, INC.
: SOUTH 500 WEST
FAY, UTAH 84123
) 266-3288

KEY

CUST # DATE TYPE
050501 04/10/97

INVOICE
554024

----- S O L D T O -----
| PRO POWER EQUIPMENT COMPANY
| 4107 SOUTH 500 WEST
|
SALT LAKE CITY, UT 84123

----- S H I P T O -----
| JEFF IVERSON
|
UT

Req#	Terms	Shipvia	FOB	Page
10-085	COD	WILL CALL	Origin	1 of 1
WORKS				

B/O Part#	Description	CC- UM	Retail	Net	Extended
0 BB50	FFRA BP BLOWER	EA	449.99	360.00*	360.
	<u>SN 9405849</u>				

SALES DRAFT
PRO POWER EQUIPMENT CO.
MURRAY, UT. 84123

04/10/97 60831411 09:30:20A

ACCOUNT NUMBER EXP TOTAL
475 101127833483 0398 \$382.43

SIG ATURE X

Jeff Iverson
IVERSON

VISA
Charge

EQ# 301538 TRAN TYPE PADC AUTH# 010216

1.5% charge of 1.5% per month
charged on all past due invoices.
No claims or adjustments made after
30 days from date of delivery and
without this invoice.

Sub-Total

Sales Tax (4.230%)

LSOI SUPPLY, INC.
90 HINDEN BLVD.
BOISE CITY, ID 83714
BO) 376-4449

STD CUST # 2263 DATE 04/11/97 TYPE INVOIC 000756

--- S O L D T O ---
PERMA GREEN LAWN CO
P O BOX 6946
BOISE, ID 83707

--- S H I P T O ---
PERMA GREEN LAWN CO
1447 TYRELL LANE
BOISE ID 83706

146 Reg# Terms Ship via FOB Page
146 NET 10 COM WILL CALL Origin 1 of
PARTS 1021

Q	B/O Part#	Description	CC-UM	Retail	Net	Extended
1	0 5110	BEFA TRIMMER	LA	299.99	299.99*	299.99
3	0 3204781	BHON HOLDER, R.	LA	9.84	9.76*	29.28
3	0 3209624	BHON HOLDER, L.	LA	9.84	9.76*	29.28
3	0 3336222	BHON FABRIC, GR	LA	40.94	34.80*	104.40
2	0 43533110200	BTAN BLADE, EDGE	LA	4.87	4.14*	91.00
4	0 OIL 220	BTAN OIL	CS	4.89	4.16*	99.00
1	0 TBC-2510	BTAN TRIMMER	LA	299.99	299.99*	299.99
3	0 VP30A	BVER TRIMMER	LA	29.95	25.64*	76.92

* Late charge of 1.5% per month
is charged on all past due invoices.
† No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total 1030.71

Sales Tax (5.000%) 51.50

5 POS

Total 1082.21

N SUPPLY, INC.
 CINDEN BLVD.
 N CITY, ID 83714
 76-4449

STD

CUST# 2263 DATE 04/10/97 TYPE INVOICE# 000661

----- S O L D T O -----
 PERMA GREEN LAWN CO
 P O BOX 6946

 BOISE, ID 83707

----- S H I P T O -----
 PERMA GREEN LAWN CO
 1447 TYRELL LANE

 BOISE ID 83706

Req#	Terms	Shipvia	FOB	Page
	NET 10 EOM	WILL CALL	Origin	1 of 1
				SIm Clk
				P02 104

3/O Part#	Description	CC- UM	Retail	Net	Extended
0 4572392	BHON CAP, FUEL	EA	10.00	8.50*	8.50

Invoice charge of 1.5% per month
 be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total	8.5
Sales Tax	0.4
Total	8.9

LSM SUPPLY, INC.
 83 SOUTH 500 WEST
 BERRA, UTAH 84123
 01) 266-3288

NEW

CUST # DATE TYPE INVOIC
 1717 04/21/97 554614

----- S O L D T O -----
 SOUTH PAW LANDSCAPE MANAGEMENT
 P O BOX 215
 FARMINGTON, UT 84025

----- S H I P T O -----
 SOUTH PAW LANDSCAPE MANAGEMENT
 3158 N PLAIN CITY RD
 OGDEN UT 84404

Req#	Terms	Shipvia	FOB	Page
142-292	COD	WILL CALL	Origin	1 of
1015				Slm C1
				W01 2:

P	R/O Part#	Description	CC- UM	Retail	Net	Extended
1	0 BBSO	PFRA BP BLOWER	EA	449.99	341.96*	341.9

SER# 0094 05186

SALES DRAFT
 PRO POWER EQUIPMENT CO.
 MURRAY, UT. 84123

7/21/97 60831411 01:05:39P

COL IT NUMBER	EXP	TOTAL
340 7330126	1299	\$374.98

IN A URE X

CRAIG WORSLEY

01681 TRAN TYPE PADC AUTH# 011108

price charge of 1.5% per month
 is charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total	341.96
Sales Tax (6.230%)	21.30
Total	363.26

9: PDS

IN SUPPLY, INC.
SOUTH 500 WEST
MAY, UTAH 84123
266-3288

STD

CUST # 0866 DATE 05/05/97 TYPE INVOICE 555546

SOLD TO
DIAMOND TREE EXPERTS INC
14104 SO 1950 WEST
BLUFFDALE, UT 84065

SHIP TO
DIAMOND TREE EXPERTS INC
14104 SO 1950 WEST
BLUFFDALE, UT 84065

Req#	Terms(P1010)	Shipvia	FOB	Page#
25-278	NET 10 EOM	WILL CALL 5-3	Origin	1 of 1
ON P07261				01M CLE P01 217

B/G Part#	Description	CC-UM	Retail	Net	Extender
0 9W36-13KA	PSCA 36"12.5 KA-NLA/Obse NOTE: SN 07541162	EA	2025.00	1899.00*	1899.00
0 66250	PLAW GOBBLER	EA	173.00	163.00*	163.00
0 JA201-3	PLAW JACOBSON	EA	17.00	12.00*	12.00
0 ST30	PERRA TRIMMER NOTE: SN 00002632	EA	299.05	270.00*	270.00

ice charge of 1.5% per month
e charged on all past due invoices.
No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total 2353.1
Sales Tax (6.230%) 146.1

