

1997

William Anthony Kraatz v. Heritage Imports, a Utah corporation dba Heritage Honda, O. Bryan Wilkinson, and Jeff J. Wilkinson : Brief of Appellee

Utah Court of Appeals

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Kent B. Linebaugh; Michael N. Zundel; Jennie B. Garner; Jardine Linebaugh Dunn; Attorney for Plaintiff/Appellant and Cross-Appellee.

Donald J. Winder; Jennifer L. Falk; Winder and Haslam, P.C.; Attorneys for Defendants/Appellees and Cross-Appellants.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff/Appellant)	ADDENDUM TO
and Cross-Appellee,	)	BRIEF OF APPELLEES/
	)	CROSS-APPELLANTS
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage)	
Honda, O. BRYAN WILKINSON,	)	Case No. 970044-CA
and JEFF J. WILKINSON,)	
	)	Priority No. 15
Defendants/Appellees)	
and Cross-Appellants.)	

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK

Kent B. Linebaugh, Esq.
Michael N. Zundel, Esq.
Jennie B. Garner, Esq.
JARDINE LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, UT 84111
Telephone: (801) 532-7700
Attorneys for Plaintiff/
Appellant and Cross-Appellee.

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 97044-CA

Donald J. Winder (#3519)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorneys for Defendants/
Appellees and Cross-
Appellants.

FILED

MAR 16 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff/Appellant)	ADDENDUM TO
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370 East South Temple #400
Salt Lake City, UT 84111
Telephone: (801) 532-7700
Attorneys for Plaintiff/
Appellant and Cross-Appellee.

Donald J. Winder (#3519)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorneys for Defendants/
Appellees and Cross-
Appellants.

ADDENDUM

- A. Exhibit #38
- B. Exhibit #589
- C. The Trial Court's Written Findings of Fact and Conclusions of Law re: Liability
- D. The Trial Court's Oral Findings of Fact
- E. Citations to the Record

- R. 1744
- R. 1782-83
- R. 1794
- R. 1808-11
- R. 1840
- R. 1843-47
- R. 1849
- R. 1851-52
- R. 1854-55
- R. 1857
- R. 1864-65
- R. 1869
- R. 1875-77
- R. 1932
- R. 1946
- R. 1948
- R. 1977-78
- R. 2004
- R. 2006-07
- R. 2010-12
- R. 2015-16
- R. 2018-19
- R. 2025
- R. 2028-41
- R. 2043-49
- R. 2052-53
- R. 2058-63
- R. 2070
- R. 2078-85
- R. 2095
- R. 2148
- R. 2222
- R. 2290
- R. 2313-14
- R. 2339
- R. 2358
- R. 2361-65
- R. 2380-82
- R. 2386-87
- R. 2394

R. 2408
R. 2410-11
R. 2464
R. 2467-70
R. 2639
R. 2768
R. 2970
R. 3002

F. Motion for Leave to Amend Answer to Assert Counterclaim;

Defendant's Memorandum in Support of Motion for Leave to Amend Answer to Assert Counterclaim;

Amended Motion for Leave to Amend Answer and to Assert Counterclaim;

Plaintiff's Memorandum in Opposition to Defendants' Motion for Leave to Amend Answer to Assert Counterclaim;

Defendants' Reply Memorandum in Support of Motion for Leave to Amend Answer and to Assert Counterclaim;

Minute Entry; and

Order Denying Defendants' Motion for Leave to Amend Answer and to Assert Counterclaim and Amended Motion for Leave to Amend Answer and to Assert Counterclaim.

Exhibit A

EMPLOYMENT AGREEMENT

THIS AGREEMENT is made and entered into as of the ____ day of May, 1990, by and between Heritage Imports, a Utah corporation doing business as Heritage Honda, hereinafter referred to as "Company," and William Anthony Kraatz, hereinafter referred to as "Employee."

R E C I T A L S :

WHEREAS, Company is a Honda automobile dealership selling new and used vehicles, providing service and parts sales;

WHEREAS, Company's business requires significant interpersonal contact between Company employees and customers, manufacturer's representatives, finance personnel;

WHEREAS, Employee has skills, personality traits and management skills, which are conducive to development and maintenance of such interpersonal relations, management of personnel, financing and sales and operating an automobile dealership; and

WHEREAS, Company desires to retain the services of Employee, and Employee desires to render services to Company on the terms and conditions set forth herein; and

WHEREAS, as an inducement to get Employee to become employed and be the general manager of Company, Company agrees to contract with Employee as hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

ARTICLE I EMPLOYMENT

1.1 EMPLOYMENT. Company hereby hires Employee and Employee hereby accepts employment with the Company.

P/f's EXHIBIT 38
FOR I.D. 4-5-94 - 12 PAGES
SUSAN WILCOX KINGSBURY, NP, CSR, RPR
WITNESS O.B. 6/1/94

054272

PLAINTIFF'S
EXHIBIT
38

1.2 SERVICES TO BE PERFORMED. Employee shall be employed as General Manager of Heritage Honda, a division of the Company and shall perform the following services: (hereinafter referred to as "Services")

(a) Employee shall be employed as General Manager of the Salt Lake Heritage Honda dealership (hereinafter referred to as "Dealership") and shall provide day-to-day management over the operations of the Dealership, including managing the new and used car sales departments, service department, parts department and financing and insurance departments. Employee shall have responsibility and authority over all aspects of the daily operations and shall be consulted on all items of long range planning relating to the Dealership.

(b) The duties and responsibilities of Employee shall include, but not be limited to, the responsibility to provide management training to persons selected by Company to enable said persons to become qualified dealers or managers acceptable to American Honda, Incorporated; provided, however, that said responsibility shall not limit Employee's authority, as General Manager, to make and carry out management decisions relating to the operation of the Dealership.

(c) Employee shall contribute his best professional skill to perform the Services at all times for the business and benefit of Company. Employee agrees to devote his full and exclusive time to perform the Services; provided, however, that Company acknowledges that, as of the date of this agreement, Employee has an interest in Anthony Wade, Inc., and that, while Employee will attempt to terminate that relationship as soon as possible, Employee will be entitled to fulfill his responsibilities relating thereto as long as those responsibilities do not materially interfere with Employee's duties under this agreement.

(d) Employee, in consideration of being offered this employment contract and in reliance upon the promises contained herein, shall relocate from St. George, Utah to the Salt Lake City, Utah area for the purpose of engaging in this employment contract.

ARTICLE II TERM OF CONTRACT

2.1 TERM. The term of Employee's employment pursuant to this Agreement shall commence on or before June 15, 1990, and shall continue thereafter on the terms and conditions provided herein for a term of five years and thereafter shall continue on a year to year basis, until terminated upon sixty (60) days advance written notice by either party. Employee's employment may not be terminated except for cause

as defined herein. For purposes of this paragraph, cause shall be deemed to include the following:

- A. Fraud;
- B. Dishonesty;
- C. Refusal by Employee to fulfill his employment responsibilities described in Article I of this Agreement; or
- D. Employee becomes disabled to the extent he is unable to perform his duties hereunder as specified in Article I of this Agreement and such disability continues for a period of time longer than six (6) consecutive months.

ARTICLE III COMPENSATION

3.1 COMPENSATION. Commencing upon the effective date of the term hereof and continuing as long as Employee's employment pursuant to this Agreement shall remain in force, Employee shall be compensated by Company for the Services rendered hereunder as set forth on the attached Schedule "A." Company's obligation to pay said compensation shall continue throughout the term of this Agreement unless the employment of Employee is terminated for cause.

3.2 ADDITIONAL COMPENSATION. Employee may receive additional compensation within the discretion of Company for other services rendered or other duties as assigned by the Company and agreed to by Employee.

3.3 INDUCEMENTS. As additional inducements to Employee to accept employment with Company, Company agrees to the terms and conditions set forth on Schedule "B" attached hereto.

3.4 RELOCATION. As an additional inducement to Employee to relocate to the Salt Lake City area, Company agrees to the terms and conditions set forth on Schedule "C" attached hereto.

ARTICLE IV
FRINGE BENEFITS

4.1 VACATION. Employee shall be entitled to such vacation period, study and/or leave time as approved from time to time by Company, but in no event less than three (3) weeks per year.

4.2 SICK LEAVE AND DISABILITY. Employee shall be entitled to such sick leave and other disability benefits as adopted by Company.

4.3 WORKING FACILITIES. Company shall furnish to Employee adequate working space and facilities to perform the services.

ARTICLE V
MISCELLANEOUS PROVISIONS

5.1 ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and supersedes any prior written or oral agreements concerning the subject matter contained herein.

5.2 AMENDMENT. This Agreement may be amended only by the written consent of the parties.

5.3 WAIVER. No waiver of any breach or default of this Agreement by either party hereto shall be considered to be a waiver of any other breach or default of this Agreement.

5.4 NOTICES. Any notices pertaining to this Agreement shall be in writing and shall be transmitted by personal hand delivery to an officer or director of Company or to Employee, or through the facilities of the United States post office, certified mail, return receipt requested. The addresses set forth below for the respective parties shall be the places where notices shall be sent, unless written notice of a change of address is given.

COMPANY:

Heritage Imports,
a Utah corporation
4646 South State Street
Murray, Utah 84107

EMPLOYEE:

William Anthony
Kraatz
481 Churchill Drive
St. George, Utah 84770

Notices given by mail shall be deemed to be delivered on the day such notice is deposited in the United States mail, postage prepaid.

5.5 RECORDS. All books, files, documents, and records, generated by Employee during his employment hereunder, are and shall remain the property of Company.

5.6 COST OF DEFAULT. In addition to any other rights contained herein, in the event either party defaults in the performance of any term or condition hereunder, the defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms hereof, including but not limited to, costs, reasonable attorney's fees, expert witness fees, and/or deposition costs whether incurred through legal action or otherwise and whether incurred before or after judgment.

5.7 GOVERNING LAW. This Agreement shall be governed by and construed under the law of the State of Utah.

5.8 UTAH JURISDICTION. The parties acknowledge that the Third Judicial District Court in and for the State of Utah shall have jurisdiction, but not exclusive jurisdiction, over the enforcement and interpretation of this Agreement.

5.9 VERBAL STATEMENTS DISAVOWED. The parties hereto acknowledge that they have not made any verbal representations which have not been included in this Agreement, or if such representations were made, they are hereby disavowed.

5.10 ASSIGNMENT. The rights and duties pursuant to this agreement are not assignable without the express written agreement of both parties.


5.11 COST OF AGREEMENT. Company shall be responsible for all legal costs and expenses incurred by Employee in preparation of this Employment Agreement, not to exceed One Thousand Dollars (\$1,000.00).

5.12 DUPLICATE ORIGINALS. The parties hereto acknowledge that this Agreement is being executed in duplicate originals and such duplicate originals, although one of such Agreements may be a photostatic copy, shall have the force and effect of an original document for all purposes including evidentiary rulings.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement
as of the day and year first above written.

COMPANY:

Heritage Imports,
dba Heritage Honda

By 
Its: President

EMPLOYEE:


William Anthony Kraatz

SCHEDULE "A" COMPENSATION

As compensation for the Services to be performed by Employee, Company shall provide to Employee:

- (a) A Base Salary of \$8,000.00 per month.
- (b) A yearly bonus equal to \$4,000.00 plus ten percent (10%) of the Dealership Net Profits in excess of \$280,000.00 determined in accordance with accounting practices acceptable to and used by Company in reporting to American Honda, Incorporated, or such other accounting method as is mutually acceptable to both Company and Employee.
- (c) Two demonstrator automobiles at all times. In connection with the automobiles: (a) Company will furnish insurance and maintenance, (b) gasoline will be furnished by Company, (c) the automobiles shall be available for Employee's use at all times, (d) all traffic violations are to be paid for by Employee, (e) model selection of automobiles will be approved by Employee, (f) automobiles will be replaced at discretion of Employee, and (g) automobiles shall be maintained in first-class salable condition at all times by Employee.
- (d) Use of a Salt Lake Sports Mall family membership during the term of this Agreement. Said membership shall be owned by Company, and Company shall pay the membership fees, monthly dues and monthly charges relating to business use of the membership by Employee. Employee shall be responsible for all charges relating to non-business use of the membership.
- (e) Use of an equity membership in Hidden Valley Country Club, commencing June 1, 1992, and continuing throughout the term of this Agreement. Said membership shall be owned by Company, and Company shall pay the membership fees, monthly dues and monthly charges relating to business use of the membership by Employee. Employee shall be responsible for all charges relating to non-business use of the membership.
- (f) Health, Accident, Hospital and Medical Care Insurance for Employee and his family. Company shall also pay non-covered health care costs reasonably and necessarily incurred by Employee or his family, not to exceed Five Thousand Dollars (\$5,000.00) per year.

SCHEDULE "B"

STOCK APPRECIATION RIGHTS

1. Company hereby grants to Employee an employee benefit, subject to the vesting schedule set forth in this paragraph, in the form of stock appreciation rights based upon any increase in the value of Company during the term of this Agreement. Those stock appreciation rights shall be subject to the following:

- (a) Employee is hereby granted an employee benefit equal to fifteen percent (15%) (subject to the vesting schedule contained in subparagraph (b) below) of any increase in the value of Company's stock (hereinafter referred to as "Stock Appreciation") during the term of this Agreement.
- (b) Employee's stock appreciation rights shall vest at 100% if more than 50% of the stock of Company, or more than 25% of the assets of Company are sold (other than in the ordinary course of business), or if Employee's employment is terminated by Company without cause as defined in this Agreement. If Employee terminates his employment, or if his employment is terminated for cause, his stock appreciation rights shall vest pursuant to the following formula:

<u>Time</u>	<u>Amount Vested</u>
Prior to June 1, 1991	20%
6-2-91 to 6-1-92	40%
6-2-92 to 6-1-93	60%
6-2-93 to 6-1-94	80%
after 6-1-94	100%

- (c) For purposes of this paragraph, Stock Appreciation shall be determined as follows:
 - (1) Company and Employee hereby agree that the fair market value of Company's stock, as of the date of this Agreement, is Two Million Five Hundred Thousand Dollars (\$2,500,000.00). Said value is hereinafter referred to as the "Initial Value".
 - (2) On the "Trigger Event" (as defined in paragraph 2 below), the fair market value of Company's stock shall be determined by mutual agreement of Company and Employee; provided, however, that if Company and Employee are unable so to agree, Employee shall select (and pay the fees and expenses

of) one qualified business appraiser, Company shall select (and pay the fees and expenses of) a second qualified business appraiser, and said two appraisers shall select a third qualified business appraiser (the fees and expenses of which shall be shared equally by Company and Employee), and the fair market value of Company's stock agreed to by two of said three appraisers shall control. For purposes of this provision, a "qualified business appraiser" shall be an individual or firm having experience and expertise in appraising businesses similar to the Dealership. The value so determined by mutual agreement or appraisal is hereinafter referred to as the "Terminal Value".

Stock Appreciation shall be the amount, if any, by which the Terminal Value exceeds the Initial Value.

2. Upon the occurrence of any of the following events (referred to herein as a "Trigger Event"), Company agrees to pay to Employee (or his estate) an amount equal to fifteen percent (15%) (or such lower percentage as may be determined in accordance with the vesting schedule in subparagraph 1(b) above) of the Stock Appreciation:

- (a) Expiration of the term of the Agreement, as provided in Section 2.1 of the Agreement;
- (b) Termination of this Agreement by reason of the disability of Employee as provided in Section 2.1 of this Agreement;
- (c) Death of Employee;
- (d) The sale of more than 50% of the stock of Company or the sale of more than 25% of the assets of Company (other than in the ordinary course of business); or
- (e) Termination without cause of the employment of Employee by Company.

After the payment to Employee pursuant to this paragraph 2, Employee's Stock Appreciation Rights shall terminate.

3. The Stock Appreciation Rights granted to Employee shall terminate and be null and void if the employment of Employee by Company is terminated for cause

(other than the disability of Employee). The Stock Appreciation Rights granted to Employee shall not be transferable by Employee.

ADDITIONAL DEALERSHIPS

4. If, during the term of this Agreement, Company determines that it is in the best interests of Company to purchase an additional Honda Automobile Dealership and that said purchase can be profitable to Company, Employee shall have the right and option, within two years after said purchase (if Employee is still employed by Company), to purchase up to fifty percent (50%) of the new dealership by paying to Company the fair market value of the interest purchased by Employee. If Employee chooses to exercise this purchase option, Employee shall have the right to declare a Trigger Event with respect to his Stock Appreciation Rights, and to cause the amount payable to him pursuant to paragraph 2 above to be contributed on his behalf to the capital of the new dealership in return for a distribution to him of fifty percent (50%) ownership interest in the new dealership notwithstanding the amount of capital contributed by others to the new dealership. If the other owners of the new dealership have been required to co-sign or guarantee any debt with respect to the acquisition or operation of the new dealership, or if the acquisition of the new dealership necessitates that debt be incurred by the owners, Employee's option may be exercised only if Employee executes an agreement to be liable for fifty percent (50%) of that debt. Upon the exercise of said option, Employee's Stock Appreciation Rights shall terminate.

SCHEDULE "C"

Company shall reimburse Employee for all reasonable expenses paid or incurred for the following:

- (1) Moving the personal effects and household goods of Employee and Employee's family to Employee's new residence, including automobile shipping charges, not to exceed the sum of Three Thousand Dollars (\$3,000.00).
- (2) Traveling by Employee and Employee's family from Employee's former residence to Employee's new residence, including costs of transportation, meals, and lodging in transit, not to exceed the sum of Five Hundred Dollars (\$500.00).
- (3) Traveling by Employee and Employee's family to and from the general location of the new principal place of work, including costs of transportation, meals, and lodging in transit, for the principal purpose of searching for and locating a new residence, not to exceed the sum of Five Hundred Dollars (\$500.00).
- (4) Reasonable expenses, not to exceed Five Hundred Dollars (\$500.00) reduced by amounts under subparagraph (3) immediately above, incident to:
 - (a) Sale or exchange of Employee's former residence, including expenses for work performed on it to assist in its sale, but excluding sales commissions.
 - (b) Purchase of Employee's new residence, including the cost of a loan but not including any payments or prepayments of interest, but excluding sales commissions.
- (5) Monthly lease payments of up to Nine Hundred Dollars (\$900.00) per month incurred by Employee for temporary housing while a new residence is being constructed for Employee; provided, that Company's obligation to reimburse Employee for those lease payments shall terminate at the earlier to occur of (a) the expiration of five (5) months from the date of this Agreement, or (b) the date on which the new residence is available for occupancy.
- (6) Commencing on the date on which the new residence being constructed for Employee is available for occupancy, and continuing thereafter for a period of not to exceed six (6) months, duplicate housing expenses incurred by Employee prior to the sale of

Employee's residence in St. George, Utah. During said period, Company shall reimburse Employee for the lesser of (a) Employee's house payment on the residence in St. George or (b) Employee's house payment on the new residence in the Salt Lake area. Employee shall be required to use all reasonable efforts to effect the sale of Employee's St. George residence. House payment is defined as the payment of monthly loan principal and interest and reserves for taxes and insurance for an Employee owned residence. Company's obligation to reimburse Employee for those duplicate housing expenses shall terminate at the earlier to occur of (a) the expiration of said six month period, or (b) the sale of Employee's residence in St. George.

Exhibit B

LAW OFFICES

JARDINE, LINEBAUGH, BROWN & DUNN
A PROFESSIONAL CORPORATION

370 EAST SOUTH TEMPLE, SUITE 400

SALT LAKE CITY, UTAH 84111-1290

TELEPHONE (801) 532-7700

TELECOPIER
(801) 355-7725

J. A. JARDINE
J. B. LINEBAUGH
JAMES R. BROWN
JAMES M. DUNN
RICHARD H. THORNTON
WILLIAM G. MARSDEN
MICHAEL N. ZUNDEL
JOHN N. BREMS
WM. SHANE TOPHAM
JOHN S. BRADLEY
HAROLD L. REISER
LAURIE S. HART
E. SCOTT LEE¹
DAVID E. SMOOT
JENNIE B. HUGGINS
JEFFERY J. DEVASHRAYEE²
J. SCOTT BROWN³
KENT W. HANSEN

ALSO ADMITTED IN:

¹IDAHO
²ARIZONA
³COLORADO

RECEIVED

JUL 05 1994

WINDER & HASLAM

July 1, 1994

Jennifer L. Falk
WINDER & HASLAM
175 West 200 South, #4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668

Re: *Kraatz v. Heritage Imports, et al.*

Dear Jennifer:

Enclosed please find copies of documents relating to the drafting of the Employment Agreement between Tony Kraatz and O. Bryan Wilkinson and/or Heritage Honda from Lee McCullough's file. As we discussed on the telephone, Mr. Kraatz is entitled to similar documents which we believe are in the possession of Bill Prater but were not produced in accordance with Mr. Kraatz's request for production of documents served January 21, 1993. Please check with Mr. Prater to determine whether he has produced all documents relating to the drafting of the Employment Agreement to Mr. Kraatz.

Also enclosed is Mr. Kraatz's privilege log in the above-entitled matter relating to the production of documents from Lee McCullough's file.

Finally, in response to your letter dated May 24, 1994, Mr. Kraatz believes that he has produced all of the documents in response to your document requests that he could locate but will look again for the documents listed in your letter. We have a copy of Mr. Kraatz's large daytimer for June 1, 1991, but no notes are found on those particular pages. Please advise as to whether this is the document that "did not copy well." Mr. Kraatz will attempt to locate the pages, if any, of his small daytimer for June 1, 1991.




July 1, 1994
Page 2

If you have any questions, please feel free to call.

Very truly yours,

JARDINE, LINEBAUGH, BROWN & DUNN
A Professional Corporation


Jeffery J. Devashrayee

JJD/L\ck\126
Enclosures

cc: Kent B Linebaugh
Michael W. Zundel

PRIVILEGE LOG OF DOCUMENTS PRODUCED
FROM FILE OF LEE MC CULLOUGH

Kraatz v. Heritage Imports, et al.

<u>Date</u>	<u>Document</u>	<u>Reason for Withholding</u>
5/7/90	Notes taken by Lee McCullough in preparation for drafting Employment Agreement for Tony Kraatz	Privilege
unknown	Draft of Employment Agreement containing notes of Lee McCullough	Privilege
5/30/90	Draft of Employment Agreement containing notes of Lee McCullough	Privilege

EMPLOYMENT AGREEMENT

THIS AGREEMENT is made and entered into as of the ____ day of _____, 1990, by and between Heritage Imports, a Utah corporation doing business as Heritage Honda, hereinafter referred to as "Company," O. Brian Wilkinson, hereinafter referred to as "Wilkinson," and William Anthony Kraatz, hereinafter referred to as "Employee."

R E C I T A L S :

WHEREAS, Company is a Honda automobile dealership selling new and used vehicles, providing service and parts sales;

WHEREAS, Company's business requires significant interpersonal contact between Company employees and customers, manufacturer's representatives, finance personnel;

WHEREAS, Employee has skills, personality traits and management skills, which are conducive to development and maintenance of such interpersonal relations, management of personnel, financing and sales and operating an automobile dealership; and

WHEREAS, Company desires to retain the services of Employee, and Employee desires to render services to the Company on the terms and conditions set forth herein; and

WHEREAS, as an inducement to get Employee to become employed and be the general manager of Company, Company agrees to contract with Employee as hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

ARTICLE I EMPLOYMENT

1.1 EMPLOYMENT. Company hereby hires Employee and Employee hereby accepts employment with the Company.

1.2 SERVICES TO BE PERFORMED. Employee shall be employed as General Manager of Heritage Honda, a division of the Company and shall perform the following services (hereinafter referred to as "Services")

(a) Employee shall be employed as General Manager of the Salt Lake Heritage Honda dealership (hereinafter referred to as Dealership) and shall provide day-to-day management over the operations of the Dealership, including managing the new and used car sales departments, service and parts departments. Employee shall have responsibility and authority over all aspects of the daily operations and shall be consulted on all items of long range planning relating to the Dealership.

(b) Employee shall contribute his best professional skill to perform the Services at all times for the business and benefit of Company. Employee agrees to devote such time and energy as may be necessary to perform the Services.

(c) Employee, in consideration of being offered this employment contract and in reliance upon the promises contained herein, shall relocate from St. George, Utah to the Salt Lake City, Utah area for the purpose of engaging in this employment contract.

ARTICLE II TERM OF CONTRACT

2.1 TERM. The term of Employee's employment pursuant to this Agreement shall commence as of the date of this Agreement and shall continue thereafter on the terms and conditions provided herein for a term of five years and thereafter shall continue on a year to year basis, until terminated upon sixty (60) days advance written notice by either party. Employee's employment may not be terminated except for cause as defined herein. For purposes of this paragraph, cause shall be deemed to include the following:

- A. Fraud;
- B. Dishonesty;
- C. Deliberate disregard for the safety and integrity of other persons or property;
- D. Accepting other employment that makes it impossible for Employee to render the Services in behalf of Company;

- E. Employee becomes disabled to the extent he is unable to perform his duties hereunder as specified in Article I of this Agreement and such disability continues for a period of time longer than twelve (12) months⁽ⁱ⁾

ARTICLE III COMPENSATION

3.1 COMPENSATION. Commencing upon execution hereof and continuing as long as Employee's employment pursuant to this Agreement shall remain in force, Employee shall be compensated by Company for the Services rendered hereunder as set forth on the attached Schedule "A."

3.2 ADDITIONAL COMPENSATION. Employee may receive additional compensation within the discretion of the Company for other services rendered or other duties as assigned by the Company and agreed to by Employee.

3.3 INDUCEMENTS. As additional inducements to Employee to accept employment with the Company, the Company and Wilkinson agree to the terms and conditions set forth on Schedule B¹¹ attached hereto.

3.4 RELOCATION. As an additional inducement to Employee to relocate to the Salt Lake City area, the Company agrees to the terms and conditions set forth on Schedule "C" attached hereto.

ARTICLE IV FRINGE BENEFITS

4.1 VACATION. Employee shall be entitled to such vacation period, study and/or leave time as approved from time to time by the Company, but in no event less than three (3) weeks per year.

4.2 SICK LEAVE AND DISABILITY. Employee shall be entitled to such sick leave and other disability benefits as adopted by the Company.