Total 2499.2

ILSD SUPPLY, INC.
 103 SOUTH 500 WEST
 UHRA, UTAH 84123
 (801) 266-3288

INVOICE # 55599
 DATE 05/13/97
 TYPE
 CUST # 0735

SOLD TO
 HILLTOP LANDSCAPING INC
 1009 WEST 2000 NORTH
 PROVO, UT 84604

SHIPPED TO
 HILLTOP LANDSCAPING INC
 1009 WEST 2000 NORTH
 PROVO UT 84604

#	Eq#	Terms	Ship via	TO	FROM
001	54	COD	UTEL CALI	001	101

ID	R/O Part#	Description	CC	UM	Retail	Del	1.5%
2	0 PP452	PROV BLOWER MOB	EA	159.79	125.00*	21.0	
1	0 5170	FLH TRIMMER	EA	207.95	227.00*		

SU 0002606

569035

Pd CK#4451

Service charge of 1.5% per month
 is charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total	537.0
Sales Tax (6.250%)	33.4

570.4

SUPPLY, INC.
 1000 SOUTH 500 WEST
 SALT LAKE CITY, UTAH 84123
 801-466-3288

NEW

CUST#
 0572

DATE
 05/20/97

TYPE

INVOICE#
 556563

----- S O L D T O -----
 | PEPPERMILL/RAINBOW CASINO
 | ATTN: MARGIE A/P
 | P O BOX 2000
WENDOVER, NV 89883

----- S H I P T O -----
 | PEPPERMILL/RAINBOW CASINO
 | 1045 WENDOVER BLVD.
 |
WENDOVER NV 89883

Req#	Terms	Shipvia	FOB	Page
	NET 10 EOM	* WILL CALL	Origin	1 of 1
PO# WILL CALL ONLY!				Slm Clk
				P01 270

B/O Part#	Description	CC- UM	Retail	Net	Extended
0 BB50	PFRA BP BLOWER	EA	449.95	399.00*	399.00
0 TBC-250	PTAN TRIMMER	EA	429.99	360.00*	360.00

price charge of 1.5% per month
 is charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total

759.

Total

759

LION SUPPLY, INC.
 90 CHINDEN BLVD.
 MERIDIAN CITY, ID 83714
 (208) 376-4449

NEW

CUST# 233015 DATE 05/21/97 TYPE INVOI
 00158

----- S O L D T O -----
 | TATES RENTS INC
 | 2923 W IDAHO STREET
 |
BOISE, ID 83702

----- S H I P T O -----
 | TATES RENTS INC
 | 401 E FIRST
 |
MERIDIAN ID 83642

Item	Req#	Terms	Shipvia	FOB	Package
01 81		NET 10 EOM	WILL CALL	Origin	1 o
Remarks					Slm
					P02

Item	B/O Part#	Description	CC- UM	Retail	Net	Exten
	0 ST30	BFRA TRIMMER	EA	299.99	239.96*	239
	0 HRC215K1SXA	BHON LAWNMOWER	EA	799.00	675.00*	675

service charge of 1.5% per month
 will be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total 914

Total 914

16 (115) 16.16

SCN SUPPLY, INC.
 3 SOUTH 500 WEST
 RAY, UTAH 84123
 1) 266-3288

STD

CUST#
 8200

DATE
 05/21/97

TYPE

INVOIC
 556550

----- S O L D T O -----
 | GRANITE SCHOOL DISTRICT
 | 340 EAST 3545 SOUTH
 |
SALT LAKE CITY, UT 84115

----- S H I P T O -----
 | GRANITE SCHOOL DISTRICT
 | METAL SHOP 53849
 | 380 WEST GREGERSON
SALT LAKE CITY UT 84115

Req#	Terms	Shipvia	FOB	Page
3 9	NET 10 EOM	WILL CALL	Origin	1 of
na ks				Slm (
	PO 650194 96-97	SCHOOL YEAR		P01

ip	B/O Part#	Description	CC- UM	Retail	Net	Extens
5	0 BB50	PFRA BP BLOWER	EA	449.95	359.96*	1799
		NOTE: BID ASSIST				

service charge of 1.5% per month
 will be charged on all past due invoices.
 NOTE: No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total

1799

Total

1799

BON SUPPLY CO. INC. / PRO POWER EQUIPMENT
 3000 JORDAN BLVD. WEST
 RAY, UTAH 84123
 1) 266-3288

CUSTOMER: 0000
 DATE: 05/23/97
 TYPE: INVOICE
 556871

SOLD TO
 COD
 Richard Higley
 , UT

SHIP TO
 COD
 UT

Req#	Terms	Shipvia	FOB	Page
521-214	COD	WILL CALL	Origin	1 of 1
arks				Slm C1 000 14

p	B/O Part#	Description	CC- UM	Retail	Net	Extended
1	0 ST30	PFRA TRIMMER	EA	299.95	279.99*	279.9
1	0 008474	PEXC BELT CLUTC	EA	21.80	21.80	21.8

Pal
CK #9857

Charge of 1.5% per month
 charged on all past due invoices.
 No time or adjustments made after
 30 days from date of delivery and
 without this invoice.

Sub-Total 301.79
 Sales Tax (6.230%) 18.81
 Total 320.60

OI SUPPLY, INC./PRO POWER EQUIPMENT
 SOUTH 500 WEST
 A', UTAH 84123
) 266-3288

CUST# 1571 DATE 07/07/97 TYPE INVOICE# 559891

----- S O L D T O -----
 JP REALTY INC
 35 CENTURY PARK-WAY
 SALT LAKE CITY, UT 84115

----- S H I P T O -----
 JP REALTY INC
 35 CENTURY PARK WAY
 SALT LAKE CITY UT 84115

Req#	Terms	Shipvia	FOB	Page
03-163	NET 10 EOM	WILL CALL	Origin	1 of
MUST PD !! CALL FOR OK !!				Slm C
				P01 2

B/O Part#	Description	CC- UM	Retail	Net	Extend
0 BB50	PFRA BP BLOWER	EA	449.95	429.00*	429.0

Service charge of 1.5% per month
 to be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total 429.

Sales Tax 26

Total 455

JILSON SUPPLY, INC. / PRO POWER EQUIPMENT
 1970 MONACO ST. #F
 COMMERCE CITY, CO 80022
 303) 227-0748

DATE 07/07/97 TYPE INVO
 STO 07/07/97 P074

----- S O L D T O -----
 DOUGLAS COUNTY GOVERNMENT A/P
 101 THIRD STREET
 CASTLE ROCK, CO 80104

----- S H I P T O -----
 DOUGLAS COUNTY GOVERNMENT
 PARKS DEPT.
 9651 SO QUEBEC ST.
 HIGHLANDS RANCH CO 80126

O#	Req#	Terms	Shipvia	FOB	Pa
16513	P07494	NET 10 EOM	WILL CALL	Origin	1
email ks					Slm
					P03

hip	B/O Part#	Description	CC- UM	Retail	Net	Exter
2	0 ST30	CFRA TRIMMER	EA	299.99	240.00*	480

Le vice charge of 1% per month
 be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total

480

Total

480

1 (34) 15126

*** CREDIT ***

SUPPLY, INC./PRO POWER EQUIPMENT
 UTH 500 WEST
 UTAH 84123
 66-3288

CUST # - DATE TYPE INVOICE
 0976 08/26/97 RETURN 563265

----- SOLD TO -----
 T & T LANDSCAPING
 4146 SOUTH 5875 WEST
 WEST VALLEY CITY, UT 84128

----- SHIP TO -----
 T & T LANDSCAPING
 4146 SOUTH 5875 WEST
 WEST VALLEY CITY UT 84128

Req#	Terms(BF104) CREDIT	Shipvia RETURN	FOB Origin	Page 1 of 1
				Sim CLK 104

USED NOT HAPPY WITH

J/O Part#	Description	CC- UM	Retail	Net	Extended
0 ST30	PFRA TRIMMER	EA	299.95	279.00*	558.00

late charge of 1.5% per month
 charged on all past due invoices
 5 days from date of delivery and
 without this invoice.

Sub-Total 558.00
 Sales Tax (8.100%) 34.00
 Total 592.00

BOM SUPPLY, INC./PRO POWER EQUIPMENT
 300 SOUTH 500 WEST
 RAY, UTAH 84123
 1) 266-3288

*** INVOICE ***
 CUST # 0825 DATE 08/28/97 TYPE INVOICE
 563435

----- S O L D T O -----
 WILDERNESS LANDSCAPING
 2590 1/2 VERONA
 HOLLADAY, UT 84117

----- S H I P T O -----
 WILDERNESS LANDSCAPING
 2590 1/2 VERONA
 HOLLADAY UT 84117

Req#	Terms(P1010)	Shipvia	FOB	Page
926-055	NET 10 EOM	WILL CALL	Origin	1 of
arts				Slm Cl
				P01 21

B/O Part#	Description	CC-UM	Retail	Net	Extended
1) 0 RB50	PFRA BP BLOWER	EA	449.95	400.00*	400.0
	NOTE: SN 9405612				

cm 565944
 10/13/97

SALES DRAFT
 PRO POWER EQUIPMENT CO.
 MURRAY, UT. 84123

8/ 7 60831411 00:33:33A

NUM	NUMBER	EXP	TOTAL
101	7353292	1299	\$424.40

DAVID VANSLOOTEN

12428 TRAN TYPE PADC AUTH# 014898

Handwritten signature: Howard Savel

Finance of 1.5% per month

based on all past due invoices

and/or adjustments made after

date of delivery and

on all invoices

Sub Total

Sales Tax

*** INVOICE ***

ION SUPPLY, INC./PRO POWER EQUIPMENT
 6841 MARLIN CIRCLE
 WY, UTAH 84123
 266 3288

STD

CUST # DATE TYPE INVOICE
 0DIS15 09/04/97 563826

TO: S O I D I O - - - - -	SHIP TO - - - - -
POWER TRIM CO INC	POWER TRIM CO INC
6841 MARLIN CIRCLE	6841 MARLIN CIRCLE
LA PALMA, CA 90623	LA PALMA CA 90623

Req#	Terms(RF104)	Shipvia	FOR	Page
	NET 10 DOM	OVERNITE	Origin	1 of
CD ON 563655				Sim C
				POO 10

p	R/O Part#	Description	CC - UM	Retail	Net	Extend
1	0 RB50	PERA RF BLOWER	EA	449.95	269.00*	269.
2	0 ST30	PERA TRIMMER	EA	299.95	180.00*	360.

service charge of 1.5% per month
 will be charged on all past due invoices.
 OTE: No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total

629

INVOICE ***

LSON SUPPLY, INC./PRO POWER EQUIPMENT
90 C INDEN BLVD.
RDEN CITY, ID 83714
OB) 76-4449

NEW

1570

09/29/97

TYPE

INVOICE

565332

----- S O L D T O -----
PRO POWER OF IDAHO FALLS
555 SO UTAH AVE.
IDAHO FALLS, ID 83402

----- S H I P T O -----
PRO POWER OF IDAHO FALLS
555 SO UTAH AVE.
IDAHO FALLS ID 83402

Req#	Terms	Shipvia	FOB	Page
0929 095	1%10TH NET 11TH	VIA BOB REED	Origin	1 of
mark:				Slm C1
				W02 10

Q	Q/O Part#	Description	CC- UM	Retail	Net	Extende
1	0 ST30	BFERA TRIMMER	EA	299.99	224.99	224.9
1	0 BB50	BFERA BP BLOWER	EA	449.99	337.49	337.4

ice charge of 1.5% per month
is charged on all past due invoices.
No claims or adjustments made after
five days from date of delivery and
never without this invoice.