4.3 WORKING FACILITIES. Company shall furnish to Employee adequate working space and facilities to perform the services.

ARTICLE V
GUARANTY - PERFORMANCE OF CONTRACT

In consideration of Employee entering into this Agreement, Wilkinson guarantees faithful and complete performance of the within contract by the Company within the time set forth therein. Wilkinson also guarantees payment of all damages, costs and expenses for which the Company may become liable with respect to the contract. Wilkinson waives all right to notice of nonperformance of or demand on the Company.

ARTICLE VI
MISCELLANEOUS PROVISIONS

6.1 ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and supersedes any prior written or oral agreements concerning the subject matter contained herein.

6.2 AMENDMENT. This Agreement may be amended only by the written consent of the parties.

6.3 WAIVER. No waiver of any breach or default of this Agreement by either party hereto shall be considered to be a waiver of any other breach or default of this Agreement.

6.4 NOTICES. Any notices pertaining to this Agreement shall be in writing and shall be transmitted by personal hand delivery to an officer or director of Company or to Employee, or through the facilities of the United States post office, certified mail, return receipt requested. The addresses set forth below for the respective parties shall be the places where notices shall be sent, unless written notice of a change of address is given.

COMPANY:

Heritage Imports,
a Utah corporation

EMPLOYEE:

William Anthony
Kraatz

WILKINSON:

O. Brian
Wilkinson

Notices given by mail shall be deemed to be delivered on the day such notice is deposited in the United States mail, postage prepaid.

6.5 RECORDS. All books, files, documents, and records, generated by Employee during his employment hereunder, are and shall remain the property of the Company.

6.6 COST OF DEFAULT. In addition to any other rights contained herein, in the event either party defaults in the performance of any term or condition hereunder, the defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms hereof, including but not limited to, costs, reasonable attorney's fees, expert witness fees, and/or deposition costs whether incurred through legal action or otherwise and whether incurred before or after judgment.

6.7 GOVERNING LAW. This Agreement shall be governed by and construed under the law of the State of Utah.

6.8 UTAH JURISDICTION. The parties acknowledge that the Third Judicial District Court in and for the State of Utah shall have jurisdiction, but not exclusive jurisdiction, over the enforcement and interpretation of this Agreement.

6.9 VERBAL STATEMENTS DISAVOWED. The parties hereto acknowledge that they have not made any verbal representations which have not been included in this Agreement, or if such representations were made, they are hereby disavowed.

6.10 ASSIGNMENT. The rights and duties pursuant to this Agreement are not assignable without the express written agreement of all parties.

6.11 COST OF AGREEMENT. Company shall be responsible for all legal costs and expenses incurred in preparation of this Employment Agreement.

6.12 TRIPLICATE ORIGINALS. The parties hereto acknowledge that this Agreement is being executed in triplicate originals and such triplicate originals, although one of such Agreements

may be a photostatic copy, shall have the force and effect of an original document for all purposes including evidentiary rulings.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

COMPANY:

Heritage Imports
dba Heritage Honda

By _____
Its: President

WILKINSON:

O. Brian Wilkinson

EMPLOYEE:

William Anthony Kraatz

CDN4169V

SCHEDULE "A"
COMPENSATION

As compensation for the Services to be performed by Employee, the Company shall provide to Employee:

- (a) A Base of \$6,000.00 per month
- (b) A yearly bonus equal to the greater of (i) ten percent (10%) of the Dealership Net Profits determined in accordance with generally accepted accounting principals (GAAP), or (ii) \$28,000.00
- (c) Two demonstrator automobiles at all times. In connection with the automobile: (a) employer will furnish insurance and maintenance, (b) gasoline will be furnished by employer, (c) the automobiles shall be available for Employee's use at all times, (d) all traffic violations are to be paid for by Employee, (e) model selection of automobile will be approved by Employee, (f) automobiles will be replaced at discretion of Employee, and (g) automobiles shall be maintained in first-class salable condition at all times by Employee.
- (d) A family membership at the Salt Lake Sports Mall including membership fees, monthly dues and all month charges except clothing and equipment.
- (e) Commencing June 1, 1992, Company shall purchase for Employee and shall register in Employee's name a family membership at the Hidden Valley Golf Club. Company shall pay the membership fees. Company shall pay during the term of the contract all monthly dues.
- (f) Health, Accident, Hospital and Medical Care Insurance for Employee and his family. Company shall also pay all non-covered health care costs reasonably and necessarily incurred by Employee or his family. X

SCHEDULE "B"

1. The Company agrees to give and provide Employee with Stock of the Company which after the transfer to Employee shall equal a fifteen percent (15%) Stock ownership interest in the Company. Said Stock shall be given to Employee simultaneously with the execution of this Agreement. The Stock shall be subject to the following provisions:

- (a) If more than 50% of the Stock of the Company or more than 25% of the assets of the Company are sold, then the Company shall purchase from Employee, at Employee's option, all, part or none of Employee's stock at its Fair Market Value determined by the mutual agreement of the parties or, if they cannot agree, by the average of three competent appraisals with Employee and the Company each choosing one appraiser and the two appraisers choosing the third appraiser.
- (b) Upon termination of Employee's employment for any reason, whether by the Company or Employee, Company shall, at Employee's option, purchase Employee's Vested Stock at the Fair Market Value of the Stock determined by the mutual agreement of the parties or, if they cannot agree, by three competent appraisals with Employee and the Company each choosing one appraiser and the two appraisers choosing the third appraiser.
- (c) Employee's ownership of the Stock shall vest at 100% if more than 50% of the stock of the Company, or more than 25% of the assets of the Company are sold, or if Employee's employment is terminated by the Company without cause as defined in this Agreement. If Employee terminates his employment, or if his employment is terminated for cause, his ownership in the Stock shall vest pursuant to the following formula:

<u>Time</u>	<u>Amount Vested</u>
Prior to June 1, 1991	20%
6-2-91 to 6-1-92	40%
6-2-92 to 6-1-93	60%
6-2-93 to 6-1-94	80%
after 6-1-94	100%

- (d) Company shall pay the portion of Employee's State and Federal income tax obligation which is attributable to the grant of the Stock. The parties agree to evaluate the feasibility of making an election pursuant to I.R.C. § 83(b) to avoid adverse tax consequences and the execution such election if appropriate.

2. OPTION UPON TRANSFER

- (a) Notice of Transfer. If Wilkinson intends to transfer stock of the Company of which he is owner to any person other than Employee, he shall give 60 days written notice to Employee of his intention to transfer. The notice, in addition to stating the fact of the intention to transfer Shares, shall state (i) the number of Shares to be transferred, (ii) the name, business and residence address of the proposed transferee, (iii) whether or not the transfer is for a valuable consideration, and if so, the amount of the consideration and the other terms of the sale. X
- (b) Option to Purchase. Within 60 days of Employee's receipt of the notice, Employee may exercise an option to purchase all of the Shares proposed to be transferred for the price and upon the other terms hereinafter provided.
- (c) Option Upon Involuntary Transfer. If Wilkinson's Shares are transferred by operation of law to any person (such as but not limited to Wilkinson's trustee in bankruptcy, a purchaser at any creditor's or court sale or Wilkinson's guardian or conservator if he becomes incompetent or his Personal Representative in the event of Wilkinson's death), Employee, within 60 days of Employee's receipt of actual notice of the transfer may exercise an option to purchase all but not less than all of the Shares so transferred in the same manner and upon the same terms as provided in this paragraph 2, with respect to Shares proposed to be transferred.
- (d) Exercise of Option. Employee, if he exercises the option granted herein, shall do so by delivering written notice of his exercise of the option within the times provided to Wilkinson's Personal Representatives, if deceased, or to the proposed transferor, or to the transferee.

- (e) Failure to Exercise Options. If the purchase options are forfeited, then in the case of a proposed transfer under paragraph 2.1, the Shares may be transferred within ten days after the expiration of the 60-day option period to the transferee named in the notice required by paragraph 2.1, and upon the terms therein stated, free of the terms of this Agreement; and in the case of Shares owned by Wilkinson's estate, or a transfer of Shares under paragraph 2.3, the Shares, after the expiration of the 60-day option period, shall in the hands of the estate or transferee, be free of the terms of this Agreement. If in the case of a paragraph 2.1 transfer, the transfer is not upon the terms or is not to the transferee stated in the notice required by paragraph 2.1, or is not within the aforesaid ten-day period, or Wilkinson, after the transfer, reacquires all or any portion of the transferred Shares, the Shares transferred shall remain subject to this Agreement as if no transfer had been made.
- (f) Purchase Price. The purchase price shall be the Fair Market Value of the Shares determined by the mutual agreement of the parties or, if they cannot agree, the average of three competent appraisals with Wilkinson and Employee each choosing one appraiser and the two appraisers choosing the third appraiser.
- (g) Liens or Encumbrances. Wilkinson shall not encumber or use any of his Shares as security for any loan, except upon the written consent of Employee.
- (h) Payment of Purchase Price. The purchase price for Shares shall be paid in cash except that at the option of Employee, 90% of the purchase price may be deferred and 10% paid at the closing. The deferred portion of the price shall be evidenced by a promissory note of Employee made payable to the order of the selling party. The note shall be for term of 10 years at the Applicable Federal Rate as published by the Internal Revenue Service determined at the date of the making of the note. The note shall be secured by the Employee's pledge, to the payee of the note, of the Shares purchased.

- (i) Closing. Unless otherwise agreed by the parties, the closing of the sale and purchase of Shares shall take place at the general offices of the Company. In the case of a purchase of Shares if Wilkinson is deceased, the closing shall take place ten days after the appointment of a Personal Representative for Wilkinson. In the case of a purchase of Shares under paragraph 2.1 or 2.3, the closing of the sale and purchase shall take place ten days after the delivery to the selling shareholder of written notice by Employee. Upon the closing of the sale and purchase, the selling and purchasing parties shall execute and deliver to each other the various documents which shall be required to carry out their undertakings hereunder including the payment of cash, the execution and delivery of notes and assignment and delivery of stock certificates. Upon the closing the selling shareholder shall deliver to the Company his resignation and that of his nominees, if any, as officers and directors of the Company and any of its subsidiaries.

3. At any time, but no later than May 31, 1995, the Company shall purchase a Honda Automobile Dealership awarded by American Honda, Inc. in the state of Utah, Nevada, New Mexico, or Arizona (or such other place as agreed upon by the parties). Employee shall have, for a two (2) year period beginning on the date the new dealership is acquired by the Company, the right to exchange the stock he owns in the Company for at least a 51% interest in the new Honda dealership. If the Company defaults in this provision, Employee shall have, in addition to all other remedies, the right to require the Company sell to Employee sufficient stock of the Company so that after the purchase Employee owns a 51% interest in the Company. The purchase price shall be payable pursuant to the terms contained in Section 2(h) of this Schedule "B". The purchase price shall be the Fair Market Value of the Stock as determined by the mutual agreement of the parties or, if the parties fail to agree, the average of three competent appraisals with the Company and Employee each choosing one appraiser and the two appraisers choosing the third appraiser.

SCHEDULE "C"

Company shall reimburse Employee for all reasonable expenses paid or incurred for the following:

- (1) Moving the personal effects and household goods of Employee and Employee's family to Employee's new residence, including automobile shipping charges. X
- (2) Traveling by Employee and Employee's family from Employee's former residence to Employee's new residence, including costs of transportation, meals, and lodging in transit. X
- (3) Travelling by Employee and Employee's family to and from the general location of the new principal place of work, including costs of transportation, meals, and lodging in transit, for the principal purpose of searching for and locating a new residence, not to exceed the sum of _____ Dollars (\$_____).
- (4) Meals and lodging while occupying temporary quarters in the general location of the new principal place of work during any period of _____ (____) consecutive days, not to exceed _____ Dollars (\$_____) reduced by amounts reimbursed under subparagraph (3) immediately above.
- (5) Reasonable expenses, not to exceed _____ Dollars (\$_____) reduced by amounts under subparagraphs (3) and (4) immediately above, incident to:
 - (a) Sale or exchange of Employee's former residence, not including expenses for work performed on it to assist in its sale. X
 - (b) Purchase of Employee's new residence, including the cost of a loan but not including any payments or prepayments of interest.
 - (c) Settlement of an unexpired lease held by Employee on Employee's former residence.
 - (d) Acquisition of a lease on Employee's new residence, not including any payments or prepayments of rent.

- (6) Duplicate housing expenses incurred prior to the sale of Employee's residence in St. George, Utah. Company shall reimburse Employee for the lesser of the Employee's house payment on the residence in St. George or Employee's house payment on an acquired residence in the Salt Lake area until such time as the sale of the St. George home is closed. Employee shall be required to use all reasonable efforts to effect the sale of Employee's St. George residence. House payment is defined as the payment of monthly loan principal and interest and reserves for taxes and insurance for an Employee owned residence, or monthly lease payments for an Employee leased residence.

CDN4169V

SUITTER AXLAND ARMSTRONG & HANSON

A UTAH PROFESSIONAL LAW CORPORATION

SEVENTH FLOOR

CLARK LEAMING OFFICE CENTER

175 SOUTH WEST TEMPLE

SALT LAKE CITY, UTAH 84101-1480

TELEPHONE (801) 532-7300

WILLIAM L. PRATER

CABLE ADDRESS: SAXLAW

TELEX: 453157

TELECOMMER: (801) 532-7335

PARK CITY, UTAH
(801) 648-4000

TELECOPY COVER LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Lee S. McCullough, Esq.

LOCATION: FAX #: (801) 364-9127

FROM: William L. Prater, Esq.

LOCATION: SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

TOTAL NUMBER OF PAGES INCLUDING THIS COVER LETTER: 5

DATE: May 31, 1990

TIME: 11:00 a.m.

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE. IF YOU HAVE PROBLEMS, PLEASE CALL (801) 532-7300, EXT. 250 (Shawna).

NOTE: Enclosed are revised pages for the Agreement between Heritage and Kraatz, marked to show changes. Bry Wilkinson spoke with Tony this morning and subsequently advised me that no further changes were needed with respect to the use of after-tax dollars regarding the option. Pursuant to Bry's request, we are expressing signature copies of the Agreement to Tony this afternoon.

as defined herein. For purposes of this paragraph, cause shall be deemed to include the following:

- A. Fraud;
- B. Dishonesty;
- C. Refusal by Employee to fulfill his employment responsibilities described in Article I of this Agreement; or
- D. Employee becomes disabled to the extent he is unable to perform his duties hereunder as specified in Article I of this Agreement and such disability continues for a period of time longer than six (6) consecutive months.

ARTICLE III COMPENSATION

3.1 COMPENSATION. Commencing upon the effective date of the term hereof and continuing as long as Employee's employment pursuant to this Agreement shall remain in force, Employee shall be compensated by Company for the Services rendered hereunder as set forth on the attached Schedule "A." Company's obligation to pay said compensation shall continue throughout the term of this Agreement unless the employment of Employee is terminated for cause.

3.2 ADDITIONAL COMPENSATION. Employee may receive additional compensation within the discretion of Company for other services rendered or other duties as assigned by the Company and agreed to by Employee.

3.3 INDUCEMENTS. As additional inducements to Employee to accept employment with Company, Company agrees to the terms and conditions set forth on Schedule "B" attached hereto.

3.4 RELOCATION. As an additional inducement to Employee to relocate to the Salt Lake City area, Company agrees to the terms and conditions set forth on Schedule "C" attached hereto.

(other than the disability of Employee). The Stock Appreciation Rights granted to Employee shall not be transferable by Employee.

ADDITIONAL DEALERSHIPS

4. If, during the term of this Agreement, Company determines that it is in the best interests of Company to purchase an additional Honda Automobile Dealership and that said purchase can be profitable to Company, Employee shall have the right and option, within two years after said purchase (if Employee is still employed by Company), to purchase up to fifty percent (50%) of the new dealership by paying to Company the fair market value of the interest purchased by Employee. If Employee chooses to exercise this purchase option, Employee shall have the right to declare a Trigger Event with respect to his Stock Appreciation Rights, and to cause the amount payable to him pursuant to paragraph 2 above to be contributed on his behalf to the capital of the new dealership in return for a distribution to him of fifty percent (50%) ownership interest in the new dealership notwithstanding the amount of capital contributed by others to the new dealership. If the other owners of the new dealership have been required to co-sign or guarantee any debt with respect to the acquisition or operation of the new dealership, or if the acquisition of the new dealership necessitates that debt be incurred by the owners, Employee's option may be exercised only if Employee executes an agreement to be liable for fifty percent (50%) of that debt. Upon the exercise of said option, Employee's Stock Appreciation Rights shall terminate.

SCHEDULE "C"

Company shall reimburse Employee for all reasonable expenses paid or incurred for the following:

- (1) Moving the personal effects and household goods of Employee and Employee's family to Employee's new residence, including automobile shipping charges, not to exceed the sum of Three Thousand Dollars (\$3,000.00).
- (2) Traveling by Employee and Employee's family from Employee's former residence to Employee's new residence, including costs of transportation, meals, and lodging in transit, not to exceed the sum of Five Hundred Dollars (\$500.00).
- (3) Traveling by Employee and Employee's family to and from the general location of the new principal place of work, including costs of transportation, meals, and lodging in transit, for the principal purpose of searching for and locating a new residence, not to exceed the sum of Five Hundred Dollars (\$500.00).
- (4) Reasonable expenses, not to exceed Five Hundred Dollars (\$500.00) reduced by amounts under subparagraph (3) immediately above, incident to:
 - (a) Sale or exchange of Employee's former residence, including expenses for work performed on it to assist in its sale, but excluding sales commissions.
 - (b) Purchase of Employee's new residence, including the cost of a loan but not including any payments or prepayments of interest, but excluding sales commissions.
- (5) Monthly lease payments of up to Nine Hundred Dollars (\$900.00) per month incurred by Employee for temporary housing while a new residence is being constructed for Employee; provided, that Company's obligation to reimburse Employee for those lease payments shall terminate at the earlier to occur of (a) the expiration of five (5) months from the date of this Agreement, or (b) the date on which the new residence is available for occupancy.
- (6) Commencing on the date on which the new residence being constructed for Employee is available for occupancy, and continuing thereafter for a period of not to exceed six (6) months, duplicate housing expenses incurred by Employee prior to the sale of

Employee's residence in St. George, Utah. During said period, Company shall reimburse Employee for the lesser of (a) Employee's house payment on the residence in St. George or (b) Employee's house payment on the new residence in the Salt Lake area. Employee shall be required to use all reasonable efforts to effect the sale of Employee's St. George residence. House payment is defined as the payment of monthly loan principal and interest and reserves for taxes and insurance for an Employee owned residence. Company's obligation to reimburse Employee for those duplicate housing expenses shall terminate at the earlier to occur of (a) the expiration of said six month period, or (b) the sale of Employee's residence in St. George.

Exhibit C

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The trial in this matter commenced without a jury on Tuesday, August 27, 1996, at the hour of 10:00 a.m. Michael N. Zundel, Esq. and Jeffrey J. Devashrayee, Esq. appeared for the Plaintiff, and Plaintiff Anthony Kraatz ("Kraatz") was personally present for the trial. Donald J. Winder, Esq. and Jennifer L. Falk, Esq. appeared for the defendant Heritage Imports, Inc. dba Heritage Honda, dba Larry H. Miller Honda (the "Dealership") and individual defendants O. Bryan Wilkinson ("B. Wilkinson") and Jeff J. Wilkinson ("J. Wilkinson") were personally present. (The Dealership and the individual defendants are sometimes collectively referred to as "Heritage".) The Court, having heard the arguments of counsel, the testimony of the witnesses, having received and reviewed the exhibits admitted into evidence, and being otherwise fully advised in the premises, and for good cause appearing, now makes and enters its Findings of Fact.

WRITTEN FINDINGS OF FACT

A. History of the Case

1. Heritage Honda is a family owned corporation whose main asset was an automobile dealership located in Murray, Utah. At all relevant times, B. Wilkinson was the majority shareholder of the Corporation (Dealership) until April of 1993, when he sold his stock to Larry H. Miller. (Joint Pretrial Order, ¶ III.C., p. 8.)

2. J. Wilkinson is the second son of B. Wilkinson and, at all relevant times, was an officer, director and minority shareholder of the Dealership. (Id., ¶ III.F.)

3. Lynlee Wilkinson, Wendy Gorringer and Matt Wilkinson are also B. Wilkinson's children, and at all relevant times were officers, directors and minority shareholders in the Dealership.

4. On or about January 15, 1993, Plaintiff filed his Complaint, alleging damages against Defendants in the amount of \$3,507,980.00, together with interest, and punitive damages against J. Wilkinson and B. Wilkinson.

5. The Complaint alleges seven Causes of Action against Heritage:

a. Breach of employment agreement against the Dealership (First Cause of Action, ¶¶ 20-22);

b. Breach of implied covenant of good faith and fair dealing against the Dealership (Second Cause of Action, ¶¶ 23-26);

c. Alter ego liability of B. Wilkinson (Third Cause of Action, ¶¶ 27-31);

d. Tortious interference with contractual and prospective economic relations by B. Wilkinson (Fourth and Fifth Causes of Action, ¶¶ 32-49); and

e. Tortious interference for contractual and prospective relations by J. Wilkinson (Sixth and Seventh Causes of Action, ¶¶ 50-66).

6. Attached as Exhibit "A" to the Complaint is a copy of the written Employment Agreement ("Agreement") entered into

between the Dealership and Plaintiff on May 31, 1990, which was introduced as Exhibit 38.

7. On or about March 22, 1993, Defendants filed their Answer denying all of Plaintiff's allegations.

8. During discovery, Plaintiff took 27 volumes of depositions and innumerable documents were produced by the Dealership and third parties to Plaintiff.

B. Contract Negotiations

1. In spring of 1990, B. Wilkinson inquired of Plaintiff whether he would be interested in becoming the Dealership's general manager. Plaintiff expressed interest because he was dissatisfied with his then present employment. (R. 1865; 2010-11.)

2. B. Wilkinson told Plaintiff he wanted to remove himself from day-to-day involvement in the Dealership due to various personal problems of which Plaintiff was aware. (R. 2010-12.)

3. B. Wilkinson also told Plaintiff the Dealership was not presently doing as well as he would like. B. Wilkinson and Plaintiff had been good friends and, over the years, had many discussions about how the Dealership was performing. (R. 2010-12.)

4. Plaintiff was allowed access to all financial records of the Dealership. (R. 2015-16.)

Specifically, Plaintiff recalls receiving some financial statements for 1988, all for 1989, and the April financial statements for 1990. (R. 1855.)

5. Plaintiff admitted he told B. Wilkinson that the Dealership should make \$1 million a year with Plaintiff as the general manager. (R. 1852.)

6. Plaintiff told B. Wilkinson the gross margin per car the Dealership was then receiving was low, and Plaintiff claimed he could raise it if he were general manager. (R. 1854.)

7. Plaintiff testified he was made aware of B. Wilkinson's spending habits before he ever signed the Agreement during a dinner meeting with B. Wilkinson's children, Matt Wilkinson, Wendy Gorringer, and her husband, Jeff Gorringer. (R. 1864.)

8. According to Plaintiff's opinion witness, Mark D. Schmitz, a Honda franchise "is a license to steal". (R. 2339.)

9. Plaintiff's counsel prepared the initial draft of an employment agreement. (Kraatz Tr., p. 10; Ex. 589 ("Draft Agreement").) (R. 1849.)

10. All of Plaintiff's duties set forth in Section 1.2, from the Draft Agreement, were incorporated into the Agreement. (Ex. 38) A new subparagraph c. was added to paragraph 2.1 of the Draft Agreement, providing that Plaintiff's employment could be terminated for "Refusal by Employee to fulfill his

employment responsibilities described in Article I of this Agreement." (Ex. 38, 589.)

11. B. Wilkinson denies ever saying Plaintiff had a "no-cut" contract. (R. 2006.)

12. Pat Nichols, an employee, was present at the employee meeting at which Plaintiff was introduced as general manager. Nichols does not recall B. Wilkinson making any reference to a "no-cut" contract at that time or any other time. (R. 2408.)

C. Employment Agreement

1. Plaintiff's employment with the Dealership commenced on June 1, 1990, and continued until September 11, 1992. He received pay through November 11, 1992. (Joint Pretrial Order, ¶ III.E., p. 8.)

2. In the Recitals to the Agreement, Plaintiff represented he had the:

skills, personality traits and management skills, which are conducive to development and maintenance of such interpersonal relations, management of personnel, financing and sales and operating of an automobile dealership
. . . .

(Ex. 38 at p. 1.)

3. The Agreement required Plaintiff, as the Dealership's general manager, to:

provide day-to-day management over the operations of the Dealership, including managing the new and used car sales department, service department, parts department, and financing and insurance department. Employee

shall have responsibility and authority over all aspects of the daily operations

(Id. at ¶ 1.2(a).)

4. The Agreement also required Plaintiff to provide management training to persons selected by Company to enable said persons to become qualified dealers or managers acceptable to American Honda, Incorporated

(Id., ¶ 1.2(b).)

5. Plaintiff testified he knew it was his duty under the Employment Agreement to train J. Wilkinson. (R. 1782-83, 1794.)

6. The Agreement required Plaintiff to contribute "his best professional skill to perform the Services at all times for the business and benefit of the Company" and to "devote his full and exclusive time to perform the Services" required of him as general manager. (Id., ¶ 1.2(c).)

D. Duties of General Manager

1. Plaintiff admitted his duties as general manager included responsibility for producing income for the Dealership. (R. 1851.)

2. Plaintiff admitted his duties included the care and keeping of the Dealership assets. (R. 1851.)

3. Plaintiff admitted, as general manager, he had the ability to hire and fire employees. (R. 1851.)

4. Plaintiff admitted, as general manager, he was responsible for financial forecasting and budgeting for the Dealership. (R. 1851-52.)

5. Larry H. Miller testified that one of a general manager's responsibilities is to manage cash flow; that "the general manager has a lot of control over cash management within the store that makes it so he can maximize the float." (R. 2222, 2078, 2085.)

6. Dan Hartmann is First Vice President of Comerica Bank, and is the manager of the Denver office. At all relevant times, Dan Hartmann was the officer in charge of flooring for Heritage. (R. 2044-45.)

7. Hartmann testified he first met Plaintiff was in 1990 at the Dealership. At that time, Plaintiff represented to Hartmann he was the new general manager, had complete control of the affairs of the Dealership, and even had the power to fire B. Wilkinson's children, who were working at the Dealership. (R. 2059.)

8. On that same day, Hartmann met with B. Wilkinson. Mr. Wilkinson also told Hartmann that "[Plaintiff] was his man and that he had given [Plaintiff] complete control and responsibility for running the Dealership", and that he felt very good about Plaintiff's abilities to turn the Dealership, the operations, around." (R. 2059.)

9. Hartmann testified his contact with the Dealership after Plaintiff was hired and before January 11, 1991 was exclusively with Plaintiff. Hartmann had

virtually no contact with B. Wilkinson from the time Plaintiff was hired until after January 11, 1991. (R. 2052-53, 2059.)

10. Plaintiff's expert, Mark Schmitz, testified that a general manager makes advertising decisions. B. Wilkinson testified that late in 1991, he assisted with advertising at the request of Plaintiff. (R. 2314, 2261, 1932.)

11. Plaintiff regularly met with Helen Green and, at times, B. Wilkinson concerning the financial condition of the Dealership. Plaintiff had numerous discussions with B. Wilkinson concerning the lack of profit and other problems the Dealership was experiencing. (R. 1857, 2028.)

12. Saturday is the highest volume of business day in the car business, and the best sales time of each day is from 4:00 p.m. until closing. (R. 2006.)

13. Even though B. Wilkinson had the ultimate risk of liability as Dealership owner, Plaintiff, as general manager, had the control over all aspects of the operation and functioning of the Dealership.

E. Breach of Contract

1. The Dealership was not profitable during the 27 months Plaintiff was general manager. (Exs. 208 & 333.) In 1990, it lost \$295,515; in 1991, it realized a profit of only \$5,169, and in 1992, it lost \$124,980. (Exs. 208, 333, 295-297.)

2. Mr. Miller testified that his Toyota dealership, of a similar size, similar location, and an equally popular

import, was less capitalized than Heritage, yet made a profit for the years 1990, 1991 and 1992. (R. 2078, 2080.)

3. Mr. Miller further testified resources were available to Plaintiff had he maximized his day-to-day cash flow opportunities, that "Heritage had enough cash to be successful where it was." (R. 2081, 2082, 2095.)

4. Mr. Miller testified that in 1992, the cash in the Dealership "was not being managed as effectively as it could have." (R. 2081-82.)

5. The only attempt during his entire twenty-seven month tenure that Plaintiff made to train either J. Wilkinson or Jeff Gorringer was to place J. Wilkinson in financing and insurance ("F&I"). At no time did Plaintiff ever attempt to place J. Wilkinson in the Parts Department, Service Department, or in Accounting. At no time did Plaintiff give instruction to J. Wilkinson on the hiring and firing of personnel, on management of assets, on employee interviews, or other aspects of general management. (R. 2380-81.)

6. J. Wilkinson testified he received no training while in F&I. (R. 2358.)

7. In December of 1990, Heritage had in place with Comerica Bank a \$3 million loan for flooring of new cars, a capitalization loan, and a mortgage loan to Good Works Partnership. All the loans were cross-collateralized and cross-defaulted, with the Dealership providing a second guarantee to Good Works Partnership for a mortgage loan. (R. 2052-53.)

8. In spite of the cross-collateralization and default provisions, Plaintiff elected to change the flooring from Comerica to Key Bank in December of 1990. (Ex. 501.) (R. 2053.)

9. In December of 1990, Hartmann, of Comerica Bank, received a letter from Plaintiff dated December 19, 1990, notifying Comerica of Plaintiff's decision to move Heritage's new car flooring to Key Bank. (Ex. 501.) (R. 2046.)

10. Hartmann tried calling B. Wilkinson for several days after he received the letter. On January 11, 1991, Hartmann sent a letter to B. Wilkinson at the Dealership notifying the Dealership that Comerica's loan was predicated on the Dealership maintaining the floor plan financing with Comerica. (Ex. 504.) (R. 2046-48.)

11. The letter also notified the Dealership that Comerica was not prepared to subordinate its first security interest on new and used vehicles and proceeds to Key Bank. (Ex. 504.) (R. 2048-49.)

12. The Dealership became in default with Comerica when Key Bank attempted to file on the assets of Heritage that secured the Comerica loan. (Ex. 275.) (R. 2048.)

13. Plaintiff's moving of the flooring caused the Dealership to enter into a Loan Modification and Extension Agreement ("Modification"). Under the terms of this Modification, Heritage was required to pay penalties in the approximate amount of \$114,000 for moving the flooring, including

an additional one percent raise in the interest rate on Good Works Partnership mortgage, attorneys' fees incurred by Comerica from the moving of the flooring and the default, and extension fees. (Ex. 275.) (R. 2040, 2064.)

14. In or about early September 1992, Plaintiff was approached by J. Wilkinson and handed a schedule for the weeks of September 6 through October 17, 1992. Both J. and B. Wilkinson testified that J. Wilkinson prepared the schedule at the direction of B. Wilkinson. Jeff Gorringer, J. Wilkinson and Plaintiff were scheduled to work every Saturday and some evenings. Plaintiff's day off each week was Wednesday. (Exs. 1 & 2; R. 2036, 2768.)

15. Plaintiff refused to work the schedule B. Wilkinson had ordered J. Wilkinson to prepare, despite the fact that the busiest day of the week in car sales is Saturday, and the busiest sales time of a day is after 4:00 p.m. (R. 2006, 2364-65.)

16. The testimony of B. Wilkinson and J. Wilkinson is uncontroverted that Plaintiff failed to train J. Wilkinson to become a qualified dealer or manager acceptable to American Honda. (R. 1877, 2033-34; 2380-81.)

17. Plaintiff failed to enhance company morale. Pat Nichols, who was a service writer and assistant Service Manager during Plaintiff's tenure, testified that before Plaintiff was hired as general manager, his employee morale was good. He further testified during the time Plaintiff was general manager, his employee morale went down, even though Nichols was in a

higher position and earned a higher salary than before Plaintiff became general manager. (R. 2010-11.)

18. On September 11, 1992, in a meeting between Plaintiff, Helen Green and B. Wilkinson, Mr. Wilkinson asked Plaintiff for his resignation. Plaintiff agreed, saying he could get another job. (R. 1875-76, 3002.)

19. In a letter dated September 11, 1992 (Exhibit "C" to Plaintiff's Complaint), Plaintiff was notified of the termination of the Employment Agreement. (Ex. 64.)

20. Plaintiff testified he was told in a meeting with B. Wilkinson on Tuesday, September 15, 1992, that the reference to "b." and "c." in the September 11th letter referred to paragraphs "b." and "c." on p. 2, Section 1.2, of the Employment Agreement.

21. B. Wilkinson testified he fired Plaintiff for the following reasons:

- a. failure to make a profit;
- b. penalties incurred by the Dealership when Plaintiff moved the flooring from Comerica to Key Bank;
- c. inability to maintain employee morale;
- d. refusal to work Saturdays when scheduled by B. Wilkinson;
- e. failure to accurately inform B. Wilkinson of the dealings and status of the Dealership;
- f. failure to spend sufficient time to maintain and develop the Dealership;

- g. poor judgment;
- h. refusal and failure to train J. Wilkinson and Jeff Gorringer;
- i. overage inventory on used units that should have either been wholesaled or returned to the owner in exchange for the actual cash value of the deal;
- j. cars delivered to wholesalers without the collection of titles or without the collection of monies (R. 1948.); and
- k. customers' complaints that they could not get customer satisfaction through customer relations, and that the general manager would not talk to them. (R. 2033-41; R. 1877.)

22. Larry H. Miller testified the Dealership had sufficient working capital, and should have made a profit during 1992. Plaintiff did not make a profit. (R. 2080, 2081-82.)

23. Before and during Plaintiff's tenure, the Dealership always paid its bills on time, payroll was met promptly, floor checks were never out of trust, and no suits were filed by creditors. (R. 2031-32.)

24. At all relevant times, Plaintiff was aware of the financial condition of the Dealership. (R. 2028-30.)

25. Plaintiff failed to perform his duties and responsibilities as provided under the Agreement.

F. Employee Handbook

1. Plaintiff never saw an Employee Handbook ("Handbook") (Ex. 135) before he signed the Agreement on May 31, 1990.

(R. 1843-44.)

2. Plaintiff admits there is no reference in the Agreement (Ex. 38) to the Handbook. (R. 1844.)

3. Paragraphs 5.1 and 5.2 of the Agreement provide:

5.1 ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and supersedes any prior written or oral agreements concerning the subject matter contained herein.

5.2 AMENDMENT. This Agreement may be amended only by the written consent of the parties.

4. Paragraph 5.9 of the Agreement states:

5.9 VERBAL STATEMENTS DISAVOWED. The parties hereto acknowledge that they have not made any verbal representations which have not been included in this Agreement, or if such representations were made, they are hereby disavowed.

5. The second paragraph of Section 100 of the Handbook entitled "Forward" declares:

The contents of this Handbook are presented as a matter of information only. While the Dealership believes wholeheartedly in the guidelines described here, they are not conditions of employment, nor may anything in this handbook be construed as a contract of employment or as guaranteeing employment. In particular, nothing in this handbook limits the Dealership's right to terminate the employment of any person at any time, with or without cause.

No manager or representative of the Dealership has any authority to enter into any agreement for employment for any

specified period of time, or to make any agreement contrary to the foregoing, except through an agreement in writing signed by the president or vice-president of the Dealership.

(Ex. 135.)

6. Plaintiff could not produce a signed copy of the Acknowledgement of Receipt of Handbook (Section 100 of Exhibit 135 following the Forward). (R. 1844.)

7. The Handbook is the only source of Plaintiff's claims for Christmas Bonuses and Retirement Benefits. (R. 1865.)

8. Section 505 on the Christmas Bonus Program provides, in relevant part:

If you separate from the Dealership's employment prior to the distribution and payment of the bonuses, you will be refunded your contributions but will not receive any Dealership matching contributions.

9. The Handbook also provides as follows:

a. Section 303 on Wages and Compensation Policy states:

Increases in wages, salaries, commissions, and benefits will be affected by such factors as the general business climate, dealership profitability, market and competitive circumstances, and your performance, productivity and ability.

b. "The Dealership may carry out any disciplinary action, depending upon its judgment of the circumstances involved." Section 310.

c. One of the classifications of disciplinary action is discharge. Id.

d. Grounds for disciplinary actions include "Inefficiency", "Inability or unwillingness to work harmoniously with other employees", "Unauthorized use of Dealership vehicles", "Falsifying Dealership records", "Insubordination", "Causing customer complaints", and "Failure to follow specified job instructions". Id. at ¶¶ 3, 7, 9, 11, 17, 20 & 24, respectively.

e. The Corporation Mission Policy statement declares, in Section 401:

Our mission is to continually improve our ability to meet our customer's needs, allowing us to prosper as a business and provide a reasonable rate of return through the extension of our sales and services

* * *

PROFITS - Profits are the ultimate measure of how efficiently we provide customers with the best products and services for their needs. Profits are required in order for us to continue our commitment to you, our valued customers.

f. The Loyalty Policy Statement declares, in relevant part:

The Dealership must insist that this harmonious spirit be continuously maintained Honesty is demanded at all times.

If you can not (sic) support the Dealership policies and programs or be a booster of the company, it would be expected that you resign immediately.

Slandorous remarks, insubordination, and the like harm everyone and are cause for discharge.

g. "The Dealership does not offer any form of severance pay." Section 522.

h. "You should avoid outside activities which substantially interfere with you work performance or compromise your objective decision making abilities. If this occurs, you will be asked to make a decision regarding the priority of employment versus other activities." Section 612.

i. "Improper use of the Dealership's Dealer Plates can result in fines or dismissal! Dealer Plates are to be used only on Company Owned Vehicles. Any other use is illegal, and therefore prohibited by company policy." Section 622.

10. In the summer of 1992, Plaintiff attended a "20 Group" meeting which concerned corporate policy manuals. Plaintiff was told that such manuals could be subject to various interpretations by the courts. (R. 1844-45.)

11. After this meeting, Plaintiff instructed a Dealership employee, Beverly, to send a memo to all employees asking them to turn in their Employee Handbooks. (Ex. 23 & Kraatz Tr., pp. 7-8.) (R. 1846-47.)

12. Plaintiff turned in his Handbook. (R. 1847.)

13. There is no evidence Plaintiff ever used a progressive discipline procedure with employees.

G. Heritage Did Not Breach Any Implied Covenant of Good Faith and Fair Dealing

1. There is no evidence of any breach by Defendant of an implied covenant of good faith and fair dealing.

H. There is Insufficient Evidence to Hold J. Wilkinson Liable for Tortious Interference

1. At all relevant times, J. Wilkinson was an officer, director and minority shareholder in the Dealership.

2. At the time J. Wilkinson was requested by his father to make a work schedule requiring Plaintiff to work Saturdays and to close, J. Wilkinson believed he was President of the Dealership.

3. J. Wilkinson officially became President of the Dealership on September 16, 1992. At the time J. Wilkinson submitted the schedule to Plaintiff, J. Wilkinson was officially Vice President of the Dealership.

4. There is no evidence J. Wilkinson made false statements to B. Wilkinson about Plaintiff.

5. The only evidence of any insubordination by J. Wilkinson to Plaintiff is the following:

a. On one occasion, J. Wilkinson complained to a co-worker, Larry Terry, about Plaintiff;

b. On one occasion, J. Wilkinson was reprimanded for playing a video game at the sales tower;

c. On one occasion, J. Wilkinson glanced through papers left in plain view by Plaintiff at the sales tower.

6. There is no evidence Plaintiff gave J. Wilkinson any notice that Plaintiff believed J. Wilkinson was insubordinate.

7. Mr. Larry Terry testified at no time did he ever hear J. Wilkinson complain of Plaintiff to B. Wilkinson. Mr. Terry further testified that at no time did he hear J. Wilkinson state he had told his father he was displeased with Plaintiff.

8. There is no evidence J. Wilkinson ever asked B. Wilkinson to terminate the employment of Plaintiff.

9. In a meeting on or about September 7, 1992, B. Wilkinson's children put together a list of items they would consider in deciding whether to purchase the Dealership from their father. (Ex. 31.) The only mention of Plaintiff suggests their intent for Plaintiff's continued employment, since the only reference to him was that his \$500 monthly compensation for his house in St. George was to be eliminated.

I. There is Insufficient Evidence to Hold B. Wilkinson Liable for Tortious Interference

1. There is no evidence of tortious interference by B. Wilkinson.

2. There is no evidence B. Wilkinson interfered with Plaintiff's Agreement with Heritage.

J. The Dealership is Not B. Wilkinson's Alter Ego

1. At all relevant times, the Dealership had more than one officer and director.

2. There is no evidence the Dealership operated other than pursuant to its Articles of Incorporation and Bylaws.

3. There is no evidence the Dealership failed to hold annual meetings.

4. There is no evidence the Dealership failed to enact corporate resolutions.

5. There is no evidence the Dealership failed to keep minutes of meetings or file corporate annual reports.

6. The Dealership filed corporate tax returns.

7. The Dealership was not undercapitalized. Corporate funds paid to B. Wilkinson were accounted for at year end as personal income and B. Wilkinson was given a W-2 for that income.

8. The Dealership passed IRS audits for 1989-1990, only having to make a minor adjustment of less than \$4,000 to its Travel & Entertainment Account and to adjust for the litigation with FSLIC.

9. The Dealership's CPA, Mr. Clark Christian of Grant Thornton, reviewed all assets at year end, making appropriate adjustments to B. Wilkinson's W-2 income. (Ex. 235.)

10. The Dealership's accounting practices were consistent throughout the years, didn't significantly increase in any one expense category, and Plaintiff was fully aware of the Dealership's accounting practices.

Exhibit D

Donald J. Winder (#3519)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff,	)	ORAL FINDINGS OF FACT
)	
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage	)	Civil No. 930900312CN
Honda, O. BRYAN WILKINSON,)	
and JEFF J. WILKINSON,	)	Judge J. Dennis Frederick
)	
Defendants.)	

ORAL FINDINGS OF FACT

The highlighted portions of the following oral findings of fact, taken from the transcript of the Judge's ruling dated September 20, 1996, are those to which Plaintiff Kraatz objects:

THE COURT: We are reconvened in the matter of William Anthony Kraatz versus Heritage Imports, et cetera, case number C-93-312. I note that counsel are present, as are the parties. I appreciate your presence here today, counsel and parties.

This matter was tried to the bench on the 27th of August of 1996 through the 30th of August. The decision at that time was taken under advisement pending further review of the exhibits received, the testimony elicited, and receipt of proposed Findings of Fact, Conclusions of Law from respective counsel. Those matters have now been received and reviewed and this Court is prepared to rule.

The gravamen of the plaintiff's Complaint is for a breach of contract of employment executed on May 31 of 1990 by Heritage Imports and the plaintiff. The initial term of the contract was from June 15th of 1990 for five years with termination limited to specific cause. Article 3, paragraph 2.1 of Exhibit 38.

The plaintiff was terminated some 27 months into the term on September 11, 1992, orally, and then by formal letter of termination later, Exhibit 64.

The plaintiff alleges his termination was for other than just cause and seeks damages under various theories, namely, breach of contract, breach of implied

covenant of good faith, for a determination that Heritage Imports, hereinafter Heritage, was merely the alter ego of Bryan Wilkinson, for a determination that both Bryan Wilkinson and his son Jeff Wilkinson induced the contract breach and each interfered with plaintiff's prospective business advantage.

The essential evidence was seriously disputed. The parties' interpretation of the pivotal provisions of Exhibit 38 and specifically paragraph 2.1 is at odds. The plaintiff claims that that provision, the so-called for cause provision, limits the for cause analysis to the specified terms contained in clauses A through D of paragraph 2.1 and that the defendants have the burden of proof to establish cause, while defendants claim, on the other hand, the clauses A through D are merely examples included within the concept of cause and that the burden is on the plaintiff to show contract breach.

If the evidence establishes sufficient cause for termination within the rubric of clauses A through D of paragraph 2.1, from whatever source produced, these concerns become moot.

Given the hotly disputed conflicts in the evidence, this Court is left, therefore, to assess the credibility of the witnesses' testimony. That I have done, and in my view, the more credible, persuasive evidence establishes by

a preponderance the following.

Heritage is a Utah corporation, and during the pertinent time frame was owned essentially by Bryan Wilkinson, except for eight percent of the stock owned by his four children. It had for years operated a Honda automobile dealership located in Murray, Utah. The operation was essentially a family run business with Bry Wilkinson functioning as the owner and at least three of his four children and his son-in-law working for the corporation.

During the time frame of 1989 to 1990 the long-time general manager of Heritage left to go to California. Bry Wilkinson commenced negotiations with the plaintiff to become the new general manager. These negotiations culminated in the execution on May 31 of 1990 of the employment agreement, Exhibit 38. The principal thrust of the negotiations was that the dealership must return to profitability. The owner's children were to be trained in management duties to ultimately assume control, and the plaintiff would be the day-to-day manager of the business and allow Bry Wilkinson to semi-retire, in exchange for which the plaintiff was to receive considerable remuneration.

Plaintiff had been part owner and general manager of a dealership in St. George, Utah, but was dissatisfied

and was looking for a lucrative management position, even if it necessitated a move to Salt Lake, and even if it entailed moving into a general manager position of authority over children of the owner who were stockholders, directors and management personnel in their own right of the corporation.

Plaintiff, before executing the contract of employment, which defined the relationship, was given access to the financial data of the corporation and represented to Wilkinson he had the requisite experience, skills and abilities to make the corporation profitable. Indeed, he said, during the negotiations with Wilkinson, he could turn the operation around and make one million dollars per year, that the gross margin per car received was low and he could increase it.

Plaintiff was to devote his best skill full-time to the business. During the plaintiff's tenure from June 1 of '90 through 9-11 of '92 he enjoyed or engaged in the following significant activities.

He demoted Jeff Wilkinson twice. He refused to comply with a work schedule Jeff [Wilkinson] had prepared(R. 2468.), Exhibit 1, at the direction of the owner, Bry Wilkinson. Plaintiff's claim that his hands were tied because of under capitalization was not established by the evidence. Indeed, plaintiff's expert - or defendant's expert Larry Miller

persuasively testified that his examination of the corporate financials indicated that the dealership was not undercapitalized.

The plaintiff threatened the owner's son with termination. He failed to properly train the owner's children (R. 2469.) and indeed, created severe resistance to his control. The plaintiff refused to work Saturdays and evenings when his visibility was required as it interfered with his personal activities. (R. 2469.) Profitability continued to lag and was discussed each 30 days at the accountability meetings. Plaintiff allowed at least on one occasion against company policy for a title to be distributed without payment. (R. 2469.) He manipulated and/or modified the balance sheet by disguising the age of inventory units which should have been returned and/or sold but were not. (R. 2469.)

Some of his purchases at auction were disadvantageous to the corporation. Some customers complained that the general manager was unavailable or would not talk to them. (R. 2496.) Morale problems were created as the plaintiff was unable to bring together the so-called management team. The plaintiff unilaterally switched banks [from Comerica to Key Bank] (R. 2469.) which strained Heritage's relationship with its long-time lender Comerica, resulting in additional payment of monies, some \$114,000, to reestablish the relationship.

The corporate net worth declined to approximately one-half from June 1 of 90 to August of 92. The gross income per unit declined during the same period. The plaintiff did not take advantage of opportunities to exploit cash available and thus failed to manage the business cash. The store should have generated profits as plaintiff represented at the outset that it would, but it did not. Compare Exhibits 208 and 333.

On September 11, 1992, Bry Wilkinson told Plaintiff he wanted his resignation due to lack of profitability and the failure to train the kids and Plaintiff's lack of candor in certain accounting activities. Bryan Wilkinson sent a letter of termination, Exhibit 64, at the plaintiff's request.

This Court is of the view that plaintiff's termination was for cause contemplated by clauses B and C of paragraph 2.1 of Exhibit 38. The evidence fails to support plaintiff's claims and this court finds no cause of action on his Complaint.

Mr. Winder, the Findings of Fact, Conclusions of Law that you have submitted will be designated as received. In addition, though, I want you to submit to this Court a judgment and we will proceed under the language of Rule 4-504 of the Code of Judicial Administration, and the Findings will be deemed received no earlier than today to

Exhibit E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS et al,

Defendants.

930900312 W
REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

(Direct Examination of
WILLIAM ANTHONY KRAATZ
by Mr. Zundel)

FILED DISTRICT COURT
Third Judicial District

OCT 2 1 1996
By SALT LAKE COUNTY
Deputy Clerk

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, August 27, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
535-5203

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1 them about Southtowne. That was the proposed dealership in
2 Sandy -- or Southtowne, so that I would have his authoriza-
3 tion to try to move that forward, and the third is a letter
4 stating that he did not want me to work at the dealership
5 during the 60-day period, that I would not just not show up
6 for work, but he was telling me that I was not expected to
7 show up for work during that 60-day period.

8 Q Did he tell you why he didn't want you to come to
9 work during the 60-day notice period?

10 A Just for the same reasons that he said that he
11 terminated me.

12 Q Let's look at the employment agreement on page 2,
13 B and C. B says, "The duties and responsibilities of the
14 employee shall include but not be limited to responsibility
15 to provide management training to persons selected by the
16 company."

17 Were persons selected by the company for you to
18 train during your employment?

19 A Yes.

20 Q And who were they?

21 A I think principally Bry's children along with --
22 there were certainly other employees to be trained, but that
23 was the specific -- one of the specifics.

24 Q Who are Bry's children?

25 A Jeffrey Wilkinson, Matthew Wilkinson, Lynlee

1 Wilkinson, and his son-in-law, Jeffrey Gorringer.

2 Q Now, when you arrived at the dealership, what
3 position did Jeff Wilkinson hold?

4 A I believe he was the general sales manager at
5 that time.

6 Q Okay. Let's just take a minute and go over
7 what's been marked as Exhibit Number 324.

8 I'd move for the admission of Exhibit 324, Judge,
9 and have the witness explain what it is. You don't have one
10 there, your Honor. I'll hand you this one. It's this
11 large schematic.

12 THE COURT: As illustrative of the -- this is the
13 authority chart or --

14 MR. ZUNDEL: Yes, your Honor.

15 THE COURT: Any objection, Mr. Winder?

16 MR. WINDER: For illustrative purposes, no. I'd
17 like a little foundation, though, about when it was prepared
18 and by whom and that sort of thing.

19 Q (By Mr. Zundel:) Okay. Looking at Exhibit 324,
20 did you help prepare this document?

21 A I gave the information that was relative to this,
22 yes.

23 Q You drew it out and my office put it together?

24 A Yes.

25 Q What does Exhibit 324 show?

1 Q Now, did you ever receive any formal written
2 notice as to who the company was selecting for you to train
3 to enable said persons to become qualified dealers or
4 managers acceptable to American Honda?
5 A Not a specific list, no.
6 Q You had a general understanding that -- was there
7 a priority hierarchy among these children as to who was
8 most likely going to be the dealer?
9 A I believe that Jeff was the one that was probably
10 most logically going to be the dealer.
11 Q The second son?
12 A Yes.
13 Q Okay, and were you asked to focus on Jeff?
14 A No, I think that was just an understanding.
15 Q Okay. Did you attempt to train the children?
16 A I did.
17 Q During your employment was there ever any attempt
18 by Heritage to have Honda, American Honda, accept any of
19 the children as dealers?
20 A Not that I'm aware of.
21 Q So there's no attempt and a failure?
22 A No.
23 Q American Honda never rejected anybody?
24 A Not that I'm aware of.
25 Q All right. How about paragraph C, says, "Employee

1 Q And when you were fired, Bry told you that he would
2 continue to have Heritage write policies under Ryan for
3 another two years?