Sub-Total

562.0

DOB

Total

SON SUPPLY, INC./PRO POWER EQUIPMENT
 3 SOUTH 500 WEST
 RAY, UTAH 84123
 (206) 266-3288

CUST# DATE TYPE INVO#
 .1570 10/03/97 56533

----- S O L D T O -----
 PRO POWER OF IDAHO FALLS
 555 SO UTAH AVE
 IDAHO FALLS, ID 83402

----- S H I P T O -----
 PRO POWER OF IDAHO FALLS
 555 SO UTAH AVE.
 IDAHO FALLS ID 83402

Req#	Terms	Shipvia	FOB	Pac
525-400	NET 90	WILL CALL	Origin	1 c
marks				Slm
CATING OPTION				W02

ip	B/O Part#	Description	CC- UM	Retail	Net	Ext
3	0 BB50	PFRA BP BLOWER	EA	449.95	337.46*	1012
1	0 BB50	PFRA BP BLOWER	EA	449.95	199.00*	199

568645

Service charge of 1.5% per month
 will be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total

121

Total

42) 15:09

ILSON ~~SUPPLY~~, INC./PRO POWER EQUIPMENT
 103 SOUTH 500 WEST
 UREAY, UTAH 84123
 301) 266-3288

CUST# DATE TYPE INVOI
 1570 10/03/97 56533

----- S O L D T O -----
 PRO POWER OF IDAHO FALLS
 555 SO UTAH AVE

 IDAHO FALLS, ID 83402

----- S H I P T O -----
 PRO POWER OF IDAHO FALLS
 555 SO UTAH AVE.

 IDAHO FALLS ID 83402

I#	Req#	Terms	Shipvia	FOB	Paq
1925-400A		1/3 APR,MAY,JUN	WILL CALL	Origin	1 o
marks					Slm
					W02

ip	B/O Part#	Description	CC- UM	Retail	Net	Exten
3	0 ST30	PFRA TRIMMER	EA	299.95	224.96*	674
1	0 ST30	PFRA TRIMMER	EA	299.95	199.00*	199

568615

Service charge of 1.5% per month
 be charged on all past due invoices.
 No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub-Total 873.8

Total 873.8

ON SUPPLY, INC./PRO POWER EQUIPMENT
 SOUTH 500 WEST
 AL, UTAH 84123
) 266-3288

STD

CUST # DATE YEAR INVOICE
 0825 10/13/97 RETURN 565944

--- S O L D T O ---
 WILDERNESS LANDSCAPING
 2590 1/2 VERONA
 HOLLADAY, UT 84117

--- S H I P T O ---
 WILDERNESS LANDSCAPING
 2590 1/2 VERONA
 HOLLADAY UT 84117

Req#	Terms(BF104)	Shipvia	FOB	Page
CREDIT	CREDIT	RETURN	Origin	1 of 2
LINE				01m C1
				001 10

B/O Part#	Description	CC	UM	Retail	Net	Extended
0 BB50	PFRA BF BLOWER		CA	449.95	400.00*	400.0

CREDIT VOUCHER
 PRO POWER EQUIPMENT CO.
 MURRAY, UT 84123

/13 97 68831411 10:11:48A

COU	NUMBER	EXP	TOTAL
840	7353292	1299	\$424.48

GNA JRE X-----

IN 01 2643 TRAN TYPE RDC AUTH# 014098

Charge of 1.5% per month
 Sub-Total
 charged on all past due invoices
 Sales Tax 26.00

recharged on 12, but the invoices
of claims or other matters made after
the date of the discharge and
not paid by the date of the discharge

*** CREDIT ***

10 SUPPLY, INC./PRO POWER EQUIPMENT
 1 CUTH 500 WEST
 1A . UT 84123
 1 366-3288

CUST # DATE TYPE INVOICE
 0735 02/20/90 RETURN 519035

S O L D T O
 HILLTOP LANDSCAPING INC
 1007 WEST 2100 NORTH

S O L D T O
 HILLTOP LANDSCAPING INC
 1007 WEST 2100 NORTH

PROV. UT 84104

PROV. UT 84104

Rev#

Total (USD) 279.00

Payable
 02/20/90

1.00

1.00

DR S
 1.00

DO NOT WRITE IN THESE SPACES

1 2/0 Part#
 1 0 5750

1 2/0 Part#
 1 0 5750

1 2/0 Part#
 1 0 5750

1 2/0 Part#
 1 0 5750

service charge of 1.5% per month
 will be charged on all past due invoices.
 RE: No claims or adjustments made after
 five days from date of delivery and
 never without this invoice.

Sub Total 279.
 Sales Tax (6.350%) 17.

*** INVOICE ***

WILSON SUPPLY, INC./PRO POWER EQUIPMENT
1103 SOUTH 500 WEST
MURRAY, UTAH 84123
801) 266-3738

STD CUST # 0501 DATE 05/13/98 TYPE INVO1 57187

----- SOLD TO -----
TRANSIT INSTRUMENT SERVICE
3592 SOUTH 500 WEST
SALT LAKE CITY, UT 84119

----- SHIP TO -----
TRANSIT INSTRUMENT SERVICE
3592 SOUTH 500 WEST
SALT LAKE CITY UT 84119

Qt	Reg#	Terms (BRETT)	Shipvia	FOB	Page
30513-176		NET 10 EOM	WILL CALL	Origin	1 of 1
Remarks					Sim (WCO)

QTY	B/O Part#	Description	CC-UM	Retail	Net	Extens
1	0 S25DA-16A	PROU CHAINSAW	EA	279.99	150.00%	150.
1	0 BD50	FRA BP BLOWER	EA	449.95	269.00%	269.

SN 9404926

[Handwritten signature]

Recharge of 1.5% per month
charged on all past due invoices.
No non adjustment made after
from date of delivery and
this invoice

Sub Total 419.94
Sales Tax (8.25%) 34.60
Total 454.54

INVOICE

SUPPLY, INC./PRO POWER EQUIPMENT
 OUTH 500 WEST NEW
 , UTAH 84123
 266-3738

CUST# 0977 DATE 05/27/98 TYPE INVOICE# 572404

----- S O L D T O -----
 | TRIPLE A LANDSCAPE
 | 117 CANDLEWOOD PLACE
 |
 | PROVO, UT 84604
 |
 |-----|

----- S H I P T O -----
 | TRIPLE A LANDSCAPE
 | 117 CANDLEWOOD PLACE
 |
 | PROVO UT 84604
 |
 |-----|

Req#	Terms	Shipvia	FOB	Page
-065	DC FLOORING	WILL CALL	Origin	1 of 1
s				Slm Clf
				P01 217

B/O Part#	Description	CC- UM	Retail	Net	Extended
0 BB50	PFRA BP BLOWER NOTE: SN 9404817	EA	449.95	270.00*	270.00
0 VK200-2R	PLAW VELKE PRO1 NOTE: DENTED UNIT	EA	294.00	180.00*	180.00
0 6212	PPEC BAGGER	EA	1998.75	1675.00*	1675.00

rv ce charge of 1.5% per month
 b charged on all past due invoices.
 : o claims or adjustments made after
 ive days from date of delivery and
 ever without this invoice.