4 MR. WINDER: Object, asked and answered.

5 Judge, as a way of a suggestion, all of these
6 pieces of paper -- and I just venture this because I think
7 it will save us some time -- this man's accountant, Wisan,
8 has put all of these pieces of paper together. They're in
9 his work files. He's produced his own spread sheet of the
10 damages from each of these contracts and I really don't
11 think that it's necessary at this point in time to go on and
12 on and on with this witness. As a matter of fact, I have
13 little or any objection on these two items, to the numbers
14 his accountant did, but I'd just submit, Judge, that we
15 ought to get to the accountant. If the witness needs to be
16 recalled, we could recall him.

17 MR. ZUNDEL: I appreciate that, Judge, and we'll
18 proceed accordingly if the Court will permit.

19 THE COURT: I'm more than happy to permit it.
20 It's my notion that that's why I referred earlier, Mr. Zundel,
21 to whether or not this was the best witness to use in terms
22 of damage claims. Certainly, he's identified categories
23 and that's fine, but he's not an accountant and he's not
24 here to tell me what projections are, et cetera, but the
25 underlying documentation, if it has been considered by an

1 expert, your financial expert, then by all means, let's
2 get him in here when the time comes and deal with it.

3 Now, insofar as the objection of record at this
4 point, I'm going to sustain the objection so we can move on.

5 MR. ZUNDEL: What was the objection?

6 MR. WINDER: Asked and answered.

7 MR. ZUNDEL: Oh, I see. Okay.

8 Q (By Mr. Zundel:) Let me -- let's talk for a
9 minute now about your relationship with J. J.

10 THE COURT: Who's J. J.?

11 MR. ZUNDEL: J. J. Wilkinson, Jeff Wilkinson.

12 THE COURT: I'm not familiar with their nicknames
13 here. If we're talking Jeff Wilkinson, a co-defendant in
14 the case, then that's fine.

15 MR. ZUNDEL: That's right.

16 Q (By Mr. Zundel:) Let me show you what's been
17 marked as Exhibit Number 1 and 2. Tell the Judge what
18 Exhibit 1 is.

19 A This is a work schedule that Jeff Wilkinson
20 prepared and presented to me around the 7th of September,
21 or a day or two before that.

22 Q And was it usual for Jeff Wilkinson as the new car
23 manager to present you as the general manager with a work
24 schedule?

25 A No, it wasn't.

1 Q Had he ever done so before?

2 A No, he had not.

3 Q And had you asked him to prepare this schedule?

4 A No, I didn't.

5 Q Do you remember when he presented to you this
6 schedule, where you were?

7 A I believe I was in my office.

8 Q And do you remember what was said between the two
9 of you?

10 A I just simply responded to him after looking at
11 the schedule that the schedule really didn't work for me
12 because it was difficult for me to take Saturdays off when
13 I had to deal with the banks during the week and the banks
14 were only open on a -- typical work days, Monday through
15 Friday, and so it would be hard for me to take a day off
16 during the week, and that's why I had been taking Saturdays
17 off as my typical day off for as long as I can remember.

18 Q Did you tell him that you would prepare a schedule?

19 A I told him that I would prepare a schedule, yes.

20 Q And what's Exhibit 2?

21 A That's the schedule that I prepared.

22 Q And did you give this schedule to Jeff Wilkinson?

23 A Yes, I did.

24 Q And did he refuse to work your schedule?

25 A Yes, he didn't like my schedule.

1 Q What did he do when you gave him the schedule?
2 A He just took the schedule and left my office.
3 Q And do you know if he spoke with anyone about it?
4 A I believe so, with his father about it.
5 Q And how soon after you were terminated did this
6 occurrence occur?
7 A Just a few days.
8 Q Now, can you describe for me, if you will, your
9 efforts to train J. J., Jeff Wilkinson, as a -- in the
10 dealership?
11 THE COURT: Now, counsel, while we're back on
12 this issue of nicknames, in looking at Exhibit 1, you're
13 telling me that J. J. stands for Jeff Wilkinson?
14 MR. ZUNDEL: Jeffrey J. Wilkinson.
15 THE COURT: Who's Jeff stand for here?
16 THE WITNESS: Jeff Gorringer, the son-in-law.
17 THE COURT: All right, that's fine.
18 Q (by Mr. Zundel:) Describe for me your efforts
19 with Jeff Wilkinson.
20 A Well, Jeff had had some experience in sales.
21 He had had some experience in working as a sales manager
22 on the sales desk. He had had no experience in the finance
23 department that I was aware of and one of the areas that I
24 thought he could use some additional training was in that
25 area. We often would look at sales managers and how they

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

FILED DISTRICT COURT
Third Judicial District

SALT LAKE COUNTY, STATE OF UTAH

SEP 12 1996

SALT LAKE COUNTY

Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.)

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF CROSS
EXAMINATION OF WILLIAM ANTHONY
KRAATZ BY MR. WINDER ONLY
(PARTIAL TRANSCRIPT OF
TRIAL PROCEEDINGS)

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, August 27, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

001840

1 Q It's your contention that what's in here raises
2 to the dignity of a contractual provision?

3 MR. ZUNDEL: Objection, Judge, same objection.

4 MR. WINDER: He's already answered that. He said
5 this was part of his employment agreement.

6 THE COURT: Well, I think he has, and I think
7 that answers your question implicitly.

8 Q (By Mr. Winder:) Okay. Look at the second
9 sentence of that second paragraph. "While the dealership
10 believes wholeheartedly in the guidelines described here,
11 they're not conditions of employment, nor may anything in
12 this handbook be construed as a contract of employment or
13 as guaranteeing employment." Do you see that language?

14 A Yes, I do.

15 Q You believe that what's in here is part of your
16 employment agreement?

17 MR. ZUNDEL: Objection, Judge.

18 THE COURT: I think he's answered that question,
19 Mr. Winder. Sustained.

20 Q (By Mr. Winder:) Now, Mr. Kraatz, you never saw
21 this employment manual before you signed Exhibit 38, your
22 employment agreement, did you?

23 A No, I did not.

24 Q There's no reference in Exhibit 38 to this
25 employee handbook, is there?

1 A No, not that I'm aware of.

2 Q As a matter of fact, there's a reference in
3 Exhibit 38 that says that Exhibit 38 is the entire agreement
4 and represents the entire understanding concerning your
5 employment; isn't that correct?

6 A I haven't read it recently, I guess.

7 Q Well, let's look at paragraph 51 on page 4 of
8 Exhibit 38.

9 A Okay.

10 Q My question was, your employment agreement says
11 it's the entire understanding, correct?

12 A That's correct.

13 Q Now, Mr. Kraatz, there came a time when -- but
14 by the way, right after the foreword there is a signature
15 page. It's the very next thing after the foreword in
16 Exhibit 135.

17 A Yes.

18 Q Do you see that?

19 A Yes, I do.

20 Q You don't have a signed copy of this, do you?

21 A I do not.

22 Q Now, Mr. Kraatz, there came a time when you went
23 to a seminar about employment manuals. Do you recall that
24 subject being discussed in a 20-group meeting?

25 A Yes, it was the subject of our 20-group meeting

1 and discussion.

2 Q And that was summer of '92?

3 A As I recall, yes.

4 Q And the discussion was that employment handbooks
5 could cause problems for dealerships, right?

6 A That's correct.

7 Q And you came back to the dealership and -- let me
8 show you, Mr. Kraatz, what's been marked as Plaintiff's
9 Exhibit 23.

10 I'd move for the admission of 23.

11 MR. ZUNDEL: No objection, Judge.

12 THE COURT: Received.

13 Q (By Mr. Winder:) You asked and instructed Beverly
14 to prepare Exhibit 23 after you went to the 20-group
15 meeting, didn't you?

16 A I asked her -- I don't recall asking her to
17 prepare this, but I may have. Bry and Helen and I were in a
18 meeting, I believe Helen was there, and that's when we
19 discussed --

20 Q Mr. Kraatz, I asked you a question.

21 A Okay.

22 Q I said, did you ask Beverly to prepare Exhibit 23?

23 A I don't recall whether I did or not.

24 Q Okay. Let's look at your deposition.

25 I'd move to publish Mr. Kraatz's deposition,

1 Volume One.

2 I'm sorry. I got the wrong volume.

3 THE COURT: Well, this is Volume One that you've
4 provided me.

5 MR. WINDER: Yes, I'm sorry, Judge. Let's publish
6 Volume Two.

7 THE COURT: Very well, Volume Two of the original
8 is published.

9 Mr. Kraatz, this is the deposition. Now, there
10 was a change notice on Volume One. Looks like it may spill
11 over into Volume Two, so you'd better have this in front
12 of you, too.

13 THE WITNESS: Yes, sir.

14 Q (By Mr. Winder:) Mr. Kraatz, you remember your
15 deposition being taken at our offices?

16 A Yes, I do.

17 Q If you'll turn, please, to page 296. You're at
18 296, Mr. Kraatz?

19 A Yes.

20 Q The question starts, or the discussion starts
21 on line 15 of page 296 with a question about the 20-group
22 meeting that we've already discussed, and it goes over to
23 page 297 and there's a question, if you see on line 14,
24 and it says, "And tell me what you did to implement his
25 instructions.

1 "Answer: I think I asked Beverly Masterson, our
2 payroll clerk, to send a memo to the employees to bring
3 their policy manuals in, but I'm not certain. I mean, it
4 seems like a logical way to do it. I don't know."

5 Do you see that question and that answer?

6 A Yes, I do.

7 Q Does that help refresh your recollection?

8 A Again, I may have done. I don't know whether I
9 did or not.

10 Q And you're not here denying that you may not have
11 done it?

12 A I'm not.

13 Q Now, Mr. Kraatz, Exhibit 23 was given out to all
14 the employees, correct?

15 A I believe it was.

16 Q And July 17 of '92 is before you were let go
17 from the dealership?

18 A That's correct.

19 Q Mr. Kraatz, did you turn your employment manual in?

20 A As I recall, I did, yes.

21 Q Thank you. Now, Mr. Kraatz, when you were negoti-
22 ating Exhibit 38, you retained an attorney to assist you,
23 right?

24 A Yes.

25 Q Lee McCollough?

1 MR. WINDER: Correct, and I have no problem with
2 pulling the letter and the privilege log.

3 THE COURT: Then what we'll do is we'll receive
4 Exhibit 589 as modified and that will be in the form simply
5 of the privilege log of documents produced rather than the
6 cover letter.

7 Q (By Mr. Winder:) Okay, Mr. Kraatz, I show you
8 what's now Exhibit 589. It's a draft of the employment
9 agreement, and then attached to it is a response from
10 the Suitter Axland firm.

11 My question to you is, Lee McCollough prepared
12 the first draft, didn't he?

13 A I believe he did, yes.

14 Q Okay. Now, Mr. Kraatz, if you'll look at Exhibit
15 589, the first draft, turn your attention to Article 2 on
16 page 2 and it goes over to page 3. The language that's
17 in Exhibit 38, refusal to fulfill employment responsibilities,
18 is not in this draft, right?

19 A Exhibit 38?

20 Q 38

21 THE COURT: Well, I can see that, counsel.
22 Both exhibits are received and I can compare them.

23 MR. WINDER: All right, thank you.

24 Q (By Mr. Winder:) Now, concerning the word
25 "refusal," do you recall any discussions with Mr. Wilkinson,

1 THE COURT: Well, the witness can testify as to
2 whether or not to his recollection there was a modification.

3 THE WITNESS: I believe that there was a
4 modification. I don't think it was ever signed by Bry or
5 myself, but as I recall, he asked his attorneys to prepare
6 some modification to our agreement.

7 Q (By Mr. Winder:) That was signed?

8 A No, that was not signed.

9 Q Fine. Now, let's talk about the responsibilities
10 of a general manager. A general manager is responsible
11 for the care and keeping of the dealership assets, right?

12 A I would think that's among his responsibilities.

13 Q And he's responsible for the production of income
14 from the dealership, right?

15 A Overseeing those people that generate the sales
16 within the dealership, I think it's his responsibility, yes.

17 Q And he's responsible for the overall hiring and
18 firing of the employees?

19 A I think that's not totally the case. I think
20 department managers that are competent have the ability to
21 hire and fire employees under their control.

22 Q But the ultimate responsibility is the GM?

23 A Probably the ultimate responsibility is probably
24 the dealer because he's above the GM.

25 Q Forecasting is one of the responsibilities of a GM?

1 A I think that's something that he would do in his
2 management practice, yes.

3 Q And help make the budget?

4 A I would think, yes.

5 Q Now, let me direct your attention to the time
6 before May 31 of 1990. That's the date of the employment
7 agreement?

8 A Okay.

9 Q You had a meeting with Bry Wilkinson at the
10 American Grill?

11 A Yes, I did.

12 Q At that meeting you told Bry that when you were
13 GM, this dealership would make a million dollars a year,
14 right?

15 A I don't recall specifically saying that. I think
16 I was optimistic about our possibilities for success.

17 Q And you made that statement that the dealership
18 would make a million dollars a year not only to Bry, but
19 in front of Clark Christian, his accountant, who was at
20 that meeting.

21 A I believe that I said that the dealership should
22 make a million dollars a year. I don't think I said that
23 it would make a million dollars a year.

24 Q Should make a million dollars a year. Okay.

25 You took Mr. Bry Wilkinson's children to dinner in

1 Q Did you tell the kids that a Honda dealership
2 can survive anything?

3 A I don't remember saying that.

4 Q Did you say that to Bry Wilkinson?

5 A I don't remember saying that to Bry.

6 Q Did you tell Bry that the gross margin he had on
7 automobiles was low?

8 A I could have.

9 Q And told him that as GM you could raise that gross
10 margin?

11 A Well, my experience in St. George was greater than
12 what he had told me that theirs was, and so I felt that that
13 was a reasonable possibility.

14 Q Didn't you tell Bry before signing the employment
15 agreement that you were dissatisfied at Stephen Wade?

16 A I think I did. I think I told him I was
17 frustrated.

18 Q And Bry told you that he wanted to step back from
19 day-to-day involvement as a dealer at Heritage?

20 A I think he said that, yes.

21 Q Now, when you went into this dealership, Bry told
22 his accountant Clark Christian that you could have any
23 financial statements, any financial records you wanted,
24 right?

25 A He may have done. I mean, I don't know if he

1 told -- what he told Clark.

2 Q You don't remember him telling that to Clark
3 at the American Grill with you present?

4 A I don't remember that, no.

5 Q You weren't denied access to any financial
6 information, were you?

7 A Not after I started there, no.

8 Q I'm talking about before.

9 A Well, Bry only had limited financial statements
10 available to him when we went up to the dealership. He and
11 I went through and he was only able to find some of the
12 financial statements and he gave me what he could find.

13 Q He gave you 1989 financial statements, Exhibit 295,
14 right?

15 A I think '89 was one of the years he gave me.

16 Q Right, and he gave you some partial months in '90?

17 A I think he gave me, yeah, I think he gave me April
18 of '90 and I think he gave me some '88 statements.

19 Q All right. Do you recall receiving the letter of
20 intent on the sale of the St. George store?

21 A Not specifically, I don't.

22 Q So you're not saying you didn't, you're saying
23 you don't recall?

24 A That's correct.

25 Q All right. Do you recall receiving any lists of

1 before September 11 of '92 that you were going to be
2 terminated?" I believe you said no.

3 A That's correct, yes, it is.

4 Q You did have lots of discussions with Bry about
5 the lack of profitability of the dealership, right?

6 A I did, uh-huh.

7 Q And you had discussions with Bry about other
8 problems that the dealership was experiencing?

9 A Yes, we did.

10 Q Now, you were asked in your -- by Mr. Zundel,
11 about universal warranties. You didn't provide any additional
12 consideration to the dealership in exchange for your right
13 to receive compensation from the universal warranties,
14 did you?

15 MR. ZUNDEL: Objection, Judge. It calls for a
16 legal conclusion.

17 THE COURT: Well, I think he can tell us what he
18 understood the arrangement to be in his own view, counsel.
19 May or may not be legally correct, but he can tell us what
20 he thought.

21 THE WITNESS: I just assumed that it was an
22 additional compensation to me and Bry, that it was because
23 we had been -- because of the competition that this warranty
24 had provided for Ryan and because there was a need for it
25 within the dealership; it gave Bry and I an opportunity to

1 Q You were asked about a dinner in Mesquite, Nevada,
2 that you had with Jeff Gorringer and Wendy.

3 A Yes.

4 Q Did you recall telling Jeff and those present
5 that Bry had given you complete control of the store?

6 A I think what I discussed with them is that Bry was
7 Bry had decided that he wanted me to be the GM and that's why
8 we were having the meeting, so I could get to know them a
9 little better and they could get to know me better, so my
10 assumption is -- I don't recall exactly that we had cut a
11 deal either verbally or written, I'm not sure which, between
12 Bryan and I.

13 Q Jeff was the GM at the St. George store at that
14 time?

15 A He was, yes.

16 Q Did he warn you about any propensities of Bry
17 Wilkinson?

18 A I just -- I think I made the statement that I
19 thought I could control the spending and to budget the
20 store, and his response to me was, "Good luck. Nobody else
21 has been able to."

22 Q Nobody else has been able to control it?

23 A Yeah.

24 Q Did he tell you why he said that?

25 A He said Bry does it his way. That was the gist of

1 the conversation.

2 Q Was he speaking from his experience in St. George?

3 A I don't know.

4 Q You talked about the policy manual. You're
5 asking to recover in this lawsuit the value of retirement
6 contributions that were made in your behalf by the dealer-
7 ship, are you not?

8 A I am.

9 Q Those are not specifically provided for in your
10 written contract, are they?

11 A No, they're not.

12 Q They are, however, provided in the policy manual?

13 A Yes, they are.

14 Q You're also suing to recover for Christmas bonuses
15 that you would have received had you stayed at Heritage; is
16 that right?

17 A Yeah, yes.

18 Q Those are not provided for in your written
19 contract, are they?

20 A No, they're not.

21 Q They are, however, provided in the policy manual,
22 are they not?

23 A Yes, they are.

24 Q Now, your written contract does say, does it
25 not, under paragraph 3.2 on page 3, "Additional compensation.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

1
2)
3 WILLIAM ANTHONY KRAATZ,) Case No. CIV 930900312 CN
4 Plaintiff,)
5 vs.) REPORTER'S PARTIAL TRANSCRIPT
6 HERITAGE IMPORTS et al,) OF PROCEEDINGS
7 Defendants.) (Examination of BRYAN
WILKINSON)
FILED DISTRICT COURT
Third Judicial District
OCT 21 1996
By SALT LAKE COUNTY
Deputy Clerk

8
9 REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

10 BEFORE THE HONORABLE J. DENNIS FREDERICK

11 on Tuesday, August 27, 1996
12 and
Wednesday, August 28, 1996

13 APPEARANCES:

14 For the Plaintiff: MICHAEL N. ZUNDEL
15 Attorney at Law
16 JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
532-7700

17 For the Defendants: DONALD J. WINDER
18 JENNIFER L. FALK
Attorneys at Law
19 WINDER & HASLAM, P.C.
175 West 200 South #4000
20 Salt Lake City, Utah 84110
322-2222

21
22
23 ANNA M. BENNETT, CSR
24 240 East 400 South
Salt Lake City, Utah 84111
535-5203
25

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1 time he was terminated?

2 A My understanding was that he knew of those
3 consequences before he was terminated.

4 Q Okay. Mr. Kraatz testified that on September 15
5 or 16 he met with you, you talked about the Ryan program
6 and you said you would continue it for two years; is that
7 what you're disputing?

8 A Not really.

9 Q You don't dispute that?

10 A No.

11 Q He also testified that he met with you on September
12 15 or 16.

13 A That's correct.

14 Q And you told him that he would continue his
15 participation in the Universal -- I'll call them over-
16 rides rather than kickbacks -- for a period of 60 days; is
17 that what you told him?

18 A I think that's correct.

19 Q All right. Now, he also testified that -- let me
20 ask you to think back in time to when you fired Mr.
21 Kraatz on September 11, 1992. Do you remember that
22 meeting?

23 A Yes, sir.

24 Q You were there and Helen Green was there?

25 A Yes, sir, and Mr. Kraatz.

1 Q And Mr. Kraatz, and did you -- was it a short
2 meeting as Mr. Kraatz testified to?

3 A Yes.

4 Q And in that meeting did you tell him that you
5 were terminating him because you could no longer be between
6 he and your children?

7 A No.

8 Q Did not, sir. Do you remember what you did tell
9 him?

10 A I asked for his resignation.

11 Q Did you -- did he refuse?

12 A No.

13 Q What did he say?

14 A I recall Mr. Kraatz said that, "If you want me to
15 go away, I will. I can get a job somewhere else."

16 Q Did you tell him why you asked for his resignation?

17 A I told him of a certified letter coming to him
18 citing the reasons.

19 Q But you did not tell him in the meeting?

20 A I believe I cited the articles expressed in the
21 letter. I don't know that there was a lot of detail given.

22 Q You did not give him any detail, you did not give
23 him any specific wrong that he had committed that had
24 offended you?

25 A Well, this is --

1 Q I'm just asking that question. Did you give him
2 a specific example or criticism that had caused you to
3 terminate him?

4 A Yes.

5 Q What was that?

6 A Lack of profitability, inability to teach my
7 children what he'd agreed to, and not always leveling with
8 me on certain accounts, titles in, overage used cars and
9 such.

10 Q And it's your testimony you talked about all of
11 that?

12 A Very briefly just like that.

13 Q All right. Let me leave that for a moment, and
14 you would admit, would you not, that Tony Kraatz tried to
15 teach your children, train your children?

16 A Tony's a friend and it was painful, real painful
17 deal for me, and I would say yes, that he tried.

18 Q And that's different than refusing to teach your
19 children.

20 A I would have to answer that that he just didn't
21 get the job done.

22 Q He had five years under your contract to get the
23 job done, didn't he?

24 A If he performed, yes.

25 Q And you terminated him 27 months into the contract?

1 A Meaning that I can't recall for sure that I gave
2 it to Mr. Kraatz.

3 Q Let me drop down here to advertising, item number
4 ten. Frank Allen and Associates was your advertising
5 agent?

6 A Allen Frank and Associates, yes.

7 Q Excuse me, that's right, and he'd been your --
8 that association had been your advertising agent for some
9 time?

10 A I would say at this time probably about a year.

11 Q Okay. You said, "Keep Allen Frank?"

12 A I did. That's my writing.

13 Q You were in charge of advertising for the dealer-
14 ship in 1992, even though Mr. Kraatz was there as the
15 general manager; that was your responsibility, right?

16 A Well, Mr. Kraatz and I discussed that. He felt
17 he could use some help in that area and the area of
18 placing insurance coverages and yes, I did help.

19 Q You took complete control over the advertising
20 in 1992?

21 A I did not take it. I talked to Tony about it
22 and we decided I could help there.

23 Q You had complete control over advertising in 1992?

24 A Sir, I was the dealer. I had complete control
25 over everything.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

OCT 2 1 1996

By SALT LAKE COUNTY
Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS et al,

Defendants.

Case No. CIV 930900312 CN

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

(Examination of O. BRYAN
WILKINSON)

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Thursday, August 29, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, CSR
240 East 400 South
Salt Lake City, Utah 84111
535-5203

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1 A Pardon?

2 Q In August and September of '92.

3 A During several of our discussions -- I didn't
4 say in August of '92.

5 Q During several of your discussions over -- okay.

6 A The period of --

7 Q When?

8 A The period of his employ.

9 Q All right. I want to test whether or not cars
10 were overaged. I'm talking about used cars, okay? Used
11 cars overaged.

12 A All right.

13 Q Do you have a time?

14 A Well, there were many months.

15 Q Just pick one.

16 A Let's pick April of '92.

17 Q April of '92?

18 A Uh-huh (affirmative).

19 Q You're comfortable with that?

20 A Well, you told me to pick one, so I did.

21 Q Is it your recollection that they were overaged
22 in April, or are we just searching?

23 A I told you it was during several of Tony's and my
24 accountability meetings and review of statements and
25 schedules that there were way too many overaged used cars.

1 A But that wasn't the first time I'd talked to Tony
2 about it. I discussed it off a schedule in a meeting that
3 we'd had together before. The context of this -- and you
4 took it a little bit out of context. You need to read the
5 page before, as well, because it refers to that, but never-
6 theless, it came in after this conversation, quickly.

7 Q This was in 19 -- when, '91?

8 A I think it was in '91, yeah.

9 Q Early or late '91, sir?

10 A I can't remember.

11 Q And it was a reason that you're now asserting
12 in this case for firing Tony in September of 1992?

13 A It was one that I didn't feel I was dealt up front
14 with and it's just one.

15 Q That same volume of your deposition you don't
16 believe -- before I return -- you believe -- you don't
17 believe that Tony was dishonest in any way in connection
18 with the Snider transaction we just talked about, do you?

19 A I think I said in my deposition that I don't
20 think Tony's basically a dishonest person.

21 Q And he didn't deceive you; he didn't intentionally
22 deceive you?

23 A Well, I haven't read this, you know, as you've
24 referred here, but I don't think he would try to do that,
25 but when you have a manager, you leave a lot of stuff in his

1 hands and you -- and it gets scary when it doesn't happen.

2 Q Well, he was relying on his managers, too,
3 wasn't he?

4 A I know.

5 Q Brett Smith?

6 A But that's his job.

7 Q And your son-in-law Jeff Gorringer?

8 A Certainly.

9 Q And Jeff Wilkinson, he had to rely on him?

10 A It doesn't matter. They're employees and it was
11 his job to get a handle. It doesn't matter whose job it was.

12 Q Now, the car, the fifth wheel, wasn't it, that
13 went to Nevada is what you're talking about was the other
14 instance?

15 A Well, there was a trade-in involved in Nevada,
16 too, but I don't think that was a fifth wheel. It was a
17 truck and trailer, but I don't know that both the units
18 went back to Nevada. I can't remember. We didn't have the
19 title on those. I was told we did.

20 Q Who was Tim Rideout?

21 A Tim Rideout was a salesperson.

22 Q And this also occurred in 1991; isn't that right?

23 A That could be.

24 Q And Tim Rideout had sold a vehicle and taken some
25 trade-ins and the trade-ins were in Nevada, right?

IN THE DISTRICT COURT OF THE THIRD JUDICIAL

FILED DISTRICT COURT
Third Judicial District

SALT LAKE COUNTY, STATE OF UTAH

SEP 12 1996

By

SALT LAKE COUNTY

Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Case No. CIV 930900312 CN

Plaintiff,

REPORTER'S TRANSCRIPT OF DIRECT
EXAMINATION OF O. BRYAN
WILKINSON BY MR. WINDER ONLY
(PARTIAL TRANSCRIPT OF
TRIAL PROCEEDINGS)

vs.

HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Thursday, August 29, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

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1 with everybody at Heritage to announce that he was the new
2 GM. Do you remember his testimony?

3 A Yes.

4 Q And Mr. Kraatz said that when you introduced him,
5 you said he had a no cut contract. Do you remember that?

6 A I remember he said that, yes.

7 Q Did you say that, Mr. Wilkinson?

8 A Not at all.

9 Q Now, somewhere in front of you -- and there are a
10 lot of pieces of paper and maybe you can find it there and
11 maybe you can't, but you know what Exhibit Number 1 is, the
12 schedule?

13 A Yes, sir.

14 Q That's been talked about; do you have that?

15 A I do.

16 Q Mr. Wilkinson, in the car business, what's the
17 significance of Saturdays and evenings?

18 A Well, most all the time I can remember, Saturdays
19 are the biggest sales day and from 4 p.m. in the afternoon
20 till closing is the best sales time of each day.

21 Q In the evening?

22 A That's correct.

23 Q Okay. Let's talk some, Mr. Wilkinson, about the
24 car business. How long have you been in the car business?

25 A Personally I have been either a lot boy or a wash

1 boy or a lube man or a sales person or a manager, used car
2 or general manager and dealer for about 40-plus years.

3 Q And you started at what dealership?

4 A I started at Zion Motors in Murray when I was a
5 small boy.

6 Q And who was the dealer of Zion Motors?

7 A My father.

8 Q His name was?

9 A Orville Joseph Wilkinson and he went by O. J.

10 Q O. J., and have you held the position as general
11 manager?

12 A Yes.

13 Q Tell us when and where.

14 A I recall the first experience I had as a general
15 manager would be in the area of age 27 to 29 under the
16 direction of a gentleman by the name of Alpha Bostrom who
17 had a management contract to operate a dealership in Murray,
18 notaby Zion Motors, Incorporated, for my father.

19 Q And you were general manager then?

20 A I had several expereicnes under Mr. Bostrom for a
21 number of years, but general manager was one.

22 Q When you were general manager, what were your
23 obligations in the dealership? What were your duties?

24 A Well, first and foremost was profitability,
25 the direction of other employees, department head meetings,

1 the dealer, operating the business yourself without a GM?

2 A I considered it, but it wasn't a choice I wanted
3 to make.

4 Q Why not?

5 A I had had some circumstances in my life that
6 brought me to feel that I really wasn't in a position
7 emotionally or spiritually or physically to do that.

8 Q Okay. There came a time when you started talking
9 to Tony Kraatz about becoming the GM at Heritage?

10 A Yes.

11 Q Can you give us a time frame?

12 A When I was in St. George living and had opened
13 a Honda store there, I'd become more acquainted with Tony,
14 mostly on a friendship and supportive basis, and as a result
15 of that, I felt good about Tony. He and some of his friends
16 he'd introduced me to had shored my personal life up and
17 given it direction that I had appreciated.

18 Q So in -- for a time frame are we talking about
19 May of 1990?

20 A Most of this began probably in '88, '89 area.

21 Q But I'm talking now about when you were talking
22 to him.

23 A Talking to him about employment and general
24 manager --

25 Q Right.

1 A -- was the spring of 1990, yes.

2 Q Okay. Now, you recall where your first discussions
3 were about that subject?

4 A The best of my recollection, we probably
5 discussed it, alluded to it on the golf course or in a
6 friendship setting in St. George and it progressed more
7 seriously in pursuit the latter part of April, early part of
8 May 1990, and we had some many conversations by phone, and
9 we'd had some meetings in Salt Lake.

10 Q Are you able to segregate out, Mr. Wilkinson,
11 in your mind any particular phone call or meeting, or do
12 they tend to run together?

13 A They run together a little bit, yes.

14 Q Are there any specific ones that you recall?

15 A Yes, there are.

16 Q Okay. Let's talk about those first. Which
17 ones?

18 A Tony had called me, I think in late April, at
19 the latest, early May, and mentioned that he had to be in
20 Salt Lake on another matter and wondered if I had time to
21 meet him personally and visit and I said yes, I did.

22 Q So did you meet with him?

23 A I did.

24 Q Is this at the Hidden Valley Country Club?

25 A I believe our country club meeting, our time

1 together was at Willow Creek because at the time, I belonged
2 to both, but --

3 Q So when you met with him, was it at Willow Creek?

4 A As a result of those meetings running together,
5 we could have possibly met at the American Grill in
6 Cottonwood Mall before Willow Creek, but Willow Creek
7 could have been before, as well.

8 Q And give us a time frame.

9 A I would say sometime the first ten days of May 1990.

10 Q And who would have been present at the meeting?

11 A That's a long time ago and it's hard for me to
12 remember, but I think on that first occasion Tony and I
13 met. My wife at that time was Tanya and she could have
14 possibly been there with me, but I don't remember.

15 Q Okay. Tell us what you said and what Tony said
16 about his coming to work at Heritage.

17 A Well, as I remember, we met and I asked Tony if
18 he had thought any more serious about experiencing the
19 probability or eventuality of coming to work with me in
20 Salt Lake or actually in Murray at Heritage Honda, and he
21 said yes, he had, that he'd had some conversations with his
22 wife, that he had talked -- I thought he said he had talked
23 to his brother-in-law, and that they were trying to put
24 together a few notes and possibilities about what he would
25 consider.

1 family reunion as I remember, and he'd let me know and
2 we'd try and get together and talk a little more about it.

3 Q So did you get together?

4 A We did.

5 Q Where?

6 A I believe that was American Grill at Cottonwood
7 Mall. I believe it was late afternoon. It wasn't noon
8 time; it was a little later.

9 Q Who was present at that meeting?

10 A I think Tony and I were the first ones there and
11 he had expressed to me previously, I think by phone, but
12 reminded me again when he got there that he would like some
13 financial information which I hadn't told Helen Green yet
14 because I wasn't sure I had anybody and you don't release
15 someone else, especially of her loyalty and character,
16 without being a little more sure, so I called Clark
17 Christian from Grant Thornton, my accountant, and said,
18 "Could you stop by the dealership? I need this." I needed
19 an '89 year financial statement and financial statement for
20 the year of '90 through April of 1990, and there were a
21 couple of schedules, as I remember, Tony asking for and then
22 I told Clark, I said, you know, "I don't want to run over
23 and get them and I don't want to send Tony over and get
24 them because I'd just like to have you stop by and ask
25 Helen for them," so he did, and when he got there, as I

1 remember, when he got to the dealership, he called me and
2 asked me if there's anything else that was needed, and I
3 asked Tony, and as I remember, there wasn't anything
4 specific referred to, so he came over to the American
5 Grill, and as I remember, brought his younger son and
6 introduced him to us and all, and sat with us for a while,
7 and by the way, I didn't remember Clark being there in my
8 deposition and have been reminded of it since by Clark
9 Christian, and I just say that because I'm sure I'll get
10 referred to it, but anyway --

11 Q Who was -- Mr. Wilkinson, who said what to whom
12 at this meeting concerning employment prospects?

13 A Well, Tony and I talked before Clark got there
14 and then Clark answered some questions for Tony and --

15 Q Do you recall what questions?

16 A I think Tony asked for a couple more items. I
17 think one of them was a schedule of prepaids. I can't
18 remember for what year, and I think for some 13th statements,
19 and I don't remember whether Clark went back and got them
20 then. There was a possibility, and this has just come to
21 my memory in the last couple months, there's a possibility that
22 Tony and I met down at the dealership one Sunday and I
23 gathered a few more things for him.

24 Q Just stick to this meeting.

25 A Okay, I'm sorry.

1 what he felt he could do.

2 MR. ZUNDEL: Objection, Judge, nonresponsive.
3 In this meeting we're talking about.

4 THE COURT: I believe that's correct. We're
5 talking about a specific meeting.

6 THE WITNESS: Thank you, your Honor. This would
7 have been -- this particular meeting would have been one of
8 other contacts that he did express that he was capable and
9 that he could do a lot for us.

10 MR. ZUNDEL: Objection, Judge, ask that the answer
11 be stricken. The witness has gone back to other conversa-
12 tions for which we have no foundation.

13 THE COURT: Well, I think we're talking about
14 this specific meeting, and if you will tell us, sir, what
15 was said and by whom regarding this issue of qualifications,
16 then that will move us along.

17 THE WITNESS: Tony felt that his qualifications --

18 MR. ZUNDEL: Objection, Judge.

19 Q (By Mr. Winder:) Did Tony say --

20 A Tony expressed to me --

21 Q Thank you.

22 A -- I'm sorry -- that his qualifications to
23 general manager, to general manage and bring not only
24 profitability but personal time away from the store for me
25 without worry on my part, and we discussed some of the concerns

1 I had with my kids and told him that when you're so close to
2 the candle, sometimes you can't get through, and I could use
3 some help with some visits, friendship, personal, and
4 direction in the business with my children.

5 Q All right. Anything else said about that subject
6 that you recall?

7 A Well, Tony felt that his --

8 MR. ZUNDEL: Objection, Judge.

9 THE WITNESS: Tony said that his experience in the
10 car business was far-reaching. Tony stated that he would be
11 my man and that we could enjoy together a good relationship,
12 a profitable relationship, a great friendship, direction and
13 help with things that I'd expressed concerns about my
14 children, and continue on as friends as we had for --
15 socially and for the past several years.

16 Q (By Mr. Winder:) Were there -- when you say he
17 talked to you about profitability, was there any specific
18 numbers mentioned?

19 A To my recollection --

20 MR. ZUNDEL: Objection, Judge. The question is
21 leading.

22 THE COURT: Well, I don't think it's critically so.
23 Go ahead, Mr. Wilkinson.

24 THE WITNESS: Thank you, your Honor. My
25 recollection is is that I was concerned about the direction

1 A "The store is safe in my hands and the Honda deal
2 will make us so much money, Bry, you'll be so happy, that
3 you won't have anything to worry about."
4 Q All right. Now, did you discuss at that meeting
5 what Tony's duties would be?
6 A Yes, and I think I asked him at that meeting to
7 spend a minute with a couple of my children, Wendy Wilkinson --
8 or Wendy Wilkinson Gorringer and her husband in particular,
9 and Matt, who were still in St. George at that time.
10 Q What did you say and he say about his duties?
11 A Well, I just -- I alluded to the fact that I
12 needed to feel confident. I didn't feel like I could be out
13 of the store and resting myself in any fashion without some
14 confidence in what he really intended to do.
15 Q And what did he say?
16 A He said, "You don't have to worry about it, Bry.
17 I have the qualifications and that's the franchise and I
18 can do it."
19 Q Now, as we approach -- and I'm trying to zero in
20 now on Tony's duties -- were there other discussions pre-May
21 31 of '90 concerning his duties specifically?
22 A Yes, during the final composing, might be the right
23 word, of the employment agreement.
24 Q About when was that?
25 A I would say all three of those meetings took place

1 Did you have a certain time?

2 A As I remember, Tony and I decided that it wouldn't
3 necessarily be at the store. It might be at my house, but
4 we'd have what we've kind of agreed to call accountability
5 meetings every 30 days --

6 Q All right.

7 A -- on the progress of the store.

8 Q And who would attend these accountability
9 meetings?

10 A As I remember, for the latter part of '90 and most
11 of '91 -- well, I'd say the latter part of '90, yeah,
12 probably through September of '91, Tony and I would meet
13 sometimes at home, sometimes at one of the country clubs,
14 and sometimes in his office or mine at the dealership.

15 Q Would anybody else be present?

16 A In the first part, I think Tony and I were pretty
17 much on our own, unless there was somebody he felt we both
18 needed to talk to about something.

19 Q Did you have a regular kind of agenda or regular
20 items that you'd talk about?

21 A I don't know that we had a written agenda.
22 Schedules and financial statements and the day-to-day
23 operative evidences that we both wanted to look at, Tony had
24 access to, and he'd either bring them or we'd go to the
25 office and he'd have them.

1 Q You reviewed financial statements at those
2 accountability meetings?

3 A We did sometimes.

4 Q Did you discuss profitability at these meetings?

5 A Oh, yes.

6 Q Did you always discuss it?

7 A Well, that was pretty important to him and to me.
8 I'd say we discussed it most every time, along with other
9 things.

10 Q All right. Now, let's just direct your attention
11 to the latter half of 1990. Are you able to distinguish
12 in your mind any particular meetings in 1990 where
13 profitability was discussed between you and Tony?

14 A Oh, yes.

15 Q Okay. Tell me when was the first one.

16 A After the first month he was there, first full
17 month that he had been in the store, which would not have
18 been June but July.

19 Q What did you say and what did he say about
20 profitability?

21 A Well, I mentioned that I had hoped our gross per
22 car would have been better and our total gross had been
23 better and that we'd have done a little better, and he said,
24 "Well, you know, it takes a little while to get started.
25 Put some people in place and it's going to come, Bry, it's

1 going to come."

2 Q Anything else discussed concerning that topic?

3 A There were personal things we discussed, friend-
4 ship things; there were a lot of things.

5 Q But things related to the business?

6 A Oh, we'd discuss inventories. From time to time
7 Tony would have some things more paramount on his mind than
8 others that he would bring to my attention.

9 Q Do you recall in that first meeting discussing
10 inventory?

11 A I think we discussed the new car inventory which
12 is rather unusual. Normally in meetings like that you
13 discuss the used, but it was kind of an unusual thing, that
14 kind of took a look at the new Honda inventory at that time.

15 Q And what did you say and what did he say about that?

16 A Well, we had a couple of problems with some over-
17 aging which wasn't usual with Hondas, and we talked about
18 what we used to call tricking them up, the cars that had
19 been there a while, and putting them on the showroom floor
20 and where they'd be more noticed by the salesman, where
21 they'd be more noticed immediately by the customer, rather
22 than one that was a newer age unit and that worked very well.

23 Q Concerning the topic of profitability, did you
24 discuss that at your next meeting?

25 A My recollection is that we were always talking

1 about profit as well as gross, but overall gross profit.

2 Q And what was the profitability picture of
3 Heritage in 1990?

4 A The total year?

5 Q Uh-huh (affirmative).

6 A Well, it wasn't great and some of that wasn't
7 Tony's fault. There were a couple of things discussed that
8 concerned me a little. Helen had brought my attention to
9 some deferral of advertising expense and I discussed it with
10 Tony at one of the meetings, and he explained to me that
11 it's real important to get off to a quick start for our
12 creditors, and I said, "Well, I just don't want them coming
13 back on me and saying that we didn't represent it like
14 most other dealers might."

15 Q Now, concerning creditors, did Heritage ever have
16 any creditor problems in terms of not paying its bills?

17 A Oh, no, we always paid our bills on time.

18 Q Did any employees not receive pay checks?

19 A No, payroll was met promptly.

20 Q Any lawsuits filed by any creditors for payment?

21 A I don't remember any.

22 Q Did you ever have any floor checks?

23 A Yes.

24 Q What's a floor check?

25 A A floor check, you have different lines of credit

1 through banks or other creditors. One may be for cash
2 capital during a heavy quarter of sales tax remittance, any
3 number of things, but flooring is a separate and kind of a
4 special item. Flooring is a bank --

5 Q What's a floor check?

6 A Okay. Well, I need to give you a little back-
7 ground on it, if I can, because flooring, first of all, you
8 have to have permission from the financial company to
9 allow the factory to draft them directly, and when that's
10 done, they send you cars. In fact, sometimes you're paying
11 flooring on them before you get them, and every 30 days,
12 with some finance companies 60 days, and others twice a
13 month, they will have their people, who are trained, ---
14 auditing inventory against the list that they have that says
15 that vehicle's still in our inventory and not sold and not
16 paid off.

17 A floor check is to make sure that an out-of-trust
18 situation, they call it SOL, sold out of trust, doesn't
19 occur.

20 Q How many floor checks did Heritage have?

21 A I would say we averaged one a month, I would say.

22 Q Were there any floor checks you didn't meet?

23 A You mean matching up what was sold with what was --

24 Q Were you ever out of trust?

25 A No.

1 Q Now, Mr. Wilkinson, there came a time, September
2 11 of '92, in which you had to let Tony go.

3 A Yes.

4 Q Why did you let him go?

5 A I let him go for reasons cited in the employment
6 agreement and because there had been a good period of time
7 for performance to show some fruits, and it was going the
8 wrong way.

9 Q So what was wrong with performance?

10 A Well, we weren't profitable on a month-to-month
11 basis and really, overall. It came later, which you have
12 not asked me about, but it came later that Tony and I in
13 late '91 and early '92 began to meet weekly, including
14 Helen Green with us, and we reviewed many schedules and
15 overage units of used were a problem. Some had stayed on
16 as much as a year.

17 MR. ZUNDEL: Objection, your Honor, objecting to
18 the -- we were asked -- the question was asked directly,
19 why did you let Tony --

20 THE COURT: So it's nonresponsive.

21 MR. ZUNDEL: Nonresponsive.

22 THE COURT: Sustained.

23 THE WITNESS: I let Tony go for -- excuse me.

24 THE COURT: Okay, now, that's important. You were
25 back telling us why it was that you terminated the plaintiff.

1 You said performance was going down rather than up.

2 THE WITNESS: Lack of profit and --

3 THE COURT: Give us the reasons, if you will, sir.

4 THE WITNESS: Well, that -- I was trying to do that
5 by virtue of the review of the schedules.

6 Q (By Mr. Winder:) If you'll just -- Mr. Wilkinson,
7 if you'll just give us the reasons, tick them off, I'll go
8 back and ask you questions about those.

9 A Thank you. Overage inventory on used units that
10 were supposed to either have been wholesaled -- used, now --
11 or given back to the people that traded it in, in exchange
12 for the cash that the actual cash value had been represented
13 on their deal, titles not collected, cars delivered to
14 wholesalers without the collection of titles or without the
15 collection of monies, and already having given wholesalers
16 the titles.

17 Limited, though, I would say no profitability and
18 certainly limited, if any, purchase of a car from the
19 Salt Lake Auto Auction from time to time that turned out
20 to be a real bad purchase that Tony had made on an auction
21 basis.

22 Claims from some customers that they couldn't get
23 customer satisfaction through customer relations, or that
24 the general manager wouldn't talk to them.

25 Tony's not having been exactly honest with me about

1 the status of used car overage inventory, and titles on
2 hand on trade-ins and titles that had been remitted without
3 payment.

4 The inability to bring the management team
5 together, the inability to direct department heads, the
6 inability to train my children to become dealers, the
7 inability to be visible in the store in the evenings and on
8 Saturdays.

9 Visibility was -- well, that's not a yes or no,
10 so -- but anyway, that was important.

11 Q Were you experiencing, or was a reason also
12 related to any banking relationships?

13 A The worst problem we had which cost us a lot of
14 money was Tony elected to change the flooring from Comerica
15 to Key Bank, and I believe that was in -- might have been
16 even late '90. I can't remember exactly when it was, but
17 that strained a relationship that lots of revisions were
18 made on that cost a lot of money.

19 Q All right. Concerning profitability, what was the
20 problem?

21 A Well, the gross per unit declined, except maybe
22 for a couple months, on new car sales from the time Tony
23 came until he left, or until I asked for his resignation.
24 The overall gross in departments declined. The net worth of
25 the dealership in total, as I remember, was reduced almost

1 in half from June first of '90 until August of '92.

2 MR. ZUNDEL: Your Honor, I'm going to make a
3 motion now and would ask that the evidence regarding
4 profitability be stricken as irrelevant in this case under
5 the contract.

6 THE COURT: Counsel, the motion's denied. You
7 can make your request to me at closing statements, but not
8 during the course of examination of a witness.

9 Go ahead.

10 MR. WINDER: Thank you, thank you.

11 Q (By Mr. Winder:) What were the problems with
12 scheduling of hours?

13 A Well, I would from time to time call to talk to
14 Tony about the operation, how many cars we'd sold that day,
15 and he wasn't there, especially during peak traffic times
16 on Saturdays. In fact, the occasion arose where Tony would
17 call in earlier than I did and then call me before I called
18 there and let me know what was happening so I wouldn't find
19 that he wasn't there.

20 MR. ZUNDEL: Objection, Judge, no foundation for
21 that testimony, ask that it be stricken.

22 THE COURT: Objection is sustained.

23 Q (By Mr. Winder:) What other problems were there
24 in terms of hours scheduled?

25 A Well, the evening hours are the most productive

1 hours. Visibility of, quote, unquote, the man who's
2 responsible for the operation day to day, I felt that over a
3 period of time Tony slacked off on his later in the evening
4 and Saturday performances.

5 Q You mentioned Comerica. Who was Comerica?

6 A Comerica is affiliated with -- I think it's a large
7 bank in Detroit. It might even be the Bank of Detroit,
8 Michigan, I don't know, but they are the finance arm that
9 offers floor lines, capital loans, real estate loans tied
10 in conjunction with each other to automobile dealers across
11 the country.

12 Q And did Heritage have a floor line or lines with
13 Comerica?

14 A Yes.

15 Q And what did Comerica finance?

16 A Comerica had our new car floor line at the Honda
17 store in Murry, and we had a operating credit line endorsed
18 by Murray and me personally, Heritage Honda and me
19 personally, and the St. George store until it was dissolved.

20 Q Did they also finance anything else?

21 A Yes, real estate.

22 Q What real estate?

23 A They financed the building and property upon which
24 and in which Heritage Imports dba Heritage Honda of Murray
25 was operated in.

1 Q The real property?

2 A The real property and the building.

3 Q Was there any connection between these two floor
4 lines?

5 A That was actually a real estate loan, but the
6 floor line --

7 Q I'm sorry. Was there any connection between these
8 two lines of financing?

9 A Yes, the real estate loan was contingent upon
10 the continuance of the flooring line.

11 Q And did Heritage -- did there come a time when
12 Heritage opened its flooring line for new cars, opened a
13 flooring line for new cars somewhere else?

14 A Yes.

15 Q When was that, approximately?

16 A I think it was in -- around November or December
17 1991.

18 Q And with what institution was there a new floor
19 line?

20 A Key Bank of Utah.

21 Q How did that come about?

22 A Am I allowed to expand?

23 Q Yes.

24 A When Tony first came to work for me, I took him up
25 to those that bought retail contracts from us and that

1 offered other services to us and introduced him to each of
2 the heads of those that I could at least get to --

3 Q Let me --

4 A -- and one was Key Bank.

5 Q Let me stop you for a moment. Who's a Mr. Ashton?

6 A Well, Mr. Ashton, I believe, was a medium officer
7 at Key Bank in their -- I think it was in their mortgage
8 department in St. George.

9 Q You recall Tony's testimony where he said that
10 you told a banker, I believe the name is Mr. Ashton, that
11 he had a no cut contract?

12 A I did not tell anything like that to Mr. Ashton.

13 Q You didn't say that?

14 A No.

15 Q Or to anybody else at Key Bank?

16 A I didn't.

17 Q But continue, please, we were talking about --

18 A Anyway, so we had met several bankers. Well, the
19 key ones with us at that point were the people at Key Bank
20 and Tony, through the course of day to day business, cemented
21 relationship ties with several entities due to the fact that
22 we needed to sell a lot of retail paper. Key Bank bought
23 from us, West One bought from us, many banks that we had
24 agreements that would allow us to share in the reserve, the
25 earnings of the interest charged to the customer, and Tony

1 and I had discussed trying to be at home partners, at home
2 dealing with those around us because they were more
3 accessible to us, and some discussion had taken place
4 between Tony and the officers at Key Bank about moving the
5 real estate loan on the building and property to them and
6 obtaining lower discount rates on the retail purchases of
7 paper and other services that they felt they could offer us.

8 Q And did there come a time when the flooring line
9 was moved to Key Bank?

10 A Yes.

11 Q Who made that decision?

12 A Tony.

13 Q Did Comerica threaten default because of that?

14 A Yeah, they threatened default and they started
15 with a revision of the note.

16 Q Did you have to pay extra monies to Comerica?

17 A We did.

18 Q About how much?

19 A I would say over the course of late '91 through
20 August of '92, upwards of over \$100,000.

21 Q All right.

22 THE COURT: Mr. Winder, how much more time do you
23 think you'll need with this witness?

24 MR. WINDER: About ten minutes, Judge, fifteen.

25 THE COURT: All right. Let's take a brief recess.

1 We've been in session for some time.

2 (Whereupon, a recess was taken.)

3 THE COURT: All right, go ahead, Mr. Winder.

4 MR. WINDER: Thank you.

5 Q (By Mr. Winder:) Mr. Wilkinson, I'm just going to
6 ask you about two more of the areas that you listed as
7 reasons why you let Tony go. One of them you mentioned was
8 training kids. What was the problem or problems there?

9 A Well, that was one of the most expressed concerns
10 I had when we entered into our employment agreement, and it
11 just did not happen.

12 Q And you also mentioned management team, department
13 heads. What was the problem there?

14 A Incrementally over the period of time Tony was
15 there from when he started, the morale in the whole dealer-
16 ship, especially along department heads, really declined.

17 MR. WINDER: Thank you. No further questions.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

SEP 12 1996

By C. C. Cawley
Deputy Clerk

WILLIAM ANTHONY KRAATZ,
Plaintiff,
vs.
HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,
Defendants.

Case No. CIV 930900312 CN
REPORTER'S TRANSCRIPT OF TRIAL
TESTIMONY OF DANIEL J.
HARTMANN

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. DENNIS FREDERICK
on Friday, August 30, 1996

APPEARANCES:

For the Plaintiff: MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants: DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South, #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

862013

* * *

1
2 D A N I E L J . H A R T M A N N , having been
3 duly summoned and sworn as a witness by and on behalf of
4 the Defendants, took the stand and testified as follows:

5 THE WITNESS: My name is Daniel J. Hartmann,
6 H-a-r-t-m-a-n-n.

7 DIRECT EXAMINATION

8 BY MS. FALK:

9 Q And what is your address?

10 A Home address?

11 Q (nodded head up and down)

12 A 41 South Indiana Place, Golden, Colorado 80401.

13 Q What is your current employment?

14 A With Comerica Bank of Detroit.

15 Q How long have you been employed with Comerica
16 Bank?

17 A I think it's 12 years.

18 Q And what is your position?

19 A I'm first vice-president.

20 Q Describe your relationship with Comerica Bank
21 with Heritage Honda.

22 A Our formal relationship became -- or started,
23 I think it was June in 1987, and we provided floor plan
24 financing, a capitalization loan, or a term loan, and a
25 mortgage loan to Good Works partnership.