Sub Total 2125.0

Sales Tax 134.9

Total 2259.9

*** INVOICE ***

SON SUPPLY, INC./PRO POWER EQUIPMENT
 3 SOUTH 500 WEST
 RAY, UTAH 84123
 1) 266-3738

CUST # DATE TYPE INVOICE
 0977 10/29/98 577843

SOLD TO
 TRIPLE A LANDSCAPE
 117 CANDLEWOOD PLACE
 PROVO, UT 84604

SHIP TO
 TRIPLE A LANDSCAPE
 117 CANDLEWOOD PLACE
 PROVO UT 84604

02 -035	Req#	Terms	Shipvia	FOB	Page
01 S		COD	WILL CALL	Origin	1 of 1
					Slm Cl
					P01 21

QTY	R/O Part#	Description	CC-UM	Retail	Net	Unit Price
1	0 BB50	PERA BP BLOWER NLA/Obs	EA	442.95	245.00*	245.00
		91 94086				
1	0 MISC	PZZZ MISC PART	EA	0.00	31.50*	31.50
		NOTE: BATTERY				
1	0 177 000 444 0	PERA STARTER	EA	36.00	35.00*	35.00
		PZZZ MISC PART	EA	0.00	4.10*	4.10
		NOTE: THROTTLE CABLE				

SALES DRAFT
 PRO POWER EQUIPMENT CO.
 MURRAY, UT. 84123

7/2/98 60831411 11:27:11A

COL IT NUMBER EXP TOTAL
 98 1082028748 11/2 335.64

NA JRE X *[Signature]*

0 4081 TRAN TYPE PADC AUTH# 029009

USA

Sub-Total	345.64
Sales Tax (6.350%)	21.96
Total	367.60

Amount of \$21.96 per month
 based on net past due invoices.
 Payment of \$21.96 made after
 10 days of delivery and
 10 days after this invoice.



FRADAN MANUFACTURING

Manufacturers of Power Equipment

Phone (914) 632-3769 • Fax (914) 632-1652

SD# 499

SERVICE DEALER AGREEMENT

FRADAN Manufacturing Corp. 499 Fifth Avenue, New Rochelle, N.Y. 10801, is responsible for management of the Service Network for the brand name FRADAN and elsewhere in this agreement will be referred to as the company. Company therefore appoints:

Name PRO POWER EQUIP. Co.

Address 4290 CHINDEN BLVD.

City Address _____

State INDIANA County ADA State INDIANA Zip 83714

Phone 208-376-4449 Fax 208-376-4464

Service Dealer for the purpose of providing authorized service both in and out of warranty for the following gasoline powered equipment sold under the FRADAN brand name; FRADAN POWER EQUIPMENT regardless of the point of sale.

Terms of this agreement are effective 12-11-96 and may be terminated with or without cause at the option of the Service Dealer or the Company, by providing 90 days written notice. This agreement is nonassignable by the Service Dealer, but it may be assigned by the Company.

Service Dealer shall function as an independent contractor and its agents and employees shall, under no circumstances, be considered as representatives, or employees of the Company.

Service Dealer must remove Power Equipment from boxes in which they are shipped. They must properly assemble the piece of equipment, make all necessary adjustments, and explain to the customer proper operation of machinery.

Machinery is not to be sold in boxes.

Company will reimburse the Service Dealer at the Service Dealer's shop labor rate of 45.00 per hour subject to prior approval of the Company. Also, the Company will reimburse the Service Dealer at dealer's price for parts used by the Service Dealer in performing warranty repairs. Labor reimbursement will be made in accordance with the times shown on the Flat Rate Labor Schedules.

It is understood that the Service Dealer must maintain an adequate stock of parts to fulfill the terms of this agreement. As the Service Dealer must obtain such parts from a Company designated source, it is incumbent upon and understood that the Service Dealer must maintain an acceptable credit status with the source.

Service Dealer must be a registered authorized engine service dealer and agrees to perform in accordance to the warranty offer by the engine manufacturer. The Company is only responsible for engines under the FRADAN brand name.

By signing the terms of this agreement, the Service Dealer agrees to:

- Provide prompt and efficient repairs on the product covered under this agreement.
- Have thoroughly trained personnel
- Have an adequately equipped service facility including all recommended service parts at all times.
- Use only the manufacturer's service parts in warranty repairs and maintain an adequate inventory of service parts at all times.
- Maintain complete records of all warranty repairs and process warranty claims on a weekly basis.
- Insure that the product conforms to the warranty policy of the Company before performing repairs.

The undersigned Service Dealer hereby agrees to provide both in and out of warranty service in accordance with the above terms.

RIGGS & STRATTON WARRANTY # YES

OTHER _____ OTHER _____

OFFICE USE ONLY / DO NOT WRITE IN THIS BOX

DISTRIBUTOR

DATE

MANAGER, WARRANTY

DATE

SERVICE DEALER FIRM NAME

SERVICE DEALER REPRESENTATIVE

SIGNATURE

DATE

PLAINTIFF'S
EXHIBIT



FRADAN MANUFACTURING

Manufacturers of Power Equipment

Phone (914) 632-3769 • Fax (914) 632-1652

SD# 500

SERVICE DEALER AGREEMENT

Fradan Manufacturing Corp. 499 Fifth Avenue, New Rochelle, N.Y. 10801, is responsible for management of the Service Network for the brand name FRADAN and elsewhere in this agreement will be referred to as the company. The company therefore appoints:

Firm Name Pro Power
Street Address 4103 So. 500 W.
Mailin g Address SAME
City Salt Lake City County Salt Lake State Utah Zip 84123
Telephone 801-266-3738 Fax 801-266-3588

is a Service Dealer for the purpose of providing authorized service both in and out of warranty for the following gasoline powered equipment sold under the FRADAN brand name; FRADAN POWER EQUIPMENT regardless of the point of sale.