1 Q Describe what flooring is, the flooring loan is.

2 A Floor plan financing is when we provide financing
3 for the inventory that the dealer carries for retail sale.

4 Q Was the flooring line cross-collateralized with
5 any other loan?

6 A We had all the loans cross-collateralized. We
7 had -- of the three loans that we had in place, we had
8 Heritage Imports providing a secured guarantee to Good Works
9 partnership for a mortgage loan, so they were cross-
10 collateralized and cross-defaulted.

11 Q And did this exist in December of 1990?

12 A Yes.

13 MS. FALK: Your Honor, I'd ask that Exhibit 501,
14 Defendant's Exhibit 501, be received.

15 THE COURT: Is that one that's in the binder?

16 MS. FALK: That is, but I have an extra copy.

17 THE COURT: Well, I've got your binder right
18 here, and this is the original you're presenting here now?

19 MS. FALK: That's a -- yes, it's a copy of the
20 original.

21 THE COURT: Any objection to 501?

22 MR. ZUNDEL: None, Judge.

23 THE COURT: It's received.

24 Q (By Ms. Falk:) Mr. Hartmann, I've just handed you
25 what's been marked as Exhibit 501. Do you recognize that

1 document?

2 A Yes.

3 Q Is it part of Comerica's loan file?

4 A Yes.

5 Q What is it?

6 A It's a letter that was faxed to me on the same
7 date of the letter itself, December 18th, 1990, indicating
8 that the intention of Heritage Honda to move its new car
9 floor plan financing from Comerica Bank to Key Bank is written
10 and signed by Tony Kraatz.

11 Q When you received this letter, what did Comerica
12 do?

13 A Well, I made a number of attempts to try to contact
14 the customer regarding this. We considered this a very
15 grave occurrence because it is -- we are in the business to
16 provide new car floor plan financing, so the intention of
17 them to move their new car financing away from Comerica, we
18 considered very seriously and I made many attempts to reach
19 Bry Wilkinson by phone.

20 MR. ZUNDEL: Objection, Judge. The question's
21 now a narrative.

22 THE COURT: I believe the question was, what -- what
23 was the original question?

24 MS. FALK: What did Comerica do when it received
25 this letter.

1 THE COURT: All right. We're still in the process,
2 I presume, of telling us what you did in response to the
3 letter, sir. Go ahead.

4 THE WITNESS: That's correct. I made numerous
5 attempts to contact Bry Wilkinson and Tony Kraatz.

6 Q (By Ms. Falk:) I'm now handing you what's been
7 marked as Defendant's Exhibit 504. Do you recognize that
8 document?

9 A Yes.

10 MS. FALK: Your Honor, I ask that Exhibit 504 be
11 received.

12 MR. ZUNDEL: Your Honor, I'm going to make an
13 objection at this point, based on relevancy, simply because
14 of the time, beginning in 1990, '91, early '91. Mr. Kraatz
15 was terminated in mid-1992, and this simply doesn't seem
16 relevant.

17 MS. FALK: I think this is directly relevant,
18 your Honor.

19 THE COURT: Well, counsel, I concur. Part of the
20 issue here has to do with termination for cause or not, and
21 the dealing with Comerica and Key Bank was one of the items
22 delineated by Mr. Wilkinson. I believe it has relevance.

23 Now, I haven't had a chance to look at the actual
24 letter itself, that is, 504, but at least at this point
25 I'm going to make the preliminary determination that it is

1 relevant.

2 Go ahead.

3 Q (By Ms. Falk:) Did you send this letter to Mr.
4 Wilkinson?

5 A Yes.

6 Q Was the loan in default at the time you sent this
7 letter?

8 A Yes.

9 Q Was the loan -- did you notify -- is this the
10 letter that you notified Mr. Wilkinson the loan was in
11 default?

12 A This letter doesn't formally provide a notification
13 of default, but our loan agreements prohibit Key Bank from
14 filing on the assets of the company and in conjunction with
15 them taking over the floor plan from us, they filed on the
16 assets, and by them filing, it created an event of default.

17 Q Did this event of default cause a loan modifica-
18 tion agreement to be entered into?

19 A Yes.

20 Q Under the loan modification agreement, what were
21 the penalties?

22 A The penalties included raising the interest rate
23 on Good Works partnership mortgage one percentage point.
24 It included some extension fees. There is a significant
25 amount of legal expense incurred, and I think that was the

1 extent of the financial burden it placed upon the dealership.

2 MS. FALK: I have no further questions.

3 THE COURT: You may cross-examine.

4 MR. ZUNDEL: Thank you.

5 CROSS-EXAMINATION

6 BY MR. ZUNDEL:

7 Q Did you know that Heritage Honda had a used car
8 flooring line with Key Bank for \$800,000 which they had drawn
9 upon in 1989?

10 A I can't recall specifically, but I don't believe so.

11 Q You did not know that?

12 A I was not aware of it, I don't think.

13 Q If you had been aware of it, that would have been
14 an event of default?

15 A We would have -- not necessarily. If they'd asked
16 us for consent to do so and we provided consent, in fact,
17 we did do that.

18 Q Later, but I'm asking 1989, without consent,
19 that's an event of default, correct?

20 A That would be.

21 Q All right, and when did you find out that Key Bank
22 had the used car flooring line?

23 A I can't recall a specific time, but it was in
24 conjunction with opening the West Valley used car lot.

25 Q That would have been in late 1990?

1 THE COURT: Exhibit 504.

2 Q (By Mr. Zundel:) Who was present?

3 A Tony Kraatz, myself, Al Williams, and Bry Wilkinson.

4 Q And do you remember what was said?

5 A I can recall the general conversation, but no

6 specifics.

7 Q Did Mr. Kraatz say anything at all during that

8 meeting, that you recall?

9 A Very little.

10 Q Who did the talking?

11 A Primarily Al Williams and Bry Wilkinson.

12 Q And Mr. Wilkinson became very upset?

13 A Yes, he was agitated.

14 Q And he used foul language?

15 A He did.

16 Q And do you recall what he said?

17 A Not specifically.

18 Q Did he swear at you?

19 A I can't recall. I think he swore in general,

20 but not necessarily at me or Al Williams.

21 Q He threatened to sue the bank?

22 A He threatened to sue us if we caused harm to

23 Heritage Honda.

24 Q Now, Mr. Wilkinson was the primary decision-

25 maker at Heritage, as far as you could tell, as to what

1 went on with Comerica?

2 A I disagree.

3 Q Mr. Wilkinson had the signature authority on
4 Comerica's loans?

5 A That's correct.

6 Q He did the talking when you were in his presence?

7 A That conversation you're referring to is the
8 first time I'd met with Bry since Tony came on at the dealer-
9 ship. I had virtually no access to Bry while Tony was there
10 up until that conversation, so -- and this letter was signed
11 by Tony Kraatz, not Bry Wilkinson.

12 Q Well, the letter that you're referring to is signed
13 by Tony Kraatz, I suppose. Let me show you what's been
14 marked as Exhibit 266. It has already been received into
15 evidence. Do you see that letter?

16 A Yes.

17 Q Is that signed by Bry Wilkinson, correct?

18 A Correct.

19 Q And he told you that he didn't like what you were
20 doing, right?

21 A Correct.

22 Q And he again threatened to sue Comerica if
23 Comerica didn't do it his way?

24 A That's correct.

25 Q All right. Now, long before Tony Kraatz had arrived

1 THE COURT: And you chose, however, after having
2 done that, not to call him to this trial?

3 MR. ZUNDEL: I couldn't get him here. He's out
4 of state.

5 THE COURT: You made no effort, I presume, to
6 inquire about the compulsion process in a foreign state
7 potentially? You deposed him in a foreign state, I take it,
8 and you haven't sought to introduce his deposition.

9 MR. ZUNDEL: It hasn't been -- I haven't had a
10 chance. I haven't had a need to rebut anything yet, Judge.

11 THE COURT: Suffice it to say, counsel, I'm not
12 persuaded that by him now showing on the scene to testify
13 regarding limited matters, it therefore opens up the
14 opportunity that you may have, having made apparently no
15 effort through this Court, to have required his attendance
16 at the trial, or to use his deposition at this trial.

17 MR. ZUNDEL: I have his deposition here, Judge.

18 THE COURT: I am not prepared to rule that he
19 remain under order of this Court to allow you to make all
20 of these inquiries. Consequently, your request to order
21 him to stay is denied.

22 MR. ZUNDEL: Thank you, Judge.

23 THE COURT: All right, you bet. You're free to
24 go, sir. Thank you.

25 MS. FALK: Your Honor, I had one or two other

1 questions; may I ask of this witness?

2 THE COURT: Oh, well, okay. She wants to open it
3 up again. Sit tight.

4 REDIRECT EXAMINATION

5 BY MS. FALK:

6 Q Why do you disagree that Mr. Wilkinson was a prime
7 decision-maker on this matter?

8 A Well, when Tony Kraatz was hired by Heritage
9 Imports, I had a conversation with Bry Wilkinson prior to
10 meeting Tony, at which time Bry had indicated that Tony was
11 his man and that he had given Tony complete control and
12 responsibility for running the dealership, that he felt
13 very good about Tony's abilities to turn the dealership,
14 the operations around, which is the reason we downgraded
15 the loans is because of some operating losses, and then I
16 had a conversation with Tony Kraatz and he had confirmed those
17 same statements. In fact, Tony had indicated he even had
18 the ability to fire Bry's children if need be.

19 Q And who was your main contact during the time
20 before the January 11th --

21 A Exclusively with Tony Kraatz.

22 Q When -- just for clarification, when was the
23 flooring actually pulled?

24 MR. ZUNDEL: Objection, Judge, that's an ambiguous
25 question, since we've talked about new and used.

1 Q (By Ms. Falk:) The new flooring which related
2 to the letter of January 11th, January 22 and the loan
3 modification agreement.

4 A We -- actually, it was phased out over time. We
5 no longer accepted any new vehicles coming in inventory and
6 Key Bank took on the new inventory as it came in and as the
7 inventory we financed was sold, our loan was paid down, and
8 eventually we were -- I think the loan was completely --
9 the floor plan loan was completely paid out in late '91.

10 Q And the 1989 or 1990, early 1990, anything prior to
11 the December 18th letter have anything to do with the
12 default?

13 A No.

14 MS. FALK: No further questions.

15 MR. ZUNDEL: Your Honor, I think counsel has now
16 opened the door with that last question and other questions
17 to the relationship between Comerica and Heritage, anything
18 to do with the default.

19 THE COURT: Well, you may examine the witness
20 regarding what you perceive to have been the redirect.

21 RECROSS-EXAMINATION

22 BY MR. ZUNDEL:

23 Q Let me show you what has been marked as Exhibit
24 263.

25 MS. FALK: Which exhibit is this?

1 Q (By Mr. Zundel:) 263.
2 Do you recognize this document?
3 A Yes.
4 Q It contains your writing?
5 A Yes.
6 Q And you say there the additional debt for Heritage
7 Honda intended for St. George but drained working capital
8 from Murray; isn't that right?
9 A Correct.
10 Q And you note here that the Murray store was in
11 default for failure to meet your tangible net worth.
12 Excuse me. This is twelve ninety.
13 Let me show you what has been marked as Exhibit
14 260. This is your document, is it not?
15 A That's correct.
16 MS. FALK: Is 263 not in evidence?
17 MR. ZUNDEL: It is in evidence, your Honor, for
18 the issue of working capital being drained from the store.
19 I offered it for that purpose anyway.
20 THE COURT: Well, 263, having been referred to
21 here, under our preceding rule, is that it's deemed admitted
22 unless there's a specific objection to it, so it's received.
23 Q (By Mr. Zundel:) Thank you.
24 Looking at 260, Mr. Hartmann --
25 A Uh-huh (affirmative).

1 Q -- you note there that Heritage was in default
2 under the minimum tangible net worth calculations of Comerica
3 in May of 1990; isn't that right?
4 A Yes.
5 Q All right. Now, in calculating net worth, minimum
6 net worth, you exclude as assets anything owed to the
7 corporation by the owner/dealer, don't you?
8 A That's correct.
9 Q That's correct? Now, in November of 1990 -- let
10 me show you that financial statement. This is a portion of
11 Exhibit 265, Judge.
12 Are you familiar with Heritage's financial
13 statements?
14 A Yes.
15 Q You've reviewed them and analyzed them?
16 A In the past.
17 Q All right.
18 THE COURT: My 265 is a one-page document memo
19 regarding Good Works Heritage --
20 MR. ZUNDEL: I misread. It's 295, Judge.
21 THE COURT: 295?
22 MR. ZUNDEL: Yeah.
23 THE COURT: All right.
24 MR. ZUNDEL: I was looking at it upside down.
25 THE COURT: All right, go ahead.

1 MS. FALK: May I have a minute, your Honor?

2 THE COURT: You may.

3 MR. ZUNDEL: May I speak to this, your Honor?

4 I don't want to --

5 THE COURT: You may after she voir dices the
6 witness.

7 MR. ZUNDEL: All right. As another matter, your
8 Honor, just so time isn't wasted, counsel and I have agreed
9 that my expert, or that Dr. Schmitt, may remain in the
10 courtroom without any objection, to all of these witnesses.

11 THE COURT: Very well.

12 VOIR DIRE EXAMINATION

13 BY MS. FALK:

14 Q Mr. Hartmann, the November 1990 financial state-
15 ment which you've been shown doesn't -- does it have anything
16 to do with the reasons for the October 1991 loan modifica-
17 tion extension?

18 A In itself, no.

19 Q What was the main reason for the loan modifica-
20 tion extension agreement? What was the act that caused the
21 loan modification?

22 A The December 18th letter from Tony Kraatz to me.

23 MS. FALK: No further questions, your Honor.

24 MR. ZUNDEL: Your Honor, I think that's fine
25 redirect, but it's not proper voir dire as far as --

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

SEP 12 1996

By C. B. [Signature] Deputy Clerk

1
2
3 WILLIAM ANTHONY KRAATZ,
4 Plaintiff,
5 vs.
6 HERITAGE IMPORTS, a Utah
7 corporation dba Heritage
8 Honda, O. BRYAN WILKINSON,
9 and JEFF J. WILKINSON,
10 Defendants.)

Case No. CIV 930900312 CN
REPORTER'S TRANSCRIPT OF
CROSS-EXAMINATION OF LAWRENCE
MILLER BY MR. ZUNDEL ONLY
(PARTIAL TRANSCRIPT OF
TRIAL PROCEEDINGS)

11 REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE J. DENNIS FREDERICK
13 on Friday, August 30, 1996

14 APPEARANCES:

15 For the Plaintiff: MICHAEL N. ZUNDEL
16 Attorney at Law
17 JARDINE, LINEBAUGH & DUNN
18 370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

19 For the Defendants: DONALD J. WINDER
20 JENNIFER L. FALK
21 Attorneys at Law
22 WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
(801) 322-2222

23
24 ANNA M. BENNETT, CSR
25 License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

002070

1 obviously consider important, so I'll allow the witness to
2 respond to that question.

3 Q (By Mr. Zundel:) Your general managers don't have
4 to go out and try and finance their stores; you deal with
5 that at the home office, right?

6 A That is correct, but I have to say that I think
7 it's important to note my testimony the other day that this
8 dealership had about the same amount, actually, a little
9 bit more cash than our Toyota dealership has in Murray so
10 if -- I don't know why cash would have had to have been
11 chased in that store if it wasn't chased in our Toyota
12 store, which it wasn't, so the general manager has a lot of
13 control over cash management within the store that makes it
14 so he can maximize the float.

15 Q I suppose what I'm simply asking is -- let me
16 direct your attention to your exhibit -- or to your deposi-
17 tion, page 239.

18 Before I ask that, if a general manager has to
19 chase cash -- and what do you mean by chasing cash?

20 A Chasing cash is that he has to go out and find
21 ways to generate cash, cash contracts in the office which
22 should have been cashed anyway. Sometimes when it gets
23 detrimental is when you start wholesaling used cars because
24 then you're selling profit opportunities to raise cash.
25 That's chasing cash. Forcing early collection of receivables,

1 things of that nature.

2 Q Let me ask you, do you know that before Tony
3 Kraatz left that the bank was calling him fairly regularly,
4 telling him that unless he got cash in the bank before
5 eleven o'clock, they would bounce his checks?

6 A I don't know that specifically, but it doesn't
7 surprise me.

8 Q It doesn't surprise you from what you looked at
9 in the financial statement, correct? And that would be
10 chasing cash, right?

11 A That's correct.

12 Q And you don't -- your managers don't have to do
13 that because you supply them with all the cash they need,
14 right?

15 A Generally, that is correct.

16 Q And it would be a big distraction, it is a dis-
17 traction to a general manager if he gets a call at 8:30 in
18 the morning from the bank saying you'd better fill up this
19 bank account in the next two and a half hours or your
20 checks are going to bounce.

21 A If he gets that call, that's a distraction.

22 Q Might miss the sales meeting that morning, right?

23 A That I don't know.

24 Q And if that situation occurs, you'd call that
25 organization undercapitalized, right?

1 MR. WINDER: Now I'm going to object, Judge. We
2 didn't get into this area.

3 THE COURT: Sustained.

4 Q (By Mr. Zundel:) Okay. Now, let's go to the used
5 car lot. You mentioed that you took over this store and
6 you said if you've got the money to make a big splash,
7 I think you're talking about parts and service and other
8 things, and I wasn't sure the point you were making, but
9 it sounded like if you had the money, you could make it
10 run; is that what it was?

11 A I feel like -- I don't know if this is right. I
12 feel like I'm being led a little bit because I feel like
13 I've made the point that the store, in my opinion, had
14 enough cash to be successful where it was.

15 THE COURT: Well, let me explain that to you.
16 He's definitely trying to lead you. He's cross-examining
17 you and he's trying to get you to say what he wants you to
18 say.

19 THE WITNESS: I understand that, and I think I know
20 what he's trying to do, but I feel like if I just say yes,
21 that I'm concurring incorrectly.

22 THE COURT: Well, you give your answers as
23 honestly and truthfully as you're able, and if somebody
24 objects, then we'll deal with it at the time.

25 THE WITNESS: Okay, then, I'm going to expand a

1 little bit to understand. I think that chasing cash in that
2 dealership was going on and I think it was a distraction to
3 Tony in his performance as a GM, but I also think that the
4 resources were available had he maximized his day-to-day
5 cash flow opportunities like keeping deals moving through
6 the service contract -- or I'm sorry, through the finance
7 office, keeping --

8 MR. ZUNDEL: But just a minute, your Honor, this
9 is beyond the scope.

10 THE WITNESS: No, it's not.

11 THE COURT: No, counsel. Counsel, I consider this
12 an opportunity for the witness to explain his answer, and I
13 don't see anything out of order about it.

14 Do you have any further examination?

15 MR. ZUNDEL: Yes, Judge.

16 THE WITNESS: I didn't finish.

17 THE COURT: Oh, well, go ahead and finish.

18 THE WITNESS: I won't make it much longer, but
19 there are so many places in a dealership for cash to get
20 spread out, in contracts, in transit, in the business office,
21 in the finance office, in parts and service, receivables,
22 that to me, one of the main parts of the job description
23 of a general manager is to manage all those sources of cash
24 so that they stay current and liquid so that you don't have
25 to meet the daylight overdraft, so you don't have to get

1 that phone call from the bank that you described.

2 Now, clearly, there's a point where you have --
3 where the store is so cash deficient that it is out of the
4 general manager's hands and no matter how good he is at his
5 cash management sources, that he's going to get that call,
6 but in my opinion, that store had enough cash to never
7 have to have that call.

8 Q (By Mr. Zundel:) When? What is it that you're
9 talking about? It didn't have it in December.

10 A Yes, it did. In my opinion, it did because I
11 looked at the four months -- if you'll recall my testimony
12 the day before yesterday --

13 Q I see.

14 A -- I looked at the four months of September
15 through December to see how much cash that store had in it
16 and it had less in that period, as you asked me a question
17 I responded to, than it did when Tony was there, and I
18 looked at that store and at our Toyota store just down the
19 street for the same period and the Honda store had more
20 cash in it than the Toyota store did.

21 Q But nevertheless, the bank threatened to pull
22 the line and call the loans on the Honda store during that
23 same period, right?

24 A Because the cash in the store was not being
25 managed as effectively as it could have.

1 Q Now, Tony wasn't even there then, right?

2 A But he was getting the calls. He had more cash

3 when he was there than he did in the period I'm describing.

4 Q The period you're describing right now is from

5 September to December, right?

6 A Yes, sir, and it had less cash then than when Tony

7 was there, and it still had more than the Toyota store.

8 Q Now, the store wasn't ever called upon by the

9 bank, as far as it wasn't in the crisis before Tony

10 left, that it was in December; it hadn't gotten that bad,

11 right?

12 A I think it must have if he was getting the phone

13 calls you described.

14 Q Well, that's a different type of phone call, one

15 that says we're going to pull your loan, we've had enough,

16 and one, get us some cash in the bank, right?

17 A That's ture. That is a different type of call.

18 Q All right. Now, you took over the West Valley lot?

19 A Yes, sir.

20 Q And you made that -- you could see an opportunity

21 there, you bought real estate and you put more vehicles

22 on it, right?

23 A That is correct.

24 Q And you spent \$600,000 doing it, right?

25 A That would be approximately correct, yes.

1 Q And that 600,000, that wasn't in Tony's operation
2 to do, right?

3 A The 600,000 came in land and infrastructure, not
4 in vehicles. It didn't go into operating capital in the
5 store. It went into the physical facility.

6 Q Someone had to come up with \$600,000 and put it
7 into that piece of property to take full advantage of that
8 profit-making opportunity which you took advantage of, right?

9 A That is correct.

10 Q And Tony didn't have it when he was there to do
11 that, did he?

12 A No, Tony didn't have that, but I think that's
13 mixing apples and oranges.

14 Q Now, when you looked at this store, you didn't do
15 a complete audit of the books when you decided whether you
16 were going to buy it or not, deciding how much it was
17 worth, did you?

18 A That's correct.

19 Q You could look at it and just by category you
20 could see that some of the categories of expenses were out of
21 whack, right?

22 A My analysis of it was -- the answer to your
23 question is yes, I could see they were out of whack, some
24 of them.

25 Q And so you knew that there was an opportunity there

1 as a dealer that you could take advantage of and you could
2 value the store without doing a complete audit, correct?

3 A Yes, sir.

4 Q All right. Now, in December when you finalized
5 your deal with Bry Wilkinson, you had Heritage by the neck,
6 should we say; they needed you very badly.

7 A I'm sorry. I had Heritage by what?

8 Q You had Bry Wilkinson by the neck. His store was
9 going to go under. You could cut a very lucrative deal,
10 couldn't you?

11 A I suppose I could have.

12 Q And the deal that you did cut has been very
13 lucrative for you, hasn't it?

14 A It has been a good deal for me.

15 Q And you'd do it again, knowing what you know now?

16 A Yes, sir, I would.

17 Q All right. The person managing the cash primarily
18 in a dealership is not ultimately but primarily the
19 comptroller, office manager; isn't that right?

20 A The person for keeping track of it is the
21 comptroller. The person managing it, in my opinion, is the
22 general manager.

23 Q All right. The comptroller, however, has to do
24 his or her job properly and well and work well with the
25 general manager and get him the information he needs so he can

1 at the books of Heritage.

2 A Yes, sir.

3 Q What was your thinking in regard to that?

4 A Well, what we did was just took a look at what was
5 being charged as a dealership expense that we would not
6 have in starting over in the operation when we took it over
7 and we summarized -- excuse me -- what those were over a
8 year's period of time and assumed that we would operate the
9 store sithout those expenses.

10 Q But in making that assumption, does that change
11 your opinion as to whether or not the store could have been
12 profitable being run the way it was.

13 A It changed the degree of profitability, but I
14 felt the store could be profitable in either event. It would
15 just be a question of degree.

16 MR. WINDER: Okay, thank you. No further
17 questions.

18 MR. ZUNDEL: One other question.

19 RE CROSS-EXAMINATION

20 BY MR. ZUNDEL:

21 Q With respect to your opinion of Mr. Kraatz and
22 how you have some doubt, I just want to be clear that that
23 doubt has arisen since this lawsuit was started.

24 MR. WINDER: That was asked and answered, Judge.
25 It wasn't in my --

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH
~~FILED DISTRICT COURT~~
Third Judicial District

* * *

JAN 27 1997

WILLIAM ANTHONY KRAATZ,
Plaintiff,

By S. O'Neil
Deputy Clerk

vs.

HERITAGE IMPORTS,
O. BRYAN WILKINSON, and
JEFF J. WILKINSON,
Defendants.

REPORTER'S TRANSCRIPT OF
TRIAL PROCEEDINGS
(Volume II)

Civil No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Wednesday, August 28, 1996

For the Plaintiff:

MICHAEL N. ZUNDEL
JEFFERY J. DEVASHRAYEE
JARDINE, LINEBAUGH & DUNN
Attorneys at Law
370 East South Temple, #400
Salt Lake City, Utah 84111
532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
WINDER & HASLAM, P.C.
Attorneys at Law
175 West 200 South, #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, C.S.R.
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

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1 overdraft. Please explain.

2 A Well, basically, in any business you have something
3 I think we all understand called cash flow. The higher the
4 volume, the greater the float, I'll call it. My terminology
5 is there's -- I look at a thing called a natural float and a
6 controlled float. A dealership, these dealerships both run
7 in the 200 to 250 thousand -- I'm sorry, 200 to 250 retail
8 new and used combined per month. That kind of volume gener-
9 ally establishes the ability to run something between four
10 and six hundred thousand dollars negative general ledger,
11 negative cash in the store without having to go to a con-
12 trolled float, without having to hold checks longer than is
13 appropriate to hold them with the creditors.