The terms of this agreement are effective _____ and may be terminated with or without cause at the option of the Service Dealer or the Company, by providing 90 days written notice. This agreement is nonassignable by the Service Dealer, but it may be assigned by the Company.

The Service Dealer shall function as an independent contractor and its agents and employees shall, under no circumstances, be considered general representatives, or employees of the Company.

The Service Dealer must remove Power Equipment from boxes in which they are shipped. They must properly assemble the piece of equipment, make all necessary adjustments, and explain to the customer proper operation of machinery. No machinery is not to be sold in boxes.

The company will reimburse the Service Dealer at the Service Dealer's shop labor rate of 45.00 per hour subject to prior approval of the Company. Also, the Company will reimburse the Service Dealer at dealer's price for parts used by the Service Dealer in performing warranty repairs. Labor reimbursement will be made in accordance with the times shown on the Flat Rate Labor Schedules.

It is understood that the Service Dealer must maintain an adequate stock of parts to fulfill the terms of this agreement. As the Service Dealer must obtain such parts from a Company designated source, it is incumbent upon and understood that the Service Dealer must maintain an acceptable credit status with the source.

The Service Dealer must be a registered authorized engine service dealer and agrees to perform in accordance to the warranty offer by the engine manufacturer. The Company is only responsible for engines under the FRADAN brand name.

Under the terms of this agreement, the Service Dealer agrees to:

- 1 Provide prompt and efficient repairs on the product covered under this agreement.
- 2 Have thoroughly trained personnel.
- 3 Have an adequately equipped service facility including all recommended service parts at all times.
- 4 Use only the manufacturer's service parts in warranty repairs and maintain an adequate inventory of service parts at all times.
- 5 Maintain complete records of all warranty repairs and process warranty claims on a weekly basis.
- 6 Insure that the product conforms to the warranty policy of the Company before performing repairs.

The designated Service Dealer hereby agrees to provide both in and out of warranty service in accordance with the above terms.

FRIGGS & STRATTON WARRANTY # _____

OTHER _____ OTHER _____

OFFICE USE ONLY / DO NOT WRITE IN THIS BOX	
DEBITOR	<u>Wilson Supply</u>
DATE	<u>12/11/96</u>
DEBITOR	<u>Scott</u>
DATE	<u>12/16/96</u>

SERVICE DEALER FIRM NAME	<u>Pro Power</u>
SERVICE DEALER REPRESENTATIVE	<u>Jeff Passey</u>
SIGNATURE	<u>Jeff Passey</u>
DATE	<u>12-11-96</u>



FRADAN MANUFACTURING

Manufacturers of Power Equipment

Phone (914) 632-3769 • Fax (914) 632-1652

SD# 520

SERVICE DEALER AGREEMENT

FRADAN Manufacturing Corp. 499 Fifth Avenue, New Rochelle, N Y 10801, is responsible for management of the Service Network for the brand name FRADAN and elsewhere in this agreement will be referred to as the company. The company therefore appoints

Name Pro-Power Eq. Co.
Address 4970 MONACO ST. UNIT F
City Address Same
City Commerce City County ADAMS State CO Zip 80022
Phone 303-227-0748 0749

Service Dealer for the purpose of providing authorized service both in and out of warranty for the following gasoline powered equipment sold under the FRADAN brand name, FRADAN POWER EQUIPMENT regardless of the point of sale

Terms of this agreement are effective 1-24-97 and may be terminated with or without cause at the option of the Service Dealer or the Company, by providing 90 days written notice. This agreement is nonassignable by the Service Dealer, but it may be assigned by the Company.

Service Dealer shall function as an independent contractor and its agents and employees shall, under no circumstances, be considered its representatives, or employees of the Company.

Service Dealer must remove Power Equipment from boxes in which they are shipped. They must properly assemble the piece of equipment, make all necessary adjustments, and explain to the customer proper operation of machinery. Machinery is not to be sold in boxes.

Company will reimburse the Service Dealer at the Service Dealer's shop labor rate of 45.00 per hour subject to prior approval of the Company. Also the Company will reimburse the Service Dealer at dealer's price for parts used by the Service Dealer in performing warranty repairs. Labor reimbursement will be made in accordance with the times shown on the Flat Rate Labor Schedules.

It is understood that the Service Dealer must maintain an adequate stock of parts to fulfill the terms of this agreement. As the Service Dealer must obtain such parts from a Company designated source, it is incumbent upon and understood that the Service Dealer must maintain an acceptable credit status with the source.

Service Dealer must be a registered authorized engine service dealer and agrees to perform in accordance to the warranty offer by the engine manufacturer. The Company is only responsible for engines under the FRADAN brand name.

By signing the terms of this agreement, the Service Dealer agrees to:

- 1 Provide prompt and efficient repairs on the product covered under this agreement
- 2 Have thoroughly trained personnel
- 3 Have an adequately equipped service facility including all recommended service parts at all times
- 4 Use only the manufacturer's service parts in warranty repairs and maintain an adequate inventory of service parts at all times.
- 5 Maintain complete records of all warranty repairs and process warranty claims on a weekly basis
- 6 Insure that the product conforms to the warranty policy of the Company before performing repairs

The undersigned Service Dealer hereby agrees to provide both in and out of warranty service in accordance with the above terms.