14 Q And Mr. Miller, your Toyota operation during that
15 period of time was running successfully?

16 A That's correct.

17 MR. WINDER: I have no further questions.

18 THE COURT: Very well. Any redirect, Mr. Zundel?

19 MR. ZUNDEL: Yes, Judge.

20 REDIRECT EXAMINATION

21 BY MR. ZUNDEL:

22 Q Mr. Miller, I have just a couple of quick ques-
23 tions. Mr. Winter asked you what your opinion of the value
24 of the store was, and it was kind of vague to me. You said
25 you paid 3 million, 3.2 million, something like that for 60

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

* * *

JAN 27 1997

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS,
O. BRYAN WILKINSON, and
JEFF J. WILKINSON,

Defendants.

By S. Onih
Deputy Clerk

REPORTER'S TRANSCRIPT OF
TRIAL PROCEEDINGS
(Volume III)

Civil No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Thursday, August 29, 1996

For the Plaintiff:

MICHAEL N. ZUNDEL
JEFFERY J. DEVASHRAYEE
JARDINE, LINEBAUGH & DUNN
Attorneys at Law
370 East South Temple, #400
Salt Lake City, Utah 84111
532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
WINDER & HASLAM, P.C.
Attorneys at Law
175 West 200 South, #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, C.S.R.

License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

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1 Counsel. I think he's probing the foundation upon which this
2 expert has opined that the expenses were too high.

3 Overruled.

4 Go ahead.

5 Q (By Mr. Winder) Are you aware of that item?

6 A I don't remember that item, no.

7 Q And if you didn't remember the item, you would know
8 why there may be legal expenses in that range?

9 A For that year, that's right.

10 Q What else did you adjust?

11 A Advertising.

12 Q Okay. How much did you whack off advertising?

13 A At least a hundred thousand dollars a year.

14 Q A hundred thousand dollars a year?

15 A Yes.

16 Q Now, you've got an exhibit that deals with adver-
17 tising, tab 3. Let's talk about that for a minute. If
18 you'll turn to your nice bar chart, Advertising Expense per
19 New Unit Sold. Do you see that?

20 A Yes.

21 Q I have here for you an August of '92 -- I've
22 already got it marked, but I have a copy here and Ms. Falk
23 will get me a number for August of '92.

24 I'd like you to tell me how in '92 you made the
25 calculation of \$870 advertising expense per unit sold.

1 A This is -- my chart is for all of 1992 and this is
2 the August statement.

3 Q I understand, but this has the advertising expense
4 year-to-date on it, it has the units sold year-to-date on it,
5 doesn't it?

6 A Your question was where in this statement do I get
7 the 870? My answer is I didn't get it from this statement.
8 I could tell you what it would be from this statement, if
9 that's what you're asking me now, but I did not use the
10 August '92 to create this chart. I used December '92.

11 Q Well, maybe I'm a little bit confused, but in tab 1
12 and tab 2 you cut stuff off at August of '92 because
13 Mr. Kraatz left in September of '92, right?

14 A Yes.

15 Q And this one you ran through the year to December
16 of '92.

17 A Yes. One reason for going through the year is
18 because some of the expenses, advertising expenses, weren't
19 booked properly up through August. They were shown as pre-
20 paid expenses and by December those were bagged into the
21 right accounts, and so I had a more accurate number in
22 December. The number doesn't really matter that much but
23 you're welcome to recalculate it.

24 Q We'll do that. All right. So now the advertising
25 expense backing up to Exhibit 2, tab 1, the advertising

1 A Yes.

2 Q Would you tell the Judge why? I think you told
3 Mr. Winder, you saw it as a less risky investment. Why is
4 that?

5 A I believe there in the 1980's, early 1990's, the
6 Honda dealership was about as good an investment as you could
7 make, particularly in the car business, and I've given
8 speeches many times and I've always said I'd rather have my
9 money into a Honda dealership than put it in a mutual fund.
10 The expected rate of return on that investment is so good, we
11 used to use the term a license to steal with Honda dealer-
12 ship, that this would be a good investment. That's why
13 people were willing to pay a large premium, something like \$3
14 million to get it.

15 Q You were asked yesterday by Mr. Winder about the
16 dealership's used car sales and you were asked are you sure
17 that used car sales went up in 1992 as opposed to 1993,
18 Mr. Winder looking askance at whatever he had on his table.
19 Have you checked that out?

20 A I did. I was not sure yesterday and I went and
21 checked the numbers and 1992 was a significant increase in
22 number of used cars that Heritage sold. That was related to
23 the West Valley location which we just talked about, and used
24 car sales went up substantially in 1992.

25 Q Mr. Winder talked -- asked you about certain

1 A Yes.

2 Q Over your objection?

3 A No.

4 Q Mr. Kraatz wanted you to be in finance and insur-

5 ance so you could learn that department better, didn't he?

6 A He might have.

7 Q Didn't he tell you that?

8 A I don't remember what he said to go in there, but I

9 believe he said that you can learn this, yes.

10 Q But you said you would go only if it were for three

11 months and not longer.

12 A No, that's what he said.

13 Q He gave you that assurance, it would only be three

14 months?

15 A Yes.

16 Q Because you objected to going there?

17 A No.

18 Q Just offered that?

19 A Yes.

20 Q You asked to be transferred from F&I before that

21 three-month period expired.

22 A No.

23 Q Okay. Let me draw your attention to September of

24 1992. At that time you were subordinate to Mr. Kraatz, is

25 that right, before his termination?

1 end of August and September 11?

2 A Other than being the president and assuming those
3 responsibilities.

4 Q Did you keep that secret that you were president?

5 A No.

6 Q Did you tell anybody?

7 A I just said -- I believe that people knew.

8 Q Okay. Let me show you what's been marked as
9 Exhibit No. 5 and Exhibit No. 6. These are copies.

10 If the Court will indulge me, I'll show you my
11 copies.

12 THE COURT: Well, I have courtesy copies here.

13 MR. ZUNDEL: May I show the witness my copies while
14 I'm getting the original?

15 THE COURT: Yes, that's fine.

16 Q (By Mr. Zundel) Do you recognize those documents?

17 A Yes.

18 Q Do they bear your signature?

19 A Yes.

20 Q And they say that you -- that there was a reorgani-
21 zation effective September 16, right?

22 A They say it's dated December 16th. I don't know if
23 it has an effective date.

24 Q Was this document prepared on the day that you were
25 elected? It says, "Action by the Board of Directors. The

1 undersigned directors hereby elect -- " Woops. Excuse me.

2 Yes. "The undersigned, being all the directors of
3 Heritage Imports, hereby elect and appoint the following
4 individuals as officers of said corporation, said individuals
5 to replace the existing officers of the corporation and to
6 serve in their respective offices listed below until their
7 replacements are subsequently elected and acting. Dated this
8 16th day of September, 1992."

9 Isn't that when you became president?

10 A No.

11 Q Okay. Now, you prepared a schedule for Mr. Kraatz
12 to work which has been marked previously in this case as
13 Exhibit No. 1. It's probably there on the desk. It might be
14 easier for you to look at my copy.

15 You remember that document?

16 A Yes.

17 Q And you prepared this document at your father's
18 request; is that right?

19 A Correct.

20 Q Okay, and did you hear your father testify yester-
21 day -- well, you scheduled Mr. Kraatz to work every Saturday
22 during the month of September; is that right?

23 A It appears so.

24 Q Did you hear your father testify yesterday that he
25 didn't ask you to do that?

1 A I believe he said that not necessarily every
2 Saturday, but Saturdays.

3 Q But you scheduled Mr. Kraatz for every Saturday,
4 right?

5 A According to the schedule, yes.

6 Q Okay, and you handed this schedule to Mr. Kraatz
7 when?

8 A It would have been before it became effective, so
9 it would have had to be before this schedule started. I
10 can't tell you the date.

11 Q Before September 7th?

12 A I believe so. I don't remember the date that I
13 handed it to him.

14 Q Okay. Could have been September 7th?

15 A I don't remember the date.

16 Q I know, but you said it would have been before it
17 became effective.

18 A I assume so. I don't know. I don't remember the
19 date that I gave it to him.

20 Q So it could have been after September 7th?

21 A I said I don't remember.

22 THE COURT: Well, just a minute, just a minute.

23 Counsel, he's indicated, has he not, that he provided a copy
24 to the Plaintiff here before the effective date of the
25 schedule?

1 MR. ZUNDEL: But I think what he said, Judge, is
2 that he now can't remember, and I want to make it clear that
3 it could be either way, before or after the schedule was --

4 THE COURT: Well, hasn't he now twice indicated
5 that he can't remember? If it wasn't before, he can't remem-
6 ber when it was, even if it was or it wasn't before.

7 MR. ZUNDEL: Your Honor, I simply wanted to
8 clarify.

9 THE COURT: Well, you can ask him what date it was
10 to the best of his knowledge. Then let's move on.

11 Q (By Mr. Zundel) The question I have for you, sir,
12 is you're not certain that this was given to him before
13 September 7th or even on, it could have been after.

14 A I don't remember the date.

15 Q Okay. Now, you had never prepared a schedule for
16 Mr. Kraatz before this time, had you?

17 A Correct.

18 Q And in fact, you had prepared schedules before but
19 they were always for your subordinate salesmen.

20 A No.

21 Q Or equals.

22 A No.

23 Q All right, but you'd never prepared a schedule for
24 the general manager.

25 A Correct.

1 Q All right, and so when you handed this to
2 Mr. Kraatz, how did he respond?
3 A I told him that my dad wanted --
4 Q No. How, when you handed this to Mr. Kraatz, how
5 did Mr. Kraatz respond?
6 A He said it would not work.
7 Q Okay.
8 A That he can't work the schedule.
9 Q And did he tell you that he would prepare a
10 schedule for you?
11 A I believe he did.
12 Q And he actually did prepare such a schedule.
13 A I believe so.
14 Q And that's been previously admitted, I believe, as
15 Exhibit No. 2. May I look and see?
16 A Sure.
17 Q Is that right?
18 A I believe so.
19 Q And you refused to work his schedule; isn't that
20 right?
21 A No.
22 Q Well, let me refer you to your deposition tran-
23 script page 85. Do you see it? Beginning at line 2.
24 "Question: So you refused the schedule he had
25 given you?

1 Q How many times were you disciplined for playing
2 video games?

3 A I can only remember of Tony talking about it one
4 time.

5 Q How many times were you disciplined for looking at
6 papers, compensation plans?

7 A Once.

8 Q Where were those compensation plans when you looked
9 at them?

10 A They were left by Tony in the sales tower.

11 Q And where's the sales tower?

12 A It's at the front of the dealership. It's just
13 behind the receptionist. It's where all the sales managers
14 would work their dealers, receptionists, other employees come
15 in and out of there, sales people and so forth.

16 Q What did you do with those papers?

17 A They were left on the counter. As I sat down, I
18 picked them up, I looked at them, I scanned over them, real-
19 ized what they were, and I put them on Tony's desk.

20 Q Earlier you testified with Mr. Zundel that you were
21 put into F&I for training; is that correct?

22 A Yes.

23 Q Did Mr. Kraatz ever train you to be in the F&I
24 department?

25 A No.

1 Q Did he ever move you to the position of office
2 manager?
3 A No.
4 Q Parts manager?
5 A No.
6 Q Service manager?
7 A No.
8 Q So you received no training at any of those areas?
9 A That's correct.
10 Q Now, the schedules we've talked about as Exhibits 1
11 and 2, one of those you testified was prepared by you because
12 of your father asking you to; is that correct?
13 A Yes.
14 Q And what was your father at the time in terms of
15 Heritage Honda? Was he above the general manager?
16 A Yes.
17 Q Earlier Mr. Zundel asked you to read from your
18 deposition; do you recall that?
19 A Yes.
20 Q And he had you read from page 53 and 54. Would you
21 please turn to that? On page 54, line 13, do you see that?
22 A Yes.
23 Q I'm going to read the question and I would like you
24 to give the response.
25 A Okay.

1 Q "Did your father give you any assurances as to what
2 your position in the business would be?"

3 A "Not necessarily. He would never guarantee any of
4 us a position. That all of that was work related, that --
5 that business was well and that we performed. He wouldn't
6 keep any of us around if we didn't. So that being the fact,
7 that he did want me to work in the business with the eventual
8 goal that Tony was there to train us."

9 Q "Did he give you any assurances as to what Tony's
10 position in the business would be?"

11 A "No."

12 Q When you talked -- and have you seen Exhibit 31?

13 A Yes.

14 Q In that meeting or that -- Chuck Quinn had already
15 been let go; is that correct?

16 A That's correct.

17 Q Did you ever tell your father to fire Tony?

18 A No.

19 MS. FALK: No further questions.

20 THE COURT: All right. Is there anything further,
21 Mr. Zundel?

22 MR. ZUNDEL: Yes, your Honor. I'm looking for a
23 specific matter. May I have just a moment?

24 THE COURT: Yes.

25

1 it's probably the most in-depth, that something's going to
2 change."

3 Was that your answer at that time?

4 A Let me just read through this and --

5 THE COURT: Well, I presume, Counsel, unless there
6 is some indication of a change, it's clear that was his
7 answer.

8 MR. ZUNDEL: Yes, Judge. All right. Thank you.
9 No further questions.

10 THE COURT: Mr. Wilkinson, you may step down.
11 Thank you.

12 You now rest, Mr. Zundel?

13 MR. ZUNDEL: Yes, your Honor, with the exception I
14 would like to put in our affidavit of attorney's fees and
15 costs.

16 THE COURT: You may submit the affidavit.

17 MR. ZUNDEL: Thank you.

18 THE COURT: At this point, given the fact that the
19 Plaintiff has now rested, subject to the submission of the
20 affidavit involved, I think it's probably timely for me to
21 address the motion for reconsideration and the objection to
22 the order denying the motion to amend the Counterclaim.

23 My decision, having reviewed the memoranda both in
24 support of and in opposition to the motion to amend, will
25 remain the same, that is, I'm denying the reconsideration

1 request. Though I have reconsidered, I've come to the same
2 conclusion. It seemed to me, and I might state for the
3 record my rationale, the motion having been filed at the late
4 date that it was filed, the if not explicit, certainly
5 implicit, acknowledgement that there would need to be more
6 discovery accomplished by the offer, gentlemanly offer to
7 reopen the deposition scheduling, seemed to me to be an
8 acknowledgement that there was a need for, or well could be
9 the need for additional discovery.

10 Consequently, I am of the same view, that this
11 would please an undue, unfair burden on the Plaintiff to
12 address the issue at that late date. Consequently, the
13 request for reconsideration is denied. The order that has
14 been submitted to me denying, therefore, the motion for leave
15 to amend is executed on this date.

16 Now, if there are any legal matters, I'll hear
17 those now before we proceed with your witnesses, Mr. Winder.

18 MR. WINDER: There are, Judge. I'd like to, if I
19 may, approach the bench. I have our response to Defendants'
20 Request for Attorney Fees, an original and a courtesy copy.

21 THE COURT: Very well. Insofar as the attorney's
22 fee issue is concerned, it will be my approach to address
23 this matter post trial, that is, in my ruling I will make a
24 decision as to whether or not fees are awardable. If the
25 are, then I will grant an opportunity to challenge the

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

* * *

JAN 27 1997

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS,
O. BRYAN WILKINSON, and
JEFF J. WILKINSON,

Defendants.

By S. Smith
Deputy Clerk

REPORTER'S TRANSCRIPT OF
TRIAL PROCEEDINGS
(Volume IV)

Civil No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, August 30, 1996

For the Plaintiff:

MICHAEL N. ZUNDEL
JEFFERY J. DEVASHRAYEE
JARDINE, LINEBAUGH & DUNN
Attorneys at Law
370 East South Temple, #400
Salt Lake City, Utah 84111
532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
WINDER & HASLAM, P.C.
Attorneys at Law
175 West 200 South, #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, C.S.R.
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

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1 a, quote, unquote, no-cut contract?

2 A No.

3 Q Have you ever heard Bry say that Tony Kraatz had a
4 no-cut contract?

5 A No.

6 Q Describe for the Court your morale at Heritage
7 Honda as an employee before Tony Kraatz was general manager.

8 MR. ZUNDEL: Objection, Judge. Question is vague.
9 The relevance of the morale before Tony Kraatz was general
10 manager is not relevant and this witness is -- I'd like to
11 voir dire the witness as to whether or not he's -- what his
12 position was then, whether he's competent to testify to this
13 issue.

14 THE COURT: Well, as to the issue of relevance, at
15 this point the question of the morale having been adversely
16 affected while the Plaintiff was at the business has been
17 raised. Consequently, I believe if there's sufficient foun-
18 dation for it, it may well be pertinent and germane to the
19 issues.

20 As to the question of foundation, if you wish to
21 voir dire the witness in that regard, you may do so.

22 MR. ZUNDEL: Thank you, Judge.

23 THE COURT: All right.

24 *

25 *

1 A Yes, sir.

2 Q Now, you were never the service manager at Heritage
3 while Mr. Kraatz was there, were you?

4 A No, sir.

5 Q You were always an advisor or something else below
6 Mr. Broughton; isn't that right?

7 A Yes.

8 Q All right. And how old were you at the time in
9 1990, sir?

10 A Twenty -- I would have been 24.

11 Q Okay. How long had you been with Heritage at the
12 time?

13 A 1990 would have been five years.

14 Q You hadn't had any other experience then anyplace
15 else as a service advisor?

16 A No, sir.

17 Q You'd never been a general manager?

18 A No, sir.

19 Q Never been a service manager?

20 A No, sir.

21 MR. ZUNDEL: No further questions, Judge.

22 THE COURT: All right, Ms. Falk, you may continue.

23 DIRECT EXAMINATION RESUMED

24 BY MS. FALK:

25 Q What was your morale as an employee at Heritage

1 Honda before Tony was general manager?

2 MR. ZUNDEL: Objection, Judge. This man's morale
3 is not relevant.

4 THE COURT: I believe it is, Counsel. I'm going to
5 allow him to testify.

6 THE WITNESS: The morale beforehand was good, yes.

7 Q (By Ms. Falk) What was your morale during the time
8 that Tony Kraatz was general manager?

9 A It slowly went downhill.

10 MS. FALK: No further questions.

11 THE COURT: All right. If there's nothing further
12 -- do you have any examination of the witness at this point?

13 MR. ZUNDEL: No, Judge.

14 THE COURT: All right. Mr. Nicholes, then, you may
15 step down. You're free to go. Thank you.

16 Call your next witness.

17 MR. WINDER: And our last witness, Judge, we'll
18 call Larry Miller. If I might have a moment, he's in the
19 hallway.

20 THE COURT: Mr. Miller, you're already under oath,
21 sir, if you'd just take the stand. Thank you.

22 LAWRENCE WARREN MILLER,
23 having been previously sworn, resumed the stand and testified
24 further as follows:

25 *

SEP 23 1996

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS ET AL,

Defendants.

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT
OF JUDGE'S RULING

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

Friday, September 20, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
532-5700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
535-5203

1 a preponderance the following.

2 Heritage is a Utah corporation, and during the
3 pertinent time frame was owned essentially by Bryan
4 Wilkinson, except for eight percent of the stock owned by
5 his four children. It had for years operated a Honda
6 automobile dealership located in Murray, Utah. The opera-
7 tion was essentially a family run business with Bry
8 Wilkinson functioning as the owner and at least three of
9 his four children and his son-in-law working for the
10 corporation.

11 During the time frame of 1989 to 1990 the long-
12 time general manager of Heritage left to go to California.
13 Bry Wilkinson commenced negotiations with the plaintiff to
14 become the new general manager. These negotiations
15 culminated in the execution on May 31 of 1990 of the
16 employment agreement, Exhibit 38. The principal thrust of
17 the negotiations was that the dealership must return to
18 profitability. The owner's children were to be trained
19 in management duties to ultimately assume control, and the
20 plaintiff would be the day-to-day manager of the business
21 and allow Bry Wilkinson to semi-retire, in exchange for
22 which the plaintiff was to receive considerable remunera-
23 tion.

24 Plaintiff had been part owner and general manager
25 of a dealership in St. George, Utah, but was dissatisfied

1 and was looking for a lucrative management position, even
2 if it necessitated a move to Salt Lake, and even if it
3 entailed moving into a general manager position of
4 authority over children of the owner who were stockholders,
5 directors and management personnel in their own right of
6 the corporation.

7 Plaintiff, before executing the contract of
8 employment, which defined the relationship, was given
9 access to the financial data of the corporation and
10 represented to Wilkinson he had the requisite experience,
11 skills and abilities to make the corporation profitable.
12 Indeed, he said, during the negotiations with Wilkinson,
13 he could turn the operation around and make one million
14 dollars per year, that the gross margin per car received
15 was low and he could increase it.

16 Plaintiff was to devote his best skill full-time
17 to the business. During the plaintiff's tenure from June 1
18 of '90 through 9-11 of '92 he enjoyed or engaged in the
19 following significant activities.

20 He demoted Jeff Wilkinson twice. He refused to
21 comply with a work schedule Jeff had prepared, Exhibit 1,
22 at the direction of the owner, Bry Wilkinson. Plaintiff's
23 claim that his hands were tied because of under capitaliza-
24 tion was not established by the evidence. Indeed,
25 plaintiff's expert - or defendant's expert Larry Miller

1 persuasively testified that his examination of the
2 corporate financials indicated that the dealership was
3 not undercapitalized.

4 The plaintiff threatened the owner's son with
5 termination. He failed to properly train the owner's
6 children and indeed, created severe resistance to his
7 control. The plaintiff refused to work Saturdays and
8 evenings when his visibility was required as it inter-
9 fered with his personal activities. Profitability
10 continued to lag and was discussed each 30 days at the
11 accountability meetings. Plaintiff allowed at least on
12 one occasion against company policy for a title to be
13 distributed without payment. He manipulated and/or
14 modified the balance sheet by disguising the age of
15 inventory units which should have been returned and/or
16 sold but were not.

17 Some of his purchases at auction were disadvan-
18 tageous to the corporation. Some customers complained
19 that the general manager was unavailable or would not talk
20 to them. Morale problems were created as the plaintiff
21 was unable to bring together the so-called management
22 team. The plaintiff unilaterally switched banks which
23 strained Heritage's relationship with its long-time
24 lender Comerica, resulting in additional payment of
25 monies, some \$114,000, to reestablish the relationship.

1 The corporate net worth declined to approximately
2 one-half from June 1 of '90 to August of '92. The gross
3 income per unit declined during the same period. The
4 plaintiff did not take advantage of opportunities to
5 exploit cash available and thus failed to manage the
6 business cash. The store should have generated profits
7 as plaintiff represented at the outset that it would, but
8 it did not. Compare Exhibits 208 and 333.

9 On September 11, 1992, Bry Wilkinson told plaintiff
10 he wanted his resignation due to lack of profitability and
11 the failure to train the kids and plaintiff's lack of
12 candor in certain accounting activities. Bryan Wilkinson
13 sent a letter of termination, Exhibit 64, at the plaintiff's
14 request.

15 This Court is of the view that plaintiff's
16 termination was for cause contemplated by clauses B and C
17 of paragraph 2.1 of Exhibit 38. The evidence fails to
18 support plaintiff's claims and this Court finds no cause of
19 action on his Complaint.

20 Mr. Winder, the Findings of Fact, Conclusions of
21 Law that you have submitted will be designated as received.
22 In addition, though, I want you to submit to this Court a
23 judgment and we will proceed under the language of Rule
24 4-504 of the Code of Judicial Administration, and the
25 Findings will be deemed received no earlier than today to

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,)

Plaintiff,)

vs.)

Civil No. 930900312CN

HERITAGE IMPORTS, a Utah)

corporation, dba HERITAGE)

HONDA, O. BRYAN WILKINSON,)

and JEFF J. WILKINSON,)

Defendants.)

Honorable J. Dennis Frederick

DEPOSITION OF ORAL BRYAN WILKINSON, Volume II

April 6, 1994

(Pages 84 through 246)

Reported by AMY STOLTENBERG, CSR, RPR
Utah CSR License 347

Kingsbury and Associates Certified Shorthand Reporters

1 work.

2 Q Tell me everything you recall about the telephone
3 conversation.

4 A I just remember we had had a reorganization, I
5 think, in the organization of the business in late summer of
6 '92 wherein J.J. was named President, and I was the Chairman
7 of the Board. I think I directed J.J. to make a schedule out
8 that slotted Tony a couple nights a week and on Saturdays.

9 Q You told J.J. to make a schedule up and slot Tony
10 for a couple of nights a week?

11 A I did. I did.

12 Q Did he do that to your knowledge?

13 A Yes, he did.

14 Q Okay. What happened as far as you know?

15 A The best of my recollection is that Tony redid the
16 schedule and changed the periods of time that he was
17 originally slotted to work.

18 Q Was the telephone conversation that you had with
19 J.J. before or after he prepared the schedule?

20 A Before or after who prepared it?

21 Q J.J. prepared the schedule.

22 A Well, I would assume it was before --

23 Q The telephone conversation was your direction --

24 A -- because I asked him to make the schedule.

25 Q On the telephone?

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah
corporation, dba HERITAGE
HONDA, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.

Civil No. 930900312CN

Hon. J. Dennis Frederick

DEPOSITION OF ORAL BRYAN WILKINSON, Volume V

May 12, 1994

Book 1 of 2 - Transcript Only
(Pages 521 through 690)

Reported by SUSAN WILCOX KINGSBURY, CSR, RPR
Utah CSR License 96, California License 2758

Kingsbury and Associates Certified Shorthand Reporters

1 Did the conversation that Mr. Kraatz writes
2 about, in fact, take place?

3 A. It did, but not exactly -- I don't remember
4 it exactly as he's written about it. But the dates and
5 times are right.

6 Q. Let's just take it one line at a time. And
7 I'd ask you to tell me whether or not the statement is
8 accurate in your view.

9 A. On which page?

10 Q. On 054600.

11 A. No, not totally.

12 Q. We're going to take it one line at a time.

13 Meeting with Bry and Helen. Bry asked for
14 my resignation stating he no longer could be in
15 the middle of his kids and me.