BRIGGS & STRATTON WARRANTY # _____

OTHER _____ OTHER _____

OFFICE USE ONLY / DO NOT WRITE IN THIS BOX

DISTRIBUTOR

DATE

MANAGER, WARRANTY

DATE

SERVICE DEALER FIRM NAME

SERVICE DEALER REPRESENTATIVE

SIGNATURE

DATE

FRADAN MANUFACTURING CORPORATION for approval



Utah Department of Commerce
Division of Corporations & Commercial Code
160 East 300 South, 2nd Floor, Box 146705
Salt Lake City, UT 84114-6705
Phone: (801) 530-4849
Toll Free: (877) 526-3994 Utah Residents
Fax: (801) 530-6438
Web site: <http://www.commerce.state.ut.us>

Registration Number: DB 200438
Business Name: PRO POWER EQUIPMENT
Registered Date: DECEMBER 13, 1996

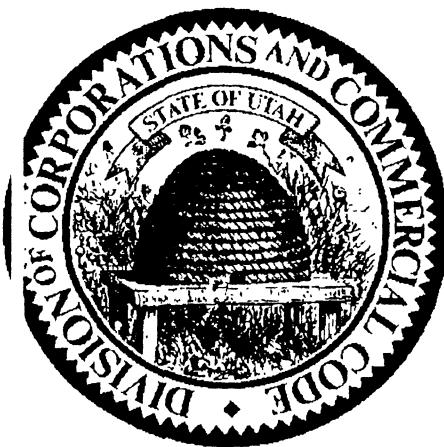
09/18/00

CERTIFIED COPY OF THE COMPUTER GENERATED TRANSCRIPT

THE UTAH DIVISION OF CORPORATIONS AND COMMERCIAL CODE ("DIVISION") HEREBY CERTIFIES THAT THE ATTACHED IS TRUE, CORRECT, AND COMPLETE COPY OF THE COMPUTER GENERATED TRANSCRIPT OF

PRO POWER EQUIPMENT

AS APPEARS OF RECORD IN THE OFFICE OF THE DIVISION.



Lorena Riffo-Jenson
Division Director of
Corporations and Commercial Code

Dept. of Professional Licensing
(801)530-6628

Real Estate
(801)530-6747

Public Utilities
(801)530-6651

Securities
(801)530-6600

Consumer Protection
(801)530-6601

**PLAINTIFF'S
EXHIBIT**

License 2000 - Adaptive Server Anywhere 6.0

Person/Facility License Activities Window Help



Licensee - PRO POWER EQUIPMENT

General Licenses Employees Public Info Corporation Supp. Info

License #	Type	Status	Probation?	Limited?
2348521-0150	DBA - General Partnership	Expired	<input type="checkbox"/>	<input type="checkbox"/>

Address

Applicant Number: 2348521

Detail

From Country:

Specialty

Supp. Info

Addition

Remarks

Start Micro Term License Group

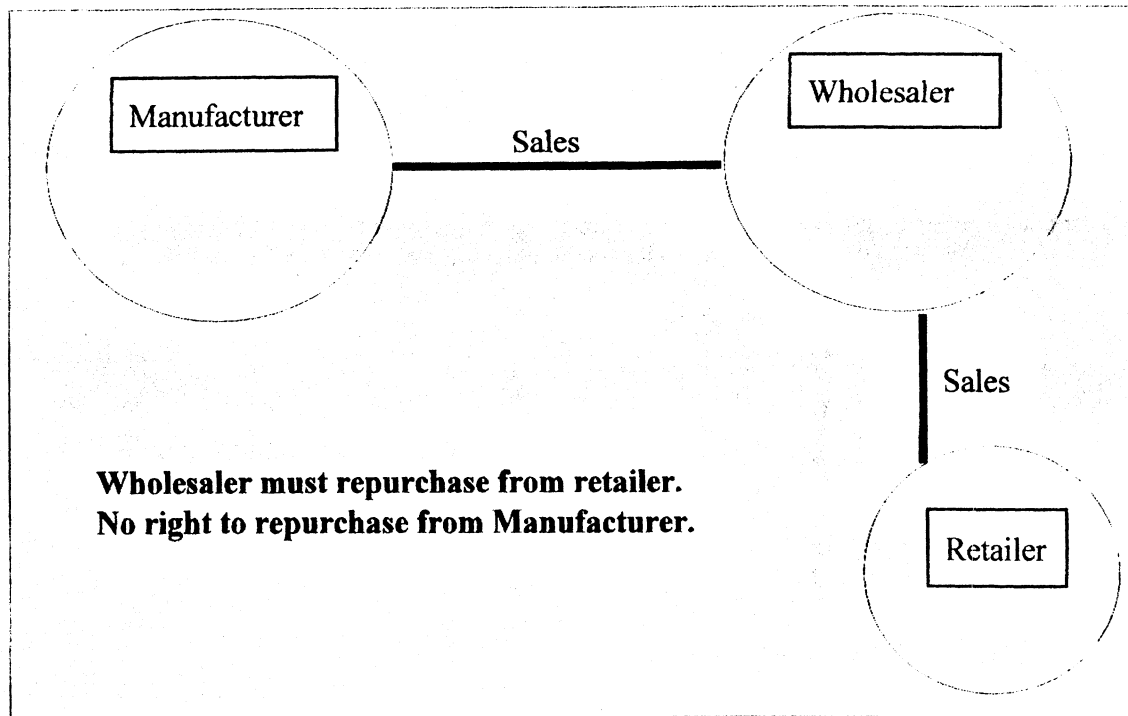
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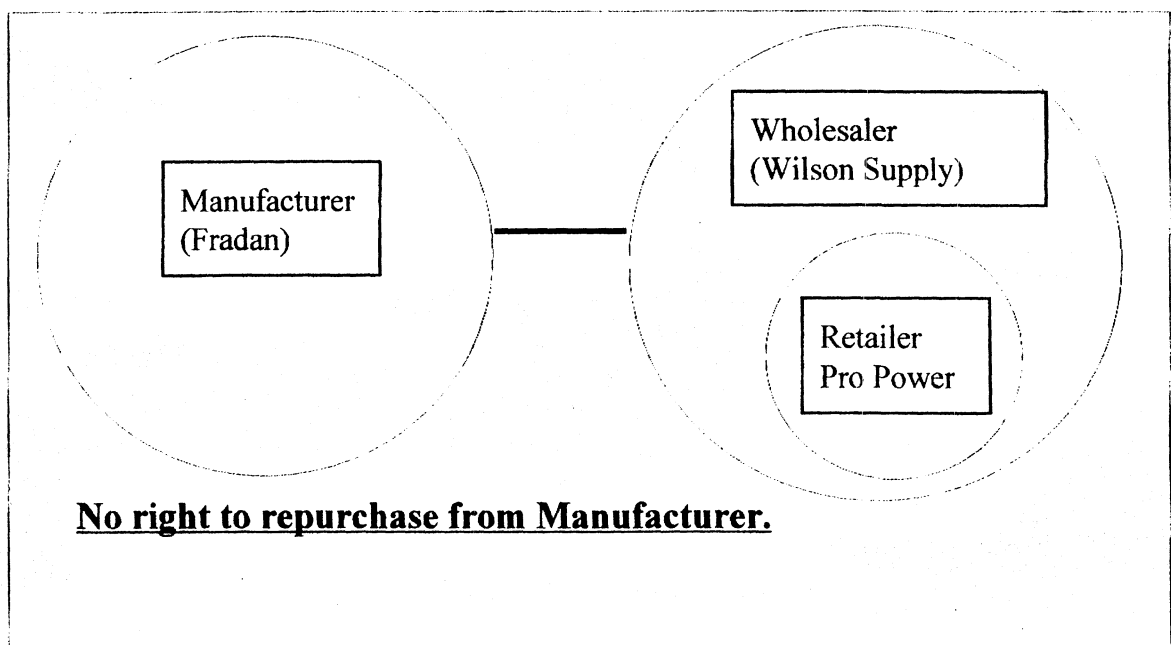
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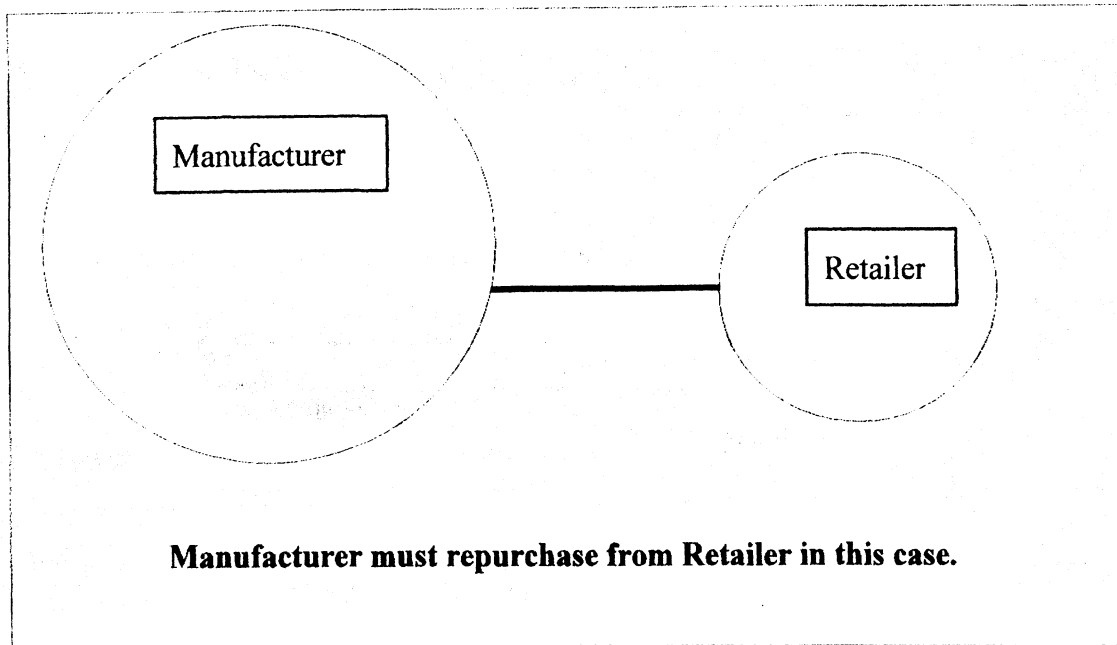
The graph below represents the dispute in Wilson v. Fradan.