16 Is that statement true?

17 A. No. I -- We had the meeting, and Helen was
18 there, and I asked for his resignation.

19 And he said "If you want me to leave, I'll
20 leave."

21 Q. Did you state that you could no longer be in
22 the middle of your kids and Mr. Kraatz?

23 A. I don't think it was put that way, no.

24 Q. Continuing:

25 He asked me several times to resign. Said

Exhibit F

96 APR 18 AM 8:59

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY _____
DEPUTY CLERK

[illegible]

Judge J. Dennis Frederick

DATED this 9th day of April, 1996.

[illegible]

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct copy of the foregoing Motion for Leave to Amend Answer to Assert Counterclaim to be mailed, postage prepaid, this 9th day of April, 1996, to:

Attorneys for Plaintiff:

Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290

1 up 2 Falk

FILED
DISTRICT COURT

96 APR 18 AM 8:59

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY _____
DEPUTY CLERK

Donald J. Winder (#3519)
Dennis V. Haslam (#1408)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
Plaintiff,	)	LEAVE TO AMEND ANSWER TO
	)	ASSERT COUNTERCLAIM
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage	)	Civil No. 930900312CN
Honda, O. BRYAN WILKINSON,)	
and JEFF J. WILKINSON,	)	Judge J. Dennis Frederick
)	
Defendants.)	

Defendants, by and through their counsel of record,
submit this Memorandum in support of their Motion for Leave to
Amend Answer to Assert Counterclaim.

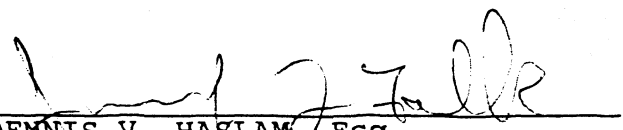
On March 22, 1993, Defendants filed an Answer to
Plaintiff's Complaint. At that time, Defendants were represented
other counsel. In their Answer, Defendants assert they are
entitled to recover reasonable attorney's fees pursuant to Utah
Code Ann. § 78-27-56. At this point, however, Defendants wish to
amend their Answer to assert a counterclaim to recover attorneys'
fees pursuant to the employment agreement between Defendant
Heritage Honda and Plaintiff Tony Kraatz. Utah R. Civ. P. 15(a)
provides that leave to amend "shall be freely given when justice

000839

so requires." In this case, Plaintiff has been aware since the commencement of this lawsuit that the prevailing party is entitled to recover fees. The Plaintiff will not be prejudiced by allowing Defendants to amend their Answer to assert a counterclaim for attorneys' fees under the contract. A copy of the proposed Amended Answer and Counterclaim is attached hereto as Exhibit "A".

For these reasons, Defendants' Motion for Leave to Amend their Answer to Assert a Counterclaim should be granted.

DATED this 16th day of April, 1996.


DENNIS V. HASLAM, Esq.
JENNIFER L. FALK, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct copy of the foregoing Defendants' Memorandum in Support of their Motion for Leave to Amend Answer to Assert Counterclaim to be mailed, postage prepaid, this 16th day of April, 1996, to:

Attorneys for Plaintiff:
Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290

Donald J. Winder (#3519)
Dennis V. Haslam (#1408)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

FILED
DISTRICT COURT
96 APR 18 AM 8:59
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY _____
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff,	)	AMENDED ANSWER AND
	)	COUNTERCLAIM
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage	)	Civil No. 930900312CN
Honda, O. BRYAN WILKINSON,)	
and JEFF J. WILKINSON,	)	Judge J. Dennis Frederick
)	
Defendants.)	

Defendants answer plaintiff's Complaint:

1. Defendants admit the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 14 and 18.

2. In response to Paragraph 8, defendants admit that on May 31, 1990, plaintiff and Heritage executed an employment agreement, a copy of which is attached as Exhibit A to the Complaint. The defendants deny the remaining allegations of Paragraph 8.

3. Defendants deny the allegations of Paragraphs 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,

000841

EXHIBIT "A"

44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66.

FIRST AFFIRMATIVE DEFENSE

Plaintiff misrepresented his skills, personalities, traits, and management skills, thereby inducing Heritage into executing the agreement.

SECOND AFFIRMATIVE DEFENSE

Plaintiff was terminated for fraud, dishonesty, and his inability to competently manage Heritage.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims against O. Bryan Wilkinson and Jeff Wilkinson lack merit, are not well-grounded in fact, are brought in bad faith, and are asserted to harass and needlessly increase the cost of litigation.

FOURTH AFFIRMATIVE DEFENSE

Defendants are entitled to recover reasonable attorney's fees from the plaintiff pursuant to Utah Code Ann. § 78-27-56.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff may not recover for damages he fails to mitigate.

SIXTH AFFIRMATIVE DEFENSE

Defendants deny the allegations stated to the extent set forth in the Counterclaim herein.

COUNTERCLAIM

Defendants counterclaim of Plaintiff and allege as follows:

1. Defendants re-allege and incorporate paragraphs 1-66 of their Answer as if fully set forth herein.

2. In or about May of 1990, defendant Heritage Honda entered into an employment agreement with Plaintiff (the "Agreement"). A copy of the Agreement is attached to Plaintiff's Complaint.

3. Paragraph 5.6 of the Agreement provides the defaulting party shall pay all expenses and costs incurred by the others parties in enforcing the terms of the Agreement, including costs, reasonable attorney's fees and expert witness fees.

4. Plaintiff has defaulted in the performance of the Employment Agreement, and Defendants (or one or more of them) are entitled to its costs, fees and expert witness fees pursuant to the terms of the Agreement.

WHEREFORE, Defendants pray for costs of this action, for attorneys' fees pursuant to the Agreement and to Utah Code Ann. § 78-27-56, and for such other and further relief as the Court deems just and proper.

DATED this _____ day of April, 1996.

DENNIS V. HASLAM, Esq.
JENNIFER L. FALK, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct
copy of the foregoing Amended Answer and Counterclaim to be
mailed, postage prepaid, this _____ day of April, 1996, to:

Attorneys for Plaintiff:

Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290

Donald J. Winder (#3519)
Dennis V. Haslam (#1408)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

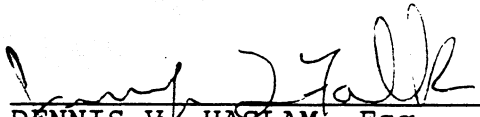
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff,	)	AMENDED MOTION FOR LEAVE
	)	TO AMEND ANSWER AND TO
vs.	)	ASSERT COUNTERCLAIM
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage	)	Civil No. 930900312CN
Honda, O. BRYAN WILKINSON,)	
and JEFF J. WILKINSON,	)	Judge J. Dennis Frederick
)	
Defendants.)	

Defendants, by and through their attorneys of record, submit this Amended Motion for Leave to Amend Answer and to Assert Counterclaim, pursuant to Utah R. Civ. Pro 13 and 15. The basis for this Motion, as more fully set forth in the supporting Memorandum and Reply Memorandum, is that Defendants wish to amend their Answer and to assert a Counterclaim for attorneys' fees pursuant to the provisions of the employment agreement. Plaintiff will not be prejudiced by the granting of Defendants' Amended Motion.

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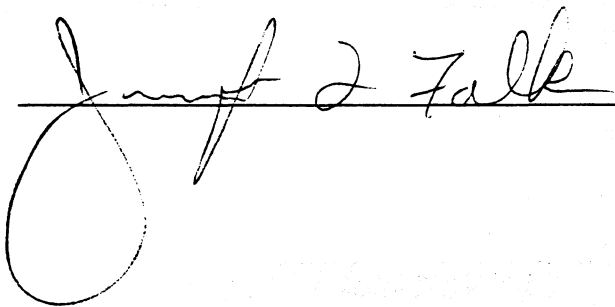
DATED this 6th day of May, 1996.


DENNIS W. HASLAM, Esq.
JENNIFER L. FALK, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct copy of the foregoing Amended Motion for Leave to Amend Answer and to Assert Counterclaim to be mailed, postage prepaid, this 6th day of May, 1996, to:

Attorneys for Plaintiff:
Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290



FILED
DISTRICT COURT

56 APR 26 PM 5:54

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY [Signature]
DEPUTY CLERK

Kent B Linebaugh (#1967)
Michael N. Zundel (#3755)
Jeffery J. Devashrayee (#6209)
JARDINE, LINEBAUGH & DUNN
A Professional Corporation
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah corporation
dba Heritage Honda, O. BRYAN
WILKINSON, and JEFF J. WILKINSON,

Defendants.

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR LEAVE TO AMEND
ANSWER TO ASSERT COUNTERCLAIM**

Civil No. 930900312CN
(Judge J. Dennis Frederick)

Plaintiff William Anthony Kraatz, by and through his counsel of record, hereby submits the following Memorandum in opposition to Defendants' Motion for Leave to Amend Answer to Assert Counterclaim.

ARGUMENT

In considering a motion to amend, three factors are relevant: (1) the timeliness of the motion; (2) the moving party's reason for the delay; and (3) the resulting prejudice to the responding party. Mountain America Credit Union v. McClellan, 854 P.2d 590, 592

000854

(Utah App. 1993); Hill v. State Farm Mutual Auto Insurance Co., 829 P.2d 142 (Utah App. 1992); Tripp v. Vaughn, 746 P.2d 794 (Utah App. 1987).

A. TIMELINESS OF THE MOTION

This action was begun more than three years ago on January 15, 1993. Defendants' answer was filed on March 22, 1993. Defendants give no explanation in their motion or memorandum for the delay in asserting the counterclaim they propose. A court does not abuse its discretion in denying a motion to amend "where the plaintiff was unable to state an adequate reason for the untimely motion." Tripp at 794 (discussing Girard v. Appleby, 660 P.2d 245 (Utah 1983)). Defendants state in their memorandum simply that they "wish to amend their answer to assert a counterclaim" and refer to the liberal policy behind Rule 15, Utah Rules of Civil Procedure. Defendants' motion is actually governed by Rule 13, Utah Rules of Civil Procedure. The motion should be denied for Defendants' failure to address the untimeliness of the motion.

B. PREJUDICE TO PLAINTIFF

Defendants' counterclaim is based upon paragraph 5.6 of the employment agreement which, according to Defendants' proposed counterclaim, "provides that the defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms of the agreement, including costs, reasonable attorney's fees and expert witness fees."

Defendants' counterclaim does not indicate how Plaintiff is in default of the agreement such as would entitle Defendants to attorney's fees. Thus, additional discovery on this issue will be required if Defendants' motion is granted. The Court has ordered that

discovery be completed on June 1, 1990. This does not give Plaintiff adequate time to conduct discovery on this issue.

Depositions of all of the Defendants have already been completed by Plaintiff. It will be time consuming and expensive to reopen the depositions of the Defendants regarding the new issue of Plaintiff's unarticulated default and which provision under the employment agreement Defendants wish to enforce by their counterclaim.

C. THE AMENDMENT IS FUTILE

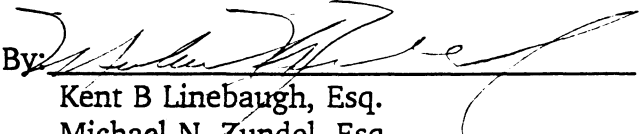
Defendants wish to treat paragraph 5.6 of the employment agreement as though it were a "prevailing party" clause entitling Defendants to attorney's fees if they defeat Plaintiff's claims. Paragraph 5.6 simply does not grant Defendants the right of recovery of attorney's fees if they merely defeat Plaintiff's claims in this action. Rather, a party seeking attorney's fees under paragraph 5.6 of the employment agreement must show that the other party is in default and that litigation is required to enforce the term of the agreement breached. No such relief is requested by Defendants.

CONCLUSION

Defendants' motion is actually misidentified as a motion to amend answer. In reality, Defendants' motion is a motion to add an omitted compulsory counterclaim under Rule 13, Utah Rules of Civil Procedure. Because Defendants have failed to properly or satisfactorily meet their burden in connection with such a motion, the motion should be denied.

DATED this 26th day of April, 1996.

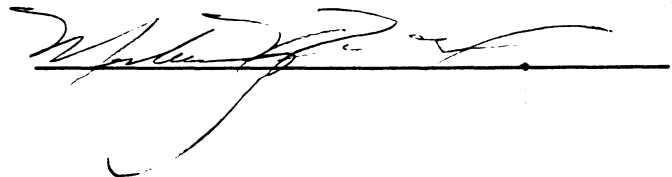
JARDINE, LINEBAUGH & DUNN
A Professional Corporation

By: 
Kent B Linebaugh, Esq.
Michael N. Zundel, Esq.
Jeffery J. Devashrayee, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 1996, I served the foregoing
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE
TO AMEND ANSWER TO ASSERT COUNTERCLAIM by causing a true and correct copy
thereof to be mailed, by first-class United States mail, postage prepaid, to the following:

Dennis V. Haslam, Esq.
Jennifer L. Falk, Esq.
Winder & Haslam
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668



DONALD J. WINDER (#3519)
DENNIS V. HASLAM (#1408)
JENNIFER L. FALK (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,	)	DEFENDANTS' REPLY
	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR LEAVE TO
Plaintiff,	)	AMEND ANSWER AND TO
	)	ASSERT COUNTERCLAIM
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage	)	Civil No. 930900312CN
Honda, O. BRYAN WILKINSON,)	
and JEFF J. WILKINSON,)	
)	
Defendants.	)	Judge J. Dennis Frederick

Defendants, by and through their counsel of record,
submit this Reply Memorandum in support of their Motion for Leave
to Amend Answer and to Assert Counterclaim.

INTRODUCTION

Plaintiff correctly points out that Utah R. Civ. P. 13,
as well as Utah R. Civ. P. 15, governs Defendants' Motion seeking

to file an Amended Answer and to assert a counterclaim for fees.¹ In order to rectify this omission, Defendants have submitted an Amended Motion For Leave to Amend Answer and to Assert Counterclaim (emphasis added), a copy of which is attached as Exhibit "A".

In light of this modification, there is no basis for Plaintiff's objection to Defendants' Motion. Defendants' Motion is timely, and will not cause prejudice to Plaintiff. Defendants' Motion should thus be granted.²

ARGUMENT

Plaintiff argues Defendants' Motion should be denied because it is untimely and will prejudice Plaintiff. Yet Plaintiff fails to point to any evidence in support of either of these claims. Plaintiff has been put on notice since the filing of the original Answer that Defendants are claiming attorney fees. Defendants' purpose in filing the Counterclaim is to clearly state that Defendants' claim for fees includes a right to fees under the Employment Agreement as well as under the statute, and

¹ Utah R. Civ. P. 13(e) states in relevant part: When a party fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may, by leave of court, set up the Counterclaim by Amendment."

²Due to the untimely filing of Plaintiff's objection, Defendants have already submitted to the Court a Notice to Submit for decision and proposed Order.

to eliminate any confusion in conforming the pleadings to the evidence at trial pursuant to Utah R. Civ. P. 15(b).³

Utah R. Civ. P. 15 "should be interpreted liberally so as to allow parties to have their claims fully adjudicated." Timms v. Dewsnap, 851 P.2d 1178, 1183 (Utah 1993). Rule 15 is only limited when the party opposing the amendment does not have adequate opportunity to respond. Id. In this case, Plaintiff will not be prejudiced because he has already conducted discovery on the issue of how Plaintiff defaulted under the Employment Agreement. For example, in April and May of 1994, during the five-day deposition of Defendant O. Bryan Wilkinson, Plaintiff's counsel asked several questions on how Wilkinson contended Plaintiff Kraatz breached, or defaulted, under the contract. See Deposition of O. Bryan Wilkinson, pages 127-178, 199-205, 213-216, 249, 318-320, 376-378, 416-431 and 444-448.

Nor is timeliness an issue preventing amendment, because even if Plaintiff could demonstrate he has not already fully discovered this issue, he still has thirty days in which to conduct discovery, and no trial date has been set. Furthermore, as stated in a recent letter to Plaintiff's counsel, Defendants are willing to cooperate with Plaintiff should he feel the need

³See Pasker, Gould, Ames & Weaver v. Morse, 887 P.2d 872, 875 (Utah App. 1994), court did not abuse its discretion by tacitly amending pleadings at trial to admitting evidence of work completed on phase of contract not pled in complaint.

to reopen any deposition to further explore the default of Plaintiff under the contract.⁴

The cases cited by Plaintiff in which the court denied a motion to amend are not on point. In Mountain America Credit Union v. McClellan, 854 P.2d 590, 592-93 (Utah App. 1993), for example, the defendant did not seek leave to amend until over a year and a half had passed after the court had granted judgment on the pleadings. In Hill v. State Farm Mutual Auto Insurance Company, 829 P.2d 142, 149 (Utah App. 1992), the Plaintiffs sought to amend their complaint "to inject a new and different cause of action" in the case six years after litigation commenced. In Tripp v. Vaughn, 746 P.2d 794, 797 (Utah App. 1987), the defendants sought to file a counterclaim to bring in a third-party defendant only two weeks before trial, which plaintiffs were able to demonstrate would prejudice them, and in Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983), the plaintiff sought to amend its complaint to introduce new and different causes of action on the morning of trial.


In contrast to the cases cited by Plaintiff, there is no prejudice in allowing Defendants to amend their Answer and assert a Counterclaim. Defendants are not seeking to add a new and different cause of action at the last minute; Plaintiff has known all along of Defendants' claim for fees, and have conducted discovery as to Plaintiff's default under the Agreement. Discovery cut-off is not until June 2, 1996, and Defendants are willing

⁴A copy of the letter is attached as Exhibit "B".

to cooperate with Plaintiff as to any further necessary discovery on this issue.

In light of this, Defendants' Motion for Leave to Amend and to Assert Counterclaim should be granted, and Defendants given leave to file their Amended Answer and Counterclaim asserting fees under the Agreement.

DATED this 6th day of May, 1996.


DENNIS V. HASLAM, Esq.
JENNIFER L. FALK, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct copy of the foregoing Defendants' Reply Memorandum in Support of their Motion for Leave to Amend Answer to Assert Counterclaim to be mailed, postage prepaid, this 6th day of May, 1996, to:

Attorneys for Plaintiff:

Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290

Donald J. Winder (#3519)
Dennis V. Haslam (#1408)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
Attorneys for Defendants
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff,	)	AMENDED MOTION FOR LEAVE
	)	TO AMEND ANSWER AND TO
vs.	)	ASSERT COUNTERCLAIM
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage)	
Honda, O. BRYAN WILKINSON,	)	Civil No. 930900312CN
and JEFF J. WILKINSON,)	
	)	Judge J. Dennis Frederick
Defendants.)	


Defendants, by and through their attorneys of record, submit this Amended Motion for Leave to Amend Answer and to Assert Counterclaim, pursuant to Utah R. Civ. Pro 13 and 15. The basis for this Motion, as more fully set forth in the supporting Memorandum and Reply Memorandum, is that Defendants wish to amend their Answer and to assert a Counterclaim for attorneys' fees pursuant to the provisions of the employment agreement. Plaintiff will not be prejudiced by the granting of Defendants' Amended Motion.

000871

EXHIBIT

"A"

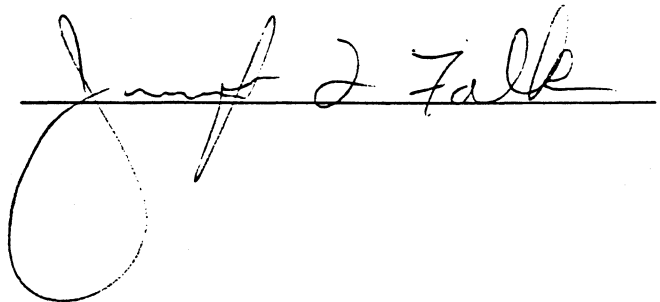
DATED this 6th day of May, 1996.


DENNIS W. HASLAM, Esq.
JENNIFER L. FALK, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a I caused a true and correct copy of the foregoing Amended Motion for Leave to Amend Answer and to Assert Counterclaim to be mailed, postage prepaid, this 6th day of May, 1996, to:

Attorneys for Plaintiff:
Kent B. Linebaugh
Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 E. South Temple #400
Salt Lake City, UT 84111-1290



ATTORNEYS
AT
LAW

WINDER & HASLAM
A PROFESSIONAL CORPORATION

SUITE 4000
175 WEST 200 SOUTH
P.O. BOX 2668
SALT LAKE CITY, UTAH 84110-2668
FAX (801) 532-3706
(801) 322-2222

DENNIS V. HASLAM

VIA FAX
355-7725

April 30, 1996

Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 East South Temple, Suite 400
Salt Lake City, UT 84111-1290

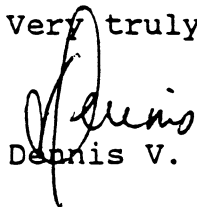
Re: Kraatz v. Heritage Imports
Civil No. 930900312 CN

Dear Michael:

On April 19, 1996, Jennifer called your office and told your secretary we would agree to a deposition of Ryan by telephone. We have not heard back from you as to possible dates for this deposition.

In addition, I have received your Memorandum opposing Defendants' Motion to Amend its Answer and assert a Counterclaim. We have no objection to your reopening the depositions of those whom you have deposed for the limited purpose of further inquiry on how Mr. Kraatz defaulted under the terms of the Employment Agreement. Please let me know whether there are any depositions you would like to reopen, and the dates you are available for these.

Very truly yours,



Dennis V. Haslam

db

000873

EXHIBIT B

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KRAATZ, WILLIAM ANTHONY	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 930900312 CN
	:	DATE 07/30/96
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
HERITAGE IMPORTS	:	COURT CLERK CLB
	:	
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION FILED JULY 1, 1996, THE COURT RULES AS FOLLOWS:

1. DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER, ETC. IS DENIED FOR THE REASONS SPECIFIED IN THE OPPOSING MEMORANDUM. THE TRIAL IS SCHEDULED FOR AUGUST 27, 1996 AND BOTH COUNSEL AGREE IF THE MOTION WERE GRANTED ADDITIONAL DISCOVERY WOULD BE REQUIRED.

2. THIS COURT IS PERSUADED THAT GRANTING THE MOTION AT THIS LATE DATE WOULD WORK PREJUDICE ON THE PLAINTIFF.

3. COUNSEL FOR PLAINTIFF TO PREPARE THE ORDER.

Case No: 930900312 CN

Certificate of Mailing

I certify that on the 30th day of July, 1996,

I sent by first class mail a true and correct copy of the
attached document to the following:

KENT B LINEBAUGH
Atty for Plaintiff
370 EAST SOUTH TEMPLE
SUITE 400
SALT LAKE CITY UT 84111

MICHAEL N. ZUNDEL
Atty for Plaintiff
370 EAST SOUTH TEMPLE
SUITE 400
SALT LAKE CITY UT 84111

DONALD J WINDER
Atty for Defendant
175 W 200 SO SUITE 4000
P.O. BOX 2668
SALT LAKE CITY UT 84110-2668

DENNIS V HASLAM
Atty for Defendant
175 W 200 SO SUITE 4000
P.O. BOX 2668
SALT LAKE CITY UT 84110-2668

JENNIFER L FALK
Atty for Defendant
175 W. 200 SOUTH #4000
P.O. BOX 2668
SALT LAKE CITY UT 84110-2668

JEFFREY J DEVASHRAYEE
Atty for Plaintiff
370 EAST SOUTH TEMPLE,
SUITE 400
SALT LAKE CITY UT 84111

District Court Clerk

By:

C. Baxterley
Deputy Clerk

FILED DISTRICT COURT
Third Judicial District

AUG 29 1996

By *[Signature]*
SALT LAKE COUNTY
Deputy Clerk

Kent B Linebaugh, Esq. (#1967)
Michael N. Zundel, Esq. (#3755)
Jeffery J. Devashrayee, Esq. (#6209)
JARDINE LINEBAUGH & DUNN
A Professional Corporation
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah corporation
dba Heritage Honda, O. BRYAN
WILKINSON, and JEFF J. WILKINSON,

Defendants.

**ORDER DENYING DEFENDANTS'
MOTION FOR LEAVE TO AMEND
ANSWER AND TO ASSERT
COUNTERCLAIM AND AMENDED
MOTION FOR LEAVE TO AMEND
ANSWER AND TO ASSERT
COUNTERCLAIM**

Civil No. 930900312CN
(Judge J. Dennis Frederick)

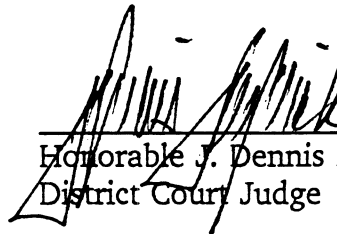
Defendants' Motion for Leave to Amend Answer and to Assert Counterclaim dated April 9, 1996, and Defendants' Amended Motion for Leave to Amend Answer and to Assert Counterclaim dated May 6, 1996 (collectively referred to herein as the "Motion"), having come before the Court pursuant to the Notice to Submit filed July 1, 1996; the Court having considered the Motion and the memoranda in support and in opposition thereto; and it appearing to the Court that trial in this matter is scheduled for August 27, 1996, and that additional discovery would be required if the Court were to permit Defendants to add

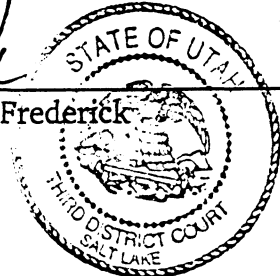
a counterclaim and that granting the Motion at this late date would work prejudice on the Plaintiff; and for the other reasons set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion for Leave to Amend Answer to Assert Counterclaim; and good cause appearing therefor, it is hereby

ORDERED, that Defendants' Motion for Leave to Amend Answer and to Assert Counterclaim and Defendants' Amended Motion for Leave to Amend Answer and to Assert Counterclaim be, and the same hereby are denied.

DATED this 9th day of August, 1996.

BY THE COURT:


Honorable J. Dennis Frederick
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 1996, I served the foregoing proposed ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER AND TO ASSERT COUNTERCLAIM AND AMENDED MOTION FOR LEAVE TO AMEND ANSWER AND TO ASSERT COUNTERCLAIM by causing a true and correct copy thereof to be mailed, by first-class United States mail, postage prepaid, to the following:

Donald J. Winder, Esq.
Jennifer L. Falk, Esq.
Winder & Haslam
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668