Fig. 2



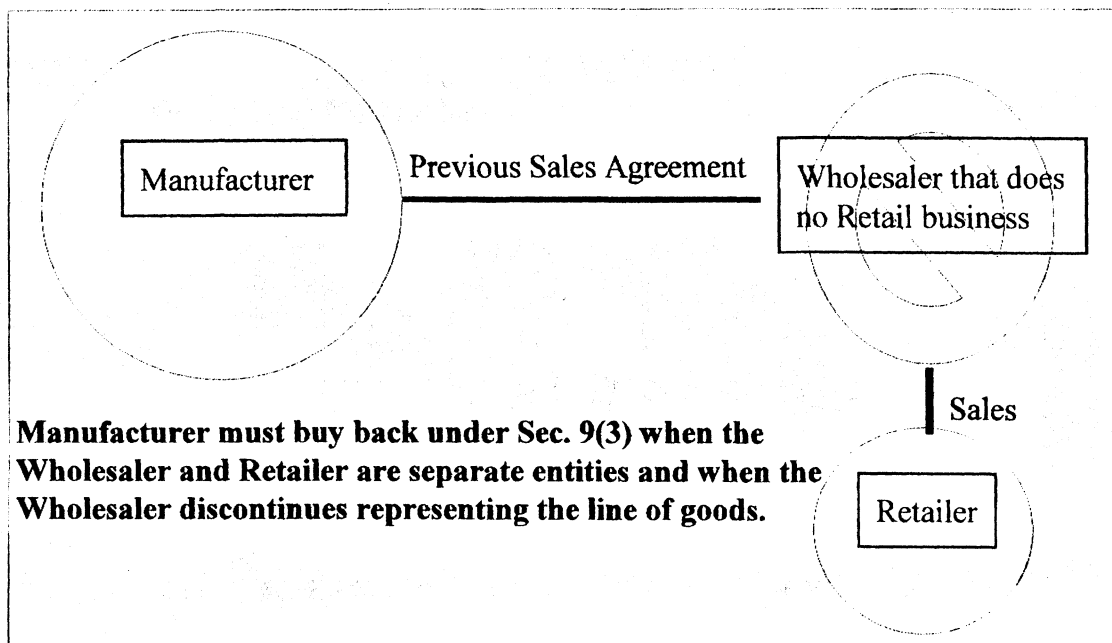
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Fig. 3



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Fig. 4



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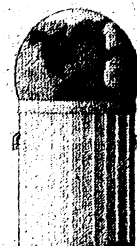
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APPENDIX E

RELEVANT TRANSCRIPT SECTIONS

Doc. 281

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 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 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 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. 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 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 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.